SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

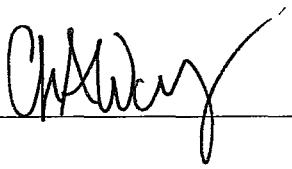
STARLIGHT RAINBOW, Plaintiff-Appellant, -against- WPIX, INC.; JEREMY TANNER; and MAGEE HICKEY Defendants-Respondents.	App. Div. No. 2018-5119 Index No. 152477/2015

NOTICE OF UNOPPOSED MOTION BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

PLEASE TAKE NOTICE that upon the annexed affirmation of Christine Walz, dated October 2, 2019, and the exhibits attached thereto, the Reporters Committee for Freedom of the Press and 20 media organizations (collectively, the "News Media Movants") will move this Court at a term for motions to be held on October 15, 2019, at the Appellate Division Courthouse, 27 Madison Avenue, New York, New York, at 10:00 a.m., or as soon thereafter as is practicable, for an order granting the News Media Movants leave to file a brief as *amici curiae* in support of Defendants-Respondents and for the affirmation of the Decision and Judgment of Supreme Court, County of New York.

All parties have consented to the filing of this motion and proposed *amici curiae* brief.

Dated: October 2, 2019
New York, New York

By: 

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

STARLIGHT RAINBOW, Plaintiff-Appellant, -against- WPIX, INC.; JEREMY TANNER; and MAGEE HICKEY Defendants-Respondents.	App. Div. No. 2018-5119 Index No. 152477/2015

AFFIRMATION OF CHRISTINE WALZ IN SUPPORT OF UNOPPOSED MOTION BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

CHRISTINE WALZ, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am a partner at Holland & Knight LLP, located at 31 West 52nd Street, New York, New York 10019, and am counsel of record for the Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press, Courthouse News Service, Daily News, LP, First Look Media Works, Inc., Gannett Co., Inc., International Documentary Assn., Investigative Reporting

Workshop at American University, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, Newsday LLC, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, and Tully Center for Free Speech (collectively, "News Media Movants"). I submit this affirmation in support of the News Media Movants' motion for leave to file a brief as *amici curiae* in support of Defendants-Respondents and for affirmation of the Supreme Court, County of New York.

2. All parties to the underlying action consent to the News Media Movants' filing of this motion and *amici curiae* brief.

3. Attached hereto as **Exhibit A** is a true and correct copy of a brief that the News Media Movants seek leave to file as *amici curiae*.

4. Attached hereto as **Exhibit B** is a true and correct copy of the Decision and Judgment from the Supreme Court, County of New York, dated October 22, 2018, from which Plaintiff-Appellant appeals.

5. The Reporters Committee is an unincorporated nonprofit association that was founded by leading journalists and media lawyers in 1970 to combat an unprecedented wave of government subpoenas seeking the names of confidential sources. Today, its attorneys provide pro bono legal representation and other legal

resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as amicus curiae in cases that present legal issues of importance to journalists and news organizations in state and federal courts around the country, including cases involving defamation suits against journalists.

6. The interests of all other News Media Movants are set forth in Appendix A to the proposed brief, which is attached hereto as **Exhibit A**.

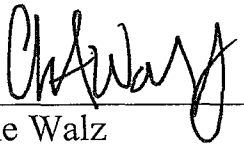
7. As members and representatives of the news media, amici have a strong interest in ensuring that journalists and news organizations are able to report on important matters of public concern without fear of defamation liability. Even where private figures are involved, reporting that touches on matters of public concern is essential to informing the public about issues affecting their lives. Journalism focused on education systems, in particular, gives families the information they need to make decisions about their children's schooling and to hold school officials accountable.

8. The News Media Movants provide a unique industry-wide perspective not currently represented by Defendants-Respondents concerning the importance of New York's gross irresponsibly standard for protecting journalists who inform the public about matters of public concern. *Amici* also present additional legal and

public policy arguments for affirming the lower court's rejection of liability for failure to issue a correction in a timely manner.

9. WHEREFORE, I respectfully request that this Court grant the News Media Movants' motion for leave to file a brief as *amici curiae* in support of Defendants-Respondents, a copy of which is attached hereto as **Exhibit A.**

Dated: October 2, 2019
New York, New York



Christine Walz

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

STARLIGHT RAINBOW, Plaintiff-Appellant, -against- WPIX, INC.; JEREMY TANNER; and MAGEE HICKEY Defendants-Respondents.	App. Div. No. 2018-5119 Index No. 152477/2015

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 20 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANTS-RESPONDENTS

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press, Courthouse News Service, Daily News, LP, First Look Media Works, Inc., Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, Newsday LLC, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, and Tully Center for Free Speech. A description of each of the *amici* is listed at Appendix A of this brief.

The Reporters Committee is an unincorporated nonprofit association that was founded by leading journalists and media lawyers in 1970 to combat an unprecedented wave of government subpoenas seeking the names of confidential sources. Today, its attorneys provide pro bono legal representation and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as *amicus curiae* in cases that present legal issues of importance to journalists and news organizations in state and federal courts around the country, including cases involving defamation suits against journalists.

As members and representatives of the news media, *amici* have a strong interest in ensuring that journalists and news organizations are able to report on important matters of public concern without fear of defamation liability. Even where private figures are involved, reporting that touches on matters of public concern is essential to informing the public about issues affecting their lives. Journalism focused on education systems, in particular, gives families the information they need to make decisions about their children's schooling and to hold school officials accountable.

The issues presented in this appeal have potentially broad ramifications for *amici*. Appellants seek to expand the definition of "gross irresponsibility" in New York law to impose defamation liability for merely negligent reporting or for failure to issue a correction. New York's gross irresponsibility standard, and standards like it in jurisdictions across the United States, permit journalists and news organizations to report on matters of public concern without fear of liability. "[E]rroneous statement is inevitable in free debate," and "it must be protected if the freedoms of expression are to have the breathing space that they need to survive." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (internal quotation marks omitted). Curtailing these protections would adversely affect the ability of *amici* and other journalists to carry out their essential constitutional role of informing public debate.

INTRODUCTION AND SUMMARY OF ARGUMENT

Journalists have an important and difficult job. Every day, members of the news media work to give people the information they need to live their lives. Journalists help people decide whether to pack an umbrella, whether to vote for the incumbent or the challenger, and whether to send their children to the neighborhood school. News is delivered in newspapers and magazines, as well as on radio and TV; and increasingly, it is posted, blogged, livechatted, or tweeted online. News arrives not once per day, but more than once per second. Reporters must keep pace with this 24-hour news cycle, racing to meet the next deadline and then the next. Adding to the difficulty, economic conditions have led media companies to downsize, spreading resources thinner and forcing reporters to do more with less. *See* Jared Bray, *As Newsrooms Do More with Less, Can Reporters Keep Up?*, Colum. Journalism Rev. (Sept. 12, 2018), https://perma.cc/F7V3-CL2W; *see also* Mathew Ingram, *The Media Today: Layoffs, Shutdowns, and Salary Outrage*, Colum. Journalism Rev. (Feb. 1, 2018), https://perma.cc/57VZ-TJZR. Despite these mounting difficulties, journalists do their best to ensure accuracy. Still, sometimes reporters and news organizations make mistakes. Given the volume and speed of reporting in the modern news environment, occasional errors are inevitable. And courts have long recognized that the law must give well-intentioned and hard-working journalists space to be fallible, lest

exposure to excessive liability deter essential reporting on matters of public concern.

