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11 **UNITED STATES DISTRICT COURT**
 12 **DISTRICT OF ARIZONA**

13 Audrey Davis, an individual,
 14
 15 Plaintiff,

16 v.

17 Rhondie Voorhees, personally and as
 18 Dean of Students at Embry-Riddle Aeronautical
 19 University; The Embry-Riddle Aeronautical
 20 University Board Of Trustees; Embry-
 21 Riddle Aeronautical University; and Tyler
 22 Smith, an individual,

23 Defendants.

24 Rhondie Voorhees, an individual

25 Counterclaimant,

26 v.

27 Audrey Davis, an individual,

28 Counterdefendant.

NO. 3:21-cv-08249-PCT-DLR

**DEFENDANT RHONDIE
 VOORHEES’S RESPONSE TO
 PLAINTIFF’S MOTION TO
 DISMISS DEFENDANT
 RHONDIE VOORHEES’S
 COUNTERCLAIM FOR
 FAILURE TO STATE A
 CLAIM**

Oral Argument Requested

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1 Defendant/Counterclaimant Rhondie Voorhees (“Dr. Voorhees”), by and through
2 undersigned counsel, respectfully requests that the Court enter an order denying Plaintiff’s
3 Motion to Dismiss Defendant Rhondie Voorhees’s Counterclaim for Failure to State a
4 Claim [Doc. 19] (the “Motion”). Dr. Voorhees’s Response in opposition to the Motion is
5 supported by the following Memorandum of Points and Authorities, and all filings in this
6 matter, which are all hereby incorporated by reference.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. RELEVANT FACTS.**

9 Dr. Voorhees is the Dean of Students at Embry-Riddle Aeronautical University in
10 Prescott, Arizona (“ERAU”). *See* Dr. Voorhees’s Counterclaim [Doc. 9] (“Counterclaim”),
11 ¶ 7. Davis is currently a student at ERAU. *Id.* at ¶ 8. In 2019, Davis filed a complaint with
12 ERAU under Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. §1681
13 et seq. *Id.* at ¶ 9. Davis was displeased with how ERAU investigated the Title IX complaint
14 and/or its findings. *Id.* at ¶ 10. In September of 2020, Davis met with Dr. Voorhees
15 regarding Davis’s concerns. *Id.* at ¶ 11. Two members of Davis’s Army ROTC cadre
16 leadership were also present at that meeting (Major Jackson and SFC J. DiCenzo). *Id.*
17 While Dr. Voorhees attempted to be empathetic to Davis’s concerns, Dr. Voorhees made it
18 very clear to Davis during the meeting that Dr. Voorhees is not, and has never been,
19 involved with overseeing or supervising any Title IX issues at ERAU. *Id.* at ¶ 12. Dr.
20 Voorhees made it clear to Davis that if Davis had concerns about a Title IX matter, then
21 she should address it with the Title IX Coordinator’s supervisor, who is the Vice President
22 and General Counsel for the University. *Id.* at ¶ 13. More specifically, Dr. Voorhees made
23 it clear to Davis that Dr. Voorhees was unable to transfer Davis’s alleged abuser from the
24 class due to the issue falling under Title IX, and that Dr. Voorhees could not make any of
25 Davis’s suggested improvements to ERAU’s Title IX processes and procedures due to her
26 role and the legalities associated with Title IX. *See id.* Dr. Voorhees drew a diagram for
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1 Davis on a whiteboard depicting the supervision structure of Title IX management on
 2 campus. *Id.* at ¶ 14. Dr. Voorhees drew a chart showing how Dr. Voorhees supervised
 3 another administrator on a half-time basis in her role as Associate Dean of Students only,
 4 and how this administrator reported to ERAU’s legal counsel for her other half-time role as
 5 Title IX Coordinator. *Id.* at ¶ 15. Dr. Voorhees directed to Davis to bring these issues to the
 6 Title IX Coordinator’s supervisor, who is the Vice President and General Counsel for the
 7 University. *See id.* Dr. Voorhees did not instruct Davis to “take her word for it.” Quite
 8 conversely, she indicated that her concerns may have merit and that if Davis wished to
 9 further pursue those concerns, she must do so through the appropriate administrators.¹

10 During the meeting, Davis acknowledged her understanding that Dr. Voorhees has
 11 nothing to do with the supervision or oversight of any Title IX matters. *Id.* at ¶ 17.
 12 However, Davis elected not to follow Dr. Voorhees’s instructions and handle the matter
 13 constructively by making the proper inquiry with Mr. Sevastos. Instead, Davis failed to
 14 take any action for approximately **four months** and then maliciously attacked Dr.
 15 Voorhees online. *Id.* at ¶ 18.

