FILED, Clerk of the Appellate Division, February 26, 2024, **A-000784-23**, **AMENDED**

TAMAR HERMAN, Plaintiff, vs. IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIR-FOUNDATION INC., and CAIR NEW JERSEYA/K/A CAIR NJ A/K/A CAIR NJ INC., Defendants.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** DOCKET NO. A-784-23T2 SUPERIOR COURT OF NEW JERSEY LAW DIVISION – UNION COUNTY, DOCKET NO. UNN-L-002913-22 Sat Below: Hon. Daniel R. Lindemann

BRIEF OF DEFENDANTS-APPELLANTS CAIR FOUNDATION INC., CAIR-NJ, AND SELAEDIN MAKSUT IN SUPPORT OF APPEAL

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PRELIMINARILY STATEMENT

This appeal concerns nothing less than the First Amendment right of a non-profit advocacy organization to speak out zealously on matters of public concern—a right long-recognized as necessary to ensure our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

The trial court disregarded this bedrock constitutional right by refusing to dismiss facially deficient defamation and false light claims against Defendant-Appellant the Council on American-Islamic Relations ("CAIR Foundation"), its affiliate CAIR New Jersey ("CAIR-NJ"), and CAIR-NJ's Executive Director Selaedin Maksut ("Maksut") (together the "CAIR Defendants"). The trial court's erroneous ruling, moreover, defied binding authority, including this Court's recent decision in Neuwirth v. State, 476 N.J. Super. 377, 392-93 (App. Div. 2023). The trial court's decision should be reversed.

In this case, Plaintiff Tamar Herman ("Herman"), a second-grade schoolteacher, brought defamation and false light claims against the CAIR Defendants on the basis of public statements they made concerning an incident that occurred between Herman and a Muslim student in her class. The student claimed Herman forcibly pulled off her hijab (her religious head covering) in front of the class. The student's account of this incident quickly found its way to defendant

Ibtihaj Muhammed ("Muhammed"), an Olympian fencer and respected public figure known for advocating for pride in wearing a hijab, who posted about the incident on social media. Upon seeing these posts, the CAIR Defendants—organizations that advocate for Muslim Americans—made a series of public statements condemning Herman's removal of the student's hijab.

Because the CAIR Defendants' statements unquestionably involved matters of public concern (and Herman, as a public-school teacher, is a public official), Herman admits that she must plead and prove that the CAIR Defendants published their statements with actual malice, i.e. "knew that the[ir] statement[s] [were] false or published with reckless disregard for the truth," as an element of her claim. See Neuwirth, 476 N.J. Super. at 391 (quoting Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999)). Recognizing that the prospect of protracted litigation of meritless defamation claims chills free speech rights, this Court has repeatedly held that a plaintiff cannot rely on conclusory and legally insufficient allegations of actual malice. Instead, to avoid dismissal at the pleading stage, she must plead "facts from which a factfinder could conclude" that each defendant acted with "subjective awareness" of falsity or "entertained serious doubts as to truth." Id. at 392-93 (citations omitted).

Herman's Amended Complaint (the "Complaint") offers no facts to support a theory that the CAIR Defendants acted with actual malice. In fact, the allegations

in the Complaint are inconsistent with any such conclusion. Her claim should not have survived a motion to dismiss.

Notwithstanding this, the trial court denied the CAIR Defendants' motions to dismiss the claims against them under R. 4.6-2(e), holding that Herman's allegations about what Muhammed knew and did ahead of publishing her social media statements could be imputed to her co-defendants. This reasoning was plain legal error, defying the settled principle that actual malice considers a defendant's own "subjective" state of mind, and must be analyzed separately as to each "particular defendant." Durando v. Nutley Sun, 209 N.J. 235, 251 (2012). The trial court's errant decision flies in the face of settled authority and threatens to chill our most prized constitutional rights. The Court can and should correct this error and dismiss the claims against the CAIR Defendants.

STATEMENT OF FACTS

A. The Incident

In the Complaint, Herman alleges she was teaching her second-grade class at a public school in Maplewood, New Jersey on October 6, 2021, Da_002; Da_10-11, when she noticed one of her students (the "Student") was "wearing a hood that was blocking her eyes." Da_10-11. Herman admits she knew the Student was an observant Muslim and "regularly wore a form-fitting hijab," but alleges that she believed that "the Student's hijab was being worn under the hood." Id. Herman

alleges she asked the Student to "brush back her hood," and when the Student did not respond or comply, she moved the head covering herself, "brush[ing] the hood back a few inches to uncover the Student's eyes and facilitate learning." Id. Herman claims that once she saw the Student's hair and realized what she had done, she "brushed the hood back to cover all the Student's hair" and "apologized to the Student." Id.

Following these events (the "Incident"), the Student's mother contacted the school, and Herman was called to a meeting with her supervisors on the morning of October 7, 2021. Da_011. Herman was placed on administrative leave that same day. Da_011.

B. Ibtihaj Muhammad's Comments about the Incident

Defendant Ibtihaj Muhammad posted about the Incident on her Facebook and Instagram accounts the day after it occurred. Da_013-14; Da_015; Da_115-123. Muhammed, an Essex County resident, is an Olympic medalist fencer known for wearing a hijab. Da_004-5. She advocates for pride in wearing this religious garb, and has authored two children's books on this subject. Da_004-6. Muhammed has been widely recognized for both her athletic achievements and advocacy. Id.

Muhammad's full October 7, 2021 post about the Incident reads:

> I wrote this book [*The Proudest Blue: A Story of Hijab and Family*] with the intention that moments like this would never happen again. When will it stop? Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second

> grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. Schools should be a haven to all of our kids to feel safe, welcome and protected—no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.nj.us and the superintendent rtaylor@somsd.k12.nj.us

Da_013-14; Da_115-16. See also Da_122-23. In the versions of this statement Muhammed posted to Instagram, she "tagged" the Instagram accounts of CAIR-NJ and CAIR Foundation. Da_016.

C. Selaedin Maksut and CAIR-NJ's Comments about the Incident

Herman's claims against CAIR-NJ and its deputy executive director Maksut arise from a series of statements made on October 8 and 9, 2021, after Maksut had "seen Muhammed's social media posts," Da_017:

On October 8 at 12:41 AM, Maksut reacted on Twitter to Muhammad's social media posts, stating, "Absolutely unacceptable. Teacher pulls off 7 year old's hijab . . . in front of the class. Our @CAIRNJ office is calling for immediate termination. Racist teachers like this cannot be trusted around our children." Da_117; Da_125.

Later that morning at 7:34 AM, Maksut appeared on an ABC network *Good*

Morning America segment, entitled "CAIR-NJ Director on ABC Amid Calls for Firing of Teacher Who Allegedly Pulled Off Student's Hijab" (the "GMA Report")[1], where he stated, "The hijab, you know, is much like any other article of clothing for a Muslim woman. To remove that publicly can be very humiliating. Anyone who thinks it's OK to do this to a student clearly is not fit to be a teacher." Da_019.

That same day, Maksut was quoted by CBS News New York, stating, "The teacher not only put her hands on her, removed her headscarf. And this is, of course, humiliating for any Muslim woman to be exposed this way, in public." Da_023; Da_029.

In an interview with WCBS NEWSRADIO 880 that day, Maksut stated, "Clearly she's demonstrated she cannot be trusted around students." Da_023.

Maksut stated in a phone interview with NBC's *Today Show* that "Anything less than removing her from the classroom would be unacceptable. If she can't respect the religious practices of her students, then she shouldn't be teaching." Da_023.

At 2:13 PM on October 8, Maksut replied to his own original tweet, stating, "Call and email the Superintendent, Dr. Ronald G. Taylor, today, and let him know Tamar Wyner Herman is unfit to be a teacher," and providing the phone number and

[1] Available at https://www.youtube.com/watch?v=az-6Xr44bfI (last visited Nov. 13, 2023).

email address of the superintendent. Da_017-18; Da_127-28. This tweet was later deleted. Da_018.

On October 8 at 11:49 AM, CAIR-NJ posted twice on Twitter, with both posts containing Maksut's quote from the CAIR Foundation Press Release, described below. Da_ 022; Da_053; Da_146-50. CAIR-NJ also posted the Maksut quote on Facebook at 11:34 AM. Da_022. On October 9 at 10:56 AM, CAIR-NJ posted a clip of the GMA Report to its Facebook account. Da_020.

D. CAIR Foundation's Statements about the Incident

Herman complains of five statements by CAIR Foundation relating to the Incident:

On October 8, following Maksut's initial post, CAIR Foundation posted a link on its Facebook and Twitter accounts to an NBC-New York story headlined, "NJ Teacher Accused of Pulling Hijab Off 2nd Grade Student's Head" (the "First NBC News Story"), along with the following message: "A teacher pulled off a 7-year-old student's hijab in front of her class. This is completely unacceptable, and we are calling for immediate termination. Our children are not safe with #Islamophobia in the classroom." Da_018; Da_130-131.

Later that morning, CAIR Foundation posted a press release on its website, entitled, "CAIR-NJ Calls for Immediate Firing of Teacher Who Allegedly Pulled Off Muslim Student's Hijab." Da_020-21; Da_133-142 (the "Press Release"). The

Press Release summarized Muhammad's allegations about the Incident, linked to the First NBC News Story, and reported that "Maplewood Police are investigating the incident." Da_021; Da_133-142. The Press Release also included the following quote from Maksut:

> We call for the immediate firing of the Maplewood teacher who pulled off the headscarf of a young Muslim student. Anything less is an insult to the students and parents of Maplewood, NJ. Forcefully stripping off the religious headscarf of a Muslim girl is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience.
>
> Muslim students already deal with bullying from peers, it's unthinkable that a teacher would add to their distress. Islamophobia in our public schools must be addressed in NJ. Classrooms are a place for students to feel safe and welcome, not fear practicing their faith."

Da_020-21.

A short while later, CAIR Foundation posted a link to the Press Release on Twitter, along with the following message: "Our children must be protected from anti-Muslim bigotry and abuse at school. The teacher who pulled a second grader's hijab off in class must be fired immediately. #Islamophobia @cairnj @MSelaedin." Da_021; Da_144.

The same afternoon CAIR Foundation posted a link to a different NBC News story headlined, "Olympian accuses New Jersey teacher of pulling off girl's hijab, school district investigating" (the "Second NBC News Story") along with the following message: "CAIR-NJ Exec. Dir. Selaedin Maksut: 'Forcefully stripping off the religious headscarf of a Muslim girl is not only exceptionally disrespectful

behavior, but also a humiliating and traumatic experience.' @CAIRNJ @Mselaedin #Islamophobia." Da_018-19; Da_127-28.

CAIR Foundation also posted a video clip of the GMA Report on its YouTube account, which included Maksut's quote "The hijab, you know, is much like any other article of clothing for a Muslim woman. To remove that publicly can be very humiliating. . . . Anyone who thinks it's OK to do this to a student clearly is not fit to be a teacher." Da_019-20. On October 9, CAIR Foundation posted the same video clip on its Facebook and Twitter accounts. Da_020.

