

EXHIBIT H

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

-----X
ROBERT DAVIS and MICHAEL LANG, : Index No. 113967/11
 :
 : Plaintiffs, : IAS Part 61 (Singh, J.)
 :
 : -against- : NOTICE OF MOTION
 : TO DISMISS
 :
 JAMES BOEHEIM and SYRACUSE UNIVERSITY, :
 :
 : Defendants. :
-----X

PLEASE TAKE NOTICE that, upon the accompanying memorandum of law and affirmation of Andrew M. Levine, Esq., dated the 20th day of January, 2012, and upon all prior pleadings and proceedings herein, the undersigned, attorneys for defendants James Boeheim and Syracuse University, will move this Court in Room 130, at 60 Centre Street, New York, New York, on the 14th day of March, 2012, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order dismissing the Complaint of plaintiffs Robert Davis and Michael Lang, in its entirety, for failure to state a claim upon which relief may be granted, pursuant to C.P.L.R. § 3211(a)(7), and for such other and further relief as the Court may deem just and proper.

Pursuant to CPLR 2214(b), answering papers and/or notice of cross-motion and supporting papers, if any, shall be served at least seven days prior to the return date.

Dated: New York, New York
January 20, 2012

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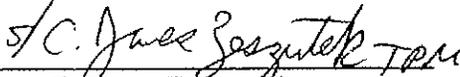
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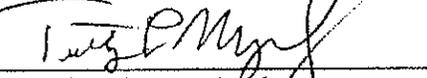
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**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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Pursuant to C.P.L.R. § 3211(a)(7), defendants Syracuse University (the “University”) and James Boeheim (collectively, “Defendants”) respectfully submit this memorandum of law in support of their motion to dismiss the Complaint of plaintiffs Robert Davis and Michael Lang (collectively, “Plaintiffs”), in its entirety, for failure to state a claim upon which relief may be granted.

PRELIMINARY STATEMENT

This action relates to statements by Coach Boeheim in which he expressed doubts about Plaintiffs’ allegations of past sexual abuse by Bernie Fine and questioned their motives in making these allegations. Boeheim asserted no objective facts about Plaintiffs. His expression of opinion fell squarely within the absolute right to express one’s thoughts without risking liability under defamation law, a protection guaranteed by the New York State and Federal Constitutions. This protection permitted Boeheim to speak his mind, especially given the public nature of Plaintiffs’ allegations and the ensuing public controversy. It also afforded Boeheim the opportunity to revise his opinions, as he did ten days later when, based on new information, he apologized for his initial comments. As none of Boeheim’s comments was a defamatory statement of fact, Plaintiffs’ Complaint fails as a matter of law.

Boeheim’s views of Plaintiffs’ veracity and motivations are, by definition, not capable of being proven true or false, a classic indication of non-actionable opinion. The reasonable reader encountering Boeheim’s initial statements, which were replete with rhetoric and hyperbole, could conclude only that he was expressing his opinion.

Boeheim's words reflect his passionate advocacy on behalf of both his colleague Fine and himself, in light of the implication that he somehow knew about Fine's alleged abuse of Plaintiffs. His comments were published in articles that included a range of views, noted his longstanding association with Fine, and disclosed the bases for his opinions, including that prior claims by Davis had not been substantiated. These elements, combined with Boeheim's admitted lack of personal knowledge and his well-known reputation for bluntly expressing himself, make clear that his statements were opinion.

Without question, Plaintiffs' underlying allegations of abuse raise serious issues that deserve – and have received and are receiving – careful attention by the University, law enforcement authorities, and others. It is a matter of public record that the University has launched an internal assessment of past actions and is cooperating with law enforcement. But a defamation action is not the proper avenue for investigating and resolving Plaintiffs' claims of past abuse or for challenging Boeheim's opinions. Because Boeheim's statements are not defamatory as a matter of law, Plaintiffs fail to state a claim against Boeheim or, under the theory of respondeat superior, against the University. Defendants therefore respectfully request that Plaintiffs' Complaint be dismissed with prejudice.

