Team No. 219938

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

No. 18-2143

ELMORE LANSFORD

Petitioner

- v. –

SILVIA COURTIER

Respondent

On Appeal from the Supreme Judicial Court of the State of Tenley
in Case No. XSJ-99219

BRIEF OF SILVIA COURTIER,
Respondent

Oral Argument Requested

QUESTIONS PRESENTED

(1) Whether an individual can be a libel-proof plaintiff under defamation law solely on the basis of past criminal convictions, including a felony, that have gained no notoriety or public attention?

(2) Whether the challenged statements in this case qualify as unprotected defamation or protected rhetorical hyperbole?

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JURISDICTION STATEMENT

A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

Sylvia Courtier had a difficult childhood. (J.A. at 5.). Both of her parents were drug addicts and died early on. *Id.* Specifically, her father went to prison on a fifteen-year sentence for selling drugs and was killed in prison. *Id*. As for her mother, she died of a drug overdose when Courtier was only ten years old. *Id*. Forced to fend for herself, Courtier stole money from grocery stores. She also became a victim of sexual assault when an older man sexually abused her. *Id.* She was declared delinquent during one of her juvenile adjudications. *Id.* Then, in her early 20s, she, like her parents, became addicted to drugs and pled guilty to a drug felony. *Id*. These events occurred decades ago, and the record does not show that these events ever received widespread public attention or notoriety at the time. *Id.* at 10.

Instead of spiraling down into recidivism, Courtier rehabilitated herself during her two-year prison sentence. *Id.* at 5. She earned her G.E.D., enrolled in community college, and took every business class she could find. *Id.* Upon her release, she opened a small-scale clothing business, which she later expanded due to its success. *Id*. Eventually, Courtier met her now deceased husband, Raymond Courtier, who invested in her business so that she could operate high-end clothing stores. *Id.* at 5, 16.

But Courtier is not just a successful businesswoman—she is also a philanthropist and dedicated community advocate. *Id.* at 2, 16. She has advocated publicly for a number of social causes, such as the restoration of voting rights for former felons, increasing adult literacy, and improving equity in education. *Id.* at 16. Courtier has also campaigned for affordable housing and against for-profit prisons. *Id.*

During the recent mayoral election in Silvertown, where Courtier lives, she made a post on her social advocacy website critiquing the policies of Defendant, who is now the current mayor.

Id. at 3–4. She also contributed substantially to Defendant's opponent's campaign. *Id.* at 3. In response to her critique, Defendant made a post to his website that asserted that in her early years, Courtier was a "lewd and lusty lush" and "nothing more than a former druggie." *Id.* at 18. He also called her a "pimp" and "whore," as well as "nothing more than a former druggie." *Id.* Although Courtier had a drug problem decades ago, nothing in the record shows that she was a "lewd and lusty lush." *Id.* at 10.

Defendant's comments did not end there, though. He also wrote that Courtier is "corrupt and a swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood." *Id.* at 18. Referencing Courtier's clothing business multiple times throughout his post, he further stated that Courtier, "is the proprietor of a bunch of upscale, hoity-toity clothing stores. . . [and] she pimps out these clothes to the rich and lavish." *Id.*

In light of Defendant's insults, Courtier filed a suit against him for defamation of character and false light invasion of privacy. *Id.* at 18. Defendant then filed an anti-SLAPP motion to dismiss the suit. *Id.* at 2. The Tenley District Court determined that Courtier is not a libel-proof plaintiff, but nevertheless dismissed her suit because it considered Defendant's comments to be protected rhetorical hyperbole. *Id.* at 19. The Tenley Supreme Court agreed that Courtier is not a libel-proof plaintiff, but found that it is "at least possible" that calling Courtier "corrupt" and a "swindler" is indeed defamatory, rather than mere rhetorical hyperbole. *Id.* at 19, 22. Therefore, the Tenley Supreme Court denied Defendant's anti-SLAPP motion, and Defendant appealed. *Id.* at 23–24.

SUMMARY OF THE ARGUMENT

Viewing the facts in the light most favorable to the plaintiff, Courtier has a good reputation to protect in her community as an honest businesswoman and philanthropist. Defendant has harmed this reputation by accusing her of drunken sexual promiscuity and criminal, dishonest

business practices. Courtier merely asks this Court to allow her to have an opportunity to defend herself against this harm.

First, this Court should not brand Courtier as a libel-proof plaintiff. The Court should respect Tenley state law holding that the libel-proof plaintiff doctrine that excludes people with good reputations like Courtier. To do otherwise would not only give Courtier a label some courts only bestow upon convicted murderers, but would also violate well-established principles of federalism whereby federal courts defer to the substance of state laws and judicial doctrines. Furthermore, the hardships Courtier endured decades ago received no public attention or notoriety, whereas her outstanding reputation as a generous businesswoman and community advocate is well-known.

Even if this Court were to reject Tenley's particular version of the libel-proof plaintiff doctrine and instead looks to the more general issue-specific and incremental harm versions of the doctrine, neither of these doctrines apply here. The issue-specific version does not bar Courtier's claims, because she does not have a reputation for being a corrupt swindler or a sexually promiscuous drunk. Therefore, she is not libel-proof on these issues. Likewise, the incremental harm version does not apply, because each of the challenged statements inflicts distinct and devastating harms on Courtier's good reputation. Finally, issues of material fact exist because Defendant may contend that Courtier does not have a good reputation or that his statements could not have further damaged her reputation—both of which Courtier contests. Therefore, granting the anti-SLAPP motion at this early stage would be procedurally improper.

Second, Defendant's statements are not protected rhetorical hyperbole. The content of the statements can be reasonably understood to assert provable facts. Defendant's accusation that Courtier was a "lewd and lusty lush" and is "corrupt and a swindler" have precise and readily

understood meanings that are verifiable. Additionally, the context in which the statements were made also implies provable facts. The majority of the uncontested statements are based on fact, leading a reasonable factfinder to conclude that Defendant's accusations regarding Courtier's corrupt business deals and sexually promiscuous acts are factual as well. Defendant may attempt to avoid liability by labeling his statements as opinion. However, the Supreme Court has held that opinions are capable of asserting and implying false facts, making them actionable under defamation law.