E. Procedural History

Herman filed this action on October 5, 2022, bringing claims for defamation *per se* and false light invasion of privacy against each of the defendants. Da_153. On February 6, 2023, CAIR Foundation and CAIR-NJ (with Maksut) filed separate motions to dismiss for failure to state a claim under R. 4.6-2(e).[2] Defendant Ibtihaj Muhammed ("Muhammed"), having been served later than the CAIR Defendants, filed a motion to dismiss or in the alternative for summary judgment on March 22, 2023.

In response to the deficiencies raised in these motions—including arguments

[2] CAIR Foundation and CAIR-NJ are independent entities, and therefore filed separate motions to dismiss in the proceedings below. Because the trial court's errors were the same as to both entities, however, and in the interest of efficiency, the CAIR Defendants now join in this appeal.

by all parties that Herman had failed to plead a non-conclusory theory of actual malice, a required element of all her claims—the motions were withdrawn without prejudice and Herman amended her pleadings and filed the operative Amended Complaint on April 18, 2023. Da_001-152.

On May 8, 2023, the CAIR Defendants filed separate renewed motions to dismiss, and Muhammed filed a renewed motion to dismiss or in the alternative for summary judgment. Da_154-157. On August 2, 2023, during the pendency of these motions, this Court published its opinion in Neuwirth. A few days before scheduled argument, the trial court adjourned the argument and ordered supplemental briefing on Neuwirth's applicability to the pending motions. Da_160-172; Da_173-180. Argument was ultimately held on October 20, 2023 (Transcript filed separately).

On October 23, 2023, the trial court issued three separate Orders and a single Statement of Reasons denying the defendants' motions. Da_181-206, 207, 208 (the "October Order"). The October Order first held that it would treat the motions to dismiss filed by CAIR Foundation and CAIR-NJ as motions for summary judgment, though there was no basis for that finding (since the CAIR Defendants had not submitted factual certifications or made arguments relying on matters outside the pleadings) and the court had not provided the parties notice it would do so. Da_187; Da_203.

Turning to the merits, the trial court acknowledged that CAIR Foundation had

"asserted that Neuwirth is now controlling law in regards to how actual malice cases should be handled by the courts," but continued "This Court disagrees." Da_204. The trial court reasoned as follows:

> While the decision was recently handed down, Neuwirth is still a New Jersey Appellate Division Case and does not supersede U.S. Supreme Court cases such as Hutchinson v. Proxmire (found that with complex issues, such as the one before the Court in the present matter, Summary Judgment is inappropriate) or New York Times Co. v. Sullivan (found that proof of "actual malice" calls into question a defendant's state of mind and "does not readily lend itself to summary judgment disposition)."

Id. The trial court then reasoned that while the plaintiff's allegations in Neuwirth were conclusory and could not support a theory of actual malice, "the Plaintiff [in this case] has presented detailed facts that call into question whether Defendant Muhammad and thus, in turn, all Defendants, here knew or had serious doubts about the veracity of the alleged defamatory statements they made or circulated." Id. (emphasis added). In other words, the trial court imputed Muhammed's alleged state of mind to the CAIR Defendants.

On November 7, 2023, the CAIR Defendants filed a motion with the trial court to stay discovery while they sought interlocutory appeal of the October Order. The CAIR Defendants then filed a Motion for Leave to appeal with this court on November 13, 2023. Three days later, on November 16, 2023, the trial court denied the CAIR Defendants' motion for a stay, Da_ 209-21 ("the November Order"). The trial court used the November Order as an opportunity to "amplify" its October

Order. Id. While trial court purported to walk back its disregard of the Neuwirth decision, admitting that "Neuwirth is most certainly controlling" on a motion to dismiss, it nevertheless reaffirmed its erroneous October Order. Da_215. The trial court held that Herman's allegations of actual malice as to all defendants were sufficient to survive a motion to dismiss since her Complaint alleged that Muhammed had published a "wholly unbelievable" story in "reliance on an informant of dubious veracity," namely, the Student. Da_ 215-17. The trial court held that these same allegations about Muhammed's state of mind—along with allegations that the CAIR Defendants failed to investigate and had a motivation to garner "influence and donations" though their statements—were sufficient to plead actual malice as to the CAIR Defendants as well. Da_217-18. The trial court reasoned that it was appropriate to impute Muhammed's knowledge to the CAIR Defendants in this manner, citing the inapposite legal principle that "one who republishes libelous matter is subject to liability as if he had published it originally, even though he attributes the libelous statements to the original publisher." Da_218 (quoting NuWave Inv. Corp. v. Hyman Beck & Co., Inc., 432 N.J. Super. 539, 563 (App. Div. 2013)). Thus, the trial court's November Order failed to remedy the fundamental error in its October Order.

ARGUMENT

I. THE TRIAL COURT MISAPPLIED THE LAW, AND ITS DENIAL OF THE CAIR DEFENDANTS' MOTIONS TO DISMISS SHOULD BE REVERSED.

Because the CAIR Defendants' motions below were filed pursuant to Rule 4:6-2(e), and determination of this appeal would involve analysis of "pure questions of law raised in [the] dismissal motion," an appellate court will engage in "*de novo* review." Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017). Under this standard, the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id. (citation omitted).

"A motion to dismiss a complaint under Rule 4:6–2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." Donato v. Moldow, 374 N.J. Super. 475, 482, (App. Div. 2005). This Court "review[s] such a motion by the same standard applied by the trial court; thus, considering and accepting as true the facts alleged in the complaint, [it] determine[s] whether they set forth a claim upon which relief can be granted." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005) (citing Donato, 374 N.J. Super. at 483). See also Banco Popular North America v. Gandi, 184 N.J. 161, 166 (2005) ("Obviously, if the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate

remedy.”). A complaint that recites “mere conclusions without facts” or relies on subsequent discovery to state a claim is not legally sufficient. Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). See also Neuwirth, 476 N.J. Super. at 390 (“‘[a] plaintiff can bolster a defamation cause of action through discovery, but not file a conclusory complaint to find out if one exists.’”) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 768 (1989) (cleaned up).

Careful evaluation of the adequacy of pleadings is especially appropriate in defamation cases, particularly where, as here, the claims implicate bedrock principles of freedom of speech and the right to comment on matters of public concern. Indeed, as this Court acknowledged in Neuwirth, testing the sufficiency of defamation claims at the pleading stage ensures “‘our citizens’ right to free expression and robust debate in our democratic society.’” 476 N.J. Super. at 390 (citing Petro-Lubricant Testing Labs., Inc. v. Adelman, 233 N.J. 236, 243 (2018) and Rocci v. Ecole Secondaire MacDonald-Cartier, 165 N.J. 149, 155 (2000)). See also Maressa v. New Jersey Monthly, 89 N.J. 176, 196 (1982) (instructing courts to “resolve free speech litigation more expeditiously whenever possible”). Prompt dismissal of meritless libel claims is also consistent with the New Jersey Constitution, whose free speech protections are even “more sweeping in scope than the language of the First Amendment.” Sisler v. Gannett Co., Inc., 104 N.J. 256,

271 (1986) (citing N.J. Const. art. I, § 6.).

A. This Court's Neuwirth Decision was Correctly Decided

The trial court's October Order openly disregarded the Neuwirth decision, characterizing it as inconsistent with U.S. Supreme Court authority. The trial court's November "Amplification" Order purportedly walked back this holding and conceded that the Neuwirth decision is binding upon trial courts. Da_209-21; Da_181-204. But Neuwirth was not only technically binding upon the trial court, it was also correctly decided in accordance with an extensive line of cases in New Jersey and in federal courts confirming that defamation cases may be dismissed at the pleading stage for failure to allege actual malice.

Neuwirth involved defamation claims brought by a Department of Health employee who claimed he was fired from his position in retaliation for reporting an ethics violation by Governor Phil Murphy's chief of staff. 476 N.J. Super. at 384. Neuwirth sued for defamation after Governor Murphy stated at a press conference that Neuwirth had been fired for cause, specifically for failing to disclose a source of outside consulting income. Id. at 385. Neuwirth attempted to plead actual malice against Governor Murphy by alleging, among other things, that Governor Murphy made the statements at issue "knowing them not to be true"; that neither the Governor nor anyone from his officer "conducted any investigation" as to the truth of the purported cause for Neuwirth's firing or contacted Neuwirth about them; and

that the Governor made the statements "recklessly and/or with actual knowledge of their falsity to punish and further retaliate against [p]laintiff." Id. at 387-389.

On interlocutory review, this Court held these allegations were insufficient to plead actual malice and reversed the trial court's denial of Governor Murphy's motion to dismiss Neuwirth's defamation claims under Rule 4:6-2(e). This Court then articulated a pleading standard rooted in a long line of authority. It held that to survive a motion to dismiss, a complaint must contain "allegations which, if proven, would constitute a valid cause of action." Id. at 390 (quoting Kieffer v. High Point Ins. Co., 422 N.J. Super. 38, 43 (App. Div. 2011) and Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)).

The Neuwirth Court then applied these settled principles to the element of actual malice, required for any defamation claim arising from statements on matters of public concern. Id. at 391. Actual malice, it noted, requires a plaintiff to "show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth." Id. (quoting Lynch, 161 N.J. at 165). Under New Jersey's pleading standard, it concluded, a defamation plaintiff in an actual malice case cannot survive a motion to dismiss unless she pleads "facts from which a factfinder could conclude that [the defendant] knew, or had serious doubts about, the veracity of the allegedly defamatory statements he made." Id. at 393.

The Neuwirth Court did not arrive at this conclusion in a vacuum. To begin with, this Court had at least twice before held that conclusory allegations of actual malice are insufficient to survive a motion to dismiss. See Newton v. Newark Star-Ledger, No. A-3819-11T3, 2014 WL 3928500, at *1, 4 (N.J. Super. Ct. App. Div. Aug. 13, 2014) (allegations, "without any supporting facts," that the defendant "purposely authored and published false statements" in "reckless disregard for [their] veracity[] and truthfulness" were insufficient to plead actual malice); Darakjian v. Hanna, 366 N.J. Super. 238, 250-51 (App. Div. 2004) (granting pre-answer motion to dismiss for failure to plead actual malice in a non-conclusory fashion). In Darakjian, this court also reasoned that a careful evaluation of the pleading sufficiency of defamation claims is not only appropriate, but necessary to "afford[sufficient] breathing space to the critical rights protected, in the public interest, by the First Amendment." Id. at 247–48.