ALLEGED FACTS¹

Initial Reporting of Plaintiffs' Claims

On November 17, 2011, *ESPN* reported that Plaintiffs had accused Bernie Fine of sexual abuse. (Compl. ¶¶ 5, 41 (attached as Ex. B).²) At the time of this report, Fine served as Associate Head Coach of the University's men's basketball team. (*Id.* ¶ 2.) The University promptly placed Fine on administrative leave. (*Id.* ¶ 43.) In addition, Chancellor Nancy Cantor wrote to the entire Syracuse community, underscoring that “[w]e hold everyone in our community to high standards and we don’t tolerate illegal, abusive or unethical behavior—no matter who you are.”³ (Ex. I.)

In reporting on Plaintiffs’ allegations, as similarly recounted in Plaintiffs’ Complaint, the media noted that Davis previously had claimed that Fine had abused him. (Ex. N; Compl. ¶ 33.) Specifically, in 2002, Davis contacted the Syracuse Police Department (“SPD”) to report Fine’s abuse, but was told that SPD would not investigate because “the statute of limitations had run.” (Compl. ¶ 33.) In 2002 and 2003, Davis approached the *Syracuse Post-Standard* and *ESPN* with his allegations, but neither published the claims. (*Id.* ¶¶ 39-40.) In 2005, Davis reported his allegations to the

¹ For purposes of this motion to dismiss pursuant to C.P.L.R. § 3211(a)(7), Defendants treat the factual allegations in the Complaint as true.

² Citations to “Ex.” refer to exhibits to the accompanying Affirmation of Andrew M. Levine dated January 20, 2012.

³ The Court may take judicial notice of this statement and the various articles relating to Plaintiffs’ allegations. *See Sprewell v. NYP Holdings, Inc.*, 1 Misc. 3d 847, 850 (N.Y. Sup. Ct. 2003) (taking judicial notice, during the motion to dismiss phase of a defamation suit, of articles published about plaintiff).

University, which launched an investigation and interviewed Davis and others. (Ex. K; Compl. ¶ 35.) The media reported that “[a]ll of those identified by the complainant [and interviewed] denied any knowledge of wrongful conduct” by Fine. (Ex. K.)

Boeheim, the Head Coach of the University’s basketball team, released a statement dated November 17, 2011, expressing his “full support” for Fine. (Ex. E.) He noted a few days later that he “really [didn’t] have any facts.” (Ex. P.) Plaintiffs’ allegations about Fine were reported amidst intensive coverage of the sexual abuse scandal that implicated coaches at Penn State University, including Coach Joe Paterno. (Compl. ¶ 41.) In this context, Boeheim defended himself and Fine: “I’m not Joe Paterno. Somebody didn’t come and tell me Bernie Fine did something and I’m hiding it. I know nothing. If I saw some reason not to support Bernie, I would not support him. . . . But until then, I’ll support him until the day I die.” (Ex. M.)

Boeheim’s Allegedly Defamatory Statements

Plaintiffs have identified several allegedly defamatory statements by Boeheim, which were published on November 17 and 18, 2011 in the *Syracuse Post-Standard*, *ESPN*, and *The New York Times*. (Compl. ¶¶ 47-52.) The thrust of the views expressed by Boeheim were twofold: (1) he doubted Plaintiffs’ allegations; and (2) he questioned their motives. (*See id.*) Boeheim’s sentiments of doubt and skepticism were conveyed by the articles in which they appear, which are appended as Exhibits G, J, and L.⁴ These

⁴ In their Complaint, Plaintiffs’ cite a *Sporting News* article, Exhibit J, which reported statements made by Boeheim to *ESPN*. (Compl. ¶ 49.) The *ESPN* article that includes the same statements is attached to the accompanying Affirmation as Exhibit N.

articles, among other things, relayed that Boenheim was “perplexed” by the allegations, which “[a]fter all . . . [were] about his friend and about his friend’s alleged dark side.” (Ex. L.)