Since 1975, New York law has recognized the practical realities of the news business and has struck the appropriate balance. In the seminal case of *Chapadeau v. Utica Observer-Dispatch*, the New York Court of Appeals held that so long as "the content of the article is arguably within the sphere of legitimate public concern," a defamation plaintiff "must establish, by a preponderance of the evidence, 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." 341 N.E.2d 569, 571 (N.Y. 1975). Only the most egregious dereliction of a reporter's duties will constitute gross irresponsibility. A reporter may not trade in unverified rumors, but she need not research endlessly to confirm every fact. "[A]ccepted standards of journalism require neither exhaustive research nor painstaking judgments." *Med Sales Associates v. Lebhar-Friedman, Inc.*, 663 F. Supp. 908, 913 (S.D.N.Y. 1987) (quoting *DeLuca v. New York News*, 438 N.Y.S.2d 199, 205 (Sup. Ct. 1981)). The publisher need only "base its story on a reliable source." *Mitchell v. Herald Co.*, 529 N.Y.S.2d 602, 605 (N.Y. App. Div., 4th Dept. 1988).

As Defendants-Respondents' brief makes clear, applying these well-established common-law rules to this case leads to a clear result. The reporter, Ms.

Hickey, was not grossly irresponsible in reporting on a matter of public concern, and the lower court's decision granting summary judgment in her favor should be affirmed. Ms. Hickey reported the first name of an allegedly bullying teacher based on information from the parent of the student victim. R. 130. As the court below correctly stated, "[O]ne would reasonably expect a parent to know the name of her child's teacher, especially if that parent was trying to protect her child from being bullied by that particular teacher." R. 12. Ms. Hickey attempted (albeit unsuccessfully) to confirm this information through multiple channels. R. 132, 134. Although Ms. Hickey made a regrettable error in publishing the wrong name, her efforts to confirm the information, particularly in light of her tight deadline, were more than sufficient to satisfy "the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, 341 N.E.2d at 571.

In an effort to overturn this result, Plaintiff-Appellant essentially argues for two changes to the existing law governing this case, both of which should be rejected. First, Plaintiff-Appellant suggests an expansion of what qualifies as gross irresponsibility. She argues that a journalist's source must not only be reliable, but also either "authoritative" or "official"—a wholly made up standard that is inconsistent with New York law. Appellant's Br. 18. She also argues that a journalist should be faulted for relying on a source who had not previously "served

as a reliable source of information . . . in the past." *Id.* at 19. These arguments are completely foreclosed by binding precedent from the New York Court of Appeals. And, even if they were not, the standard urged by Plaintiff-Appellant would intolerably weaken vital legal protections for journalists reporting on matters of public concern. A great many news stories are reported using information from sources who have not previously given interviews to the same journalist. Further, "official" or "authoritative" sources are often not available, and a source can provide reliable information without being a police officer or elected official. Indeed, some of the most important work that journalists do is reporting on abuses by public officials. By its very nature that sort of investigative reporting must often rely on sources from outside official channels. New York law is right to protect journalists who rely on information from reliable sources, and that rule requires affirmance in this case.

This is not the first time that a plaintiff has sought to weaken the gross irresponsibility standard. Previous attempts have been correctly rejected. *See Simonsen v. Malone Evening Telegram*, 470 N.Y.S.2d 898, 900 (App. Div., 3d Dept. 1983) ("[A] recent effort to change the rule so as to provide a higher degree of care on the part of the publisher has been found to be completely unacceptable.") (citing *Karaduman v. Newsday, Inc.*, 416 N.E.2d 557, 562 (N.Y. 1980)).

Second, Plaintiff-Appellant advances what the court below called "a relatively novel theory for defamation liability under New York law." R. 13. Ms. Rainbow argues that WPIX was grossly irresponsible for failing to timely issue a correction to the version of the story that appeared on its website after she attempted to notify the station about the error.[1] She does not (and could not) cite any New York law supporting this proposition. Instead, she relies on an irrelevant provision of the Second Restatement of Torts and what she contends is a "logical corollary" found in cases treating a correction as evidence of a lack of gross irresponsibility. Plaintiff-Appellant argues that these cases imply the inverse: that failing to issue a correction is proof of gross irresponsibility. Appellant's Br. at 25. Yet this is a common logical fallacy, known as "denying the antecedent." Just because New York courts have credited news media defendants for publishing corrections in finding that they were not grossly irresponsible does not mean that a failure to correct is proof of gross irresponsibility.

Here, too, the public policy considerations that animated the Court of Appeals' decision in *Chapadeau* to protect journalists from excessive defamation liability also militate against creating a legal "duty to correct." As an initial matter, such a rule could have a chilling effect on legitimate reporting. In addition, New

[1] Like the trial court, *amici* recognize the importance of correcting errors in news reports and do not condone the failure to do so in this case. But also like the trial court, *amici* recognize that this Court's task is to decide questions of law, not journalistic practices or ethics.

York law already contains adequate incentives for journalists to issue retractions. Finally, imposing a legal duty to correct presents difficult line-drawing problems, and incorrectly calibrating such a rule could impose a significant financial burden on already cash-strapped media organizations, especially those covering smaller markets.

For these reasons, *amici* urge the Court to affirm the decision below granting summary judgment in favor of Defendants-Respondents.

ARGUMENT

A defamatory statement about a matter of public concern is actionable by a private individual in New York only if the publisher is grossly irresponsible. This common-law rule grew out of United States Supreme Court jurisprudence applying the First Amendment's robust protection for open public debate to the private law of defamation. When a public figure alleges defamation, she must show "actual malice" on the part of the publisher. *N.Y. Times Co.*, 376 U.S. at 280. To prove actual malice, a plaintiff must demonstrate that a publisher made a false and defamatory statement with either knowledge of its falsity or with reckless disregard for the truth. *Id.*

New York law holds private-figure plaintiffs to a similarly rigorous standard. The New York Court of Appeals has held that so long as the content of an article is "arguably within the sphere of legitimate public concern," a publisher

may be held liable only if the plaintiff shows by a preponderance of the evidence 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." *Chapadeau*, 341 N.E.2d at 571. This standard sets a purposefully high bar. "[A]s a matter of New York State libel law, for matters that concern the public interest, *Chapadeau* holds plaintiffs to a proof *at least as stringent* as that to which *New York Times* constitutionally holds plaintiffs suing public figures"—that is, reckless disregard for the truth. *Med Sales Associates*, 663 F. Supp. at 912–13 (emphasis added).

