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

RANDY COHEN,

Plaintiff,

-against-

BROAD GREEN PICTURES LLC and
LEARNING TO DRIVE MOVIE LLC,

Defendants.

ECF CASE

Index No. 155458/2016

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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Defendants respectfully submit this Memorandum of Law in support of their motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint against them for failure to state a cause of action.

PRELIMINARY STATEMENT

One of the most basic requirements to a defamation claim is that the statements at issue refer to the plaintiff. In this case, Plaintiff claims that he is defamed by a trailer for the film *Learning to Drive* – which shows a woman named Wendy referencing a philandering ex-husband named Ted. Plaintiff claims that viewers would identify him as Ted, even though neither he nor his ex-wife is named in the trailer. Instead, Plaintiff claims the trailer is defamatory because the film it advertises is based on a *New Yorker* article written by his ex-wife – an article which is also never mentioned in the trailer.

Plaintiff's strained claimed for defamation must be dismissed for two reasons. First, Plaintiff has not and cannot satisfy the constitutional requirement that the alleged defamatory statement is "of and concerning" him – to the contrary, no reasonable viewer of the Trailer would believe the defamatory statements to be about the Plaintiff. In addition, the Complaint must be dismissed because the Plaintiff has failed to plead that Defendants acted with the requisite level of fault in distributing the allegedly defamatory statements.

BACKGROUND

A. The Parties

Plaintiff Randy Cohen ("Plaintiff" or "Cohen"), a well-known author and the former writer of *The Ethicist* column in the *New York Times*, was, according to the allegations in the Complaint, married to a New York writer named Katha Pollitt from 1987 until 1991. Compl. ¶

5[1]; Affirmation of Katherine M. Bolger ("Bolger Aff."), Ex. 3 at 1.

Defendants Learning to Drive Media LLC and Broad Green Pictures LLC (collectively, the "Defendants") produced and distributed the film *Learning to Drive*. *Id.*

B. The Article

In 2002, Ms. Pollitt published a lengthy article in the New Yorker entitled *Learning to Drive*. Compl. ¶ 8; Bolger Aff, Ex. 2 (the "Article").[2] Written in the first person, the Article describes Ms. Pollitt's attempt to learn to drive at the age of fifty-two, and her relationship with Ben, her "gentle Filipino driving instructor." Article at 1. In the Article, Ms. Pollitt accompanies stories of her driving lessons with details of her personal life and reflects both on why it has taken her so long to learn to drive and why she ultimately decided to do so. In the Article, Ms. Pollitt describes Plaintiff as follows: "my ex and I get on very well. He's an excellent father, and when I have a computer problem he helps me over the phone, although he refuses to come and fix the machine himself." *Id.* ¶ 10; Article at 6.

Ms. Pollitt contrasts Plaintiff with the "man I lived with, my soul mate, made for me in Marxist heaven," who "was a dedicated philanderer." Article at 1. She describes this man, whom she refers to as her "lover," as "a womanizer, a liar, a cheat, a manipulator, a maniac, a psychopath." *Id.* at 5. The Article even contains Ms. Pollitt's recollection that her "lover used to joke that I had missed my chance to rid myself of my former husband forever by failing to run him over while an unlicensed, inexperienced driver." *Id.* at 8.

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[1] For the purposes of this motion only, as required by the CPLR, Defendants accept the truth of all well-pleaded factual allegations in the Complaint not contradicted by admissible documentary evidence. *See Simkin v. Blank*, 19 N.Y.3d 46, 52 (2012).

[2] This Court may consider the full Article and Trailer on this motion, both as materials incorporated by reference into Plaintiff's complaint, and pursuant to CPLR 3211(a)(1). *See, e.g., Roth v. United Fed'n of Teachers*, 5 Misc. 3d 888, 889 (Sup Ct. Kings Cnty. 2004) (characterizing newspaper article at issue in defamation case as "documentary evidence" within the meaning of CPLR 3211(a)(1)).

Plaintiff concedes that it is clear from the Article that this "lover" is not him. Compl. ¶¶ 10, 25.

