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

HALEIGH BREEST,

Plaintiff,

-against-

PAUL HAGGIS,

Defendant.

Index No. 161137/2017

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

TABLE OF CONTENTS

PAGE NO

TABLE OF AUTHORITIES ..... ii-v

RAPE IS GENDER-MOTIVATED VIOLENCE 1

FACTS 1

ARGUMENT 4

I. RAPE IS A GENDER-MOTIVATED CRIME OF VIOLENCE 4

A. The City Council Intended to Create an Effective Remedy for Victims of Gender-Motivated Crimes 5

B. Rape and Sexual Assault Are Gender-Motivated 6

C. Haggis's Words and Acts Make Clear He Was Motivated By Gender 10

D. Haggis's Pattern of Raping and Assaulting Women Shows He Was Motivated By Gender 14

II. ALLEGATIONS THAT HAGGIS RAPED AND ASSAULTED OTHER WOMEN WERE PROPERLY PLED USING "JANE DOE" TO PROTECT THE VICTIMS 15

III. THE FIRST-FILED RULE DOES NOT APPLY AND HAGGIS'S FRIVOLOUS SUIT WILL SOON BE DISMISSED 18

CONCLUSION 21

TABLE OF AUTHORITIES

PAGE NO

Cases

Anisimov v. Lake,
982 F. Supp. 531 (N.D. Ill. 1997) 11, 14

Baychester Shopping Ctr., Inc. v. Llorente,
175 Misc. 2d 739 (Sup. Ct. N.Y. Cnty. 1997) 18

Blair v. All Stars Sports Cabaret,
87 F. Supp. 2d 1133, 1137 (D. Colo.) 8

Brzonkala v. Virginia Polytechnic Inst. & State Univ.
132 F.3d 949 (4th Cir. 1997) 8, 11, 13, 15

Cadiz-Jones v. Zambretti,
No. 123772/00, 2002 WL 34697795 (Sup. Ct. N.Y. Cnty. April 9, 2002) 5, 6

Cooperman v. C. O. R. Land Corp.,
41 Misc. 2d 330 (Sup. Ct. Kings Cnty. 1963) 20

Cordero v. Epstein,
22 Misc. 3d 161 (Sup. Ct. N.Y. Cnty. 2008) 13

Doe v. Hartz,
970 F.Supp. 1375 (N.D. Iowa 1997) 8

Doe v. Madison Third Bldg. Cos., LLC,
121 A.D.3d 631 (1st Dep't 2014) 17

Doe v. Metro. Life Ins. Co.,
234 A.D.2d 74 (1st Dep't 1996) 17

Doe v. New York Univ.,
6 Misc. 3d 866 (Sup. Ct. N.Y. Cnty. 2004) 17

Foley v. D'Agostino,
21 A.D.2d 60 (1st Dep't 1964) 16

Fowler v. Am. Lawyer Media, Inc.,
306 A.D.2d 113 (1st Dep't 2003) 16

Gottwald v. Sebert,
No. 653118/2014, 2016 WL 1365969 (Sup. Ct. N.Y. Cnty. 2016) 9

Hirsch v. Stellar Mgmt.,
148 A.D.3d 588 (1st Dep't 2017) 17

Int'l Pub. Concepts, LLC v. Locatelli,
46 Misc. 3d 1213(A (Sup. Ct. N.Y. Cnty. 2015) 18

Jugmohan v. Zola,
No. 98 CIV. 1509 (DAB), 2000 WL 222186 (S.D.N.Y. Feb. 25, 2000) 13, 14, 15

Kasachkoff v. Sujnow,
2016 N.Y. Misc. LEXIS 80 (Sup. Ct. N.Y. Cnty. 2016) 18

Kent Dev. Co. v. Liccione,
37 N.Y.2d 899 (1975) 19, 20

Kinzer v. Bederman,
59 A.D.3d 496 (2d Dep't 2009) 18

L-3 Commc'ns Corp. v. SafeNet, Inc.,
45 A.D.3d 1 (1st Dep't 2007) 18, 19, 20

Liu v. Striuli,
36 F. Supp. 2d 452 (D.R.I. 1999) 8

Mattison v. Click Corp. of Am., Inc.,
Civ. A. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998) 8, 11

McCann v. Bryon L. Rosquist, D.C., P.C.,
998 F. Supp. 1246 (D. Utah 1998) 9

Morgulas v. J. Yudell Realty, Inc.,
161 A.D.2d 211 (1st Dep't 1990) 19

N.Y.C. Health & Hosps. Corp. v. St. Barnabas Cmty. Health Plan,
22 A.D.3d 391 (1st Dep't 2005) 17

Patrolmen's Benevolent Assn. v City of New York,
41 N.Y.2d 205 (1976) 6

Reynoso v. City of New York,
27 Misc. 3d 1206(A) (Sup. Ct. Bronx Cnty. April 8, 2010) 16

Roe v. California Dep't of Developmental Servs.,
No. 16-CV-03745-WHO, 2017 WL 2311303 (N.D. Cal. May 26, 2017) 7, 10, 11

Ruffalo v. Ackerman,
45 Misc. 3d 1228(A) (N.Y. Sup. Ct. December 12, 2014) 16

Santiago v. Alonso,
66 F. Supp. 2d 269 (D.P.R. 1999) 8

Scholastic Inc. v. Pace Plumbing Corp.,
129 A.D.3d 75 (1st Dep't 2015) 16

Schwenk v. Hartford,
204 F.3d 1187 (9th Cir. 2000) 7, 8, 10

Seaboard Sur. Co. v. Gillette Co.,
75 A.D.2d 525 (1st Dep't 1980) 20

Sprecher v. Thibodeau,
148 A.D.3d 654 (1st Dep't 2017) 19

State of Massachusetts v. Aboulez,
No. 94-0985H (Mass. Super. Ct. Mar. 14, 1994) 15