Third, Courtier has established a prima facie case for defamation, thereby meeting her burden to overcome this anti-SLAPP motion. Defendant's statements are per se defamatory because they attack her sexual purity, imply that she has engaged in criminal conduct, and accuse her of dishonesty in her occupation. Viewing the record in the light most favorable to Courtier, Defendant's statements are also false statements of fact, as they were made without any factual basis. The accusations not only hurt Courtier's reputation in the community but will also result in a pecuniary harm to her business. Finally, these statements constitute per se defamation, which meets the actual malice standard. If the Court does not find defamation per se, Courtier's claim should still move forward because there is a genuine issue of material fact as to whether the actual malice standard has been met.

Thus, for the above reasons, this Supreme Court should affirm the Tenley Supreme Court's decision to deny Defendant's anti-SLAPP motion.

STANDARD OF REVIEW

Under Tenley's anti-SLAPP statute, the person filing the anti-SLAPP motion to dismiss the case has "the burden of making a prima facie case that a legal action against the petitioning party is based upon, relates to, or is in response to that party's exercise of the right to

free speech, right to petition, or right of association." Tenley Code Ann. § 5 – 1 – 705(a). Defendant has met this burden. However, if the responding party establishes a prima facie case for each essential element of the claim, then the court shall not dismiss the legal action. *Id.* at § 5 – 1 – 705(b). Therefore, if Courtier establishes a prima facie case for each essential element of her defamation claim, the Court should not dismiss her defamation claim.

"If a defendant makes an anti-SLAPP motion to strike founded on purely legal arguments, then the analysis is made under FED. R. CIV. P. 8 and 12 standards." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018), and *cert. denied sub nom. Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, 139 S. Ct. 1446 (2019). Otherwise, state law anti-SLAPP procedural provisions could conflict with the Federal Rules of Civil Procedure. *Id.* Here, because Defendant makes an anti-SLAPP motion to strike founded on purely legal arguments regarding the libel-proof plaintiff doctrine and the issue of rhetorical hyperbole, FED. R. CIV. P. 8 and 12 govern. (J.A. at 6, 24.).

The standard of review for a dismissal for failure to state a claim under FED. R. CIV. P. 12(b)(6) is *de novo*. *Omnipoint Commc'ns Enters. v. Newtown Twp.,* 219 F.3d 240, 242 (3d Cir. 2000). The court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *Cruz v. Beto,* 405 U.S. 319, 322 (1972). Therefore, this Court should draw all reasonable inferences of the alleged facts in favor of Courtier.

ARGUMENT

I. COURTIER, AN HONEST BUSINESSWOMAN AND COMMUNITY ADVOCATE, IS NOT A LIBEL-PROOF PLAINTIFF.

The libel-proof plaintiff doctrine bans "a person with no good reputation to protect" from proceeding with a defamation claim. (J.A. at 20.); *see also* David L. Hudson, Jr., *Shady Character: Examining the Libel-Proof Plaintiff Doctrine*, 52 TENN. B.J. 14, 15 (2016). Courtier is not a libel-

proof plaintiff for four reasons. First, federal courts must defer to how a particular state has chosen to adopt its libel-proof plaintiff doctrine. Here, Tenley state law holds that its version of the doctrine only applies to those people who—unlike Courtier—have no good reputation to protect, such as violent, unreformed criminals. Second, Courtier's past struggles with the law received no notoriety or public attention; rather, she has established a good reputation in her community through her business success and social advocacy. Third, neither of the more general versions of the libel-proof plaintiff doctrines apply because (1) under the issue-specific version, Courtier does not have a reputation on the issue of being a corrupt swindler or a drunken sexually promiscuous drunk, and (2) under the incremental harm version, each of the challenged statements made by Defendant inflict distinct and devastating harms on Courtier's good reputation. Finally, if Defendant contends that Courtier's reputation was already tarnished to begin with, or if Defendant claims that her already tarnished reputation could not have been further tarnished, both which Courtier contests, this presents genuine issues of material facts, rendering application of the libel-proof plaintiff doctrine procedurally inappropriate.

A. This Court should respect Tenley state law holding that the libel-proof plaintiff doctrine only applies to those with no good reputation to protect.

This Court should look to Tenley's particular version of the libel-proof plaintiff doctrine, because this doctrine is rooted in substantive state law rather than a uniform federal standard. Because Tenley has adopted a narrow version of this doctrine that specifically excludes people like Courtier with good reputations to protect, Courtier is not a libel-proof plaintiff.

i. Federal courts must apply state law in ruling on libel-proof plaintiff doctrine claims.

Federal courts must defer to state law when making substantive determinations on state law libel claims such as what version of the libel-proof plaintiff doctrine a state has adopted, if

any. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991) (examining whether California has adopted the libel-proof plaintiff doctrine); *Lamb v. Rizzo*, 391 F.3d 1133, 1139 (10th Cir. 2004) (deferring to Kansas state law in adopting the libel-proof plaintiff doctrine); *Brooks v. Am. Broad. Companies, Inc.*, 932 F.2d 495, 501 (6th Cir. 1991) ("[O]ur task is to anticipate how the Supreme Court of Ohio would rule" on the libel-proof plaintiff doctrine). As the Supreme Court famously held in *Erie Railroad Company v. Tompkins*, "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state . . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Therefore, this Court should defer to Tenley state law to determine the boundaries of its libel-proof plaintiff doctrine.

Additionally, the Court should note that the libel-proof plaintiff doctrine is not a monolith; rather, the doctrine differs between states. For example, there is an issue-specific version of the doctrine, as well as an incremental harm version. *Thomas v. Tel. Pub'g Co.*, 155 N.H. 314, 322 (N.H. 2007). Furthermore, many states' libel-proof plaintiff doctrines specifically require that the negative fact about the plaintiff must have been "widely reported to the public" in order for the doctrine to apply. *Id.* at 325; *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 10 (Tex. App. 1994). Given these differences between states, this Court must carefully examine how the Tenley Supreme Court, in particular, applies its version of the libel-proof plaintiff doctrine.

ii. Tenley has adopted a narrow libel-proof plaintiff doctrine that excludes people with good reputations like Courtier.