There is no dispute that the journalist in this case made an error, reporting information from a reliable source that turned out to be wrong. Yet such conduct is not grossly irresponsible under New York law. And Plaintiff-Appellant's arguments for weakening the gross irresponsibility standard's protections for journalists and news organizations—either by imposing higher burdens on initial publication or by creating liability for failure to issue a correction—should be rejected.

I. THE GROSS IRRESPONSIBILITY TEST REQUIRES REASONABLY RELIABLE SOURCES, NOT OFFICIAL OR AUTHORITATIVE ONES

The parties agree that the gross irresponsibility standard applies in this case. The news report in question detailed an allegation that a school teacher was

bullying a fifth-grade student. This is unquestionably a matter of public concern, touching on both the important topic of public education and the social scourge of bullying. *Chapadeau* itself similarly involved a news report concerning wrongdoing by a school teacher, although there the alleged misconduct was drug use rather than bullying. 341 N.E.2d at 569–70. Here, because the reporting at issue was "arguably within the sphere of legitimate public concern," it is actionable only if the reporter "acted in a grossly irresponsible manner." *Chapadeau*, 341 N.E.2d at 571.

Court decisions applying the gross irresponsibility standard make clear that only the most egregious violations of professional journalistic standards can lead to liability. *Chapadeau* held that journalists are grossly irresponsible only when they produce stories "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." 341 N.E.2d at 571. Subsequent cases have underscored the strength of the protection afforded journalists and news organizatons; the law "demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy." *Karaduman v. Newsday, Inc.*, 416 N.E.2d 557, 566 (N.Y. 1980). A reporter relying on a source satisfies the gross irresponsibility standard where there is no evidence that she "grossly distorted what [she] heard" or "sprang to unwarranted conclusions." *Simonsen*, 470 NYS.2d at 899. A reporter will not be

faulted for failing to conduct deeper research when she has "no reason to doubt the veracity of the individuals who furnished information." *Campo Lindo for Dogs v. N.Y. Post Corp.*, 409 N.Y.S.2d 453, 455 (App. Div., 3d Dept. 1978). And a journalist "is under no legal obligation to interview every possible witness to an incident or to write the most balanced article possible"; rather, she need only "base [her] story on a reliable source." *Mitchell*, 529 N.Y.S.2d at 605.

In *DeLuca v. N.Y. News*, the Supreme Court addressed the relationship between the gross irresponsibility standard and the practical realities of the news business. 438 N.Y.S.2d 199 (Sup. Ct. 1981). Quoting from a prior, unreported case, the court explained that "[r]esearch can continue endlessly, but accepted standards of journalism require neither exhaustive research nor painstaking judgments." *Id.* at 205. Rather, journalists "have the right to be wrong so long as they are not guilty of not checking their facts at all, making gross distortions of the record or jumping to totally unwarranted conclusions." *Id.* The court connected this rule to the same interests underlying the First Amendment's limitations on defamation liability: "The entire purpose of affording scope and latitude in the reporting of public issues is to stimulate thought, discussion, investigation and change." *Id.*

Amici agree with Defendants-Respondents that, applying these principals here, it is clear that Ms. Hickey's reporting was not grossly irresponsible. She

obtained the name of the allegedly bullying school teacher from a reliable source, the mother of the bullied student. R. 130. She attempted to check this information both by conducting interviews at the school and by checking with the Department of Education. R. 132, 134. In the latter instance, she received an ambiguous response—"these are serious allegations and we will be investigating"—that could be interpreted as affirmation. R. 131. Her reporting was not grossly irresponsible.

Amici write to emphasize the correct legal standard to be applied in this case because Plaintiff-Appellant seeks to move the goalposts. She suggests that to avoid a finding of gross irresponsibility, a journalist's source must be not only reliable, but also either "authoritative" or "official." Appellant's Br. 18. She also argues that a journalist should be faulted for relying on a source who had not previously "served as a reliable source of information . . . in the past." *Id.* at 19. Plaintiff-Appellant is wrong. These arguments are completely foreclosed by settled law. As set forth above, the gross irresponsibility standard has no such requirements.[2] All it requires is that a reporter base her story on a source that would ordinarily be reasonably reliable.

A requirement that journalists use "official," "authoritative," and/or repeat sources is also inconsistent with the practical realities of the news business, which

[2] The "official" or "authoritative" language cited by Plaintiff-Appellant evokes the fair report privilege—a defense to a defamation claim under New York law, see N.Y. Civ. Rights Law § 74—which Plaintiff-Appellant herself concedes is "inapplicable to the present case." Appellant's Br. at 26.

have long been recognized as a proper consideration under New York's common-law defamation jurisprudence. Imposing this higher burden on reporters would hinder their efforts to inform the public and would stifle debate on matters of public concern. Reporters must often rely on sources with whom they have never before spoken, such as when a journalist at the scene of a crime or an accident interviews witnesses about what they saw. And journalists covering new or unusual happenings in their communities will often interact with fresh sources upon whom they have not relied in the past.

In addition, many types of invaluable news reporting, across a wide range of media organizations and subject matter, cannot reasonably be based on information from official sources. A small newspaper in a rural town reports on community events—tee-ball games, church picnics, fairs and festivals—at which no government official is present to be consulted. Perhaps more significant, important investigative and watchdog journalism could not hold officials accountable if the only permissible sources were officials themselves. Simply put, reliable yet unofficial sources are necessary for effective journalism.

The balance struck and leeway provided by the gross irresponsibility standard is particularly necessary in the modern media landscape. The advent of cable news created the 24-hour news cycle, and the Internet shifted the pace of breaking news to warp speed. More consumers get their news online than ever

before. *See* Jeffrey Gottfried & Elisha Shearer, *Americans' Online News Use is Closing in on TV News Use*, Pew Research Center (Sept. 7, 2017), https://perma.cc/5ZUN-HKZB. And as consumers increasingly expect to receive their news in real time, journalists have turned to new tools and techniques to provide breaking news around the clock. *See* John Boitnott, *Tech Is Changing the Way We Get Our News, and It's Not Stopping*, INC. (July 22, 2015), https://perma.cc/5ZUN-HKZB. Journalists trying to meet a deadline or racing to break news on Twitter must work quickly and efficiently but also accurately. The gross irresponsibility standard appropriately balances these imperatives. A reporter cannot publish mere rumor and cannot act recklessly. But where she puts her faith in a reliable source who makes a mistake, a reporter is protected from defamation liability as a matter of New York law.

II. LIABILITY SHOULD NOT BE IMPOSED FOR FAILURE TO ISSUE A TIMELY CORRECTION

Plaintiff-Appellant's second argument is, as the court below pointed out, a "novel" one. R. 13. Ms. Rainbow argues that even if WPIX is not liable for its initial publication of the defamatory statement, it should be liable for failing to correct or retract the story in a timely manner after she attempted to alert the station to the error. No New York court has ever imposed liability on a news media defendant for failure to make a timely correction, and this one should not be the first. This theory of liability not only finds no support in New York law, but

important public policy considerations also militate against adoption of such a rule. First, imposing liability for corrections could chill reporting on matters of public concern. Second, as the lower court noted, the law already provides an effective incentive for news organizations to correct stories, so imposing liability for failure to correct would be unnecessarily cumulative. Finally, failure-to-correct liability would present problems of administration and line-drawing.

