UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY WAYNE DESIGNS, LLC, *and* GREGORY ORENSTEIN, Plaintiffs, -v- JOHN LOWRY *and* CYNTHIA LOWRY, Defendants.	24 Civ. 2109 (PAE) OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Gregory Wayne Designs LLC ("GWD") and Gregory Orenstein (together, "Plaintiffs") filed this action in New York State Supreme Court against their former interior-decorating clients John and Cynthia Lowry (collectively, "the Lowrys"), bringing claims for breach of contract, quantum meruit, unjust enrichment, defamation, and intentional infliction of emotional distress ("IIED"). The Lowrys removed the action to this Court based on diversity jurisdiction.

Plaintiffs have moved to remand, and the Lowrys have moved to strike certain allegations from the Complaint and dismiss the IIED claim. For the reasons that follow, the Court denies the motion to remand, dismisses the IIED claim, and strikes one paragraph from the Complaint.

I. Factual Background[1]

GWD is a limited liability company with offices in New York. Dkt. 1, Ex. 2 ("Compl.") ¶ 2. Its sole principal and member, Orenstein, a citizen of New Jersey, provides professional

[1] In resolving the motions, the Court treats all facts alleged in the Complaint as true. *See Federal Ins. Co. v. Tyco Int'l Ltd.*, 422 F. Supp. 2d 357, 391 (S.D.N.Y. 2006) ("When considering a motion to remand, the district court accepts as true all relevant allegations contained in the complaint and construes all factual ambiguities in favor of the plaintiff." (citations omitted)); *Ibrahim v. Fid. Brokerage Servs. LLC*, No. 19 Civ. 3821 (VEC), 2020 WL 107104, at *1 n.1 (S.D.N.Y. Jan. 9, 2020) ("For purposes of Defendants' Rule 12(b)(6) motion to dismiss and Rule

interior decorating services to clients. *Id.* ¶ 4. The Lowrys, a married couple, own residential properties at 70 Little West Street in lower Manhattan and 10 Fox Run in Sherman, Connecticut. *Id.* ¶¶ 8, 11.

On March 28, 2022, the Lowrys entered into a written contract with GWD and Orenstein to obtain "professional decorating consultation and advice" in connection with ongoing renovations at both properties. Dkt. 1, Ex. C ("Contract"). In exchange for these services, the Lowrys agreed to pay $250,000 and reimburse any related out-of-pocket expenses. *See* Contract ¶¶ 2, 7. The Lowrys also agreed to pay an up-front $20,000 retainer fee. *Id.* ¶ 7. Although the contract did not specify a completion date, the Complaint alleges that the parties expected their arrangement to last for approximately six months to one year. *See* Compl. ¶ 19.[2]

What began as a routine contractual arrangement devolved into a prolonged, hostile working relationship. The Lowrys proved to be "extremely difficult clients," whose unprofessional conduct caused undue confusion and delay. *Id.* ¶ 20. They repeatedly changed their minds about design elements, refused to accept Orenstein's advice on decorating and scheduling matters, approached the renovations in a scattered and disorganized manner, and unexpectedly expanded the scope of both projects. *Id.* ¶ 21. They also made erratic changes to the projects' basic organization and staffing. *Id.* For example, Cynthia Lowry was supposed to be the "point person" on both projects, and responsible for making major decisions. *Id.* ¶ 30. But, as the projects continued, she increasingly complained that she was too busy raising her

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12(f) motion to strike, the Court must accept as true the factual allegations contained in the complaint and draw all inferences in plaintiff's favor." (citations and internal quotation marks omitted)).

[2] The Lowrys separately contracted with numerous other contractors and professionals on the two renovation projects. *Id.* ¶15.

children to continue leading the projects. *Id.* After giving birth to her third child, her involvement with the projects waned, significantly impacting their progress. *Id.* The projects' progress was also stalled by the Lowrys' early termination of several contractors and vendors after fighting with them. *Id.* ¶ 24. After firing their general contractors, the Lowrys hired a successor who did not have the resources or staff to operate both projects, causing further delays and interruptions. *Id.*

Over the course of the two renovation projects, the Lowrys, especially John Lowry, engaged in "abusive and inappropriate conduct" toward Orenstein. *See id.* ¶¶ 37–40. This included "calling and texting Ornstein at unreasonable hours," "yelling and screaming" at him, "berating" him on a regular basis, often in the presence of others, making "inappropriate comments about [his] weight, dress, and physical appearance," "sending inappropriate communications of a sexual nature, including, among other things, penis emojis and references to the [Lowrys'] intimate relationship," and "sharing personal details regarding [their] marital troubles." *Id.* ¶ 92. John Lowry also engaged in name-calling, calling Orenstein a "piece of shit," "untalented," and "incompetent." *Id.* ¶ 28. The Lowrys also tasked Orenstein with menial chores unrelated to the renovations, such as gift shopping, which diverted his attention from the projects and unnecessarily extended the length of the arrangement.