Federal courts have also long applied a similar pleading standard. Since the U.S. Supreme Court's decisions in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 129 (2009), countless federal courts have dismissed defamation claims at the pleading stage for failure to "alleg[e] enough facts to raise a reasonable expectation that discovery will reveal evidence of actual malice." Biro v. Conde Nast, 807 F.3d 541, 545-46 (2d Cir. 2015). See also, e.g., Cabello-Rondon v. Dow Jones & Co., Inc., 720 F. App'x 87, 88 (2d Cir. 2018)

(dismissing complaint for failure to plead facts supporting an inference of actual malice); Pace v. Baker-White, 850 F. App'x 827, 831 (3d Cir. 2021), cert. denied, 142 S. Ct. 433 (2021) (same); Michel v. NYP Holdings, Inc., 816 F.3d 686, 704 (11th Cir. 2016) ("[F]ailure to investigate, standing alone, does not give rise to a conclusion that the defendants acted with actual malice. Rather, the plaintiff must plead facts giving rise to a reasonable inference that the defendants acted to intentionally avoid learning the truth."). These cases put to rest any suggestion that it would be contrary to law to dismiss a complaint for failure to allege facts in support of actual malice, as the trial court reasoned in its October Order.

The trial court's stated reason for initially refusing to apply Neuwirth, moreover, misinterpreted the cases it relied upon. The trial court reasoned that Neuwirth was inconsistent with, and could not "supersede," the U.S Supreme Court decisions in Hutchinson v. Proxmire, 443 U.S. 111, 120 (1979) and Sullivan, 376 U.S. 254. See Da_204. But Sullivan contains no discussion of whether failure to adequately allege actual malice would be suitable for determination at the pleading stage. 376 U.S. at 256, 286. Nor does Hutchinson support the trial court's disregard of Neuwirth and countless other cases. Hutchinson held that the actual malice standard did *not* apply to the plaintiff's claims because he was not a public figure, 443 U.S. at 135-36; thus it set no standard for either pleading or proving actual malice. The court did muse in a footnote of dicta that the element of actual malice

"does not readily lend itself to summary disposition." Id. at 120 n.9. However, the U.S. Supreme Court clarified several years later that actual malice *may* be resolved in pre-trial motions, and effectively renounced the Hutchinson footnote, writing:

> Our statement in Hutchinson v. Proxmire, . . . that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 n.7 (1986) (citations omitted).[3] In short, neither Sullivan, nor Hutchinson, nor any other U.S. Supreme Court authority calls the Neuwirth decision into question. To the contrary, the Neuwirth decision was squarely in line with New Jersey precedent and analogous federal caselaw.

B. Herman Failed to Plead Actual Malice as to the CAIR Defendants

Though the trial court stated in its November "Amplification" Order that it recognizes that Neuwirth is binding authority, it only paid lip service to that authority. See Da_215. The trial court still failed to apply governing law and

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[3] In fact, New Jersey does provide additional "protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws," by applying an actual malice requirement as an additional common law defense to a libel or slander action when the words in question are fair comment on a matter of public interest or concern. See Senna v. Florimont, 196 N.J. 469, 488-494 (2008).

therefore arrived at the same erroneous conclusion that Herman had adequately pled actual malice. Perhaps most troublingly, the trial court once again improperly conflated allegations about Muhammed's subjective knowledge of falsity with allegations about the CAIR Defendants' subjective knowledge of falsity, and denied the CAIR Defendants' Motion to Dismiss on the basis of allegations made as to Muhammed exclusively. See Da_216-18. This imputation of one defendant's state of mind onto other defendants defies basic precepts of actual malice. The trial court concocted this improper legal theory because the Complaint's allegations against the CAIR Defendants categorically fail to present a cognizable theory of actual malice. Indeed, the allegations closely track those found insufficient as a matter of law in Neuwirth. Herman's claims against the CAIR Defendants should have been dismissed for failure to plead actual malice.

1. Actual Malice May Not Be Imputed from One Defendant to Another

Because actual malice considers a defendant's "subjective awareness of [a statement's] probable falsity and his actual doubts as to its accuracy, Neuwirth, 476 N.J. Super. at 392 (emphasis added), this element must be pled separately as to each defendant. See also Durando, 209 N.J. at 251 ("The [actual malice] test is subjective, not objective, and involves analyzing the thought processes of the particular defendant" (emphasis added)); Secord v. Cockburn, 747 F. Supp. 779, 787 (D.D.C. 1990) ("Actual malice must be proved separately with respect to each defendant")

(citing St. Amant v. Thompson, 390 U.S. 727, 730 (1968)).

Notwithstanding this well-settled principle, the trial court's November Order held that allegations concerning information that only Muhammed knew about Herman, Herman's student, and the child's mother were sufficient to plead actual malice as to the CAIR Defendants. See Da_191 (holding Herman "meets the requisite malice requirement" as to all defendants with a bulleted list of allegations that only concerned Muhammed). For example, the trial court cited allegations that Muhammed relied on "informants of dubious veracity"—namely, the student and her mother, Da_216—but ignored the Complaint's own allegation that the CAIR Defendants relied not upon the student or her mother, but on Muhammed. The trial court also pointed to Herman's claim that Muhammed should have known the account she published was "wholly unbelievable" because she had met Herman before the incident and personally knew her to be an ally of Muslims. Id. Again, the Complaint contains no allegation that any of the CAIR Defendants knew Herman. See Da_017. In short, Herman's allegations concerning the subjective state of mind of Muhammed—a public figure whose social media posts were the source for the CAIR Defendants' statements, *see* Da_017-18—say nothing about the subjective state of mind of any of the CAIR Defendants.

In an attempt to justify its improper imputation of actual malice among the defendants, the trial court cited law holding that someone who republishes a

defamatory statement "is subject to liability as if he had published it originally." Da_218 (quoting NuWave Inv. Corp., 432 N.J. Super. at 563). While this is certainly correct, it is irrelevant here. To state a defamation claim where actual malice applies, as it does here, a plaintiff must allege "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and was not privileged); and (3) that the defendant published the defamatory statement with actual malice." Durando, 209 N.J. at 248 (emphasis added). The principle the trial court cited—that republication constitutes publication for defamation purposes—relates to the publication element of a defamation claim (element (1)). It has zero relevance to the separate and independent actual malice element (element (3)).

In this case, the CAIR Defendants do not dispute that they published statements based on Muhammed's account under the first element. What Herman has not pled is a cognizable theory of fault under the last element—specifically, "facts from which a factfinder conclude" that each of the CAIR Defendants' published their statements with knowledge of falsity or with reckless disregard for the truth, as actual malice requires. Neuwirth, 476 N.J. Super. at 392-93. The trial court's inapposite authority does not relieve Herman of her pleading burden. And she failed to meet this burden, for the reasons set out below.

2. Herman Did Not Plead Actual Malice as to Any of the CAIR Defendants

The trial court thoroughly erred in holding that Herman pled actual malice as to the CAIR Defendants. Herman fails to allege any facts evidencing that any of the CAIR Defendants acted with knowledge their statements were false, or "entertaining serious doubts as to the truth" of those statements. Neuwirth, 476 N.J. Super. at 392, (quoting St. Amant, 390 U.S. at 731). To the contrary, just like the plaintiff in Neuwirth, Herman offers only boilerplate recitations of legal conclusions, and a handful of factual allegations that our highest courts have held do not constitute actual malice as a matter of law. Indeed, the few allegations in the Complaint that do concern the CAIR Defendants' state of mind (see below) improperly lump these distinct defendants together, see Da_023-026, underlining how conclusory Herman's pleadings ultimately are. Because the Complaint falls far short of "clearly alleg[ing] facts supporting" the element of actual malice as to any of the CAIR Defendants, Neuwirth, 476 N.J. Super. at 391, their motions to dismiss under Rule 4.6-2(e) should have been granted.[4]

The Complaint's allegations of actual malice as to the CAIR Defendants are few:

[4] Herman's claims for false light invasion of privacy should have been dismissed for the same reason as her defamation claims. LoBiondo v. Schwartz, 323 N.J. Super. 391, 417 (App. Div. 1999), citing Bainhauer v. Manoukian, 215 N.J. Super. 9, 48 (App. Div. 1987) (if the alleged defamation is not actionable, then its consequences are also not actionable). See also, Decker v. Princeton Packet, 116 N.J. 418, 432 (1989) and Durando, 209 N.J. 236 (dismissing defamation and false light for failure to show sufficient evidence of actual malice).

- It alleges that "Maksut, CAIR, and CAIR-NJ" made the statements at issue "for the purpose of drumming up support and publicity, without caring whether their statements were true or not, and with reckless disregard for the fact that their likely false statements would harm Herman." Da_024-25;
- It alleges that "Neither Maksut, CAIR, CAIR NJ, nor any other representatives or agents of these organizations ever attempted to contact Herman to learn what actually happened," Da_025; and
- It alleges that the CAIR Defendants "ha[ve] never retracted or withdrawn" their statements. *See, e.g.,* Da_050-51.

These thin and boilerplate allegations fall far short.

First, as Neuwirth and other Appellate Division cases have held repeatedly, conclusory allegations that a defendant was "aware" of statements' being false yet made them "recklessly and/or with actual knowledge of their falsity" are mere recitations of the applicable legal standard, not factual assertions, and are therefore insufficient to withstand a motion to dismiss. 476 N.J. Super. at 393. See also Darakjian, 366 N.J. Super. at 247 (rejecting conclusory allegations of "knowledge of falsity or reckless disregard for truth or falsity" that were "unsupported by any factual contentions offered to substantiate the assertion"); Newton, 2014 WL 3928500, at *4 (rejecting "bare conclusory assertions that the articles contained

false statements of fact and the Star–Ledger purposely published the articles in reckless disregard for the truth").

Second, the allegations regarding the CAIR Defendants' motives to "drum[] up support" without regard to the "harm" they might cause Herman say nothing about their knowledge of falsity but present a theory of "bad or corrupt motive" which does not support a theory of actual malice. Neuwirth, 476 N.J. Super. at 392 (quoting Marchiano v. Sandman, 178 N.J. Super. 171, 174 (App. Div. 1981)). See also Newton, 2014 WL 3928500, at *4 ("Mere conclusory allegations of '[s]pite, hostility, hatred, or the deliberate intent to harm demonstrate possible motives for making a statement, but not publication with a reckless disregard for its truth.'" (quoting Lynch, 161 N.J. at 166–67).

Third, Herman's bald characterization of the CAIR Defendants' statements as "likely false" and "unbelievable," Da_023-25, are conclusory and insufficient. See Neuwirth, 476 N.J. Super. at 390; Newton, 2014 WL 3928500, at *4 ("allegations "[t]hat an editor or reporter 'should have known' or 'should have doubted [the] accuracy' of an article before publishing it is insufficient to show reckless disregard for the truth.'" (quoting Durando, 209 N.J. at 251–52)). In fact, Herman's own Complaint indicates the CAIR Defendants had every reason to believe Muhammed, the admitted source for their statements. See Da_017. It describes Muhammed as a highly respected public figure who, among other things, was "named by President

Obama to the President's Council on Fitness, Sports, and Nutrition in 2017," has "authored three books," is "the subject of two biographies," and who has a "role model Barbie[]" modeled after her. Da_004-5. On the other hand, Herman offers no theory, much less facts, to explain why the CAIR Defendants should have doubted Muhammed's account of the Incident. Indeed, Herman's own Complaint admits that a version of the Incident, in which Herman claims she brushed back the Student's head covering without realizing it was a hijab, did in fact occur. Da_010-11.