United States v. Morrison,
529 U.S. 598 (2000). 5

Walsh v. Goldman Sachs & Co.,
185 A.D.2d 748 (1st Dep't 1992) 19

Wittels v. Sanford,
137 A.D.3d 657 (1st Dep't 2016) 18

Statutes, Codes, & Regulations

34 U.S.C.A. § 12361 6

42 U.S.C. § 13981 ..... 5, 6

42 U.S.C. § 1983 16

CPLR 213 ..... 1, 18

CPLR 3013 15

CPLR 3024 ..... 13, 17

CPLR 3026 15

CPLR 3211 ..... 18, 19, 20

N.Y.C. Admin. Code § 8-902 ..... 5, 6

N.Y.C. Admin. Code § 8-903 6

N.Y.C. Admin. Code § 8-905 7

N.Y.C. Admin Code § 8-904 4

Other Authorities

Julie Goldscheid & Risa E. Kaufman,
Seeking Redress for Gender-Based Bias Crimes-Charting New Ground in Familiar Legal Territory, 6 Mich. J. Race & L. 265 (2001)..... 7, 15

Siegel, N.Y. Prac. § 208 (5th ed.) 16

Siegel, N.Y. Prac. § 230 (5th ed.) 17

RAPE IS GENDER-MOTIVATED VIOLENCE

Haggis's motion to dismiss is absurd and offensive.

Rape is gender-motivated violence. Paul Haggis raped Haleigh Breest. Compl. ¶ 65.[1] He demeaned her repeatedly with sexual comments. *Id.* ¶¶ 34-39,52, 56, 61-62. He sexually assaulted and raped numerous other women. *Id.* ¶¶ 83-132. Haggis does not sexually assault or rape men. He only preys on women. This is the definition of gender-motivated violence.

It is inconceivable that a powerful, older man like Haggis could lure a vulnerable young woman to his apartment under false pretenses, demean and insult her with sexist and derogatory comments, threaten her, abuse and rape her—then claim he was *not* motivated by her gender. No man can rape a woman and ask a court to declare as a matter of law it had nothing to do with her gender.

The motion should be denied.

FACTS

The facts alleged in the complaint tell a sordid story and state a valid claim.

Plaintiff Haleigh Breest is a publicist for a company that hosts film premieres in New York City. Compl. ¶ 15.

On January 31, 2013, when she was 26 years old, she met defendant Paul Haggis at a premiere party. *Id.* ¶¶ 16-17. Haggis was almost 60 years old at the time and an influential, powerful, Academy Award winning director, producer, and writer. *Id.* ¶¶ 18-20.

At the end of the party, Haggis offered Ms. Breest a ride home in his car. *Id.* ¶ 22. Then, he invited her over for a drink. *Id.* ¶ 25. Ms. Breest resisted, saying she would be more

[1] Citations to "Compl." are to the operative Amended Complaint in this action, Dkt. No. 6, which is the subject of this motion to dismiss. Ms. Breest has filed a motion to amend her complaint to include a claim under CPLR 213-c, which is pending and not the subject of this motion. *See* Dkt. Nos. 8-11.

comfortable at a public bar, but Haggis insisted and pressured her to come to his place. *Id.* ¶ 26. Ms. Breest was nervous, but intimidated and felt obliged to agree. *Id.* ¶ 27. She told Haggis she was agreeing only to a drink and had no interest in sleeping with him. *Id.*

Haggis Threatens, Demeans, and Rapes Ms. Breest

But the moment they were alone in Haggis's apartment, he became sexually aggressive and forcibly kissed Ms. Breest. *Id.* ¶¶ 30-32.

Ms. Breest was petrified and, apparently sensing her fear, Haggis threateningly said: "You're scared of me, aren't you?" *Id.* ¶¶ 33-34.

Haggis also angrily told her: "Don't fucking act like an 18 year old." *Id.* ¶ 36.

He accused Ms. Breest of asking for it, claiming she had "been flirting with me for months." *Id.* ¶ 38.

Haggis then forcibly removed Ms. Breest's clothing. *Id.* ¶¶ 42-43.

She pushed him away and repeatedly said "No." *Id.* ¶¶ 44-45.

But Haggis did not stop and the more Ms. Breest said "No," the more excited he became. *Id.* ¶¶ 46-47.

Haggis forced Ms. Breest to give him oral sex, commanding her to "Put my dick in your mouth." *Id.* ¶¶ 52-54.

He roughly inserted his finger into her vagina and commented: "You're nice and tight." *Id.* ¶¶ 55-56.

He told Ms. Breest to stop resisting and agree to sex—because he "had a vasectomy" so she wouldn't get pregnant, as if that was the only reason a woman might object to rape. *Id.* ¶ 62.

Then, Haggis vaginally raped Ms. Breest. *Id.* ¶¶ 63-66.

Ms. Breest was physically injured from the rape. *Id.* ¶ 71. But as is often the case with rape victims, the emotional damage she sustained ultimately proved far more harmful. For years, Ms. Breest struggled with a lack of confidence, anxiety, body image issues, and intimacy issues. *Id.* ¶¶ 75-78. Eventually, she sought mental health therapy. She was diagnosed with Post Traumatic Stress Disorder. *Id.* ¶ 79.