In early 2023, Orenstein told the Lowrys he could no longer continue working for them. *Id.* ¶ 41. However, after the Lowrys apologized and assured him that working conditions would improve, Orenstein decided to continue working for them. *Id.* ¶ 43. But the conditions did not improve. In December 2023, the Lowrys terminated his services and cancelled the contract. *Id.* ¶ 46. The Lowrys "advised that they would not be honoring any of the purchases or orders that were made by GWD and would not be paying numerous outstanding invoices." *Id.* ¶ 56.

After canceling the contract, the Lowrys continued to demand that Orenstein complete decorations for the Connecticut property. *Id.* ¶¶ 47, 54.[3] Between December 2023 and March 2024, the Lowrys made negative comments about Orenstein to his vendors and merchants—calling him "incompetent," "unorganized," "unskilled," and "unprofessional." *Id.* ¶¶ 77–80.

II. Procedural Background

On March 4, 2024, Plaintiffs filed this action in New York State Supreme Court. Dkt. 1. Their Complaint brings claims: for (1) breach of contract; (2) quantum meruit; (3) unjust enrichment; (4) defamation of character; (5) defamation per se; and (6) intentional infliction of emotional distress. *See id.* ¶¶ 48–99. It does not demand a specific amount of damages. Instead, for each claim, it states that the damages exceeded "the jurisdictional limits of all other courts." *Id.* ¶¶ 58, 67, 75, 86, 89, 99.

On March 20, 2024, the Lowrys removed the case to this Court, based on diversity jurisdiction. Dkt. 1. On March 27, 2024, the Lowrys filed motions to strike certain allegations in the Complaint and to dismiss the IIED claim, Dkt. 6, and a memorandum of law in support, Dkt. 7 ("Def. Mem."). On April 19, 2024, Plaintiffs filed an opposition, Dkt. 17 ("Pl. Opp."), and a supporting declaration, Dkt. 18. On April 25, 2024, the Lowrys filed a reply. Dkt. 20. ("Def. Reply").

On April 19, 2024, Plaintiffs filed a motion to remand the case to state court, Dkt. 14, and a memorandum of law, Dkt. 16 ("Pl. Remand Mem."), and declaration in support, Dkt. 15. On May 7, 2024, the Lowrys filed an opposition. Dkt. 21. ("Def. Remand Opp."). On May 14, 2024, Plaintiffs filed a reply. Dkt. 22 ("Pl. Remand Reply").

[3] The Complaint does not specify what payments, if any, Plaintiffs have received from the Lowrys pursuant to their original agreement.

III. Motion to Remand[4]

Because the Court must determine its jurisdiction at the outset, the Court addresses first Plaintiffs' motion to remand.

A. Applicable Legal Standard

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). District courts have original jurisdiction over cases "between . . . citizens of different states" where the amount in controversy exceeds $75,000. *Id.* § 1332(a)(1). Diversity jurisdiction under § 1332(a) "requires complete diversity between all plaintiffs and defendants." *Pampillonia v. RJR Nabisco Inc.*, 138 F.3d 459, 460 (2d Cir. 1998).

On a motion to remand, "the [removing] defendant bears the burden of demonstrating the propriety of removal." *Cal. Pub. Emps. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 100 (2d Cir. 2004) (citation omitted). "[R]emoval statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand." *Am. Standard, Inc. v. Oakfabco, Inc.*, 498 F. Supp. 2d 711, 715 (S.D.N.Y. 2007) (citations omitted); *see also Hill v. Delta Int'l Mach. Corp.*, 386 F. Supp. 2d 427, 429 (S.D.N.Y. 2005) (grounding this principle in "respect for the independence of state courts").

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[4] For purpose of the remand motion, the Court has considered, in addition to the Complaint, the notice of removal and the parties' contract. Dkt. 1, Exs. 1–3; *see Arseneault v. Congoleum*, No. 01 Civ. 10657 (LMM), 2002 WL 472256, at *6 (S.D.N.Y. Mar. 26, 2002), *reconsideration denied*, 2002 WL 531006 (S.D.N.Y. Apr. 8, 2002) ("The Second Circuit . . . has said that, on jurisdictional issues, 'federal courts may look outside [the] pleadings to other evidence in the record,'" and therefore the court will consider "material outside of the pleadings" submitted on a motion to remand. (citation omitted)).

