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

JENNIFER SHEPARD-BROOKMAN,

Plaintiff,

v.

ROSIE O'DONNELL,

Defendant.

Index No. 160608/2015

MEMORANDUM OF LAW OF DEFENDANT ROSIE O'DONNELL IN SUPPORT OF HER MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, STRIKE CERTAIN MATTERS IN THE COMPLAINT

DECHERT LLP

1095 Avenue of the Americas
New York, New York 10036
Telephone: (212) 698-3500
Fax: (212) 698-3599

Attorneys for Defendant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES/RULES

Defendant Rosie O'Donnell ("O'Donnell" or "Defendant") respectfully submits this memorandum of law in support of her Motion to Dismiss the Complaint (the "Complaint") filed by Plaintiff Jennifer Shepard-Brookman ("Brookman" or "Plaintiff") for failure to state a cause of action pursuant to CPLR 3016(a) and 3211(a)(7) (the "Motion to Dismiss"), or, in the alternative, to strike certain matter in the Complaint pursuant to CPLR 3024(b).

PRELIMINARY STATEMENT

In March 2015, Brookman was fired from her job as a producer of the American Broadcast Company's ("ABC") television show known as "The View" (hereinafter, the "Show"). Seven months later, Brookman brought this lawsuit against O'Donnell, a former co-host of the Show, seeking damages for ABC's decision to fire Brookman, and the attendant hardship she claims to have experienced. With the passage of time, Brookman apparently decided that O'Donnell—who left ABC more than a month before Brookman was fired, and who never had authority in ABC's employment decisions—bears sole responsibility for Brookman's firing. Plaintiff's claim is centered on unspecified statements O'Donnell allegedly made during a confidential workplace meeting held two months before ABC fired Brookman—statements that Brookman characterizes as an accusation by O'Donnell that she leaked confidential information about the Show to the media. *See* Complaint, *Shepard-Brookman v. O'Donnell*, No. 160608/2015 (filed Oct. 15, 2015), attached as Exhibit A to the Affirmation of Nicolle L. Jacoby ("Jacoby Aff.") ¶ 1 ("Compl.") ("Ms. Brookman brings this claim to hold Ms. O'Donnell accountable for … making false and defamatory statements of fact about Ms. Brookman to others in their workplace, which … led to her termination of employment.").

Brookman's attempt to disclaim all responsibility for her situation and collect a payout by filing an inflammatory and defective complaint against a former co-host of the Show should be

rejected. The Complaint suffers from plain deficiencies that require its dismissal as a matter of law. On the most fundamental level, and contrary to long-settled law, the Complaint fails to allege the specific words that form the factual predicate for Brookman's defamation claim. This failure is especially curious given that Brookman was present when the allegedly defamatory remark was made. Instead, Brookman asks this Court to accept her self-serving ***characterization*** of what O'Donnell allegedly said. A slander claim is not made out by such vague and conclusory allegations. Moreover, the Complaint suffers from additional fundamental defects that independently warrant its dismissal: even were any such alleged defamatory "statements" pled (and they have not been)—such communications are shielded by a qualified privilege. The Court should dismiss the Complaint with prejudice.

If the Court nonetheless either denies the Motion to Dismiss or grants Brookman leave to re-plead her claim, the Court should order that scandalous and prejudicial matters alleged in her Complaint be stricken. Brookman dedicates a substantial portion of the Complaint's allegations to irrelevant personal attacks on Defendant and equally needless third party accounts of purported dysfunction at the Show. Brookman's transparent effort to prejudice Defendant is inconsistent with proper litigation, and the CPLR provides a specific remedy for such inappropriate pleading.

STATEMENT OF FACTS[1]

A. The Parties

1. Plaintiff Brookman

Brookman worked for ABC as a producer of the Show from 2001 to March 2015, when ABC allegedly fired her for "being the source of … unauthorized and improper leaks of

[1] The factual allegations of the Complaint are accepted as true solely for purposes of this motion to dismiss. *See Lipsky v. Price*, 625 N.Y.S.2d 563, 564, 215 A.D.2d 102, 103 (1st Dep't 1995).

information about the Show to the media." *See* Compl. ¶¶ 7, 25, 31. At the time of her dismissal, Brookman had been the longest-serving senior production staffer on the Show. *Id.* ¶ 15.

