

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JENNIFER ECKHART,

Plaintiffs,

v.

FOX NEWS NETWORK, LLC and ED HENRY, in his
individual and professional capacities,

Defendants.

Case No. 20-CV-5593 (RA) (GWG)

**MEMORANDUM IN SUPPORT OF REPLY TO OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT OF DEFENDANT ED HENRY**

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PRELIMINARY STATEMENT

The Opposition (the “Opp.”) of Plaintiff Jennifer Eckhart (“Plaintiff” or “Jennifer”) attempts to manufacture a disputed issue of material fact by misleading and even false references to the record that distract from the core facts of this case: Jennifer sought out, invited, encouraged, and expressed pleasure from sex with Defendant Ed Henry (“Defendant” or “Ed”) over a three year period without ever mentioning to anyone until years after the fact, in the context of a ginned-up lawsuit, that her consensual relationship with Ed was in fact coerced and even, incredibly, constituted rape. But the issue on summary judgment is not whether attorneys can characterize facts in different ways but what the facts themselves show and whether there is truly a triable issue as to a materially disputed fact. Despite its creative attempts to invent a fictional past for Jennifer and immunize her from the plain import of her own erotic language – “love it,” “want it badly,” “someone needs to take ownership of this pussy,” “slide my bikini off,” “come do me in the back of this cab” – with appeals to a “rape myth” allegedly perpetuated by the recipient of these sexual advances, the Opp. falls flat. The actual contemporaneous evidence in this case – the words of Plaintiff herself both before and after the allegedly coerced encounters with Defendant – demonstrate beyond any doubt that Jennifer and Ed engaged in a consensual, mutually pleasurable sexual relationship. There is no genuine issue of material fact as to the nature of the sexual relationship between Ed and Jennifer and no jury question as to “assault,” “rape” or “sex trafficking” on this record.

RESPONSE TO COUNTERSTATEMENT OF FACTS

Plaintiff’s Responses to Defendant’s Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 (the “Counterstatement”) is replete with misleading and even false assertions. Rather than supporting Jennifer’s claims, this pattern highlights the misleading and dishonest nature of Plaintiff’s lawsuit itself. Typical is the Opp.’s presentation of a truncated

version of an already truncated Whats App message. In her Ex. 61, submitted in support of the Counterstatement, ¶ 239, Jennifer presents a portion of one of her text messages as evidence that Ed “continued to verbally abuse and sexually harass Plaintiff after the rape.” However, this extract omits what immediately precedes the presented portion, namely, a provocative photograph of Jennifer’s legs, and an erotic invitation to sexual activity, “Come meet me,” and “come spread them [those leggggz] and slide my bikini off.” Compare Plaintiff’s Rule 56.1 Counterstatement of Facts, ¶ 239, Ex. 61, Dkt. 442-10 at 3, with Defendant’s Rule 56.1 Statement of Facts ¶¶ 107-114; Dkt. 438-52. This is not a one-off example, but part of a pattern. In one of the Exhibits submitted in support of Jennifer’s claims that Ed has “continued” to “verbally abuse” and “sexually harass” her, the Counterstatement identifies an extract from one of Jennifer’s preserved exchanges with Ed, including only Ed’s words referring to Jennifer as a “hottie” and a “perfect 10.” Ex. 61, Dkt. 442-10 at 4. Incredibly, the exhibit cuts out Jennifer’s own language making clear that, not only did Jennifer not have any regrets about sex with Ed, but that she was eager to repeat the experience, as the full extract, with Jennifer’s memorable words, “Come do me in the back of this cab,” makes indisputable. Dkt. 438-46. “Come meet me,” “Come do me,” “Come spread them” – there is simply no rational universe in which a woman who has just endured what is presented as an unimaginably horrible rape would pursue her “abuser” with such unambiguous, unqualified enticements.