16 Shockingly, on or about February 15, 2021, Davis published several false and
 17 defamatory statements on Change.org (the “Petition”). *Id.* Davis knowingly made the false
 18 factual implication that Dr. Voorhees was not only responsible for Davis’s investigation
 19 taking over 150 days, but that Dr. Voorhees was also responsible for how things were
 20

21
 22 ¹ It was recently discovered that, on August 26, 2020, before Dr. Voorhees met with Davis
 23 and her ROTC cadre, the Title IX Coordinator emailed Davis’s cadre and stated that “the
 24 Title IX Office will no longer respond to inquiries and/or demands by any member of the
 25 ERAU AROTC program regarding this case. Please contact Charlie Sevastos, Vice
 26 President and General Counsel for the University.” Davis and her cadre were aware that all
 27 Title IX issues would need to be addressed with Mr. Sevastos – not Dr. Voorhees. This
 28 information, along with any other information in this Response not contained in the
 Counterclaim, is only being included for the purpose of demonstrating to the Court that Dr.
 Voorhees is capable of pleading additional facts, and that leave to amend should be granted
 to the extent the Court is inclined to grant the Motion or any part of it.

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1 handled post-investigation, even though Davis knew that this was false. *Id.* at ¶ 19.²

2 The title of the Petition is, “Dean of Students, Rhondie Voorhees to Resign.” *See id.*
3 at ¶ 18. The title of the Petition, when read together with the Petition as a whole, conveys
4 that Dr. Voorhees is the individual at ERAU who is responsible for the “school’s reputation
5 with title IX” due to her inability or refusal to perform her duties as Dean of Students.
6 Davis portrayed that getting Dr. Voorhees to resign would solve most of the problems with
7 how Title IX complaints are handled at ERAU. *See id.* at ¶ 19.

8 In the Petition, after Davis misstates several facts about Dr. Voorhees’s former
9 employment at UM, she discusses how she “and most of [her] female friends at ERAU
10 have been sexually assaulted or harassed,” how she reported her alleged assault to the
11 school, how “the investigation took over 150 days to come to a decision,” how “[t]here
12 was not enough evidence to convict,” and how “[t]he following semester [she] was put in a
13 class with [her] abuser.” *See id.* In that same paragraph of the Petition, Davis then
14 discusses “the rumors” regarding the “school’s reputation with title IX,” how she “had a
15 meeting with the Dean,” how Davis told Dr. Voorhees that “it was very traumatic to see
16 that [she] was put in a class with [her] abuser” and that “there should be an early warning
17 system put in place for both parties” *See id.* at ¶¶ 18-19.

18 In that same paragraph of the Petition, Davis then falsely implies that Dr. Voorhees
19 represented that she the authority to make changes to these processes, and that she would
20 get back to Davis. *See id.* Davis specifically stated that “[Dr. Voorhees] said that would
21 take a lot of work, and never got back to me.” *See id.* This is exactly the opposite of what
22 Dr. Voorhees told Davis. *See id.* at ¶¶ 15-19. Again, Dr. Voorhees directed Davis to bring
23 these issues to the Title IX Coordinator’s supervisor -- indicating that her concerns may
24
25

26 ² The allegations in Davis’s Complaint [Doc. 1] demonstrate that Davis maliciously
27 targeted Dr. Voorhees in the Petition. Surprisingly, the Petition fails to address vast
28 majority of the issues and allegations contained in Davis’s Complaint and falsely portrays
an entirely different picture.

1 have merit. Dr. Voorhees did not ignore her suggestions.