2. Defendant O'Donnell

Defendant is a television and radio personality, celebrity blogger, comedian, actress, and writer. *Id.* ¶ 8. Defendant worked for ABC as a moderator and co-host of the Show from late 2006 through late 2007. *Id.* ¶ 9. In July 2014, Defendant returned to work for ABC as a co-host of the Show.[2] *Id.* ¶ 12.

B. <u>Brookman's Claim</u>

Brookman's single-count Complaint centers on what she claims was an accusation made by Defendant to her co-workers in connection with Defendant's duties as a co-host of the Show. The Show consists of a panel of several female co-hosts who discuss a variety of social and political issues. *Id.* ¶ 5. As part of the production of the Show, the staff and co-hosts regularly hold "a meeting for the planning of topics for the content of the Show, known as a 'Hot Topics' meeting." *Id.* ¶ 21. Brookman alleges that during one such meeting in mid-January 2015—where only ABC producers, staffers and co-hosts of the Show were present—Defendant "addressed the issue of unauthorized and improper leaks of information about the Show to the media." *Id.* ¶¶ 21, 22. Brookman does not deny that such leaks occurred and that they were a serious issue for the Show. *See id.* ¶ 22 (describing the leaked information as "sensitive"). Indeed, Plaintiff herself characterizes the leaks as "betraying professional and personal

[2] Although not alleged, Defendant left the Show in February 2015, and such information is a matter of public record of which the Court may take judicial notice. Ex. B to the Jacoby Aff.; *see Am. Broad. Co. v. Wolf*, 430 N.Y.S.2d 275, 280 n.2, 76 A.D.2d 162, 179 (1st Dep't 1980) ("Courts may take judicial notice of facts which are part of the general knowledge of the public"), *aff'd,* 52 N.Y.2d 394 (1981); *Jeffries v. Steiner*, 924 N.Y.S.2d 862, 85 A.D.2d 1431 (3d Dep't 2011) (taking judical notice that person "resigned from her position … in April 2011").

confidences" and "unauthorized and improper." *Id.* ¶¶ 21, 25. Furthermore, Brookman does not allege, let alone imply, that it would be inappropriate for ABC to fire the employee(s) responsible.[3]

Rather, Brookman claims that O'Donnell, in the course of addressing the issue, "verbally accused Ms. Brookman of being the source of leaks of information to the media about," as Plaintiff alleges, "Ms. O'Donnell's bad reaction to the producers' initial agreement to allow just Ms. Goldberg [another co-host of the Show] to interview Beverly Johnson about the Bill Cosby sex scandal, the bad relationships of the co-hosts of the Show, and the behind-the-scenes drama of the Show." *Id.* ¶ 22; *see id.* ¶ 29 ("Defendant made the above-noted statements of fact about Plaintiff, which were defamatory in nature, to other staffers in their workplace."). Brookman admits she was present at the meeting, but fails to plead the actual words that she claims slandered her.

Brookman also asserts that, after the "Hot Topics" meeting, "[i]n or about late January 2015," Defendant "continued to publicly accuse Ms. Brookman of being the source of such unauthorized and improper leaks of information about the Show to the media and verbally told staffers of the Show, such as William Wolff and Brian Balthazar, that Ms. Brookman had been leaking such information about the Show." *Id.* ¶ 25. Again, Brookman fails to identify the actual words spoken. Nor do her allegations provide information about where these conversations supposedly took place, how many times such conversations occurred, who was present at each such conversation, or any other relevant particulars.

According to Brookman, ABC terminated her employment two months later due to what she has characterized as Defendant's accusation. *Id.* ¶ 31 ("Defendant's above-noted statements

[3] ABC is not a defendant, and Brookman has not alleged that her firing was wrongful.

… led to her termination of employment."). Brookman does not allege that ABC had any other basis for terminating her employment. In addition to losing her job, Brookman claims that the alleged statements caused her "to suffer intense emotional distress, anxiety, and lack of sleep," and they "destroyed her professional reputation." *Id.* Brookman does not plead special damages, instead seeking recovery under a slander *per se* theory. *See Liberman v. Gelstein*, 80 N.Y.2d 429, 434-35, 590 N.Y.S.2d 857 (1992).