The Tenley Supreme Court has adopted a libel-proof plaintiff doctrine that must be "narrowly applied and in limited circumstances," excluding people with good reputations like Courtier. (J.A. at 20.). In announcing the state's adoption of the doctrine, the Tenley Supreme Court held that "a person with no good reputation to protect should not be allowed to proceed with

[a defamation suit].” *Id.* The court held that Courtier is not such a person, noting that she “is a perfect example of someone who . . . has restored and rehabilitated herself and has a reputation to protect from defamatory and false statements.” *Id.* at 20. The court also observed that Courtier has “devoted much of her adult life to altruistic, charitable, and philanthropic efforts.” *Id.* at 20–21. Furthermore, under Tenley state law, mere past convictions are not enough to render a plaintiff libel-proof. *See id.* If otherwise, the state’s libel law “would create an ‘open season’ for all who sought to defame persons convicted of a crime.” *Id.* at 20 (quoting *Wolston v. Readers Digest Ass’n*, 443 U.S. 157, 168 (1979)). Therefore, Courtier’s past criminal behavior and single felony conviction cannot, alone, brand her as a libel-proof plaintiff with no good reputation to protect.

Tenley’s libel-proof plaintiff doctrine only applies to violent criminals who have not reformed their ways and are still serving sentences. In establishing the boundaries of the doctrine, the cases adopting the doctrine cited by the Tenley Supreme Court all involved murderous criminals serving time who had not reformed their ways. *Id.* at 19–20. For example, the Court explicitly cited *Ray v. Time, Inc.*, which held James Ray, the convicted killer of Dr. Martin Luther King, Jr., to be libel-proof. *Id.* (citing *Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976)). Ray is a person “with no good reputation to protect.” *Id.* at 20. Unlike Ray, Courtier’s crimes do not rise to the level of murder, and she now has a good reputation to guard from defamatory statements.

Similar to the Tenley Supreme Court’s version of the doctrine, the Second Circuit has also held that its libel-proof plaintiff doctrine is “a limited, narrow one.” *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976). Tenley’s narrow construction of the libel-proof plaintiff doctrine parallels numerous court rulings that have applied the doctrine to violent criminals serving their sentence with no evidence of character reformation. *See, e.g., Lamb,* 391 F.3d at 1134 (10th Cir. 2004); *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975); *Davis v. The Tennessean*, 83

S.W.3d 125, 131 (Tenn. Ct. App. 2001) (holding convicted armed robber sentenced to 99 years for felony murder libel-proof); *Coker v. Sundquist*, No. 01A01-9806-BC-00318, 1998 WL 736655, at *3–4 (Tenn. Ct. App. Oct. 23, 1998) (holding murderer on death-row libel-proof); *Jackson v. Longcope*, 476 N.E.2d 617, 621 (Mass. 1985) (holding murderer serving life sentence libel-proof). For instance, in *Cardillo v. Doubleday & Co.*, a *habitual* criminal serving a 21-year sentence for multiple federal felonies was held to be libel-proof. 518 F.2d at 639. Likewise, the Tenth Circuit held that the plaintiff in *Lamb v. Rizzo* was libel-proof because he was serving three consecutive life sentences for two counts of first-degree kidnapping and one count of first-degree murder. 391 F.3d at 1134. Unlike the plaintiffs in these cases, Courtier is not a habitual criminal, nor has she ever committed murder. To the contrary, Courtier has overcome the many hardships she faced in childhood and has since rehabilitated her reputation by becoming an outspoken role model for entrepreneurship and advocacy on behalf of marginalized populations in her community.

Even if the Court finds that Tenley's libel-proof plaintiff doctrine could apply to people besides unreformed violent criminals, that possibility does not alter Tenley's substantive determination that the doctrine does not apply to people like Courtier who have reformed their ways and indeed have a good reputation to protect. The Tenley Supreme Court quoted then-Judge Antonin Scalia, who wrote: "The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us . . . " (J.A. at 20.) (citing *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984)). Although the court, unlike the D.C. Circuit, ultimately adopted the libel-proof plaintiff doctrine, its application of the doctrine to Courtier recognized the "little bit of good" inside of her that made her capable of redemption. Under Tenley state law, plaintiffs who have reformed in such a way that they now have good reputations cannot be libel-proof. *See* (J.A.

at 20–21.). Therefore, because Courtier has established a good reputation in her community through business success and public service, she cannot be libel-proof under Tenley state law.

In summary, this Court should take care to observe this country's foundational federalist principles and defer to the substantive boundaries of Tenley's libel-proof plaintiff doctrine, which explicitly excludes Courtier from classification as libel-proof.

B. Courtier's past struggles received no public attention, whereas her outstanding reputation as a successful businesswoman and philanthropic community advocate has.

For the libel-proof plaintiff doctrine to apply, the record "must show not only that the plaintiff engaged in criminal or anti-social behavior in the past, but also that [her] activities were widely reported to the public." *Thomas*, 155 N.H. at 325. After all, if the wrongdoing "had not been reported in the community or otherwise widely known, then it could not have damaged the plaintiff's reputation." Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1923 (1985). As such, the doctrine, which is based on the premise that the plaintiff *already has* an infamous reputation, could not apply. *Id.*

For this reason, courts should only apply the libel-proof plaintiff doctrine when the public is aware of the plaintiff's notorious reputation. *See, e.g., Lamb*, 391 F.3d at 1137–38; *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354 (S.D.N.Y. 1998), *Wynberg v. National Enquirer, Inc.,* 564 F. Supp. 924, 928–29 (C.D. Cal.1982) (stating whether the doctrine applies depends in part upon "the degree and range of publicity received" and holding plaintiff who had multiple articles establishing a reputation for taking advantage of a woman for financial gain libel-proof); *Logan v. District of Columbia,* 447 F. Supp. 1328, 1332 (D.D.C. 1978) (holding plaintiff whose drug use was publicized in a book libel-proof); *Ray,* 452 F. Supp. at 622, *aff'd per curiam,* 582 F.2d 1280 (6th Cir. 1978) (holding plaintiff who was a public figure because he assassinated Dr. Martin Luther

King Jr. libel-proof); *McBride*, 894 S.W.2d at 10 (stating that plaintiff's criminal or anti-social behavior must be widely reported to the public for libel-proof plaintiff doctrine to apply); *Jackson,* 476 N.E.2d 617 (holding plaintiff who had scores of newspaper articles covering his criminal acts libel-proof). In *Lamb v. Rizzo*, for example, the Tenth Circuit held a plaintiff whose convictions and periodic escapes from custody had "widespread notoriety" libel-proof. 391 F.3d at 1137–38. Similarly, in *Cerasani v. Sony Corp.*, the Southern District Court of New York held a plaintiff libel-proof whose criminal acts, which included racketeering and conspiring to rob a bank, were closely covered by the media and had been published in a best-selling book, which was then republished again a decade later. 991 F. Supp. at 346, 354.