A. New York Law Provides No Support for Imposing Failure-to-Correct Liability

Plaintiff-Appellant's argument for failure-to-correct liability finds no support in New York law. She bases her novel argument on the Restatement (Second) of Torts, published in 1977, which includes a provision imposing liability on property owners for "intentionally and unreasonably" failing to remove "defamatory matter" that is "exhibited on land or chattels in his possession or under his control." Restatement (Second) of Torts § 577(2) (Am. Law Inst. 1977). The comment to the section explains that "the duty arises only when the defendant knows that the defamatory matter is being exhibited on his land or chattels." § 577 cmt. p. The relevant illustration provides that a tavern owner is liable for failing to remove defamatory graffiti in the bathroom, even though he is not liable for the initial publication of the graffiti. § 577 cmt. p, illus. 15. The tavern owner can be liable as soon as he has notice of the graffiti, even if he removes it within one hour. *Id.* Ms. Rainbow argues that this provision "plainly applies" to WPIX's failure to

timely retract its story, but the relevance of the Restatement to the present case is far from evident.

First and foremost, the Restatement is not law and, insofar as it was intended to say what the law *is* rather than what the law *should be*, it is not an accurate description of the law as it pertains to publishers in New York—either in 1977 or today. *Chapadeau*, decided just two years before the Restatement was published, is binding and precludes imposition of this form of liability on publishers.

Further, the Internet did not exist when the Restatement was written, so the provision's applicability to online news is doubtful. When this Restatement provision was published, it would not have applied to the media in existence at the time. Print publications are sold to readers, and are thus no longer chattels within the publisher's possession or control. Once television news is broadcast, it cannot be scrubbed away like a lewd comment scrawled on a stall door. The Restatement authors could not have foreseen the advent of Internet news and likely did not intend this rule to cover news media publishers.

Even if the Restatement section could be extended by analogy to online news, its applicability to the present facts remains in doubt because WPIX did not have the requisite notice. Although Plaintiff-Appellant allegedly attempted to contact the station several times to report the error, WPIX has no record of receiving any of those messages. As the Restatement says, "the duty arises only

when the defendant knows that the defamatory matter is being exhibited on his land or chattels." § 577 cmt. p. This appears to require actual, rather than just constructive, notice. Because WPIX did not have actual notice of the error until the filing of this lawsuit, at which time the station took the story down, no liability would flow under this Restatement provision, even if it did apply here.

Additionally, Plaintiff-Appellant argues that because a retraction can function as evidence of a lack of gross irresponsibility, failure to issue a retraction should be affirmative evidence of gross irresponsibility as a "logical corollary." This does not follow. In fact, it is a prime example of a logical fallacy known as "denying the antecedent." W. Kent Wilson, *Formal Fallacy*, *in* The Cambridge Dictionary of Philosophy 316–17 (Robert Audi ed., 2d ed., 1999). "If A, then B," does not imply "If not A, then not B." Just because the law provides an incentive for publishers who correct errors does not mean that the law must also provide a punishment for those who fail to issue corrections. Indeed, the opposite inference—that the law has chosen to deal with the issue of corrections by giving publishers credit for issuing them, rather than by taking a failure to correct as proof of gross irresponsibility—is far more compelling. As the court below concluded, "[T]hat the law offers a carrot to incentivize timely retractions does not imply that the law also wields a stick at those publishers who do not make timely retractions." R. 15. In sum, neither the extension by analogy of the Second Restatement nor the

purported logical implications of New York caselaw cited by Plaintiff-Appellant support her contention that tort liability should flow from a failure to timely correct.

B. Public Policy Militates Against Imposing Liability for Failure to Correct

Since *Chapadeau*, New York's common law of defamation has incorporated a practical understanding of the realities of the news business, as well as a desire to protect journalists who inform the public. Applying those same considerations here shows why the Court should not impose liability for a failure to retract.

First, the risk of liability not only for an initial defamatory publication but also for a failure to issue a timely correction could chill reporting on matters of public concern. Imagine the following scenario: the subject of an unflattering story threatens to sue unless the publisher retracts. The publisher is confident in the reporting, having used reliable sources, but cannot be 100 percent certain that the story is accurate. The gross irresponsibility standard would protect the news organization from liability for the initial publication. But the specter of separate liability for failing to issue an immediate retraction might force the publisher to pull its story, for fear that the story may later prove to have errors. Imposing liability for declining to issue a retraction would allow a subject unhappy with unfavorable coverage to exploit that fear, threatening a lawsuit and leaving the

publisher with the untenable choice of standing behind the reporting (and risking liability), or pulling the story and depriving the public of important information.

Second, New York law already provides an incentive for news media organizations to issue corrections when errors are discovered. In several cases holding that reporters did not act with actual malice or gross irresponsibility, New York courts have credited publishers for issuing corrections or retractions. *See, e.g.*, *Kipper v. NYP Holdings Co.*, 912 N.E.2d 26, 28 (N.Y. 2009) (noting a newspaper's correction in finding no actual malice); *Gordon v. LIN TV*, 933 N.Y.S.2d 466, 467 (App. Div., 4th Dept. 2011) ("[T]he fact that defendants corrected the mistake within the same broadcast demonstrates that they strived for accuracy."); *Alicea v. Ogden Newspapers*, 495 N.Y.S.2d 845, 845 (App. Div., 4th Dept. 1985) (finding no gross irresponsibility where a retraction was printed). Further, New York's retraction statute mitigates damages in a defamation action when a defendant has published a retraction. N.Y. Civ. Rights Law § 78. By granting legal cover to a publisher who issues a correction or retraction, the law of New York provides adequate incentives for publishers to issue corrections when they make mistakes.

These incentives work. *The New York Times*, *Newsday*, WABC-TV 7, and the *Washington Post*, among many others, have streamlined the process for reporting corrections. *See, e.g.*, Corrections, N.Y. Times, https://perma.cc/JL5F-

QJTC; Contact Newsday, NEWSDAY, https://perma.cc/C4QE-9NVP ("To send us a correction, email li@newsday.com or 631-843-2700."); *1 dead, 5 hurt in Bronx construction site collapse*, WABC-TV 7 (Aug. 27, 2019), https://perma.cc/GFR4-QRSA (including "report a correction or typo" button at the bottom of every news article); Submit a Correction, Wash. Post, https://perma.cc/U2N8-G3S7. And WPIX itself has established new correction policies. Emails alerting the station to errors in stories are now forwarded by the assignment desk to both the News Director and Managing Editor, and every single news story on WPIX's website now includes a "submit a correction" button. R. 161. Simply put, media organizations already have effective incentives—legal, reputational, financial—to get their stories right and to correct them when they make mistakes.