ARGUMENT

In New York, it is well-settled that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." N.Y. CPLR 3016(a). Accordingly, where a plaintiff fails to allege the precise words underlying her defamation claim, the complaint must be dismissed for failure to state a cause of action. *See, e.g.*, *Laiken v. Am. Bank & Trust Co.*, 308 N.Y.S.2d 111, 112, 34 A.D.2d 514, 514 (1st Dep't 1970) ("The complaint in an action for slander is required to state *in haec verba*[4] the words used. This requirement is strictly enforced and the exact words must be set forth."); *see also Kramer v. Skyhorse Publ'g, Inc.*, 989 N.Y.S.2d 826, 832, 45 Misc. 3d 315, 320 (Sup. Ct. N.Y. Cty. 2014) (noting that CPLR 3016(a) "was enacted to ensure that defendants are adequately notified of the alleged defamatory statement and to discourage actions intended solely to harass"). Because Brookman fails to plead the allegedly defamatory words as required by CPLR 3016(a), her Complaint must be dismissed. (Point I).

The Complaint must also be dismissed because any workplace communications accusing Brookman of wrongfully leaking information concerning the Show are protected by the qualified common-interest privilege. (Point II). In the alternative, the Court should order that certain

[4] "'In these same words; verbatim.'" *Roth v. United Fed'n of Teachers*, 787 N.Y.S.2d 603, 609 n.5, 5 Misc. 3d 888, 900 n.5 (Sup. Ct. Kings Cty. 2004) (citations omitted).

scandalous and prejudicial allegations unrelated to Brookman's claim be stricken from the Complaint and any amended complaint pursuant to CPLR 3024(b). (Point III).

I. PLAINTIFF FAILS TO PLEAD THE ALLEGEDLY DEFAMATORY WORDS AS REQUIRED BY CPLR 3016(a).

Brookman alleges that O'Donnell "verbally accused" her "of being the source of leaks of information to the media" at a Hot Topics meeting in mid-January 2015, Compl. ¶ 22, and that, after the Hot Topics meeting, O'Donnell "continued to publicly accuse" her in conversations at unspecified locations and times with staffers such as William Wolff and Brian Balthazar. *Id.* ¶ 25. At no time does she identify the "particular words complained of" as required by CPLR 3016(a). Because Brookman's ***characterization*** of unpled, unknown words as an "accusation" cannot substitute for pleading the actual words, her claim must be dismissed.

Vague and conclusory allegations about what was said cannot satisfy a defamation plaintiff's pleading burden, and are thus insufficient to survive a motion to dismiss. *See, e.g.*, *Mañas v. VMS Assoc., LLC*, 863 N.Y.S.2d 4, 8, 53 A.D.3d 451, 455 (1st Dep't 2008) ("'[S]ince the actual defamatory words were never pleaded with particularity, but were only paraphrased in a manner such that the actual words were not evident from the face of the complaint, the long-standing rule is that dismissal is required.'" (citations omitted)); *Equinox Mgmt. Grp. v. Guardian Life Ins. Co.*, 813 N.Y.S.2d 403, 403, 28 A.D.3d 246, 247 (1st Dep't 2006); *Khan v. Reade*, 776 N.Y.S.2d 281, 282, 7 A.D.3d 311, 312 (1st Dep't 2004) ("[C]ourt erred in failing to dismiss … inasmuch as plaintiff failed to allege the precise words allegedly giving rise to defamation …."); *Dazzo v. Meyers*, 443 N.Y.S.2d 245, 251, 83 A.D.2d 14, 22 (2d Dep't 1981) (upholding dismissal of complaint because "it fails to state the specific words uttered"); *Ewig v. Taub*, 56 N.Y.S.2d 122, 123 (Sup. Ct. Ulster Cty. 1945) ("The words spoken must be pleaded, not the conclusions of the pleader.").