Fourth, as Neuwirth and the New Jersey and U.S. Supreme Courts have all held, a defendant's "'[m]ere failure to investigate all sources' does not demonstrate actual malice." 476 N.J. Super. at 393 (quoting Lynch, 161 N.J. 172). See also Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) ("failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard"). Thus, Neuwirth found allegations that Governor Murphy had failed to "conduct[] any investigation" or "confront[] the plaintiff" about allegations against him were insufficient to plead actual malice. 476 N.J. Super. at 388. Herman's nearly identical claim here—that the CAIR Defendants did not attempt to contact her before publication—likewise fails to meet her pleading burden.

Finally, Neuwirth disposes of any theory that the CAIR Defendants' failure to

retract their statements evidences actual malice. That decision confirmed that allegations about actions taken or not taken *after* publication "say[] nothing about the [defendant's] subjective state of mind when [it] made the statements." 476 N.J. Super. at 393. Indeed, courts have repeatedly held that a failure to retract cannot be evidence of actual malice. See, e.g., Schwartz v. Worrall Publications, Inc., 258 N.J. Super. 493, 503–04 (App. Div. 1992) (citing cases).

In sum, and as the Neuwirth decision confirms, a plaintiff cannot rely on conclusory allegations and legally insufficient theories to plead actual malice. Yet that is precisely what Herman attempted to do here. The trial court erred in denying the CAIR Defendants' motions to dismiss, and its decision should be reversed.

CONCLUSION

For the foregoing reasons, the CAIR Defendants respectfully request that this Court reverse the trial court's October Order and November Order, and dismiss Plaintiff's claims against the CAIR Defendants with prejudice.

Dated: February 8, 2023

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

TAMAR HERMAN, Plaintiff-Respondent, v. IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN- ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIR FOUNDATION, INC., and CAIR NEW JERSEY A/K/A CAIR NJ A/K/A CAIR NJ INC., Defendant-Appellants.	Docket No. A-784-23T2 Superior Court of New Jersey Law Division Union County Docket No. UNN-L-02913-22 Sat Below: Hon. Daniel R. Lindemann

BRIEF OF PLAINTIFF-RESPONDENT TAMAR HERMAN IN OPPOSITION TO APPEAL OF DEFENDANTS-APPELLANTS CAIR FOUNDATION INC., CAIR-NJ, AND SELAEDIN MAKSUT

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PRELIMINARY STATEMENT

Defendant-Appellants[1] CAIR Foundation, Inc. ("CAIR"), CAIR-NJ, and Selaedin Maksut ("Maksut") (collectively the "CAIR Defendants" or "Defendants") Appeal (the "Appeal") should be denied.

Defendants' Appeal rests entirely on a *false* premise calculated to deceive this Court: that in denying the CAIR Defendants' motions to dismiss the Amended Complaint ("Am. Compl."), the court below (Hon. Daniel R. Lindemann) "disregarded" Defendants' "First Amendment right [as] a non-profit advocacy organization to speak out zealously on matters of public concern . . . ." (Db 1). Defendants also contend that Judge Lindemann "defied binding authority," particularly this Court's recent decision in *Neuwirth v. State*, 476 N.J. Super. 377 (App. Div. 2023). (Db 1). Indeed, Defendants' appellate argument revolves around their specious contention that Judge Lindemann defied *Neuwirth*. As the record shows, Judge Lindemann *did no such thing* – Judge Lindemann cited *Neuwirth* in his original order denying Defendants' motions to dismiss issued on October 23, 2023 (the "Denial Order") (Da 203-04) and specifically recognized *Neuwirth* as binding precedent in his amplified order issued on November 7, 2023 (the "Amplification Order") (Da 215-16).

[1] The other defendant, Ibtihaj Muhammad, has filed a separate and independent appeal. *See* App. Div. Docket AM-000143-23.

Contrary to Defendants' arguments, their motion to dismiss was not denied because of a supposed error of the trial court, but rather because they simply failed to establish the prerequisites of their motion. Indeed, the Appeal is meritless because – as is evident from the face of the papers and as discussed in Judge Lindemann's opinions—Plaintiff-Respondent Tamar Herman ("Herman") properly plead her compelling and richly detailed claims.

"A finding of reckless publication . . . may result if the publisher fabricates a story, publishes one that is *wholly unbelievable* . . ." *Neuwirth*, 476 N.J. Super. at 391-392 (citing *St Amant. v. Thompson*, 390 U.S. 727, 732 (1968); *Costello v. Ocean County Observer*, 136 N.J. 594, 615 (1994)) (emphasis added). That is exactly the case here. Herman, a beloved teacher and grandmother who is also Jewish, brought defamation and false light claims against the CAIR Defendants on the basis of their multiple appalling public smears of Herman premised upon a *wholly unbelievable* and fabricated story that Herman physically abused a female Muslim student in her second-grade class with discriminatory intent. The story was originally posted on social media by co-Defendant Ibtihaj Muhammad ("Muhammad"), a former Olympic fencer with an enormous online audience and platform.

According to Muhammad, Herman, without any apparent motive and after decades of spotless service as an outstanding teacher, forcefully pulled the

student's hijab off in front of her classmates, then told the student that her hair was beautiful and she no longer had to wear a hijab. This story was *wholly unbelievable* on its face. Yet, the CAIR Defendants, seeking to gain credibility with their thousands of online followers, drive donations to their cause, and divide rather than unite people, parroted Muhammad's accusations through the bullhorn of their own social media accounts and television appearances, accusations that they had a high degree of awareness were likely false, as the absurd accusations simply made no sense.

Defendants' repetitious argument centers on their belief that the Amended Complaint, (Da 001-64), does not adequately plead actual malice as to the CAIR Defendants, purportedly because it "offers no facts to support a theory that that the CAIR Defendants acted with actual malice." (Db 2). But Defendants gloss over this Court's recognition in *Neuwirth* that knowing or reckless publication of a wholly unbelievable story, or "reliance on an informant of dubious veracity," satisfies the actual malice standard. (Da 215). Judge Lindemann's denial of the CAIR Defendants' motions to dismiss was proper and consistent with the precedents of this Court, the Supreme Court of New Jersey, and the Supreme Court of the United States.

For these reasons, and as further discussed below, Defendants' Appeal should be denied and the ruling of the court below affirmed.

STATEMENT OF FACTS

I. The Events of October 6, 2021

On October 6, 2021, Plaintiff Herman, who is Jewish and is a beloved teacher with 33 years of experience, was teaching her second-grade class at Seth Boyden Elementary School (the "School") in the South Orange Maplewood School District (the "District"). Am. Compl. ¶¶ 1, 2, 10 (Da 002-04 & 10).

With the class busily engaged on a writing assignment, Herman noticed one of her female students (the "Student") wearing a hood that was blocking her eyes. *Id.* ¶ 10 (Da 10). While Herman was aware that the Student—who was 7 years of age—regularly wore a form-fitting hijab, the article of clothing Herman witnessed that day did not resemble the hijab that the Student wore every day prior. *Id*. Accordingly, Herman believed in good faith that the Student's hijab was being worn under the hood. *Id*.

Intending to encourage the Student to engage in her schoolwork, as her eyes were partially blocked by the hood, Herman—in accordance with school policy which indicates the students should not be allowed to wear items that block their vision—asked the Student to brush back her hood. *Id*. This was a particularly reasonable request as the rest of the Student's face was already significantly covered by a mask being worn to protect against COVID-19. *Id*. When the Student did not respond to Herman's request, Herman, justifiably

believing the Student's hijab was underneath, brushed the hood back a few inches with her hand in order to uncover the Student's eyes and facilitate learning. *Id*. While lightly brushing back the hood itself, and without making contact with the Student physically, Herman noticed the Student's hair and that the Student was not wearing her regular form-fitting hijab underneath. *Id*. Herman immediately and gently brushed the hood back to cover all the Student's hair and, out of respect for the religious practices of Islam and for the Student's observation of same, apologized to the Student. *Id*. The hood never left the Student's head, this momentary interaction did not attract the attention of the other students, and classroom learning went on as normal. *Id*.

During this interaction, Herman did not speak to the Student, other than the aforementioned initial request of the Student to brush back her hood and apology. *Id.* ¶ 11 (Da 11). Nor did Herman remove the hood from the Student's head or use physical force of *any* kind on the Student and her hijab, including grabbing, pulling, ripping, or stripping; rather, Herman merely *brushed* the hood back, and lightly at that. *Id*.

II. The CAIR Defendants

CAIR is a non-profit Muslim civil rights advocacy group headquartered in Washington D.C. but with a nationwide presence. Am. Compl. ¶ 6 (Da 008Click or tap here to enter text.). CAIR NJ is the New Jersey chapter of CAIR.

Id. Maksut is the Deputy Executive Director of CAIR NJ. *Id.* ¶ 5 (Da 008). CAIR has known affiliations with antisemitic activities and groups. *Id.* ¶ 6 (Da 008-09). According to the Anti-Defamation League (ADL), members of "CAIR's current leadership had early connections with organizations that are or were affiliated with Hamas . . . ." *Id*. Additionally, as also documented by the Anti-Defamation League, members of CAIR's leadership "have used . . . antisemitic tropes related to Jewish influence over the media or political affairs, or has descended into the vilification of Zionists, which includes the majority of American Jews . . . ." *Id*. CAIR has not been particularly secretive or shy about its antisemitic viewpoints, even at the highest levels of the organization; indeed, in a speech delivered at the 16th Annual Convention for Palestine on November 24, 2023 outside of Chicago, Nihad Awad, executive director and co-founder of CAIR, said that he was "happy to see" the October 7, 2023 attacks against Israel, and also stated that "the people of Gaza have the right to self-defense . . . Israel as an occupying power does not have that right to self-defense."[2] As a result of Awad's hateful remarks, the White House announced that it was ending its work with CAIR on crafting a national antisemitism strategy, and issued an unusually

[2] Timothy H.J. Nerozzi, *CAIR director says he was 'happy' on Oct. 7, Israel 'does not have right to self-defense,'* FOX News (December 7, 2023), available at https://www.foxnews.com/us/cair-director-says-happy-witness-oct-7-says-israel-does-not-have-right-self-defense

pointed statement decrying CAIR's vile rhetoric: "We condemn these shocking, antisemitic statements in the strongest terms."[3]

The CAIR Defendants maintain a substantial online social media presence. Am. Compl. ¶¶ 5-7 (008-09).