Finally, the judicially created regime of liability for failing to timely issue a correction urged by Plaintiff-Appellant would be difficult to administer and would present difficult line-drawing questions. For example, one important consideration would be how quickly to require a correction. News organizations frequently receive requests for changes to their stories and it can take days, or even weeks, to investigate claims of error. News organizations need time and space to determine whether a request reflects a legitimate issue with a story or instead comes from someone unhappy with the truth. As noted above, the Second Restatement suggests that liability would flow from failing to retract a defamatory statement for

even one hour, a standard that would impose significant and unrealistic burdens on news outlets.

Another nettlesome issue is the requisite knowledge of the publisher. Must it have actual knowledge of the alleged error or just constructive? And must the publisher be certain that the article was wrong before it is required to retract? If not, what level of proof must the person reporting the error make to the publisher of the information's falsity before the duty to correct is triggered? The court below correctly concluded that these questions are best decided—if at all—by the Legislature. R. 15–16; *see also Rodriguez v. Daily News, L.P.*, No. No. 20582014, 2014 WL 12580400, at *1 (Sup. Ct., Kings Cty., Aug. 19. 2014), *aff'd*, 37 N.Y.S.3d 613 (App. Div., 2d Dept. 2016), *leave to appeal denied*, 73 N.E.3d 358 (N.Y.2017) (holding that "imposing liability for untimely corrections is a matter for the legislature, not the courts, to address.") (interal quotation marks omitted).

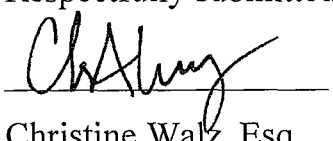
For all these reasons, this Court should reject Plaintiff-Appellant's invitation to create a new standard for liability for failing to timely issue a correction.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the Supreme Court's order granting summary judgment in favor of Defendants-Repondents.

Dated: New York, NY
October 2, 2019

Respectfully submitted,



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Appendix A: Identity of Individual *Amici*

Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest

papers in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 100 million page views each month.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional

newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the

visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of 30 million people who listen to NPR programming and newscasts each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including podcasts (which see about 19 million unique users each month), social media, mobile applications, and NPR.org (which sees about 37 million unique visitors each month).

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products.

Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, appendices, and this Statement is 4,932.

Dated: New York, New York
October 2, 2019

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM
Justice

----------X

STARLIGHT RAINBOW,

Plaintiff,

- v -

WPIX, INC, JEREMY TANNER and MAGEE HICKEY,

Defendants.

INDEX NO. 152477/2015
MOTION DATE 10/03/2018
MOTION SEQ. NO. 003

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion for SUMMARY JUDGMENT (AFTER JOINDER

Motion by Defendants WPIX, Inc. and Magee Hickey (collectively, "Defendants")[1] for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted for the reasons stated herein:

BACKGROUND

On March 14, 2015, Defendant WPIX, Inc. ("WPIX") posted the following story titled "Flatbush 12-year-old claims her 5th grade teacher is bullying her":

> "Brooklyn (PIX11)-Jxxxxx Sxxxxxx walks to PS 235 each day with her mother for moral support because the 12-year-old claims her fifth-grade teacher has been bullying her for the past six months.
>
> 'Miss [Starlight] Rainbow makes me uncomfortable and even scared to come to school,' Jxxxxx told PIX11. 'I feel I am poison to the school.'
>
> The fifth grader claims the teacher made fun of her in front of her classmates, calling her poison in the classroom. Meeting in front of the school with community activist Tony Herbert, her family claims the bullying has only gotten worse, even turning physical, ever since they complained to the principal and superintendent about it.

[1] The complaint was dismissed without prejudice as against Defendant Jeremy Tanner on November 6, 2015. (NYSCEF Document No. 5.)

'Miss Rainbow opened the door and said I'm not allowed in,' Jxxxxx said, 'she pushed me and slammed the door in my face.'

But the moment that brings Jxxxxx's mother to tears is when she thinks about her daughter's response to the death of Avonte Oquendo, the teen with autism who went missing for months.

'I wish I was the boy Avonte that got killed because I don't want to be in the school anymore,' Jxxxxx said.

'Here's a young person threatening to kill herself has to be looked at," community activist Tony Herbert said, "we're asking the mayor to get involved and get involved quickly.'

Jxxxxx ran away from school Thursday and called 911 for help and that was the reason for the gathering in front of the school.

After a three-hour delay, the Department of Education released this statement: 'We take these allegations very seriously and are investigating the matter,' a spokesman said.

But Jxxxxx's family is still worried about this unhappy 12-year-old.

'What would make you comfortable at PS 235,' PIX11 asked.

'Nothing, at this point,' she said.

Does she want to change schools?

'Yes, as far as I can go from here,' the girl said."

(Affirm. in Supp., Ex. A [Complaint with Subject Article attached] [brackets around "Starlight" in original].)

As would later be revealed, the above article inaccurately reported the name of the alleged bullying teacher, whose actual name was *Cynthia* Rainbow. Plaintiff Starlight Rainbow, it turned out, was another teacher working at Lyons Community School in Brooklyn, who had no relationship with the student, Cynthia Rainbow, or PS 235.

According to Defendant Magee Hickey ("Hickey"), at the time of the story, she had worked in the news industry for over thirty years and had been at WPIX for the last 2.5 years. Prior to this lawsuit, Hickey states that she had never been sued before, and none of her stories had ever led to a defamation lawsuit against

one of her employers. (Affirm in Supp., Ex. B [Hickey EBT] at 8:09-14:16, 19:10-20.)

Hickey states that on the morning of March 14, 2014, her assignment editor told her to cover a news conference about the subject story taking place at 11 AM that day. Hickey states that she received a press release about the news conference that had been authored by a community activist named Tony Herbert. (Affirm in Supp. Ex. C [Press Release].) The press release contained many of the same (and additional allegations) as the subject WPIX article, but only referred to the alleged bullying teacher as "Ms. Rainbow"—her first name was not mentioned.

Hickey states that she attended the news conference that morning where she interviewed Mr. Herbert, the student, and the student's mother, Genae Simpson. Hickey states that during the interview she asked the student and her mother for the first name of the alleged bullying teacher, and they both told her that it was "Starlight." (Hickey EBT at 42:19-44:14.) Hickey states that she asked Mr. Herbert, the student, and the mother to repeat the bullying teacher's name because Starlight was "an unusual name," and that the name Starlight was repeated (but that she does not specifically recall whether Mr. Herbert also confirmed the name Starlight.) (Id.)

Mr. Herbert states, in an affidavit, that Hickey asked Ms. Simpson for the teacher's first name, and Ms. Simpson told her the teacher's name was "Starlight." (Affirm. in Supp. Ex. D [Herbert Aff.] ¶ 6.) Mr. Herbert states that Hickey "reacted somewhat incredulously and said something like, 'that's such an unusual name, are you sure?'" and that "Genae Simpson then repeated her answer and Ms. Hickey may have even asked it again and then I vaguely recall we all repeated her answer as if she hadn't been able to hear it." (Id. ¶¶ 7-8.)[2]

Hickey states that she then attempted to talk to parents, teachers and other students as they left the school by approaching them on the sidewalk. However, her attempts were unsuccessful because school safety agents ordered her (and her cameraman) to "get off the sidewalk" and "not to interfere with the business of the school." (Hickey EBT at 55:20-58:19.)