In expressing doubt regarding Plaintiffs’ claims, which Boenheim described as “what I *absolutely believe* is a false allegation,” he rhetorically noted the passage of time: “This is alleged to have occurred . . . what? Twenty years ago? Am I in the right neighborhood? . . . So we are supposed to do what? Stop the presses 26 years later? For a false allegation? *For what I absolutely believe is a false allegation?*” (Ex. L; Compl. ¶ 47 (emphasis added).) Boenheim also denied Davis’ claim that Boenheim had seen him in Fine’s hotel room back in 1987: “I know [Davis is] lying about me seeing him in his hotel room. That’s a lie. If he’s going to tell one lie, I’m sure there’s a few more of them.” (*Id.*)

Consistent with what was published in contemporaneous media coverage, Boenheim also noted that “[Davis previously had] supplied four names to the university that would corroborate his story. None of them did.” (Ex. J; Compl. ¶ 49.) Boenheim stated his skepticism hyperbolically, noting it was “a bunch of a thousand lies that [Davis] has told.” (*Id.*) In rhetorical fashion, he observed the coincidence of Davis and Lang’s familial relationship: “You don’t think it is a little funny that his cousin (relative) is coming forward?” (Ex. N; Compl. ¶¶ 49-50.) Similarly, he characterized the timing of Lang’s allegations as “a little suspicious.” (Ex. G; Compl. ¶ 51.)

In addition, Boeheim questioned Plaintiffs' motives for raising these claims when they did. He alluded to the widespread media attention surrounding Penn State and theorized that Plaintiffs were motivated by money. (Ex. L.) Specifically, Boeheim said:

- “The Penn State thing came out and the kid behind this [Davis] is trying to get money. He’s tried before. And now he’s trying again. If he gets this, he’s going to sue the university and Bernie. What do you think is going to happen at Penn State? You know how much money is going to be involved in civil suits? I’d say about \$50 million. That’s what this is about. Money.” (*Id.*; *see* Compl. ¶ 48.)
- “Why wouldn’t he come to the police (first this time)? Why would he go to ESPN? What are people looking for here? I believe they are looking for money. I believe they saw what happened at Penn State and they are using ESPN to get money. *That is what I believe.* You want to put that on the air? Put that on the air.” (Ex. N (emphasis added); *see* Compl. ¶ 49.)

Over the next several days, Boeheim stated that he “support[ed]” Fine and believed what he said “was the right statement.” (Ex. P; Compl. ¶ 52.)

Different Viewpoints on Plaintiffs’ Allegations

In addition to Boeheim’s statements, the media coverage in the weeks following the first story included a range of other opinions on the subject. Nearly all Central New Yorkers “have chosen sides” on the subject, observed one article. (Ex. M.) A former Syracuse basketball player was quoted to say that Fine would be “cleared, as he’s been cleared before.” (*Id.*) Articles stated that “the case against Fine appears shaky” (Ex. O) and wondered if Fine had been “unfairly smear[ed]” (Ex. Q).

Other articles expressed strong support for Plaintiffs, labeling the accusations as “chilling” and potentially reflecting the “ultimate abuse of power.” (Ex. F.) Some

immediately drew the comparison to Penn State, calling the allegations against Fine a “sequel,” with parallels “eerily similar.” (Ex. H.)

Boeheim’s Apology

On November 27, 2001, ten days after the initial *ESPN* story broke, new information emerged regarding Fine, including a taped phone conversation between his wife and Davis, and the University terminated Fine’s employment. (Ex. S.) In addition, the University noted that it was reviewing its procedures in responding to Plaintiffs’ initial allegations and was cooperating with law enforcement, with the ultimate goal of “ensur[ing] that Syracuse University remains a safe place” for campus community members and visitors alike. (*Id.*)

On the same day as Fine’s termination, Boeheim apologized, expressing deep regret for his earlier comments:

The allegations that have come forth today are disturbing and deeply troubling. I am personally very shocked because I have never witnessed any of the activities that have been alleged. I believe the university took the appropriate step tonight. What is most important is that this matter be fully investigated and that anyone with information be supported to come forward so that the truth can be found. I deeply regret any statements I made that might have inhibited that from occurring or been insensitive to victims of abuse.

(Ex. R.) Boeheim later explained: “What I said last week was out of loyalty. . . . I couldn’t believe what I was hearing.” (Ex. T.) Notwithstanding Boeheim’s apology, Plaintiffs brought this defamation action, which they announced at a press conference on December 13, 2011. (Ex. U.)