C. The Trailer For The Film *Learning To Drive*

In 2015, Defendants produced and released a film based on the Article, also called *Learning to Drive*. *Id.* ¶ 13. In connection with the film, Defendants produced a trailer approximately two minutes and twenty-four seconds in length, which was released in April 2015. Bolger Aff., Ex. 1 (the "Trailer"). Like the Article, the Trailer portrays a middle-aged woman learning to drive. The protagonist is, however, named Wendy Shields, not Katha Pollitt. *Id.* The driving instructor depicted in the Trailer is a bearded and turbaned Indian Sikh man named Darwan Singh Tur, not a Filipino man named Ben. *Id.* The Trailer depicts Darwan cooking Indian food, attending a Sikh Temple, and telling Wendy that he works as a driving instructor because "for a better job, I would have to take off my turban, shave off my beard, but this is how I know who I am." *Id.* The Trailer also features a number of others characters not mentioned in the Article, including Wendy's boyfriend, a female friend of hers, and Darwan's friends and relatives. *Id.*

Although text on a title card appearing about twenty-five seconds into the Trailer says that the film is "based on a true story," the Trailer never identifies the Article as the film's source material, and never mentions Ms. Pollitt at all. *Id.*

Five scenes in the Trailer, totaling less than thirty seconds, relate to Wendy's ex-husband, whose name is Ted. The Trailer's opening scene shows Wendy appearing on a radio show. Another guest whispers to her, "I heard about you and Ted," and Wendy responds, "Heard what, exactly?" *Id.* In another scene, a man who appears to be Ted, sitting with Wendy in the back of a taxi, says, "I'm not going home with you, Wendy." *Id.* Later in the Trailer, that man jokingly tells Wendy that her learning to drive is "a scary thought." *Id.*

Plaintiff sues over the other two scenes related to Ted.[3] In one scene, Wendy tells her daughter that "instead of buying a motorcycle, Daddy decided to give adultery a spin." *Id.*; Compl. ¶ 16. In the other, she discusses Ted with a female friend:

> Wendy: I used to have a husband who drove.
> Friend: Ah, Ted.
> Wendy: Where do they find these skanks?[4]

Compl. ¶ 18; Trailer.

D. Procedural History

Plaintiff commenced this proceeding by Summons and Complaint filed on June 29, 2016. NYSCEF Dkt. Nos. 1-2. He alleges one count of slander *per se* arising out of two statements in the Trailer. Compl. ¶¶ 16, 18, 31.

On August 5, 2016, the parties stipulated to extend Defendants' time to respond to the Complaint until September 2, 2016. NYSCEF Dkt. No. 5.

ARGUMENT

This court should dismiss Plaintiff's complaint because the alleged defamatory sting is not "of and concerning" Plaintiff. No reasonable reader would believe that the Trailer's statements about Wendy's husband, Ted, were about Ms. Pollit's ex-husband, Randy Cohen.

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[3] Although the Complaint refers in passing to alleged defamation in the film as well, Compl. ¶ 20, Plaintiff's claim appears to be limited to the Trailer. *See id.* ¶ 1 ("This is an action for slander per se, based upon language *spoken in the trailer* of a recent motion picture called 'Learning to Drive'" (emphasis added)). While his Complaint sets out the words he complains of in the Trailer, *id.* ¶¶ 16-18, it does not allege that any particular words in the film were defamatory. Plaintiff's failure to set out the words he complains of in the film would require dismissal of any claim for defamation in the film. *See* CPLR 3016(a) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint"); *BCRE 230 Riverside LLC v. Fuchs*, 59 A.D.3d 282, 283 (1st Dep't 2009) ("Dismissal of a claim need not await disclosure where it is 'otherwise deficient in failing to allege *in haec verba* the particular defamatory words'" (citation omitted)).

[4] The Complaint misquotes this line of dialogue. *See* Compl. ¶ 18 ("Where does he find these skanks?").