[2] Mr. Herbert further states: "I too was surprised at hearing that unusual name, although I have no personal knowledge of that teacher's name and only learned the bullying teacher's name was Cynthia Rainbow from subsequent news reports." (Id. ¶ 8.)

Hickey further states that she reports on a lot of stories involving the New York City school system, and as such she has certain questions that she will "always ask" the New York City Department of Education ("DOE") as part of her process of putting together a news story. Hickey states that as part of her process, she contacted the DOE Press Office for comment right after the interview. Hickey states that she did not attempt to contact PS 235's principal because, in her experience, school principals would generally just refer her to the DOE Press Office. Hickey further states that when she called the DOE Press Office, she spoke to an individual who was either the head of the office or one of the assistants. Hickey states that she cannot remember what was said verbatim, but that per her usual process, she probably communicated the following to the DOE Press Office:

> "I have an allegation that a teacher at a certain school, at P.S. 235, is accused of bullying. I have the name of the teacher. Can you confirm that that teacher is at this school? Can you confirm that you've heard of this allegation? What can you tell me about this teacher? Does she have a track record of problems, disciplinary action against her – or him, but in this case her - what can you tell me?"

(Hickey EBT at 45:24-51:03.) Hickey further states that although she does not recall what was said verbatim, she does have a "specific recollection" of asking the above questions. (Id.) In addition, Hickey states that she specifically provided the DOE Press Office with the name Starlight Rainbow. Hickey states that that DOE Press office told her "[w]e will get back to you."

Hickey states that the press office called back between 3 and 4 p.m. that day and told her that "these are serious allegations and we will be investigating" but would not say more when she repeated the above questions and asked if the DOE could tell her more about the incident. (Id. at 48:10-50:25.) Hickey states that usually the DOE Press Office would provide information that is "on the record" and information that is "off the record," but that in this case she did not recall receiving any information from the DOE Press Office off the record.

A video of the story was then broadcast on the 5 PM PIX11 News[3] and posted as a written article on the WPIX website that evening.

[3] A recording of the broadcast was not submitted as an exhibit to this motion, and Defendants' counsel stated at oral argument that such recording was taped over after a 24-hour period, pursuant to WPIX's records retention procedures. (Oral Arg. Tr. at 4:03-26.)

On March 19, 2014, News 12 reported that the alleged bullying teacher, Cynthia Rainbow, abused and threatened a second student, and on March 27, 2014, the Canarsie Courier reported on these same allegations, using the correct first name, and included an apparent photograph of Cynthia Rainbow. (Affirm. in Supp., Ex. E [Other Articles].)

Plaintiff did not learn about the subject article until a colleague forwarded it to her in August of 2014. (Affirm. in Supp., Ex. F [Plaintiff EBT] at 8:22-9:10.) Concerned that a parent might inquire about the article and to see if there was another teacher working in the DOE with the same name, Plaintiff emailed her principal on August 25, 2014 about the article. (Affirm. in Supp., Ex. G [Principal Email Correspondence]; Plaintiff EBT 17:18-18:18; 27:5-16.) On that same day, Plaintiff's principal responded that, based on a check of the DOE Email system, Plaintiff was the only person with the name "Starlight Rainbow"—although there were a few other "Starlights" and "Rainbows" in the system. (Id.)

Plaintiff states that on August 26, 2014, she sent an email to WPIX at the email address news@pixll.com informing WPIX that an article published on March 14, 2015 inaccurately "names me as a teacher that was bullying a student at PS 235". (Affirm. in Opp., Ex. P [August 26, 2014 Email to WPIX]; Plaintiff EBT at 31:20-34:8.) Plaintiff explained that she did not work at PS 235 or know the student in the story. (Affirm. in Opp., Ex. P [August 26, 2014 Email to WPIX]; Plaintiff EBT at 31:20-34:8.) Plaintiff wrote: "I need you to retract this story or I will sue you for defamation of character. Please respond as soon as possible to let me know what you choose to do." (August 26, 2016 Email to WPIX.)

Plaintiff states that she also called and left voice messages on an automated system for WPIX on August 26 and August 27, 2014, but that she was unable to reach an actual person. (Plaintiff EBT at 31:12-34:08; Affirm in Opp. O [Plaintiff Phone Records].)

Plaintiff states that she then reached out to her union representative, and that in January 2015 her union informed her that they would not represent her "because it was a civil suit." (Plaintiff EBT at 34:09-37:12.)

Plaintiff states that after she was unable to get help from her union, she retained private counsel. On February 2, 2015, Plaintiff's counsel sent a letter to WPIX describing the March 14, 2018 article and demanding that "you remove this defamatory posting from your website and post a retraction immediately" and that "if you fail to do so, Ms. Rainbow intends to initiate legal action to compel its

removal and to recover damages." (Affirm. in Opp., Ex. O [February 2, 2015 Letter]; Plaintiff EBT at 37:13-38:08.)

On March 13, 2015, Plaintiff filed the instant complaint, alleging a single cause of action for defamation per se. Five days later, on March 18, 2015, WPIX removed the subject story from its website. (January 28, 2016 Defendant Responses to Initial Interrogatories] ¶ 7.)

Defendants state that WPIX has been unable to find any record of Plaintiff's calls, but that at the time, such voicemails would have gone to a line "monitored by [the] executive assistant to the general manager of WPIX and programming coordinator." (Affirm in Opp., Ex. Q [June 5, 2017 Def Supp Responses to Interrogatories]; Affirm in Supp., Ex K [February 18, 2017 Def Responses to Second Set of Interrogatories].)

Defendants further state that at "all relevant times," the news@pix11.com address that Plaintiff sent her initial retraction request to, has been a "generic email account that is automatically directed to the mailbox of those working on the assignment desk." (June 5, 2017 Def Supp Responses to Interrogatories.) According to Defendants, the assignment desk "receives between 1,000 and 2,000 emails each day," and the assignment editor on duty then scans the emails for tips. (June 5, 2017 Def Supp Responses to Interrogatories.)

Defendants now move for summary judgment arguing, in sum and substance, that their reporting and subsequent delay in removing the article were not the "grossly irresponsible" actions required to meet the standard for liability in the instant case. Plaintiff opposes the motion.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d

499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

Defamation is "the making of a false statement that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" (*Manfredonia v Weiss*, 37 AD3d 286, 286 [1st Dept 2007], quoting *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211–212 [1926].) An action for defamation seeks to compensate the plaintiff for the injury to his or her reputation caused by the defendant's written expression, which is libel, or by the latter's oral expression, which is slander. (*Intellect Art Multimedia, Inc. v Milewski*, 24 Misc 3d 1248(A) [Sup Ct, NY County 2009] [Gische, J.]; *Idema v Wager*, 120 F Supp 2d 361, 365 [SDNY 2000], *affd*, 29 Fed Appx 676 [2d Cir 2002].)