III. Muhammad

Muhammad is a former United States Olympic fencer who gained national and international fame because she wore a hijab while winning a bronze medal at the 2016 Summer Olympics. Am. Compl. ¶ 3 (Da 004-06). Muhammad has also authored children's books about wearing hijab. *Id*. Muhammad and Herman knew each other from the local community and maintained a friendly relationship with each other prior to the events giving rise to this lawsuit. *Id.* ¶ 4 (Da 006-07).

Muhammad maintain a substantial online social media presence. *Id.* ¶ 3 (Da 004-06).

IV. Defendants' Defamatory Statements

For the convenience of the Court, the defamatory statements published by Defendants are reproduced in the Table below. Although each statement is unique, the legal arguments addressing them are generally similar and thus they

[3] Josh Christenson, *White House cuts ties with CAIR on antisemitism strategy after director says Hamas attacks made him 'happy,'* New York Post (December 7, 2023), available at https://nypost.com/2023/12/07/news/cair-head-says-he-was-happy-about-hamas-october-7-attacks-claims-aipac-controlling-the-us-government/

may be grouped together for the purposes of this Opposition to Defendants' *Appeal.*

Date/Time	Defendant(s) / Citation	Statement
Oct. 7, 2021 at 4:03 p.m. Eastern Time	Muhammad, Am. Compl. ¶¶ 21 - 26 (Da 013-15)	**Muhammad Statement #1** *I wrote this book with the intention that moments like this would never happen again. When will it stop? Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. School should be a haven to all of our kids to feel safe, welcome and protected – no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.nj.us and the superintendent rtaylor@somsd.k12.nj.us*
Oct. 7, 2021 at 4:30 p.m. Eastern	Muhammad, Am. Compl. ¶¶ 27 - 30, (Da 015-16)	**Muhammad Statement #2** *Yesterday, Tamar Herman, a teacher at Seth*

Date/Time	**Defendant(s) / Citation**	**Statement**
Time		*Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. Schools should be a haven for all of our kids to feel safe, welcome and protected— no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.Nj.us and the superintendent Rtaylor@somsd.k12.Nj.us* *@cair_national @cair.nj*
Oct. 8, 2021 at 12:41 a.m. Eastern Time	Maksut, Am. Compl. ¶¶ 35 - 37 (Da 017)	**Maksut Statement #1** *Absolutely unacceptable. Teacher pulls off 7 year old's hijab…in front of the class.* *Our @CAIRNJ office is calling for immediate termination.* *Racist teachers like this cannot be trusted around our children.*

Date/Time	**Defendant(s) / Citation**	**Statement**
Oct. 8, 2021 at 2:13 p.m. Eastern Time	Maksut, Am. Compl. ¶¶ 38 - 40 (Da 017-18)	**Maksut Statement #1 (Reply)** *Call and email the Superintendent, Dr. Ronald G. Taylor, today, and let him know Tamar Wyner Herman is unfit to be a teacher. rtaylor@somsd.k12.nj.us (973) 762-5600*
Oct. 8, 2021 at 9:45 a.m. Eastern Time	CAIR, Am. Compl. ¶¶ 41 - 43 (Da 018)	**CAIR Statement #1** *A teacher pulled off a 7-year-old student's hijab in front of her class. This is completely unacceptable, and we are calling for immediate termination. Our children are not safe with #Islamophobia in the classroom.*
Oct. 8, 2021 at 3:56 p.m. Eastern Time	Maksut, CAIR, CAIR NJ, Am. Compl. ¶¶ 44 - 46 (Da 018-19)	**Maksut Statement #2** *CAIR-NJ Exec. Dir. Selaedin Maksut: "Forcefully stripping off the religious headscarf of a Muslim girl is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience." @CAIRNJ @Mselaedin #Islamophobia*
Oct. 8, 2021 at 7:34, 9:52, 9:53, 10:56 a.m. Eastern Time	Maksut, CAIR, CAIR NJ, Am. Compl. ¶¶ 47 - 50 (Da 019-20)	**Maksut Statement #3** *The hijab, you know, is much like any other article of clothing for a Muslim woman. To remove that publicly can be very humiliating.* *Anyone who thinks it's OK to do this to a student clearly is not fit to be a teacher.*

Date/Time	Defendant(s) / Citation	Statement
Oct. 8, 2021 at 11:28 a.m. Eastern Time	CAIR, CAIR NJ Am. Compl. ¶¶ 51 - 55 (Da 020-21)	**CAIR Statement #2** *We call for the immediate firing of the Maplewood teacher who pulled off the headscarf of a young Muslim student. Anything less is an insult to the students and parents of Maplewood, NJ. Forcefully stripping off the religious headscarf of a Muslim girl is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience.* *Muslim students already deal with bullying from peers, it's unthinkable that a teacher would add to their distress. Islamophobia in our public schools must be addressed in NJ. Classrooms are a place for students to feel safe and welcome, not fear practicing their faith.*
Oct. 8, 2021 at 11:42 a.m. Eastern Time	CAIR, Am. Compl. ¶¶ 56 - 57 (Da 021)	**CAIR Statement #3** *Our children must be protected from anti-Muslim bigotry and abuse at school. The teacher who pulled a second grader's hijab off in class must be fired immediately.* *#Islamophobia* *@cairnj @ Mselaedin*
Oct. 8, 2021 at 11:49 a.m. Eastern Time	CAIR NJ, Am. Compl. ¶ 58 (Da 021-22)	**CAIR NJ Statement #1** *We call for the immediate firing of the Maplewood teacher who pulled off the headscarf of a young Muslim student. Anything less is an insult to the students and parents of Maplewood, NJ.*

Date/Time	Defendant(s) / Citation	Statement
Oct. 8, 2021 at 11:34 and 11:49 a.m. Eastern Time	CAIR NJ, Am. Compl. ¶¶ 59 - 62 (Da 020)	**CAIR NJ Statement #2** *Forcefully stripping off the religious headscarf of a Muslim girl is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience.* *Muslim students already deal with bullying from peers, it's unthinkable that a teacher would add to their distress. Islamophobia in our public schools must be addressed in NJ. Classrooms are a place for students to feel safe and welcome, not fear practicing their faith.*
October 8, 2021	Maksut, Am. Compl. ¶ 63 (Da 023)	**Maksut Statement #4** *The teacher not only put her hands on her, removed her headscarf. And this is, of course, humiliating for any Muslim woman to be exposed this way, in public.*
October 9, 2021	Maksut, Am. Compl. ¶ 64 (Da 023)	**Maksut Statement #5** *Clearly she's demonstrated she cannot be trusted around students.*
October 9, 2021	Maksut, Am. Compl. ¶ 65 (Da 023)	**Maksut Statement #6** *Anything less than removing her from the classroom would be unacceptable. If she can't respect the religious practices of her students, then she shouldn't be teaching.*

V. The CAIR Defendants' Lack of Interest in the Truth

As CAIR shockingly admitted in its motion to dismiss, the truth about Herman didn't matter; what mattered was giving the CAIR Defendants' audience the "outrage" that they expect:

> The CAIR Foundation's audience would therefore expect public statements regarding such an incident to reflect a high degree of outrage.
>
> Memorandum Of Law in Support of Motion by Defendant CAIR Foundation Inc. to Dismiss the Amended Complaint (the "CAIR Memo") at 29 (Pa 036).

In other words, CAIR itself admits that its goal was not truth, but rather to give its audience what they expect – outrageous public statements. Thus, as pleaded in the Amended Complaint, "[t]he value of this *unbelievable* and distorted story to [the CAIR Defendants]—that a beloved grandmotherly second-grade teacher would forcefully strip off the religious headwear of a Muslim student—lie[d] not in its truthfulness but in its sensationalized nature, inflaming the passions of [the CAIR Defendants] . . . and those entities' donors, followers, and supporters." Am. Compl. ¶ 66 (Da 023-24).

As the Amended Complaint clearly describes, the CAIR Defendants just blindly and recklessly copied Muhammad's wild, wholly unbelievable allegations that they knew or should have known were likely false, and ran with them. The story was unbelievable on its face. Moreover, as the Amended Complaint also makes clear, never once did the CAIR Defendants use the word

"alleged" or "allegedly" when describing the conduct that they falsely accused was attributable to Herman; nor did they ever qualify their incendiary character assassination with phrases such as "if true" or "if accurate." Am. Compl. ¶¶ 35-70 (Da 017-26). "All that mattered was getting credit for being the one to light the match." *Id.* ¶ 66 (Da 024).

VI. Aftermath of the Defamatory Statements

As a result of the defamatory statements, Herman's life was turned upside-down: she had her professional reputation left in tatters, was targeted with threats to her physical safety, was mercilessly bullied and ridiculed, was shamed in local and national news articles, was derided and humiliated in her community, was removed from her classroom at the School, was placed on administrative leave by the District, and was even the subject of a Tweet by New Jersey Governor Phil Murphy and a Facebook post by the rabbi of her childhood synagogue. Am. Compl. ¶¶ 1, 12-19 & 73-90 (Da 002-03, 011-13 & 026-32). Herman was also the target of a criminal investigation by the Essex County Prosecutor's Office, which ultimately declined to bring charges. *Id*. ¶¶ 1 & 71-72 (Da 002 & 026). She also had to move to a new home and see a psychotherapist. *Id*. ¶¶ 162-164 (Da 055-56).

ARGUMENT

I. Judge Lindemann Explicitly Endorsed Neuwirth as Controlling Authority in Harmony with the U.S. Supreme Court, Contrary to Defendants' Misdirection

The CAIR Defendants absurdly contend that Judge Lindemann "openly disregarded the *Neuwirth* decision, characterizing it as inconsistent with U.S. Supreme Court authority." (Db 15). Judge Lindemann *did no such thing*. Indeed, below is what Judge Lindemann actually wrote in the Amplification Order, where, rather than "disregard," he explicitly endorsed *Neuwirth* as controlling:

> For the reasons set forth herein, this Court specifically finds, by way of amended, clarified, supplemented or otherwise amplified Underlying Decision that, as to the controlling law on a Motion to Dismiss, *Neuwirth* ***is most certainly controlling*** . . . ."
>
> (Da 215) (emphasis added).

In addition, Judge Lindemann, rather than stating that *Neuwirth* was "inconsistent with U.S. Supreme Court authority," specifically pointed out that *Neuwirth* was in *harmony* with Supreme Court authority by quoting *Neuwirth*'s citation to *St. Amant.*

> A finding of reckless publication . . . may result if the publisher fabricates a story, publishes one that is **wholly unbelievable**, or **relies on an informant of dubious veracity**, (*St. Amant. v. Thompson*, 390 U.S. 727, 732 (1968)); *Costello v. Ocean County Observer*, 136 N.J. 594, 615 (1994), or purposely avoids the truth, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989).