Because the Trailer does not mention the Article or the *New Yorker*, most people would not make a connection between Wendy and Ms. Pollit, or Ted and Randy. And for those readers who did make that connection based on the Article, they could not believe Plaintiff was the "dedicated philanderer" named therein because the Article itself specifically precludes that meaning. For this reason, the complaint should be dismissed. In the alternative, this Court should dismiss the complaint because Plaintiff has failed to adequately plead that the Defendants acted with actual malice and/or gross negligence in distributing the Trailer.

When evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a claim, courts must grant the motion if the "four corners" of a plaintiff's complaint fail to evidence facts "'which taken together manifest any cause of action cognizable at law.'" *McGill v. Parker*, 179 A.D.2d 98, 105 (1st Dep't 1992) (citation omitted) (dismissing defamation claim). And, while courts must accept as true allegations in a plaintiff's complaint, courts need not accept as true "'bare legal conclusions.'" *Cangro v. Marangos*, 61 A.D.3d 430, 430 (1st Dep't 2009) (citation omitted). Similarly, "[u]nder CPLR 3211(a)(1), a dismissal is warranted" when "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). "A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint." *Uzamere v. Daily News, L.P.*, 34 Misc. 3d 1203(A), 2011 WL 6934526, at *2 (Sup. Ct. N.Y. Cnty. Nov. 10, 2011); *see Three Amigos SJL Rest., Inc. v. CBS*, 132 A.D.3d 82, 90 (1st Dep't 2015) (affirming dismissal of defamation claim under CPLR 3211(a)(1) and (7)), *appeal filed*, No. 2015-00238 (N.Y. Aug. 26, 2015).

To protect public debate and safeguard freedom of the press, New York courts have long favored dismissal of libel claims at the earliest possible stage of the proceedings. In fact, "[t]he

New York Court of Appeals has explained that there is 'particular value' in resolving defamation claims at the pleading stage, 'so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms.'" *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012) (quoting *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379 (1995)), *aff'd*, 807 F.3d 541 (2d Cir. 2015) and 622 F. App'x 67 (2d Cir. 2015); *see also Batra v. Wolf*, 36 Media L. Rep. 1592, 1594 (Sup. Ct. N.Y. Cnty. 2008) (attached as Ex. 4 to the Bolger Aff.) (noting in context of motion to dismiss libel-in-fiction claim on "of and concerning" grounds that "New York courts favor early adjudication of libel claims to protect freedom of speech from the chilling effects of unwarranted claims." (citing *Immuno AG. v. Moor-Jankowski*, 145 A.D.2d 114, 128 (1st Dep't 1989), *aff'd*, 77 N.Y.2d 235 (1991))).

I.

THIS COURT SHOULD DISMISS THE COMPLAINT BECAUSE THE ALLEGED DEFAMATORY STATEMENTS ARE NOT "OF AND CONCERNING" PLAINTIFF

First, this Court should dismiss Plaintiff's Complaint because the alleged defamatory statements are not "of and concerning" him. A plaintiff in a defamation case must satisfy what is known as the "of and concerning" requirement – he "bears the burden of pleading and proving that the asserted defamatory statement 'designates the plaintiff in such a way as to let those who knew him understand that he was the person meant.'" *Three Amigos*, 132 A.D.3d at 89 (citation omitted); *accord Carlucci v. Poughkeepsie Newspapers, Inc.*, 57 N.Y.2d 883, 885 (1982). This burden "is not a light one." *Three Amigos*, 132 A.D.3d at 89 (internal marks and citation omitted). Indeed, the "of and concerning" requirement has constitutional force: the First Amendment prohibits a plaintiff from recovering for defamation unless the statements at issue refer to him or her. *N.Y. Times v. Sullivan*, 376 U.S. 254, 288 (1964).

