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

ALEXANDRA WATERBURY, Plaintiff, -against- NEW YORK CITY BALLET, INC., JARED LONGHITANO, CHASE FINLAY, SCHOOL OF AMERICAN BALLET, AMAR RAMASAR, and ZACH CATAZARO, Defendants.	Motion Seq. No. 4 Index No. 158220/18

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT AMAR RAMASAR

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Defendant Amar Ramasar ("Ramasar") respectfully submits this memorandum in support of his motion pursuant to CPLR 3211(a)(7), dismissing with prejudice the Fifth Cause of Action of the Amended Verified Complaint ("Complaint") for negligence to the extent that claim applies to him.[1]

PRELIMINARY STATEMENT & BACKGROUND

The core factual allegation on which all of plaintiff Alexandra Waterbury's ("Waterbury") claims depend is that:

- **Her boyfriend of one year, defendant Chase Finlay ("Finlay"), a former principal dancer with defendant New York City Ballet ("NYCB"), allegedly shared with others explicit images of Waterbury that he purportedly photographed and shared without her consent. Waterbury claims to have been damaged by Finlay's sending these images to third parties (which purportedly occurred no less than five times before any alleged involvement by Ramasar). (Cmpl. ¶¶ 78, 82, 86, 87, 88, 96, 107, 115, 152-56.)**

Otherwise, the Complaint is a jumble of allegations that for the most part have nothing whatsoever to do with Waterbury, and virtually nothing to do with Ramasar, a former principal dancer with NYCB.

Given the Complaint's fixation on defendant NYCB, the Court could be forgiven if it formed the mistaken impression that Waterbury was a dancer with NYCB. But Waterbury had and has *no association* with NYCB whatsoever. Accordingly, the Complaint's multiple

[1] A copy of the Complaint ("Cmpl.") is attached as Exhibit A to the accompanying Affirmation of Lance J. Gotko, dated February 22, 2019.

allegations related to "*female NYCB corps members*" have absolutely nothing to do with Waterbury.[2]

In addition, through the use of loaded phrases recklessly tossed about in the Complaint, Waterbury has attempted to create the false impression that she was physically, sexually assaulted or beaten – or worse.[3] But the Complaint does *not* allege any fact showing that anything like that happened to Waterbury, or that Ramasar condoned the abuse of any woman.

The Complaint does *not* allege that Ramasar was a participant in conversations between other individuals where women allegedly were spoken of in denigrating terms.[4]

The Complaint does *not* allege that Ramasar ever forwarded any photo of Waterbury to anyone.

The Complaint does *not* allege any fact establishing a relationship between Ramasar and Waterbury that would have imposed a direct, legal duty running from him to Waterbury.[5]

The Complaint also does *not* plead any fact showing that "but for" Ramasar's actions, Finlay would not have performed the actions which Waterbury claims caused her damage. To the contrary, the Complaint alleges that on multiple occasions Finlay texted explicit images of Waterbury to third parties *without any involvement by Ramasar whatsoever*. (Cmpl. ¶¶ 78, 82, 86, 87, 88, 96.)

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[2] *See, e.g.*, Cmpl. ¶¶ 41, 58, 81, 85, 90, 91, 92, 93, 94, 97.

[3] For example, the Complaint repeatedly refers to "sexual assault, battery and abuse" (*see, e.g.*, Cmpl. ¶ 160), and alleges that "the worst nightmare of every woman happened to plaintiff" (*id.* ¶ 4).

[4] *See, e.g.*, Cmpl. ¶¶ 53, 80, 82, 85, 88.

[5] Waterbury alleges that "she thought [Ramasar] was her friend." (Cmpl. ¶ 4.)

As regards the claim against Ramasar, the Complaint alleges that:

- **On May 21, 2018, [Ramasar] texted Finlay asking him to text him "those photos/videos." Finlay then sent images to Ramasar of Waterbury's bare breasts and performing a sexual act. (Cmpl. ¶ 95.)**

That is the total factual predicate for the negligence claim – and the only claim – asserted against Ramasar.

The Complaint does *not* identify what "photos/videos" Ramasar was asking for. And the Complaint does *not* allege that Ramasar knew that Finlay would send him pictures of Waterbury. Indeed, the Complaint alleges that earlier "[t]hat same day" Finlay texted Ramasar a picture of the breasts of a woman who was *not* Waterbury. (Cmpl. ¶ 92.)

