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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Audrey Davis,
Plaintiff /
Counterclaim-Defendant,
v.
Rhondie Voorhees,
Defendant /
Counterclaim-Plaintiff,
and,
ERAU College Board of Trustees; ERAU;
and Tyler Smith,
Defendants.

Case No. 3:21-cv-08249-DLR

**REPLY IN SUPPORT OF
PLAINTIFF’S MOTION TO
DISMISS DEFENDANT RHONDIE
VOORHEES’S COUNTERCLAIM
FOR FAILURE TO STATE A
CLAIM**

Plaintiff Audrey Davis hereby files her Reply in support of her Motion to Dismiss Defendant Rhondie Voorhees’s Counterclaim (Doc. No. 9) for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. No. 19).

MEMORANDUM OF POINTS AND AUTHORITIES

1.0 INTRODUCTION

Defendant Rhondie Voorhees’s Opposition to the Motion to Dismiss fails to show how her Counterclaim adequately alleges actual malice and curiously urges the Court to allow leave to amend. Voorhees makes this request despite the fact that Ms. Davis already

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1 filed a motion to dismiss identifying numerous deficiencies in Voorhees’s claims for
2 defamation and false light, yet Voorhees’s Counterclaim addressed none of these
3 deficiencies. Voorhees already had two opportunities to plead cognizable claims; she
4 should not be given a third one. The Court should dismiss her Counterclaim with prejudice.

5 **2.0 LEGAL ARGUMENT**

6 **2.1 Voorhees Fails to State a Claim for Defamation**

7 The Motion to Dismiss contains Arizona defamation standards. (Doc. No. 19 at 8.)

8 **2.1.1 Voorhees is a public figure and is subject to the “actual malice”**
9 **standard, which she cannot meet.**

10 The Motion to Dismiss lays out the “actual malice” standard that public figure
11 defamation plaintiffs must satisfy, as well as how courts determine whether a plaintiff is a
12 public figure, which discussion is incorporated herein by reference. (Doc. No. 19 at 9-15.)

13 The Motion to Dismiss cites numerous cases establishing that Voorhees is a public
14 figure when it comes to any matters of governance of that university just by virtue of being
15 the dean of a major university. (Doc. No. 19 at 10-11.) Voorhees provides no response to
16 this authority. The controversy here is how Dean Voorhees handled a sexual assault
17 scenario at Embry Riddle, which necessarily implicates her history of handling similar
18 scenarios during her time at the University of Montana. Her handling of Title IX matters at
19 the University of Montana was covered extensively in media and in a nationally bestselling
20 book by Jon Krakauer. (Doc. No. 19 at 3-6.) She has filed two lawsuits – this one and the
21 Montana federal case against the University of Montana – claiming her knowledge and
22 importance in Title IX disputes. (See Doc. No. 19-4.) She claims to be instrumental with
23 regard to the current interpretation of Title IX, alleging in the Montana case that she
24 participated in drafting the “last historical reflection on Title IX” in 2002. (*Id.* at ¶ 113.)
25 She additionally alleged in that lawsuit that she was a key member of the Title IX team at

1 the University of Montana, and her tenure was at a time when the university was in the
2 news for its allegedly faulty Title IX investigations. (*See id.* at ¶ 114.)

3 Furthermore, the issues raised in Ms. Davis’ Petition relate to matters of public
4 debate. Title IX and the subject of sexual assault on college campuses have been at the
5 forefront of public discourse for years. In the Montana First Amended Complaint, Plaintiff
6 Voorhees acknowledges that the University of Montana’s adherence to Title IX resulted in
7 vigorous public debate and the publication of Mr. Krakauer’s bestselling book. (*See id.* at
8 ¶¶ 25-28.) She can hardly now claim to be a mere private figure on this subject, with no
9 other authority than her own desire to sue a student. Her disingenuous arguments have
10 neither logic nor legal authority behind them.

11 Voorhees does not directly address her representations that she made in the Montana
12 case in her Opposition, instead asserting that “Davis attempts to take out of context
13 statements that were made” in the Montana case. (Doc. No. 25 at 8, n.6.) But there is no
14 explanation of how these statements are “out of context” or how the meaning of her
15 statements change when viewed in the “correct” context. The document speaks for itself,
16 and the Court may properly observe that her statements in that litigation are incompatible
17 with her position here.