Further, even after being called out for the Complaint’s deceptive use of the phrase ““#obey or #discipline,” the Counterstatement doubles down, insisting that this language is part of a continued abuse and harassment, *see* ¶ 239, when Jennifer’s own words tell the exact opposite story, in which she is the one suggesting the use of a belt and she is the one initiating the S&M “obey” banter. *See* Defendant Ed Henry’s Memorandum in Support of Motion for Summary Judgment of Defendant Ed Henry, Dkt. 437 (the “Mem.”) at 6, 17, 20 and Note 6.

With other examples, the Opp. does not even attempt to provide support for its misleading statements, simply cherry-picking language and referencing an exhibit and then omitting the message that demonstrates beyond peradventure that Jennifer had enjoyed and wanted to repeat the rough sex she recharacterizes years later as “rape.” The Counterstatement highlights the phrase, “gonna make you my little whore again,” but then omits from both Ex. 61 and 62 offered in support of these “facts” the actual message, crude as it is, in which Jennifer responds, “good, someone needs to take ownership of this pussy.” Dkt 438-51. The Counterstatement then cites Ed’s Valentine’s Day banter as part of his alleged ongoing sexual abuse, but fails to provide the large red heart and winking, tongue-out emoji with which Jennifer meets the banter, signifying both her pleasure (the heart) and shared sense of wackiness (the emoji). Statement of Facts ¶ 86. The Counterstatement overflows with material that follows the same selective and deceptive pattern. *See, e.g., infra*, at 6-9, 13.

LEGAL ARGUMENT

I. PLAINTIFF CONCEDES SUMMARY JUDGEMENT IS APPROPRIATE WHERE, IN COMPARISON WITH UNAMBIGUOUS CONTEMPORANEOUS EVIDENCE, SUBSEQUENT TESTIMONY IS “CONTRADICTORY OR RIFE WITH INCONSISTENCIES.”

The core question before the Court is whether Jennifer’s contemporaneous text messages, both before and after the alleged “rape” and other alleged instances of sexual violence are so contradictory and inconsistent with the narrative she has created years after the fact that no genuine issue of material fact exists as to Jennifer’s central claims of gender motivated violence and sex trafficking. Jennifer concedes that summary judgment is appropriate where, as here, testimony is so “contradictory or rife with inconsistencies such that it [is] facially implausible.” *Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 726 (2d Cir. 2010). Opp. at 8. This is not a case in which the Court is asked to parse the details of testimony and determine whether particular

assertions in this testimony, standing alone, are or are not credible. Nor is it a “he said, she said” dispute. It is a “she said/she said” case.

Here, we have Jennifer’s actual words, her actual contemporaneous expressions of enticement, pleasure, approval, and encouragement of a sexual relationship that simply cannot have been coerced when its defining feature is language such as “come do me,” “come meet me,” “good,” “miss more” and imagery such as a bright red kiss or heart, and sexually provocative photographs of naked body parts being erotically aroused. The narrative Jennifer has spun in her constructed testimony years later is, in light of the uncontroverted and incontrovertible contemporaneous evidence, so “replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in his complaint.” *Jeffreys v. City of N.Y.*, 426 F.3d 549, 555 (2d Cir.2005); *Jimenez v. City of New York*, No. 14-CV-2994 SAS, 2015 WL 5638041, at *6 (S.D.N.Y. Sept. 24, 2015) (alleged assault victim’s “current statement too fanciful to be believed”); *Shabazz v. Pico*, 994 F. Supp. 460, 470 (S.D.N.Y.1998) (“[W]hen the facts alleged are so contradictory that doubt is cast upon their plausibility, [the court may] pierce the veil of the complaint's factual allegations, dispose of some improbable allegations, and dismiss the claim”) (internal quotation marks omitted; alterations incorporated). *Vasquez v. Cnty. of Rockland*, No. 13 CIV. 5632 (SLC), 2020 WL 883514, at *9 (S.D.N.Y. Feb. 24, 2020) (plaintiff’s statements alone are an insufficient basis for the Court to conclude that [defendant’s] conduct was malicious or sadistic); *Beauvoir v. Falco*, 345 F. Supp. 3d 350, 368 (S.D.N.Y. 2018) (uncorroborated, self-serving testimony is insufficient to defeat summary judgment). *Fincher*, 604 F.3d at 726.