By contrast, nothing in the record demonstrates that the public knew of Courtier's past hardships before Defendant made his defamatory statements about her. Defendant fails to cite any evidence indicating that Courtier's past wrongdoings received any notoriety or public attention. Without this evidence, the court "must assume . . . that [plaintiff's] reputation in the community [is] good." *McBride*, 894 S.W.2d at 10. However, the Court has more than a mere assumption of good reputation to rely on here, as evidenced by Courtier's public business success and philanthropic advocacy efforts. Therefore, because Courtier's past struggles received no notoriety or public attention and she has a respected reputation in the community, the libel-proof plaintiff doctrine does not apply to her.

C. Neither the issue-specific nor the incremental harm version of the libel-proof plaintiff doctrine bars Courtier's claims.

The Tenley Supreme Court noted that two primary versions of the libel-proof plaintiff doctrine exist: the issue-specific version and the incremental harm version. (J.A. at 19–20.). Even if this Court ignores the particular manner in which Tenley has constructed its libel-proof plaintiff doctrine, neither of the generally applied versions of the issue-specific or incremental harm

doctrines bar Courtier's claims. First, the issue-specific version does not apply because Courtier does not have a reputation being "corrupt," a "swindler," or a "lusty lush." Therefore, she cannot be libel-proof on these issues. Second, the incremental harm doctrine does not apply, because each challenged statement made by Defendant inflicts distinct and devastating harms on Courtier's good reputation.

i. Courtier does not have a reputation for being a corrupt swindler or a drunken, sexually promiscuous woman and is therefore not libel-proof on these issues.

The issue-specific doctrine holds that "a libel-proof plaintiff is one whose reputation on the matter in issue is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged." *McBride*, 894 S.W.2d at 9. Defendant has failed to present any evidence that Courtier already has a reputation for being "corrupt and a swindler." Furthermore, even though Defendant has called her a "lusty lush," "pimp," and "whore," he fails to present any evidence that she is a drunken, sexually promiscuous woman. This lack of evidence renders the issue-specific version of the libel-proof plaintiff doctrine inapplicable.

Although Courtier has used drugs in the past, this does not permit Defendant to spout defamatory statements on issues unrelated to this past without repercussions. As the D.C. Circuit observed, "It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity." *Liberty Lobby,* 746 F.2d at 1568. Likewise, while Courtier may have previously used drugs many years ago and could therefore be classified as a—in the Defendant's words—"former druggie," Defendant fails to present evidence that she has a reputation for being "corrupt and a swindler." Rather, she is known in the community as a successful businesswoman and altruistic philanthropist.

Defendant also fails to present any evidence that Courtier was or is a "lewd and lusty lush"—that is, a habitual heavy drinker that engages in an inordinate amount of sexual activity. *Lusty*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/lusty#synonyms (last visited Sept. 22, 2019) (defining "lusty" as connoting "inordinate indulgence in sexual activity"); *Lush*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/lush (last visited Sept. 22, 2019) (defining "lush" as "a habitual heavy drinker"). Therefore, because Courtier does not have a reputation for corruptness, swindling, heavy drinking, or engaging in excessive sex, the issue-specific libel-proof plaintiff doctrine does not apply to her on these matters.

ii. Each statement alone inflicts distinct and devastating harms on Courtier's good reputation, rendering the incremental harm doctrine inapplicable.

Under the incremental harm doctrine, a plaintiff may be held libel-proof when the challenged statement, "though maliciously false," does not cause harm "beyond the harm caused by the [unchallenged or nonactionable] remainder of the publication." *Church of Scientology Int'l v. Time Warner, Inc.*, 932 F. Supp. 589, 593 (S.D.N.Y. 1996). Even if Courtier can somehow be said to possess the reputation of a former drug user, despite lack of public awareness regarding this part of her past, Defendant's additional accusations create distinct and devastating harms that render the incremental harm doctrine inapplicable.

In *Chastain v. Hodgdon*, the court did not apply the incremental harm doctrine to a plaintiff accused of sexual assault and attempted rape who admitted in his autobiography that he was a "mad womanizer." 202 F. Supp. 3d 1216, 1223 (D. Kan. 2016). The court reasoned that a " 'womanizer' is distinct from someone who sexually assaults or attempts to rape women," and that "[e]ven a 'mad womanizer' could experience harm to his reputation" from such accusations. *Id.*

Likewise, although Courtier may have past experiences with drugs, the accusations that she was or is "corrupt and a swindler," "a lewd and lusty lush," "a pimp," and "a whore" all present distinct and devastating harms that present significant—not incremental—damage to her reputation. To hold otherwise would mean that one can accuse a former drug user of virtually anything, including swindling others in businesses dealings and sleeping with others excessively. This would create the very "open season" for all who seek to defame persons convicted of a crime that this Court seeks to prevent. *Wolston*, 443 U.S. at 168.

Thus, because of the distinct and devastating nature of Defendant's accusations in comparison to any unchallenged portions of his statement, the incremental harm doctrine does not apply. As such, even under the two general versions of the libel-proof plaintiff doctrine, this Court should not brand Courtier as a libel-proof plaintiff.

D. The record contains factual disputes about whether Courtier is a libel-proof plaintiff.

Defendant may argue that the libel-proof plaintiff applies to Courtier, alleging that his attacks on Courtier could not have further damaged her supposedly tarnished reputation. However, Courtier contests that her reputation was already tarnished or could not have been further tarnished, creating issues of material fact that merit dismissal of the anti-SLAPP motion.