ARGUMENT

I. A Defamation Complaint That Fails to Plead False Statements of Fact Must Be Dismissed.

Where, as here, a complaint fails to state a cognizable legal claim, it must be dismissed. C.P.L.R. § 3211(a)(7); *see, e.g., Brian v. Richardson*, 87 N.Y.2d 46, 54 (1995). To sustain a claim for defamation, a plaintiff must plead: (1) a false statement of fact; (2) published to a third party without any privilege; (3) with fault; and (4) damages. *E.g., Dickson v. Slezak*, 73 A.D.3d 1249, 1250 (3d Dep’t 2010). In this case, whether Boeheim’s comments constitute actionable statements of fact or non-actionable, protected opinion is a question of law for the Court. *See, e.g., Mann v. Abel*, 10 N.Y.3d 271, 276 (2008); *Roth v. United Fed’n of Teachers*, 5 Misc. 3d 888, 893 (N.Y. Sup. Ct. 2004).

As detailed below, Boeheim’s challenged statements are non-actionable. This is particularly so given how vigilantly New York courts police the line between opinion and fact, “providing the broadest possible protection” to statements of opinion. *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (internal citations and quotations omitted). In fact, the New York Constitution protects free speech beyond the “minimum standards” guaranteed by the Federal Constitution, and it expressly guarantees that “every citizen may freely speak, write and publish sentiments on all subjects.” *Id.* at 248-49 (internal citations and quotations omitted). Put simply, expressions of opinion are “privileged and, no matter how offensive, cannot be the subject of an action for defamation.” *Mann*, 10 N.Y.3d at 276; *accord Roth*, 5 Misc. 3d at 897. Because Plaintiffs challenge only statements of protected opinion, their Complaint cannot

withstand a motion to dismiss. *See, e.g., Brian*, 87 N.Y.2d at 54 (granting defendant’s motion to dismiss because the allegedly libelous statements were protected opinion); *Wahrendorf v. City of Oswego*, 72 A.D.3d 1604, 1605 (4th Dep’t 2010) (same).

II. The Challenged Statements Are Not Defamatory as a Matter of Law.

At bottom, the allegedly defamatory statements identified by Plaintiffs communicated two opinions. *First*, Boenheim disbelieved the allegations against Fine. *Second*, Boenheim thought the accusers were financially motivated. As demonstrated below, neither of these opinions, given the factors that New York courts use to distinguish statements of opinion from fact, is capable of defamatory meaning. Similarly, Boenheim’s affirmation of “support” for Fine (Ex. P; Compl. ¶ 52) was simply a reiteration of his initial non-defamatory statements and likewise is not actionable.

Accordingly, the law requires dismissal of the Complaint.

A. Boenheim’s Statements Expressing Disbelief of Plaintiffs’ Allegations Constitute Non-Actionable Opinion.

Taken as a whole in their proper context, as the Court of Appeals has mandated that courts approach challenged statements, Boenheim’s statements doubting Plaintiffs’ allegations are clear opinion. The court should not parse a challenged communication “for the purpose of isolating and identifying assertions of fact,” *Brian*, 87 N.Y.2d at 51, because statements viewed in isolation, “without knowing the full context in which they were uttered . . . may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context,” *Immuno AG.*, 77 N.Y.2d at 255. The ultimate question is whether the reasonable person “would have

believed that the challenged statements were conveying facts about the libel plaintiff.” *Id.* at 254. Boenheim’s statements did not convey facts about Plaintiffs. Rather, both the *content* and the *context* of Boenheim’s statements make clear that they were his opinions. *See id.*

1. The Content of the Challenged Statements Establishes That Boenheim Was Not Stating Facts.

a. Rhetoric and Hyperbole

In expressing his doubts about Plaintiffs’ veracity, the “imprecise language” and “sarcastic, hyperbolic” tenor of Boenheim’s words negate any possible impression that he was making factual assertions. *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 144 (1992) (dismissing statements as non-actionable hyperbole where the “general tenor” was an “angry, unfocused diatribe”); *Varrenti v. Gannett Co.*, 33 Misc. 3d 405, 412 (N.Y. Sup. Ct. 2011) (series of rhetorical questions suggesting that a police officer had broken into a home and beaten up a deaf child were non-actionable opinion due to the “sarcastic and hyperbolic” tone).