As Ed noted in the Mem. at 1, Jennifer has done a profound disservice to the “me too movement” by presenting such a wildly fanciful recharacterization of completely unambiguous language and conduct: Ed apparently had such overweening power over the naïve, innocent girl

Jennifer wants the Court to believe she was that her voluntary choices in sending erotic photographs, sexually explicit songs, enticing and provocative texts are somehow not what they seem but the coerced expression of an agency-less pawn of some Harvey Weinstein-like sexual predator. None of this even remotely passes the smell test. None of this has anything to do with Ed's credibility. If there were even a shred of contemporaneous evidence to suggest that Jennifer's photographs, songs, "emojis," words and images are something other than what they obviously are – an email to a friend, a confession to a therapist, a word to a parent – perhaps Jennifer might have the beginning of a case. But there is none of that. In the annals of 21st century assault and rape cases, there is not one in which the alleged victim has created such an unmistakable record of her own encouraging and approving of sexual relations later characterized as rape. In the most celebrated cases, such as the Weinstein or Haggis cases, there was no contemporaneous evidence – songs, text messages, emojis, erotic photographs – from the plaintiff enticing, indeed directing, the defendant to have sex with her ("come do me in the back of this cab"). In a "she said/she said" case, such as this one, the Court can, and should, shut the matter down. *People v. Jovanovic*, 700 N.Y.S.2d 156, 168–69 (1st Dep't 1999), cited approvingly by the Court in its order on sealing, Dkt. 431 at 7, is instructive. In that case, the Appellate Division ruled that certain pre-incident messages from the complainant should not have been excluded from evidence under the Rape Shield Law because they bore on the issue of consent. *Id.* More pertinently, as Judge Mazzarrelli wrote, concurring in part and dissenting in part, there was nonetheless a jury question because:

the complainant's testimony was corroborated by a neighbor who heard sounds as if someone were "undergoing root canal" from defendant's apartment at the time in question, by the complaining witness's prompt outcries to five individuals, some of these individuals' observations of the complaining witness' injuries, the lab results as to her clothing, and the e-mails sent between the complaining witness and defendant subsequent to the incident.

Id., 700 N.Y.S.2d at 175 (1999).

Nothing remotely similar occurred here. Jennifer told no-one of her later version of her relationship with Ed in the years after the events; she did not go to the police or seek to have a rape kit prepared; she did not arouse any attention during, or in leaving the hotel after, the incident; and she continued for months after the alleged “rape” to continue to solicit and/or encourage sex with Ed in the most provocative manner imaginable.¹ Jennifer deliberately misleads the Court with alleged evidence that she was prescribed medication in the aftermath of the alleged 2015 unwanted sexual encounter. Counterstatement ¶ 157, Ex. 50. According to Jennifer, “in 2015, she was prescribed bupropion to help cope with the distress caused by frequently seeing Mr. Henry in the Fox News offices in New York. Ex. 3 (Eckhart Dep.) at 332:8-19; Ex. 50 [Dkt. 423-17].” **But Ex. 50 consists of therapist’s notes from 2017, not 2015** (as can be seen by the age of the patient noted as 27 years of age and the date of birth as 5/2/90), makes no reference to bupropion, and obviously references the testimony of Dr. Oakes, to whom Jennifer complained in 2017 of anxiety following her father’s illness and the death of a friend, not a conjured up Dr. Sager. *See* Dkt. 423-17. The handwritten notes clearly read “Father – ill Close Friend – recently deceased.” This corresponds exactly to Dr. Oakes’ testimony. *See* Rule 56.1 Statement of Facts, ¶ 25, Oakes 65:21-25; 66:1-2. Internal inconsistencies and flat-out misrepresentations are not a proper means of creating a “disputed” issue of fact. A plaintiff cannot say anything and then hide behind the cloak of credibility as a means of taking a non-case to the jury. *See Pugh v. Casimir*, No. 18-CV-7350(EK)(RLM), 2021 WL 4463103, at *12 (E.D.N.Y. Sept. 29, 2021) (total absence of corroboration militates in favor of summary judgment).

