IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CAREER SKILLS INSTITUTE OF WEST VIRGINIA D/B/A/ MARTINSBURG COLLEGE, a West Virginia corporation,	)	
Plaintiff,	)	
	)	No. 2:19-cv-02036-DDC
v.	)	
CHERYL MURRAY, an individual, and JOHN DOES 1-10,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT CHERYL MURRAY'S MOTION TO STRIKE PURSUANT TO THE KANSAS PUBLIC SPEECH PROTECTION ACT, AND IN THE ALTERNATIVE, TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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INTRODUCTION

Free speech promotes the sharing of ideas without government-sanctioned retribution. Few rights are more sacred, particularly for the least powerful among us who may be intimidated or bullied into keeping their mouths shut. For this reason, in 2016, the State of Kansas joined a growing number of states that have enacted statutes to protect its citizens from being bullied into silence through so-called "Strategic Lawsuits Against Public Participation." Such "SLAPP" lawsuits are designed to intimidate critics by burdening them with the cost of legal defense and ultimately chilling the exercise of free speech. Through the Public Speech Protection Act ("PSPA")—known as an "anti-SLAPP" law and codified at K.S.A. § 60-5320—Kansas took action to "encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law." *Id.* § 60-5320(b). Under the PSPA, a party may bring a motion to strike a claim if the claim is "based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association." *Id.* § 60-5320(d); *see also Caranchini v. Peck,* No. 18-2249-CM-TJJ, 2018 WL 6173097 (D. Kan. Nov. 26, 2018).

As detailed below, this lawsuit is precisely the type of SLAPP lawsuit that the PSPA protects defendants against. Defendant Cheryl Murray is the spouse of a veteran and actively involved in veteran issues. Plaintiff Career Skills Institute of West Virginia d/b/a Martinsburg College ("Martinsburg") is an online, for-profit college that recruits heavily from the military community and has been the subject of public scrutiny regarding its aggressive marketing to potential recipients of U.S. Department of Defense ("DoD") scholarship funds. On or about January 11, 2019, defendant Cheryl Murray made a self-described "P[ublic] S[ervice] A[nnouncement]" on Facebook in which she, *inter alia*, expressed her view that Martinsburg is a "SCAM," that no "decent college" will accept their credits, and that the school lures military

spouses to enroll by advertising their participation in the Military Spouse Career Advancement Account ("MyCAA") scholarship program run by the DoD.

Ms. Murray's post generated numerous comments from the public—highlighting the extent to which her views were regarding a matter of public interest and concern. In response to those comments, Ms. Murray suggested that individuals with complaints about Martinsburg file those complaints with DoD, but that those without a "reason" to complain should not submit a complaint. Less than two weeks after her post, and without any warning, Martinsburg filed this lawsuit in which it seeks, *inter alia*, to not only punish Ms. Murray for exercising her rights to protected speech but also to compel future speech through a court-issued injunction.

As set forth in Part I(A) below, Ms. Murray easily meets her burden of showing that her statements about Martinsburg's practices relate to her exercise of free speech. Therefore, under the PSPA, in order to proceed with its suit, Martinsburg must "establish a likelihood of prevailing" on its claims by "presenting substantial competent evidence to support a prima facie case." As set forth in Part I(B), under controlling law and the facts alleged in the complaint and in Ms. Murray's declaration, Martinsburg cannot establish a likelihood of prevailing. Finally, as described in Part II, the Court should, alternatively, dismiss this case pursuant to Fed. R. Civ. P. 12(b)(6) because Martinsburg has failed to state any claim upon which relief may be granted.

STATEMENT OF FACTS

A. Martinsburg College

Martinsburg is a privately held, online, for-profit college with a self-professed "dedication to [the] military community." (*See* Declaration of LaRue Robinson, Attachment 3 to this Memorandum, at Ex. 1.) On its website, Martinsburg declares that "the college has consistently maintained high student completion and satisfaction rates." (*Id.* at Ex. 2.) On the

social media site Twitter: "Educators for over 30 years -we provide quality accredited online certificate & degree programs to the #military community." (*Id.* at Ex. 3.)

Martinsburg advertises programs in health care, medical administration, security, business & professional development, information technology, and digital technology integration. (*Id.* at Ex. 4.) According to its website, Martinsburg students can "[e]arn a certificate in as little as 6-8 months or an Associate's degree in a minimum of 24 months." (*Id.* at Ex. 5.) U.S. Department of Education ("ED") data show that 879 first-time, full-time students were enrolled at Martinsburg in the Fall of 2017 while, at the same time, the school employed only six full-time and three part-time faculty members. (*Id.* at Ex. 6.) Consistent with Martinsburg's marketing to military spouses, the same ED data source shows that in the Fall of 2017, 98% of the student body was female, 97% were enrolled part-time, and 100% were enrolled through online, distance education. (*Id.*)

Martinsburg's website touts that one of its key "advantages," is the "military spouse scholarship," which is a "totally unique approach to scholarship" that is "sponsored by Martinsburg" and "available to every spouse who meets the requirements." (*Id.* at Ex. 7.) As stated on Martinsburg's website:

> Martinsburg College is offering a tuition Scholarship for Military Spouses to earn an Associate's Degree. This is a great opportunity for spouses to gain in-demand skills while earning an associate's degree and graduate debt free. **Don't be limited by a lack of funding. Receive an associate's degree with no debt or loans.** This is a truly innovative program that addresses the needs of military spouses.

(*Id.* (emphasis in original).) Martinsburg programs range from $222 for a single credit in an associate's program to $3,996 for 18 credits in a certificate program. (*Id.* at Ex. 8.)

MyCAA is a federally funded "workforce development program that provides up to $4,000 of tuition assistance to eligible military spouses." (*Id.* at Ex. 9.) As the government describes:

> The scholarship assists military spouses in pursuing licenses, certificates, certifications or associate degrees necessary to gain employment in high-demand, high-growth portable career fields and occupations. Spouses may use their My Career Advancement Account Scholarship funds at any academic institution approved for participation in the scholarship.

Id. According to the DoD, there are over 3,000 participating, approved schools in the MyCAA program, including Martinsburg. (*Id.* at Ex. 10.) Over 10,200 spouses have used the MyCAA program to attend Martinsburg. (*Id.* at Ex. 11.)

Martinsburg has an active online presence. For example, Martinsburg has a Twitter feed with over 2,550 followers and on which it has made nearly 8,000 posts. (*Id.* at Ex. 3.) One such post, from March 12, 2019, reads: "Military Spouses: Don't miss out on the Martinsburg College Military Spouse Scholarship and get the education you deserve!" (*Id.* at Ex. 12.) Martinsburg also has an active YouTube presence – its video titled "Military Spouse Scholarship – Martinsburg College" has been viewed over 8,800 times and advertises that the military scholarship is "sponsored by Martinsburg College." (*Id.* at Ex. 13.) Martinsburg is also active on Instagram, where it has posted numerous times about "Our Military Spouse Scholarship program." (*Id.* at Ex. 14.) Martinsburg is similarly active on Facebook, with nearly 8,000 users "liking" its page and dozens of posts, groups, and events aimed at military spouses. (*Id.* at Ex. 15.) And indeed, Martinsburg has sought to hire "admissions representatives" who primarily work in a "home office" and who spend time "developing relationships" through online "Social Networking" platforms. (*Id.* at Ex. 16.)