If arguments the Defendant makes on appeal present factual challenges, then the anti-SLAPP motion must be treated "as though it were a motion for summary judgment." *Planned Parenthood Fed'n of Am., Inc.*, 890 F.3d at 833. A court can only grant summary judgment where there is no genuine issue as to any material fact. FED. R. CIV. P. 56. An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Accordingly, the moving party must establish

that no such issue remains for trial, even if the evidence is viewed in the light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

A court should not apply the libel-proof plaintiff doctrine if genuine issues of material fact exist regarding the plaintiff's reputation. *Brooks*, 932 F.2d at 501–02 ; *see also Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1074 (5th Cir. 1987). In *Zerangue, v. TSP Newspapers, Inc.*, the Fifth Circuit held that the trial court did not err by reserving the question of whether plaintiffs were libel-proof for the jury because six years had passed since defendants had been stripped of their law enforcement positions and jailed. 814 F.2d at 1074. Because *decades* have passed since Courtier committed unlawful acts rather than just six years, it is even more likely that she has rehabilitated her reputation. More importantly, if Defendant claims Courtier does not have a good reputation, this creates an issue of material fact that should preclude the Court from granting Defendant's motion.

Similarly, in *Brooks v. American Broadcasting Companies, Inc.*, the Sixth Circuit determined that "genuine issues of material fact remain[ed] as to whether defendants' statements could have done further damage" to the plaintiff's "already tarnished reputation" and thus refused to apply the libel-proof plaintiff doctrine. 932 F.2d at 501–02. Likewise, if Defendant argues his statements could not have further damaged Courtier's reputation, which Courtier contests, this presents another genuine issue of material fact, making dismissing the suit at this early stage inappropriate.

For all of these reasons, Courtier asks this Court to reject branding her as a libel-proof plaintiff and therefore dismiss Defendant's anti-SLAPP motion.

II. DEFENDANT'S STATEMENTS ARE NOT PROTECTED RHETORICAL HYPERBOLE.

Rhetorical hyperbole encompasses a variety of communications including epithets, name-calling, and insults. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20 (1990). Statements labeled as such are not actionable under defamation law because they are not to be taken literally, and therefore do not damage the subject's reputation. *Greenbelt Coop. Publ'g Ass'n v. Bresler,* 398 U.S. 6, 13-14 (1970). Thus, the dispositive question is whether a reasonable factfinder could conclude that the statements at issue imply facts. *Milkovich,* 497 U.S. at 21. In answering this question, the decisionmaker must first examine the content of the challenged statements and determine whether they assert provable facts. *Ollman v. Evans,* 750 F.2d 970, 979 (D.C. Cir. 1984). Next, the decisionmaker must determine whether the context in which the statement was made reasonably implies an assertion of provable fact. *See Old Dominon Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264, 286 (1974) (holding that statements at issue were rhetorical hyperbole based on the context in which the statements were made). If the statements imply provable facts, either through a literal interpretation of the statement or the surrounding context, the ultimate question is whether figurative or hyperbolic language negates these facts. *Milkovich,* 497 U.S. at 21. Where the figurative or rhetorical hyperbolic language does not negate the asserted facts, the statements at issue may be actionable under defamation law. *Id.*

In the present case, a reasonable factfinder could interpret the accusation that Courtier was a "lewd and lusty lush," and that she is "corrupt and a swindler," to assert provable facts. These statements imply that Courtier is a drunken, sexually lewd woman who carries out her business in an unethical and deceptive manner. The context surrounding the accusations would also lead a

reasonable factfinder to conclude these same facts. Most importantly, Defendant's use of rhetorical language does not negate the facts asserted by his statements.

A. A reasonable factfinder could interpret the language and content of the statements at issue to assert objectively provable facts.

In determining whether a statement is rhetorical hyperbole, courts will first look to the content of the statements and ask whether they assert provable facts. *Ollman,* 750 F.2d at 979. The content of the statements assert provable facts because they have a precise meaning that is verifiable. Furthermore, labeling the statements as "opinions" will not preclude them qualifying as defamation.

i. The statements at issue have a precise and readily understood meaning.

First, courts consider whether the language of the statements at issue have a precise and readily understood meaning while taking into account that the First Amendment protects "overly loose, figurative, rhetorical, or hyperbolic language." *Hadley v. Doe,* 34 N.E.3d 549, 558 (Ill. 2015); *see also Mr. Chow of N.Y. v. Ste. Jour Azur S.A.,* 759 F.2d 219, 226 (2d Cir. 1985) (stating that courts "must . . . look at the language itself to determine if it is used in a precise, literal manner or in a loose, figurative or hyperbolic sense"). Statements that have a precise and commonly understood meaning rather than a loose and figurative meaning are likely to be assertion of fact. *Flamm v. American Ass'n of University Women,* 201 F.3d 144, 153 (2d Cir. 2000).

In *Henderson,* the defendant stated that the plaintiff was a "sleaze-bag agent" who "slimed up from the bayou." *Henderson v. Times Mirror Co.,* 669 F. Supp. 356, 359 (D. Col. 1987). The court determined that these statements were protected because the words' meanings were so "imprecise that they cannot be considered as asserting facts." *Id.* However, contrary to the statements in *Henderson,* Defendant's accusation that Courtier was a "lusty lush" has a precise and readily understood meaning. "Lust" has been commonly understood to imply sexual

promiscuity. *Rejent v. Liberation Publications, Inc.,* 611 N.Y.S.2d 866, 867–68 (N.Y. App. Div. 1994) (holding that the word "lust" is susceptible to the defamatory connotation that the subject is lustful and sexually promiscuous). As previously mentioned, lush means drunk. Thus, a reasonable factfinder reading Defendant's statement would understand Courtier to have previously engaged drunken, sexually lewd activities.