The statements in question were characterized by a defensive tone that suggested the absence of objective facts. Boenheim’s statements included rhetorical questions (“This is alleged to have occurred . . . what? Twenty years ago? Am I in the right neighborhood?”); sarcastic commentary (“So, we are supposed to what? Stop the presses 26 years later?”); and hyperbole (“a bunch of a thousand lies he has told”). (Exs. L, J.) Similarly, Boenheim asked rhetorically: “You don’t think it is a little funny that his cousin

(relative) is coming forward?” (Ex. N; Compl. ¶ 50.) These are clear examples of non-actionable opinion being expressed through rhetoric and exaggeration.

Using strong, colorful language as Boenheim did – even including his use of the term “liar” – constitutes “personal opinion and rhetorical hyperbole.” *Ram v. Moritt*, 205 A.D.2d 516, 517 (2d Dep’t 1994) (calling plaintiff liar, cheat, and debtor not a statement of objective fact); *Sabratek Corp. v. Keyser*, No. 99 Civ. 8589(HB), 2000 WL 423529, at *6 (S.D.N.Y. Apr. 19, 2000) (statements calling plaintiff a “pathological liar” and a “dirty liar” were “appropriately labeled hyperbole and opinion”); *Farber v. Jefferys*, 33 Misc. 3d 1218(A), 2011 N.Y. Slip Op. 51966(U), at *15 (N.Y. Sup. Ct. Nov. 2, 2011) (“[T]he use of the word ‘liar’ [] has been considered rhetoric when uttered in the context of some heated public debates.”). As Second Circuit Judge Robert Sack, a recognized authority on defamation, has said, “[c]ommon law tradition has combined with constitutional principles to clothe the use of epithets, insults, name-calling, and hyperbole with virtually impenetrable legal armor.” Robert D. Sack, *Sack on Defamation* § 2.4.7, at 2-44 (4th ed. 2010). Invoking this broad protection, courts have repeatedly dismissed defamation claims based on name-calling. *See, e.g., Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970) (the term “blackmail” used to describe a bargaining position was not defamatory because the term would have been perceived to be “rhetorical hyperbole, a vigorous epithet”); *600 West 115th*, 80 N.Y.2d at 143 (statement that a proposition “is as fraudulent as you can get and it smells of bribery and corruption” was non-actionable); *Galasso v. Saltzman*, 42 A.D.3d 310, 311 (1st Dep’t 2007) (calling party in a dispute “no good,” “a criminal,” that he was “engaged in

criminal conduct,” and had “committed crimes” was not actionable). The law is clear that the use of the word “liar” does not convert otherwise non-actionable opinion into an actionable statement of fact.

This principle of law is even stronger where, as here, a speaker is denying allegations made at least in part against himself. See *El-Amine v. Avon Prods., Inc.*, 293 A.D.2d 283, 283 (1st Dep’t 2002) (holding that “statement by defendant to the media that plaintiff’s claim against it was without merit constituted mere opinion, and was therefore nonactionable”); *Gotbetter v. Dow Jones & Co.*, 259 A.D.2d 335, 335 (1st Dep’t 1999) (statement calling plaintiff’s suit “‘baseless’ is not actionable because [it] is merely an opinion”). In *Independent Living Aids, Inc. v. Maxi-Aids, Inc.*, 981 F. Supp. 124 (E.D.N.Y. 1997), the plaintiff asserted that the defendant, Zaretsky, committed a laundry list of competitive wrongs and slandered the plaintiff. The allegedly slanderous comments were made in response to the plaintiff’s allegations, which Zaretsky denied, stating plainly that his adversary and two other parties were “liars.” *Id.* at 127-28. Following the approach set forth in *Immuno AG.*, the court found the statements to be constitutionally protected “personal opinion and rhetorical hyperbole” because, “in the context of the entire article,” the remarks “can only be understood as a denial of the[] accusations.” *Id.* at 128.