18 Voorhees tries to get around the inescapable conclusion that she is a limited-purpose
19 public figure by redefining the relevant controversy as solely Davis’s Title IX complaint at
20 ERAU, as though the surrounding context of Title IX enforcement generally and
21 Voorhees’s publicized relationships to this controversy is irrelevant. (Doc. No. 25 at 13.)
22 But that is not the test for public figure status. By that reasoning, no complaint regarding a
23 given Title IX case would be part of a public controversy because each individual case is
24 merely a “private disagreement” between a student and the Title IX administrator. Or, just
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1 as absurdly, a celebrity who commits murder would not be a public figure because he
2 merely had a private dispute with his victim. Regardless of what Voorhees’s formal duties
3 as Dean of Students were in relation to Title IX cases, she was effectively the “mayor” of
4 the ERAU community and had a duty (whether real or perceived) to ensure the well-being
5 of the student body, and she had a well-known history of working on Title IX cases in an
6 academic context. She is a limited-purpose public figure.

7 Voorhees compares herself to the plaintiff in *Unsworth v. Musk*, No. 2:18-cv-08048-
8 SVW-JC, 2019 U.S. Dist. LEXIS 229076 (C.D. Cal. Nov. 18, 2019), but that case is
9 inapposite. *Musk* dealt with statements Elon Musk made about a journalist who criticized
10 Musk in connection with a highly-publicized proposal Musk made to use a submarine to
11 save children from a cave. The *Musk* court found that there was a public controversy
12 regarding the rescue of the children and the viability of Musk’s plan to assist in the rescue.
13 *Id.* at *17. It also found that the plaintiff, through his statements to the media criticizing
14 Musk’s rescue plan, actively injected himself into these controversies. *Id.* at *18. However,
15 Musk calling the plaintiff a “pedo guy” was not germane to this public controversy, as the
16 rescue of children or the viability of Musk’s submarine had nothing to do with the
17 plaintiff’s sexual proclivities. *Id.* at *20-21. That is the opposite of the facts here. All of
18 Ms. Davis’s statements about Voorhees relate directly to her as the Dean of Students and
19 the actions she has taken in education administration positions.

20 As a fallback position, Voorhees insists that discovery is necessary to determine her
21 public figure status.¹ This position has no support. Indeed, the court in *Musk* discussed how

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23 ¹ This is how SLAPP plaintiffs behave. They file unsupportable claims against financially
24 inferior opponents, and then when they meet resistance, they claim a vague need for “discovery.”
25 What discovery does Dean Voorhees now, all of a sudden, think she needs? She was unaware of
the need for such facts when filing the counterclaim, despite the fact that all of Ms. Davis’
arguments are familiar to her – Voorhees having been served with them as early as October 7,

1 public figure status is a question of law that is to be resolved by the court, not the trier of
 2 fact. *Id.* at *10-11; *see Jankovic v. Int’l Crisis Grp.*, 822 F.3d 576, 585 (D.C. Cir. 2016)
 3 (finding that “[w]hether [Plaintiff] is a limited-purpose public figure or a private figure is
 4 a matter of law for the court to decide”); *Manzari v. Associated Newspapers Ltd.*, 830 F.3d
 5 881, 888 (9th Cir. 2016) (holding that “[w]hether an individual is a public figure is a
 6 question of law that must be assessed through a totality of the circumstances”); *Carafano*
 7 *v. Metrosplash, Inc.*, 207 F. Supp. 2d 1055, 1070 (C.D. Cal. 2002) (noting that “[t]he
 8 determination of whether Plaintiff is a public figure is a question of law”) (citing *Rosenblatt*
 9 *v. Baer*, 383 U.S. 75, 88 n.15 (1966)). Even if public figure status were typically a factual
 10 question, Voorhees does not suggest what kind of discovery would assist in determining
 11 public figure status. The publicity Voorhees has received in relation to her Title IX and
 12 school administration conduct is already part of the record and no discovery can negate it.
 13 She is a public figure and must adequately plead and prove actual malice, which she has
 14 failed to do, and which she cannot do.