2 After Davis falsely implied that Dr. Voorhees represented that she had the authority
3 to make the changes to Title IX processes, in the same paragraph of the Petition, Davis then
4 states that “[Dr. Voorhees] represents a culture of letting abusers get a free pass.” *See id.* at
5 ¶ 18. Davis is clearly conveying that Dr. Voorhees had the authority to change Title IX
6 policies and procedures at ERAU, even though Davis knows that is not the case, and that a
7 new Dean of Students would seemingly help the Title IX issues at ERAU. *See id.* at ¶¶ 15-
8 19. Surprisingly, the Petition fails to mention the Title IX Coordinator by name or her
9 supervisor. Davis, who is a very bright young woman, maliciously made Dr. Voorhees the
10 target of her Petition for the admitted purpose of getting her terminated from ERAU and
11 destroying her career. This was certainly no innocent mistake.³

12 In the next section of her Petition, Davis opens with the statement that “[t]his
13 behavior needs to stop being covered up and coddled.” *See id.* at ¶ 18. When viewing the
14 Petition as a whole, this statement (when read into the context of the Petition) falsely
15 implies that Dr. Voorhees is responsible for covering up illegal and/or inappropriate
16 behavior based on how Dr. Voorhees allows Title IX complaints to be handled at ERAU.
17 Davis then lists several things that “ERAU Title IX does not” allegedly do. After listing
18 these items, Davis states that “[she] do[es] not feel comfortable or safe with [Dr. Voorhees]
19 being the staff representative for the student body.” *See id.* Once again, Davis is falsely
20 conveying that Dr. Voorhees is responsible for overseeing Title IX at ERAU, and that the
21 University would be a safer place if someone other than Dr. Voorhees was overseeing Title
22 IX due to Dr. Voorhees’s complete failure to handle her duties as Dean of Students.

23
24 The foregoing defamatory statements (collectively, the “Statements”) are
25

26 ³ It has been recently discovered that, before Davis published the Petition, she was talking
27 with another student about whether to publish it, and the other student ostensibly informed
28 Davis that Dr. Voorhees has nothing to do with Title IX at ERAU, and that Davis replied
that she didn’t care and that she was going to publish the Petition regardless.

1 completely *separate and apart from the articles* cited and misstated by Davis. In the
 2 Petition, after Davis states that she doesn't feel safe with Dr. Voorhees as the Dean of
 3 Students, Davis then lists website links to various articles and documents she found online
 4 and proceeds to completely misstate the following article:
 5 [https://missoulain.com/news/local/transgender-student-drops-out-alleges-discrimination-at-](https://missoulain.com/news/local/transgender-student-drops-out-alleges-discrimination-at-missoula-college/article_5c8a65bf-35a6-5af0-98bd-777e769f10cd.html)
 6 [missoula-college/article_5c8a65bf-35a6-5af0-98bd-777e769f10cd.html](https://missoulain.com/news/local/transgender-student-drops-out-alleges-discrimination-at-missoula-college/article_5c8a65bf-35a6-5af0-98bd-777e769f10cd.html). *See id.* at ¶¶ 27-
 7 28. Davis published that “Dean Rhondie made Trans student drop out, after coming out.
 8 Stating they violated student conduct [code] after an incident that occurred 6mo prior.”
 9 This is a complete misstatement. *See id.* The article explains that a concern for safety was
 10 the issue, not the fact that the student was transgender. *See id.* The student was a convicted
 11 felon who was conditionally admitted to the university, who then allegedly committed a
 12 violent crime.

13
 14 Similarly, at the beginning of the Petition, Davis falsely published that “Dean of
 15 Students Rhondie Voorhees was asked to leave her last position at University of Montana
 16 **for the culture she, and other staff members perpetuated regarding how the college**
 17 **system of justice handles rape.”** *Id.* at ¶ 20. Davis did not simply note that Dr. Voorhees
 18 was asked to leave the University of Montana (“UM”), which is not in dispute. Rather,
 19 Davis states that Dr. Voorhees was asked to leave for this damaging reason. Yet, one of the
 20 articles⁴ cited by Davis in the Petition specifically states that UM elected not to renew Dr.
 21 Voorhees’s contract because the Dean of Students position was eliminated, and that UM
 22 has stated this publicly, along with the fact that Dr. Voorhees remained an employee in
 23 good standing throughout and was paid fully for the duration of her contract period. *Id.* at ¶
 24 21. This article refers at least five times to “reorganization,” “restructure,” and “redefined”
 25 or “changing” roles by the university in relation to the elimination of the Dean of Students
 26

27
 28 ⁴ [https://missoulain.com/news/local/university-of-montana-dean-of-students-asked-to-](https://missoulain.com/news/local/university-of-montana-dean-of-students-asked-to-leave/article_cbcd2362-f723-5c73-9e8fe88a6835d705.html)
[leave/article_cbcd2362-f723-5c73-9e8fe88a6835d705.html](https://missoulain.com/news/local/university-of-montana-dean-of-students-asked-to-leave/article_cbcd2362-f723-5c73-9e8fe88a6835d705.html).