The allegations made by Plaintiffs against Fine, as detailed in the media, implied that Boenheim had knowledge of Fine’s behavior, and Boenheim vehemently denied such knowledge. As in *Independent Living*, Boenheim’s use of the “epithet ‘liar’” merely expressed his opinion that the individuals making allegations against him (and Fine) were

not telling the truth. *Id.* (quoting *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977)). Moreover, Boenheim's belief that Plaintiffs were not truthful is not "capable of being proven true or false," yet another indication that he was not stating facts. *Mann*, 10 N.Y.3d at 276; *Brian*, 87 N.Y.2d at 51.

b. Disclosed Bases for Boenheim's Opinion

In addition, statements of opinion "accompanied by a recitation of the facts on which it is based" are not actionable because "a proffered hypothesis offered after a full recitation of facts . . . is readily understood by the audience as conjecture." *Lapine v. Seinfeld*, 31 Misc. 3d 736, 753 (N.Y. Sup. Ct. 2011) (internal quotations omitted); *see also Bruno v. N.Y. Daily News Co.*, 89 A.D.2d 260, 264 (3d Dep't 1982) (accusations that plaintiff, the individual in charge of the state lottery, was "gypping" and "systematically cheating" the public were dismissed as protected expressions of opinion, where "supportive facts concerning the overdistribution of [lottery] tickets, failure to award prizes and an unanticipated surplus were included"); *Zion v. NYP Holdings, Inc.*, 6 Misc. 3d 1027(A), 2004 N.Y. Slip Op. 51829(U), at *2 (N.Y. Sup. Ct. Dec. 17, 2004) (view expressed by an editor that one of his columnists had fabricated the premise of a column was non-actionable since it amounted to an expression of opinion based on disclosed facts), *aff'd*, 18 A.D.3d 376, 377 (1st Dep't 2005).

Boenheim's statements were expressions of doubt regarding Plaintiffs' accusations, based on his association with Fine, his lack of any memory that he ever saw Davis in a hotel room, and his understanding that Davis' prior accusations had not been substantiated. Significantly, Boenheim's statements did not imply that facts underlying his

opinion were hidden or unknown to the audience. *See McNamee v. Clemens*, 762 F. Supp. 2d 584, 602 (E.D.N.Y. 2011) (finding that statements made by the defendant calling the plaintiff a liar implied facts that were unknown to his audience). Courts routinely dismiss defamation suits based only on statements of opinion, where the facts underpinning the statements are disclosed to the audience. *E.g., Brian*, 87 N.Y.2d at 53-54.

Nor is this a situation in which disclosed facts underlying an opinion are disputed and are capable of being proven true or false. *See Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 384 (S.D.N.Y. 1998). Boenheim's statement that he never saw Davis in Fine's hotel room constitutes Boenheim's recollection of events – from more than twenty-five years ago – and is not subject to verification. *See Roth*, 5 Misc. 3d at 897-98 (noting that “debatable, loose and varying” content that is “insusceptible to proof of truth or falsity” indicates a statement is opinion (internal quotations omitted)). In terms of Boenheim's mention that Davis' earlier claims had not been corroborated, this fact had been publicized in the media and is not disputed in the Complaint. (Compl. ¶ 37.) *See McGill v. Parker*, 179 A.D.2d 98, 109 (1st Dep't 1992).

In short, the bases for Boenheim's opinions were disclosed, permitting the reasonable reader to assess the statements and draw his or her own conclusions. Boenheim's statements taken as a whole, not parsed to individual phrases, conveyed his doubt in the Plaintiffs' allegations, which is protected opinion. *See Mann*, 10 N.Y.3d at 277 (“Although one could sift through the article and argue that false factual assertions

were made by the author, viewing the content of the article as a whole, as we must, . . . the article constituted an expression of protected opinion.”).

2. The Context of the Challenged Statements Belies Any Defamatory Meaning.

a. Immediate Context of the Articles

In considering an allegedly defamatory statement, the disputed language must be given “a fair reading in the context of the [quoted] publication[s] as a whole.” *Leone v. Rosenwach*, 245 A.D.2d 343, 343 (2d Dep’t 1997) (citations omitted). Accordingly, Boeheim’s statements are required to be assessed within the context of the articles in which they appeared. (Exs. G, J, L.)

