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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TARLA MAKAEFF, on Behalf of
Herself and All Others Similarly
Situated,

Plaintiffs,

vs.

TRUMP UNIVERSITY, LLC, (aka
Trump Entrepreneur Initiative) a New
York Limited Liability Company,
DONALD J. TRUMP, and DOES 1
through 50, inclusive,

Defendants.

Case No. 10cv0940 GPC (WVG)

**ORDER GRANTING
PLAINTIFF/COUNTER
DEFENDANT’S SPECIAL
MOTION TO STRIKE
DEFENDANT/
COUNTERCLAIMANT’S
DEFAMATION
COUNTERCLAIM;**

[Dkt. Nos. 14, 282, 294.]

TRUMP UNIVERSITY, LLC,

Counterclaimant,

vs.

TARLA MAKAEFF, and ROES 1
through 10, inclusive,

Counter Defendant.

INTRODUCTION

Before the Court is Plaintiff/Counter Defendant Tarla Makaeff’s (“Makaeff”) and Defendant/Counterclaimant Trump University, LLC’s (“Trump University”) supplemental briefing regarding Makaeff’s special motion to strike Trump

1 University’s counterclaim, (Dkt. No. 14). (Dkt. Nos. 294; 300; 312.) The Court held
2 a hearing on the matter on June 13, 2014. Amber Eck, Esq. and Helen Zeldes, Esq.
3 appeared on behalf of the moving party, defamation Defendant Tarla Makaeff, who
4 was present in court. Nancy Stagg, Esq. and Benjamin Morris, Esq. appeared on
5 behalf of defamation Plaintiff Trump University, LLC. Having considered the Ninth
6 Circuit’s mandate, (Dkt. No. 282), the Parties’ submissions, oral argument by
7 counsel, the applicable law, and for the reasons set forth below, the Court hereby
8 GRANTS Makaeff’s special motion to strike Trump University’s counterclaim.
9 (Dkt. No. 14.)

10 BACKGROUND

11 **I. Factual History**

12 Between August 2008 and June 2009, Makaeff attended approximately seven
13 real estate investing and finance seminars, workshops, and classes hosted by Trump
14 University and spent a total of approximately \$60,000 on the programs. (Dkt. Nos. 4
15 at 9; 14-1 at 11.)

16 Although Trump University asserts Makaeff was satisfied with the services
17 Trump University provided to her, noting that Makaeff frequently provided
18 excellent reviews of the programs, (Dkt. No. 4 at 7–8), Makaeff states the Trump
19 University programs she attended were unsatisfactory. (Dkt. No. 14-1 at 10–11.)
20 Specifically, Makaeff alleges the programs were shorter than advertised, (Dkt. No.
21 14-1 at 10–11), she was provided only a toll-free telephone number instead of a
22 one-year mentorship of “expert, interactive support,” (Dkt. No. 14-1 at 10), and her
23 Trump University mentors were largely unavailable and offered no practical advice
24 when she did speak with them, (Dkt. No. 14-1 at 11).

25 In addition, Makaeff alleges she was told by Trump University staff to raise
26 her credit card limits to purchase real estate, but once she did, she was pressured by
27 Trump University staff to instead use her elevated credit to purchase the Trump
28 Gold Elite seminar for \$34,995. (Dkt. No. 1 at 9.) Makaeff also claims she was told

1 by Trump University staff that her first real estate transaction after signing up for
2 the Trump Gold Elite program would earn her approximately the amount she spent
3 on the Trump Gold Elite program, which it did not. (Dkt. No. 1 at 17.)

4 Additionally, Makaeff alleges Trump University instructed her to engage in
5 illegal real estate practices, such as posting advertising “bandit signs” on the sides
6 of roadways.¹ (Dkt. No. 1 at 18.) On June 18, 2009, Makaeff received a letter from
7 the Orange County District Attorney’s Office informing her that posting bandit
8 signs in California without lawful permission could subject her to fines, a
9 misdemeanor charge, and up to six months in jail. (Dkt. No. 294 at 8.)

10 Furthermore, Makaeff alleges that in 2008, Trump University Coaching
11 provided Makaeff’s personal financial information to HSBC and opened a credit
12 card on Makaeff’s behalf without her authorization. (Dkt. No. 294 at 26.) During a
13 phone interview with a Trump University Coaching representative, Makaeff was
14 told she was pre-approved for an HSBC/Prosper Learning credit card. (Dkt. No. 294
15 at 26–27.) Makaeff testified to believing that because HSBC had sufficient
16 information to pre-approve her for a credit card, Trump University Coaching
17 provided Makaeff’s personal and financial information to HSBC without Makaeff’s
18 authorization. (Dkt. No. 294 at 27.)

19 In April 2009, approximately seven months after Makaeff began attending
20 Trump University seminars, Makaeff wrote to Trump University stating she was
21 having significant personal financial difficulties and requested a full refund. (Dkt.
22 No. 4 at 8.) At that time, Trump University explained to Makaeff it could not offer
23 her a refund “after she participated in every program and received the information,
24 skill set, and mentoring she paid for.” (Dkt. No. 4 at 8.)