The First Department's decision in *Dillon v. City of New York*, 704 N.Y.S.2d 1, 261 A.D.2d 34 (1st Dep't 1999), is instructive. There, the court upheld dismissal of a complaint where "[t]he particular words giving rise to the implication are not set forth in any manner that would support a defamation claim, leaving only a vague and conclusory allegation." 704 N.Y.S.2d at 6-7, 261 A.D.2d at 39-40. The First Department found that "[a]llegations that the letter communicated to third parties that 'in sum and substance [Dillon was] unprofessional and cavalier' are conclusory rather than accusatory, fail to specify time, place and manner of the communication … and do not satisfy the pleading requirement of CPLR 3016 (a) that the actual defamatory words be specified." *Id.* Like the plaintiff in *Dillon*, Brookman's failure to plead the actual words in the Complaint "is all the more curious in that" Brookman "concedes being" present at the meeting, "presumably enabling" her "to quote" Defendant's statement "at length." *Id.* Tellingly, Brookman states that she "felt attacked," and "denied that she leaked any such information about the Show to the media" at that meeting. Compl. ¶ 24.

Pleading the particular words spoken is not a mere formality. "Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation." *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 380, 625 N.Y.S.2d 477 (1995); *see Aronson v. Wiersma*, 65 N.Y.2d 592, 593, 493 N.Y.S.2d 1006 (1985) ("Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance."). In order to conduct that necessary inquiry, the Court must be able to read the actual words that allegedly were spoken. Absent a recitation in the complaint of the actual words, neither a court nor a defendant can determine if the alleged statement meets the standards for defamation or is protected by privilege. *See Sheila C. ex rel. Doe v. Povich*, 768 N.Y.S.2d 571, 579-80, 21 Misc.

3d 315, 323-24 (Sup. Ct. N.Y. Cty. 2003) ("[T]he pleading must set forth the exact words used, which also is necessary so that the court may perform a threshold review to determine if the exaggerating words are defamatory or, alternatively, are 'rhetorical hyperbole' that 'cannot reasonably be interpreted as stating actual facts about an individual ….'").

Since Brookman does not plead the words that give rise to her claim, at either the Hot Topics meeting or in subsequent unspecified workplace encounters,[5] the Court cannot determine whether the alleged statements are "reasonably susceptible of a defamatory connotation." *Armstrong*, 85 N.Y.2d at 380, 625 N.Y.S.2d 477. For example, the Court cannot assess from Brookman's paraphrasing whether the alleged statements actually conveyed facts about Brookman, were neutral admonishments about leaks or instead were "merely opinion and personal surmise built upon" fully recited facts. *Bernard v. Grenci*, 853 N.Y.S.2d 168, 170, 48 A.D.3d 722, 724 (2d Dep't 2008); *see Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-90, 508 N.Y.S.2d 901 (1986) ("It is a settled rule that expressions of opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage action.'" (citations omitted)). It is precisely for this reason that a plaintiff in New York alleging slander is statutorily required to plead the words she alleges defamed her before forcing a party to spend significant time and resources defending a lawsuit. Because Brookman's pleading fails to meet

[5] Although "every distinct publication of libelous matter gives rise to a separate cause of action," *Woodhouse v. New York Evening Post*, 193 N.Y.S. 705, 706, 201 A.D. 9, 10 (1st Dep't 1922), Brookman does not identify whether her single-count slander per se claim is predicated on the alleged unspecified "statement" at the Hot Topics meeting, Compl. ¶ 22, or one of the indeterminate follow-up encounters with "staffers of the Show." *Id.* ¶ 25; *see id.* ¶¶ 29-30. It cannot be both and the Complaint fails to properly plead a claim for slander for this additional reason. *See Ewig*, 56 N.Y.S.2d at 124 (dismissing complaint where, *inter alia*, "from th[e] allegation it is not clear whether the pleading intends that false and defamatory words were spoken on the 16th of October … or on the 17th … or on the trial, might assert that within this pleading he could prove that some of the alleged defamatory statements were made on one of those days and some on the other or they were made on the first day and repeated on the latter"); *Woodhouse*, 193 N.Y.S. at 707, 201 A.D. at 11 (the allegation "'other than the one sued on, should [be] stricken out, or else plaintiff compelled to set them forth as separate causes of action'" (citations omitted)).

this statutory requirement, the Complaint should be dismissed. *See Roth*, 787 N.Y.S.2d at 609, 5 Misc. 3d at 900 ("[E]ven according plaintiff every possible favorable inference … dismissal of the [slander] cause of action should not await disclosure ….").