B. Discussion

Generally, "when a defendant seeks federal-court adjudication" through removal "the defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87 (2014). Here, Plaintiffs contest defendants' allegation that the amount in controversy exceeds $75,000.[5] On such a challenge, 28 U.S.C. § 1446(c)(2)(B) instructs: "[R]emoval . . . is proper on the basis of an amount in controversy asserted" by the defendant "if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds" the jurisdictional threshold. Given the presumption against removal, the burden rests with the removing defendants—the Lowrys—to demonstrate by "competent proof" that the Plaintiffs' claims are in excess of the statutory jurisdictional amount. *Burr ex rel. Burr v. Toyota Motor Credit Co.*, 478 F. Supp. 2d 432, 438 (S.D.N.Y. 2006). In determining whether the removing defendant has met this burden, courts "look first to the plaintiffs' complaint and then to [the defendant's] petition for removal." *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 296 (2d Cir. 2000). And "[w]here the pleadings themselves are inconclusive as to the amount in controversy . . . courts may look outside those pleadings to other evidence in the record." *United Food & Com. Workers Union v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994).

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[5] The parties are completely diverse as required by 28 U.S.C. § 1441(b) and § 1332. Orenstein is a New Jersey citizen. GWD is a limited liability corporation whose "citizenship . . . is determined by the citizenship of each of its members." *Mack v. Harrah's Casino*, No. 08 Civ. 5690 (CM), 2010 WL 532867, at *2 (S.D.N.Y. Feb. 8, 2010). As Orenstein is GWD's sole member, GWD is a citizen of New Jersey. The parties disagree whether the Lowrys are citizens of New York or Connecticut, but given Plaintiffs' New Jersey citizenship, this disagreement is irrelevant, as under either scenario, the Lowrys would not share a citizenship with Plaintiffs. *See* Dkts. 8, 10.

The Complaint does not specify an amount in controversy, but for each claim, it states: "By reason of the foregoing, Plaintiffs are entitled to damages, in an amount to be determined by the trier of fact, which exceed the jurisdictional limits of all other Courts." Compl. ¶¶ 58 (breach of contract); 67 (quantum meruit); 75 (unjust enrichment); 85 (defamation of character); 89 (defamation per se); 99 (IIED). By implication, this sums up to at least $50,000, the limit in New York City Civil Court. *See* N.Y. City Civ. Ct. Act § 202 (McKinney). Relying on these allegations, the Lowrys argue that the Complaint facially alleges damages exceeding $50,000 for each claim, meaning a total of more than $300,000 in damages. The Second Circuit, however, has held that a "boilerplate demand statement setting forth an open-ended demand" for damages is generally insufficient to rebut a jurisdictional challenge to the amount-in-controversy requirement. *United Food*, 30 F.3d at 305; *see, e.g.*, *Agnesini v. Doctor's Assocs., Inc.*, No. 10 Civ. 9190 (BSJ) (FM), 2012 WL 5873605, at *2 (S.D.N.Y. Nov. 13, 2012) (boilerplate assertion that the "amount in controversy exceeds . . . Seventy-Five Thousand Dollars ($75,000) . . . is not sufficient evidence to rebut Defendant's challenge to the jurisdictional facts alleged."); *Parker v. Riggio*, No. 10 Civ. 9504 (LLS), 2012 WL 3240837, at *8 (S.D.N.Y. Aug. 6, 2012) (boilerplate assertion that "the amount in controversy exceeds $75,000" insufficient); *Valentin v. Dollar Tree Stores, Inc.*, No. 21 Civ. 3647 (MKV), 2021 WL 2852039, at *2 (S.D.N.Y. July 8, 2021) (complaint's allegation that plaintiff seeks "a sum which exceeds the jurisdictional limits of all lower courts" establishes only the jurisdictional threshold to avoid removal into lower state courts). The notice of removal similarly is not controlling, as it only conclusorily asserts that the amount in controversy exceeds $75,000. Dkt. 1 at 3.

With the Complaint and notice of removal inconclusive as to the amount in controversy, the Court turns to evidence outside of the pleadings, namely the parties' contract, as informing

the value of Plaintiffs' claim for quantum meruit. The Lowrys rely on the quantum meruit claim as supporting damages exceeding $75,000.

Under New York law, to prevail on a quantum meruit claim, a plaintiff must show: (1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered. *Evans-Freke v. Showcase Contr. Corp.*, 926 N.Y.S.2d 140, 142 (2d Dep't 2011). Damages are keyed to the fourth element: the "reasonable value of the services rendered." *Id.* The Complaint's quantum meruit claim alleges that the Lowrys "significantly expanded the scope of work under the Contract" and "insisted and demanded that additional work, labor and services be performed" which was "[b]eyond the scope and parameters of the Contract." Compl. ¶¶ 60, 61. It seeks damages reflecting "the value of the additional work, labor and services" performed "beyond the initial scope of the Contract." *Id.* ¶ 66. The Lowrys, supported by case authority, urge the Court to look to the contract as a gauge of the "reasonable value" of Plaintiffs' services. *See, e.g.*, *Johnson v. Robertson*, 15 N.Y.S.3d 457, 460 (2d Dep't 2015) ("unsigned agreement furnished evidence of [reasonable] value"); *Evans-Freke*, 926 N.Y.S.2d at 142 (although contract was unenforceable, its terms, including "the previously agreed upon hourly labor rates," could be used to determine the reasonable value of services rendered); *Frank v. Feiss*, 698 N.Y.S.2d 363, 365 (4th Dep't 1999) ("Although there is no direct evidence of the reasonable value of the work performed, the parties' agreement furnishes evidence of such value.").