Additionally, Defendant's statement calling Courtier "corrupt and a swindler" also has a precise and readily understood meaning. Merriam-Webster Dictionary defines "corrupt" as being "characterized by improper conduct (such as bribery or the selling of favors)." *Corrupt,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/corrupt (last visited Sept. 22, 2019). The dictionary also defines "swindle" to mean to obtain money or property by fraud or deceit. *Swindle,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/swindle (last visited Sept. 22, 2019). The Defendant's statement has a precise and readily understood meaning that Courtier is a dishonest business owner. The Illinois Supreme Court has held that the term "scamming" could reasonably be found defamatory because it imputes a lack of integrity by implying that the subject is lying and trying to deceive others. *Kolegas v. Heftel Broadcasting Corp.,* 607 N.E.2d 201, 207 (Ill. 1992). Similarly, a reasonable factfinder could read Defendant's statement that Courtier is "corrupt and a swindler" to imply that she also lies and deceives others in her business practices.

Most importantly, Defendant assists the reader in concluding and accepting his implication of facts because he explains exactly what he means by the words "corrupt" and "swindler." He states that Courtier, "is the proprietor of a bunch of upscale, hoity-toity clothing stores. . . [and] she pimps out these clothes to the rich and lavish." This statement asserts that Courtier "swindle[s]" her customers by engaging in fraudulent business practices to take their money. Defendant further

elaborates on the term "corrupt" and "swindler" when he says, "[Courtier] hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood." Such an explanatory phrase tells a reasonable factfinder that Courtier deceives the public by pretending to be a philanthropic social justice advocate, when in reality she is an unethical and deceptive business owner.

Thus, by elaborating on the terms "corrupt" and "swindler" and by asserting that Courtier was a "lusty lush," Defendant gives the statements at issue a precise and commonly understood meaning, indicating that they are not statements of rhetorical hyperbole.

ii. The statements at issue are verifiable.

An important question in the determination of whether a statement constitutes rhetorical hyperbole is whether or not the statement is capable of being objectively characterized as true or false. *Hotchner v. Castillo-Puche,* 551 F.2d 910, 913 (2d Cir. 1977). If a statement lacks a plausible method of verification, a reasonable reader would not believe that the statement has specific factual content. *Ollman,* 750 F.2d at 979.

Courts have held that the accusation that someone is "corrupt" implies factual allegations of illegal and unethical actions. *Rinaldi v. Holt, Rinehart, & Winston, Inc.,* 366 N.E.2d 1299, 1307 (N.Y. 1977) ("the ordinary and average reader would likely understand the use of [corrupt] . . . as meaning that Plaintiff had committed illegal and unethical actions"). Further, the word "corrupt" is commonly understood to mean criminal behavior and "refers to verifiable acts." *600 West 115th Street Corp. v. Von Gutfeld,* 603 N.E.2d 930, 937 (N.Y. 1992). A reasonable factfinder could interpret Defendant's accusation that Courtier is "corrupt" to mean that she is a dishonest and unethical person who runs her business in a deceptive and illegal manner. Such an accusation can be proven true or false by investigation into Courtier's business records and financial statements.

Similarly, courts have held the term "swindler" to assert the fact that someone has engaged in fraudulent financial activity. *Laughland v. Beckett,* 870 N.W.2d 466, 475 (Wis. 2015). The court in *Brotman* found that the plaintiff's statement asserting that the defendant was "working a scam" asserted provable facts. *Kumaran v. Brotman,* 617 N.E.2d 191, 200 (Ill. 1993). The court held that the word "scam" has a precise core meaning, namely, to "swindle.," and that whether a scam occurred is verifiable. *Id.* Likewise, whether Courtier is a swindler or not can be verified by comparing the actual value of her merchandise to their listed price.

Furthermore, the accusation that Courtier is a "lusty lush," is also provable as false. *See Cohen v. Google,* 887 N.Y.S.2d 424, 428 (N.Y. Sup. Ct. 2009) (finding that accusations of sexual promiscuity are provable as false). A factfinder could comb through Courtier's personal life, interviewing those who knew her, to determine whether she once had a reputation for being sexually lewd or a drunk.

Because Defendant's statements that Courtier is "corrupt and a swindler" and that she was a "lewd and lusty lush" can be proven false by examining her business records and personal life, they do not qualify as rhetorical hyperbole.

iii. Labeling the statements at issue as opinions does not preclude liability.

Defendant may attempt to argue that his statements are merely his opinion and therefore are not actionable. However, the Supreme Court has rejected the idea that a statement labeled as an opinion will automatically receive wholesale immunity. *Milkovich,* 497 U.S. at 20. Rather, "expressions of opinion may often imply an assertion of objective fact." *Id.* at 19. Thus, if the facts upon which a speaker bases his opinion are "either incorrect or incomplete, or if his assessment of them is erroneous, the [opinion] may still imply a false assertion of fact." *Id.*

Defendant has no legitimate factual basis to accuse Courtier of being "corrupt," a "swindler," or a "lusty lush." The statement asserting that Courtier has deceived the poor into thinking she is a social justice advocate also lacks any factual basis. Quite to the contrary, the contested statements imply false assertions of fact. Therefore, an attempt to label the statements at issue as opinions will not shield Defendant from liability.

B. The context in which the statements were made implies objectively provable facts.

In determining whether speech is actionable, courts must additionally consider the *impression* created by the context in which the challenged statements were made. *Immuno, A.G. v. Moor-Jankowsky,* 567 N.E.2d 1270, 1273–74 (N.Y. 1991). Defendant's use of explanatory phrases creates a context of provable facts by elaborating on the accusations at issue. Additionally, all of the uncontested statements in Defendant's post are either fact or based on fact, leading a factfinder to conclude that the contested statements are also fact. While Defendant uses rhetorical and hyperbolic language in some parts of his post, this does not render every statement in his post as rhetorical hyperbole. Finally, that the overall statement is made in the context of political debate does not preclude liability under defamation law.

i. Defendant's use of explanatory phrases creates a context of provable facts.