15 **2.1.2 Voorhees cannot meet the actual malice standard.**

16 Ms. Davis read reliable news articles and a best-selling book when examining Dean
 17 Voorhees’s record. Voorhees herself alleges that Ms. Davis relied upon statements made by
 18 the University of Montana – a governmental entity – when she allegedly defamed Dean
 19 Voorhees. When Ms. Davis applied this public information, this governmental and
 20 journalistically vetted information, she applied it to her own personal experience – which
 21 was consistent with Dean Voorhees’ existing reputation as someone who is soft on campus
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 24 2021? Further, in this case, they were the subject of a meet and confer prior to filing. (Doc. No. 19
 25 at 17.) But *now* she wants to amend again – something she apparently felt no need to do even upon
 seeing all of the arguments in the motion to dismiss.

1 sexual assault and arrogantly dismissive and vindictive toward students. Her actions in
2 this case are consistent with this prevailing reputation.

3 Merely claiming that Voorhees was “involved in” Title IX activity cannot possibly
4 be defamatory. Voorhees complains of the alleged implication in the Petition that she had
5 some authority to make changes to how Title IX cases were handled at ERAU and that she
6 was involved to some unspecified degree in Ms. Davis’s Title IX case. Ms. Davis disputes
7 that the Petition communications these implications, but even if they did it would not make
8 a difference. It is entirely possible for the Dean of Students not to have a formal role in the
9 handling of Title IX cases at a university while also having the authority to change how the
10 university handles these cases. It is also entirely possible for a university administrator to
11 influence how a Title IX case is handled through unofficial means. Voorhees’s argument
12 consists of repeatedly insisting that Ms. Davis was fully aware of formal separations of
13 power and authority at ERAU in Title IX cases and that she must have believed such
14 separations were ironclad. Such allegations are not present in the Counterclaim and it is
15 not reasonable for the Court to draw such inferences.

16 Voorhees complains that Ms. Davis’s statement that “Voorhees made a trans student
17 drop out of the University of Montana after the student came out, accusing the student of
18 violating the code of conduct six months earlier” is defamatory because Voorhees claims
19 she did not force out this student for transphobic reasons. But Ms. Davis does not claim
20 that Voorhees did so – Voorhees just makes this up out of thin air, because she is
21 unconcerned with either ethics, facts, or law. This Court should not follow her lead.

22 The truth is clear on the face of the complaint that the Petition accurately restates
23 the linked *Billings Gazette* article that discusses how a trans student endured mistreatment
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1 at the University of Montana for their status and that, after a different trans student engaged
2 in an act of violence, she feared this mistreatment would only intensify. (Doc. No. 19-1.)

3 In what is a pattern of Voorhees' out of control ego, she retaliated against this
4 student, too. After the student circulated a petition to amend UM's code of conduct such
5 that it would preclude anti-trans bullying, Voorhees placed the student on interim
6 suspension for alleged code of conduct violations (that the student disputed). (*Id.* at 7-8.)
7 It is entirely reasonable for a reader to conclude that these purported bases for disciplining
8 the trans student were pretextual, and that Voorhees actually took these actions in retaliation
9 for petitioning to forbid the bullying of trans students on campus. Not taking Voorhees's
10 account of events at face value does not equal actual malice. It is especially not so when
11 Voorhees has demonstrated a lack of honesty and transparency.

12 Voorhees complains that one of the articles cited in Ms. Davis's Petition does not
13 explicitly state that she was asked to leave her position at UM, and so it was defamatory to
14 state she was removed "for the culture she, and other staff members perpetuated regarding
15 how the college system of justice handles rape." (Doc. No. 25 at 6.) But this statement does
16 not appear next to the *Missoulian* article Voorhees refers to and does not purport to
17 summarize that article's contents. Rather, it is the first sentence of the Petition, meaning
18 that all the evidence provided in the Petition, taken together, led Ms. Davis to this
19 conclusion. And such evidence clearly does so. Voorhees admits she was asked to leave her
20 position at UM, the *Missoulian* article discusses the John Krakauer book that addresses
21 Voorhees's record on sexual assault cases at UM, and the Petition cites the Krakauer book.
22 Just because the school did not publicly admit that Voorhees was removed from her position
23 because she helped foster a culture of sexual assault does not prevent someone reviewing
24 available evidence to reach this conclusion. It is common knowledge that, outside truly
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1 egregious circumstances, high-ranking officials in government or large companies are
 2 permitted to leave gracefully to save face, rather than being kicked to the curb. Why was it
 3 unfathomable to believe that is what happened with Voorhees?