II. THE COMMUNICATION AT ISSUE IS PRIVILEGED

Even if Brookman could plead the allegedly defamatory words in good faith, her defamation claim is barred because, as is clear from the face of the Complaint, she is avowedly challenging a communication between co-workers concerning a matter of common interest. "Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether …." *Liberman*, 80 N.Y.2d at 437, 590 N.Y.S.2d 857. Pertinent here, New York courts recognize a "conditional, or qualified, privilege" over "'communications made by one person to another upon a subject in which both have an interest.'" *Id.* (citations omitted). The "common interest" privilege applies where a defendant makes a "good faith communication upon any subject matter in which the speaker has an interest, or in reference to which he has a duty … to a person having a corresponding interest or duty." *Present v. Avon Prod., Inc.*, 687 N.Y.S.2d 330, 334, 253 A.D.2d 183, 187 (1st Dep't 1999). Under this theory, "[t]he parties need only have such a relation to each other as would support a reasonable ground for supposing an innocent motive for imparting the information." *Anas v. Brown*, 702 N.Y.S.2d 732, 734, 269 A.D.2d 761, 762 (4th Dep't 2000) (noting that the "'duty be not a legal one, but only a moral or social duty of imperfect obligation'" (citations omitted)).

A. <u>The Alleged Statements Are Matters Of Common Interest</u>

New York courts routinely apply the common interest privilege to dismiss complaints challenging communications between co-workers regarding issues in the workplace. *See, e.g.*, *O'Neill v. New York Univ.*, 944 N.Y.S.2d 503, 513, 97 A.D.3d 199, 213 (1st Dep't 2012) ("[T]he

challenged statements … were communications regarding a work related common interest … [t]hus, [they] fall within the qualified privilege."); *Gondal v. New York City Dep't of Educ.*, 796 N.Y.S.2d 594, 595, 19 A.D.3d 141, 141 (1st Dep't 2005); *Dillon* 261 A.D.2d at 40, 704 N.Y.S.2d 1 ("[S]tatements … made about an employee in an employment context … are qualifiedly privileged as having been made by one person to another upon a subject in which they have a common interest."); *Red Cap Valet, Ltd. v. Hotel Nikko (USA), Inc.*, 709 N.Y.S.2d 578, 579, 273 A.D.2d 289, 290 (2d Dep't 2000) (finding court "erred … in failing to dismiss" a defamation claim where "[t]he statement, which was made to a co-worker, was subject to a qualified privilege because it concerned a matter in which both [defendant] and her co-worker had an interest"); *see also Liberman*, 80 N.Y.2d at 437, 590 N.Y.S.2d 857 ("[S]o long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded.").[6]

Brookman does not plead the actual words that give rise to her claim, but even her self-serving summary of what allegedly transpired establishes that any purportedly defamatory communication occurred among co-workers in a confidential work-setting and addressed what Plaintiff admits is their common interest in preventing leaks of sensitive information concerning the Show. Compl. ¶ 21 (alleging that the communications concerned a "betray[al of] professional and personal confidences"); *id.* ¶ 22 (alleging that the communications were made in connection with "addressing the issue of *unauthorized and improper* leaks of information *about the Show* to the media" (emphasis added)); *id.* ¶ 29 (alleging that all of the statements were made "to other staffers in their workplace"). Indeed, by claiming that such accusations led to her

[6] The First Department has repeatedly approved the dismissal of defamation claims on a CPLR 3211(a)(7) motion where, as here, the complaint on its face establishes that the common interest privilege applies and that malice was insufficiently pled. *See, e.g., O'Neill*, 944 N.Y.S.2d at 513, 97 A.D.3d at 212 (affirming dismissal of defamation claim under CPLR 3211(a)(7) based on common interest privilege).

termination, Brookman implicitly concedes that the subject matter of the challenged statement was a matter of common interest that Defendant would be obliged to report. *See Present*, 687 N.Y.S.2d 330, 253 A.D.2d at 187 ("The common interest privilege covers statements by employees to management about another employee's job-related misconduct …."); *Hollander v. Cayton*, 536 N.Y.S.2d 790, 792, 145 A.D.2d 605 (2d Dep't 1988) (allegedly defamatory statements made by President of Medical Staff at regularly scheduled meetings to fellow physicians and other staff who shared a common interest in the quality of the care rendered by plaintiff were subject to qualified privilege).