Under the contract, Orenstein was to receive $250,000 plus out-of-pocket expenses for his "professional decorating consultation and advice" and "help oversee[ing] any construction/renovation." Contract ¶¶ 1, 3. The Complaint alleges that the parties expected the

contractual project to last six months to one year in duration. Compl. ¶ 19. In fact, it alleges, Plaintiffs worked for the Lowrys for a total of 21 months (from March 2022 to December 2023). *See* Compl. ¶¶ 16, 19, 46–47. The Lowrys argue that the Court can look to the $250,000 fee to help estimate the "reasonable value" of the additional nine to 15 months of work Plaintiffs claim to have performed. Extrapolating from the $250,000 fee, the estimated "reasonable value" of the extra work performed ranges from $187,500 to $312,500, depending on the number of additional months worked.[6]

Plaintiffs have not presented an alternative methodology yielding damages under $75,000.[7] But they challenge the Lowrys' methodology on two grounds. First, they argue, the $250,000 fee anticipated by the contract fee is irrelevant because, in their contract breach claim, they do not seek to recover that amount in damages, but only out-of-pocket and travel expenses under their breach of contract claim. That argument does not logically follow, as it bears only on the recovery on the breach of contract claim, whereas the Lowrys pursue removal based on the quantum meruit claim, which turns on the "reasonable value" of extra services performed *outside* the contract. Put differently, even assuming *arguendo* the Lowrys fully paid the $250,000 fee that the contract set for the original project, that fee is still a viable measure of the reasonable value of the analogous work performed outside the contract.

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[6] This conservative estimation assumes that the contractual project was expected to last for one year, and thus that, for each month, Plaintiffs were entitled to about $20,833.33 ($250,000/12 months = $20,833.33).

[7] Nor have they stipulated that they will not seek more than $75,000 in damages. *See, e.g.*, *Luce v. Kohl's Dep't Stores, Inc.*, 23 F. Supp. 3d 82, 86 (D. Conn. 2014) (remand warranted on plaintiff's stipulation that she would not seek damages exceeding $75,000).

Plaintiffs next argue that the contract was service based, not time based, and thus the contract fee is a poor gauge of damages for the quantum meruit claim. But it is their Complaint that alleges that the Plaintiffs had to perform additional renovation and decoration work that was unaccounted for in the original contract, extending the project by at least a year. The reasonable value of this work must be estimated in some way. Plaintiffs do not propose an alternative to the Lowrys' proposal—which is reasonable under the case law—to use the pre-existing contract price as a baseline for valuing substantially similar services performed by the same decorator and decorating firm for the same clients *See Ragland v. Molloy*, 125 N.Y.S.3d 283, 284 (2nd Dep't 2020) ("In determining an award of quantum meruit compensation [for attorneys' fees], a court must weigh the relevant factors . . . . [W]hile not binding or determinative, a court should also consider any agreement outgoing and incoming counsel may have had regarding compensation."); *Klein v. Eubank*, 693 N.Y.S.2d 541, 542 (1st Dep't 1999) ("terms of the original retainer were a relevant consideration" in establishing the amount of a quantum meruit award."); *Wahl v. Warren*, 859 N.Y.S.2d 907, 907 (Sup. Ct. App. Term 2008) (reasonable rental value for quantum meruit award "can be established by proof of rentals for comparable premises or by proof of the rent paid under the expired lease."); *Linder v. Capogrosso*, 12 Misc. 3d 141 (N.Y. Sup. Ct. App. Term 2006) ("Although there was no direct evidence of the reasonable value of the work performed, the parties' oral agreement, together with their written correspondence, furnishes evidence of such value."); *Taylor & Jennings, Inc. v. Bellino Bros. Const. Co.*, 483 N.Y.S.2d 813, 815 (3d Dep't 1984) ("[R]ecovery under the equitable doctrine of *quantum meruit* was proper, as was use of the contract price to evidence the reasonable value of the work performed."). That methodology enables the Lowrys to meet their burden of demonstrating by a preponderance that the amount in controversy exceeds $75,000. *See Barett v. TP Trucking Co.,*

No. 20 Civ. 2937 (PMH), 2020 WL 1862362, at *1 (S.D.N.Y. Apr. 14, 2020) ("[A] defendant need not prove the amount in controversy to an absolute certainty." (quotation omitted)); *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, 515 F. Supp. 3d 95, 102 (S.D.N.Y. 2021) (that the damages calculation is "an estimate, not a precise figure, also does not matter, because it far exceeds the statutory threshold.").

Accordingly, the Court finding an amount in controversy exceeding $75,000, denies Plaintiffs' motion to remand.