1 position. *Id.* at ¶ 22. The article also includes a reference to Dr. Voorhees being an
2 “employee in good standing.” *Id.*

3 Nowhere in the articles cited by Davis was there any allegation that Dr. Voorhees
4 was run out of her prior position at UM because of her hostility toward a sexual assault
5 victim there. Answer at ¶ 27. In fact, one of the articles cited by Davis noted how Dr.
6 Voorhees was praised for her work by a victim. *Id.* The idea that Dr. Voorhees “was asked
7 to leave her last position at University of Montana for the culture she, and other staff
8 members perpetuated regarding how the college system of justice handles rape” was
9 completely made-up by Davis, is false, and was published by Davis with the intent to ruin
10 Dr. Voorhees’s career.⁵ It should also be noted that only about half of the links in the
11 Petition allowed a reader to click and view the material without being charged.

12
13 In the Motion, Davis discusses how John Krakauer’s book, which Davis only cited
14 to in Petition, allegedly contradicts Dr. Voorhees’s assertions that she did not oversee Title
15 IX claims at UM. However, Mr. Krakauer wrote and stated several things in his book, in
16 addition to interviews, that were incorrect, and Davis’s alleged reliance on what Krakauer
17 stated does not negate how Davis maliciously published the Statements. Again, Dr.
18 Voorhees directed to Davis to bring her concerns to the Title IX Coordinator’s supervisor,
19 but Davis failed and refused to do so. Davis was interested in getting her “pound of flesh,”
20 and a quick search on the Internet gave Davis the ammunition needed to hit an easy target.
21 It is important to note that Davis did not simply repeat untrue things that others had already
22 said about Dr. Voorhees; in fact, she fabricated a whole new series of unsubstantiated lies
23 as discussed above.

24 In the Motion, Davis also incorrectly states that Dr. Voorhees is alleging that it was
25

26 ⁵ Davis has since learned that Dr. Voorhees’s departure from UM stemmed from her efforts
27 to bring to light concerns about Title IX violations and student and campus safety,
28 especially for female students and faculty, as well as her own safety – exactly the opposite
of what Davis alleged in the Petition and what she continues to allege.

1 defamatory to say that she oversaw Title IX claims at UM. Dr. Voorhees states in her
2 Counterclaim that “Davis also falsely published that, “[i]n the total of 80 rapes over the
3 span of three years Dr. Voorhees oversaw, only one was convicted.’ ” Counterclaim at ¶
4 25. Dr. Voorhees alleges in her Counterclaim that this statement is false and defamatory
5 and then proceeds to explain why the statement is false. *See id.* at ¶¶ 24-26. Dr. Voorhees
6 did not oversee 80 rape cases during any three-year period while at UM; in 2012 and 2013,
7 long before her departure from UM, she reviewed a high-profile Title IX case involving an
8 athlete, wherein over Dr. Voorhees’ objection, she was instructed to apply a higher burden
9 of proof when reviewing the findings. Additionally, there was not “80 rapes” in “three
10 years” at UM at any time while Dr. Voorhees was Dean of Students.⁶ *See id.* Davis had
11 good reason to believe the Statements were false but published them regardless.

12
13 In addition to publishing the Petition, on February 15, 2021, Davis emailed at least
14 74 students and faculty at ERAU and directed them to “check out this petition and share.”
15 *Id.* at ¶ 30. Davis also posted on Facebook.com the false and defamatory implication that
16 Dr. Voorhees was directly connected to the alleged mismanagement of Davis’s Title IX
17 case at ERAU. *See id.* at ¶ 31. Davis also created and disseminated at least four memes of
18 Dr. Voorhees, each containing a Statement or variation thereof, designed and intended to
19 impeach Dr. Voorhees’s ability to adequately perform her duties as the Dean of Students at
20 ERAU. *See id.* at ¶ 32.