4 Voorhees argues that it was defamatory for Ms. Davis to claim that “[i]n the total of
 5 80 rapes over the span of three years Dr. Voorhees oversaw, only one was convicted”
 6 because Ms. Davis got the number of rapes wrong. (Doc. No. 25 at 8.)² But this claim of
 7 falsity means nothing because it is not coupled with any factual allegation or argument as
 8 to why Ms. Davis knew this was false or should have harbored significant subjective doubt
 9 as to its truth. Was the actual number of rapes higher or lower? By how much? What
 10 difference does it make? There is nothing to support an inference of actual malice.

11 Finally, in the Petition, Ms. Davis admitted that she was “biased” and encouraged
 12 everyone receiving the Petition to do independent research. She even provided links to her
 13 sources so that readers could review them and come to their own conclusions.³ As the
 14 Motion to Dismiss explains, this makes it much more likely readers would view the Petition
 15 as an expression of opinion, not fact. (Doc. No. 19 at 14-15.)

16 Voorhees argues in her Opposition that Davis “made it clear that she was aware of
 17 additional, undisclosed facts based on her personal knowledge,” and that her Petition was
 18 not based solely on the third-party sources in her Petition, making it more likely readers
 19 would view her Petition as a series of factual statements. (Doc. No. 25 at 15-16.) But

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 21 ² Voorhees also claims she did not “oversee” these cases at UM because a separate
 Title IX coordinator was responsible (Doc. No. 9 at ¶ 24), despite allegations to the
 contrary in her Complaint in the Montana case.

22 ³ Voorhees argues that readers could not actually form their own opinions because
 23 some of the sources Ms. Davis cited in her Petition were not available for free, and that a
 reader might need to purchase a subscription to access some articles. This argument is not
 24 supported by any authority, as none exists. Hyperlinks post-date defamation jurisprudence
 by decades, and there is nothing to suggest that, for example, citing a book in an article
 25 plays no part in the defamation analysis simply because a reader might need to purchase a
 copy of the book to review the author’s claims.

1 Voorhees fails to identify what these alleged undisclosed facts are or whether such alleged
2 undisclosed facts are false. She also fails to explain how such alleged undisclosed facts
3 could negate the prominent disclaimer in the Petition that Ms. Davis was biased and that
4 readers should come to their own conclusions.

5 **2.1.3 Ms. Davis’ statements are fair reports of other commentaries on**
6 **Voorhees’s actions.**

7 The Motion to Dismiss explains how a defendant does not publish with actual
8 malice when she relies on reputable news reports and that a sloppy investigation does not
9 amount to actual malice. (Doc. No. 19 at 15-16.) Even an investigation where a reporter
10 has an “admitted lack of concern regarding the truth of the statements” is insufficient to
11 establish actual malice. *DODDS v. A. Broad. Co.*, 145 F.3d 1053, 1063 (9th Cir. 1998).

12 Voorhees does not claim that any of the information in the sources cited in the
13 Petition are false and does not identify any plausible factual bases for claiming that Ms.
14 Davis knew or suspected any such information was false. She even admitted in the Montana
15 case that Ms. Davis was relying on information from UM. (Doc. No. 19-4 at ¶ 130.) The
16 closest Voorhees comes to doing so is claiming that, regarding the Krakauer book, “Mr.
17 Krakauer wrote and stated several things in his book, in addition to interviews, that were
18 incorrect,” without identifying any allegedly false statements or why they are pertinent to
19 Ms. Davis’s statements in the Petition. (Doc. No. 25 at 7.)