B. <u>The Complaint Fails To Adequately Plead Malice</u>

Because the challenged communications are protected by the common interest privilege, Brookman's slander claim is only properly pled if she adequately alleges that Defendant acted with malice in making those statements. *See Liberman*, 80 N.Y.2d at 436, 590 N.Y.S.2d 857 ("The shield provided by a qualified privilege may be dissolved if plaintiff can demonstrate that defendant spoke with 'malice.'"). She does not. To plead malice, the Complaint must assert facts that would support a finding of malicious intent. It is well established that conclusory assertions that Defendant harbored spite or ill will or a reckless disregard for the truth are insufficient. *See, e.g.*, *O'Neill*, 944 N.Y.S.2d at 513, 97 A.D.3d at 213 ("The complaint fails to overcome this privilege because it contains no more than conclusory allegations of malice …."); *Ferguson v. Sherman Square Realty Corp.*, 817 N.Y.S.2d 272, 273, 30 A.D.3d 288, 288 (1st Dep't 2006) ("[C]onclusory allegations of malice … are insufficient to overcome the moving defendants' qualified common-interest privilege."); *Sborgi v. Green*, 722 N.Y.S.2d 14, 14, 281 A.D.2d 230, 230 (1st Dep't 2001); *Red Cap Valet*, 709 N.Y.S.2d at 579, 273 A.D.2d at 290 ("The plaintiff failed to allege any facts from which malice could be inferred and its conclusory

allegations of malice were insufficient to overcome the privilege."); *Dillon*, 704 N.Y.S.2d 1, 261 A.D.2d at 40 ("Actual malice is not supported in these pleadings where allegations of ill will and spite manifested by the [statement] rest solely on surmise and conjecture."); *Hame v. Lawson*, 895 N.Y.S.2d 141, 142, 70 A.D.3d 640, 640 (2d Dep't 2010); *see also Liberman*, 80 N.Y.2d at 439, 590 N.Y.S.2d 857 ("[S]pite and ill … refers not to defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements.").

The Complaint lacks a single factual allegation to give rise to an inference that Defendant made the alleged statements with malice. The Complaint merely recites the boilerplate legal conclusion that "Ms. O'Donnell was solely motivated by personal spite and ill will against Ms. Brookman, and knew or had a high degree of awareness of the probable falsity of such accusations against Ms. Brookman." Compl. ¶ 26.[7] This one sentence allegation, without even the barest explanation of why Defendant was "solely motivated" by any feeling toward Brookman or how Defendant knew or was highly aware that her statement was likely false, is precisely the type of "conclusory statement[] of law" that fails "to supply material facts by inference within the doctrine of liberal construction." *Didier v. MacFadden Publ'ns, Inc.*, 299 N.Y. 49, 53, 85 N.E.2d 612, 612 (1949); *see Gondal*, 796 N.Y.S.2d at 595, 19 A.D.3d at 141

[7] Brookman cannot rely on an alleged single unrelated dispute with Defendant to plead malice. Compl. ¶¶ 18-19 (alleging that, "[i]n or about mid-September 2014, O'Donnell accused Ms. Brookman of conspiring with Ms. Goldberg to shift the coverage of a story [about the beheading of James Foley by ISIS] away from Ms. O'Donnell and to Ms. Goldberg" and "intimidated" Brookman). Brookman claims that the alleged incident occurred in "mid-September 2014," four (4) months prior to the alleged defamatory communication at issue, and her Complaint is devoid of any allegation suggesting a nexus between that run-in and the purportedly slanderous statements made in mid-January 2015. *See Sborgi*, 722 N.Y.S.2d at 14, 281 A.D.3d at 230 ("[N]either falsity nor the existence of prior earlier disputes between the parties permits an inference of malice …."); *Liberman*, 80 N.Y.2d at 439, 590 N.Y.S.2d 857 ("If the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant *also* despised plaintiff." (emphasis in original)). Nor can she bootstrap a claim of malice from allegations as to O'Donnell's alleged bad relationships with others, *see, e.g.*, Compl. ¶ 20, as those allegations similarly have no bearing on any allegation that O'Donnell acted with malice *toward Brookman* at the moment she uttered the allegedly defamatory statements. Indeed, all of these allegations should be stricken from the Complaint as irrelevant and unduly prejudicial. *See* Point III *infra*.