Haggis Has a Pattern of Raping and Assaulting Women

Ms. Breest is not alone. Haggis repeatedly rapes and sexually assaults women. As alleged in the complaint, Haggis lured another woman (a publicist like Ms. Breest) to a secluded area, then forcibly kissed her, threatened her, forcibly removed her clothing, forced her to give him oral sex, and pushed her to the ground and raped her. *Id.* ¶¶ 83-95. Haggis also set a late night meeting with another young woman, then became sexually aggressive, forcibly kissed and grabbed her, and told her: "I need to be inside you," and pursued her as she fled. *Id.* ¶¶ 96-109. And Haggis pinned another young woman's arms to her sides so he could forcibly kiss her, pursued her into a taxi, and grabbed and forcibly kissed her again when she got out of the taxi, forcing her to hit him and scream for help in order to escape. *Id.* ¶¶ 110-30.

Ms. Breest Confronts Haggis and Sues

Eventually, Ms. Breest gained the courage to confront Haggis and hired lawyers who spoke with Haggis's attorneys to explore the possibility of resolving Ms. Breest's claims prior to litigation. *See Haggis v. Breest*, No. 161123/2017, Dkt. No. 1. Instead, Haggis preemptively sued Ms. Breest, alleging that those settlement discussions had caused *him* extreme emotional distress. *Id.* Ms. Breest filed this case hours later. Dkt. No. 2. Ms. Breest's motion to dismiss Haggis's frivolous IIED case against her is pending. *See Haggis v. Breest*, No. 161123/2017, Dkt. Nos. 14-18.

ARGUMENT

Haggis's motion to dismiss should be denied. First, the complaint pleads in great detail that Haggis's rape of Ms. Breest was a gender-motivated crime of violence. Second, the allegations about the other women Haggis has raped and assaulted are relevant, detailed, and properly pled using "Jane Doe" designations to avoid exposing these victims to unwanted publicity. Third, there is no basis to consolidate this case with Haggis's meritless, improper case against Ms. Breest.

I. RAPE IS A GENDER-MOTIVATED CRIME OF VIOLENCE

The New York City Victims of Gender-Motivated Violence Protection Act provides a cause of action for "any person claiming to be injured by an individual who commits a crime of violence motivated by gender." New York City Administrative Code § 8-904. Haggis does not dispute that rape and sexual assault are crimes of violence. But Haggis would like this Court to go into his mind on a motion to dismiss, and declare as matter of law that he was not motivated by gender. The argument is meritless.

First, rape is *necessarily* a gender-motivated crime of violence. That is not only the overwhelming case law; it is obvious. Haggis doesn't rape men; he only rapes women. Gender is the whole reason for his rape of Haleigh Breest. Second, Haggis's own acts and words alleged in the complaint make clear that he was motivated by misogyny and even sadism toward women. He enjoys when women are afraid of him. He likes to overpower and coerce women. He likes to demean women. At minimum, a factfinder is entitled to find his behavior gender-motivated. Finally, the complaint alleges a detailed pattern of Haggis' sexual abuse of women. The pattern is further evidence of Haggis' gender-motivated intent.

If the jury finds that Haggis raped Ms. Breest, that is *per se* gender-based violence. But even if Haggis were permitted to tell the jury that all of his rapes and sexual

assaults had nothing to do with gender, no court is obliged to accept this absurd claim as a matter of law on a motion to dismiss.

A. The City Council Intended to Create an Effective Remedy for Victims of Gender-Motivated Crimes

The New York City Council passed the Victims of Gender-Motivated Violence Protection Act to create an effective remedy for victims of gender-motivated crimes like rape. As the legislative history makes clear, the City Council intended to provide broad protection to women who were the victims of gender-motivated crimes. Now, especially now, is not the time to undermine that important law.

New York City passed the Victims of Gender-Motivated Violence Protection Act "[i]n light of the void left by the Supreme Court's decision," *United States v. Morrison*. N.Y.C. Admin. Code § 8-902. *Morrison* struck down the federal right of action for victims of gender-motivated violence under the Violence Against Women Act (VAWA) (42 U.S.C. § 13981), holding that Congress lacked the authority under the Commerce Clause and the Fourteenth Amendment to pass such a remedy. 529 U.S. 598, 627 (2000). The Supreme Court, however, urged local governments to provide a remedy to women (like Morrison) who had been brutally raped, as "no civilized system of justice could fail to provide her a remedy." *Id.*

New York City rallied to that call and passed the Gender-Motivated Violence Protection Act. *See Cadiz-Jones v. Zambretti*, No. 123772/00, 2002 WL 34697795 (Sup. Ct. N.Y. Cnty. April 9, 2002) (the legislative history of the Gender-Motivated Violence Protection Act shows the Council intended to fill the void left by *Morrison*).

The City Council recognized that "gender-motivated violence is widespread throughout the United States" and "that three out of four women will be the victim of a violent crime sometime during their lives." N.Y.C. Admin. Code § 8-902. The Council also concluded

"that victims of gender-motivated violence frequently face a climate of condescension, indifference and hostility in the court system." *Id.* The Council sought, therefore, to create a private right of action for victims of gender-motivated violence "to resolve the difficulty that victims face in seeking court remedies by providing an officially sanctioned and legitimate cause of action for seeking redress for injuries resulting from gender-motivated violence." *Id.*

"It is fundamental that in interpreting a statute, the court should attempt to effectuate the intent of the Legislature." *Cadiz-Jones*, 2002 WL 34697795 (holding that the Gender-Motivated Violence Protection Act was intended to apply retroactively) (citing *Patrolmen's Benevolent Assn. v City of New York*, 41 N.Y.2d 205, 208 (1976)). The Council intended the Gender-Motivated Violence Protection Act to make it *easier* for victims of gender-motivated violence to seek court remedies. *Id.* Haggis, by contrast, seeks to make it more difficult, even impossible, for a woman who is the victim of the worst of all gender-motivated crimes of violence—rape—to sue in New York.[2]

B. Rape and Sexual Assault Are Gender-Motivated

The Council's intent to replace VAWA makes the extensive federal case law interpreting "gender-motivation" in VAWA claims useful in interpreting the parallel City Gender-Motivated Violence Protection Act, especially because the Gender-Motivated Violence Protection Act uses the *identical definition* of "gender-motivated crime of violence" as VAWA.[3]

---

[2] Rates of sexual assault remain extremely high today: nearly 1 in 5 women have been raped. *See* Centers for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey: Summary Report* (2010) at 18 *available at* https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf. Only 23% of rapes and sexual assaults are reported to the police. *See* U.S. Dep't of Justice, *Criminal Victimization 2016* (Dec. 2017) at 7, *available at* https://www.bjs.gov/content/pub/pdf/cv16.pdf.