A court may determine whether statements are "of and concerning" the plaintiff as a matter of law on a motion to dismiss. *See, e.g., Three Amigos*, 132 A.D.3d at 88 ("[W]hether a plaintiff in a defamation action has demonstrated that a particular statement names or so identifies him so that the statement can be said to be 'of and concerning' that plaintiff may be decided as a matter of law and need not be determined by a jury"); *Springer v. Viking Press*, 90 A.D.2d 315 (1st Dep't 1982), *aff'd*, 60 N.Y.2d 916 (1983) (affirming dismissal of libel-in-fiction claim on "of and concerning" grounds on motion to dismiss); *Allen v. Gordon*, 86 A.D.2d 514 (1st Dep't), *aff'd*, 56 N.Y.2d 780 (1982) (same); *Randall v. Demille*, 21 Media L. Rep. 1362, 1364 (Sup. Ct. N.Y. Cnty. 1992) (attached as Ex. 5 to the Bolger Aff.) ("It is for the court to determine, in the first instance, whether the complaint sufficiently alleges that the portrayal...refers to, and is 'of and concerning'" the plaintiff (citations omitted)); *see also Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001) (whether the statements complained of are "of and concerning" the plaintiff "should ordinarily be resolved at the pleading stage").

Courts consider defamation claims arising out of works that, like the Trailer, purport to be "based on a true story" to be libel-in-fiction claims. *See, e.g., Carter-Clark v. Random House, Inc.*, 17 A.D.3d 241, 241 (1st Dep't 2005); *Davis v. Costa-Gavras*, 654 F. Supp. 653, 655, 658 (S.D.N.Y. 1987). Such claims are inherently paradoxical because "the plaintiff must assert simultaneously that the [fictional work] is 'about' him or her to the extent that there are similarities between the plaintiff and the fiction character but 'could not be about' the plaintiff because, in real life, he or she would never do the scandalous things ascribed to the character." *Welch v. Penguin Books USA, Inc.*, No. 21756/90, 1991 N.Y. Misc. LEXIS 225, at *6 (Sup. Ct. Kings Cnty. Apr. 3, 1991); *see also Batra*, 36 Media L. Rep. at 1594 (referring to "the

counterintuitive nature of a libel-in-fiction claim."). New York courts accordingly apply the "of and concerning" requirement with particular rigor in libel-in-fiction cases, requiring the plaintiff to establish "that the description of the fictional character is so closely akin to her that a [viewer], knowing the real person, would have no difficulty linking the two." *Carter-Clark*, 17 A.D.3d at 241; *see also Batra*, 36 Media L. Rep. at 1594 ("'[T]he identity of the real and fictional personae must be so complete that the defamatory material becomes a plausible aspect of the real life plaintiff or suggestive of the plaintiff in significant ways. Identification alone is insufficient.'" (quoting *Welch*, 1991 N.Y. Misc. LEXIS 225, at *7)).

In applying this test, "the court's task necessarily entails a search for similarities and dissimilarities so as to determine whether a person who knew plaintiff and who has [viewed the work] could reasonably conclude that plaintiff was" the fictional character in question. *Springer*, 90 A.D.2d at 319. It does not matter whether the author intentionally based the character in question on the plaintiff. *Welch*, 1991 N.Y. Misc. LEXIS 225, at *10 (dismissing claim even though "plaintiff may indeed have been a model or inspiration for his fictional counterpart."); *accord Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980) ("[C]onscious parallelism on a superficial plane" not enough). Because superficial or common characteristics are not enough to connect a fictional character to a particular person, the similarities must be specific and unique. *See Springer*, 90 A.D.2d at 320 ("Superficial similarities are insufficient as is a common first name."); *Allen*, 86 A.D.2d at 515 (dismissing claim even though plaintiff and character shared "a commonly used name"); *Elias v. Rolling Stone LLC*, --- F. Supp. 3d ----, 2016 WL 3583080, at *8 (S.D.N.Y. June 28, 2016), *appeal filed*, No. 16-2465 (2d Cir. July 15, 2016) (article's description of anonymous rapist riding bike did not refer to plaintiff because "there is no basis

from which [he] could be distinguished from any other adult male riding his bike on the UVA campus").

And, even if some viewers do believe the work to be "of and concerning" the plaintiff, the plaintiff still has no claim if those viewers know the plaintiff well enough not to believe the alleged defamation. *Batra*, 36 Media L. Rep. at 1595 (citing *Springer* and *Welch* as cases in which claims were dismissed "since only readers acquainted with [the plaintiff] personally recognized them, they knew the defamation was false.").