To state a claim for defamation, a plaintiff must allege: (1) a false statement that is (2) published to a third party (3) without privilege or authorization (4) constituting fault as judged by, at a minimum, a negligence standard and that (5) causes harm, unless the statement constitutes defamation per se (in which case damages are presumed). (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999].) There are four categories of statements that constitute defamation per se: "(1) statements charging plaintiff with a serious crime; (2) statements that tend to injure plaintiff in her trade, business or profession; (3) statements that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman." (*Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept 1996].)

Here, there is no dispute that the subject article inaccurately reported the first name of the bullying teacher as "Starlight"—rather than "Cynthia," as Defendants' competitors accurately reported. There also appears to be no dispute that the publication would constitute defamation per se as it would presumably injure Plaintiff in her profession as a teacher.

Defendants, however, argue that the story they reported on was one of public concern, and as such they can only be held liable if they acted in a grossly irresponsible manner—which, they argue that they did not do as a matter of law. Plaintiff does not contest that the subject article reported on a matter of public concern—the bullying of a twelve-year-old student by her own teacher—but

contends that Defendants acted in a grossly irresponsible manner: first, by publishing the article without proper fact-checking; and, second, by WPIX's failing to retract the subject article in a timely manner after Plaintiff gave notice that the article inaccurately named her as the bullying teacher.

The Court discusses each of these arguments in turn.

I. Defendants Did Not Act in a Grossly Irresponsible Manner by Publishing the Subject Article.

"Where the plaintiff is a private person, but the content of the article is arguably within the sphere of legitimate public concern, the publisher of the alleged defamatory statements cannot be held liable unless it 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.'" (*Stone v Bloomberg L.P.*, 163 AD3d 1028, 1029 [2d Dept 2018], quoting *Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975].) "One is grossly irresponsible in this regard when he or she relies solely on conduits for unverified rumor, without investigation or research, fails to verify the accuracy or veracity of information before disseminating it, or evinces an inability or unwillingness to take any steps to obtain such a verification." (*Matthaus v Hadjedj*, 2018 N.Y. Slip Op. 30855[U], 5 [Sup Ct, New York County 2018] [Bannon, J.] [internal citations omitted].)

Under a gross irresponsibility standard, a news agency's liability for publishing a defamatory statement can be predicated on the grossly irresponsible conduct of one of its employees, pursuant to respondeat superior, or if it "had, or should have had, substantial reasons to question the accuracy of the information or the bona fides of [its] source." (*Ortiz v Valdescastilla*, 102 AD2d 513, 519 [1st Dept 1984]; *see also Weiner v Doubleday & Co., Inc.*, 74 NY2d 586, 595 [1989] [holding that a publisher is not required to do "original research with respect to every potentially defamatory reference"]; *Love v William Morrow and Co., Inc.*, 193 AD2d 586, 589 [2d Dept 1993] ["[A] publisher may rely upon the author's reporting abilities unless there is substantial reason to question the accuracy of the articles or the bona fides of the reporter."].)

Plaintiff argues that Defendants were grossly irresponsible by publishing her name as the bullying teacher because their sole source for the bullying teacher's first name was the mother of the bullied student, Ms. Simpson—whom Hickey had never met before. Plaintiff further complains that Hickey never attempted to

contact the accused bullying teacher or principal at PS 235. Rather, Plaintiff complains that Hickey's only attempt at fact-checking was her call to DOE's main press office, and that Hickey chose to run the story "despite the fact that she was unable to get confirmation from the DOE that Starlight Rainbow even taught at P.S. 235." (Memo in Opp. at 13.) Plaintiff further points out that Defendants' competitors correctly named the accused bullying teacher as Cynthia Rainbow—albeit days after Defendants' story ran. (Id. at 13-14.)

This Court finds that notwithstanding the clear inaccuracy in naming Plaintiff as the bullying teacher, Defendants did not act in a grossly irresponsible manner by publishing the name that was given to them. As a general matter, one would reasonably expect a parent to know the name of her child's teacher, especially if that parent was trying to protect her child from being bullied by that particular teacher. As such, it was not grossly irresponsible for Hickey to assume that Ms. Simpson had given her the correct name of the teacher bullying her daughter, when Ms. Simpson had arranged for a press conference for the purpose of shaming the DOE and the mayor into taking measures to protect her daughter.

Unlike the cases cited by Plaintiff, Hickey had no reason to suspect that the information she was receiving from Ms. Simpson was unreliable. (*See e.g. Lewis v Newsday, Inc.*, 246 AD2d 434, 437-38 [1st Dept 1998] [cited in Memo in Opp. at 12] [where source referred to the plaintiff as a "scab" which was "arguably an indication of animus in this context"]; *Sheridan v Carter*, 48 AD3d 444, 446 [2d Dept 2008] [cited in Memo in Opp. at 12] [allowing complaint to survive motion to dismiss where it alleged that the defendants published the statements "without examining police records or contacting the plaintiffs, and after being notified by the plaintiffs' lawyer that [the source's] claims were baseless"].)

Based on the evidence presented, there was never any reason for Hickey to suspect that she had been given the wrong name of the accused bullying teacher, and as such, there was no reason for her to investigate this fact further. (*Gaeta v New York News, Inc.*, 62 NY2d 340, 351 [1984].) At most, Hickey thought the name Starlight was unusual, and, according to Mr. Herbert, this apparently led to her asking it to be repeated, which, Mr. Herbert, the student, and Ms. Simpson all did. (Herbert Aff. ¶¶ 7-8.)[4]

[4] It also bears noting how unforeseeable the particular harm was at the time of publication: that there would be another teacher working in Brooklyn, with the same unusual last name, and the unusual first name of Starlight.

In addition, Hickey identified the alleged bullying teacher to the DOE Press Office as "Starlight Rainbow," and asked the DOE Press Office to confirm that the teacher was at PS 235 and that it had heard about the allegation. The DOE did not respond that there was not a teacher at PS 235 by the name Starlight Rainbow or indicate to Hickey that the information that she provided was in anyway inaccurate. To the contrary, the DOE told Hickey that the allegations she asked about were "serious" and that they would be "investigating." As such, in these circumstances, it was not grossly irresponsible for Hickey to believe that name of the alleged bullying teacher was Starlight Rainbow.

Similarly, because Hickey was not grossly irresponsible in publishing the subject article and because WPIX had no reason suspect the bona fides of Hickey, WPIX did not act in a grossly irresponsible in its decision to publish the subject story. (*Love v William Morrow and Co., Inc.*, 193 AD2d 586, 589 [2d Dept 1993].)

Accordingly, this Court finds that Hickey and WPIX did not act in a grossly irresponsible manner when they published the subject story inaccurately naming Plaintiff as a teacher bullying one of her students.

II. WPIX Is Not Liable for Its Failure to Timely Correct the Subject Story.

In addition to arguing that Defendants acted in a grossly irresponsible manner when they published the story on March 14, 2014, Plaintiff argues that WPIX was grossly irresponsible in its failure to timely "correct a blatant and obvious error in a story posted on their website, after it was repeatedly brought to WPIX's attention." (Memo in Opp. at 15.)

This appears to be a relatively novel theory for defamation liability under New York law.