[3] *Compare* 42 U.S.C. § 13981 (transferred to 34 U.S.C.A. § 12361) ("the term 'crime of violence motivated by gender' means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender") (VAWA), *with* N.Y.C. Admin. Code § 8-903(b) ("'Crime of violence motivated by gender' means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender.") (City's Gender-Motivated Violence Protection

The applicable federal case law is particularly important since neither the Court of Appeals nor any Appellate Division has ever addressed the Gender-Motivated Violence Protection Act. Other courts have looked to VAWA case law in interpreting local gender-motivated crime legislation similar to New York's Gender-Motivated Violence Protection Act. *See*, *e.g.*, *Roe v. California Dep't of Developmental Servs.*, No. 16-CV-03745-WHO, 2017 WL 2311303, at *10 (N.D. Cal. May 26, 2017) (analyzing VAWA case law to interpret California's Ralph Act, similar legislation to Gender-Motivated Violence Protection Act).

Just like VAWA, the City's Gender-Motivated Protection Act was designed to create a cause of action for "gender-motivated" crimes—not for "random acts of violence unrelated to gender." N.Y.C. Admin. Code. § 8-905(b). A mugging or a robbery gone awry, for example, does not automatically become a "gender-motivated" crime simply because the victim is female.

But rape and sexual assault are different.[4] "[I]f an attack is emotionally motivated—as are all rapes and sexual assaults—it is necessarily animated by gender-animus." *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). "The fact that in this case the alleged crime was a sexual assault is sufficient in and of itself to support the existence of gender-based animus." *Id.* at 1203.

"Rape (or attempted rape) is sui generis. As several courts have noted, rape *by definition* occurs at least in part because of gender-based animus." *Id.* "Although there might be some difficulty in determining whether other crimes, even crimes against the person, were

---

Act).

[4] *See* Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes-Charting New Ground in Familiar Legal Territory*, 6 Mich. J. Race & L. 265, 276 (2001) (documenting how "almost all courts evaluating whether rape or sexual assault were 'gender-motivated' under the VAWA Civil Rights Remedy reasoned that sexual assault or other unwanted sexual conduct reflected gender-motivation . . . apparently deeming it self-evident that such crimes are inherently gender-motivated.").

'because of' or 'on the basis of' the victim's gender, the court has little doubt that allegations of sexual assault or sexual exploitation crimes are allegations of crimes committed 'because of' or 'on the basis of' the victim's gender." *Mattison v. Click Corp. of Am., Inc.*, Civ. A. No. 97-CV-2736, 1998 WL 32597, at *6–7 (E.D. Pa. Jan. 27, 1998) (quoting *Doe v. Hartz,* 970 F.Supp. 1375, 1406 (N.D. Iowa 1997) *rev'd in part on other grounds* 134 F.3d 1339 (8th Cir. 1998)); *see also Blair v. All Stars Sports Cabaret*, 87 F. Supp. 2d 1133, 1137 (D. Colo.) (holding second degree sexual assault is a crime "motivated by gender"), *vacated in part*, 98 F. Supp. 2d 1223 (D. Colo. 2000); *Santiago v. Alonso*, 66 F. Supp. 2d 269, 271 n.2 (D.P.R. 1999) ("Contrary to what defendant argues, plaintiff's allegation that defendant raped her is sufficient to meet the VAWA's animus requirement.").

Here, Haggis lured a vulnerable young woman to his apartment, then assaulted and raped her. *See* Compl. ¶¶ 19-65. "[T]here is an absence of any 'apparent motive' for the rape[] other than gender bias. For example, no robbery or other theft accompanied the rape[]." *Brzonkala v. Virginia Polytechnic Inst. & State Univ.* 132 F.3d 949, 964 (4th Cir. 1997), *reh'g en banc granted, opinion vacated on other grounds* (Feb. 5, 1998), *on reh'g en banc,* 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000); *see also Liu v. Striuli*, 36 F. Supp. 2d 452, 475 (D.R.I. 1999) ("The pattern of physical and emotional abuse by [defendant] alleged by [plaintiff], including the rapes, the lewd comments, the threats of deportation, along with the lack of any other apparent motive, is sufficient to warrant the conclusion that [defendant's] conduct was gender-motivated."). Haggis's actions are "necessarily animated by gender-animus." *Schwenk*, 204 F.3d at 1202.

Ignoring this entire body of case law, Haggis cites a single, non-binding decision for the premise that "every rape is not a gender-motivated hate crime." Def. Br. at 6 (citing

Gottwald v. Sebert, No. 653118/2014, 2016 WL 1365969, *21 (Sup. Ct. N.Y. Cnty. 2016)). *Gottwald* is (i) distinguishable and (ii) wrong. *Gottwald* involved a contractual dispute between singer Kesha and music producer Lukasz Gottwald, Sony Music, and multiple other music production companies. *Id.* at *1. The majority of the opinion is devoted to an analysis of the contractual dispute and it is clear that Kesha only raised allegations of sexual assault after she had been sued for breach of contract. *Id.* No such contractual relationship or dispute exists here. In addition, in *Gottwald*, the complaint failed even to "allege that Gottwald harbored animus toward women or was motivated by gender animus when he allegedly behaved violently toward Kesha." *Id.* at *21. In contrast, the complaint here alleges in detail that Haggis was motivated by gender animus against Ms. Breest and the other women he assaulted. Compl. ¶¶ 19-65, 83-139; *see infra* Parts I(C) & (D).