C. Motion to Dismiss

1. Legal Standard

The Lowrys moves to dismiss the Complaint's IIED claim under Federal Rule of Civil Procedure 12(b)(6).[8] To survive such a motion, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is properly dismissed where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Id.* at 558. When resolving a motion to dismiss, the Court must assume all well-pleaded facts to be true, "drawing all reasonable inferences in favor of the plaintiff." *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012).

2. Discussion

The Complaint's IIED claim is based on the Lowry's allegedly "outrageous conduct" which included: (1) "calling and texting Orenstein at unreasonable hours of the day and night";

[8] In their reply, Plaintiffs state that the Lowrys' motion to dismiss is "improperly" included with their motion to strike. That is wrong. Courts often decide contemporaneously filed motions to strike and dismiss. *See, e.g.*, *Orientview Techs. LLC v. Seven For All Mankind, LLC*, No. 13 Civ. 0538 (PAE), 2013 WL 4016302, at *1 (S.D.N.Y. Aug. 7, 2013) (granting in part and denying in part a motion to both strike and dismiss counterclaims and affirmative defenses).

(2) "yelling and screaming at Orenstein . . . often in the presence of others"; (3) "berating Orenstein on a regular basis, often in the presence of others"; (4) "making wholly inappropriate comments about Orenstein's weight, dress, and physical appearance"; (5) "sending inappropriate communications of a sexual nature, including, among other things, penis emojis and references to the [Lowrys'] intimate relationship"; and (6) "sharing personal details regarding the [Lowrys'] marital troubles, among other things." Compl. ¶ 92. The Lowrys argue that this alleged conduct falls short of that required for an IIED claim. They are correct.

To plead an IIED claim under New York law, a complaint must allege "(1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Conboy v. AT & T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001). An IIED claim must allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Chanko v. Am. Broadcasting Cos.*, 29 N.Y.S.3d 879, 886 (2016). These standards "are rigorous and difficult to satisfy." *Howell v. N.Y. Post Co.*, 596 N.Y.S.2d 350, 353 (1993). "Courts are generally loath to find that conduct involving discrimination or harassment in the course of employment is sufficient for a claim of IIED." *Padilla v. Sacks & Sacks, LLP*, No. 19 Civ. 10021 (GBD), 2020 WL 5370799, at *2 (S.D.N.Y. Sept. 8, 2020). Normally, verbal abuse, inappropriate language, and public embarrassment do not rise to the level of extreme or outrageous conduct. *See, e.g.*, *Elmowitz v. Exec. Towers at Lido, LLC*, 571 F. Supp. 2d 370, 379 (E.D.N.Y. 2008) (publicly shouting derogatory remarks and hitting plaintiff multiple times with a telephone insufficiently extreme and outrageous); *Kaye v. Trump*, 873 N.Y.S.2d 5, 6 (1st Dep't 2009) (making rude remarks, commencing two baseless lawsuits, and

attempting to instigate an arrest insufficiently extreme and outrageous); *Martin v. Citibank, N.A.*, 762 F.2d 212, 220 (2d Cir. 1985) (allegations that employees were chosen for polygraph test based on their race during internal investigation of theft of funds at bank insufficiently extreme and outrageous); *Murphy v. Am. Home Prods. Corp.*, 461 N.Y.S.2d 232, 236 (1983) (employee's termination in humiliating manner insufficiently extreme and outrageous); *Shea v. Cornell Univ.*, 596 N.Y.S.2d 502, 504 (3d Dep't 1993) (sexual harassment in workplace insufficiently extreme and outrageous); *Leibowitz v. Bank Leumi Tr. Co. of N.Y.*, 548 N.Y.S.2d 513, 521 (2d Dep't 1989) (use of religious and ethnic slurs to coerce employee to leave job insufficiently extreme and outrageous).

Measured by these standards, the Complaint's allegations do not meet "the extremely high threshold established under New York law for the highly disfavored claim of IIED." *Lee v. Sony BMG Music Ent., Inc.*, 557 F. Supp. 2d 418, 426 (S.D.N.Y. 2008). The Complaint alleges that the Lowrys were difficult and demanding clients, who crossed professional and personal lines by engaging in name-calling, making inappropriate comments, and sharing personal marital details. Such behavior, while condemnable, is not actionable as IIED under the assembled case law.

Plaintiffs attempt to salvage their claim by likening it to the IIED claim that this Court held plausibly pled in *Moraes v. White,* 571 F. Supp. 3d. 77 (S.D.N.Y. 2021). There, the plaintiff, an immigrant nanny, alleged that the defendant couple, after firing her, engaged in a "multi-pronged campaign to harass" her, which included threatening to have her arrested; sending agents to her apartment to threaten her with deportation; sending baseless cease-and-desist letters threatening to file complaints against her with the district attorney and the police; and creating evocative posts on Facebook with the goal of destroying her future job prospects in

the community. *Id.* at 105. The Complaint here alleges that John Lowry called Orenstein a "piece of shit," "untalented," and "incompetent," and commented on his physical appearance; and that both Lowrys made negative statements about Orenstein to vendors and merchants. These allegations, of verbal abuse and negative commentary, are demonstrably short of the "deliberate and malicious campaign of harassment or intimidation" alleged in *Moraes*. *Id.*

The Court accordingly dismisses the Complaint's IIED claim.