> (Da 215) (quoting *Neuwirth*, 476 N.J. Super. at 391-392 (citing *Lynch v. N.J. Educ. Ass'n.*, 161 N.J. 152, 165-166 (1999))) (emphasis added by Judge Lindemann) (citations edited).

The above quotes from the Amplification Order are inconvenient truths for the CAIR Defendants, as they puts the lie to the core premise of their entire Appeal. Judge Lindemann also sensibly recognized that while *Neuwirth* is *one of* the controlling authorities, it is not *the only* controlling authority and "does not supersede" relevant authority from the Supreme Court of the United States such as *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). (Da 204). The CAIR Defendants hang their hat on the phrase "does not supersede" in an effort to manufacture legal error. (Db 18). But there is no legal error in Judge Lindemann's non-controversial recognition that the Supreme Court of the United States is the highest court in the land.

In fact, it is the CAIR Defendants who "complete[ly] disregard" controlling precedent in order to advance an intellectually dishonest argument that goes like this: because the outcome in *Neuwirth* went in favor of the defendants (on facts having absolutely nothing to do with Herman's case) and because *Neuwirth* is the *newest* defamation decision at the appellate level, this Court should ignore *all other* authority in which defamation plaintiffs were successful, including the *Supreme Court of New Jersey's* often-cited decision in *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 769 (1989)

(reversing dismissal of defamation claims despite extremely limited factual development in pleadings at the trial level that were "not crystal clear" and "disjointed"). As Defendants would have this Court believe, *Neuwirth* is the *only* decision in the history of defamation law that matters. They get so carried away with their "one case" strategy, losing the forest for the trees, that their motion focuses almost *exclusively* on *Neuwirth*, citing it on page after page in nearly *forty* instances, to the near-exclusion of any other arguments. (Db 1-2, 10-12, 14-20, 22-27). But this Court knows better because it decided *Neuwirth*. The decision didn't break new ground; rather, this Court in *Neuwirth* correctly applied and restated the Supreme Court of New Jersey's well-established precedent that the actual malice standard requires a showing "that the publisher either knew the statement was false or published with reckless disregard for the truth." *Neuwirth*, 476 N.J. Super. at 391 (quoting *Lynch*, 161 N.J. at 165). In other words, the law of defamation is the same in New Jersey today as it was before *Neuwirth*. The fact that *Neuwirth* issued during the pendency of the case at bar is irrelevant because the underlying jurisprudence relating to defamation generally, and actual malice specifically, was already well-settled.

II. Judge Lindemann Properly Analyzed and Applied *Neuwirth*

In *Neuwirth*, the plaintiff began employment with the State as an assistant commissioner for the Department of Health in October 2018. 476 N.J. Super. at

382. On May 28, 2020, the plaintiff was terminated. *Id*. at 384. According to the plaintiff, people associated with "the State and/or Governor's Office" anonymously and falsely reported to the media that he had been terminated because he did not disclose and obtain approval for outside consulting work, and that he had poor attendance while employed by the State. *Id*. at 385. At a May 29, 2020 press briefing, Governor Murphy stated about the plaintiff, *inter alia*: ". . . folks are not – it's par for the course that you're not supposed to have another source of income, that's just as a general matter. We'll leave it there." *Id*. During a June 1, 2020 press briefing, Governor Murphy, in response to a question about the vacancy created by the plaintiff's termination, stated, *inter alia*: "I don't have a good answer about anyone else who may have a second job . . . . But you basically, someone has to declare themselves and seek basically a waiver or an exemption for it, I think is the right way to put it." *Id*. at 385-386. After Attorney General Platkin described the approval process for outside employment, Governor Murphy noted that their comments were "not specific to any one individual." *Id*. at 386.

Following a cease and desist letter to the State, the plaintiff sued the State under various theories and eventually filed a fourth amended complaint alleging defamation against Governor. *Id*. at 386-387. The State Defendants moved to dismiss and the trial court denied the motion. *Id*. at 389. This Court granted leave

to appeal and reversed, holding that the plaintiff failed to adequately plead actual malice. *Id*. at 389-393.

Judge Lindemann properly analyzed and applied *Neuwirth* in relation to the question of actual malice in Herman's case. He correctly pointed out that in *Neuwirth*, there were no facts "from which a factfinder could conclude Governor Murphy knew, or had serious doubts about, the veracity of the alleged defamatory statements he made." (Da 204) (quoting *Neuwirth*, 476 N.J. Super. at 393). In contrast, Judge Lindemann noted that here, "[Herman] has presented detailed facts . . . ." (Da 204). Judge Lindemann provided further analysis in the Amplification Order. First, he recited the actual malice standard as set forth in *Lynch,* 161 N.J. at 165 (Da 215). Then, as discussed *supra*, he harmonized *Neuwirth* with *St. Amant*, correctly pointing out that actual malice may lie where the defendants publish a story that is "wholly unbelievable." (Da 215) (quoting *Neuwirth*, 476 N.J. Super. at 391-392 (citing *Lynch*, 161 N.J. at 165-166)). And, on pages six and eight of the Amplification Order, Judge Lindemann again pointed out that the level of detail in the case at bar far exceeded that of *Neuwirth*: "the Complaint in *Neuwirth* pales in comparison to the record here . . . the allegations in the Amended Complaint demonstrate 'wholly unbelievable' and 'reliance on an informant of dubious veracity.'" (Da 216-18). Thus, Judge Lindemann recognized that under *Neuwirth*, the CAIR Defendants

can be held liable because they re-published Muhammad's absolutely wild third-hand account from a dubious informant about a grandmotherly teacher attacking a second grader, a story that could fairly be characterized on its face as "wholly unbelievable."

III. The Amended Complaint Sufficiently Pleads Actual Malice Because the Wild Story Republished by the CAIR Defendants Was "Wholly Unbelievable" from an "Informant of Dubious Veracity"

The fundamental basis of Defendants' Appeal is that the Amended Complaint fails to plead actual malice. They argue that actual malice may not be imputed from one defendant to another, (Db 20-22), and more broadly, that Herman's allegations about the CAIR Defendants did not provide any specific facts evidencing the CAIR Defendants' state of mind, (Db 23-27). These arguments, whether correct or not, are completely irrelevant under the "wholly unbelievable" and "dubious veracity" standards.

As set forth in great detail in the Amended Complaint, and in the Amplification Order, Plaintiff pleaded that the Defendants' defamatory statements were "wholly unbelievable" and that they were made in "reliance on an informant of dubious veracity." Am. Compl. ¶ 32, 66, 101, (Da 016, 023-24 & 035-36); *see also* Amplification Order at p. 6 (Da 218) ("the Complaint in *Neuwirth* pales in comparison to the record here . . . the allegations in the Amended Complaint demonstrate 'wholly unbelievable' and 'reliance on an

informant of dubious veracity.'"). Indeed, Judge Lindemann recognized a critically important point about the actual malice standard that the CAIR Defendants ignore: a plaintiff need not plead a comprehensive series of "behind-the-scenes" or "insider" facts regarding defendants' communications in order to show that there was a "high degree of awareness of . . . falsity" or that the defendants had "serious doubts" as to the truth of their statements, and thereby satisfy the actual malice standard. *See Neuwirth*, 476 N.J. Super. at 391-392; *Costello*, 136 N.J. at 615 ("[r]arely will direct evidence exist to meet that burden. Instead, a plaintiff might show actual malice by demonstrating that the defendant had 'obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'") (internal citations omitted)); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1089-90 (3d Cir. 1988); *Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982).

Yet, this impossible standard is exactly what the CAIR Defendants seem to demand of Herman. Through no fault of her own, Herman, who has not yet had an opportunity to conduct discovery, does not have access to the CAIR Defendants' internal emails or phone records, or other evidence regarding what they knew and when they knew it. Almost no defamation plaintiff could possibly have access to such evidence prior to discovery.

This is why there is a ***second path*** to pleading actual malice, as set forth in *Neuwirth*. A plaintiff can also show "reckless publication" (and thus actual malice) where the defendants "fabricate[] a story, publish[] one that is *wholly unbelievable*, or relies on an *informant of dubious veracity*, or purposely avoids the truth" *Id*. at 392 (internal citations omitted). That is exactly the case here—Plaintiff plead that the CAIR Defendants republished an utterly absurd story about a grandmotherly teacher assaulting a second-grader, a story that was "wholly unbelievable" on its face.

With this second path in mind, Judge Lindemann was most certainly on target when he noted that the facts in *Neuwirth* "pale[] in comparison" to the facts presented by Herman; the statements made by Governor Murphy about the plaintiff in *Neuwirth* were not particularly noteworthy or hard-to-believe, indeed, the Governor was merely discussing the mundane subject of dual employment and alluding to the possibility that the plaintiff may have engaged in unapproved dual employment. *Neuwirth*, 476 N.J. Super. at 385-386. In contrast, the outrageous story that the CAIR Defendants parroted to their hundreds of thousands of social media followers was *anything but* mundane: they claimed as true a completely wild tale that a grandmotherly second-grade teacher—Herman—had viciously and violently assaulted in a student in a

sudden fit of racially motivated pedagogical abuse. They did this because their audience demands "outrage."

Unlike in *Neuwirth*, the story that the CAIR Defendants maliciously spread was on its face "wholly unbelievable." Moreover, unlike in *Neuwirth*, where the allegedly defamatory story came from high-level State employees who were *not* of dubious veracity and thus credible—including the Governor, the Attorney General, and the plaintiff's supervisors—the informant in Herman's case was a second-grade student and the student's story was uncorroborated in any way, thus adding the "informant of dubious veracity" prong to the analysis. The fact that the story in Herman's case was "wholly unbelievable" is on its own enough to satisfy the actual malice standard; the additional fact that the story came from a second-grader without any corroboration only adds a second prong that would satisfy the actual malice standard, since the "wholly unbelievable" and "dubious veracity" prongs are "*or*" factors rather than "*and*" elements.

Ultimately, the question that establishes actual malice in Herman's case is this: Why would a grandmotherly second-grade teacher with decades of teaching experience suddenly turn into a bigot, and viciously attack and assault a helpless second-grade student for no apparent reason? There is no rational answer to this question, which is why the story is "wholly unbelievable." No

less an authority than the Essex County Prosecutor's Office clearly realized that this story was "wholly unbelievable" when it declined to prosecute Herman. Am. Compl. ¶ 72 (Da 026). If Defendants' *crazy* story about Herman is not "wholly unbelievable," then it would be hard to picture what kind of story *would* meet that standard.

Defendants improperly attempt to use Muhammad's reputation as a shield against liability, arguing that Defendants had "every reason" to believe Muhammad's third-hand version of events because Muhammed was a "public figure" who "authored three books" promoting girls wearing hijab. (Db 25-26); (Da 004-06). But Defendants have it backward—evidence of Muhammad as a well-know partisan advocate, culture warrior, and author of books in favor of using the hijab, is exactly why Muhammad's libel ***should have been questioned more*** by Defendants, ***not less***.