("[P]laintiff's conclusory allegations of malice [are] insufficient to overcome the privilege."); *Lowinger v. Jacques*, 612 N.Y.S.2d 18, 18, 204 A.D.2d 175, 176 (1st Dep't 1994) ("[T]he amended complaint fails to plead evidentiary facts to overcome the common interest qualified privilege …."). Accordingly, the Complaint fails to adequately plead malice and must be dismissed.

Moreover, dismissal of the Complaint based on the common interest privilege should be with prejudice. Since Plaintiff cannot overcome the privilege except by recasting her defamation claim entirely to allege statements unrelated to matters of common interest to her co-workers, repleading would be futile. *See, e.g.*, *Mechta v. Mack*, 546 N.Y.S.2d 12, 13, 154 A.D.2d 440, 440 (2d Dep't 1989) (upholding dismissal of complaint and denial of leave to amend where, *inter alia*, "the subject statement … was subject to a qualified privilege").

III. NUMEROUS ALLEGATIONS SHOULD BE STRICKEN FROM THE COMPLAINT

For the reasons set forth above, the Complaint should be dismissed with prejudice. However, if the Court denies the Motion to Dismiss, Defendant respectfully requests that the Court order that seven (7) gratuitous allegations in the Complaint be stricken as scandalous and prejudicial matter. If the Court dismisses the Complaint, but grants Brookman leave to amend, Defendant respectfully requests that the Court condition its grant on Brookman excluding such scandalous and prejudicial matter from any amended pleading.

CPLR 3024(b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." In considering a motion to strike, "the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to the cause of action," *Soumayah v. Minnelli*, 839 N.Y.S.2d 79, 82, 41 A.D.3d 390, 393 (1st Dep't 2007), and then whether those irrelevant allegations are "scandalous or prejudicial." *See Int'l Publ'g*

Concepts, LLC v. Locatelli, 9 N.Y.S.3d 593, 2015 N.Y. Slip Op. 50049(U), at *8 (Sup Ct. N.Y. Cty. 2015). In assessing the second prong, the court focuses on whether, if the case went to trial, the allegations "'may instill undue prejudice in the jury.'" *Id.* (citations omitted); *see In re Albany Law School*, 915 N.Y.S.2d 747, 749, 81 A.D.3d 145, 148 (3d Dep't 2011) (court did not err in striking allegations because "[w]hile this information may create an interesting historical background for this proceeding, none of it is relevant to petitioners' claims, but it could serve to prejudice respondent"), *aff'd as modified,* 19 N.Y.3d 106, 968 N.E.2d 967 (2012).

Among the Complaint's sixteen (16) paragraphs of "Introductory Facts" are three irrelevant paragraphs purportedly summarizing unidentified stories "reported" or "appear[ing]" "in the media" that vilify Ms. O'Donnell and needlessly scandalize the Show and ABC:

- "[In or about July 2014], a story was reported in the media that Ms. O'Donnell disliked and probably could not co-exist with Mr. Geddie, and that Mr. Geddie, may be terminated from his job on the Show." Compl. ¶ 13.

- "[In or about August 2014], another story was reported in the media that Ms. O'Donnell wanted to take control of the Show and the role of moderator from Ms. Goldberg, and that Ms. O'Donnell and Ms. Goldberg clashed about Ms. O'Donnell's efforts to take control of the Show." *Id.* ¶ 16.

- "Since Ms. O'Donnell's return to the Show in late 2014, numerous stories appeared in the media about Ms. O'Donnell and her acrimonious relationship with the other co-hosts and staffers of the Show." *Id.* ¶ 20 (thereafter summarizing six (6) "example" stories).

The "Introductory Facts" section includes four (4) additional hearsay allegations that unjustifiably disparage Defendant without any apparent connection to Brookman's slander claim:

- "During [Defendant's first stint on the Show, she] feuded with Mr. Geddie, the executive producer of the Show since 1997, and senior staffers and co-hosts of the Show, and reportedly fell into rages, screamed at the staff, insulted them, and was so vicious that some of the staffers on the Show spoke of Ms. O'Donnell using the word 'hate.'" *Id.* ¶ 10.