21
22
23 ⁶ Davis attempts to take out of context statements that were made in a lawsuit between
24 Dr. Voorhees and UM, which is still currently pending. The pending lawsuit in Montana,
25 including any of the statements or issues therein, is not relevant to this case, and Dr.
26 Voorhees does not need to attempt to educate Davis regarding the difference between
27 overseeing Title IX cases as an appointed Title IX coordinator and conducting a formal
28 review of a Title IX case. Moreover, the incorporation of documents outside of the
pleadings is inappropriate, and Dr. Voorhees hereby objects accordingly. All such
information should be disregarded by the Court or stricken. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds by *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

1 Davis’s conduct was clearly intended to cause harm to Dr. Voorhees’s reputation
2 and interfere with her employment with ERAU. *Id.* at ¶ 33. After Dr. Voorhees confronted
3 Davis about why and how the statements in the Petition were not true, Davis took several
4 days to remove the Petition, as well as the Facebook comment. *Id.* at ¶ 34. Notably, on
5 February 16, 2021, Davis was informed by a Title IX investigator at ERAU that Dr.
6 Voorhees “has nothing to do with Title IX here at ERAU or any of its processes.” *Id.* at ¶
7 35. The investigator reiterated to Davis that the Title IX Coordinator reports to the Vice
8 President and General Counsel for the University. *Id.* He reiterated that, “Rhondie does not
9 work within Title IX,” and “she does not report to and is not a part of the same Title IX
10 supervision and process like Liz and I are.” *Id.* Davis told the investigator on that day that
11 she understood all of this and had no questions regarding it. *Id.*

12 Even after learning from an actual Title IX investigator at ERAU that the Petition
13 contained several false and defamatory statements, Davis failed to act promptly to remove
14 the Petition. *Id.* at ¶ 36. After receiving several demands from Dr. Voorhees to delete the
15 Petition, Davis finally did so on February 21, 2021. *Id.* at ¶ 37. Unfortunately, however, at
16 this point, the defamatory statements began to spread well beyond ERAU, and individuals
17 who were not affiliated with ERAU began to share the Petition on social media and make
18 new negative comments about Dr. Voorhees. *Id.* at ¶ 38. It was explained to Davis the
19 damage she caused and that she would continue to cause if she did not promptly issue a
20 retraction. *Id.* at ¶ 39. For several months after publishing the defamatory statements, Davis
21 continued to act with reckless indifference to the harm she continued to cause by refusing
22 to issue any retraction. *Id.* at ¶ 40. While Dr. Voorhees was extremely empathetic to Davis
23 under the circumstances, Dr. Voorhees refuses to allow Davis to destroy Dr. Voorhees’s
24 reputation, which has taken decades and countless sacrifices to build. *Id.* at ¶ 41.

26 **II. LEGAL STANDARD.**

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28

1 A complaint will survive a motion to dismiss if “it contain[s] sufficient factual
 2 matter, accepted as true, to state a claim to relief that plausible on its face.” *Ashcroft v.*
 3 *Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). “A claim has facial
 4 plausibility,” and thus survives a motion to dismiss, “when the pleaded factual content
 5 allows the court to draw the reasonable inference that the defendant is liable for the
 6 misconduct alleged.” *Id.* at 678. Detailed factual allegations are not required. *Id.*

7 **III. ARGUMENT**

8 **a. Dr. Voorhees has established a claim for defamation.**

9 In order to state a claim for defamation, a plaintiff must allege (1) that the defendant
 10 made a false statement; (2) that the statement was published or communicated to someone
 11 other than plaintiff; and (3) that the statement tends to harm plaintiff's reputation. See
 12 *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989). “
 13 ‘To be defamatory, a publication must be false and must bring the defamed person into
 14 disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or
 15 reputation.’ ” *Turner v. Devlin*, 174 Ariz. 201, 203–04, 848 P.2d 286, 288–89 (1993)
 16 (citation omitted). “In Arizona, a publication which impeaches the honesty, integrity or
 17 reputation of a person is libelous per se . . . and actionable without proof of special
 18 damages because damages are presumed.” *Peagler v. Phoenix Newspapers*, 114 Ariz. 309,
 19 316 (Ariz. 1977) (citation omitted). “Slander per se in Arizona are statements which
 20 charge one with a contagious or venereal disease; charge that a woman is not chaste;
 21 accusations which tend to injure a person in his or her profession, trade or business; or
 22 statements that impute the commission of a crime involving moral turpitude.” *Boswell v.*
 23 *Phoenix Newspapers, Inc.*, 152 Ariz. 1, 6, 730 P.2d 178, 183 (Ct. App. 1985) [FN 4].