Here, it is clear that no reasonable reader would believe that the alleged defamatory statements in the Trailer are "of and concerning" Plaintiff. The Trailer is, on its face, about Wendy and Darwish (with passing references to Ted), not Katha and Randy. Accordingly, to most viewers, there is no connection whatsoever between Plaintiff and the Trailer.

Instead, Plaintiff's claim depends on the assertion that a viewer would identify Wendy Shields as Katha Pollitt and Ted as Plaintiff. Compl. ¶ 18. But the Trailer provides little meaningful information about Wendy – she is no more than a middle-aged woman learning to drive who befriends her instructor and has a cheating ex-husband – and it never refers to Ms. Pollitt or the Article. A viewer of the Trailer therefore cannot connect Wendy with Ms. Pollitt – or Ted with Plaintiff – unless he or she had also read the Article.[5] As Plaintiff concedes, however, any such person would also know that he did not cheat on Ms.Pollitt, because the Article "carefully distinguished [Ms. Pollitt's] unfaithful lover from her former husband, the plaintiff, and had expressed a favorable opinion of the latter." *Id.* ¶ 25. In fact, anyone who read the Article would barely recognize the Trailer, which creates a whole different world from that of

[5] Plaintiff's allegation that "Ms. Pollitt received a credit [in the film] as the author of the article on which the film is based," Compl. ¶ 13, is irrelevant because no such credit appears in the Trailer.

the Article. In the Trailer, the driving instructor is given a whole life separate from Wendy, including a new religion, ethnicity, and apparent love interest. And Wendy herself is given friends, a new love interest, and a much closer relationship with the driving instructor. The Trailer, therefore, is a clearly fictionalized version of the Article. As a result, viewers of the Trailer who had not read the Article would not connect Ted with Plaintiff, and viewers who had read the Article would know both that the Trailer was heavily fictionalized and that Plaintiff had not committed adultery. Because no one who saw the Trailer would both connect Ted with Plaintiff *and* believe based on the Trailer that Plaintiff committed adultery, Plaintiff has not established and, indeed, cannot establish that the allegedly defamatory statement is of and concerning him.[6]

In fact, New York courts have dismissed cases where there are stronger connections between a plaintiff and the alleged defamatory statement than those between Plaintiff and the alleged defamatory statements at issue here. In *Welch*, for example, the plaintiff had "a lot in common" with Franklin Swift, a character portrayed in a novel as a racist, homophobic, and emotionally unbalanced rapist:

> They are physically similar; both have dark complexions, dark hair and carry approximately 225 pounds on a six foot four inch frame. The two men dropped out of high school but subsequently obtained equivalency diplomas. They share

[6] Even if a viewer could somehow connect Plaintiff with Ted, though, this case must still be dismissed because the viewer would not "be totally convinced that the [Trailer] in all its aspects as far as plaintiff is concerned is not fiction at all." *Welch*, 1991 N.Y. Misc. LEXIS 225, at *10. Viewers understand that even films purporting to be based on a true story often "utilize simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes." *Davis*, 654 F. Supp. at 658. Even to someone who knows nothing about the Article, it is clear from the Trailer's humorous tone and Hollywood tropes ("This summer, some moments teach us, some people surprise us, and some friendships change us forever") that it was never intended to be a literal portrayal of reality. A reasonable viewer would understand that, like every other character and event depicted in the Trailer, Ted bears no more than a passing resemblance to reality.

> the same avocational interests; they both enjoy carpentry and a good game of scrabble. Their vocational history is also identical; Leonard Welch and Franklin Swift have both been employed as construction workers. Each owns a fish tank, favors a bowl of Wheatena in the morning, drip dries after a shower, has a trick knee, and is the only son in a family with three children. Their romantic relationships are also alike. Both men met their girlfriends while rendering carpentry services at their respective apartments, and in addition, both couples apparently have had identical vacations, dates and arguments.