D. Motion to Strike

1. Legal Standard

Under Federal Rule of Civil Procedure 12(f), a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." To prevail on such a motion, the movant must demonstrate that "(1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; and (3) that to permit the allegations to stand would result in prejudice to the movant." *eShares, Inc. v. Talton*, No. 22 Civ. 10987 (JGLC), 2024 WL 1348829, at *10 (S.D.N.Y. Mar. 29, 2024). "[O]rdinarily neither a district court nor an appellate court should decide to strike a portion of the complaint on the grounds that the material could not possibly be relevant on the sterile field of the pleadings alone." *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976). "[S]triking portions of a pleading is a drastic remedy disfavored by the courts, and is sparingly granted." *Bishop v. Toys "R" US-NY, LLC*, No. 04 Civ. 9403 (PKC), 2009 WL440434, at *3 (S.D.N.Y. Feb. 19, 2009). As such, "[m]otions to strike under Rule 12(f) are generally disfavored and granted only if there is a strong reason to do so." *Holland v. Chase Banks USA, N.A.*, 475 F. Supp. 3d 272, 275 (S.D.N.Y. 2020) (internal and quotation marks omitted).

2. Discussion

The Lowrys move to strike over a dozen paragraphs in the Complaint. The Court denies these motions, save one.

a. Paragraphs 21(ix)–(x), 28, 31, and 34

The Lowrys move to strike several allegations detailing the difficult professional relationship between the parties during the renovation projects. One set of allegations relates to the Lowrys' unprofessional conduct during the renovation projects that caused the parties' relationship to deteriorate. These allege that the Lowrys: "berated contractors, vendors and Orenstein on a regular basis," Compl. ¶ 21(ix); "communicated in a haphazard manner, often texting or calling at inappropriate times of the day and night," *id.* ¶ 21(x); "burdened Orenstein with their personal problems and asked him to perform tasks and chores that had no relationship with the Decorating Project," *id.* ¶ 31. They also allege that John Lowry: "would often call Orenstein a 'piece of shit,' 'untalented,' 'incompetent' and even commented on Orenstein's physical appearance and weight," *id.* ¶ 28; and "fired" his wife as a result of a marital dispute, "no longer permit[ing] [her] to be involved in the Decorating Project," *id.* ¶ 34.

These allegations are not properly struck, because they directly "bear[] on the issues in the case." *Talton*, 2024 WL 1348829, at *10. Indeed, all of the Complaint's surviving claims arise from the breakdown of the parties' business relationship, as embodied in their contract, which the Lowrys allegedly eventually terminated, and the circumstances surrounding that termination. And as pled, the Lowrys' conduct towards Plaintiffs during the period from March 28, 2022 until December 2023 is central context to the termination. It potentially bears upon all surviving claims, including those of breach of contract and quantum meruit. Plaintiffs are broadly at liberty to develop facts in discovery bearing on the Lowrys' conduct towards them. The Court expects Plaintiffs will rely on such allegations in attempting to establish their claims.

The Lowrys counter that these allegations paint them in a negative light. It is certainly true that these allegations depict the Lowrys as unprofessional and venal. But that the facts pled reflect poorly on a party's character does not make these allegations irrelevant. Here, the specific instances of unprofessional behavior on the Lowrys' part are fairly pled as highly relevant, including insofar as they support Plaintiffs' claim that the Lowrys unjustifiably terminated the contract and defamed them.

These allegations are thus a far cry from the truly extraneous scandalous or inflammatory material that Rule 12(f) permits to be struck. *See Cabble v. Rollieson*, No. 04 Civ. 9413 (LTS) (FM), 2006 WL 464078, at *11 (S.D.N.Y. Feb. 27, 2006) ("A scandalous allegation" under Rule 12(f) is "one that reflects unnecessarily on the defendant's moral character, or uses repulsive language that detracts from the dignity of the court."). And given that the allegations here "bear[] on relevant issues," that they may also be of an "inflammatory nature" is "not sufficient to grant the motion to strike." *Schoolcraft v. City of New York*, 299 F.R.D. 65, 67 (S.D.N.Y. 2014) (denying motion to strike allegation that plaintiff made "a race-based discriminatory remark against African Americans" because, although inflammatory, the allegation was germane to counterclaim). The Court denies the motion with respect to paragraphs 21(ix)–(x), 28, 31, and 34.