24
 25 “Unless the publication . . . [is] privileged or qualifiedly privileged, the proof of
 26 publication . . . carri[e]s with it the presumption of its falsity and of malice toward the
 27 plaintiff and the burden was upon the defendant to prove both the truth of the publication
 28

1 and a lack of malice toward plaintiff.” *McClinton v. Rice*, 76 Ariz. 358, 365-366 (Ariz.
2 1953). However, when a publication addresses a matter of public concern, the First
3 Amendment requires that the plaintiff bear the burden of demonstrating the statements
4 were false. *Dombey v. Phoenix Newspapers Inc.*, 150 Ariz. 476, 481, 724 P.2d 562, 567
5 (1986) (“[I]n cases involving matters of public concern . . . the plaintiff [has] the burden of
6 proving falsity.”). And if the plaintiff is a public official or figure, he or she must show that
7 the defendant exhibited actual malice when publishing the false remark. *Id.* But if the
8 plaintiff is a private individual, he or she need only show negligent publication. *Id.*

9 “Statements that can be interpreted as nothing more than rhetorical political
10 invective, opinion, or hyperbole are protected speech, but false assertions that state or
11 **imply a factual accusation** may be actionable.” *Burns v. Davis*, 196 Ariz. 155, 165, 993
12 P.2d 1119, 1129 (Ct. App. 1999). “The trial court first decides whether, under all the
13 circumstances, a statement is even capable of a defamatory meaning. If so found, the jury
14 then determines whether the defamatory meaning was actually conveyed.” *Id.* “**In most**
15 **instances, it is for the jury to determine whether an ordinary reader or listener would**
16 **believe the statement to be a factual assertion, mere opinion or hyperbole.**” *Id.* “The
17 meaning of words and statements should not be construed in isolation; rather, consideration
18 should be given to the context and all surrounding circumstances, including the impression
19 created by the words used and the expression's general tenor.” *Id.*

20
21 In this case, the Statements are factual in nature and capable of being proven
22 objectively false. Davis knowingly made the false factual implication that Dr. Voorhees
23 was not only responsible for Davis’s investigation taking over 150 days, but that Dr.
24 Voorhees was also responsible for how things were handled post-investigation. Similarly,
25 Davis falsely conveys that Dr. Voorhees is the individual at ERAU who is responsible for
26 the “school’s reputation with title IX” due to her inability or refusal to perform her duties
27 as Dean of Students.
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1 However, as discussed, Dr. Voorhees cannot be responsible for policies and
2 procedures that she has no authority to change, oversee, or enforce, and the fact that Dr.
3 Voorhees has no such authority at ERAU can be easily proven.

4 The Petition also falsely conveys that that Dr. Voorhees represented to Davis that
5 she the authority to make changes to these processes, but that she was dismissive of
6 Davis’s suggestions based on that they would “take a lot of work.” Additionally, when
7 viewing the Petition as a whole, Davis falsely conveys that Dr. Voorhees is responsible for
8 covering up illegal and/or inappropriate behavior based on how Dr. Voorhees allows Title
9 IX complaints to be handled at ERAU. Again, for the reasons discussed above, this is false
10 and can be proven as such.

11 The Statements tend to injure Dr. Voorhees in her profession as the Dean of
12 Students, as well as her general reputation. False factual statements indicating that a person
13 is covering up and coddling rape and sexual assault clearly impeach the honesty, integrity
14 and/or reputation of a person. Accordingly, the Statements are per se defamatory and are
15 presumed to be false and malicious given that Dr. Voorhees is private person and the
16 Statements pertain to a private concern.