In response to Plaintiffs’ allegations, and the public debate that ensued, Boeheim added his own view to the mix of opinions. The “immediate context in which the disputed words appear[ed]” included the articles’ descriptions of the history of Davis’ allegations dating back to 2002 and previously unsuccessful attempts to verify these accusations. *Brian*, 87 N.Y.2d at 51. The articles disclosed that Davis had taken his allegations to the media in the past and now had publicized them again. (Exs. G, J.)

In addition, the three articles in which Boeheim’s statements appeared provided important editorial context. The articles: (1) disclosed that Boeheim was “support[ing] his longtime assistant” (Ex. N); (2) noted his decision to “take a firm position against the accuser” (Ex. J); and (3) described Boeheim as “upset” and “perplexed.” (Ex. L.) This immediate context, along with the additional factors discussed below, signaled to any reader that Boeheim was expressing his opinion.

b. Larger Context of Boeheim's Statements

In analyzing Boeheim's statements, the Court must also consider: (1) his self-proclaimed lack of knowledge of the underlying facts; (2) his longstanding association with Fine; and (3) his reputation for bluntly expressing his views. These aspects of "the larger context in which the statements were published," including the "identity, role, and reputation" of the speaker, *Brian*, 87 N.Y.2d at 51-52, are all indicative of Boeheim having expressed opinion, not fact.

First, Boeheim admitted that he was not familiar with the underlying facts. (Ex. P.) He stated, "I know nothing." (Ex. M.) This, by definition, indicated that he was expressing only an opinion. See *Finkelstein v. Wachtel*, No. 00 Civ. 2672(JSM), 2003 WL 1918309, at *7 (S.D.N.Y. Apr. 21, 2003) (holding statements to be non-actionable opinion where defendant "made clear that he did not know all of the facts of the matter").

Second, Boeheim's personal bias in favor of Fine was also apparent to the reasonable person encountering his statements. Boeheim's widely known and longstanding relationship with Fine made clear to any reasonable reader that he was not a "disinterested observer" expressing dispassionate facts "proffered for their accuracy." *Brian*, 87 N.Y.2d at 53; see, e.g., *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *7 (N.Y. Sup. Ct. Apr. 19, 1996) (noting that allegedly defamatory remarks about former husband amidst acrimonious divorce proceedings could not be construed as stating objective facts because it was "obvious" they were "likely to reflect a certain personal bias"); *Dworin v. Deutsch*, No. 06 CIV. 13265, 2008 WL 508019, at *4

(S.D.N.Y. Feb. 22, 2008) (applying New York law to dismiss a libel claim where statements about “a man with whom [defendant] was engaged in a bitter power struggle” could be viewed only as conveying defendant’s “own biased opinion”).

Boeheim’s statements that Plaintiffs were not being truthful, which came in direct response to Plaintiffs’ allegations against a close colleague and himself, can reasonably be interpreted only in the same way. In *Gentile v. Grand Street Medical Associates*, 79 A.D.3d 1351, 1352-53 (3d Dep’t 2010), the court recognized the inherently “contentious” nature of the situation that resulted in a defendant responding to sexual harassment allegations with a newspaper advertisement accusing the plaintiff of “exploiting hard working people” through lawyers. The court concluded that the defendant’s words amidst the dispute were “likely to be the product of passionate advocacy,” reflecting a clear indication of personal bias. *Id.* at 1353. Such statements were thus “highly unlikely [to be] understood as statements of fact, rather than a rhetorical expression” of the defendant’s opinion. *Id.*

It is furthermore against the larger backdrop of the recent Penn State scandal that Boeheim proclaimed: “I’m not Joe Paterno,” rejecting the implication that he had personal knowledge of Fine’s alleged behavior. (Ex. M.) The challenged statements were “impassioned advocacy” on not just Fine’s behalf, but his own. *Goetz v. Kunstler*, 164 Misc. 2d 557, 562 (N.Y. Sup. Ct. 1995).

