**No. 18-56351**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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STEPHANIE CLIFFORD, AKA STORMY DANIELS,

*Plaintiff-Appellant,*

v.

DONALD J. TRUMP

*Defendant-Appellee.*

On Appeal from the United States District Court
for the Los Angeles District of California
No. 2:18-cv-06893-SJO-FFM
Hon. James Otero

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# APPELLANT'S OPENING BRIEF

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Michael J. Avenatti, Esq., SBN 206929
Ahmed Ibrahim, Esq., SBN 238739
AVENATTI & ASSOCIATES, APC
520 Newport Center Drive, Suite 1400
Newport Beach, CA 92660
Telephone: 949.706.7000
Facsimile: 949.706.7050

*Attorneys for Appellant*
Stephanie Clifford, aka Stormy Daniels

**CORPORATE DISCLOSURE STATEMENT/CERTIFICATE OF INTERESTED PARTIES**

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Stephanie Clifford, aka Stormy Daniels states that:

1. Because Appellant is a natural person and not a corporate entity, no disclosure is required under Federal Rule of Appellate Procedure 29.1.

Date: January 22, 2019

AVENATTI & ASSOCIATES, APC

*/s/ Michael J. Avenatti*
Michael J. Avenatti, Esq.

*Attorneys for Appellant Stephanie Clifford, aka Stormy Daniels*

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## INTRODUCTION

In May 2011, Plaintiff and Appellant Stephanie Clifford ("Plaintiff" or "Ms. Clifford") agreed to speak with *In Touch* magazine about her relationship with Defendant and Respondent Donald J. Trump ("Mr. Trump"). [ER264 at ¶6.] Plaintiff agreed to participate only after being told the story was going to run with or without her cooperation. [Id.] However, a few weeks after speaking with *In Touch*, Plaintiff was approached and threatened by a man who, in the presence of Plaintiff's infant daughter, told her "Leave Trump alone. Forget the story." [Id. ¶ 7-8.] The man then leaned around and looked at Plaintiff's infant daughter and said, "That's a beautiful little girl. It'd be a shame if something happened to her mom." [Id. ¶9.]

In April of 2018, shortly after publicly disclosing her account of the threatening incident, a sketch of the man was released. [ER265 at ¶14.] Despite knowing the truth of Plaintiff's account of their affair, Mr. Trump, from his verified personal Twitter account (@realDonaldTrump), falsely accused Plaintiff of lying, deceiving the public, and committing a crime, stating: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" [Id. ¶15.] In response, Plaintiff filed the present defamation action.

The district court erroneously granted Mr. Trump's special motion to strike filed under the Texas Citizens Participation Act (the "TCPA"), Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.*, the Texas version of the anti-SLAPP statute. The district court's decision was erroneous for numerous reasons discussed below. However, to summarize, the district court erred initially by applying the TCPA in federal court in the first place. The TCPA imposes a burden of proof that conflicts with the Federal Rules of Civil Procedure, requiring a plaintiff to submit "clear and specific evidence" of each essential element of his or her claim. Consequently, it should not be applied at all in federal court. Tex. Civ. Prac. & Rem. Code § 27.005(c); Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015). The district court further erred by applying a standard of review "analogous" but not identical to Rule 12 of the Federal Rules of Civil Procedure, and not permitting Plaintiff to conduct discovery. [ER7]; Planned Parenthood v. Ctr. For Med. Progress, 890 F.3d 828, 833-34 (9th Cir. 2018).

However, even if the TCPA applies in federal court, the district court nevertheless erred by concluding that Plaintiff did not successfully allege a cause of action for defamation against Mr. Trump. The district court incorrectly concluded that Mr. Trump's tweet was rhetorical hyperbole. A statement is not hyperbole when it asserts "an objectively verifiable fact." Backes v. Misko, 486 S.W.3d 7, 26 (Tex.App. 2015). Instead, "[i]f the district court can assess the truth

or falsity of the claim, that seems a strong indication that it was a provably false assertion of fact, and therefore actionable." Manufactured Home Communities v. County of San Diego, 644 F.3d 959, 964 (9th Cir. 2008). Here, Mr. Trump's tweet objectively accuses Plaintiff of lying about her account of the threatening incident in 2011 and her account of her affair with Mr. Trump. These factual assertions are verifiable and not opinion. Accordingly, the district court erred for these and other reasons discussed herein.

The decision below should be reversed and Plaintiff permitted to proceed to discovery and a trial on the merits.[1]

## STATEMENT OF JURISDICTION

The district court's jurisdiction was premised on 28 U.S.C. § 1332. The district court granted Mr. Trump's motion to strike/dismiss the Complaint and dismissed the sole cause of action for defamation in an order dated October 15, 2018. [ER3.] That same day, Plaintiff timely filed a notice of appeal. [ER1-ER2] This Court has jurisdiction over Plaintiff's appeal of that order pursuant to 28 U.S.C. § 1291.

[1] The district court granted attorneys' fees to Mr. Trump pursuant to the TCPA subsequent to its order granting Mr. Trump's motion. In the event this Court reverses any part of the district court's order, Plaintiff maintains that the attorneys' fee order must be vacated.

## STATEMENT OF ISSUES ON APPEAL

1. Did the district court err by applying the Texas anti-SLAPP statute ("TCPA"), which imposes a higher burden of proof at the pleading stage without permitting discovery?

2. Did the district court err by granting Mr. Trump's motion under the TCPA and employing a standard of review "analogous," but not identical to, Rule 12(b)(6)?

3. Did the district court err by finding that Mr. Trump's statement accusing Plaintiff of lying about a threatening incident in 2011, her affair, and committing a crime was non-actionable rhetorical hyperbole?

4. Did the district court err by concluding in the alternative that Plaintiff failed to prove Mr. Trump's malice and refusing to permit discovery on the issue.

## STATEMENT OF THE CASE

### I. THE ALLEGATIONS IN THE COMPLAINT ESTABLISHING MR. TRUMP'S FALSE AND DEFAMATORY STATEMENT.

As alleged in the Complaint in this action, in May 2011, Plaintiff agreed to speak with *In Touch* magazine for an article about her relationship with Mr. Trump that the magazine was preparing at the urging of Plaintiff's ex-husband, who had approached the magazine without approval from Plaintiff. [ER264 at ¶6.] Plaintiff

agreed to participate only after being told the story was going to run with or without her cooperation. [Id.]

A few weeks after speaking with *In Touch*, while Plaintiff was in Las Vegas, Nevada, she was approached and threatened by a man regarding her intention to tell the story of her relationship with Mr. Trump. The threat occurred in the presence of Plaintiff's infant daughter in a parking lot. [Id. ¶7.] The man approached Plaintiff and said to her, "Leave Trump alone. Forget the story." [Id. ¶ 8.] The man then leaned around and looked at Plaintiff's infant daughter and said, "That's a beautiful little girl. It'd be a shame if something happened to her mom." [Id. ¶9.]

Plaintiff was shaken by the experience and understood the man's statement to be a direct threat. [Id. ¶10.] However, because Plaintiff was frightened, she did not at the time go to the police and did not seek to go public with her story. [Id. ¶11.] Ultimately, the story was not run by *In Touch* in 2011 because, Plaintiff believes, Mr. Trump's personal attorney, Michael Cohen threatened and intimidated the magazine into not proceeding with the story. [ER265 at ¶12.] Mr. Trump was elected President of the United States on November 8, 2016. [Id. ¶13.]

Thereafter, on or about April 17, 2018, a sketch of the man who threatened her in 2011 was released publicly. [Id. ¶14.] The sketch was created in consultation with Ms. Lois Gibson, one of the foremost forensic artists in the

world. [Id.] Ms. Gibson met with Plaintiff for an extended period of time while compiling the sketch and asked her numerous questions about the encounter and the assailant. [Id.]

Nevertheless, after the sketch was made public, on April 18, 2018, Mr. Trump, from his verified personal Twitter account (@realDonaldTrump) posted the following false statement regarding Plaintiff, the sketch, and her account of the incident in 2011:

> A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!

[ER265 at ¶15.] The statement posted by Mr. Trump was in response to another tweet posted by the account DeplorablyScottish (@ShennaFoxMusic), which showed side-by-side images of the sketch of Plaintiff's harasser, and a picture of Plaintiff and her husband. [Id. ¶16.]

Mr. Trump's statement falsely attacks the veracity of Plaintiff's account. [Id. ¶17.] Mr. Trump's statement was false because Plaintiff was in fact threatened in 2011 as she has recounted and the sketch was the result of her recollection regarding the appearance of the assailant. [ER267 at ¶29; ER49 at ¶¶2-3.] Nevertheless, Mr. Trump accuses Plaintiff of committing a crime in that it effectively states that Plaintiff falsely accused an individual of committing a crime. [ER267 at ¶29.] Mr. Trump's statement is malicious, false, and defamatory. [ER267-ER268 at ¶¶17, 30-32.] Plaintiff alleges that in making the statement, Mr.

Trump used his national and international audience of millions of people to make a false factual statement. [Id.] Plaintiff alleges that in doing so, Mr. Trump knew that his false statement would be read around the world and that Plaintiff would be subjected to threats of violence, economic harm, and reputational damage. [ER265 at ¶17.]