¹ In addition to her many blandishments, such as “come slip off this bikini,” Jennifer sent Ed an erotic photograph of a busty woman by a pool in April 2017 months after the February encounter. Dkt. 391-39. *See also* Mem. at 7.

A. Jennifer Has Completely Failed to Raise a Triable Issue with Respect to Sex Trafficking.

Much of the Fourth Amended Complaint and the Opp. belabor irrelevant issues in a vain effort to establish a “modus operandi” that would support a “sex trafficking” claim. The “MO” evidence is irrelevant because, to proceed, Jennifer herself must bring forth more than a scintilla of evidence to support the claim that she was herself “enticed” into a “commercial sex act.” The contemporaneous documentary evidence establishes that if anyone was enticed into sex, it was Ed, not Jennifer (“com’n get it,” “come and do me,” “come spread,” “want it badly” “fucking dirty boy, I love it,” “good,” “miss more,” “someone needs to take ownership,” “All Eyes on You,” “Fuck you all the Time,” etc., etc.). A retrospective retelling of a story utterly inconsistent with the documentary evidence in a case cannot transform voluntary, consensual sex initiated by alleged victim into illicit “enticement.” Similarly, when the documentary evidence establishes that the alleged victim was a more than willing participant in sex that she both welcomed and enjoyed, far-fetched, evidence-free claims that the sex was “really” coerced by promises of fame and fortune necessarily fall flat. Jennifer’s own stories make no sense. As noted in the Mem. at 4, 16, Jennifer makes much of the fact that she carried a yellow legal pad to her first meeting with Ed but concedes that she never took the pad out of her purse. For her second sexual encounter, Jennifer does not even suggest there was a “commercial” motive; rather, her implausible, unsubstantiated claim is that Ed used his power to force her commit fellatio, not that he promised anything in exchange. With respect to the alleged rape, Jennifer’s own tale is that she only learned of Ed’s new job on the night of the incident, when she had been seducing him with erotic songs and photographs for months before the incident, and sent him text messages initiating the

S&M theme before she had, by her own account, any idea that Ed possessed any new “commercial” power.²

But Jennifer’s “modus operandi” evidence is itself insufficient as a matter of law to establish intent under 18 U.S.C.A § 1591. The Opp. introduces a new allegation from an admittedly drunk and sleep-deprived woman who claims that Ed somehow reached across from under a table without anyone noticing and fingered her in such a shocking manner she does not remember how she reacted. Opp. at 5-6; Dkt. 370-115 ¶ 11. Leaving aside the implausibility of this woman’s account, it is irrelevant to the sex trafficking issue because the woman does not even suggest that on this occasion or on any other Ed attempted to use the promise of career advancement to obtain sexual favors. On the contrary, the woman is adamant that she succeeded on her own merits at Fox and not because of anything Ed allegedly did for her professionally. Dkt. 370-115 at ¶ 8. Indeed, the woman claims she had no knowledge whether Ed even put in a word for her. *Id.* She cannot possibly have been enticed into a “commercial sex act” if she had no knowledge of whether Ed took any action on her behalf.