Long before Ms. Murray's comments or this litigation, Martinsburg has been the subject of public discussion, criticism, and critique, in part due to its receipt of federal funding and recruitment tactics within the U.S. military community. For example, a 2010 Bloomberg News story recounted the following about Martinsburg and its corporate predecessor, Career Blazers Learnings Center:

> Career Blazers Learning Center, a New York-based vocational school, gave away laptops loaded with instructional software to Marines about to be deployed to combat zones, owner Paul Viboch said. It also hired former Marines as recruiters and paid referral fees to students for signing up other service members. Entire units enrolled, and Career Blazers received $4.5 million in tuition assistance from the Marine Corps in 2006, the most of any post-secondary provider.
>
> Career Blazers charged $4500 – the maximum that the military reimburses in a year – for self- paced lessons on how to perform basic computer applications or balance checkbooks. Much of the material was available for less expense at workshops or community college classes on bases, education specialists said. "The military overpaid for laptops," said Johanna Rose, an education technician at Camp Lejeune.
>
> Relocated to Martinsburg, West Virginia, and renamed Martinsburg Institute, Career Blazers stopped giving away laptops three months ago. Its tuition assistance from the Marine Corps slipped to $616,000 in fiscal 2009, as education officials on some Marine bases discouraged service members from enrolling, Viboch said. "I was too successful, too quickly," he said.

(*Id.* at Ex. 17.) A separate article by The Century Foundation explained that: "Two DEAC schools[1] (Martinsburg College and Lakewood College) were among the institutions with the most service member complaints, as released by DOD for FY 2015." (*Id.* at Ex. 18.)

B. Defendant Cheryl Murray

[1] DEAC is the "Distance Education Accrediting Commission," a national accrediting agency that specializes in the accreditation of distance education programs of study and institutions. DEAC is a recognized accreditor by the U.S. Department of Education.

Defendant Cheryl Murray is a military spouse and an active member in the military family community. (Declaration of Cheryl Murray ("Murray Decl."), Attachment 2 to this Memorandum, at ¶ 3.) She has three children, ages 7, 4, and 6 months. (*Id.* ¶ 5.) Her husband served in the Army for approximately eight years, mostly as a cannon crewmember handling heavy artillery, including one tour in Afghanistan. (*Id.* ¶ 4.) Her husband completed his most recent term of service in December 2018. *Id.* Ms. Murray currently lives at home with her children and is completing degrees in biochemistry and social psychology. (*Id.* ¶ 9.)

C. Ms. Murray's January 2019 Facebook Post

As an active member in the military community, Ms. Murray became involved in online groups devoted to helping members of military families obtain higher education, occasionally participating in online groups under pseudonyms such as "Sheryl Shine." (*Id.* ¶ 10.) Ms. Murray has spent years taking college courses online, so she shared her experiences within groups on Facebook. (*Id.* ¶ 13.) Members of the groups often used colorful language and loose expressions of opinion when discussing various institutions. (*Id.* ¶ 12.)

Over time, Ms. Murray noticed repeated comments online about Martinsburg from discontented current and former students. For example, she saw comments from students who had enrolled at Martinsburg and were having trouble finding jobs or transferring credits to other institutions. (*Id.* ¶ 14.) Students also complained that Martinsburg's advertising practices were aggressive and relentless, with sales representatives befriending prospective students through Facebook groups and events (almost always targeting military spouses) and then repeatedly calling and messaging them until they enrolled. (*Id.* ¶¶ 15-19.)

Aware of these tactics and the numerous complaints, Ms. Murray researched Martinsburg to confirm statements from students. (Id. ¶ 20.) In addition, she researched Martinsburg's national accreditation and learned, through numerous articles and posts, that it was set to expire

in June of 2019 and that it was inferior to regional accreditation because, among other things, credits often did not transfer. (Id. ¶ 23.) This was also consistent with her personal experience when she was told approximately five years ago by a regionally accredited college in Texas that credits from the nationally accredited for-profit college that she was considering attending would not transfer. (*Id.)* She also called three of the schools that Martinsburg advertised to have articulation agreements with (Trident University, Western Governors University, and Bellevue University) and was told by representatives at the schools that they had not heard of Martinsburg. (*Id.* ¶ 22.) Based on what she knew from her experience and what she learned in her research, and with the intent to voice her opinion and encourage others to make informed decisions, *Id.* ¶ 24, on January 11, 2019, Ms. Murray posted the following to her Facebook page:

> Just a PSA 🚨🚨
> Martinsburg College is a complete SCAM. They lure military and spouses in with the MyCAA grant, have a national accreditation that is in jeopardy, NO EMPLOYER ACCEPTS THEIR CERTIFICATIONS OR DEGREES, and because of it being a national accreditation NO decent college will accept their credits for you to continue your education elsewhere. If you're lucky, MAYBE one or two classes will transfer.
> They're also recently advertising an "articulation" program with Trident University, WGU, AND Bellevue University. 🚨 this is FALSE.
> And yes this is public. I'm a little tired of seeing people get SCAMMED by these annoying reps.
>
> Also note: you can use your MyCAA grant at just about ANY college.
>
> ETA: since this is starting to go viral I'll say there's a great group called Mil Smarts that leads people the right way with educational needs
>
> ETA: you can potentially get your mycaa funding back if you've been scammed by the school. Military one source has requested that anyone who would like to inquire about a refund to contact them directly. If overseas there is an online chat option. Phone lines are open 7-10pm central time as well.
>
> Please file a grievance at the following link for ANY school you feel the need to.
>
> 🚨 Be warned if you comment as a current student- MC is watching this post. I think I peed on their Cheerios.
> They're also deleting the post everytime it's shared in one of their spouse *ahem* prey groups.

(Compl. Ex. A at 2 (hereinafter "the Post") (Doc. 1-1).) Ms. Murray followed the Post with a Military OneSource link which provided information to the public on how to submit a complaint regarding an institution of higher education. (Murray Decl., ¶ 26 & Robinson Decl., Ex. 20.)