Mr. Trump made his statement either knowing it was false, had serious doubts about the truth of his statement, or made the statement with reckless disregard for its truth or falsity. [ER267 at ¶30.] Indeed, given the circumstances surrounding the threatening incident and that Plaintiff had not gone public with her story at the time of the possible *In Touch* story, it is reasonable to infer that the person who threatened Plaintiff could have been acting directly or indirectly on behalf of Mr. Trump and/or Mr. Cohen. [Id. ¶31.] In which case, Mr. Trump would have had actual knowledge of the falsity of his statement. [Id.] Alternately, Mr. Trump acted in reckless disregard of the truth or falsity of his statement as he would have had no basis for his assertion and defamatory statement. [ER268 at ¶32.]

On the basis of these allegations, the Complaint alleged a single cause of action for defamation against Mr. Trump. [ER266–ER268 at ¶¶21-38.]

## II. MR. TRUMP'S MOTION TO STRIKE AND THE DISTRICT COURT'S RULING BELOW.

The Complaint in this action was filed on April 30, 2018 in the United States District Court for the Southern District of New York. [ER263-ER269.] Thereafter, on or about July 23, 2018, Mr. Trump filed a motion to transfer venue to the Central District of California. [ER261-ER262.] Although Plaintiff did not believe venue was proper in the Central District, Plaintiff ultimately consented to the transfer and the parties stipulated to transfer the action to the Central District. [ER246-ER248; see also ER254-ER258 (arguing venue was not proper in California).] The case was ordered transferred to the Central District on August 9, 2018. [ER31-ER32.]

On or about August 28, 2018, more than 60 days after the filing of the Complaint, Mr. Trump filed a Special Motion to Dismiss/Strike Complaint Pursuant to Anti-SLAPP Statute or, alternatively, to Dismiss Complaint Pursuant to FRCP 12(b)(6) (the "Motion"). [ER89-ER104.] The Motion argued that the action was governed by Texas law, and that the TCPA governed this action and required dismissal of Plaintiff's defamation claim. [Id. at ER93-ER102.] Alternately, the Motion argued that the action should be dismissed under California's anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16), or Rule 12(b)(6). [Id. at ER102-ER104.]

Mr. Trump submitted extensive evidence outside of the pleadings. [See ER105-ER110.] Much of this evidence centered on media attention surrounding the disclosure that Plaintiff had an affair with Mr. Trump and focused on Plaintiff's counsel, as opposed to Plaintiff herself. [ER105-110; ER111-ER176; ER177-ER215.] Additionally, the evidence submitted by Mr. Trump was offered to contradict the pleadings and the allegation that Plaintiff had been damaged by Mr. Trump's defamatory tweet. [ER105-110, ER216-ER245.]

Plaintiff timely opposed Mr. Trump's motion. [ER33-ER47; ER48-ER50; ER51-ER54; ER81-ER88.] Among other things, Plaintiff argued that it was improper to apply the TCPA in federal court because its terms conflicted with the Federal Rules of Civil Procedure, specifically Rules 12 and 56, and noted that numerous courts in Texas had declined to apply the TCPA in federal court at all. [ER36-ER38.] Thus, if the TCPA applied at all, because Mr. Trump sought to contradict the pleadings, the motion must be considered under Rule 56 and Plaintiff afforded an opportunity for discovery. [Id.][2] Alternately, the district court was required to restrict itself to a Rule 12 analysis. [Id.] Regardless, Plaintiff argued that she had met her burden under any standard and that the district

[2] Plaintiff specifically requested discovery on the issue of malice. [See ER33, ER45-ER47; ER53 at ¶6.]

court should deny the motion. [ER38-ER47.][3] However, in the event that the district court did grant the motion, Plaintiff argued she was entitled to amend. [ER47.]

The district court held a hearing on Mr. Trump's motion on September 24, 2018. [See ER17.] During the hearing, counsel for Mr. Trump purported to withdraw their arguments seeking to contradict the pleadings and argued the motion could be decided under Rule 12(b)(6). [ER20:9-17.] Nevertheless, counsel for Mr. Trump continued to rely on matters outside of the pleadings, including media coverage, to falsely argue that there was a "political feud" between the two parties. [ER 25:16-23.]

The district court issued a decision granting Mr. Trump's motion on October 15, 2018. [ER3-ER16.] In doing so, the district court claimed to apply a standard of review "analogous" to Rule 12. [Id. ER7.] However, as argued herein, the district court did not in fact apply Rule 12(b)(6). Rather, the district court found that the TCPA applied and, as such, imposed a higher burden or proof in violation of the Federal Rules of Civil Procedure. [Id. ER7-ER8.]

[3] While Plaintiff objected to Mr. Trump's recourse to matters outside the pleadings without having an opportunity for discovery, out of caution, Plaintiff submitted evidence substantiating her claim. [ER52-ER53 at ¶2-6, ER55-ER80; ER48-ER50.]

Furthermore, the district court considered matters outside of the pleadings such as Plaintiff's purported status as a "political adversary" to Mr. Trump. [Id. at ER12-ER14.] Although not supported by the pleadings in this action, this conclusion was central to the district court's holding that Mr. Trump's tweet was not actionable rhetorical hyperbole. [Id.] Alternately, the district court concluded that Plaintiff failed to establish malice and refused to permit Plaintiff discovery on the issue despite the fact that evidence supporting Mr. Trump's malice was uniquely within his control. [Id. at ER14-ER15.] The district court further denied Plaintiff an opportunity to amend. [Id. at ER15-ER16.] The district court determined on the basis of its ruling that the TCPA applied and that Mr. Trump was entitled to recover attorneys' fees. [Id. at ER16.]

Plaintiff timely filed a notice of appeal and the present appeal was commenced. [ER1-ER2.]

## SUMMARY OF ARGUMENT

*First*, the district court erred by applying the TCPA in federal court in the first instance. The TCPA requires a plaintiff to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code § 27.005(c). This imposes a standard of proof similar to the one the plaintiff will face at trial. In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015). This is a higher burden of proof than that imposed by the Federal

Rules of Civil Procedure at the pleading stage, which requires only that a party allege facts sufficient to state a claim that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, (2007). In view of this conflict with the Federal Rules of Civil Procedure, the TCPA does not apply in federal court. See Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (refusing to apply D.C. anti-SLAPP statute).

*Second*, even assuming the TCPA can be applied in federal court, the district court nonetheless erred by imposing a standard of review "analogous," but not identical, to the standard under Rule 12(b)(6). As this Court has held with respect to California's anti-SLAPP statute, insofar as it is applied in federal court, *it must be applied in a manner consistent with either Rule 12(b)(6) or Rule 56*. Planned Parenthood v. Ctr. For Med. Progress, 890 F.3d 828, 833-34 (9th Cir. 2018). The district court here did not in fact decide Mr. Trump's motion under a Rule 12(b)(6) standard and instead relied on the standard under the TCPA, considered matters outside the pleadings, and did not construe the pleadings properly in Plaintiff's favor. This is particularly apparent with respect to the district court's conclusion that Plaintiff was a "political adversary" of Mr. Trump's – a false assertion that is not correct, not disclosed by the pleadings, and was likely influenced by Mr. Trump's recourse to media attention.

*Third*, in view of the fact that the district court considered matters outside of the pleadings and that Plaintiff specifically requested discovery on, among other things, the issue of malice, the district court erred by not permitting discovery prior to deciding Mr. Trump's motion. See Planned Parenthood, 890 F.3d at 833-34 (adopting the rule that if motion "is a factual challenge, then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted."); Flowers v. Carville, 310 F.3d 1118, 1131 (9th Cir. 2002) (the "issue of 'actual malice' ... cannot be properly disposed of by a motion to dismiss,' where the plaintiff has had no opportunity to present evidence in support of his allegations.").

*Fourth*, the district court erred by concluding that Mr. Trump's tweet constituted non-actionable rhetorical hyperbole. A statement is not hyperbole when it asserts "an objectively verifiable fact." Backes v. Misko, 486 S.W.3d 7, 26 (Tex. App. 2015). Instead, "[i]f the district court can assess the truth or falsity of the claim, that seems a strong indication that it was a provably false assertion of fact, and therefore actionable." Manufactured Home Communities v. County of San Diego, 644 F.3d 959, 964 (9th Cir. 2008). Here, the district court acknowledged that Mr. Trump's tweet was a factual statement that could be proven false and thus should not have found it to be rhetorical hyperbole. This is true even when a statement may be "uttered in the heat of political battle." Id. at 963-64.

*Fifth*, the district court erred by concluding in the alternative that Plaintiff did not establish malice. Although Plaintiff should have been permitted discovery because evidence of malice is exclusively within Mr. Trump's control, the allegations nonetheless establish malice. Plaintiff alleged that the story was not run by *In Touch* in 2011 because, Plaintiff believes, Mr. Trump's personal attorney, Michael Cohen, threatened and intimidated the magazine into not proceeding with the story. [ER265at ¶12.] Because at the time of the incident so few people knew not only of Plaintiff's affair with Mr. Trump, but the *In Touch* story, it is reasonable to infer that the person who threatened Plaintiff was acting directly or indirectly on behalf of Mr. Trump and/or Mr. Cohen. [ER267at ¶31.] If this were the case, Mr. Trump would have had actual knowledge of the falsity of his statement. [Id.] Alternately, because Mr. Trump knew of the truth of Plaintiff's account of her affair with Mr. Trump, Mr. Trump would have had no basis to challenge the accuracy of her account of the 2011 threatening incident and would have acted in reckless disregard of the truth of his statement. [ER268 at ¶32.] Indeed, none of the alternate grounds asserted by Mr. Trump support the decision below. For example, Plaintiff was not required to plead, but did in fact properly plead damages, because Mr. Trump's statement was defamation *per se*. State Med. Ass'n of Tex. v. Comm. for Chiropractic Ed., 236 S.W.2d 632, 634 (Tex. Civ. App. 1951).