b. Paragraphs 25, 26, 37, 39, 40, 93, and 94

The Lowrys relatedly move to strike a series of paragraphs that describe John Lowry as overly demanding, hostile, and aggressive. The Complaint alleges that John Lowry was "a high energy, tightly wound, overly aggressive, demanding person, who, by all accounts, is very difficult to work with," Compl. ¶¶ 25, 93; "[w]orking with [him] proved to be extremely difficult" because he "treat[ed] everyone as his personal servant, demanding that they do what he wants and on his schedule," *id.* ¶ 37; and that he "refused to accept blame for any of the issues

created by [the Lowrys'] indecision and haphazardness" and instead "had to place blame on others, often directing that blame at the Plaintiffs," *id.* ¶ 40. The Complaint adds that Cynthia Lowry herself "shared many stories with Orenstein about how difficult, demanding and intolerant her husband can be." *Id.* ¶¶ 26, 94. It cites, as an example, that "when a millwork fabricator had a death in the family and was out of pocket for some time, [he] stated that he 'does not care' and insisted that the fabricator immediately got back to work." *Id.* ¶ 39.[9]

The Lowrys argue that these allegations are irrelevant to Plaintiffs' claims. For much the same reasons as above, the Court declines to strike these allegations. Some of these allegations are indeed articulated as general statements about John Lowry's character, but as pled they are based upon, and in substance address, the interactions between the Lowrys and Orenstein during their professional relationship. And for the reasons above, the nature of those dealings, including Lowry's manner of dealing with contractor Orenstein, is relevant to the pending claims. *See Lynch v. Southampton Animal Shelter Found. Inc.*, 278 F.R.D. 55, 67–68 (E.D.N.Y. 2011); *see also Martinez v. Sanders*, No. 02 Civ. 5624 (RCC), 2004 WL 1234041, at *3 (S.D.N.Y. June 3, 2004) (plaintiff's prior employment and how she came to work for defendant is "appropriate background evidence that is properly admissible and relevant."). Lowry's conduct may help explain the deterioration of the parties' professional relationship; the delay and expansion of the renovation projects; and the early termination of the contract.

[9] As to paragraph 39, the Lowrys also argue that the Complaint does not allege that the millwork fabricator was part of the parties' contract. On a motion to strike, the Court must "draw all reasonable inferences in the pleader's favor" and "resolve all doubts in favor of denying the motion to strike." *Jujamcyn Theaters LLC v. Fed. Ins. Co.*, 659 F. Supp. 3d 372, 383 (S.D.N.Y. 2023). The Court reads the Complaint to allege that the millwork fabricator incident occurred during the renovation project at issue and informed the course of dealings between the parties. As such, it is pertinent context for the parties' dispute.

In any event, even assuming some details in the pleadings about John Lowry concern traits or background that are immaterial to the dispute, "allegations that supply background or historical material or other matter of an evidentiary nature normally will not be stricken from the pleadings unless they are unduly prejudicial to the defendant.'" *Lynch*, 278 F.R.D. at 67–68. Material that does not "cast a positive light upon the defendant" is not necessarily "so unduly prejudicial to the defendant that striking the paragraphs is warranted." *Wahlstrom v. Metro-N. Commuter R.R. Co.*, No. 96 Civ. 3589 (PKL), 1996 WL 684211, at *3 (S.D.N.Y. Nov. 25, 1996). Rather, for the motion to strike to succeed on this basis, the Complaint must include "a scandalous allegation" "that reflects unnecessarily on the defendant's moral character, or uses repulsive language that detracts from the dignity of the court." *Cabble*, 2006 WL 464078, at *11. The allegations here do not meet this threshold. That John Lowry was demanding, overly aggressive, and tightly wound, or treated people around him like "personal servant[s]," are negative characterizations but not scandalous ones.

To the extent that the Lowrys cast this motion as seeking to exclude evidence at trial as improper character evidence under Federal Rule of Evidence 404(a), that motion is premature. Discovery has not even begun. Evidentiary issues are not the province of a motion to strike. *Lipsky*, 551 F.2d at 893. A Court "cannot, and need not, decide on the basis of the pleadings alone whether the allegations . . . would be admissible at trial." *Philip Morris Cap. Corp. v. Nat'l R.R. Passenger Corp.*, No. 19 Civ. 10378 (JMF), 2021 WL 797671, at *9 (S.D.N.Y. Feb. 26, 2021). *See, e.g.*, *Dubai Equine Hosp. v. Equine Imaging, LLC*, No. 18 Civ. 6925 (VSB), 2019 WL 3811922, at *3 (S.D.N.Y. Aug. 14, 2019) (denying motion to strike, based on claim that evidence was inconsistent with Rule 404(b), in part because "[e]videntiary questions, such as the one present in this case, should especially be avoided at such a preliminary stage of the

proceedings."); *Santiago v. Owens-Illinois, Inc.*, No. 05 Civ. 00405 (JBA), 2006 WL 3098759, at *1 (D. Conn. Oct. 31, 2006) ("[M]otions to strike are to be directed at 'redundant, immaterial, impertinent or scandalous matter,' Fed. R. Civ. P. 12(f), not disputes over the admissibility of evidence.").