The Post resonated with, and generated comments from, members of the military community. (Murray Decl. ¶ 29; *see also* Compl. Ex. A (showing comments) (Doc. 1-1).) Ms. Murray responded to certain of these comments – focusing her responses on providing concrete and accurate information to those with specific questions. For example, some individuals replied by expressing their own negative impression of Martinsburg.[2] With respect to these types of replies, Ms. Murray provided information from the DoD's Military OneSource regarding how to submit a complaint about an online institution of higher education. She repeatedly posted:

[2] Comments from other Facebook users included: "I am currently enrolled with martinsburg and without a doubt felt pushed into it!" (Compl. Exh. A at 6 (Doc. 1-1).) "I feel like the rep I talked to literally didn't even give me the option to say no, and wouldn't stop bothering me until everything was set up." (*Id.*) "I've been kicking myself every day for taking a Martinsburg 'course.'" (*Id.* at 7.) "[G]ood for you for posting. They pissed ME off for what they did to me." (*Id.*) "I thought they were fake too." (*Id.* at 8.) "I have heard nothing but bad things about them." (*Id.*) "I was scammed." (*Id.*) "You don't need to use any of their marketers to use mycaa and most major universities or colleges accept mycaa. You can go online and apply for mycaa yourself! . . . . I try to inform all of the new spouses that come through our command! I'm a Navy ombudsman and try to get the information out to everyone!!" (*Id.* at 9.) "I did the one of the business classes and it was a COMPLETE joke..like stuff you would learn in a basic computers course and a course on how to be a decent coworker. Nothing actually usable. . . ." *Id.* at 11. "I know, it was such a waste, I regret is so badly." (*Id.* at 12.) "I got a certificate through them back in 2011 or 2012. To be fair, I thought it was pretty useless to begin with so I guess I was just right." (*Id.* at 13.) "[A]t least now Reid knows I'm not crazy when I say the courses are wack." (*Id.* at 14.) "THIS POST RIGHT HERE IS SO TRUE WHEN I GOT MARRIED TO MY HUSBAND WHO AT THE TIME WAS IN THE MILITARY I WAS GETTING MESSAGES NONSTOP FROM MARTINSBURG REPRESENTATIVES PUSHING ME TO GET INTO THEIR PROGRAMS THEY ARE A SCAM." (*Id.* at 18 (emphasis in original).) "It's insane how many wives they have scammed." (*Id.* at 20.) "I used MC and never even finished the course because it seemed completely pointless." (*Id.* at 22.) "They tried to charge me $4k for a program I ended up taking at Penn Foster for $500 textbooks included. I'm all for supporting military spouses and this just feels like they're being taken advantage of. I always thoughts maybe I was just missing the value but it's clear now.. they will take your whole grant for a tiny little certificate program." (*Id.* at 24.) "I always got a weird feeling from them. They were so aggressive with trying to get me to go to school there. This isn't the first time I've heard this about them either." (*Id.*) "Exactly why I don't friend them as soon as I get their friend request. It's like vultures. As soon as you add yourself to a new wives page they all come out." (*Id.* at 29.)

> "I contacted military one source directly. Will be posting an update with their response once I receive their emails. They've asked that ANYONE who feels scammed or has a grievance with ANY school and wants a refund opportunity to immediately contact them at their 1-800 number. It is done on INDIVIDUAL bases. If you are overseas there is an online chat option, and they are open 7-10PM M-F for calls."

(*See* Compl. Exh. A at 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 21, 22, 23, 24, 25, 26, 29 (Doc. 1-1).)

Ms. Murray made clear in her responses that her views were painted with a broad brush. For example, she suggested to one user that "if you don't have an official complaint, don't file one. A minute number of students have had success depending on their program. You are now the second person I know of-to be frank. If I told you to file, without a reason to-I'd be essentially asking you to commit fraud. Not doing that." (*Id.* at 33.)

D. The Lawsuit

Ms. Murray made the Post on January 11, 2019. Less than two weeks later, and without warning, Martinsburg filed its complaint asserting claims of business defamation, trade libel, tortious interference with contract, and injunctive relief. (Compl. ¶¶ 36-61 (Doc. 1).) Martinsburg seeks compensatory and punitive damages, an order requiring Ms. Murray to "undertake corrective advertising to inform the public of the falsity of [her] statements," costs and expenses, including attorney's fees, and other relief. (*Id.* at Prayer for Relief ¶¶ D-H.)

ARGUMENT

I. The Court Should Strike All of Plaintiff's Claims Under the PSPA.

In 2016, Kansas adopted the "Public Speech Protection Act," now codified at K.S.A. 60-5320, which was intended "to encourage and safeguard" individual rights to "speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum

extent permitted by law." K.S.A. § 60-5320(b); *see also* Session of 2016 Conference Committee Report Br. on Senate Bill 319 (April 27, 2016) at 2-319; *Caranchini*, 2018 WL 6173097. This "anti-SLAPP" law was designed to provide a "timely remedy when frivolous lawsuits are filed to intimidate and silence people with limited resources who exercise their First Amendment right to free speech. Such [SLAPP] lawsuits …, and the prospective of expensive litigation, can have a chilling effect on free speech." 2016 Conf. Committee Br. (April 27, 2016) at 2-319.

"Under the Act, a party may bring a motion to strike the claim[s] if [they are] 'based on, relate[] to, or [are] in response to a party's exercise of the right of free speech, right to petition or right of association." *Caranchini, supra* (quoting K.S.A. § 60-5320(d)). To gain protection under the Act, "the party bringing the motion to strike must first make a prima facie case 'showing the claim against which the motion is based concerns a party's exercise of free speech, right to petition or right of association.'" *Id.* (quoting K.S.A. § 60-5320(d)).[3] "If the moving party meets this burden, the burden shifts to the responding party who must then 'establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case.'" *Id.* at 356 (quoting K.S.A. § 60-5320(d)). "When deciding whether either party has met its burden, the court must consider the pleadings and any affidavits 'stating the facts upon which the liability or defense is based.'" *Id.* (internal citations omitted & quoting K.S.A. § 60-5320(d)). In considering whether parties meet their respective burdens, the statute should be "applied and construed liberally to effectuate its general purposes." K.S.A. § 60-5320(k).

A. Ms. Murray's Actions Were an Exercise of Her Right of Free Speech.

[3] Under Kansas law, to make a prima facie case, a party must provide "evidence sufficient to sustain a verdict in favor of the issue it supports, even though it may be contradicted by other evidence." *Becker v. Knoll*, 291 Kan. 204, 206 (2010).

All of Martinsburg's claims in this lawsuit are covered by the PSPA because they are "based on, relat[ing] to or … in response to [her] exercise of the right of free speech." K.S.A. § 60-5320(d). The statute defines the "exercise of the right of free speech" as "a communication made in connection with a public issue or issue of public interest," such as "community well-being;" "the government;" "public figures;" "or goods, products, and services in the marketplace." K.S.A. § 60-5320(c). *See also generally T &T Financial of Kansas City, LLC v. Taylor*, 408 P.3d 491 (Kan. Ct. App. 2017) (applying this standard).