*Finally*, the district court erred by not granting Plaintiff an opportunity to amend. Among other things, Plaintiff could have alleged additional facts on the issue of malice or the context of Mr. Trump's statement. Accordingly, the failure to permit amendment conflicted with the Federal Rules of Civil Procedure favoring amendment. Verizon Delaware v. Covad Commc'ns, 377 F.3d 1081, 1091 (9th Cir. 2004).

## STANDARD OF REVIEW

Because the district court purported to apply a Rule 12 standard, this Court reviews the decision *de novo*. Planned Parenthood v. Ctr. For Med. Progress, 890 F.3d 828, 832 (9th Cir. 2018).

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY APPLYING THE TCPA IN FEDERAL COURT.

The district court held that the TCPA applied in federal court and granted Mr. Trump's motion under the TCPA, denying as moot Mr. Trump's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. [ER16.] Because the TCPA mandates a substantive review which conflicts with the Federal Rules of Civil Procedure, the district court erred by applying the TCPA.

### A. The TCPA Conflicts with the Federal Rules of Civil Procedure and Thus Should Not Be Applied in Federal Court.

Plaintiff argued before the district court that the TCPA conflicts with Federal Rules of Civil Procedure 12 and 56 and thus should not be applied in federal court. [ER36-ER38.] At a minimum, Plaintiff argued, Mr. Trump's motion to strike could not be considered under any standard of review other than that imposed by the Federal Rules of Civil Procedure. [Id.] The district court implicitly recognized this to be the case, but nonetheless applied the TCPA on the basis that it was purportedly "analogous" to a Rule 12 motion. [ER7.] The district court's attempt to save the TCPA and grant Mr. Trump's motion was nevertheless erroneous because it still amounted to imposing a burden of proof inconsistent with Rule 12 and, in considering matters outside the pleadings, did not permit Plaintiff the opportunity to conduct discovery.

#### 1. The TCPA Imposes a Higher Burden of Proof than Rule 12(b)(6).

As an initial matter, it is necessary to examine the standard of review applicable to a motion under the TCPA pursuant to Texas law. Under the TCPA, the movant bears the initial burden of establishing "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of … the right of free speech." Tex. Civ. Prac. & Rem. Code § 27.005(b). The "right of free speech" within the meaning of the TCPA "means a

communication made in connection with a matter of public concern" which in turn can refer or relate to "a public official or public figure." Tex. Civ. Prac. & Rem. Code §§ 27.001(3), 7(D). Assuming this burden is met, the TCPA requires "the party bringing the legal action" to establish "*by clear and specific evidence a prima facie case for each essential element of the claim in question*." Tex. Civ. Prac. & Rem. Code § 27.005(c) (emphasis added).

"When considering the motion to dismiss, the court considers both the pleadings *and any supporting and opposing affidavits*." D Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 434 (Tex. 2017) (emphasis added). The pleadings themselves are evidence. See Walker v. Hartman, 516 S.W.3d 71, 81 (Tex. App. 2017) (construing "live pleadings and affidavits" as "evidence under the TCPA…"). As to the meaning of the "clear and specific evidence" standard, the Texas Supreme Court has held that although the standard for a prima facie case does not impose "an elevated evidentiary standard or categorically reject circumstantial evidence," it does impose a standard similar to the one the plaintiff will face at trial. In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015). The Texas Supreme Court contrasted this standard with that of notice pleading which "merely require[s] that the pleadings provide fair notice of the claim and the relief sought such that the opposing party can prepare a defense." Id. at 590. "[U]nder notice pleading, a plaintiff is not required to 'set out in his pleadings the evidence upon

which he relies to establish his asserted cause of action[,]'" but "the TCPA requires that on motion the plaintiff present 'clear and specific evidence' of 'each essential element.'" Id. Thus, the Court explained "[f]air notice of a claim under our procedural rules … may require something less than 'clear and specific evidence' of each essential element of the claim" and that "[b]ecause the [TCPA] requires more," a notice pleading standard is insufficient to survive a motion under the TCPA. Id. at 590-91.

Because the TCPA "clear and specific evidence" standard is analogous to Plaintiff's burden of proof at trial, the standard is minimally analogous to the preponderance of evidence standard of proof and may rise to that of clear and convincing evidence. See Turner v. KTRK Television, 38 S.W.3d 103, 118 (Tex. 2000) (discussing burden of proof on proving falsity at trial). This is not the standard imposed by the Federal Rules of Civil Procedure. Indeed, as this Court has explained, on a Rule 12(b)(6) motion, "[r]eview is limited to the complaint" and "[a]ll factual allegations set forth in the complaint are taken as true and construed in the light most favorable to [p]laintiffs." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citations and quotations omitted). "[F]actual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6)." Id.

The TCPA thus imposes a burden of proof on a plaintiff that is significantly higher than Rule 12. As argued below, the TCPA cannot therefore be applied in federal court.

**2. Due to the Conflict with the Federal Rules of Civil Procedure, the TCPA Cannot Be Applied in Federal Court.**

Precisely because of the conflict between the Federal Rules of Civil Procedure and anti-SLAPP statutes such as the TCPA, the application in federal courts of state anti-SLAPP statutes is controversial. Several circuits, including the Tenth, Eleventh and D.C. Circuits, have refused to apply the statutes entirely. See Carbone v. Cable News Network, 910 F.3d 1345, 1356-57 (11th Cir. 2018); Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015); Los Lobos Renewable Power v. Americulture, 885 F.3d 659, 673 (10th Cir. 2018). This Court has, with respect to California's anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16), held that although it may be applied in federal court, it must be decided in accordance with either Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. See Planned Parenthood v. Ctr. For Med. Progress, 890 F.3d 828, 833-34 (9th Cir. 2018) (adopting the rule that if "an anti-SLAPP motion to strike [is] founded on purely legal arguments, then the analysis is made under Fed. R. Civ. P. 8 and 12 standards;" but that "if it is a factual challenge, then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted."). This Court has not, to Plaintiff's knowledge, addressed the

applicability of the TCPA in federal court. Nor has the Fifth Circuit resolved this issue.[4]

The D.C. Circuit in Abbas explained how the elevated standard of review under the D.C. anti-SLAPP law, which requires a pre-trial demonstration that the "claim is likely to succeed on the merits" conflicts with the Federal Rules of Civil Procedure. 783 F.3d at 1332 (Kavanaugh, J.). By contrast, "under Federal Rule 12(b)(6), a plaintiff can overcome a motion to dismiss by simply alleging facts sufficient to state a claim that is plausible on its face." Id. at 1332. "A well-pleaded complaint 'may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable.'" Id. This is a lower standard of proof than the one a plaintiff faces at a trial on the merits.[5] Nevertheless, "[u]nder the Federal

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[4] This question may be resolved by the Fifth Circuit Court of Appeal shortly. See Rudkin v. Roger Beasley Imports, No. 18-50157. Notably, numerous district courts in Texas have refused to apply the TCPA due to its conflict with Rules 12 and 56. See, e.g., Mathiew v. Subsea, No. 4:17-CV-3140, 2018 WL 1515264, at *7 (S.D. Tex. Mar. 9, 2018), report and recommendation adopted, No. 4:17-CV-3140, 2018 WL 1513673 (S.D. Tex. Mar. 26, 2018) (the "TCPA directly conflicts with the 'integrated program' Rules 12 and 56 create for determining whether to grant pre-trial judgment in cases in federal court because it changes the burdens of proof applicable to both parties" and as a result "the procedural mechanisms of the TCPA must yield to the Federal Rules of Civil Procedure."); Rudkin v. Roger Beasley Imports, No. A-17-CV-849-LY, 2017 WL 6622561, at *3 (W.D. Tex. Dec. 28, 2017), report and recommendation approved, No. A-17-CV-849-LY, 2018 WL 2122896 (W.D. Tex. Jan. 31, 2018) ("Even if the [TCPA] is viewed to be somehow substantive, it still cannot be applied in federal court, as its provisions conflict with Rules 12 and 56, rules well within Congress's rulemaking authority.").

[5] Notably, "Rule 56 permits summary judgment only 'if the movant [first] shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Abbas, 783 F.3d at 1334 (quoting Fed. R. Civ. P. 56(a)). By contrast, under the anti-SLAPP statute, the burden of proof shifts to

Rules, a plaintiff is generally *entitled to trial* if he or she meets the Rules 12 and 56 standards to overcome a motion to dismiss or for summary judgment." Id. at 1334 (emphasis added). Thus, unlike the D.C. statute (and the TCPA), "the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal." Id. In view of this conflict between the Federal Rules and the D.C. statute, the court in Abbas concluded "we may not apply the D.C. Anti-SLAPP Act's special motion to dismiss provision." Id. The Court thus reversed the district court's decision to dismiss under the D.C. statute. Id. at 1337.

Similarly, the Eleventh Circuit concluded that Georgia's anti-SLAPP statute conflicted with the Federal Rules for the same reasons. As the Eleventh Circuit wrote, "Rules 8, 12, and 56 express 'with unmistakable clarity' that proof of probability of success on the merits 'is not required in federal courts' to avoid pretrial dismissal, and that the evidentiary sufficiency of a claim should not be tested before discovery." Carbone, 910 F.3d at 1351 (citing Hanna v. Plumer, 380 U.S. 460, 470 (1965)). Consequently, there is a "'direct collision' between the Federal Rules and the motion-to-strike provision of the Georgia statute." Id. The

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plaintiff once the defendant makes a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." Id. at 1332. Again, this is a significantly lower hurdle for the defendant than those applicable under Rule 56. Moreover, a motion under Rule 56 is contemplated only after the plaintiff has had an opportunity to conduct discovery and even allows a plaintiff to avoid summary judgment where additional discovery is required. Fed. R. Civ. P. 56(f).