As a preliminary matter, New York has long followed the "single publication rule," which holds that:

> "[T]he publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable statute of limitations runs from the date of that publication."

(*Firth v State*, 98 NY2d 365, 369 [2002], quoting *Gregoire v G. P. Putnam's Sons*, 298 NY 119, 123 [1948].) The Court of Appeals has held that the "single publication rule" applies to material posted on internet websites and that each "'hit' or viewing" of the material does not constitute a new publication. (Id.)

Plaintiff cites to no authority for the proposition that a separate cause of action for defamation arises when a publisher is alerted to a potential inaccuracy in its content and then fails to timely issue a retraction. Rather, the rule is that a new cause of action does not accrue. (*See Firth v State*, 98 NY2d 365, 369 [2002].)

For example, in *Rodriguez v Daily News, L.P.*, the defendant news agencies received an email from the NYPD with the plaintiff's photograph, stating that the person in the photograph was sought for questioning in connection with an attempted rape. (2014 WL 12580400, at *1 [Sup Ct, Kings County 2014] [Walker, J.], affd, 142 AD3d 1062, 1064 [2d Dept 2016], lv to appeal denied, 28 NY3d 913 [2017].) The defendants then published a news reports based on the email and containing the plaintiff's photograph. Although it turned out that the plaintiff had no involvement with the attempted raped, the news reports containing the plaintiff's picture remained on the defendants' websites for months after the plaintiff notified the defendants that they had incorrectly identified him as the perpetrator.

The *Rodriguez* court found that the defendants reports were protected under Civil Rights Law § 74 as substantially accurate reports of the information provided by the NYPD in its press release, and as such granted summary judgment to the defendants. In addition, the *Rodriguez* court rejected the plaintiff's theory that the defendants could be held liable for failing to promptly remove the plaintiff's photograph from their websites. The court explained:

> "Nor has the court found, or plaintiff cited to, any legal authority under which defendants may be held liable to plaintiff for not promptly removing plaintiff's photograph from their websites, or for their failure to publish a retraction of the articles/stories, upon being informed that the person in the photograph was not the perpetrator of the sexual assault.
>
> While the court finds it unconscionable that a publisher, whether malicious or not, may refuse to remove a news article/report from its website that it knows to be false, this is a matter for the legislature, not the courts, to address."

(Id. at *3.)

Courts in other jurisdictions have generally rejected the idea that a new cause of action for defamation can arise based on a publisher's failure to timely retract an article when its inaccuracy is brought to the publisher's attention after publication. (*See e.g. McFarlane v Sheridan Square Press, Inc.*, 91 F3d 1501, 1515 (DC Cir 1996) ["[Plaintiff] presents no authority, however, nor are we aware of any, for the proposition that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication."]; *Lohrenz v Donnelly*, 223 F Supp 2d 25, 56 [DDC 2002] "[T]here is no duty to retract or correct a publication, even where grave doubt is cast upon the veracity of the publication after it has been released."], *affd*, 350 F3d 1272 [DC Cir 2003]; *D.A.R.E America v. Rolling Stone Magazine*, 101 F Supp 2d 1270, 1287 [CD Cal 2000) ["[T]here is no authority to support Plaintiffs argument that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication. "]; *Coughlin v Westinghouse Broad. & Cable, Inc.*, 689 F Supp 483, 488 [ED Pa 1988] ["Counsel have not been able to come up with any case in any American jurisdiction which recognizes a claim sounding in damages for failure to retract what is defamatory."].)

Plaintiff nonetheless points out that, under this state's law, the fact that a defendant news organization retracted an article is evidence of a lack of gross irresponsibility. (Memo in Opp. at 14, citing *Kipper v. NYP Holdings Co., Inc.*, 12 NY3d 348, 359 [2009], *Gordon v. Lin TVCorp.*, 89 A.D.3d 1459 [4th Dept. 2011], and *Alicea v Ogden Newspapers*, 495 A.D.2d 233 [4th Dept. 1985], aff'd 67 N.Y.2d 862 [1986].) Plaintiff argues "that if the retraction of an article constitutes evidence of a lack of gross irresponsibility, then, as a logical corollary, the failure to retract a defamatory article is evidence of gross irresponsibility." (Pl. Letter to Court at 2 [NYSCEF Doc. No. 62.) Defendants' counter that although publishers have a "moral obligation" to timely correct inaccuracies in published stories after such inaccuracies are brought to their attention, they do not have a legal duty do so. (Oral Arg. Tr. at 14:14-15:07.)

The Court agrees with Defendants. That the law offers a carrot to incentivize timely retractions does not imply that the law also wields a stick at those publishers who do not make timely retractions. Moreover, while the Court agrees with Justice Walker and Defendants that it is morally reprehensible for news agencies not to diligently and quickly remove reporting errors from their websites when an affected party—like Plaintiff—brings such errors to their attention, this Court also agrees with Justice Walker that imposing liability for

untimely corrections is "a matter for the legislature, not the courts, to address." (*Rodriguez*, 2014 WL 12580400, at *1.) This is especially so given that the Court of Appeals declined to change the single publication rule in the context of the internet, reasoning that to do so "would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the Internet's unique advantages." (*Firth v State*, 98 NY2d 365, 372 [2002]; *see also Gertz v Robert Welch, Inc.*, 418 US 323 [1974].)

Accordingly, this Court finds, as a matter of law, that WPIX is not liable for its alleged failure to timely correct the inaccuracy in the subject article until after the commencement of this action, notwithstanding the various attempts by Plaintiff and her counsel to bring the inaccuracy to WPIX's attention.[5]

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendants WPIX, Inc. and Magee Hickey's motion for summary judgment, pursuant CPLR 3212, is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that said defendants are directed to serve a copy of this order upon the Clerk of the Court with notice of entry within twenty (20) days of the date of this order.

10/18/2018
DATE

HON. ROBERT D. KALISH, J.S.C.

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

[5] However, given WPIX's apparent failure in its "moral obligation" to make a timely correction, this Court finds that in these circumstances it would be inequitable to award Defendants costs and disbursements pursuant to CPLR 8101.

AFFIDAVIT OF SERVICE

ELVIN RAMOS, being duly sworn, deposes and says:

1. I am over 18 years of age, am employed by the firm of Holland & Knight LLP, 31 West 52nd Street, New York, NY 10019, am not a party to this action and reside in the State of New York, County of Queens.

2. On Wednesday, October 2, 2019, I served a true copy of the within Notice of Motion, Affirmation of Christine Walz in Support of Unopposed Motion by the Reporters Committee for Freedom of the Press, et al, for Leave to File *Amici Curiae Brief* with Exhibits A & B, upon:

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at the address designated by the attorneys for that purpose by depositing a true copies of the above mentioned documents into the custody of Federal Express, an overnight delivery service, prior to the latest time designated by Federal Express for next day delivery.

Sworn to before me this
2 day of October, 2019

Notary Public

Elvin Ramos

GLENN M. HUZINEC
Notary Public, State of New York
No. 01HU4873127
Qualified in Richmond County
Certified in New York County
Commission Expires October 6, 2021