20 Voorhees’s argument is primarily that Ms. Davis had actual knowledge that
21 Voorhees did not oversee Title IX matters at ERAU. Again, this does not speak to actual
22 malice because Ms. Davis never made such a claim. But even if she did, the only facts
23 alleged to support Ms. Davis’s supposed knowledge of falsity are statements from ERAU
24 administration that, somehow, the Dean of Students with a reputation for handling Title IX
25 matters has nothing to do with Title IX cases at ERAU, despite meeting with Ms. Davis

1 about her Title IX case. Ms. Davis was not required to take these representations at face
2 value when they made no sense. *Harte-Hanks*, 491 U.S. at 691, n.37 (stating that “the press
3 need not accept ‘denials, however vehement; such denials are so commonplace tin the
4 world of polemical charge and countercharge that, in themselves, they hardly alert the
5 conscientious reporter to the likelihood of error”). Furthermore, “[k]nowledge of
6 contradictory information is not the same thing as knowledge of falsehood.” *Century Surety
7 Co. v. Prince*, 782 Fed. Appx. 553, 556 (9th Cir. 2019).

8 **2.2 Voorhees Fails to State a Claim for False Light**

9 Voorhees admits that the false light analysis is largely the same as the defamation
10 analysis. (Doc. No. 25 at 16.) However, Voorhees provides no argument as to how the
11 statements in the Petition would be offensive to a reasonable person.

12 **2.3 The Court Should Not Give Voorhees Leave to Amend**

13 Voorhees argues she should be allowed to amend her Counterclaim to include
14 additional facts supporting her claims. But she already had this opportunity. Prior to
15 Voorhees voluntarily dismissing her Arizona state court action, Ms. Davis filed a motion
16 to dismiss containing essentially the same arguments presented in the instant Motion. (Doc.
17 No. 24-11.) Ms. Davis identified the same deficiencies as in the instant Motion, yet
18 Voorhees did *nothing* to address them. Her Counterclaim is nearly identical to the
19 complaint she filed in state court, despite Voorhees alluding to additional facts she claims
20 that she can now plead. There is no indication as to when she learned of these alleged
21 additional facts, and thus no reason to believe she first learned of them after Ms. Davis
22 filed the instant Motion. Voorhees knew that her Counterclaim was fatally defective when
23 she filed it. She should not get yet another opportunity to fix its problems – especially when
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1 her level of candor has been shown to be so deficient that the Court should expect further
2 amendments to simply be Voorhees making things up so that she can lash out at a student.

3 Even if the Court were inclined to allow Voorhees to plead additional facts, such
4 facts do not help her. Voorhees claims that “[i]t was recently discovered that,” on August
5 26, 2020, the ERAU Title IX coordinator emailed Ms. Davis to inform her that she needed
6 to contact ERAU’s Vice President and General Counsel, Charlie Sevastos, regarding her
7 Title IX complaint. (Doc. No. 25 at 3, n.1.) This does not matter because Ms. Davis did not
8 state or imply that Voorhees was directly involved in her Title IX case. But even if she had,
9 an email from ERAU stating that the Title IX department would not handle her case, but
10 that a different official within ERAU would, does not change Ms. Davis’s reasonable
11 perception that the Dean of Students who was heavily involved in Title IX matters at her
12 previous university likely had some involvement in Title IX matters at ERAU.

13 Another “recently discovered” alleged fact is that another student “ostensibly
14 informed” Ms. Davis that Voorhees “has nothing to do with Title IX at ERAU, and that
15 Davis replied that she didn’t care and that she was going to publish the Petition regardless.”
16 (Doc. No. 5 at n.3.) Again, this doesn’t matter because Ms. Davis did not claim that
17 Voorhees handled her Title IX case. It also is not grounds for leave to amend because there
18 is no argument or authority to support the proposition that a mere student telling Ms. Davis
19 that the *Dean of Students* at ERAU had nothing to do with Title IX matters somehow
20 equates to actual knowledge of falsity or reckless disregard. This presupposes that anyone
21 would be gullible enough to believe Voorhees’ clear belated fabrication of events.

22 **3.0 CONCLUSION**

23 For the foregoing reasons, the Court should dismiss Voorhees’s Counterclaim with
24 prejudice.

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Dated: January 25, 2022.

Respectfully submitted,

/s/ Marc J. Randazza

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 25th day of January, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza
Randazza Legal Group, PLLC

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