Jennifer cites extensively from text exchanges with one of Ed’s former romantic partners. Counterstatement ¶¶ 250-54. Notably, Jennifer cites from paragraphs 5 and 7 of

s declaration, but conveniently omits paragraph 6, which completely undermines everything that Jennifer attempts to force to admit:

² Jennifer claims that the Whats App message in which she sent Ed a picture of a belt and told him she would “always obey” occurred after the sexual encounter. Counterstatement ¶ 239. This is yet another example of obvious revisionist history (although it is unclear why Jennifer thinks sending this revisionism *helps* her case). Jennifer concedes that the alleged “rape” occurred on February 10, 2017. Counterstatement, ¶ 210. February 10 that year fell on a Friday. <https://bit.ly/3VZp78S>. The “always obey” message with the image of a belt sent by Jennifer references a prospective meeting “next” Thursday or Friday. *See supra* at 4. Similarly, Jennifer’s peppering of Ed with erotic photographs began on Wednesday, February 8 and continued until the morning of Friday, February 10, again, well before Ed made any mention of his new job, according to Jennifer herself. Mem. at 6; Rule 56.1 Statement of Facts ¶ 47; Counterstatement ¶¶ 215-220.

In or around November 2016, Ed and I became involved in a welcome, consensual, extra-marital relationship, which continued off and on until around March or April of 2020. At no time during my relationship with Ed did I feel forced or coerced into doing anything I did not want to do.

Dkt. 442-1 ¶ 6.

directly addresses the text messages that Jennifer attempts to use against her, explaining that they were written under the sting of jealousy and that in reality her relationship with Ed was “at all times welcome and consensual.” Dkt. 442-1 ¶ 12. Most pertinently, Jennifer leaves out the critical statement from the affidavit: “Ed never promised me any career advancement or other work-related benefits during our relationship.” Dkt. 442-1 ¶ 10.

Desperate to find anything to besmirch Ed given the void at the center of her case, Jennifer treats the Court to a hearsay news account of an alleged encounter with Roxy Maroquin, whose deposition was never taken and from whom Jennifer did not obtain a declaration in support. Counterstatement ¶¶ 263-64. But even assuming all the facts alleged are true, Ms. Maroquin’s account contains nothing remotely resembling an enticement into a commercial sex act.

Jennifer attempts to create a triable issue by loosely throwing around the word “lie”, citing an investigator’s “confident” reading of Ed’s mind as proof that Ed was “lying” about his awareness of an RAV complaint. Opp. at 7; Counterstatement at 269; Dkt. 423-12 ¶ 9. Absurdly, Jennifer then cites evidence that Ed was driving in a car with Karyn Turk as proof that he is “lying” about being sexually involved with Ms. Turk. Counterstatement, ¶ 271. But notwithstanding the arguments in the Opp., Ed’s credibility is not at issue. It is Jennifer’s own texts, messages, songs, emojis, and photographs that fatally undermine her case.

B. Jennifer Has Completely Failed to Raise a Triable Issue with Respect to Her Claims of Gender Motivated Violence, Assault and Battery.

Jennifer’s claims of Gender Motivated Violence, assault and battery all share a common feature: they cannot be maintained in the face of evidence of consent, as established by the

documentary evidence in this case. As with Jennifer's reinvention of her past years after the events at issue for purposes of sex trafficking, the contemporaneous documentary evidence leaves no doubt that Jennifer was a willing participant in sexual activities she sought out and enjoyed. The Court is not required to send to the jury a story that would require a superhuman suspension of disbelief. *See supra* at 4.

The first incident of which Jennifer complains occurred only months before she voluntarily compiled and sent to Ed her provocative list of erotic song titles. Indeed, Jennifer did not suggest to anyone that the first incident was in any way involuntary until after she filed her lawsuit. Declaration of Eden P. Quainton (the "Quainton Decl."), Ex. 1, Eckhart Dep., 431:15-20, 467:10-12.