Third, as noted in one of the many contemporaneous articles, Boeheim would “rather chew bolts than mince words.” (Ex. M.) Boeheim’s longstanding reputation for blunt opinions when speaking to reporters is also an element of context. *See, e.g.,*

Lapine, 31 Misc. 3d at 754 (noting the relevance of context on a motion to dismiss where statements were made by a well-known comedian appearing on a night show); *Gardner v. Martino*, 563 F.3d 981, 988 (9th Cir. 2009) (concluding that statements of a talk-show host were protected opinion because he was known to be “an opinionated and arrogant host”). Providing his unvarnished opinion in hyperbolic terms, as Boenheim did here, cannot be construed as asserting objective facts.

B. Boenheim’s Statements Questioning Plaintiffs’ Motives Are Non-Verifiable and Therefore Not Actionable.

Plaintiffs also cannot base a defamation suit on Boenheim’s statements speculating that they were financially motivated, which are classic examples of non-actionable opinion. Such statements are not “capable of being proven true or false.” *Mann*, 10 N.Y.3d at 276; *Brian*, 87 N.Y.2d at 51. Under established law, statements about a person’s motives are “intrinsicly unsuited as a foundation for defamation” because they simply cannot be confirmed or denied. *Goetz*, 164 Misc. 2d at 564; *see also Hollander v. Cayton*, 145 A.D.2d 605, 606 (2d Dep’t 1988) (finding statements that the plaintiff was “immoral,” “unethical,” and had “mismanaged cases” was “incapable of being objectively characterized as true or false”).

Courts have routinely dismissed defamation claims based on statements essentially identical to Boenheim’s suggestion that Plaintiffs had financial motives:

- Statements that plaintiffs brought sexual harassment lawsuits because they “*want to make easy money*” by “find[ing] a few lawyers who make a living *exploiting* hard working people and corporations” were not defamatory because they constituted rhetorical hyperbole, not capable of being proven true or false. *Gentile*, 79 A.D.3d at 1353 (emphasis added).

- Statements made by pitcher Roger Clemens and his agent that his former trainer wanted to “shake Roger down” and was “crawling up [Clemens] back *to make a buck*” was opinion, not fact, because the language was loose and hyperbolic. *McNamee*, 762 F. Supp. 2d at 603-04 (emphasis added).
- The phrase “*flagrant opportunist*” was a statement of opinion and thus not actionable as a matter of law. *Costanza v. Seinfeld*, 279 A.D.2d 255, 256 (1st Dep’t 2001) (emphasis added).
- The statement that the plaintiff engaged in “*extortion*” was non-actionable opinion because a reasonable reader would understand from the context that the statement was rhetorical hyperbole or a vigorous epithet, and not meant to suggest that the plaintiff committed the crime of extortion. *Trustco Bank of N.Y. v. Capital Newspaper Div. of Hearst Corp.*, 213 A.D.2d 940, 942 (3d Dep’t 1995) (emphasis added).

Boeheim’s statements questioning Plaintiffs’ motives are not verifiable, and “it is highly unlikely that [they] would be understood as statements of fact, rather than a rhetorical expression of . . . opinion as to the motive for bringing [the allegations].” *Gentile*, 79 A.D.3d at 1353. Accordingly, these statements are non-actionable as a matter of law.

III. Because Plaintiffs Have Failed To State a Claim Against Boeheim, Plaintiffs’ Complaint Against the University Similarly Fails.

As discussed above, Plaintiffs’ defamation claim against Boeheim fails as a matter of law, given that Boeheim was expressing his opinions and did not make any defamatory statements of fact. Because Plaintiffs’ claim against the University is predicated entirely on these same allegedly defamatory statements (Compl. ¶¶ 47-52, 59) and Plaintiffs have failed to state a cognizable legal claim against Boeheim, their claim against the University similarly fails. *See, e.g., Karaduman v. Newsday, Inc.*, 51 N.Y.2d

531, 545-46 (1980) (holding in a defamation suit that "it is manifest that there can be no vicarious liability on the part of the employer if the employee himself is not liable").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to dismiss Plaintiffs' Complaint, in its entirety, with prejudice.

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Respectfully,

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* Motion for admission *pro hac vice* to be filed