17
18 **1. Dr. Voorhees is not public figure or limited purpose public figure.**

19 As Davis admits, Dr. Voorhees is clearly not a “general purpose public figure.”
20 “[T]he general public figure is a rare creature.” *Waldbaum v. Fairchild Publications, Inc.*,
21 627 F.2d 1287, 1292 (D.C. Cir. 1980). “Absent clear evidence of general fame or notoriety
22 in the community, and pervasive involvement in the affairs of society, an individual should
23 not be deemed a public personality for all aspects of his life.” *Gertz v. Robert Welch,*
24 *Inc.*, 418 U.S. 323, 352(V), 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

25 Some individuals become limited-purpose public figures when they thrust
26 themselves to the forefront of a public controversy in order to influence the resolution of
27 the issues involved. *Gertz*, 418 U.S. at 345. Courts consider whether “(i) a public
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1 controversy existed when the statements were made, (ii) whether the alleged defamation is
2 related to the plaintiff's participation in the controversy, and (iii) whether the plaintiff
3 voluntarily injected itself into the controversy for the purpose of influencing the
4 controversy's ultimate resolution.” *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 266 (9th
5 Cir. 2013). “A public controversy is not simply a matter of interest to the public; it must be
6 a real dispute, the outcome of which affects the general public or some segment of it in an
7 appreciable way.” *Waldbaum*, 627 F.2d at 1296–98. It has been made very clear that
8 “private concerns or disagreements do not become public controversies simply because
9 they attract attention.” *Id.*

10 The dispute between ERAU and Davis regarding how ERAU handled her Title IX is
11 nothing more than a private disagreement. Davis’s personal Title IX matter and how
12 ERAU dealt with it was never publicly discussed or debated issue until Davis began
13 posting the Statements. Moreover, presuming for the sake of argument that Title IX policies
14 at ERAU could be a matter of public concern, when focusing on the point of the Petition, it
15 becomes even more evident that there is no public controversy. As discussed, the premise
16 of Davis’s Petition was that Dr. Voorhees is responsible for ERAU’s Title IX problems and
17 should resign given her mismanagement. However, prior to Davis’s conduct, there has
18 never been any public controversy about Dr. Voorhees at ERAU concerning Title IX
19 (given that Dr. Voorhees is not involved in any Title IX matter at ERAU), and Dr.
20 Voorhees did not thrust herself into the spotlight regarding Title IX matters at ERAU.

21 Similarly, Dr. Voorhees did not participate in any controversy related to Davis’s
22 Title IX issues. Dr. Voorhees was simply trying to talk to Davis about getting counseling to
23 help her address any issues associated with her reported assault. Likewise, Dr. Voorhees
24 was not trying to influence a resolution of Davis’s complaint with how ERAU handled her
25 Title IX matter; she was simply trying to get her to go to counseling. In an email to Davis’s
26 cadre leader (Major Jackson), before Dr. Voorhees met with Davis, the Title IX
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1 coordinator specifically directed Davis and her ROTC cadre to ERAU’s Vice President and
2 General Counsel – not Dr. Voorhees.

3 Notably, if the well-known journalist who recently sued Elon Musk for calling him
4 a pedophile is not a limited-purpose public figure, Dr. Voorhees clearly is not a limited-
5 purpose public figure either. In *Unsworth v. Musk*, No. 2:18-CV-08048-SVW-JC, 2019
6 WL 8220721(C.D. Cal. Nov. 18, 2019), the court reasoned as follows:

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8 The limited-purpose public figure doctrine exists because
9 “[t]hose who attempt to affect the result of a particular controversy
10 have assumed the risk that the press, in covering the controversy,
11 will examine the major participants with a critical eye.” *Waldbaum*,
12 627 F.2d at 1298. But this eye only reaches “the issues at
13 hand.” *Id.* To allow criticism into every aspect of a plaintiff’s life
14 simply because he chose to get involved in a limited issue would
15 render him an all-purpose public figure—effectively merging the
16 limited-purpose public figure doctrine.

17 *Unsworth v. Musk*, No. 2:18-CV-08048-SVW-JC, 2019 WL 8220721, at *7 (C.D. Cal.
18 Nov. 18, 2019). Determining whether Dr. Voorhees is limited-purpose public figure is a
19 fact-intensive analysis. Exploring the relevant facts cannot be sufficiently explored in this
20 Response. Accordingly, to the extent the Court is inclined to consider Dr. Voorhees a
21 limited-purpose public figure, Dr. Voorhees requests that the Court defer making any
22 ruling until the issue has been fully briefed after discovery.

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**2. Dr. Voorhees has alleged sufficient facts indicating that Davis
published the Statements with actual malice.**

Even if Dr. Voorhees was required to plead malice, she has alleged, or is certainly
capable of alleging, sufficient facts indicating that Davis published the Statements with
malice. A statement is published with actual malice when the publisher had “knowledge
that it was false or with reckless disregard of whether it was false or not.” *Gertz*, 418 at
328, 94 S. Ct. at 3001. Again, as discussed above, Davis knew that the Statements were
likely false but elected to publish them regardless, and Dr. Voorhees has alleged or is

1 certainly capable of alleging sufficient facts regarding malice. Accordingly, the Motion
2 must be denied.