Eleventh Circuit concluded "Rules 8, 12, and 56 create an affirmative entitlement to avoid pretrial dismissal that would be nullified by the Georgia anti-SLAPP statute if it were applied in a federal court" and affirmed the district court's refusal to apply the Georgia anti-SLAPP statute and denial of the defendant's special motion to strike. Id. at 1352.

Similarly, in Los Lobos Renewable Power v. Americulture, the Tenth Circuit held that the New Mexico anti-SLAPP statute at issue was "not designed to influence the *outcome* of an alleged SLAPP suit but only the *timing* of that outcome." 885 F.3d 659, 673 (10th Cir. 2018) (emphasis in original). As such, the "statute simply does not define the scope of any state substantive right or remedy" and must be considered procedural in nature. Id. Consequently, the statute does not apply in federal court and, again, Rules 12 and 56 govern the resolution of a pre-trial motion to dismiss a lawsuit. Id. The Tenth Circuit affirmed the district court's refusal to apply the New Mexico anti-SLAPP statute. Id.

As noted, this Court has not addressed the applicability of the TCPA in federal court. However, even though this Court has not categorically refused to apply California's anti-SLAPP statutes in federal court, it has held that motions to strike under California's statute must be decided in accordance with the Federal Rules of Civil Procedure even though California's statute imposes a different burden of proof upon the plaintiff. Planned Parenthood, 890 F.3d at 832-35.

In Planned Parenthood, this Court acknowledged that the "degree to which the anti-SLAPP provisions are consistent with the Federal Rules of Civil Procedure has been hotly disputed." Id. at 833. Thus, the Court pointed out that it had already "concluded that an automatic stay on discovery," as is required by California's anti-SLAPP statute, "would conflict with Federal Rule of Civil Procedure 56, and was inapplicable in federal court." Id. (citing Metabolife Intern. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001)). The Court further noted that it had in a prior unpublished opinion decided that 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;" however, "if it is a factual challenge, then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted." Id. at 833-34 (citing Z.F. v. Ripon Unified Sch. Dist., 482 F. App'x 239, 240 (9th Cir. 2012)).

The Court concluded that the reasoning in Z.F. was persuasive and, "[i]n order to prevent the collision of California state procedural rules with federal procedural rules," held that it would "review anti-SLAPP motions to strike under different standards depending on the motion's basis." Id. at 833. Thus, "on the one hand, when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated." Id.

On the other hand, "when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply" and "in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court." Id. Any "contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure while in a federal district court" and in any such "contest between a state procedural rule and the federal rules, the federal rules of procedure will prevail." Id. Accordingly, the Court affirmed the district court's consideration of the defendant's anti-SLAPP motion under Rule 12 and refusal "to evaluate the factual sufficiency of the complaint at the pleading stage." Id. at 835.

Here, as discussed above, the TCPA imposes an elevated standard of proof over that of the Federal Rules of Civil Procedure by placing the burden of proof on the plaintiff to provide "clear and specific evidence" as to the essential elements of the claim – a standard that is analogous not to Rule 12 under the Federal Rules, but to the plaintiff's burden of proof at trial. In re Lipsky, 460 S.W.3d at 591. As the above-cited authority explains, this presents a fundamental conflict with the Federal Rules, which must govern in federal court. See, e.g., Abbas, 783 F.3d at 1336. The TCPA, which does not impose a higher substantive burden of proof

than the one at trial, should thus be deemed to be purely procedural in nature and inapplicable in federal court. Los Lobos, 885 F.3d at 673.

Any argument that this Court should extend the decision in Planned Parenthood under California's anti-SLAPP statute to the TCPA and find that the TCPA applies so long as the district court evaluates the motion under the applicable Federal Rules, should be rejected. To begin with, the district court did not even take this approach. Further, this Court's decision under the California anti-SLAPP statute should not be extended to the TCPA for the same reasons the D.C. Circuit refused to reach a similar conclusion. As the Court held in Abbas, the "main problem with [this argument] is that it requires the Court to rewrite the special motion to dismiss provision." 783 F.3d 1333-34. As the court in Abbas stated, "[h]ad the D.C. Council simply wanted to permit courts to award attorney's fees to prevailing defendants in these kinds of defamation cases, it easily could have done so." Id. at 1334. But, that is not what the legislature did as to the D.C. anti-SLAPP statute or the TCPA. Rather, in each instance, the legislature "enacted a new provision that answers the same question about the circumstances under which a court must grant pre-trial judgment to defendants" and the "likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56." Id. at 1334-35.

Accordingly, the Court should simply hold the TCPA to be inapplicable in federal court and reverse the district court's ruling granting Mr. Trump's motion.

### B. The District Court's Attempt to Apply a Standard "Analogous" to Rule 12 Erroneously Imposed a Higher Standard of Proof.

The district court implicitly recognized that the application of the TCPA in federal court was not permitted. It applied the TCPA, but in doing so, reasoned that it was applying a standard of review "analogous" to a Rule 12 motion. [ER7.] The fact that the district court felt compelled to use the term "analogous" as opposed to identical is itself telling. Assuming *arguendo* that this attempt to salvage the TCPA was permissible, the district court nevertheless erred because the purportedly "analogous" standard of review was not the same as the Rule 12(b)(6) standard of review. Instead, the district court erroneously: (1) imposed a higher burden of proof upon Plaintiff; and (2) improperly considered matters outside of the pleadings and failed to construe the allegations and record in a manner favorable to Plaintiff.

*First*, as to the correct standard of review, under this Court's decision regarding California's anti-SLAPP statute, if the TCPA applies at all, the district court was obligated to apply either a Rule 12 standard of review or a Rule 56 standard of review. Planned Parenthood, 890 F.3d at 834-35. Here, the district court failed to apply either standard and instead explicitly relied on the standard of review under the TCPA. [See ER10 ("[T]he Court next applies the substantive

requirements of the TCPA to the Special Motion and the allegations in the Complaint.").] As the district court stated, the TCPA requires that if the defendant establishes that the complaint implicates a matter of public concern, "the burden then shifts to the plaintiff to 'establish[] *by clear and specific evidence a prima facie case for each essential element of the claim in question*.'" [Id.] As discussed above, this standard of review, which corresponds to the plaintiff's burden of proof at trial, is not identical to or even "analogous" to the standard of review under Rule 12(b)(6).

In applying this purportedly "analogous" standard, the district court seemed to take for granted that because it assumed the truth of the allegations in the Complaint, as opposed to entertaining an explicit factual challenge to the Complaint, it had complied with its obligations under Rule 12(b)(6). [See ER8 (stating that Mr. Trump's motion "largely assume[s] the truth of the Complaint.").] This is not correct. Instead, as discussed above, the law under Rule 12 establishes that a "plaintiff can overcome a motion to dismiss by simply alleging facts sufficient to state a claim that is plausible on its face." Abbas, 783 F.3d at 1334. *"A well-pleaded complaint 'may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable.'"* *Id.* (emphasis added). This is not the same as the "clear and specific" evidence required under the TCPA, regardless of whether one assumes the truth of the allegations in the Complaint. Tex. Civ. Prac.

& Rem. Code § 27.005(c); In re Lipsky, 460 S.W.3d at 591. Indeed, as discussed above, under the TCPA, the pleadings themselves are evidence, thus simply assuming their truth is not the end of the inquiry. Walker, 516 S.W.3d at 81.

The district court's reliance on the outcome of Rehak Creative Services v. Witt, 404 S.W.3d 716 (Tex. App. 2013), further illustrates how the district court failed to apply the proper standard of review under Rule 12. The decision in Rehak was explicitly premised on the evidentiary standard of review under the TCPA – not Rule 12. Specifically, the Texas Court of Appeal held that the "record does not contain a minimum quantum *of clear and specific evidence* demonstrating that the Witt campaign's 'How to Succeed' website made defamatory statements of fact about Rehak and Rehak Creative Services, Inc." Id. at 732.

Thus, the mere fact that the Court purported to limit itself to the pleadings (which, as discussed below, in reality it did not), does not establish that the district court applied the appropriate standard of review. Instead, the district court improperly relied upon a higher standard of review and burden of proof under the TCPA, and relied on evidentiary materials outside the pleadings. The decision should be reversed for this reason alone. Planned Parenthood, 890 F.3d at 834-35.

*Second*, as to considering matters outside of the pleadings and failing to construe the pleadings in a manner favorable to Plaintiff, under Rule 12, a court must do more than simply assume the truth of the allegations in the complaint.

Review is *both* "limited to the complaint" *and* "[a]ll factual allegations set forth in the complaint are … construed in the light most favorable to [p]laintiffs." Lee, 250 F.3d at 688 (citations and quotations omitted). The district court did not state that the allegations of the Complaint must be construed in the light most favorable to Plaintiff, and the district court's order demonstrates it did not apply this principle. [See ER3-ER16.] The district court both considered matters outside of the Complaint and failed to construe the record in a light favorable to Plaintiff.