In any event, *Gottwald* is not binding on this Court. Neither the Appellate Division nor the Court of Appeals has ever addressed the Gender-Motivated Violence Protection Act. The Court can and should reject *Gottwald* to the extent it suggests that a rape victim does not always have a claim under the Act.

The idea that rape is not motivated by gender is anachronistic and offensive. It relies on the outdated idea that some rapists might be motivated by love and therefore lack the required "gender-motivated" animus to be held liable. That "is clearly wrong. . . In fact, the perception that a man is somehow less culpable in taking inappropriate liberties with members of the female gender if his motivations are amorous, seems to be just the type of 'animus' that is a focus of concern in gender discrimination. Regardless of the amorous intentions of the perpetrator, non-consensual expressions of affection that rise to the nature of those alleged in this action are laden with disrespect for women." *McCann v. Bryon L. Rosquist, D.C., P.C.*, 998 F.

Supp. 1246, 1252–53 (D. Utah 1998), *rev'd,* 185 F.3d 1113 (10th Cir. 1999), *cert. granted, judgment vacated,* 529 U.S. 1126 (2000).

"The psychological factors that underlie a particular rape or the conduct of a particular rapist are often complex as well as extremely difficult to determine. It would be both an impossible and an unnecessary task to fashion a judicial test to determine whether particular rapes are due in part to gender-based animus. With respect to rape and attempted rape, at least, the nature of the crime dictates a uniform, affirmative answer to the inquiry." *Schwenk*, 204 F.3d at 1203. "Regardless of how they are perpetrated, sexual assault and rape are gender-based crimes." *Roe*, 2017 WL 2311303, at *10. Haggis's rape of Ms. Breest is no exception.

C. Haggis's Words and Acts Make Clear He Was Motivated By Gender

Even assuming rape were not always motivated by gender, Haggis's words and acts in *this* case make clear that he was motivated by gender when he attacked Ms. Breest.

"Whether a particular act of violence is gender-motivated and thus falls within the Act's scope is determined in light of the 'totality of the circumstances.'" *Schwenk*, 204 F.3d at 1198. Haggis's actions illustrate that they were motivated by gender:

- Haggis lured Ms. Breest to his apartment under false pretenses. Compl. ¶¶ 22-28.
- Once they were alone, Haggis immediately became sexually aggressive. *Id.* ¶ 30.
- Haggis forcibly kissed Ms. Breest without her consent. *Id.* ¶¶ 31-32.
- Haggis ripped Ms. Breest's clothing off with force. *Id.* ¶¶ 42-43, 49.
- Ms. Breest repeatedly told him "No," but "the more she said 'No,' the more excited Mr. Haggis became." *Id.* ¶¶ 45-47.
- Haggis forced Ms. Breest to give him oral sex. *Id.* ¶ 53-54.
- Haggis forcibly inserted his finger in Ms. Breest's vagina. *Id.* ¶ 55-56.

- Haggis forcibly penetrated Ms. Breest's vagina with his penis and raped her. *Id.* ¶¶ 63-65.

To suggest that Haggis would have done these things to Ms. Breest if she were a man is "a silly argument." *Roe*, 2017 WL 2311303, at *10. Nearly identical acts have already been held to show gender-motivation. In *Anisimov v. Lake*, for example, the court held that allegations of "fondling her, attempting to remove her clothing, grabbing her breasts, assaulting and attempting to rape her, and ultimately luring her to a deserted office site and raping her, are sufficient." 982 F. Supp. 531, 541 (N.D. Ill. 1997). In *Mattison*, allegations that defendant drove plaintiff home, then "forcefully removed plaintiff's pantyhose against her will and penetrated plaintiff's vagina with his penis" constitute "detailed allegations of outrageous, humiliating and degrading behavior" that "demonstrates disrespect for women in general and connects this gender disrespect to sexual intercourse" and provides "ample evidence from which the factfinder can infer the requisite gender bias." 1998 WL 32597, at *2 & *6-7. In *Brzonkala*, the fact that plaintiff "twice told [defendant] 'No" before he initially raped her" was evidence of gender-motivation. 132 F.3d at 964. And in *Roe*, the Court held that defendant's conduct was motivated by gender because he "penetrated [plaintiff] digitally, and vaginally raped her. These are acts he would not, and could not, have perpetrated if [plaintiff] were a man." 2017 WL 2311303, at *10.

Haggis's actions alone are sufficient to allege his gender bias against Ms. Breest. No man who respects women and views them as equal could act the way Haggis did.

Haggis was not required to say "I hate women" while he raped Ms. Breest for her to have a claim under the Gender-Motivated Violence Protection Act. *Brzonkala*, 132 F.3d at

964 (internal quotation omitted). "Verbal expression of bias by an attacker is certainly not mandatory to prove gender bias." *Id.*

But here, there *is* "verbal expression of bias" by Haggis. Haggis's misogyny towards women and Ms. Breest in particular is illustrated by his comments during the rape:

- Early on in the attack, Haggis told Ms. Breest: "You're scared of me, aren't you?" Compl. ¶ 34.
- Haggis asked Ms. Breest her age and told her: "Don't fucking act like an 18 year old." *Id.* ¶¶ 35-36.
- Haggis accused Ms. Breest of "flirting with me for months," *id.* ¶ 38—the classic rapist's defense of "you asked for it."
- Haggis "commanded Ms. Breest: 'Put my dick in your mouth.'" *Id.* ¶ 52.
- Haggis described Ms. Breest as: "You're nice and tight," *id.* ¶ 56, an explicit reference to Ms. Breest's female anatomy.
- Haggis told Ms. Breest to submit to the rape because "I've had a vasectomy, so you're fine. You can't get pregnant," *id.* ¶ 62—another clear reference to Ms. Breest's female anatomy and a sexist suggestion that the only reason a woman would object to being raped is fear of pregnancy.