Ms. Murray's Post and subsequent comments clearly meet this definition because they are "communications" and Martinsburg and its practices meet several definitions of "public issue" and "public interest" First, Ms. Murray's comments concern community well-being by warning members of the military community that attending classes through Martinsburg could deprive them of time and money. The vast number of comments—including many that endorsed her statements, *supra* n. 2—confirms that the subject of her post was of interest and helpful to members of the public. *See also, e.g., Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 262 (9th Cir. 2013) (holding under analogous provision of California law that "statements warning consumers of fraudulent or deceptive business practices constitute a topic of widespread public interest, so long as they are provided in the context of information helpful to consumers"). Second, Ms. Murray's comments relate togovernment activities, as she criticized the school for taking funding from the DoD—specifically, the MYCAA scholarship benefit—without providing a satisfactory education in return. Statements about "the use of public funds" are inherently "a subject of public interest." *Sellars v. Stauffer Commc'ns, Inc.*, 9 Kan. App. 2d 573, 578 (1984), aff'd, 236 Kan. 697 (1985) ("The publications in this case also involve a subject of public interest - the use of public funds."). Third, as discussed below, because Martinsburg is a public figure, Ms.

Murray's comments were made in connection with a "public figure." *See* Section I(B)(i)(B)(1) at pp. 15-17. And finally, Ms. Murray's comments concerned "a good, product, or service in the marketplace": Martinsburg advertises in the market for online higher education, and sells its service for as much as $3,996 for 18 semester credits. (Robinson Decl. Ex. 9.)

B. Martinsburg's Claims Are Not Supported By "Substantial Competent Evidence"

Having made a *prima facie* showing that Ms. Murray's statements constituted an exercise of her rights to free speech, the burden shifts to Martinsburg to present "substantial competent evidence" to establish a likelihood of prevailing on the merits. K.S.A. § 60-5320(d). Substantial competent evidence is evidence that "possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved." *Griffin ex rel. Green v. Suzuki Motor Corp.*, 280 Kan. 447, 459 (2005). For both legal and factual reasons, Martinsburg is unable to present substantial evidence to sustain a verdict in its favor on any of its claims. All of the claims should therefore be stricken.

i. Martinsburg's Business Defamation Claim is Unsupported.

Martinsburg's first claim, which goes to the core of its complaint, is for "business defamation." In Kansas, the elements of defamation are (i) false or defamatory words, (ii) communicated to a third person, (iii) that harm the reputation of the person defamed. *Luttrell v. United Tel. Sys., Inc.*, 9 Kan. App. 2d 620, 620–21 (1984), aff'd, 236 Kan. 710 (1985). But in this context, where the Post consisted of opinion statements and rhetorical hyperbole posted to social media regarding a public figure and matter of significant public interest, and were made without actual malice, Martinsburg cannot establish a likelihood of success. Moreover, Plaintiff cannot set forth substantial competent evidence suggesting that Murray's statements were not

made in good faith, which gives rise to a qualified privilege defense under Kansas law. This too establishes that Martinsburg is unlikely to succeed on its claim.

a. The Post Consists of Statements of Opinion and Hyperbole.

First, the Post consists of rhetorical statements that were personal opinion and hyperbole, which are, by law, not defamatory. *Gatlin v. Hartley, Nicholson, Hartley & Arnett, P.A.*, 29 Kan. App. 2d 318, 320 (2001). When, upon an independent examination of the whole record, reasonable readers would have viewed statements as hyperbole, those statements cannot be as a source of defamation. *See Milkovich v. Lorain Journal Co*., 497 U.S. 1, 17 (1990). Ms. Murray was giving her personal, subjective opinion—not recounting objective observations. *See, e.g., Byers v. Snyder*, 44 Kan. App. 2d 380, 397 (2010).

In the Post and subsequent comments, Ms. Murray used strong and figurative language which was not meant to be taken literally. *See, e.g., Summit Bank v. Rogers,* 206 Cal. App. 4th 669 (2012) (online message board statements that Bank CEO "thinks that the Bank is her personel [sic] Bank to do with it as she pleases," that depositors should move their accounts immediately, that the Bank is a "problem bank," and that regulators had "look[ed] at Summit Bank" three times in less than a year are non-actionable hyperbole that readers of online message boards would view with "a certain amount of skepticism"). Her statements were also written in a colloquial manner. In reference to Martinsburg, for example, she said "I think I peed on their Cheerios." And the language she used, such as calling Martinsburg a "complete SCAM," was clearly exaggerated for effect. Such comments are not actionable. *See e.g., Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343 (D. Mass. 2017) (finding that terms such as "fraud," "snake-oil job," "rip-off" and "scam" are generally protected as hyperbolic speech); *SPX Corp. v. Doe,* 253 F. Supp. 2d 974 (N.D. Ohio 2003) (finding that online statements that company was "cooking the books" and should get ready for an "SEC and FBI probe," and warning

"Accounting Fraud!!!!!!" are non-actionable statements of opinion); *McCabe v. Rattiner,* 814 F.2d 839, 842 (1st Cir. 1987) (because "the word 'scam' does not have a precise meaning… the assertion 'X is a scam' [is] incapable of being proven true or false").

Similarly, her statement that "[t]here are only .5% real success stories" reflects her opinion that Martinsburg alumni have been generally unsuccessful at finding jobs or using their credits elsewhere. Whether someone is or is not a "real success stor[y]" is not an objective fact, and neither was that statement presented as the result of any student data analysis by Ms. Murray. It is also comes directly after Ms. Murray's explanation that she "made the post as a rant." Moreover, the posts were made on Facebook, where "exaggeration and hyperbole abound." *See Carey v. Throwe,* No. GLR-18-162, 2019 WL 414873 at *8 (D. Md. Jan. 31, 2019) (holding that the statement on Facebook that one "has the integrity of a lifer on death row" is a non-actionable "verbal flourish of disdain"); *Stolatis v. Hernandez,* 36 N.Y.S. 3d 410, 2016 N.Y. Misc. LEXIS 943 (N.Y. Sup. Ct. March 25, 2016) (statements on Facebook calling plaintiff an "alleged criminal mastermind" were rhetorical hyperbole as they were made on "a popular social media website, during an impassioned reaction").

Ms. Murray also never identified herself as an authoritative source of information, and there is no other indication that she intended that the public take literally the Post that she herself described as a "rant." In addition, Ms. Murray immediately follows some of her statements with clarifications that lessen their severity, demonstrating that they are not meant to be interpreted literally. For example, her statement that "NO EMPLOYER ACCEPTS THEIR CERTIFICATIONS OR DEGREES . . . and NO decent college will accept their credits" is immediately followed by "MAYBE one or two classes will transfer," demonstrating that her statements about credit transfers were intended as exagerations. Ms. Murray did not present her

post as a clear presentation of well-researched facts, but rather as a statement of her frustration with Martinsburg and concern that other people were being scammed.[4]

b. As a Public Figure, Martinsburg Must, But Cannot, Establish that Ms. Murray's Statements Were Knowingly False or Made with Reckless Disregard for the Truth.