Welch, 1991 N.Y. Misc. LEXIS 225, at *1. Despite these similarities, however, the court held that the novel was not "of and concerning" the plaintiff and dismissed the case. Because Swift's negative attributes pervaded his character, the court held that "no one who knows the plaintiff can confuse him with the fictional Swift in these essential aspects…the self-destructive motif of the character winds up overwhelming and trivializing the claimed similarities" *Id.* at *9. [7]

Here, as in *Welch*, even if a viewer could connect the Trailer to the Article, no one can confuse Plaintiff, the "ex" with whom Ms. Pollit gets "on well," with Ted the philanderer. The dominant character trait of Ted in the Trailer is that he "decided to give adultery a spin." This characteristic overwhelms any alleged similarities between Plaintiff and Ted. For this reason, the allegedly defamatory statements in the Trailer are not "of and concerning" Plaintiff.

[7] Other New York courts have reached similar results. *See, e.g., Springer,* 60 N.Y.2d at 917 (holding that novel was not "of and concerning" the plaintiff even though there was "similarity of given name, physical height, weight and build, incidental grooming habits and recreational activities" between her and a character portrayed as a prostitute); *Sugarman v. Apostolina,* No. 101750/06, slip op. (Sup. Ct. N.Y. Cnty. Jan. 14, 2007) (NYSCEF Dkt. No. 28) (attached as Ex. 6 to the Bolger Aff.) (dismissing claim where plaintiff and character shared name); *Carter-Clark v. Random House, Inc.*, 196 Misc. 2d 1011, 1012-15 (Sup. Ct. N.Y. Cnty. 2003) (dismissing claim where plaintiff and character had some physical similarities, and both worked at libraries in Harlem visited by Southern governors running for president); *Randall*, 21 Media L. Rep. at 1365, 1369 (dismissing claim where plaintiff and character were both allegedly redheads, accomplished painters of mansions on Long Island's Gold Coast, raised in similar mansions, "avid horsewomen" known for riding white horses, and belonged to a Gold Coast organization called the Gazebo Society).

II.

PLAINTIFF HAS FAILED TO ADEQUATELY PLEAD ACTUAL MALICE AND/OR GROSS IRRESPONSIBILITY

In the alternative, this Court should dismiss Plaintiff's complaint because Plaintiff has failed to adequately plead that Defendants acted with the requisite degree of fault in distributing the Article.

In the landmark decision in *New York Times Co. v. Sullivan*, the Supreme Court constitutionalized the tort of defamation, overturning the centuries-old rule that defamation was a strict liability tort. In doing so, the Court expressly concluded that, in cases involving a public official, the First Amendment requires a rule that prohibits a public official from recovering damages for a defamatory falsehood unless "*he proves* that the statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80 (emphasis added). The Supreme Court later expanded this rule to include public figures, in addition to public officials, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 153 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333-34 (1974), and the law is now clear that a public figure libel plaintiff bears the burden of proof on actual malice, a burden he must carry by "demonstrat[ing] with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984). *See also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

Following on *Sullivan*, in *Gertz v. Robert Welch, Inc.* the U.S. Supreme Court allowed each state to set its own standard for libel plaintiffs who are not public officials or public figures

and are suing on a matter of public interest, provided that the minimum standard set by each state is at least negligence. 418 U.S. at 348. In *Chapadeau v. Utica Observer-Dispatch*, the New York Court of Appeals held in actions brought by private figure plaintiffs involving a matter of public concern, the plaintiff must establish that the publisher "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." 38 N.Y.2d 196, 199 (1975) (emphasis added).[8]

It is therefore not enough for the plaintiff to plead and prove that the defendant knew the statements at issue were false – under that standard, a plaintiff would able to establish fault as a matter of course in every case involving work of fiction, rendering the constitutional fault requirement meaningless. This would be inconsistent not only with five decades of caselaw recognizing the importance of the constitutional protections for libel defendants, but also with the acknowledged "obvious and implied constitutional repercussions of a libel-in-fiction claim as well as the accepted fact that writers create their fictional works based on their own experiences." *Welch*, 1991 N.Y. Misc. LEXIS 225 at *9; *see also Davis*, 654 F. Supp. at 658 ("[P]ublishing a dramatization is not of itself evidence of actual malice.").