In *Dilworth,* the Seventh Circuit noted that epithets often have both a literal and figurative meaning. *Dilworth v. Dudley,* 75 F.3d 307, 310 (7th Cir. 1996). Whether they are capable of being defamatory depends on which meaning is intended, a question that can be answered only by considering the context in which the term appears. *Id.* For example, "[i]f you say simply that a person is a 'rat,' you are not saying something definite enough to allow a jury to determine whether what you are saying is true or false. If you say he is a rat because. . . whether you are defaming

him depends on what you say in the because clause." *Id.* at 309. Similar to the facts in *Dilworth,* Defendant not only calls Courtier "corrupt and a swindler," but he also explains what he means when he uses those words. That is, Defendant attempts to assert that Courtier is dishonest and deceptive by "hoodwinking the poor" into thinking she is a social justice advocate. Defendant's explanatory statement further implies that she carries her business in a financially deceptive manner by "pimp[ing] out clothes to the rich." Thus, the explanatory phrase after the statements at issue create a context indicative of provable facts, therefore rejecting a finding of rhetorical hyperbole.

ii. The vast majority of Defendant's accusations are based on fact, leading a reasonable reader to believe all of his accusations are factual.

Statements which are fantastic, impossible, or highly improbable are likely to be found as rhetorical hyperbole. *Pring v. Penthouse Int'l, Ltd.,* 695 F.2d 438, 444 (10th Cir. 1982). In the same vein, a statement that is surrounded by other believable statements based on factual events will also imply facts. *See Milkovich,* 497 U.S. at 18. The core of the context analysis is that statements will absorb the general tenor of the statements around them. *Id.*

While Defendant indeed uses hyperbolic and figurative language, all of the assertions that he makes are true, except for the three at issue in this case. Those who read Defendant's statement know that Courtier is indeed a business owner of up-scale boutique clothing stores. It is also widely known that she is an advocate for marginalized communities. Thus, a reasonable person would understand that the vast majority of Defendant's statements are true assertions of fact, even if they are decorated in hyperbolic language. Such a reasonable factfinder, then, would also believe that Defendant's accusation that Courtier was a "lewd and lusty lush" and that she is "corrupt" and "a swindler" are also either factual or based on fact.

iii. Defendant's use of hyperbolic language in his post does not negate an assertion of fact for the contested statements.

Although certain remarks in an article may constitute rhetorical hyperbole, this does not render the entire statement rhetorical hyperbole. *Brotman,* 617 N.E.2d 191 at 201. The court in *Brotman* held that while some of the remarks in an article such as "eight-ball" were rhetorical hyperbole, the "scam" remark and the essence of the article could be found to be libelous per se. *Id*. The court therefore rejected defendants' contention that the entire article was rhetorical hyperbole. *Id.* Similarly, Defendant's use of hyperbolic language in the post to his website does not render the entire the post and all of its individual assertions rhetorical hyperbole. To the contrary, the contested statements themselves did not use rhetorical hyperbole and thus are actionable as defamation.

Furthermore, courts have held that a false assertion of fact can be defamatory even when couched in rhetorical hyperbole. *Hadley,* 34 N.E.3d 549 at 558; *see also Solaia Technology, LLC v. Specialty Publishing Co.,* 852 N.E.2d 825, 841 (Ill. 2006) (finding defamation per se even though the statement employed hyperbolic language). It has been well established that statements made with literary tools, such as allusion, irony, or question, can nevertheless be defamatory statements that assert facts. *Berkos v. National Broadcasting Co.,* 515 N.E.2d 668, 674 (Ill. 1987). Therefore, Defendant cannot escape liability for his defamatory factual assertions by claiming that the statements are merely ridicule or sarcasm.

iv. Statements made in political debates are not immune from liability under defamation law.

Statements made in heated debates by politicians do not receive wholesale immunity from a finding of defamation. *Hadley,* 34 N.E.3d at 559. In *Hadley,* the court did not find persuasive the defendant's argument that the political context in which the statement was made favored a

finding of rhetorical hyperbole. *Id*. Instead, it found that the accusations about the defendant could be reasonably construed as intended to present a fact about the politician. *Id.* Similarly, the statements Defendant made about Courtier could be reasonably construed as intended to present facts that attack her personal image and her reputation as a business owner.

Therefore, because both the content of the challenged statements and the context in which they were made imply provable facts, the court should find that the statements at issue are not rhetorical hyperbole.

III. THE FACTS SUPPORT A PRIMA FACIE CASE FOR DEFAMATION.

Under Tenley law, a Plaintiff can overcome an anti-SLAPP motion by establishing a prima facie case of defamation. Tenley Code Ann. § 5-1-705(b). To do so, a plaintiff must allege that the contested statement meets six elements: identification, publication, defamatory meaning, falsity, statement of fact, and damages. (J.A. at 7.). It is undisputed that Defendant made an unprivileged publication about Courtier when he posted to his website, thereby meeting the identification and publication elements. Viewing the facts in the light most favorable to Courtier, a court could additionally find that Defendant's statement are defamatory and false, thereby harming Courtier's reputation and damaging her business. Further, by establishing a case for per se defamation, Courtier demonstrates that Defendant acted with actual malice. If the Court does not find Defendant's statements constitute defamation per se*,* then it should let Courtier's complaint proceed for a jury to decide this issue of material fact.

A. The statements at issue have defamatory meanings.

To be defamatory, a statement must harm the Plaintiff's reputational interest. Restatement (Second) of Torts § 559 (AM. LAW INST. 2019). A communication is defamatory if it tends to harm the reputation of another so as to lower her in the estimation of the community or to deter third

persons from associating or dealing with her. *Id*. Defamatory matters often include statements "reflecting unfavorably upon [the Plaintiff's] personal morality or integrity." *Id.*

Historically, common law has recognized four basic categories of per se defamatory statements—those that impute criminal conduct, loathsome diseases, sexual misconduct, and misconduct in a person's trade, profession, office, or occupation. Rodney A. Smolla, Law of Defamation § 7:9 (2019). Defendant's statements meet three of the four categories of per se defamation. His accusation that she was a "lewd and lusty lush" branded Courtier with drunken, sexual promiscuity, thereby triggering the sexual misconduct category. Even in jurisdictions which do not hold statements that challenge the sexual purity of an individual to be per se defamatory, courts have found such statements to be per quod defamatory. *See Cohen,* 887 N.Y.S.2d at 951 (holding that statements accusing defendant of being a "skank" and "whor[e]" are defamatory). Reading the facts in the light most favorable to Courtier, a reasonable factfinder would find defamatory connotation from Defendant's accusation. *Id.*