Against this backdrop, the Fifth Cause of Action to the extent asserted against Ramasar should be dismissed for failure to state a claim. Without a legal duty there *cannot* be negligence, and Ramasar did *not* have a legal duty to Waterbury to not ask Finlay to text him some photos/videos. In addition, nothing Ramasar did caused the injuries Waterbury complains of, which occurred (if at all) due to Finlay's alleged conduct.

ARGUMENT

A plaintiff must establish three elements to prevail on a negligence claim: "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof." *Akins v. Glens Falls City Sch. Dist.*, 53 N.Y.2d 325, 333 (1981). Because Ramasar did *not* have a duty to Waterbury (and thus did not breach a duty to Waterbury), and because Ramasar's actions did *not* cause the harm that Waterbury alleges, the claim against Ramasar for negligence should be dismissed.

I.

THE CLAIM AGAINST RAMASAR SHOULD BE DISMISSED FOR LACK OF ANY AFFIRMATIVE LEGAL DUTY TO WATERBURY

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136, 138 (2002). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts." *Sanchez v. State of New York*, 99 N.Y.2d 247, 252 (2002).

It is the long-established law of this State that "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of *negligence in the air*, so to speak, will not do." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 341 (1928) (emphasis added; internal quotation omitted).

> What the plaintiff must show is "a wrong" to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one.

Id. at 343-44. In other words, to hold Ramasar liable for negligence, it does not suffice for Waterbury to allege a legally cognizable wrong committed against someone else. Nor does it suffice for Waterbury to allege conduct that is "unsocial" or unacceptable in some way, but is not a legally cognizable wrong to her.

Furthermore, "[t]he injured party must show that a defendant owed *not* merely a general duty to society but *a specific duty to him or he*r, for without *a duty running directly to the injured person* there can be no liability in damages, however careless the conduct or foreseeable the harm." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001) (emphasis added; internal quotation and alternation omitted).

Notably, the New York Court of Appeals has "been cautious . . . in extending liability to defendants for their failure to control the conduct of others. A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control. This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 232-33 (internal quotations and citations omitted). New York law has recognized such a duty where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's *actual control* of the third person's actions, or between defendant and plaintiff that *requires* defendant to protect plaintiff from the conduct of others – relationships such as master and servant, parent and child, and common carriers and their passengers. *Id.*

A. The generalized duty Waterbury seeks to impose on Ramasar does not give rise to a claim for negligence.

In the Complaint, Waterbury baldly asserts that Ramasar

> had a duty to Ms. Waterbury, other female Ballet dancers, students and other women to not condone, encourage and/or incite the male Ballet dancers, including Mr. Finlay to degrade, demean, sexual assault, abuse and batter women, including but not limited to the taking, sending, sharing and disseminating sexual, explicit and intimate images of Ms. Waterbury and other female Ballet dancers, students and others, and breached that duty by his conduct which condoned, encouraged and/or incited male Ballet dancers to degrade, demean, sexual assault, abuse and batter women, including but not limited to the taking, sending, sharing and disseminating sexual, explicit and intimate images of Ms. Waterbury and other female Ballet dancers, students and others.

(Cmpl. ¶ 160.)[6]

[6] As noted, the Complaint does not allege any fact whatsoever establishing that Waterbury was "sexually assaulted, abused and battered." And not surprisingly, there is no fact alleged showing that Ramasar "condoned, encouraged and/or incited" anyone to "sexually assault, abuse and batter" anyone, let alone Waterbury. The Court should ignore these conclusory and baseless

In contrast to the claims of negligence asserted against NYCB (*see* Cmpl. ¶ 118) and Finlay (*see id*. ¶ 152), the Complaint does not allege where Ramasar's supposed "duty" to "Waterbury, other female Ballet dancers, students and other women" came from or why it exists.[7] Rather than identify a direct duty owed to her which was breached by a legally cognizable wrong, Waterbury says that Ramasar owed a duty to her, *and* to ballet dancers, *and* to students, *and* to *all* "*other women*," which he breached by engaging in behavior that "condoned, encouraged and/or incited" *others* to engage in behavior that is alleged to have harmed her.

This vague and sweeping "duty" is precisely the kind of "negligence in the air" that the Court of Appeals has held to be too indirect and generalized to be legally cognizable. *See Palsgraf*, 248 N.Y. at 341.

Thus, in *Hamilton*, the Court of Appeals held that persons killed or injured by illegally obtained handguns are not owed a duty by handgun manufacturers to exercise reasonable care in the marketing and distribution of their handguns, finding that (among other things) absent *a duty owed directly to the plaintiff* – as opposed to the public generally – there could be no liability.