Central to the district court's conclusion that Plaintiff failed to meet her burden under the TCPA was the district court's conclusion that Mr. Trump "issued the tweet in the context of *Plaintiff presenting herself as a political adversary to the President*." [ER13 (emphasis added).] The district court added, without citation to any filings in this action, that "[i]n filings before this Court, Ms. Clifford has challenged the legitimacy of Mr. Trump's victory in the 2016 Presidential election." [Id.] The district court elaborated later in its decision denying Plaintiff leave to amend that "Ms. Clifford argues that Mr. Trump sought to silence her as a strategy to win the Presidential election, a clear argument against the legitimacy of Mr. Trump's Presidency." [ER16.] In support of this, the district court did not cite a contention or filing in this action, but instead the complaint in a separate action styled Stephanie Clifford v. Donald Trump, No. 2:18-cv-02217-SJO-FFM. [Id.]

The Complaint in this action does not permit the conclusion that Plaintiff presented herself as a "political adversary" to Mr. Trump. [See ER263-ER269 at ¶¶6-38.] At best, the Complaint discloses that Plaintiff contemplated publicly disclosing the truth of her affair with Mr. Trump, but was threatened into silence, and when she ultimately did go public with her story, was defamed by Mr. Trump as a liar and a con artist. [Id.] Telling the truth regarding the fact of a relationship between Plaintiff and Mr. Trump does not make Plaintiff a "political adversary" to Mr. Trump. There is no indication from the Complaint that Plaintiff, an adult film actress and director, holds elected office or is running for any elected office, nor is there any basis for that conclusion in reality. [Id.; see also ER22:10-13, ER27:10-ER28:17.]

To be clear, the district court's mere impression that Plaintiff and Mr. Trump are political adversaries, unsupported by any record evidence, does not make it so. *That Plaintiff is a litigant against the President does not in an and of itself establish that she is a "political adversary."* The facts at issue regarding the threatening incident in 2011 and Plaintiff's affair with Mr. Trump predate his presidency. The assumption that the allegations in this lawsuit render Plaintiff a "political adversary" of Mr. Trump both undermines the independence of the courts, by transforming every lawsuit into a political challenge as opposed to a request that the law be upheld, and weakens the principal of the neutrality of the

law applying equally to all citizens.[6] Indeed, there can be no serious contention that Mr. Trump's tweet was an act done in the official capacity of the President, and the Supreme Court has clearly stated that "litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power." Clinton v. Jones, 520 U.S. 681, 701 (1997). The President, like everyone else, is subject to the law. See id. at 694 ("But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity."). And more to the point, the district court's conclusion that Plaintiff is a "political adversary" and resulting immunization of Mr. Trump demonstrates the court did not limit its review to the pleadings or construe the allegations in a light most favorable to Plaintiff under Rule 12(b)(6). Lee, 250 F.3d at 688.

The district court purported to rely on the complaint in Stephanie Clifford v. Donald Trump, No. 2:18-cv-02217-SJO-FFM to support its conclusion. [See ER11.] Although Plaintiff does not believe that the complaint in that action,

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[6] In making the argument that Plaintiff was a political adversary to Mr. Trump, Mr. Trump focused on media appearances by Plaintiff's *counsel*. [See ER169-ER176; ER25:16-22; but see ER27:10-16.] These are matters outside of the pleadings, which as argued above, should not have been considered by the district court and, even if accurate, simply do not transform *Plaintiff*, a litigant against Mr. Trump, into a political adversary.

anymore than this action, supports the district court's conclusion that Plaintiff is a "political adversary" to Mr. Trump, for the same reasons discussed above, the complaint from another action is plainly outside the pleadings in this action. Moreover, although Mr. Trump submitted extensive evidence outside the pleadings in connection with his motion to strike, the complaint referenced by the district court was not part of the formal record submitted by Mr. Trump before the trial court or, as a result, now on appeal. [See ER105-ER110.][7] Indeed, it is far more likely the district court was actually relying on external evidence regarding the media attention the case has received than any specific document or pleading in this or any other case. [See ER169-176; ER25:16-22.]

It is thus apparent from the district court's ruling that the court did not apply the appropriate standard of review under Rule 12(b)(6) or under this Court's decisions regarding the application of California's anti-SLAPP statute. Planned Parenthood, 890 F.3d at 834-35. Thus, even though Plaintiff maintains that the TCPA should not be applied in federal court *at all*, Abbas, 783 F.3d at 1337, even if it is, the district court's decision that Mr. Trump's motion was "analogous" to a

[7] In a footnote, the district court mentions "judicially-noticeable facts" but does not, in that footnote, disclose what those facts are or engage in any substantive analysis establishing the propriety of taking judicial notice of any facts outside the allegations of the Complaint. [ER8 n.4.] Nor was there a formal request for judicial notice of this complaint filed by Mr. Trump in connection with his motion to strike. Accordingly, "judicially-noticeable facts" cannot establish the propriety of the district court's recourse to matters outside the pleadings.

Rule 12 motion and the manner in which the district court applied that standard did not comport with the requirements of Rule 12. Accordingly, the decision below should be reversed.

### C. The District Court Erred By Not Permitting Plaintiff an Opportunity for Discovery.

The district court also erred because it did not permit Plaintiff the opportunity to conduct discovery. This error is apparent with respect to two issues: (1) the district court's reliance on matters outside of the pleadings (discussed above); and (2) the district court's analysis of the malice requirement.

*First*, as discussed above, the district court considered matters outside of the pleadings. Review on a Rule 12(b)(6) motion is limited to the pleadings. Lee, 250 F.3d at 688. As this Court held with respect to California's anti-SLAPP statute, if a motion under that statute is not considered under a Rule 12(b)(6) standard, then Rule 56 must apply. Planned Parenthood, 890 F.3d. at 834-35. However, "in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court." Id. at 834; see also Metabolife, 264 F.3d at 846; Z.F., 482 F. App'x at 240. Accordingly, the district court should not have ruled on Mr. Trump's motion until after affording Plaintiff an opportunity for discovery. The decision below should be reversed.

*Second*, Plaintiff should have been afforded an opportunity to conduct discovery on the issue of malice. [See ER45-ER47; ER53 at ¶6.] In fact, Plaintiff

specifically requested discovery into the circumstances surrounding Mr. Trump's tweet, such as why he posted it and what his knowledge of the underlying factual circumstances of the threatening incident in 2011 were when he posted the tweet. [ER53 at ¶6.] The district court should have, at a minimum, permitted discovery on the issue of malice and erred by not doing so.

Malice is the "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." Masson v. New Yorker Magazine, 501 U.S. 496, 511 (1991). The reckless disregard prong may be established in a wide variety of ways. This Court has held that a plaintiff can prevail by showing the defendant had "high degree of awareness of ... probable falsity," "entertained serious doubts as to the truth of his publication," or "had obvious reasons to doubt the veracity, but engaged in purposeful avoidance of the truth." Eastwood v. Nat'l Enquirer, 123 F.3d 1249, 1251 (9th Cir. 1997) (citations and quotations omitted). Courts will also consider "[a] failure to investigate . . ., anger and hostility toward the plaintiff . . , reliance upon sources known to be unreliable . . ., or known to be biased against the plaintiff [as evidence that] the publisher himself had serious

doubts regarding the truth of his publication." Overstock.com v. Gradient Analytics, 151 Cal.App.4th 688, 709–10 (2007).[8]

As discussed below, Plaintiff's allegations regarding malice were sufficient to survive Mr. Trump's motion to strike. However, Plaintiff was also entitled to discovery on the issue of malice because "[a]ctual malice is a subjective standard that turns on the defendant's state of mind;" and "it is typically proven by evidence beyond the defamatory publication itself." Flowers v. Carville, 310 F.3d 1118, 1131 (9th Cir. 2002). This Court has, thus, recognized that "'the issue of 'actual malice' ... cannot be properly disposed of by a motion to dismiss,' where the plaintiff has had no opportunity to present evidence in support of his allegations." Id. Similarly, in Metabolife, this Court discussed approvingly of the district court's recognition that it "should not scrutinize Plaintiff's evidence of facts uniquely within the Defendants' control before ordering discovery" and refusal to rule on the issue of actual malice. 264 F.3d at 846; see also Rogers v. Home Shopping Network, 57 F.Supp.2d 973, 981 (C.D. Cal. 1999).

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[8] Texas law is the same. "In the defamation context, 'actual malice' means 'that the defendant made the statement 'with knowledge that it was false or with reckless disregard of whether it was true or not.'" Warner Bros. v. Jones, 538 S.W.3d 781, 805 (Tex.App. 2017). "To establish reckless disregard, a public figure must provide sufficient evidence that the publisher 'entertained serious doubts as to the truth of his publication' or had 'a high degree of awareness of ... probable falsity.'" Id. Additionally, "lack of care or an injurious motive in making a statement … are factors to be considered." Bentley v. Bunton, 94 S.W.3d 561, 596 (Tex. 2002). Similarly, "a purposeful avoidance of the truth is" evidence and "[i]magining that something may be true is not the same as belief." Id.

Here, the district court found that Plaintiff's allegations regarding malice were insufficient because, according to the district court, "Plaintiff does not allege facts establishing how Mr. Trump knew or did not know about the 2011 threat in the first place." [ER15.] While this is not an accurate characterization of Plaintiff's allegations (as discussed below), because the alleged flaw goes to Mr. Trump's subjective knowledge—a matter exclusively within his control—the district court should have first permitted Plaintiff discovery into the issue of malice rather than granting the motion. Flowers, 310 F.3d at 1131.