Some of these comments are explicitly about Ms. Breest's female gender (*e.g.* "You're tight" and "You can't get pregnant"); others reflect clear gender animus and are incompatible with any kind of respect for women (*e.g.*, "You're scared of me"; "Don't fucking act like an 18 year old"; "Put my dick in your mouth"; "you've been flirting with me for months").

Exactly these sorts of comments have been held to be evidence of gender-motivation. The *Brzonkala* court, for example, held that defendant's statements "You better not have any fucking diseases" and "I like to get girls drunk and fuck the shit out of them" were evidence of gender-motivation. 132 F.3d at 964. In *Jugmohan v. Zola*, the court considered as evidence of gender-motivation that defendant "used sexual language and commented on Plaintiff's figure and breasts" in addition to the fact that he "forcibly grabbed Plaintiff's hair, breasts, and buttocks, fondled Plaintiff's breasts, buttocks, and stomach, and kissed, pinched, and pursued Plaintiff despite her rebuffs and attempts to escape." No. 98 CIV. 1509 (DAB), 2000 WL 222186, at *4 (S.D.N.Y. Feb. 25, 2000). Similarly, Haggis's sexist, derogatory, and insulting comments to Ms. Breest during the course of the rape are evidence of gender-motivation. At minimum, that is for the jury to decide, not this Court as a matter of law.

Again, Haggis ignores this body of case law and relies on a single, non-binding New York case, *Cordero v. Epstein*, where Justice Lehner dismissed a claim under the Gender-Motivated Violence Protection Act because the complaint "contains no more than the conclusory allegation that the alleged crimes of violence were 'motivated by gender.'" 22 Misc. 3d 161, 164 (Sup. Ct. N.Y. Cnty. 2008). But Ms. Breest's allegations are the opposite of "conclusory." The complaint pleads the details of Haggis's rape of Ms. Breest in excruciating detail. Any further detail and defendant would no doubt insist that the content was intentionally salacious and use it as fodder for his meritless claim (*see infra*) that portions of the complaint should be struck under CPLR 3024(b). *See* Def. Br. at 9.[5]

The only thing possibly more offensive than Haggis's argument that sexual assault and rape are not gender-based is his argument that she asked for it because she "describes

[5] In the unlikely event the Court finds there is a pleading defect, plaintiff requests leave to replead any portions of the complaint as deemed necessary by the Court.

several acts that are of a voluntary nature" that preceded the rape (*e.g.*, she accepted a ride in his car). *See* Def. Br. at 2. "[W]hether [Ms. Breest] voluntarily entered [Haggis's] car or [apartment] is no more relevant to her civil rights claim than if an African–American family voluntarily moved into a 'white neighborhood' and found a burning cross on their lawn. Neither victim 'asked for it,' and the focus of the Court should not be diverted from the actions of the defendant to those of the victim." *Anisimov*, 982 F. Supp. at 541.

D. Haggis's Pattern of Raping and Assaulting Women Shows He Was Motivated By Gender

The way Haggis treated Ms. Breest and the way he spoke to her are more than sufficient to allege that his actions were motivated by gender.

But there is even more. After Ms. Breest filed her complaint, other women came forward to say that Haggis had similarly raped and assaulted them. As alleged in the operative Amended Complaint:

- Haggis lured another woman (a publicist like Ms. Breest) to a secluded area, then forcibly kissed her, threatened her, forcibly removed her clothing, forced her to give him oral sex, and pushed her to the ground and raped her. Compl. ¶¶ 83-95.
- Haggis set up another late night meeting with another young woman, then became sexually aggressive, forcibly kissed and grabbed her, and told her: "I need to be inside you." *Id.* ¶¶ 96-109.
- Haggis pinned another young woman's arms to her sides so he could forcibly kiss her, pursued her into a taxi, and grabbed and forcibly kissed her again when she got out of the taxi, forcing her to hit him and scream for help in order to escape. *Id.* ¶¶ 110-30.

Haggis has "an extensive history of acting in a humiliating, abusive, or degrading sexual manner exclusively toward other women." *Jugmohan*, 2000 WL 222186, at *2. There is

no suggestion that Haggis is violent with men, that he has grabbed or forcibly kissed men, or that he has raped men. All of his victims are women. "The fact that all previous victims of Defendant's unwanted sexual advances were women underscores Plaintiff's claim that Defendant was motivated by a gender animus towards women." *Id.* at *4; *see also Brzonkala*, 132 F.3d at 964 (allegations that defendant had "a history of taking pleasure from having intercourse with women without their sober consent" showed gender-motivation); *State of Massachusetts v. Aboulez*, No. 94-0985H (Mass. Super. Ct. Mar. 14, 1994) (injunction issued based on affidavits submitted by defendant's wife and other former partners showing a pattern of repeated violence towards women).[6]

The complaint alleges gender motivation in excruciating detail. If these highly specific allegations of sexist and violent conduct, demeaning and derogatory comments, and a pattern of violence against women do not suffice to plead a claim under the Gender-Motivated Crimes of Violence Act, then the Act has no meaning at all.

II. ALLEGATIONS THAT HAGGIS RAPED AND ASSAULTED OTHER WOMEN WERE PROPERLY PLED USING "JANE DOE" TO PROTECT THE VICTIMS

Allegations about the other women Haggis raped and assaulted show that Haggis has a pattern of gender-motivated sexual assault. *See*, *e.g.*, *Jugmohan*, 2000 WL 222186, at *4 ("The fact that all previous victims of Defendant's unwanted sexual advances were women underscores Plaintiff's claim that Defendant was motivated by a gender animus towards women."). They are relevant and detailed. There is no basis to disregard or strike them.