In order to succeed, then, a plaintiff must plead and prove that the defendant acted with the requisite degree of fault not only as to falsity, but also as to the "of and concerning"

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[8] The Trailer unquestionably relates to a matter of public concern. The Court of Appeals has held that "[a]bsent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of genuine public concern." *Huggins v. Moore*, 94 N.Y.2d 296, 303 (1999). "[A] matter may be of public concern even though it is a 'human interest' portrayal of events in the lives of persons who are not themselves public figures, so long as some theme of legitimate public concern can reasonably be drawn from their experience." *Id.* Fictional works are entitled to the same protection as works of non-fiction. *Davis*, 654 F. Supp. 653 at 658 ("The cases on point demonstrate that the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted"). In the case of the Trailer, Ted's mistreatment of Wendy is an important part of the challenges she overcomes in connecting with Darwish and learning to drive.

requirement. In other words, a public-figure plaintiff must plead and prove that the defendant either knew that a reasonable observers would identify the fictional character as him, or that the defendant was subjectively aware the plaintiff would probably be identifiable. Similarly, a private-figure plaintiff must prove that the defendant was grossly irresponsible in failing to prevent readers or viewers from identifying the plaintiff. *See* Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:9.7 at 2-166 (4th ed. 2010) ("If an author takes reasonable precautions to disguise the identity of a character modeled or believed by readers to be modeled from real life, assuming the fictional work can be said to be about a matter of legitimate public concern, the author is not guilty of 'fault' and, as a matter of constitutional law, should not be liable."); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1194-95 (9th Cir. 1989) (applying N.Y. law) ("[I]f a speaker knowingly publishes a literally untrue statement without holding the statement out as true, he may still lack subjective knowledge or recklessness as to the falsification of a statement of fact required by *New York Times*."); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 163 (Tex. 2004) (actual malice standard requires court to ask "did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts?"); Restatement (Second) of Torts § 564, cmt. f (constitutional fault standards apply to "of and concerning" requirement).

Failure to do so, even at the pleading stage, must result in dismissal. *See, e.g., Jimenez v. United Fed'n of Teachers*, 239 A.D.2d 265, 266 (1st Dep't 1997) (plaintiff must "allege facts sufficient to show actual malice with convincing clarity"); *Red Cap Valet, Ltd. v. Hotel Nikko (USA), Inc.*, 273 A.D.2d 289, 290 (2d Dep't 2000) (dismissing complaint where "[t]he plaintiff failed to allege any facts from which malice could be inferred"); *Zetes v. Richman*, 86 A.D.2d 746, 747 (4th Dep't 1982) (dismissing claim because "[t]he pleadings are barren of facts

suggesting the presence of [circumstances justifying an inference of fault]; thus, plaintiff has raised no triable issue of fact as to whether [defendant] was grossly irresponsible in proceeding with the publication.").

Here, Plaintiff, a well-known writer, book author and former high profile *New York Times* columnist, is a public figure. Bolger Aff., Ex. 3; *see James v. Gannett Co.*, 40 N.Y.2d 415, 423 (1976) ("The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention."). Yet his complaint is devoid of any allegations that defendants were subjectively aware that a reasonable viewer would understand the allegedly defamatory statements to be about Plaintiff. Instead, the only allegation is that Defendants knew the Trailer to be false – in other words, that they knowingly produced a work of fiction. Compl. ¶ 25. But this allegation of falsity does not establish that Defendants knew or were subjectively aware that others would likely believe the alleged falsification to be about Plaintiff. Even if Plaintiff were not a public figure, the allegations in the Complaint also could not as a matter of law establish that Defendants' were grossly irresponsibility in failing to prevent viewers from identifying Ted with Randy. As a result, under either standard Plaintiff has failed to adequately plead fault as to the "of and concerning" requirement and his claim must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their motion and dismiss Plaintiff's Complaint in its entirety, with prejudice, together with costs, attorneys' fees, and such other relief as the Court deems appropriate.

Dated: September 2, 2016

Respectfully submitted,

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