## II. THE DISTRICT COURT ERRED BY GRANTING MR. TRUMP'S MOTION BECAUSE PLAINTIFF STATED A CLAIM FOR DEFAMATION.

Although the district court never should have reached the merits of Mr. Trump's motion, should this Court conclude either that the TCPA does apply or that the district court did apply the correct standard of review, Mr. Trump's motion should have still been denied. This is so because Plaintiff's Complaint stated a cause of action for defamation against Mr. Trump.

The elements of a claim for defamation are well-established. See D Magazine Partners, 529 S.W.3d at 434. "In making the initial determination of whether a publication is capable of a defamatory meaning, [courts] examine its 'gist.'" Id. The Court must "construe the publication 'as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence

would perceive it.'" Id. Mr. Trump argued before the district court that his statement was not a statement of fact, that Plaintiff has no damages, and that she cannot prove the requisite level of fault. The district court declined to consider Mr. Trump's arguments regarding damages and resolved the motion on the other grounds asserted by Mr. Trump. [See ER11-ER16.]

### A. Mr. Trump's Statement Is a False Statement of Fact and Is Not Rhetorical Hyperbole.

The district court correctly concluded that Mr. Trump's statement was a statement of fact. It then, however, contradicted itself by erroneously concluding that the statement was non-actionable rhetorical hyperbole.

#### 1. Mr. Trump's Tweet Was a Statement of Fact.

Under Texas law, "to be actionable, a statement must assert an objectively verifiable fact rather than an opinion." Hoskins v. Fuchs, 517 S.W.3d 834, 840 (Tex. App. 2016). Thus, Texas courts "classify a statement as fact or opinion *based on the statement's verifiability and the entire context in which the statement was made*." Id. (emphasis added). In Bentley v. Bunton, for example, "the host of a call-in talk show televised on a public-access channel in a small community repeatedly accused a local district judge of being corrupt." 94 S.W.3d at 566–67. In that action, the Texas Supreme Court addressed the question of whether the accusation that the plaintiff was "corrupt" constituted an opinion or statement of fact. Resolution of the issue hinged on the "verifiability" of the accusation "and

the context in which [the accusations] were made." Id. at 852. As the Texas Supreme Court stated, the accusation that someone is corrupt "may be merely epithetic in the context of amorphous criticism," or "it may also be used as a statement of fact that can be proved true or false…" Id. at 581-582. Indeed, "[c]orrupt conduct, determined as a matter of fact, may be punished under Texas law in numerous situations." Id. at 582.

In discussing the distinction between statements of fact and opinion, the Texas Supreme Court cited with approval the Supreme Court's discussion in Milkovich v. Lorain Journal as follows:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. … Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Bentley, 94 S.W.3d at 583 (*citing* Milkovich v. Lorain Journal, 497 U.S. 1, 18-19 (1990)). Based on the context of the accusation, which included reference to a supposed investigation, the Court concluded that the accusation of corruption was "a matter of verifiable fact," albeit false, not "constitutionally protected opinion." Id.

Here, Mr. Trump, from his personal Twitter account made the false factual statement regarding Plaintiff, the sketch, and her account of the incident in 2011: "A sketch years later about a nonexistent man. A total con job, playing the Fake

News Media for Fools (but they know it)!" [ER265 at ¶15.] As noted above, the statement posted by Mr. Trump was in response to a tweet from another user showing side-by-side images of the sketch of Plaintiff's harasser and a picture of Plaintiff and her husband. [Id. ¶16.]

As such, the statement itself contains at least two distinct and verifiable factual statements: (1) that the man who threatened Plaintiff in 2011 does not exist and, consequently, that Plaintiff is lying about the encounter and ever having been threatened when she contemplated going public about her affair with Mr. Trump; and (2) that Plaintiff is engaged in a "con job" or is "[s]omeone who defrauds a victim by first gaining the victim's confidence and then, through trickery, obtaining money or property; a swindler." CONFIDENCE MAN, Black's Law Dictionary (10th ed. 2014). These are both verifiable statements – it is either true, or not true, that the man exists. It is also either true, or not true, that the threatening incident happened or that instead Plaintiff orchestrated a fraud (or "con job") on Mr. Trump, the media, and the public.

For these reasons, this action is entirely distinguishable from Dallas Morning News v. Tatum, cited by Mr. Trump before the district court. There, the Texas Supreme Court held that the statement at issue did not in fact "implicitly accuse the [plaintiffs] of being deceptive people in the abstract or by nature." No. 16-0098, 2018 WL 2182625, at *17 (Tex. May 11, 2018). Rather, "it accuses them of a

single, understandable act of deception, undertaken with motives that should not incite guilt or embarrassment." Id. Further, it held that the statement at issue used "language that conveys a personal viewpoint rather than an objective recitation of fact" which included "So I guess," "I think," and "I understand." Id. Mr. Trump's statement is not analogous at all and is not in any manner equivocal or neutral – it states flat out that Plaintiff's assailant does not exist and accuses her of fraud and committing a crime.

The district court agreed that Mr. Trump's tweet was a statement of fact, writing that "Plaintiff correctly points out that Mr. Trump's tweet contains two verifiably true/false statements: (1) that the man who threatened Ms. Clifford in 2011 does not exist and therefore, that Plaintiff is lying about her encounter with him; and (2) that Ms. Clifford is engaging in a 'con job' or is lying to Mr. Trump, the public, and the media about the threat (and by implication her affair with Mr. Trump)." [Id. at 10.] The district court thus properly concluded "[i]f the man who threatened Ms. Clifford in 2011 does exist, or if Ms. Clifford is not lying to Mr. Trump, the public, and the media about the threats that she received or her affair with Mr. Trump, Mr. Trump's tweet would be verifiable as false." [Id.] Having concluded the tweet contained statements of verifiable fact, the court erred by later concluding otherwise and dismissing Plaintiff's claim.

**2. Mr. Trump's Tweet Was Not Rhetorical Hyperbole.**

Despite concluding that the tweet was a statement of fact, the district went on to write that Plaintiff's argument "crumbles when it comes to the second step in the *Bentley/Milkovich* analysis because Mr. Trump's tweet constitutes 'rhetorical hyperbole.'" [Id.] However, as noted above, a statement is not hyperbole when it asserts "an objectively verifiable fact." Backes, 486 S.W.3d at 26. As this Court has held, where a statement charges a person with "specific and objectively verifiable acts" it is not rhetorical hyperbole or opinion. Rodriguez v. Panayiotou, 314 F.3d 979, 987 (9th Cir. 2002). Rather, "[i]f the district court can assess the truth or falsity of the claim, that seems a strong indication that it was a provably false assertion of fact, and therefore actionable." Manufactured Home Communities v. County of San Diego, 644 F.3d 959, 964 (9th Cir. 2008). Under this standard, the district court erred.

Nevertheless, the district court reasoned if the "Court were to prevent Mr. Trump from engaging in this type of 'rhetorical hyperbole' against a political adversary, it would significantly hamper the office of the President." [Id. at 11.] The district court explained, despite its conclusion that the tweet contained verifiable statements of fact, that because "Mr. Trump's tweet displays an incredulous tone," it was "was not meant to be understood as a literal statement about Plaintiff." [Id. at 10-11.] The court concluded that to "allow Plaintiff to

proceed with her defamation action would, in effect, permit Plaintiff to make public allegations against the President without giving him the opportunity to respond." [Id.]

As argued above, the district court's factual assertion regarding Plaintiff's status as a "political adversary" is not supported by the pleadings and should not have been considered by the district court. Regardless, even if true, it does not support the district court's conclusion that the statement was non-actionable rhetorical hyperbole. This is so because the district court's acknowledgement that the tweet was a verifiable statement of fact and that Mr. Trump used the statement to challenge Plaintiff's account requires the conclusion that the tweet was not rhetorical hyperbole.

Indeed, contrary to the district court's conclusion regarding the context of the statement, the actual context demonstrates that it was issued in response to Plaintiff's appearance on *The View*. [ER265 at ¶¶14-16.] Plaintiff and Mr. Trump are not strangers; they have a personal history together. A reasonable reader of the statement might read it, coming from Mr. Trump (the person Plaintiff states she had an affair with), as being a *factual* assertion that Plaintiff is lying about being threatened for going public about the affair because the affair itself never

happened. This is a verifiable statement and would be understood as such.[9] Indeed, Mr. Trump is not an unaffiliated individual on the Internet speculating without any pretense of personal knowledge. Aside from Plaintiff, *Mr. Trump is one of the few people in the world who has personal knowledge of the true facts of their affair*. In light of this, Mr. Trump cannot declare his statement an opinion or rhetorical hyperbole and avoid the reasonable implication that he has factual knowledge supporting the statement. See Bentley, 94 S.W.3d at 583 ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.").

The district court's concern over affording Mr. Trump an opportunity to respond does not change the analysis. [ER13.] Mr. Trump can, of course, respond to Plaintiff's complaint without accusing her of lying, let alone committing a crime. Moreover, if that accusation is central to Mr. Trump's defense, then the appropriate defense to Plaintiff's complaint is to assert the truth of Mr. Trump's statement. Instead, the district court's decision allows Mr. Trump to respond with impunity – i.e., make a factual assertion about the truth of Plaintiff's account without ever having to verify or defend his claim. The President is subject to the

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[9] Although it would not have been permissible for the district court to entertain a factual challenge to the allegations in the Complaint, absent permitting Plaintiff discovery, out of an abundance of caution, Plaintiff submitted a declaration effectively verifying these allegations. [ER49 at ¶¶2-3.] Indeed, Plaintiff continues to be threatened in response to Mr. Trump's tweet. [Id. ¶¶3-4.]

law, particularly for matters pertaining to his private actions, just like everyone else. See Clinton, 520 U.S. at 694.