First, the allegations concerning the other victims are detailed, spanning fifty paragraphs of the complaint. Compl. ¶¶ 83-132. These paragraphs more than satisfy the notice pleading requirements of CPLR 3013. *See also* CPLR 3026 ("Pleadings shall be liberally

[6] Cited in Goldscheid & Kaufman, *Seeking Redress for Gender-Based Bias Crimes*, 6 Mich. J. Race & L. at 275.

construed."); Siegel, N.Y. Prac. § 208 (5th ed.). They provide the Court and Haggis with "notice of the transactions" because they allege in great detail *when* and *where* Haggis assaulted these other women and *what* he said and did to them. They are hardly "conclusory." *Contra* Def. Br. at 7.

"[T]he statements in the pleading, viewed with reason and liberality, are 'sufficiently particular' to give [Haggis] notice of [Ms. Breest's] claims" and Haggis has made no showing that he was "prejudiced in any manner" by the use of Jane Doe pleading. *Foley v. D'Agostino*, 21 A.D.2d 60, 68 (1st Dep't 1964); *id.* at 65 ("the burden is expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced"). "A party suffers prejudice where he or she has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 80 (1st Dep't 2015) (internal quotation and modification omitted). Any claim by Haggis that he could not adequately respond to the Jane Doe allegations would be either disingenuous given the detail alleged or an astonishing admission that he has assaulted so many women, he does not know which ones are cited in the complaint.

Second, it was proper for the complaint not to identify Haggis's other victims by name. Haggis cites no case to the contrary or even remotely on point. Def. Br. at 8.[7] Plaintiffs themselves can proceed anonymously as "Jane Doe" when they are victims of sexual assault and anonymity is needed to protect their privacy, particularly in a case like this that has garnered

[7] None of the cases Haggis cites concerns Jane Doe third-party witnesses and none is a sexual assault case like this one. *See Fowler v. Am. Lawyer Media, Inc.*, 306 A.D.2d 113 (1st Dep't 2003) (holding "vague and conclusory allegations are insufficient to sustain a breach of contract cause of action.") (quotation omitted); *Reynoso v. City of New York*, 27 Misc. 3d 1206(A), 5 (Sup. Ct. Bronx Cnty. April 8, 2010) (holding "failure to allege more than one instance of misconduct" fails to plead a City "policy or custom" required for *Monell* claim under 42 U.S.C. § 1983); *Ruffalo v. Ackerman*, 45 Misc. 3d 1228(A) (N.Y. Sup. Ct. December 12, 2014), 2 (dismissing *pro se* plaintiff's "fourth similarly inappropriate complaint" "of irrelevant, bombastic, acrimonious allegations" without "any coherent or comprehensible factual allegations").

significant media attention. *See*, *e.g.*, *Doe v. New York Univ.*, 6 Misc. 3d 866, 880–81 (Sup. Ct. N.Y. Cnty. 2004) (granting plaintiffs-victims of sexual assault the right to sue anonymously as Jane Doe because of their "emotional distress," to protect their "privacy," and to "avoid any sensational publicity."); *see also Doe v. Madison Third Bldg. Cos., LLC,* 121 A.D.3d 631, 632 (1st Dep't 2014) (example of rape and assault plaintiff proceeding anonymously); *Doe v. Metro. Life Ins. Co.*, 234 A.D.2d 74, 74 (1st Dep't 1996) (same). It was both lawful and appropriate under the circumstances to protect the identity of Haggis's other victims, who are understandably afraid that he might sue or attack them in the press as he has done to Ms. Breest.[8]

Third, there is no basis to strike these sections of the complaint because they are the opposite of "scandalous, prejudicial and wholly irrelevant to this action." *Contra* Def. Br. at 9. CPLR 3024(b) only allows for the striking of "scandalous or prejudicial matter" that has been "*unnecessarily inserted in a pleading*." CPLR 3024(b) (emphasis added). Allegations relevant to the claims should not be struck merely because they are prejudicial or scandalous "because most of what a party pleads is intended to prejudice the other side. The key words are 'unnecessarily inserted,' which makes relevancy the measuring rod." Siegel, N.Y. Prac. § 230 (5th ed.).

"A motion to strike scandalous or prejudicial material from a pleading (*see* CPLR 3024[b]) will be denied if the allegations are relevant to a cause of action." *N.Y.C. Health & Hosps. Corp. v. St. Barnabas Cmty. Health Plan*, 22 A.D.3d 391, 391 (1st Dep't 2005); *see also Hirsch v. Stellar Mgmt.*, 148 A.D.3d 588, 588 (1st Dep't 2017) (same). As set forth above, these allegations are probative of Haggis's pattern of sexual assault against women and his gender-motivation—an element of Ms. Breest's cause of action under the Gender-Motivated Violence

[8] *See* Anonymous, *I'm a Paul Haggis Sex Assault Accuser, and I'm Anonymous. Here's Why*. The Hollywood Reporter (Jan. 17, 2018), *available at* https://www.hollywoodreporter.com/news/im-a-paul-haggis-sex-assault-accuser-im-anonymous-heres-why-guest-column-1075211.

Protection Act and an issue that will be heavily litigated in this case, as is clear from this motion. Again, Haggis cites only irrelevant, non-binding cases in support of his argument to strike. Def. Br. at 9.[9] Striking allegations in this case directly relevant to Ms. Breest's claim would be reversible error. *Wittels v. Sanford*, 137 A.D.3d 657, 659 (1st Dep't 2016), *leave to appeal denied,* 28 N.Y.3d 902 (2016).