3 **3. Davis’s Statements are not fair and accurate commentaries.**

4 “[S]tatements of opinion are actionable when they ‘imply a false assertion of fact.’ ”
5 *Turner v. Devlin*, 174 Ariz. 201, 204-209 (Ariz. 1993). “ ‘[S]imply couching such
6 statements in terms of opinion does not dispel [the false, defamatory] implications’ because
7 a speaker may still imply ‘a knowledge of facts which lead to the [defamatory] conclusion.’
8 ” *Partington v. Bugliosi*, 56 F.3d 1147, 1152-53 (9th Cir. 1995) (citation omitted).

9 “[W]hen a speaker outlines the factual basis for his conclusion, his statement is
10 protected.” *Id.* at 1156. This assumes, however, that the factual basis itself is true. “A
11 speaker can’t immunize a statement that implies false facts simply by couching it as an
12 opinion based on those facts.” *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002).
13 “Likewise, a defamatory statement isn’t rendered nondefamatory merely because it relies
14 on another defamatory statement.” *Id.* However, “unless defendants knew the news reports
15 were probably false or had some obvious reason to doubt their accuracy, their reliance is
16 protected by the First Amendment. But if it turns out that defendants knew the news reports
17 were wrong—or **acted with reckless indifference in the face of some clear warning**
18 **sign**—then they weren’t entitled to repeat them publicly and later claim that they were
19 merely expressing nondefamatory opinions.” *Id.* at 1129.

20
21 The majority of the Petition and the Statements at issue focused on Davis’s first-
22 hand experiences with Title IX at ERAU. Davis was not some outside commentator with
23 limited facts available to her, simply giving her two cents on a couple of articles. She made
24 it clear that she was aware of additional, undisclosed facts based on her personal
25 knowledge. Because Davis’s Statement were not solely made in reasonable reliance on the
26 facts outlined in the articles cited by Davis, a reasonable listener could consider the
27 Statements to imply an assertion of objective facts rather than an interpretation of the facts
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1 equally available to Davis and to the listener. *See Manufactured Home Communities, Inc.*
2 *v. Cty. of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008) (“[I]n this case a reasonable listener
3 could conclude that Jacob ‘impl[ied] there are other, unstated facts supporting’ her
4 comments.”). It should also be noted that only about half of the links in the Petition
5 allowed a reader to click and view the material without being charged. Thus, a substantial
6 portion of the information was not equally available to the readers of the Petition, and it is
7 unlikely that college students would actually pay for the information.

8 Additionally, as discussed above, Davis had a clear warning, as well as actual
9 knowledge, that Dr. Voorhees did not oversee the Title IX or the Title IX Coordinator in
10 her capacity as such. Davis elected not to follow Dr. Voorhees’s instructions and handle
11 the matter constructively by making the proper inquiry. Instead, Davis failed to take any
12 action for approximately **four months** and then maliciously attacked Dr. Voorhees online.
13 This is textbook reckless disregard, and the Motion must be denied.
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15 **b. Dr. Voorhees has established a claim for false light.**

16 For the same reasons as discussed above, Dr. Voorhees has established a claim for
17 false light. Davis had knowledge of or acted in reckless disregard as to the falsity of the
18 publicized matter. While having good reason to believe otherwise, Davis falsely portrayed,
19 among other things, that that Dr. Voorhees was the individual at ERAU who is responsible
20 for the “school’s reputation with title IX” due to her inability or refusal to perform her
21 duties as Dean of Students. Accordingly, the Motion must be dismissed.

22 **IV. CONCLUSION.**

23 Based on the foregoing, Dr. Voorhees respectfully requests that the Motion be
24 denied, or in the alternative, to the extent the Court is inclined to grant the Motion or any
25 part of it, that leave to amend should be granted, and that the Court grants such other and
26 further relief as the Courts finds reasonable and necessary.
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RESPECTFULLY SUBMITTED this 11th day of January, 2022.

RM WARNER, PLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the submission date referenced above, I caused the foregoing document to be electronically filed 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/ Daniel R. Warner
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