Likewise, it strains credulity to the breaking point to believe that a bright, talented, educated career woman who admits there was no hierarchical professional relationship with Ed, *see* Dkt. 425 at 28, was forced to remove her panties involuntarily and provide them in an envelope to Ed. Only a woman enjoying and willingly participating in the thrill of an erotic relationship would act in this way. Jennifer's story that, frantic, panty less and having just been violently forced to perform oral sex on Ed, she then rushed down to a cab with a waiting boss without triggering the slightest concern or suspicion is utterly fanciful. *See Jimenez*, 2015 WL 5638041, at *6; Mem. at 4-5. Here too, the documentary evidence in the form of Jennifer's own playlist of songs speaks louder than her invented yarn. The only plausible interpretation for her selection of songs such as "All Eyes on You," and "Fuck you all night" in early 2016 is what the plain meaning of these words indicate: after the events of 2015, Jennifer's eyes were still on Ed and she wanted to have sex with him "all night," much as she would later entice him to "come do me in the back of this cab."

In reality, Jennifer knows that her stories from 2019 on about her 2015 sexual encounters cannot sustain her extravagant claims and focuses on the 2017 alleged “rape.” Indeed, in the scant two pages of her 25-page brief that Jennifer devotes to the ostensibly core issues in the case, Jennifer only discusses the alleged “rape” and ignores the 2015 incidents. But here the contemporaneous documentary evidence is overwhelming that the 2017 sexual encounter was voluntary, freely sought out, encouraged by Jennifer, and followed by further erotic enticements and demands for more sex. *See supra* at 4-5, 7; Mem. at 7-12.

The Opp.’s focus on *Roelcke v. Zip Aviation, LLC*, 571 F. Supp. 3d 214 (S.D.N.Y. 2021) highlights the untenable nature of Jennifer’s claims. First, *Roelcke* involved a case of alleged assault by an employer. Given Jennifer’s failure to articulate a plausible basis for her employment-related claims against Ed, *see infra* at 14, *Roelcke* is inapposite. But more fundamentally, *Roelcke* represents the paradigm “he said/she said” case that should go to the jury, not the “she said/she said” case where a plaintiff’s own contemporaneous statements render judgment as a matter of law appropriate. In *Roelcke*, 571 F. Supp at 232, the defendants proffered some evidence from third parties that they alleged cast doubt on plaintiff’s version of events, but they did not have the overwhelming record of plaintiff’s own contemporaneous statements present here encouraging, approving of, and seeking to renew a sexual experience only recast in a negative light years later.³

Fed. R. Evid. 415, on which Jennifer places much reliance, does not shore up Jennifer’s case. It is not that “corroboration is unnecessary,” Opp. at 14, but that “corroboration is irrelevant”—since there is nothing to corroborate. However, even taken at face value, Fed. R. Evid. 415 adds little, if anything. Fed. R. Evid. 415 provides that “in a civil case involving a

³ Remarkably, Jennifer cites *Jeffreys*, 426 F. 3d 549, twice in her short treatment of her core claims, even though *Jeffreys* is one of the leading cases granting summary judgment to defendants.

claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.”

Rule 415, as qualified by Fed. R. Evid. 413, which provides a restrictive definition of sexual “assault,” limited to non-consensual contact or gratification from inflicting death, bodily injury or physical pain on another, eliminates the vast majority of the purported corroborating evidence Jennifer has spent years attempting to accumulate while imposing millions of dollars in costs on others. Ed’s alleged “aggressively flirtatious” behavior, Counterstatement at ¶ 247, obviously does not constitute “sexual assault” with the meaning of Rule 413 and cannot be admitted as propensity evidence under Rule 415. Evidence of Ed’s relationship with

, dwelt on at length by Jennifer, was entirely consensual, according to herself, *see supra* at 8-9, and likewise cannot come with Rule 415. Counterstatement, ¶ 250-254.