Under the First Amendment, statements and publications concerning a public official or public figure are actionable for defamation only if the plaintiff can establish that the defendant acted with "actual malice." *See, e.g., Steere v. Cupp*, 226 Kan. 566, 574 (1979) (*citing New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). Martinsburg is undoubtedly a "public figure." However, there are no allegations in Martinsburg's complaint to suggest that she acted with "actual malice."

1. Martinsburg is a Public Figure.

Martinsburg is a for-profit, online institution of higher education that recruits heavily from military families. It promotes itself heavily on social media through videos and posts to Facebook, Twitter, Instagram, and YouTube, Robinson Decl. Exhs. 5, 15-18, and specifically seeks to hire admissions recruiters with expertise in this area. (Robinson Decl. Ex. 17.) Martinsburg also receives substantial revenue from the federal government through its

[4] *See also Global Telemedia, Int'l, Inc. v. Doe 1,* 132 F. Supp. 2d 1261, 1267-68 (C.D. Cal. 2001) (disparaging statements in Internet chat room about company, including that its plans for a product roll-out were "practically nonexistent or just plans on a drawing board," deemed opinion based on use of "exaggeration, figurative speech, and broad generalities" which would not be understood to be "anything other than his personal views of the company and its prospects"); *Rocker Mgmt., LLC, v. John Does 1 through 20*, No. 03-003-3 CRB, 2003 WL 22149380 (N.D. Cal. May 28, 2003) (comments on Yahoo message board stating that company engaged in "BASIC MANIPULATION 101," such as floating "rumors, lies and half truths everywhere they can," were deemed opinion because they were "free flowing diatribes"); *Summit Bank*, 206 Cal. App. 4th at 697 ("[T]he law does not require [defendant] to justify the literal truth of every word of the allegedly defamatory content, nor must we parse each word written by [defendant] to determine its truthfulness.").

participation in the MYCAA program: over 10,200 military spouses have used the grant at Martinsburg. (*See* Robinson Decl. Ex. 11.) Martinsburg plays an "influential role in ordering society" as a public-facing educational institution. *See Gertz v. Robert Welch, Inc*., 418 U.S. 323, 345 (1974).

Martinsburg therefore meets the test for an "all-purpose public figure," which is a person or entity that has "persuasive power and influence" in society or that "achieve[s] pervasive fame and notoriety." *Ruebke v. Globe Commc'ns Corp.*, 241 Kan. 595, 600 (1987). Numerous courts have found private colleges to be "public figures." In *Ithaca Coll. v. Yale Daily News Pub. Co*., for example, the New York Supreme Court determined that Ithaca College was a public figure because of its "[a]ssumption of its role as a qualified educator of a large number of students," ability to influence the public good, and general visibility in its community. 433 N.Y.S.2d 530 (Sup. Ct. 1980), aff'd, 445 N.Y.S.2d 621 (1981). *See also, e.g., University of the South v. Berkley Pub. Corp.*, 392 F. Supp. 32 (S.D.N.Y. 1974). Plaintiff has assumed the same role. It performs an important societal function as a provider of educational services to members of the U.S. military and has made a substantial effort to attain visibility in that community.

Even if the Court were to find that Martinsburg is not an all-purpose public figure, the college would be a limited purpose public figure: one who has "thrust [itself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Steere v. Cupp*, 226 Kan. 566, 572 (1979) (citing *Gertz v. Welch*, 418 U.S. at 345). Limited public figure status is "the result of acts or events which by their nature are bound to invite comment." *Ruebke v. Globe Commc'ns Corp.*, 241 Kan. 595, 601(1987).

There can be no doubt that Martinsburg thrust itself into public controversy by its pervasive advertising and recruiting methods, which invoked widespread concern and

controversy long before Ms. Murray made her comments**.** Current and past Martinsburg students had repeatedly complained on Facebook and to other sources, expressing discontent with the quality of Martinsburg's educational programs and marketing tactics. (Murray Decl. ¶ 14.) In *Makaeff v. Trump Univ., LLC*, the Ninth Circuit found Trump University to be a limited purpose public figure for this exact reason. 715 F.3d 254, 267 (9th Cir. 2013). In that case, Trump University's employees posted complaints about the school on public message boards and a newspaper reported that it had defrauded students. *Id.* In a subsequent suit for defamation, Trump University was treated as a public figure. Martinsburg, having faced a public controversy over the legitimacy of its educational and business practices, is no different.[5]

2. Martinsburg Cannot Show Actual Malice.

As a public figure, Martinsburg bears the burden of showing that Ms. Murray acted with "actual malice," and, under the PSPA, must provide "substantial competent evidence" of that fact in order to proceed. "Actual malice" requires showing that Ms. Murray had knowledge that her statements were false or acted with reckless disregard for their veracity. *Scarpelli v. Jones*, 229 Kan. 210, 216 (1981) (citing *Dobbyn v. Nelson*, 2 Kan.App.2d 358, 360, aff'd 225 Kan. 56 (1978)). Mere failure to investigate cannot establish reckless disregard for the truth. *Gertz*, 418 U.S. at 332. Martinsburg must also show that Ms. Murray acted with a "high degree of awareness of . . . probable falsity," *id*., and "evil-mindedness or specific intent to injure," *Turner v. Halliburton Co.*, 240 Kan. 1, 2 (1986).

[5] Numerous circuits have determined that "large scale, aggressive advertising can inject a person or entity into a public controversy that arises from the subject of that advertising." *See Makaeff*, 715 F.3d at 267; *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980); *Nat'l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc*., 705 F.2d 98 (4th Cir. 1983). Martinsburg's aggressive social media outreach programs, which include such tactics as repeatedly calling or Facebook messaging military spouses, Murray Decl. ¶ 16, injected the school into the controversy surrounding its programs. This sort of advertising invites comments by the public.

While Martinsburg includes in its complaint a bare allegation that Ms. Murray intended to cause it harm, it does not provide any factual support for that claim. (*See* Compl. ¶ 39 (Doc. 1).) Furthermore, Ms. Murray has stated in her declaration that she was *not* acting with the intent to injure Martinsburg and that she reasonably believed the articles and social media comments that criticized Martinsburg. (Murray Decl. ¶¶ 24, 28.) Ms. Murray reached out to members of the online military community to discuss their experiences with the college before posting about it. (*Id.* ¶ 21.) It was reasonable for her to believe that members of the group were posting true descriptions of their experiences, especially when a large number of them had similar problems with the college.

Ms. Murray also based many of her comments on personal experiences and common knowledge. As in *Makaeff v. Trump University, LLC*, she did not republish unverified accounts in their entirety but rather commented based on a mix of those comments and her experiences. 715 F.3d at 271. Ms. Murray recognized from personal experience and common knowledge that employers and other, nonprofit, educational institutions often perceive for-profit colleges negatively, and that Martinsburg's national accreditation meant that its credits were unlikely to transfer to regionally accredited institutions. Ms. Murray had also seen Martinsburg's representatives aggressively target other military spouses as potential students and use fake profiles to gain access to them. (Murray Decl. ¶¶ 15-17.)