Mohammad's bias is explicit on the face of the Muhammad Statement #1, which she prefaced with a publicity plug for her pro-hijab children's book. Am. Compl. ¶¶ 21-26 (Da 013-15) ("***I wrote this book*** with the intention that moments like this would never happen again. When will it stop?" (emphasis added)). Using this opportunity to peddle her book and her ideological bias was a bright red flag that should have made Defendants pause before blindly parroting Muhammad's third-hand account of an unnamed seven-year-old's

outrageous and wholly unbelievable story. Muhammad's own statements show that she herself was an "informant of dubious veracity," who cannot be blindly relied upon for the truth of her allegations she was publishing to promote her own brand, social media agenda, and her 2019 children's book. *See Neuwirth*, 476 N.J. Super. at 391-392 (citing *Lynch*, 161 N.J. at 165-166); *St. Amant*, 390 U.S. at 732 (1968) ("[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of [her] imagination, or is ***based wholly on an unverified anonymous telephone call***. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation").

Here, where portions of the story are clearly fabricated, self-serving, and—by Defendants' own admission—based wholly on an unverified and unidentified second-grader, Muhammad was herself an "informant of dubious veracity," precisely *because* of her public reputation and advocacy work. (Db 25-26); *see Neuwirth*, at 391-392; *Lynch*, 161 N.J. at 165-166; *see also St. Amant*, 390 U.S. 727, 732.

Defendants cannot deny they had a duty to attempt some independent investigate before blindly relying on Muhammad when making their baseless, false, and outrageous accusations against Herman. "Although failure to

investigate fully will not by itself be sufficient to prove actual malice, a failure to pursue the most obvious available sources for corroboration may be clear and convincing evidence of actual malice." *Costello v. Ocean Cnty. Observer*, 136 N.J. 594, 615 (1994) (emphasis added). Here, it is clear that the most obvious available sources for corroboration—Herman herself, the Student herself, the Student's family, or other persons who were in the room—were never pursued by the Defendants, providing further evidence of their actual malice.

Thus, when Plaintiff's Amended Complaint, briefing on the CAIR Defendants' Motions to Dismiss, and the Amplification Order are viewed through the lens of what *Neuwirth actually said* about actual malice, it is clear that this case is replete with factual allegations going to the actual malice of each of the Defendants. Contrary to the CAIR Defendants' distortion of *Neuwirth*, there is more than one way to plead actual malice, and point-by-point allegations about what the CAIR Defendants said or thought behind the scenes is not required at the pleading stage where a story is "wholly unbelievable" or the informant may be one of "dubious veracity." *See* Am. Compl. ¶ 32, 66, 101, (Da 016, 023-24 & 035-36), Amplification Order at pp. 5-8 (Da 215-218).

CONCLUSION

For all of the reasons discussed herein, the Appeal should be denied in its entirety.

Respectfully Submitted,

Dated: March 27, 2024
New York, NY

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TAMAR HERMAN, Plaintiff, vs. IBTIHAJ MUHAMMAD, SELAEDIN MAKSUT, COUNCIL ON AMERICAN-ISLAMIC RELATIONS A/K/A/ CAIR A/K/A CAIR-FOUNDATION INC., and CAIR NEW JERSEYA/K/A CAIR NJ A/K/A CAIR NJ INC., Defendants.	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** DOCKET NO. A-784-23T2 SUPERIOR COURT OF NEW JERSEY LAW DIVISION – UNION COUNTY, DOCKET NO. UNN-L-002913-22 Sat Below: Hon. Daniel R. Lindemann

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PRELIMINARY STATEMENT

This Court is charged with undertaking a *de novo* review of the pleadings below to determine whether Plaintiff Tamar Herman adequately pled actual malice against the CAIR Defendants in her Amended Complaint ("the Complaint"). This independent review can lead to only one conclusion: Plaintiff has failed to meet the pleading standard articulated in Neuwirth v. State, 476 N.J. Super. 377 (App. Div. 2023), and predecessor cases.

Though Plaintiff urges this Court to ignore its own precedent and defer to the erroneous rulings below, it is clear that the Complaint asserts no "facts from which a factfinder could conclude" that each of the CAIR Defendants knew, or had serious doubts about, the veracity of the allegedly defamatory statements they made. Id. at 392-93. Indeed, in her Opposition ("Opp.") Plaintiff appears to concede that her arguments in support of actual malice rest largely on patently insufficient claims of corrupt motive and failure to sufficiently investigate, as well as conclusory boilerplate language.

In an attempt to justify this dearth of facts supporting actual malice, Plaintiff concocts a false scenario wherein every Challenged Statement made by the CAIR Defendants was a "wholly unbelievable" fabrication. The Complaint's own allegations flatly preclude such a finding. Indeed, Plaintiff even admits that a version of the Incident—one on its face prone to being viewed differently by those

involved—actually occurred, pleading in her Complaint that she touched her young student's hijab without the girl's consent and exposed her hair. While Plaintiff's and Ibtihaj Muhammad's accounts of the impact and aftermath of these events may differ, the core facts of the Incident are hardly unbelievable. In fact, they indisputably occurred. Moreover, by her own admission Plaintiff was subsequently put on administrative leave and criminally investigated—circumstances inconsistent with any theory that Muhammad's account was wholly unbelievable.

Plaintiff's Opposition also admits unreservedly that the CAIR Defendants relied solely upon the account published by Muhammad—a person the Complaint describes as having a stellar reputation both in Maplewood, New Jersey and nationwide, and for whom Plaintiff herself had great "affinity and respect." By Plaintiff's own allegations, therefore, the CAIR Defendants had *every reason* to believe Muhammad's statements about the Incident. Tied down by these admissions, Plaintiff now bizarrely claims that Muhammad should not have been trusted "precisely because of her public reputation and advocacy work." Opp. at 25. Yet she offers no law—or even logic—supporting a theory that a person's *positive* reputation and widely admired advocacy work should cause them to be mistrusted.

Herman's allegations concerning the subjective state of mind of Muhammad, a public figure whose social media posts were the source for the CAIR Defendants' statements, moreover, say nothing about the subjective state of

mind of any of the CAIR Defendants. The court below erroneously imputed Muhammad's alleged subjective knowledge to the CAIR Defendants, in contravention of long-settled constitutional principles. Plaintiff now hopes this Court will do the same. It should unequivocally decline.

Having exhausted her legal and factual arguments, Plaintiff attempts to manufacture outrage based on facts outside of the pleadings and unconnected to the Incident. Rather than bolstering her case, her attempts at inflaming personal passions expose the weakness in her arguments. As the saying goes, "when neither the law or the facts are on your side, pound the table." As this Court can easily recognize, this case is not a referendum on current international events. It is a simple matter of defamation law. The question before this Court is whether Plaintiff can survive a motion to dismiss where she is required, but has failed, to plead facts supporting a theory of actual malice as to *each* defendant. Under settled caselaw, she cannot.

ARGUMENT

Plaintiff cannot escape that, despite two bites at the apple, she has not pled actual malice as to the CAIR Defendants in her Complaint. Knowing she cannot rebut the CAIR Defendants legal arguments, Plaintiff's Opposition heavily relies on the trial court's erroneous decision below. But Plaintiff's deference to the trial court is misplaced. Particularly because this case implicates the First Amendment, the

Court must conduct "an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression." Ward v. Zelikovsky, 136 N.J. 516, 536-37 (1994) (quotations omitted); see also Bacon v. New Jersey State Dep't of Educ., 443 N.J. Super. 24, 33–34 (App. Div. 2015) (courts "employ a plenary standard of review" over the trial court's decision).

Plaintiff also clings to allegations that on their face cannot amount to actual malice, even if accepted as true, and to inapplicable legal theories. Effectively conceding that her pled allegations of failure to sufficiently investigate, improper motive, and failure to retract cannot support a finding that the CAIR Defendants published with actual malice, Plaintiff now attempts to shoehorn the same deficient facts into a "second path to pleading actual malice." Opp. at 22. More specifically, in her Opposition Plaintiff argues that the CAIR Defendants published their statements with "reckless disregard" for truth by repeating a "wholly unbelievable" story and relying on an "informant of dubious veracity." See id. But Plaintiff's allegations have not come close to meeting those standards either. With a fresh pair of eyes on the record, it is clear that the trial court's orders were erroneous, its

decision should be reversed, and the Complaint should be dismissed because Plaintiff has not pled actual malice against the CAIR Defendants.[1]

A. The Complaint Does Not Allege Reckless Publication Based on a "Wholly Unbelievable" Story

Plaintiff's assertion that the Challenged Statements parrot a "wholly unbelievable" story is a legal conclusion unsupported by the allegations in the Complaint. First, Plaintiff's version of events corroborates the facts relayed in the CAIR Defendants' statements. The CAIR Defendants' statements express shock and outrage on behalf of a seven-year-old student whose teacher "pulled" her hijab, "forcibly stripping off the religious headscarf" in full view of the class without the child's consent. Plaintiff alleges the same core facts. Though she was "aware that the Student—who was seven years old—regularly wore a form-fitting hijab," Herman pleads in her Complaint that she:

> asked the Student to brush back her hood…. When the Student did not respond to Herman's request, Herman, justifiably believing the Student's hijab was underneath brushed the hood back a few inches with her hand…. While lightly brushing back the hood itself, and without making contact with the Student physically, Herman noticed the Student's hair and that the Student was not wearing her regular form-fitting hijab underneath. Herman immediately and gently brushed the hood back to cover all the Student's hair and, out of respect for the religious practices of Islam and for the Student's observation of same, apologized to the Student.

Da_010-11. Stripped of their subjective narrative and gloss, Plaintiff's allegations

[1] The CAIR Defendants reserve, and do not waive, their arguments below that the statements are substantially true and/or opinions based on disclosed facts.

are simply a different perspective of the same incident. In both versions, Herman was aware of the child's religious practices. In both versions, Herman did not have permission from the student to touch her head covering. In both versions, Herman touched the head covering, exposing the child's hair as a result. In both versions, Plaintiff verbally acknowledged what she had done.

Plaintiff insists that only her version of these events is believable. Essentially, she argues that because she knows that she did not touch the child's hijab maliciously, then no one could reasonably believe it. And anyone who believes anything different cannot be trusted. But the Complaint itself belies any such theory. It makes clear that Muhammad and the CAIR Defendants were not the only ones to believe the Student's account. Both the school's administrators and the Essex County Prosecutor found the Incident as described by the child and her parents was credible enough to warrant action. The day after the Incident, on October 7, 2021, the school placed Herman on administrative leave before the end of the school day (and before Muhammad's first statement was published at 4:03 PM that day). Da_011-12; Opp. at 8. The Essex County Prosecutor also found the story worth investigating and did so for three months before finally declining to press charges. Da_026. And Governor Phil Murphy even tweeted on October 8 that he was "deeply disturbed by these accusations." Da_013. These responses by public officials demonstrate that Muhammad's account was, regardless of its truth, entirely

believable.