Additionally, Defendant's statement that Courtier is "corrupt and a swindler" asserts that she has engaged in unethical and criminal conduct in her profession. Such accusations also attack her ability to carry out her profession as a businessowner. Thus, these accusations trigger the first and fourth categories of per se defamation: criminal conduct and misconduct in one's profession. In *Brotman,* the court held that calling someone a "scam," which means "to cheat or *swindle*" is defamatory per se because it imputes a lack of integrity in the discharge of employment duties, thereby prejudicing an individual's business and profession. *Brotman,* 617 N.E.2d at 199. The court also held that such an accusation imputes the commission of a crime. *Id.* Thus, Defendant's statements are defamatory per se because they harm Courtier's reputation relating to her sexual purity, criminal conduct, and her ability to carry out her business. However, even if the Court does

not find Defendant's statements to be defamatory per se, the Court may still find defamation per quod. Even in jurisdictions that do not recognize defamation per se, courts have found that statements which adversely affect people in their trade, business, or profession nevertheless satisfy the defamatory element. *Lograsso v. Frey,* 10 N.E.3d 1176, 1181 (Ohio Ct. App. 2014); *see also* Restatement (Second) of Torts § 559 (AM. LAW INST. 2019) (defamatory matters include statements "tend[ing] to discredit [one's] financial standing in the community").

B. The statements at issue are false statements of fact.

In order to constitute defamation, the statements at issue must be false statements of fact. (J.A. at 7.). Courtier has already argued why Defendant's statements are statements of fact under the rhetorical hyperbole analysis. Courtier additionally asserts that the statements are indeed false. Defendant's statements that Courtier is a "whore" and a "lewd and lusty lush" imply that she once had a reputation for drunkenness and sexual promiscuity. This assertion is completely unfounded, as there is nothing in the record that touches on her drinking habits or sexual conduct, except for her being sexually assaulted by an older man as an adolescent. This instance cannot reasonably be used to describe Courtier, a victim of sexual assault, as someone who is sexually lewd or promiscuous.

Additionally, Defendant asserts that Courtier is "corrupt and a swindler," implying that she is a dishonest businesswoman who engages in unethical and deceptive business practices. Again, nothing in the record points to Courtier's misconduct as a business owner. Therefore, the statements at issue that attack Courtier's character and her business practices are false statements of fact.

C. The statements at issue cause harm to Courtier.

In order to establish a prima facie case for defamation, Courtier must also show that she suffered a special harm by Defendant's statement. *Lott v. Levitt,* 556 F.3d 564, 570 (7th Cir. 2009). Special harms "are tangible losses or injuries to the plaintiff's property, business, occupation, or profession." *Id.* The facts in this case show that Courtier has not only suffered harm to her reputation, but she will also suffer special pecuniary harm to her business. *See Agilysys, Inc. v. Hall,* 258 F.Supp.3d 1331, 1352 (N.D. Ga. 2017) (holding that corporation sufficiently alleged that it suffered special damages, including loss of revenue, sales, and customer relationships, as a result of defendant's defamatory statements). Defendant's statement implying Courtier engages in deceptive, illegal, and unethical business practices would reasonably hurt her standing and reputation in the community. Believing these statements to be true, a reasonable factfinder would be deterred from shopping at Courtier's business, thereby resulting in special harm to her. In *Brotman,* the court found that to be accused of cheating or swindling was per se defamatory because the statements prejudiced the plaintiff in his *business* as a schoolteacher. *Brotman,* 617 N.E.2d at 199. Similarly, to be accused of deception, particularly in sales to customers, harms Courtier in her business as a clothing store owner.

D. Defendant meets the actual malice standard.

Plaintiffs who are public figures must allege that the defendant acted with "actual malice or reckless disregard" in making the allegedly defamatory statement. *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 154–54 (1967). The "actual malice" standard requires that the defendant made the allegedly defamatory statements with knowledge that they were false or with reckless disregard as to whether they are false or not. *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964). Establishing actual malice "requires a showing that the defendant made the statement with a high

degree of awareness of its probable falsity" or with serious doubts as to its truth. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968).

Even if the Court finds that Courtier established herself as a public figure, Defendant's statements nevertheless meet the actual malice standard. When a plaintiff proves publication of defamatory per se statements, the essential elements of falsity, injury, and malice are presumed. *LSA-C.C. art. 2315. Hakim v. O'Donnell,* 144 So. 3d 1179, 1186 (La. Ct. App. 2014); *see also Castine v. Castine,* 743 S.E.2d 97 (S.C. Ct. App. 2013). Defendant's statements are defamatory per se because they imply that Courtier engaged in criminal conduct, accuse her of sexual promiscuity, and prejudice her business. Thus, the statements meet the actual malice standard because they are defamatory per se.

Even if the court finds that Defendant's statements are not defamatory per se, the court should dismiss this anti-SLAPP motion and let the matter go before a jury, because there exists an issue of material fact as to whether Defendant knew of the statement's probable falsity. *See Ventura v. Kyle,* 63 F. Supp. 3d 1001, 1006–07 (D. Minn. 2014) (holding that issue of whether defendant acted with actual malice boiled down to a credibility contest and thus should be decided by a jury). Courtier asserts that Defendant knew she does not run a corrupt business and that she had no past reputation for drunken sexual promiscuity. Thus, if the Court does not find Defendant's statements to be defamatory per se, it should allow a jury to weigh the evidence. *Anderson,* 477 U.S. at 242–43 ("the [court's] function is not to weigh the evidence . . . but to determine whether there is a genuine issue for trial.").

Thus, because Courtier has established that the statements at issue are defamatory, false, cause harm, and Defendant meets the actual malice standard, Courtier has met her burden of establishing a prima facie case for defamation.

Conclusion

Viewing the facts in the light most favorably to the Plaintiff, Courtier has established that she is not a libel-proof plaintiff, that Defendant's statements are not rhetorical hyperbole, and that the facts present a prima facie case for defamation. Therefore, this Court should deny Defendant's anti-SLAPP motion and allow Plaintiff's case to proceed.