Equally inadmissible under Rule 415 are allegations that Ed engaged “in inappropriate sexual banter,” Counterstatement ¶ 256, sent unwanted pictures, *id.* ¶¶ 256-262, or was “horny,” *id.* ¶ 266. Jennifer’s long recitation of an uncorroborated news report, Counterstatement, ¶¶ 263-64, is obviously inadmissible hearsay, which Rule 415 cannot save. *See, e.g., McMahon v. Valenzuela*, 14-cv-2085, 2015 WL 7573620, at *3 (C.D. Cal. Nov. 25, 2015) (“the general standards of the rules of evidence ... continue to apply [to Rule 415], including the restrictions on hearsay evidence”) (citing Kenneth W. Graham, Jr. 23 *Fed. Prac. & Proc. Evid.* § 5416 (1st ed.); *United States v. Sumner*, 119 F.3d 658, 662 (8th Cir. 1997) (citing comments of principal Congressional sponsors of Rule 415). Jennifer’s repetition of unsubstantiated claims in the Areu complaint your Honor dismissed with prejudice, Counterstatement ¶ 260, and her placing of (and refusal to

remove) false accusations against Ed on the public docket,⁴ typify the increasingly desperate quality of her attempts to “dirty up” Ed without providing admissible evidence.⁵

Ultimately, the third-party evidence is mere distraction. Jennifer’s case fails because of her own contemporaneous words and conduct. There was no “gender motivated violence,” no assault, no battery, only freely chosen, mutually pleasurable sex between two consenting adults. No amount of historical revisionism can erase the unambiguous texts, images and songs Jennifer sent to Ed before the alleged “rape” or the racy, enticing, sexually eager photographs and messages she continued to communicate to Ed in the days, weeks and months after an event she showed no signs of considering as anything other than a pleasurable, if kinky, experience she would gladly repeat.

⁴ In December 2023, Jennifer placed on the public docket a completely unverified accusation that Ed had criminally assaulted a woman from behind during a “boat party” in Florida and that this assault was captured on video. Dkt. 274. Jennifer’s counsel should have known this allegation was false because he was expressly told that Ed’s counsel had thoroughly investigated the allegation and found it to have no merit. Dkt. 282-1 at 5. The Court permitted Jennifer’s counsel to investigate the incident but ordered counsel to report back promptly to the Court. Quainton Decl. at ¶ 3, Ex. 2, Transcript of January 11, 2024 hearing, 83:6-8. Jennifer’s counsel neither reported back to the Court nor took any action to remove the scurrilous attack on Defendant from the docket. However, Ed’s counsel recently learned that Jennifer’s counsel was provided with a copy of the video in question and admitted that the video does not show Defendant engaging in any improper conduct and in fact ***does not show Defendant on the boat at all***. Quainton Decl. ¶ 4. Counsel has failed to inform the Court or to remove the accusation from the docket.

⁵ _____’s affidavit makes clear she is highly unlikely to testify at trial, in which case the affidavit would be inadmissible hearsay. *See* Dkt. 430-12 at 17 (expressing _____’s unwillingness to be “forced” to participate in “someone else’s lawsuit” and a desire not to be identified). Moreover, the account in the affidavit, the memory of an admittedly drunk, sleep-deprived woman, who does not remember how she or anyone else reacted to an implausible incident, has little probative value and potentially great prejudicial effect, and should in any event be excluded under Fed. R. Evid. 403. *See, e.g., Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1269-70 (9th Cir. 2000) (affirming District Court’s exclusion of Rule 415 evidence under Rule 403 where, *inter alia*, the witness admitted to being intoxicated at the time and there was a high risk of confusion as to the central issue of whether defendant molested plaintiff); *see also United States v. Barnason*, 852 F. Supp. 2d 367, 376 (S.D.N.Y. 2012) (it is “universal among the courts of appeals, that nothing in Rule 415 removes evidence admissible under that rule from Rule 403 scrutiny”) (citing *Martinez v. Cui*, 608 F.3d 54, 60 (1st Cir. 2010)).