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allegations. *See Sonkin v. Sonkin*, 157 A.D.3d 414, 415 (1st Dep't 2018) (on motion to dismiss under CPLR 3211(a)(7), the court is "not required to accept as true, factual allegations that [a]re conclusory, inherently incredible, or speculative.").

[7] Ramasar does not suggest that the claims of negligence asserted against NYCB and Finlay are legally valid. He merely points out that while the Complaint explains the purported source of duties supposedly breached by NYCB and Finlay, the Complaint does not do so for the duty alleged to have been breached by Ramasar. It merely asserts that such a duty to "Waterbury, other female Ballet dancers, students and other women" exists. Significantly, applicable law holds that the romantic relationship that once existed between Waterbury and Finlay does *not* give rise to a unique, legal duty of care. *See Marmelstein v. Kehillat New Hempstead*, 11 N.Y.3d 15 (2008). If Finlay, Waterbury's boyfriend, did not owe her a legal duty then, *a fortiori*, Ramasar, at least once removed, cannot be deemed to have a legal duty to Waterbury.

B. Ramasar is not responsible for Finlay's actions.

The claim asserted against Ramasar also seeks to impose the kind of responsibility for the actions of a third party that the Court of Appeals has declined to impose absent defendant's *actual control* of the third party or a *special relationship* between the plaintiff and defendant. *Compare Hamilton*, 96 N.Y.2d at 232-33 *and Lavingne v. Katz*, 187 Misc. 2d 746 (Sup. Ct. Nass. Cnty. 2001) (holding that Kinko's, which provided fax services to customer who sent nude photos of plaintiff to various recipients, owed no duty to plaintiff) *with Davis v. South Nassau Comm. Hosp.*, 26 N.Y.3d 563, 572 (2015) (finding that medical providers owed a duty to the public to warn a patient that the prescription medication they provided him could impair his driving).

See also Vega v. Crane, 162 A.D.3d 167, 169–70 (4th Dep't 2018), where the court held that "a person does not owe a common-law duty to motorists to refrain from sending a text message to a person whom he or she knows, or reasonably should know, is operating a motor vehicle." *Id*. The court noted that the sender of the text "does not control the driver, and that the driver, on the other hand, has complete control over whether to allow the conduct of the text sender to create a distraction." *Id*.

Again, it is important to focus on the central core of all of Waterbury's claims: ***She is upset because her boyfriend, Finlay, texted to third parties intimate photos of her allegedly taken and sent without her consent.***

Finlay is an adult who acted on his own. Ramasar did *not* control him. And no special relationship existed between Ramasar and Waterbury pursuant to which he was obligated to protect her from Finlay's actions.

C. Liability should not be imposed on Ramasar under the circumstances.

There are sound policy reasons why Ramasar should not have a duty imposed on him under the circumstances presented here. With respect to the delineation of duty, the Court of Appeals has noted that:

> Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. Thus, in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.

Hamilton, 96 N.Y.2d at 232 (internal quotations and citations omitted). The Court of Appeals has warned that:

> A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, regardless of the economic and social burden.

Lauer v. City of New York, 95 N.Y.2d 95, 103 (2000).

We have made a diligent search of case law, and have found no decision where a court imposed a legal duty on someone like Ramasar who was the recipient of a "sext." And for the prudential reasons articulated by the Court of Appeals, the Court here – in what appears to be a case of first impression – should *not* impose such a duty.

"Sexting" – "the sending or receiving of sexually suggestive or explicit content via text message" – is a part of modern life. Indeed, the word "sexting" has "entered common usage for the reason that it has become a common practice. Rene Lynch, '*F-bomb*,' '*sexting*' *among new Merriam–Webster dictionary words*, L.A. TIMES (Aug. 14, 2012)" (available at

http://articles.latimes.com/2012/aug/14/nation/la-na-nn-f-bomb-dictionary-20120814). *United States v. Broxmeyer*, 699 F.3d 265, 298 (2d Cir. 2012) (Jacobs, J. dissenting).