Accordingly, the Court denies the motion to strike paragraphs 25, 26, 37, 39, 40, 93, and 94.

c. Paragraph 78

The Lowrys also move to strike paragraph 78, which alleges that the Lowrys "stated to Plaintiffs' vendors and merchants that the Plaintiffs are 'incompetent,' 'unorganized,' 'unskilled' and 'unprofessional,' among other things. These statements were made with the intent of persuading the merchants and vendors to cease doing business with Plaintiffs." *Id.* ¶ 78.

This motion borders on frivolous. These allegations are not only relevant, but central, to the Complaint's defamation claim, which alleges that the Lowrys "made and published knowingly false, damaging and harmful statements to third persons" concerning plaintiffs' "reputation and character." *Id.* ¶ 77.[10] The Lowrys argue that these comments alone could not support a successful defamation claim, because "only a provable statement of fact is actionable as defamation." *Brahms v. Carver*, 33 F. Supp. 3d 192, 198 (E.D.N.Y. 2014). That argument is misplaced as the basis for a motion to strike. After discovery, the Lowrys will be at liberty to argue that the assembled evidence, viewed in the light most favorable to Plaintiffs, could not support a viable defamation claim. The motion is thus both meritless and procedurally improper. *See, e.g., GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 101–02 (2d Cir. 2019) ("[U]se of a Rule 12(f) motion to strike [defendant's] new counterclaims (as distinguished from striking

[10] Indeed, paragraph 78 is contained under the sub-header: "Fourth Cause of Action: Defamation of Character."

matter in them) was procedurally improper."); *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) ("Rule 12(f) designed for excision of material from a pleading, not for dismissal of claims in their entirety.").

d. Paragraph 12

The Lowrys seek to strike paragraph 12, which states that the Lowrys "reside together at the Manhattan Apartment with their children." Compl. ¶ 12. They contend that this statement is scandalous, as it serves to antagonize them by mentioning their children in a public document. This contention, too, is baseless.

The Complaint's bare allegation that the Lowrys reside at the Manhattan apartment with their children is not at all scandalous. There is nothing improper about living in an apartment with one's children. The cited sentence does not contain any negative connotation whatsoever. And it does not identify the children in any way or disclose any sensitive information about them. *Low v. Robb*, No. 11 Civ. 2321 (JPO), 2012 WL 173472, at *11 (S.D.N.Y. Jan. 20, 2012) (denying motion to strike paragraph that "contains background information" where defendant "has not shown how inclusion of these statements could prejudice him in any way"); *Arias-Zeballos v. Tan*, No. 06 Civ. 1268 (GEL), 2006 WL 3075528, at *10 (S.D.N.Y. Oct. 26, 2006) ("[T]he cited paragraphs include numerous factual allegations and requests for relief that could not be considered scandalous or otherwise prejudicial under any reasonable standard.").

e. Paragraph 22

The Lowrys, finally, move to strike paragraph 22, which states that the Lowrys "are already involved in at least one lawsuit with a number of contractors who performed work at the Connecticut Property." Compl. ¶ 22.[11] This motion has merit. It is well settled that allegations

[11] The referenced action, filed in the Connecticut Superior Court, is hyperlinked in a footnote in the Complaint. The case has not yet been resolved.

in a complaint "that are either based on, or rely on, complaints in other actions that have been dismissed, settled, or otherwise not resolved, are, as a matter of law, immaterial within the meaning of Federal Rule of Civil Procedure 12(f)." *Low*, 2012 WL 173472, at *9. Paragraph 22 fits into this category, justifying striking it as relief. *See, e.g.*, *id.* (striking paragraphs referring to ongoing disputes "notwithstanding [plaintiff's] argument that these statements demonstrate a 'pattern of conduct'"); *Footbridge Ltd. v. Countrywide Home Loans, Inc.*, No. 09 Civ. 4050 (PKC), 2010 WL 3790810, at *5 (S.D.N.Y. Sept. 28, 2010) (striking paragraphs "based on pleadings and settlements in other case and government investigations"); *In re Merrill Lynch & Co., Research Reports Sec. Litig.*, 218 F.R.D. 76, 78–79 (S.D.N.Y.2003) (striking paragraphs that refer to or rely on ongoing disputes). Accordingly, the Court strikes this allegation.

CONCLUSION

For the reasons stated above, the Court denies Plaintiffs' motion for remand, grants the Lowrys' motion to dismiss the claim for IIED, and strikes paragraph 22 of the Complaint. The Court directs that paragraph 22 of the Complaint be struck. The Clerk of Court is respectfully directed to close the motions at Dockets 6 and 14.

The Court directs defendants to respond to the Complaint by August 14, 2024. By separate order, the Court will schedule an initial pretrial conference.

SO ORDERED.

Paul A. Engelmayer
United States District Judge

Dated: July 24, 2024
New York, New York