Plaintiff clearly understands the weakness of her argument because she exaggerates the actual language and gist of the CAIR Statements in an attempt to establish that the student's story was "wholly unbelievable." In reality, "forcefully stripping off the religious headscarf" was the harshest language the CAIR Defendants used, conveying the child's lack of consent to the hijab's removal. See Opp. at 8 (statement chart). But Plaintiff argues in her opposition that the Statements were "premised upon a . . . story that Herman physically abused a female Muslim student." Opp. at 2. Plaintiff further argues that the CAIR Defendants "parroted…a completely wild tale that…Herman had viciously and violently assaulted a student." Opp. at 22 (emphasis added). These extreme words are Plaintiff's words, not the CAIR Defendants'. The CAIR Defendants' statements focused the "disrespectful" nature and "humiliating" effect of Herman's actions, not on any alleged physical violence. See, e.g., Da_018-19 (CAIR NJ Executive Director Seladin Maksut stated that "forcefully stripping off the religious headscarf of a Muslim girl is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience."); Da_019-20 (Maksut noting that "[t]o remove [the hijab] publicly can be very humiliating").

Plaintiff's own distortion of the actual Statements cannot be the basis of finding that the student's story was "wholly unbelievable." And she certainly has

not cited any cases to support that her own exaggerated interpretation of a statement should be the measure of whether it is "wholly unbelievable." In fact, none of the cases Plaintiff cites even found that a challenged statement was wholly unbelievable.

The rare cases where courts find reckless reliance upon wholly unbelievable accounts involve facts bearing no relation to those here. For example, in one case (not cited by Plaintiff), the court found reckless disregard for truth where the plaintiff alleged in detail how the defendant had fabricated nearly every significant detail of the story based on sources that did not exist. Pistilli-Leopardi v. MediaNews Grp., Inc., 2020 WL 3967992, at *5 (N.J. Super. Ct. App. Div. July 14, 2020). Those circumstances could hardly be farther removed those here, where Plaintiff alleges the CAIR Defendants' statements recounted an Incident that admittedly did occur (though those involved had different perspectives on what happened), in reliance upon a known, highly respected source. Under these pled facts, Plaintiff simply cannot meet the high bar for pleading actual malice.

B. The Complaint Does Not Allege Reckless Publication Based on an "Informant of Dubious Veracity"

Plaintiff's Complaint also fails to allege that the CAIR Defendants relied on an "informant of dubious veracity."

Plaintiff concedes that the CAIR Defendants relied upon Ibtihaj Muhammad as their source for the CAIR Statements. See Opp. at 25 (the CAIR Defendants "rel[ied] on Muhammad when making" the statements at issue). See also Opp. at 3,

13, 20, 24. The Complaint does not allege (because it cannot) that any of the CAIR Defendants were familiar with the Student or her mother, making it irrelevant whether they were "dubious witness[es]" or "unverified and unidentified" as Plaintiff contends. See Da_019, DA_023-24. Da_035-36; Opp. at 25. The sole question for this Court is whether Plaintiff has sufficiently pled that it was reckless for the CAIR Defendants to rely upon Muhammad. The Complaint's own allegations make any such finding impossible.

Indeed, Plaintiff uses more than three pages of her Complaint to extol the virtues of Muhammad. Da_004-7. She includes extensive detail on Muhammad's athletic career, including that Muhammad is a former Olympic fencer who medaled at the 2016 Olympics, where she was the first women to wear a hijab while competing. Da_004-6. The Complaint also alleges that Muhammad was named by President Obama to the President's Council on Fitness, Sports, and Nutrition. Id. She also grew up in Maplewood, where Plaintiff teaches, and she is a business owner and author of three books. Id. Muhammad has been the subject of two biographies and is included in the Barbie line of female role models. Id. The Complaint further alleges that Plaintiff herself was friendly with Muhammad and found her to be upstanding and inspiring. Plaintiff shared her "affinity and respect for Muhammad" by supporting her on Facebook and giving her a "prominent place in Herman's classroom," including hanging a poster of Muhammad, displaying Muhammad's

book in her classroom, and using her "as an example of perseverance, persistence, dedication, overcoming obstacles, overcoming adversity, and achieving excellence in spite of it all." Da_006-7 These allegations are utterly incompatible with any theory that Muhammad was an unreliable source.

Despite her own admissions, Plaintiff now argues that "Muhammad was herself an 'informant of dubious veracity,' precisely because of her public reputation and advocacy work." Opp. at 25. At its core, this argument suggests that Muhammad, as a Muslim woman who advocates for pride in wearing a hijab, cannot be trusted to relay information about incidents involving other hijab-wearing Muslims. Being a "partisan advocate," Opp. at 24, cannot be enough to find Muhammad is a dubious informant. Indeed, such a finding would be inconsistent with numerous cases rejecting the theory that partisan bias may be evidence of actual malice. See, e.g., Dershowitz v. Cable News Network, Inc., 541 F. Supp. 3d 1354, 1370 (S.D. Fla. 2021) (striking allegations of political animus as "immaterial and impertinent" to the question of actual malice); Arpaio v. Robillard, 459 F. Supp. 3d 62, 66 (D.D.C. 2020) ("the motivations behind defendants' communications—inspired by political differences or otherwise—do not impact whether defendants acted with actual malice as a matter of law"); Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665 (1989) (political or financial "motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice").

Nor can Plaintiff offer any cases that support her backwards theory that Muhammad's public advocacy for a marginalized community renders her categorically unreliable. In fact, the Supreme Court's decision in St. Amant v. Thompson, which Plaintiff repeatedly cites, contradicts this theory. There, the Court found that the Plaintiff had failed to demonstrate that it was "reckless disregard of truth" to "heedless[ly]" rely upon a source who was personally involved in the labor dispute at the heart of the statements merely because he had a personal stake in the issue. 390 U.S. 727, 730-31, 733 (1968). It explained that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id. at 731 (emphasis added). The Court found this standard could not be met in the absence of evidence "indicat[ing] an awareness by [the defendant] of the probable falsity of" the statement at issue, and noted in particular the plaintiff's failure to demonstrate a "low community assessment of [the source's] trustworthiness or unsatisfactory experience with him by [the defendant]." Id. at 733. See also Durando v. Nutley Sun, 209 N.J. 235, 252 (2012) (citing approvingly).

New Jersey cases applying this standard have arrived at similar conclusions. For example, in Pro. Recovery Servs., Inc. v. Gen. Elec. Cap. Corp., 642 F. Supp. 2d 391 (D.N.J. 2009), the court found that even though the source had gotten facts

wrong and was a "disgruntled" former employee of the plaintiff, she was not an informant of "dubious veracity" because she was "not only readily identifiable, but also provided her personal contact information, a written statement, and demonstrated commitment to her allegations…." Id. at 404. Similarly, in Turf Lawnmower Repair, Inc. v. Bergen Rec. Corp., 139 N.J. 392, 426 (1995), the court found the evidence was insufficient to supporting a finding of actual malice even where the reporter had relied solely upon sources "whom he knew had bias against" the plaintiffs, omitted relevant information, and his reporting was described by an expert as "totally unprofessional." Id. at 433-34. Conversely, in Gray v. Press Commc'ns, LLC, 342 N.J. Super. 1 (App. Div. 2001), the court found that a factfinder could find "reckless disregard for the truth" based on "sources…of dubious veracity," where the sources' identities were "so vague that a jury could find that they were contrived after the fact." Id. at 6-7 (emphasis added).

Here, Plaintiff's pleadings fall far below the threshold showing necessary to survive a motion to dismiss. Not only does Plaintiff fail to allege "a low community assessment" of Muhammad or and prior suspect dealings between Muhammad and the CAIR Defendants, St. Amant, 390 U.S. at 733, her Complaint also describes Muhammad in glowing terms as a nationally respected model citizen who Plaintiff herself deeply admired. These alleged facts are not only insufficient to plead actual malice, they are utterly incompatible with it.

C. Plaintiff Fails to Plead Actual Malice as to Each CAIR Defendant

Even in its error, the trial court below appeared to recognize that the Complaint's allegations against the CAIR Defendants were insufficient to plead actual malice. Thus, it wrongly held that allegations concerning Muhammad could be imputed to the CAIR Defendants. See Da_216-18. This reasoning defied the settled principle that actual malice must be sufficiently pled as to each defendant. See Durando, 209 N.J. at 251 ("The [actual malice] test is subjective, not objective, and involves analyzing the thought processes of the particular defendant" (emphasis added)); Secord v. Cockburn, 747 F. Supp. 779, 787 (D.D.C. 1990) ("Actual malice must be proved separately with respect to each defendant"). Indeed, even Plaintiff now appears to concede (by declining to dispute), that it was clearly erroneous for the trial court to impute Muhammad's alleged subjective knowledge of falsity to the CAIR Defendants. See Opp. at 20. It nevertheless bears underscoring that actual malice, by its very definition, may not be imputed between defendants.

As a consequence, Plaintiff's claims against the CAIR Defendants must be dismissed unless she has alleged "facts" in her Complaint "from which a factfinder could conclude" that each of the CAIR Defendants—CAIR Foundation, CAIR-NJ, and Selaedin Maksut—knew their statements were false or "in fact entertained serious doubts as to their truth," St. Amant, 390 U.S. at 731. The Complaint falls utterly short of alleging such facts. First, as noted above, Plaintiff's allegations as

to Muhammad's knowledge of Herman, the Student, or the Student's mother does not in any manner evidence knowledge of falsity by the CAIR Defendants. Second, the Complaint fails to point to any reason that any, much less each, of the CAIR Defendants should each have doubted the truth of their statements. Indeed, the Complaint does not even distinguish among the CAIR Defendants in alleging (in a conclusory fashion) that they acted with actual malice. See Da_023-026.

Faced with her own pleading deficiencies, Plaintiff's Opposition repeatedly calls the CAIR Defendants "antisemitic" and transparently attempts to inflame this Court by invoking the Israel-Palestine conflict. See Opp. at 6-7. Putting aside the flagrant impropriety of referencing the events of October 7, 2023 in the context of a lawsuit concerning statements made two years prior, Plaintiff's attacks have no logical place in this matter either. The Complaint does not allege that the CAIR Defendants knew Plaintiff was Jewish when they made their statements, much less that they were motivated to lie about Plaintiff by virtue of their supposed "antisemitic viewpoints." This Court should reject Plaintiff's attempt to weaponize a polarizing international conflict to distract from her failure to plead actual malice as to each defendant.

CONCLUSION

For the foregoing reasons, the CAIR Defendants respectfully request that this Court reverse the trial court's October Order and November Order and dismiss Plaintiff's claims against the CAIR Defendants with prejudice.

Dated: April 10, 2024

Respectfully submitted,

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