Ms. Murray also performed research to confirm her views of Martinsburg and the statements made by other students before posting. (*Id.* ¶¶ 20-23.) She looked at ED publications, DEAC's website, and numerous articles discussing Martinsburg, accreditation, and for-profit colleges. (*Id.* ¶ 23.) She had no obligation to do this, but she chose to do so in order to provide accurate information to members of her community.

Finally, her lack of actual malice is highlighted by certain of her statements on Facebook, in which she encouraged individual to submit complaints about Martinsburg only if they had real issues, because otherwise it "would be fraud." (Compl. Exh. A at 4 (Doc. 1-1); *see also id.* at 33 ("[I]f you don't have an official complaint, don't file one. . . . If I told you to file, without a reason to-I'd be essentially asking you to commit fraud. Not doing that.").) Her contemporaneous Facebook posts also show that she believed "[e]verything in the above post is accurate." (*Id.* at 13.) She noted that she "help[s] military students daily with their educational needs for free," and that she has "had hundreds (not an exaggeration) come to [her] for help" after attending Martinsburg. (*Id.* at 15.) She forwarded individuals to government websites for complaint submission. She had no financial incentive and sought no profit or competitive benefit from her posts about Martinsburg. (Murray Decl. ¶ 27.) Put simply, there is no evidence that Ms. Murray acted with actual malice or with *any* disregard for the truth, in her statements, let alone the "substantial competent evidence" that is required.

c. Ms. Murray's Statements Are Entitled to Protection as Qualifiedly Privileged.

Even if Martinsburg were not a public figure or limited public figure, they would still have to show actual malice because Ms. Murray's statements are entitled to a qualified privilege. *See Turner*, 240 Kan. at 8 (citing *Munsell v. Ideal Food Stores*, 208 Kan. 909, 920–21 (1972)). As addressed above, Plaintiff cannot prove actual malice.

A qualified privilege exists when a statement is "made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person with a corresponding interest or duty." *Scarpelli v. Jones*, 229 Kan. 210, 216, 626 P.2d 785, 790 (1981) (citing *Senogles v. Security Benefit Life Ins. Co.*, 217 Kan. 438, Syl. P 3, 536 P.2d 1358 (1975)). This privilege exists regardless of whether Martinsburg is a

public figure or limited public figure. This privilege applies to "those situations where public policy is deemed to favor the free exchange of information over the individual's interest in his or her good reputation." *Turner*, 240 Kan. at 7–8. Ms. Murray's statements were made in good faith on a subject of shared interest between her and the people she communicated to—the quality of certifications and degrees Plaintiff marketed to the military community. Therefore, the qualified privilege applies.

Ms. Murray's interest in Martinsburg's programs grew as she saw posts online regarding Martinsburg, the problems with the quality of its education, and the nature of its recruiting practices. With the knowledge that she had from her personal experiences and her research on for-profit colleges, including Martinsburg, she felt she had an obligation to respond to questions and inform fellow military spouses of the facts she had come to learn. Her comments thus concerned an issue in which she had a personal interest and were made to people who shared that interest.

i. Count II, Trade Libel, is Not Recognized Under Kansas Law.

Plaintiff's second claim is for "trade libel." (Compl. ¶¶ 42-46 (Doc. 1).) And although the tort of trade libel is known by various names, including business disparagement, commercial disparagement, product disparagement, injurious falsehood, slander of goods, or disparagement of property, none of these claims are recognized by the State of Kansas. *Ezfauxdecor, LLC v. Appliance Art Inc.*, No. CV 15-9140, 2017 WL 661576, at *4 (D. Kan. Feb. 17, 2017) (equating the tort of "product disparagement" with "trade libel," and noting that "Kansas does not recognize the tort of "product disparagement"); *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032, 1073 (D. Kan. 2006) (equating "trade libel" with the torts of "injurious falsehood" and "commercial disparagement" and recognizing that Kansas courts have refused to recognized the tort of "business disparagement"); *Martin Marietta Materials, Inc. v. Kansas*

Dep't of Transp., 953 F. Supp. 2d 1176, 1200 (D. Kan. 2013), *aff'd*, 810 F.3d 1161 (10th Cir. 2016); *Hartford Fire Ins. Co. v. Vita Craft Corp.*, 911 F. Supp. 2d 1164, 1179 (D. Kan. 2012). Indeed, the Kansas Court of Appeals has specifically rejected attempts to create a tort of "business disparagement" in Kansas. *St. Catherine Hosp. of Garden City v. Rodriguez*, 25 Kan. App. 2d 763, 768 (1998) ("Although it has been recognized in other states, we decline to create a new tort [of business disparagement] in the state of Kansas."). Because Kansas has not recognized this tort, Martinsburg cannot establish by substantial competent evidence that it is likely to prevail on this count. (Even if this were a recognized cause of action, Plaintiff's claim would nonetheless fail for all the reasons described in section I(B) *supra*, that is, the lack of a statement that would be actionable in defamation or libel in the first instance). *See Bose Corp. v. Consumers Union*, 467 U.S. 1267 (1984) (applying traditional defamation principles to product-disparagement claim).

ii. Martinsburg Cannot Prove a Tortious Interference with Contractual Relations Claim.

As an initial matter, as with "trade libel" or product-disparagement claims, failed defamation claims cannot be repackaged as a claim for tortious interference. *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs.*, 175 F.3d 848 (10th Cir. 1999) (upholding trial court's grant of summary judgment to defendant on tortious-interference claim where basis of allegation was "a statement of opinion protected by the First Amendment," and summarizing numerous cases holding that failed defamation claims could not form the basis for a tortious-interference claim); *Eddy's Toyota v. Kmart Corp.*, 945 F. Supp. 220 (D. Kan. 1996) (holding that letters expressing opinion protected by the First Amendment "cannot form a basis for plaintiff's tortious interference claim"); *see also Sports Unlimited, Inc. v. Lankford Enters.*, 93 F. Supp. 2d 1164 (D. Kan. 2000) (holding that because plaintiff's claim for tortious interference

was merely a "defamation claim 'dressed up in a different fashion,'" statute of limitation for defamation applied to plaintiff's claim); *Taylor v. Int'l Union of Electronic., Elec., Salaried, Mach. and Furniture Workers, AFL-CIO (IUE),* 25 Kan. App. 2d 671, 968 P.2d 685 (Kan. Ct. App. 1998) (concluding that "plaintiff's tortious interference action is in reality one for defamation" when based on allegedly defamatory statements).