In a recent study, the American Psychological Association has found that 88% of adults have "sexted" at some time in their lives, 82% percent in the prior year alone. American Psychological Association, *How Common Is Sexting?* (Aug. 8, 2015) (available at: http://www.apa.org/news/press/releases/2015/08/common-sexting.aspx). A study by the Journal of the American Medical Association in April 2018 observed that nearly 15% of participants between the ages of 12 and 18 had sent sexually explicit text messages, and nearly 30% had received them. Shari Madigan, *et al*., *Prevalence of Multiple Forms of Sexting Behavior Among Youth*, JAMA PEDIATRICS (Apr. 2018) (available at: https://jamanetwork.com/journals/jamapediatrics/article-abstract/2673719) Twelve percent admitted to forwarding a sext without consent. *Id*.; *see also* Hoder, TIME, *Study Finds Most Teens Sext Before They're 18* (2014) (available at: http://time.com/2948467/chances-are-your-teen-is-sexting/) (noting 54% have sexted); *More Adults are Sexting, Poll Finds*, S.F. Gate, (February 12, 2014, 4:29 AM) (available at: http://www.sfgate.com/technology/article/More-adults-are-sexting-poll-finds-5225788.php) (among 18-24 year olds in America, 44% receive sexts).

Given the wide prevalence of "sexting" in our society, to find that Ramasar had a duty here would subject huge numbers of individuals (i.e., those who receive a sext) to liability to a huge pool of potential plaintiffs (i.e., individuals who have had explicit photos taken of them).

Notably, legislatures have acted when they determined there was a problem that should be addressed in this area. *See, e.g.*, 18 U.S.C. §§ 1801 *et seq*. (federal Video Voyeurism

Prevention Act); N.Y. Penal Law § 250.45 (Unlawful Surveillance in the Second Degree); N.Y.C. Admin. Code §§ 10-177 *et seq*. (Unlawful Disclosure of an Intimate Image). But none of these statutes apply to what Ramasar is alleged to have done, which is a strong indication that the Court should not impose a duty here. *See Vega*, 162 A.D.3d at 170 (declining to impose common law duty on sender of text; noting that legislature did not create duty to refrain from sending a text to persons known to be driving but, instead, made the driver responsible for remaining distraction-free).

Given the prevalence of sexting in our society, the Court – no matter how sympathetic Waterbury may be, on the one hand; and bearing in mind the precedential, and consequential, future effects of its ruling, on the other hand – should *not* impose a new duty here on recipients of sexts sent by others.

II.

THE CLAIM AGAINST RAMASAR SHOULD BE DISMISSED BECAUSE HIS CONDUCT DID NOT CAUSE WATERBURY'S INJURIES

Even if the Court were to hold that Ramasar owed Waterbury a duty which was breached, any such breach was not the cause-in-fact of Waterbury's injuries.

It is a bedrock principle of tort law that for there to be a recovery for an injury, it must be established that defendant's act was a cause-in-fact of the injury. *See Hamilton*, 96 N.Y.2d at 241 ("[I]n common-law negligence actions, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury.").

This rule requires a plaintiff to establish, beyond the point of speculation and conjecture, a factual, causal connection between its losses and a defendant's actions.

> A jury verdict must be based on more than mere speculation or guesswork. Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and

> probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury.

Bernstein v. City of New York, 69 N.Y.2d 1020, 1021 (1987) (internal citations and quotation marks omitted). A defendant's conduct is not a cause-in-fact of an injury or loss if the injury or loss would have occurred regardless of the conduct. *See* Prosser & Keeton, THE LAW OF TORTS § 41 (5th ed. 1984).

Waterbury alleges that ***she was injured because Finlay purportedly sent pictures of her to others without her permission.*** *That* is the cause of Waterbury's alleged harm – *not* anything Ramasar did.

Indeed, the Complaint alleges that Finlay texted explicit images of Waterbury to third parties – *without any involvement by Ramasar whatsoever – on five separate occasions* (twice in 2017) before the May 21, 2018 text interaction between Finlay and Ramasar, and *one time after that.* (Cmpl. ¶¶ 78, 82, 86, 87, 88, 96.) Finlay obviously did not need any encouragement from or involvement by Ramasar to cause him to text pictures of Waterbury to others.

Because Finlay's sending of Waterbury's photos to others would have occurred – *and did occur* – without any involvement by Ramasar, his actions were *not* the cause-in-fact of Waterbury's injury, and the claim for negligence should be dismissed. *See Ordonez v. Long Island R. Co.*, 112 A.D.2d 923, 925 (2nd Dep't 1985) (holding that train company was not liable to minor plaintiff for negligently failing to repair fencing through which plaintiff walked, grabbed the third rail and electrocuted himself, because plaintiff had first walked to the publicly accessible platform before approaching the third rail: "[e]ven a negligent defendant cannot be

held liable if the accident would have occurred [anyway] because the required element of causation is then lacking.").

CONCLUSION

For the foregoing reasons, the Fifth Cause of Action to the extent it is asserted against Ramasar should be dismissed with prejudice.

Dated: New York, New York
February 22, 2019

Respectfully submitted,

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