- "In her effort to assert control over the Show and to reclaim the role as moderator, Ms. O'Donnell sought to take coverage of news stories on the Show away from Ms. Goldberg and to herself, would become upset if she was not granted the coverage she expected, and

accused Ms. Brookman of teaming with Ms. Goldberg to undermine Ms. O'Donnell." *Id.* ¶ 17.

- "For example, in or about mid-September 2014, Ms. O'Donnell accused Ms. Brookman of conspiring with Ms. Goldberg to shift the coverage of a story on the Show, specifically about the beheading of James Foley by ISIS, away from Ms. O'Donnell and to Ms. Goldberg." *Id.* ¶ 18.

- "At that time, Ms. O'Donnell intimidated Ms. Brookman by screaming that she 'owned' the story and was upset that Ms. Goldberg covered the story, and by grabbing the arms of the chair in which Ms. Brookman was sitting, leaning very close to her face, and prohibiting her from leaving, while continuing to aggressively and loudly berate her for giving the coverage of the story to Ms. Goldberg." *Id.* ¶ 19.

To plead a defamation claim Brookman must allege (1) a false statement (2) regarding Brookman (3) published to a third party without privilege or authorization that (4) causes special harm to Brookman or is defamatory *per se*. *See Kramer*, 989 N.Y.S.2d at 832-33, 45 Misc. 3d at 320; *see Dillon*, 704 N.Y.S.2d 1, 261 A.D.2d at 38 (noting that the publication must "constitute[e] fault as judged by, at minimum, a negligence standard"). None of the above-noted paragraphs allege, let alone suggest, facts even remotely relevant to Brookman's claim. *See Wegman v. Dairylea Coop., Inc.*, 376 N.Y.S.2d 728, 733, 50 A.D.2d 108, 111 (4th Dep't 1975). The allegations are extraneous matter, clearly included for the purpose of disparaging Ms. O'Donnell and the Show during her tenure. *See Locatelli*, 2015 N.Y. Slip. Op. 50049(U) at *9 (recognizing that irrelevant materials is "scandalous or prejudicial" where "there appears to be no other purpose for the allegations … than to implicate [those persons] in … alleged wrongdoing without going so far as to assert claims against them" for such wrongdoing); *Baychester Shopping Ctr. v. Llorente*, 669 N.Y.S.2d 460, 461, 175 Misc. 2d 739, 740 (Sup. Ct. N.Y. Cty. 1997) (holding that newspaper articles "about Defendants" that are "part of the pleading" should be stricken as "scandalous or prejudicial material unnecessarily inserted"). Indeed, Plaintiff concedes as much, as she calls the entire section setting forth these allegations "Introductory Facts" and juxtaposes it with the "Underlying Facts of the Claim" section that

deals with the actual cause of action. The Court "'in keeping with sound discretion and the interests of justice [should] preserve defendant's right to a fair trial by not permitting plaintiff to invoke the liberal rule with respect to pleading and allege the aforesaid prejudicial unnecessary matter under the guise of relevancy.'" *Soumayah*, 839 N.Y.S.2d 79, 41 A.D.3d at 393 (citations omitted).

Striking those allegations will not cause any cognizable prejudice to Brookman because they are plainly irrelevant to her claim, but failure to do so will result in prejudice to Defendant. *See Shulsky v. Shulsky*, 312 N.Y.S.2d 944, 947, 63 Misc. 2d 642, 644 (Sup. Ct. Kings Cty. 1970) ("[W]here liberality [in pleading] conflicts with a precise prohibition as that in section 3024(b) regarding prejudicial matter, liberality must yield.").

CONCLUSION

For the reasons articulated above, the Defendant respectfully request that the Complaint be dismissed with prejudice.

Dated: New York, New York
November 19, 2015

DECHERT LLP

By: */s/ Nicolle L. Jacoby*
Nicolle L. Jacoby
Andrew A. Spievack
1095 Avenue of the Americas
New York, New York 10036
Telephone: (212) 698-3500
Fax: (212) 698-3599
nicolle.jacoby@dechert.com
andrew.spievack@dechert.com

Attorneys for Defendant