Plaintiff's claim fails on numerous additional grounds. Under Kansas law, the requirements for a tortious interference with contractual relations claim are that (i) there was a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (ii) the defendant knew of the plaintiff's relationship or expectancy; (iii) the plaintiff was reasonably certain to have continued the relationship or realized the expectancy; and (iv) damages were suffered as a direct or proximate cause of (v) the defendant's intentional misconduct. *Turner*, 240 Kan. at 12 (citing *Maxwell v. Southwest Nat. Bank, Wichita, Kan.*, 593 F. Supp. 250, 253 (D. Kan. 1984)). The following discussion will examine these elements.

a. Plaintiff Cannot Be Reasonably Certain it Would Have Continued Any Affected Relationships.

Martinsburg was not reasonably certain to have continued its relationship with its students. Students had expressed their frustrations with Martinsburg's programs and marketing tactics through online posts and complaints to DoD long before Ms. Murray's January 11, 2019 Post. (Murray Decl. ¶ 14-17.) Many of the commenters on Ms. Murray's post were current students or recent alumni who were unhappy with the quality of the education Martinsburg provides. It is not reasonably certain that students would have continued their relationships with the college when others in their community had repeatedly criticized it. In fact, Plaintiff failed to identify any specific student relationships that ended as a result of Ms. Murray's actions.

Furthermore, as a provider of an online, distance-learning program, Martinsburg likely has a large number of students drop out or fail to complete their courses due to other commitments. In this kind of educational environment, it cannot be reasonably certain that those relationships would continue, and that Plaintiff would continue to receive future economic benefit. *See Macke Laundry Serv. Ltd. P'ship v. Mission Assocs., Ltd.*, 19 Kan. App. 2d 553, 561–62, 873 P.2d 219, 225 (1994).

b. Plaintiff Lacks Evidence Damages are a Direct or Proximate Cause of Ms. Murray's Conduct.

Martinsburg provides no specific evidence to support its claim that Ms. Murray's conduct damaged Plaintiff. Plaintiff further cannot demonstrate that Ms. Murray's conduct was a direct or proximate cause of any losses. There was no direct harm, as Ms. Murray did not have a relationship with Martinsburg. She encouraged others to end their time in programs like Martinsburg's if they were unhappy with their education, but that was their independent choice based on their personal satisfaction or dissatisfaction wit Martinsburg's services. Students and alumni of Plaintiff's programs had already posted online about bad experiences before Ms. Murray posted about Martinsburg. Those comments could have caused students to drop out of the program instead of Ms. Murray's comments.

c. Ms. Murray's Conduct was Not Malicious.

Kansas requires "malicious conduct" for this tort. *Turner*, 240 Kan. at 12. As set forth above, Ms. Murray did not display malice in any of her actions. She stated in her posts that her intention was to help members of her community avoid being scammed, and she repeatedly acknowledged that students should report any school that had scammed them, not just Martinsburg. Furthermore, she made an effort to avoid having others falsely report problems with the school. Finally, she had no relationship with Martinsburg or reason to want to harm it—

her intentions were to voice her opinions an encourage others to make informed decisions, not harm the school. (Murray Decl. ¶ 24.) Martinsburg has failed to show that she had any improper motive to harm its business relationships. *See DP-Tek, Inc. v. AT & T Glob. Info. Sols. Co.*, 100 F.3d 828, 833 (10th Cir. 1996).

d. Ms. Murray's Statements Were Justified.

Justification is an affirmative defense to an action for tortious interference. *Turner*, 240 Kan. at 12. If a defendant's statement is justified, the plaintiff must provide proof there was actual malice. *See id.* at 13. An inference of actual malice is insufficient. *Batt v. Globe Eng'g Co.*, 13 Kan. App. 2d 500, 507 (1989).

Factors the Court may consider when determining if a statement was justified include "the nature of the interferer's conduct, the character of the expectancy with which the conduct interfered, the relationship between the various parties, the interest sought to be advanced by the interferer, and the social desirability of protecting the expectancy or the interferer's freedom of action." *Turner*, 240 Kan. at 13 (citing 45 Am.Jur.2d, Interference § 27); *Cohen v. Battaglia*, 296 Kan. 542, 548 (2013). Generally, Kansas courts recognize a justification if the defendant acts in the pursuit of a lawful interest or purpose and if "the right is as broad as the act and covers not only the motive and purpose but also the means used." *Id.*

Ms. Murray's comments were justified because she acted in good faith with the lawful purposes of helping others in the military community gain valuable educations and avoid being scammed. Her means of doing so were legitimate, as she posted her concerns on Facebook with information about how to report any schools that engaged in fraud and noted to individual commenters that they should only report schools if they had actually been harmed. She had a close relationship with her community as someone who had received questions about how to deal with for-profit schools. Furthermore, the social desirability of protecting members of the

military community from being scammed and receiving poor educations is substantially higher than Martinsburg's alleged contractual expectations.

iv. Plaintiff is Unlikely to Receive Injunctive Relief.

Plaintiff's final cause of action seeks prospective, injunctive relief against Ms. Murray, requiring her to "undertake corrective advertising to inform the public of the falsity of [her] statements." (Compl. ¶¶ 56-61 & Prayer for Relief ¶ E (Doc. 1).) In an ordinary case, to obtain injunctive relief, the party must establish: (i) there is a reasonable probability of irreparable future injury; (ii) an action at law will be inadequate; (iii) the threatened injury to the plaintiff outweighs whatever damage the proposed injunction may cause the defendant; and (iv) the injunction, if issued, would not be adverse to the public interest. *Sampel v. Balbernie*, 20 Kan. App. 2d 527, 530–31 (1995). In the context of free speech, this burden is particularly high because there is a "heavy presumption against [the] constitutional validity" of a restraint on speech. *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 233 (1984). *See also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.").

Here, there is no evidence of a risk of "irreparable future injury," nor is there any evidence regarding the inadequacy of the action at law, or that Ms. Murray will ever make statements on Facebook or otherwise regarding Martinsburg in the future. The mere possibility of future wrong or injury is insufficient. *Mid-Am. Pipeline Co. v. Wietharn*, 246 Kan. 238, 242 (1990).

Further, Martinsburg cannot show that it is suffering *any* continuing injury or has *any* real, nonspeculative, or immediate threat of future injury. *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004). The Post is no longer visible to the public, apart from the court filings and news stories about the filing of this litigation. (Murray Decl. ¶ 33; *see also* Ex. 19.)

Far from acting in a way to suggest that she intends to comment on Martinsburg in the future, Ms. Murray has refrained from public comment since this lawsuit was filed (two weeks after her original post) and has removed the Post from her Facebook page. (Murray Decl. ¶ 38.)[6]

* * * *

Having made a *prima facie* case regarding the applicability of the PSPA, and having demonstrated that Martinsburg cannot "establish a likelihood of prevailing on [any of its] claim[s] by presenting substantial competent evidence to support a prima facie case," in its favor, K.S.A. § 60-5320(d), this Court should grant the Motion to Strike. Upon granting the Motion to Strike, Ms. Murray respectfully requests leave to file a submission detailing the costs and fees associated with the filing of this Motion, as required by the PSPA. K.S.A. § 60-5320(g) ("[t]he court shall award … without regard to any limits under state law" the costs and fees associated with the filing of this Motion, and any additional relief as the Court "determines necessary to deter repetition of the conduct by others similarly situated.").