This Court has found similar statements to be actionable. For example, a union banner stating "THIS MEDICAL FACILITY IS FULL OF RATS" could be understood as a "misrepresentation of fact" regarding a rodent problem and was not rhetorical hyperbole despite the fact that the union argued it would be understood in the context of the labor dispute, not an actual rodent problem. San Antonio Community Hospital v. Southern California District Council of Carpenters, 25 F.3d 1230, 1237 (9th Cir. 1997). Similarly, the accusation that a police officer committed "specific and objectively verifiable acts of genital exposure and masturbation" were "provably false factual assertions" even though the speaker used "colorful and humorous language … to speak about the incident." Rodriguez, 314 F.3d at 987. Indeed, like the Mr. Trump's statement here, the accusation that a party "lied to the County" could be reasonably construed by a fact finder as a statement of fact, even though "*uttered in the heat of political battle*," and this Court reversed dismissal of the cause of action as based on rhetorical hyperbole. Manufactured Home Communities, 644 F.3d at 963-64 (emphasis added).

The authority relied upon by the district court to support its analysis in fact largely supports Plaintiff's position. In Milkovich v. Lorain Journal, 497 U.S. 1

(1990), the Supreme Court found statements very much like Mr. Trump's here to be actionable statements of fact. There, the statements at issue amounted to an accusation that the plaintiff committed perjury. The statements appeared in a column in a newspaper and included the following accusations quite similar in tone to Mr. Trump's here: "Maple beat the law with the `big lie," "If you get in a jam, lie your way out," and "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened." Id. at 4-5.

The Supreme Court held that these statements were actionable and that the "dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." Id. at 21. The Court answered in the affirmative and concluded that the accusation of perjury was "sufficiently factual to be susceptible of being proved true or false" because a "determination whether petitioner lied in this instance can be made on a core of objective evidence…" Id. The Court in Milkovich specifically rejected the claim that there needed to be separate protections for statements of opinion, writing that the Court was "not persuaded that … an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." Id. Rather, the First Amendment protections associated

with the relative burdens of proof as to the issue of "culpability" or the presence of malice were sufficient. Id. Milkovich, thus, supports the conclusion that Mr. Trump's tweet is an actionable verifiable statement of fact. If Mr. Trump wishes to defend his statement, he can argue its truth as a defense to Plaintiff's claims.

The Texas decisions cited by the district court similarly do not support its analysis. The district court relied heavily on the decision in Rehak Creative Services v. Witt, to support its conclusion that Plaintiff's purported status as a "political adversary" to Mr. Trump rendered his statement rhetorical hyperbole. Although true that Rehak discussed the fact that the statements at issue were made in the context of a political campaign, this was not the sole factor in the court's analysis and the facts of that case are quite different from those presented here.

For example, the plaintiff in that action was not the speaker's political adversary and the court concluded that in fact an "ordinary reader would understand that [the defendant's] vigorous criticism targeted the incumbent elected official she hoped to unseat in the primary—*not [the plaintiff]*." 404 S.W.3d at 731 (emphasis added). In other words, the statement in Rehak was not actionable because it was not reasonably understood to target the plaintiff. Here, there can be no doubt that Mr. Trump was referring to Plaintiff and neither the district court nor Mr. Trump contended otherwise.

Additionally, the statements in question in Rehak were made online and directly linked to documents, which the plaintiff contended demonstrated the falsity of the statements made on the website. Id. at 731. The court concluded these linked documents "unmistakably show[ed] 'the exact opposite' of the gist" the plaintiff argued was being conveyed, which would lead a person of ordinary intelligence to conclude the statement was mere rhetorical hyberbole "being employed as part of a political campaign during a contested primary." Id. This, according to the court in Rehak, undermined the plaintiff's contention that the statements would reasonably be construed as a statement of fact about the plaintiff. Id. Here again, there is nothing about Mr. Trump's statement that undermines the interpretation that it is a factual statement about Plaintiff which accuses her of lying about the threatening incident, the affair, and committing a crime.

The district court cited Backes v. Misko, which again supports Plaintiff's position. In Backes the court did not conclude that the statements at issue were rhetorical hyperbole. It instead found that posts on an Internet message board referencing "Munchausen Syndrome by Proxy" and claiming a "STRONG suspicion[]" about the plaintiff (although the plaintiff was not named in the post) and asking "to whom do you turn them over?" was in fact actionable. 486 S.W.3d at 14, 26. The court found, applying the TCPA's heightened evidentiary burden, that the post was a "transparent accusation against [plaintiff], as the Post was

written in such a way that readers familiar with [plaintiff] knew she was the only possible person [the defendant] had a 'STRONG suspicion' of suffering from MSBP and allegedly abusing her daughter." Id. at 26. The statement was not rhetorical hyperbole because "the Post asserted an objectively verifiable fact about [plaintiff] — whether she suffered from MSBP" and because "[i]njuring a child or placing a child in imminent danger of injury constitutes a felony." Id.

Again, in Backes, as in the other authority discussed, where the statement at issue communicates an objectively verifiable fact about the plaintiff that is not otherwise undermined by the context, it is not rhetorical hyperbole. Here, Mr. Trump's statement does just that – a fact that the district court itself acknowledged when stating that "Plaintiff correctly points out that Mr. Trump's tweet contains two verifiably true/false statements…" [ER12.][10] Nothing about Plaintiff's purported status as a "political adversary," even if true and properly considered, undermines the conclusion that Mr. Trump was making a factual statement about Plaintiff.

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[10] Insofar as the district court relied on the "tone" of Mr. Trump's tweet to conclude that it was rhetorical hyperbole, this reasoning is unavailing. Under this rationale, Mr. Trump's reputation among some, particularly those that oppose his Presidency (but not his 50 million-plus Twitter followers and his voters), that he is a habitual liar and thus can never be taken seriously, would effectively immunize Mr. Trump from ever being accountable for making factually false statements. Indeed, Mr. Trump's worry over the chilling impact on politics if he is held accountable is unfounded. Mr. Trump, like all other Americans, subject to the law, must take care to ensure that his statements are supported by facts.

### B. Plaintiff was Not Required to Prove Malice, but did Adequately Allege Mr. Trump's Malice.

The district court's alternate conclusion that Plaintiff failed to properly allege malice was erroneous for several reasons.

*First*, given the circumstances surrounding the threatening incident, malice can be properly inferred. At the time of the incident and the *In Touch* interview, Ms. Clifford had not gone public with her story. Rather, Plaintiff agreed to cooperate with *In Touch* magazine at the urging of Plaintiff's ex-husband and only after being told the story was going to run with or without her cooperation. [ER264 at ¶6.] Ultimately, the story was not run by *In Touch* in 2011 because, Plaintiff believes, Mr. Trump's personal attorney, Michael Cohen threatened and intimated the magazine into not proceeding with the story. [ER265 at ¶12.] Given that, at the time of the incident, so few people kne, not only of Plaintiff's affair with Mr. Trump, but the *In Touch* story, it is reasonable to infer that the person who threatened Plaintiff was acting directly or indirectly on behalf of Mr. Trump and/or Mr. Cohen. [ER267 at ¶31.]

Mr. Trump argued that this cannot be inferred because other people did know of the affair and Plaintiff's intention to go public. This possibility does not negate the inference of malice raised by Plaintiff. As the Texas Supreme Court has clarified, circumstantial evidence is sufficient to meet a plaintiff's burden under the TCPA. In re Lipsky, 460 S.W.3d at 591.

The district court misunderstood or ignored Plaintiff's allegations, writing that Plaintiff simply assumes Mr. Trump knew of the threat and does not allege facts to demonstrate that knowledge. [ER14-ER15.] In so concluding, the district court ignored Plaintiff's allegations and the factual context of the threatening incident. Under the circumstances, there is in fact a circumstantial basis to infer actual malice. In re Lipsky, 460 S.W.3d at 591.

*Second*, if Mr. Trump did not have actual knowledge of the circumstances, then Mr. Trump acted in reckless disregard of the truth or falsity of his statement as he would have had absolutely no basis for his assertion. [ER268 at ¶32.] This is not simply a failure to investigate. Rather, the inference of malice here is bolstered by Plaintiff's public disclosure of the fact of their affair. As cited, "anger and hostility toward the plaintiff" can be considered as evidence of malice. Overstock.com, 151 Cal.App.4th at 709–10; see also Bentley, 94 S.W.3d at 596 (an "injurious motive in making a statement" can be considered as evidence of malice.). Here, Ms. Clifford's account of the affair is accurate, something Mr. Trump knows well, and thus he had reason to seriously doubt the truth of his tweet attacking the veracity of Plaintiff's account of the threatening incident and their affair. This, coupled with a lack of any investigation, establishes malice even in the absence of discovery.

## III. MR. TRUMP'S ALTERNATE REQUESTS FOR RELIEF DO NOT PROVIDE A BASIS TO AFFIRM.

Alternately, Mr. Trump sought relief under California's anti-SLAPP statute and Rule 12(b)(6). Neither provides a basis to affirm the result below.