II. PLAINTIFF PROVIDES NO BASIS FOR HER EMPLOYMENT-RELATED CLAIMS AGAINST DEFENDANT.

Jennifer fails to present any serious defense of her employment-related claims against Ed. Instead of legal argument showing how Ed can possibly be liable to Jennifer under the New York City Human Rights Law when she concedes he had no managerial or supervisory authority over her, *see* Dkt. 425 at 28, and the contemporaneous evidence establishes that the parties' sexting and sexual relationship was entirely consensual, Jennifer recites hornbook law, with no analysis, that an employer can be liable if he treats the plaintiff less well than other employees for a discriminatory purpose. *Opp.* at 12. *Williams v. New York City Hous. Auth.*, 61 F.4th 55, 69 (2d Cir. 2023). But Jennifer presents no argument or evidence that Ed was a de facto employer; that as her employer or employer's agent, he treated Jennifer less well than other employees; that he discriminated against her; that he had any authority over her; or that he had any power to affect her conditions of employment. As a result, Jennifer's NYCHRL cause of action necessary fails, even without the decisive evidence of Jennifer's own freely chosen erotic texts, images, photographs and songs, which foreclose a harassment claim against Ed.

III. PLAINTIFF OFFERS NO CONVINCING ARGUMENT IN SUPPORT OF HER CLAIM FOR "REVENGE PORN."

Jennifer's legal arguments fare no better than her factual arguments. In an attempt to salvage her "revenge porn" claims, Jennifer advances two arguments, neither of which is persuasive. First, according to Jennifer, reasonable people can differ as to whether a depiction of a clothed intimate body part is unclothed. *Opp.* at 23. This is nonsense. Clothed does not mean unclothed. It means clothed, whether with lingerie or some other type of clothing. Naturally, Plaintiff does not offer any legal authority in support of her "black means white" argument because there is none.

Second, a photograph of Jennifer clothed in lingerie (Henry___016), Opp. at 24, purportedly comes within the “revenge porn” statute because Jennifer is holding a cell phone in one hand while the tips of two fingers of her other hand are inserted into the top of her black panties. This image allegedly portrays “sexual conduct” because it shows the “touching of the sexual or intimate parts of a person for the purpose of gratifying sexual desire of either party.” Opp. at 24, N.Y. Pen. Law § 130. Leaving aside that the photograph does not show any touching of Jennifer’s “intimate parts,” and Jennifer’s implausible assertion that she sent this photograph “even though she did not want to do so,” Jennifer clearly misreads the statute. Notably, in a pattern that is now all too familiar, Jennifer omits the language that comes immediately after the text quoted in the Opp.: “‘Sexual contact’ . . . includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.”

While the statute uses the word “including,” this preposition plainly refers to contact of one person on another, not of one person on itself. In other words, the statute says that it does not matter who is touching whom, but there must still be some reciprocal touching, which is common to all the examples given. *See Samantar v. Yousuf*, 560 U.S. 305, 316–17 (2010) (interpreting the verb “includes” with the maxim “[a] word may be known by the company it keeps”). Here, even if the word “including” is meant to be illustrative, it still indicates that “sexual contact” involves victim/actor contact of some kind. Plaintiff’s lingerie selfie does not involve “sexual contact” within the meaning of N.Y. Penal Law § 130, nor is there any touching of an intimate body part in the photograph Jennifer sent to Ed. The “revenge porn” statute does not apply, and the Eighth Cause of Action of the Fourth Amended Complaint cannot proceed to trial.

CONCLUSION

For the reasons set forth above, summary judgment should be entered for Defendant Ed Henry on all causes of action asserted against him.

Dated: December 30, 2024
New York, NY

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on December 30, 2024, the foregoing document and the Declaration of Eden P. Quainton, dated December 30, 2024, were filed through the CM/ECF system and thereby served electronically on counsel for Plaintiff Jennifer Eckhart and Defendant Fox News Network, LLC.

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