II. In the Alternative, Martinsburg Fails to State a Claim on Which Relief Can be Granted.

If the Court denies the the Motion to Strike, the complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). Simply put: even without the evidence submitted in support of this motion, and taking the well-pleaded allegations as true, Martinsburg has not

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[6] The final factors regarding injunctive relief require the court to consider the adequacy of an injury at all, the potential harm to Ms. Murray as a result of an injunction, and the public interests. *First*, even if Martinsburg is able to prove damages, there is no reason why financial compensation would be inadequate. Thus, the equitable remedy for an injunction is not necessary here. *Second*, an injunction would restrain Ms. Murray from speaking openly and truthfully about Martinsburg, and what she knows about the institution, which is antithetical to the goals and stated purpose of the PSPA. *Third*, with respect to the public interest, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016). Limiting Ms. Murray's speech would not only chill general conversations in online communities, but it would also have a chilling effect on *other* students and members of the public who are now fearful of speaking openly about Martinsburg.

stated a plausible claim on which relief can be granted. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In addition to the points contained in Section I above, *supra* pp. 9-25, regarding the legal and factual deficiency of Martinburg's claims:

1. **Defamation.** Martinsburg's defamation claim rests entirely on statements of opinion and hyperbole, which are, as a matter of law, not defamatory. *Gatlin*, 29 Kan. App. 2d at 320. An honest reading of Ms. Murray's Facebook post makes clear that she was providing her own personal, subjective opinion as to the quality of Martinsburg's programs, which is not actionable.

Furthermore, because Martinsburg is a public figure, it must meet the difficult task of plausibly alleging actual malice, meaning that Ms. Murray had knowledge that her statements were false or that she acted with reckless disregard for their veracity and with specific, evil-minded intent to injure. *See Scarpelli*, 229 Kan. at 216; *Turner*, 240 Kan. at 2. Martinsburg has not done so. Instead, Martinsburg asserts only that Ms. Murray "failed to use ordinary care," which is not the applicable legal standard. (Compl. ¶ 38 (Doc. 1).) Martinsburg also fails to provide any factual support its conclusory assertion that Ms. Murray was "motivated by bad faith in an attempt to cause harm to Plaintiff." (*Id.* ¶ 39.) Indeed, Ms. Murray's own show that she was acting in good faith: Ms. Murray refused to tell others what to say, advised those without complaints not to file, believed everything she posted "is accurate," and was providing her assistance for free in order to help members of her community with their "educational needs." (*See* Compl. at Ex. A (Doc. 1-1).)

2. **Trade Libel.** Neither trade libel nor other analogous causes of action (*i.e.*, business disparagement, commercial disparagement, product disparagement, injurious falsehood, slander of goods, or disparagement of property) are recognized under Kansas law, therefore Martinsburg

cannot state a claim under this theory. *See supra* at pp. 20-21 (collecting cases). Moreover, Martinsburg relies on conclusory allegations rather than actual facts to support its trade libel allegation. For instance, Plaintiff states, without providing *any* detail or supporting facts, that Ms. Murray "directed [her statements] to Plaintiff's customers and potential customers" and "did not have a reasonable basis" for asserting her statements. Those unsupported allegations are simply insufficient under *Iqbal* and *Twombly*.

3. **Tortious Interference.** Martinsburg's tortious interference claim is precisely the kind of claim that consists of "[t]hread bare recitals of the elements of a cause of action, supported by mere conclusory statements," which "do not suffice to state a claim for relief." *Abraham v. Gold Crown Mgmt. LLC*, No. 18-2410-DDC-TJJ, 2019 WL 174973, at *2 (D. Kan. Jan. 11, 2019) (internal quotation marks omitted) (Crabtree, J.)

First, Martinsburg states that Ms. Murray "intentionally and maliciously interfered" with alleged contracts without providing any facts or plausible support for that statement, including the specific individuals who supposedly contracted with Martinsburg. (Compl. ¶ 50 (Doc. 1).) Second, Plaintiff alleges that Ms. Murray was "motivated substantially by malice and/or personal interest" without pleading any facts that would make such an allegation about Ms. Murray's motive plausible. (*Id.* ¶ 51.) Third, again without any support, Plaintiff states Ms. Murray "intentionally designed" her actions to "cause students to breach and/or cancel their contracts." But even a cursory review of the Post and the comments that follow show that Ms. Murray repeatedly directed complaining students to government-sponsored portals for filing complaints. *See supra* at pp. 21-24. Simply put: Martinsburg's allegations are "naked assertions devoid of further enhancement" which cannot withstand a motion to dismiss. *Iqbal*, 556 U.S. at 678.

4. **Injunctive Relief.** As discussed *supra*, Martinsburg seeks an injunction that will suppress certain speech in advance of its expression and compel additional speech. The prohibition on future speech constitutes a prior restraint, which comes with a heavy presumption *against* constitutional validity. *Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 235 (1984). *Mid-W. Conveyor Co. v. Jervis B. Webb Co.*, No. CIV. A. 93-2539-EEO, 1994 WL 133008, at *4 (D. Kan. Mar. 21, 1994). Martinsburg has not sufficiently pled that Ms. Murray has attempted to or plans to make communications about it in the future nor has it pled any facts supporting its blanket statement that Ms. Murray "engaged in a systemic and methodical scheme." (Compl. ¶ 57 (Doc. 1).) Plaintiff further fails to note facts supporting its allegation that there is not an adequate remedy at law. Therefore, the extraordinary remedy of a prior restraint is unnecessary.

With respect to the compelled speech, *i.e.*, "an order requiring Defendant Murray to undertake corrective advertising to inform the public of the falsity of its statements," such an order would constitute impermissible compelled speech. *First*, the requested order does not provide *any* detail regarding the means of communication. But *second*, the requested order would not even have Ms. Murray correct the record as to the alleged falsity of the Post. Rather, Martinsburg is requesting the Court to order Ms. Murray to "undertake corrective advertising" to "inform the public of the falsity of [her] statements." This is precisely the sort of compelled speech that the first amendment is designed to guard against.

CONCLUSION

For the foregoing reasons, Ms. Murray respectfully requests that this Court grant this motion to strike all claims of Plaintiff's complaint under the PSPA and allow for a separate

submission detailing costs, fees, and additional relief, or alternatively, dismiss the complaint for failure to state a claim upon which relief may be granted.

Dated: April 5, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Memorandum in Support of Defendant Cheryl Murray's Motion to Strike Plaintiff's Complaint or to Dismiss under Rule 12(b)(6) was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record and constitutes service in this action.

s/ J. Eric Weslander
J. Eric Weslander