### A. California's Anti-SLAPP Statute is Not an Alternate Basis for Relief.

Although Mr. Trump requested that the action be dismissed pursuant to California's anti-SLAPP law, Mr. Trump did not advance additional arguments under California law and there is no reason to believe it should govern. See Competitive Techs. v. Fujitsu, 286 F.Supp.2d 1118, 1158–59 (N.D. Cal. 2003) ("California appears to have no governmental interest in having its [anti-SLAPP] law applied" where none of the counterclaim defendants resided in California). The law in this Circuit is established that, as to California's anti-SLAPP statute, the district court must evaluate Mr. Trump's motion to strike under Rule 12 or Rule 56. Planned Parenthood, 890 F.3d at 834-35. As discussed above, the district court did not. Thus, Mr. Trump's request should be denied for the same reasons.

### B. Plaintiff Adequately Pled a Basis to Recover Damages.

Mr. Trump argued before the district court that Plaintiff has not suffered damages. Although the district court did not address this argument and, indeed, could not properly address it under this Court's decision in Planned Parenthood because Mr. Trump explicitly contradicted the pleadings, the argument should

nonetheless be rejected because Mr. Trump's statement constitutes defamation *per se* and because Plaintiff can plead and prove damages.

*First*, as noted above, damages are an essential element of a claim for defamation "unless the statement constitutes defamation per se." D Magazine Partners, 529 S.W.3d at 434. It has long been the law in Texas "that written or printed words which charge dishonesty of fraud, or rascality and general depravity are generally libelous per se." State Med. Ass'n of Tex. v. Comm. for Chiropractic Ed., 236 S.W.2d 632, 634 (Tex. Civ. App. 1951); see also Dkt. 28 at 11:13-14 (conceding that statements that "unambiguously charge a crime, dishonesty, fraud, rascality, or general depravity" are defamatory per se). Where an alleged defamatory statement "could reasonably be construed to accuse [the plaintiff] of committing a crime, it is defamatory per se…" D Magazine Partners, 529 S.W.3d at 439; see also Ramos v. Henry C. Beck, 711 S.W.2d 331, 334 (Tex. App. 1986). Similarly, "[i]f there is a question whether the hearer could reasonably understand the statement in a defamatory sense," to impute the commission of a crime, "an ambiguity exists, and a fact issue is presented." Ramos, 711 S.W.2d at 334.

Thus, for example, "Texas case law firmly establishes that falsely accusing someone of stealing or calling someone a 'thief' constitutes defamation per se." Fiber Sys. Int'l v. Roehrs, 470 F.3d 1150, 1162 (5th Cir. 2006). Similarly, "[f]alsely calling someone a 'crook' … or falsely accusing him of stealing property

falls within the parameters of slander *per se*…" Bennett v. Computer Assocs., 932 S.W.2d 197, 200 (Tex.App. 1996). Accusing an individual of forging documents is defamatory per se. Morrill v. Cisek, 226 S.W.3d 545, 550 (Tex. App. 2006). Accusing someone of conduct amounting to moral turpitude amounts to defamation per se. Fawcett v. Grosu, 498 S.W.3d 650, 662 (Tex. App. 2016). Notably, any crime involving "dishonesty, fraud, deceit, [or] misrepresentation" constitutes a crime of moral turpitude within the meaning of the law. Escobedo v. State, 202 S.W.3d 844, 848 (Tex. App. 2006).

Whether a publication accuses someone of a crime, for example, need not be entirely "unambiguous" and can be determined from "gist" of the publication or whether "a reasonable person could view it as accusing" the plaintiff of a crime. D Magazine Partners, 529 S.W.3d at 437. For example, in D Magazine, the Texas Supreme Court examined a defamatory article in detail to determine that it could be reasonably understood to accuse the plaintiff of a crime. The Texas Supreme Court came to this conclusion despite the fact that the "article never expressly accuses [the plaintiff] of lying or fraudulently obtaining benefits, and D Magazine insists that each statement in the article is literally, or at least substantially, true." Id. at 438. Nevertheless, "[v]iewing the article as a whole … a reasonable person could perceive it as accusing [the plaintiff] of providing false information to the Commission (either affirmatively or by omission) in order to obtain benefits to

which she was not entitled." Id. Because of this, "it is defamatory per se, and [the plaintiff] need not show actual damages." Id. at 439.

Mr. Trump's tweet is not nearly so subtle and outright accuses Plaintiff of fraud, dishonesty, lying to the public, and falsely reporting the crime that was the threatening incident that took place in 2011. Further, Mr. Trump refers to Plaintiff's actions as a "con job." This in itself refers to fraudulent or criminal conduct because, as discussed above, "confidence man" or "con man" is defined as "[s]omeone who defrauds a victim by first gaining the victim's confidence and then, through trickery, obtaining money or property; a swindler." CONFIDENCE MAN, Black's Law Dictionary (10th ed. 2014).

Mr. Trump argued that he could not have accused Plaintiff of committing a crime because she did not in fact report the crime to the authorities. This argument amounts to the circular logic that in order for Plaintiff to be falsely accused of committing a crime, she must have actually taken all the steps necessary to commit the crime. On the contrary, "the charge of violating a criminal statute need not be made in a technical manner." Gray v. HEB Food Store No. 4, 941 S.W.2d 327, 329 (Tex.App. 1997). Instead, the inquiry is whether "an ordinary person would draw a reasonable conclusion" that the Plaintiff had been accused of a crime. Id. For all the reasons, discussed herein, the statement by Mr. Trump is reasonably interpreted to accuse Plaintiff of falsifying the account of the threatening incident

and behaving in a criminal and fraudulent manner – committing a "con job." Accordingly, Plaintiff is not required to prove damages. This is true regardless of whether the Court limits its review to the pleadings or considers extrinsic evidence (which it cannot).

*Second*, even if Plaintiff was required to prove damages, she did so. The law in Texas is clear that damages in the defamation context can be for "non-economic losses, such as mental anguish or lost reputation" and these damages "are, by their nature, incapable of precise mathematical measure." Brady v. Klentzman, 515 S.W.3d 878, 887 (Tex. 2017); see also Bentley, 94 S.W.3d at 605 (affirming award of "$7 million in mental anguish damages and $150,000 in damages to his character and reputation."); Miranda v. Byles, 390 S.W.3d 543, 556 (Tex. App. 2012) (damages based on testimony that the accusations had caused "alienation from the rest of [the plaintiff's] family and that they no longer felt safe traveling to the valley for family functions…").

Here, Plaintiff submitted evidence establishing that since Mr. Trump's statement, she has received an increase in threats and abuse, including scorn and ridicule, directed at her by certain members of the public. [ER19 at ¶4.] These threats and abuse include death threats and threats of physical violence and, as a result she has felt emotional distress and mental anguish. [Id.] It is apparent to her, based on the increase in these threats, that Mr. Trump's statement has injured

and harmed Plaintiff's reputation among certain members of the public. [Id.] Indeed, this is not surprising. When the President of the United States falsely accuses you of falsifying an account of a crime and defrauding the President, the public, and the media, it is not a stretch to believe this will provoke a response and harm to Plaintiff. [Id. ¶5.]

Mr. Trump cited news articles for the proposition that Plaintiff's pay had quadrupled, but news articles cannot be used in this manner. Larez v. City of Los Angeles, 946 F.2d 630, 642-44 (9th Cir. 1991). Neither of the articles Mr. Trump cites actually states that Clifford's pay has quadrupled; the word "quadrupled" appears in the context of a hypothetical. [ER216-ER233.] In any event, the news articles do not establish that Plaintiff was not harmed by Mr. Trump's statement. Clifford's injury is the impact of Mr. Trump accusing her of committing a crime and characterizing her as a dishonest fraud and a liar.

## IV. PLAINTIFF SHOULD HAVE BEEN GRANTED LEAVE TO AMEND.

Lastly, even if the Court determines that the district court properly granted Mr. Trump's motion below (which it should not), Plaintiff was entitled to amend. Plaintiff was not afforded even one opportunity to amend the Complaint in this action. This Court has held that "granting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal

amendment." Verizon Delaware v. Covad Commc'ns, 377 F.3d 1081, 1091 (9th Cir. 2004). This was particularly true as to the question of malice, which is a factual issue. Indeed, although the district court reasoned that Plaintiff could not amend as to whether Mr. Trump's tweet was actionable, it did not meaningfully address the issue of malice in reaching this conclusion. [ER15.] Thus, even if the Court affirms the result below, should that decision be made on any issue regarding the factual sufficiency of the pleadings, Plaintiff should have been permitted to amend.

## CONCLUSION

Plaintiff respectfully requests that this Court reverse the district court's decision below and remand for further proceedings and discovery.

Date: January 22, 2019

AVENATTI & ASSOCIATES, APC

*/s/ Michael J. Avenatti*
Michael J. Avenatti, Esq.
Ahmed Ibrahim, Esq.
*Attorneys for Appellant Stephanie Clifford, aka Stormy Daniels*

## STATEMENT OF RELATED CASES

Appellant Stephanie Clifford is not aware of any related cases presently pending in the Ninth Circuit.

Date: January 22, 2019

AVENATTI & ASSOCIATES, APC

*/s/ Michael J. Avenatti*
Michael J. Avenatti, Esq.

*Attorneys for Appellant Stephanie Clifford, aka Stormy Daniels*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: January 22, 2019

AVENATTI & ASSOCIATES, APC

*/s/ Michael J. Avenatti*
Michael J. Avenatti, Esq.

*Attorneys for Appellant Stephanie Clifford, aka Stormy Daniels*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 23 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 22, 2019

AVENATTI & ASSOCIATES, APC

*/s/ Michael J. Avenatti*
Michael J. Avenatti, Esq.

*Attorneys for Appellant Stephanie Clifford, aka Stormy Daniels*