III. THE FIRST-FILED RULE DOES NOT APPLY AND HAGGIS'S FRIVOLOUS SUIT WILL SOON BE DISMISSED

There is no basis to dismiss this case and force Ms. Breest to replead her claims as counterclaims in the case Haggis filed against her. Def. Br. at 10.

First, Haggis's case against Ms. Breest is meritless, should soon be dismissed on Ms. Breest's pending motion to dismiss, and is nothing but a PR stunt. *See Haggis v. Breest*, No. 161123/2017, Dkt. Nos. 14-18. Dismissal of Haggis's case will make it impossible to dismiss this case under CPLR 3211(a)(4). *See L-3 Commc'ns Corp. v. SafeNet, Inc.*, 45 A.D.3d 1, 7–8 (1st Dep't 2007) (dismissal under 3211(a)(4) "was unwarranted" where the other action was no longer pending). Ms. Breest's case, by contrast, will survive even in the unlikely event that the Court dismisses her claim under the Gender-Motivated Violence Protection Act, because Ms. Breest has a pending motion to amend her complaint to add a claim for rape under CPLR 213-c, which is not subject to Haggis's motion to dismiss. *See* Dkt. Nos. 8-11.

Second, CPLR 3211(a)(4) does not apply because the two cases do not involve "the same cause of action." Ms. Breest's claims are for rape and gender-motivated violence;

[9] *See Int'l Pub. Concepts, LLC v. Locatelli*, 46 Misc. 3d 1213(A), 21 (Sup. Ct. N.Y. Cnty. 2015) (striking allegations about attorney involvement in wrongdoing because "[i]n the absence of any clear relevancy," there was "no other purpose" for such allegations other than to disparage attorneys and attempt to disqualify them); *Baychester Shopping Ctr., Inc. v. Llorente*, 175 Misc. 2d 739, 740 (Sup. Ct. N.Y. Cnty. 1997) (striking press articles attached to pleading that were not about the case); *Kinzer v. Bederman*, 59 A.D.3d 496, 497 (2d Dep't 2009) (striking language that "is irrelevant to the viability of a dental malpractice cause of action"); *Kasachkoff v. Sujnow*, 2016 N.Y. Misc. LEXIS 80, at *7 (Sup. Ct. N.Y. Cnty. 2016) (striking some allegations, allowing others, concerning Attorney General investigation into plaintiff).

Haggis's sole claim is for intentional infliction of emotional distress arising out of settlement discussions between lawyers (an improper basis for an IIED claim under New York law). The two cases do not involve the same cause of action, the same statutes, or the same kind of relief, so 3211(a)(4) does not apply. *See Kent Dev. Co. v. Liccione*, 37 N.Y.2d 899, 901 (1975) (dismissal not warranted even though "both suits arise out of the same subject matter" "since the nature of the relief sought is not the same or substantially the same"); *Sprecher v. Thibodeau*, 148 A.D.3d 654, 656 (1st Dep't 2017) (dismissal not warranted where subject matter of two suits was "related" but involved different damages); *Walsh v. Goldman Sachs & Co.*, 185 A.D.2d 748, 749 (1st Dep't 1992) (dismissal was error even though both cases involved claims of age discrimination, because "different statutes are involved"); *Morgulas v. J. Yudell Realty, Inc.*, 161 A.D.2d 211, 213 (1st Dep't 1990) (dismissal not warranted where causes of action were different, even if plaintiff had "the option of counterclaiming" and "there *could* be such cause of action" in the other case).

Third, CPLR 3211(a)(4) would not mandate dismissal even if the cases were the same; it grants discretion to the court to "make such order as justice requires." Here, justice requires that the rapist not be allowed to cast himself as the victim, especially when Haggis only filed his case first by a couple of hours and did so only as a PR stunt. In nearly identical circumstances, where a party filed first after its opponent had threatened litigation and presented a draft complaint during the course of settlement discussions, the First Department held it was error to apply the first-filed rule. *L-3 Commc'ns*, 45 A.D.3d at 8-9. The First Department explained: "courts have often deviated from the first-in-time rule where one party files the first action preemptively, after learning of the opposing party's intent to commence litigation . . . court decisions in New York have consistently rejected the application of the first-in-time rule in

these circumstances on the ground that such a race to the courthouse would create disincentives to responsible litigation, by discouraging settlements due to fear of a preemptive strike and by providing a tactical advantage to defendants." *Id.* at 8. That is particularly true where the two cases were commenced close in time; here, the cases were filed within hours of each other. *Id.* at 9; *see also Seaboard Sur. Co. v. Gillette Co.*, 75 A.D.2d 525, 525 (1st Dep't 1980) ("While priority must be considered in weighing such a motion, it is not necessarily the controlling factor, particularly in the circumstances found here. The actions were commenced almost simultaneously" and movant had only "a technical priority of a few hours.").

Finally, in the unlikely event that Haggis's case survives the motion to dismiss, the Court could order the two cases consolidated for trial. *See Kent*, 37 N.Y.2d at 901 (where dismissal denied, "a joint trial might be appropriate"); *Cooperman v. C. O. R. Land Corp.*, 41 Misc. 2d 330, 331 (Sup. Ct. Kings Cnty. 1963) (denying motion to dismiss under CPLR 3211(a)(4) and ordering consolidation instead as the "more appropriate solution").

CONCLUSION

Rape is gender-motivated. Derogatory sexual comments are gender-motivated. A pattern of sexual assaults only against women is gender-motivated. Haggis's motion to dismiss should be denied.

Dated: February 2, 2018
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

/s/
Jonathan S. Abady
Ilann M. Maazel
Zoe Salzman

600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Attorneys for Plaintiff Haleigh Breest