25
26 ¹ Trump University argues it specifically instructed Makaeff to seek local legal counsel
27 to ensure that the signs are permissible in her community before she posts them. (Dkt.
28 No. 300 at 10 n.5.) According to Trump University, notice was given to Makaeff in the
form on a handout in a binder provided to her eight or nine months before she posted
the signs. (Dkt. No. 300 at 10 n.5.) The form stated, “Make sure you check with the city
first because you could have your signs removed or a potential fine.” (Dkt. No. 300-2,
Ex. 1 at 3.)

1 On or around September 10, 2009, Makaeff sent a four-page letter to Bank of
2 America (“BofA”), her credit card company, complaining about Trump University
3 and requesting a refund of the money she spent on Trump University programs.
4 (Dkt. No. 294-2, Ex. 1.) In this letter, Makaeff accused Trump University of
5 engaging in, among other wrongs: (1) grand larceny; (2) identify theft; and the (3)
6 unsolicited taking of personal credit and trickery into opening credit cards without
7 approval. Specifically, Makaeff stated:

8 I want to make you aware that the HSBC bank has separated (March 17,
9 2009) from any relation with any Trump University, Trump Institute,
10 Trump subsidiaries such as Prosper Inc., and any party related to the
11 aforementioned because of cases such as mine in which the
12 aforementioned companies participated in the dispersal of my personal
13 financial information and opening of credit between a multitude of
entitles including banks regulated by the FDIC. This type of fraudulent
sales techniques are governed by state and federal protection consumers
such as me against this outright Fraud, **Grand Larceny**, and **Identity Theft**
by Trump University/Profit Publishing Group.

14 . . .

15 I was tricked into signing up for this with my information was taken under
16 high pressure sales tactics clearly in violation of State and Federal
Statutes protecting consumers from high pressure sales tactics, bait and
switch, **unsolicited taking of personal credit and trickery into opening
credit cards without MY approval or understanding.**

17 (Dkt. No. 294-2, Ex. 1 at 4–5) (emphases added). Trump University refers to the these
18 three statements collectively as the “Specific Crimes.”

19 Makaeff additionally lodged written complaints against Trump University with
20 the Better Business Bureau Serving Metropolitan New York (“BBB”), the New York
21 Attorney General’s office, the New York State Education Department, the New York
22 Bureau of Consumer Protection, the New York District Attorney, the FBI, the FTC, and
23 on an Internet message board. (Dkt. No. 14-1 at 11.) Makaeff did not accuse Trump
24 University of the Specific Crimes in these complaints.

25 **II. Procedural History**

26 Makaeff brought a class action lawsuit against Trump University on April 30,
27 2010. (Dkt. No. 1.) On May 26, 2010, Trump University filed a defamation
28 counterclaim against Makaeff, alleging Makaeff “published statements to third parties

1 about Trump University orally, in writing and on the Internet that are per se
2 defamatory, including many completely spurious accusations of actual crimes.” (Dkt.
3 No. 4 at 3.) Trump University alleges Makaeff’s defamatory statements were a
4 substantial factor in causing actual and significant economic damages amounting to or
5 exceeding \$1,000,000. (Dkt. No. 4 at 9–12.)

6 On June 30, 2010, Makaeff filed a special motion to strike Trump University’s
7 counterclaim on the ground the counterclaim is a strategic lawsuit against public
8 participation, or “SLAPP suit,” with the purpose of intimidating Makaeff into dropping
9 her class action lawsuit. (Dkt. No. 14-1 at 8.) In her anti-SLAPP special motion to
10 strike Trump University’s counterclaim, filed pursuant to California Code of Civil
11 Procedure section 425.16, Makaeff argued that Trump University is a public figure and
12 in order to prevail on its defamation counterclaim, it must prove Makaeff acted with
13 actual malice when she made the Specific Crimes statements. (Dkt. No. 14-1 at 21–24.)

14 On August 23, 2010, Judge Irma E. Gonzalez denied Makaeff’s special motion
15 to strike Trump University’s counterclaim. (Dkt. No. 24.) Specifically, Judge Gonzalez
16 found that Trump University is not a public figure and therefore did not need to prove
17 Makaeff acted with actual malice when she made the Specific Crimes statements. (Dkt.
18 No. 24 at 6–8.) Makaeff’s subsequent motion for reconsideration of her special motion
19 to strike Trump University’s counterclaim was denied by Judge Gonzalez on
20 September 20, 2010, on the basis that there was no intervening change in the law or any
21 clear error committed by the court that would support reconsideration of the original
22 motion. (Dkt. Nos. 31; 40 at 3.)

23 On January 3, 2011, Makaeff appealed Judge Gonzalez’s August 23, 2010 order
24 to the Ninth Circuit, (Dkt. No. 43), which reversed and remanded the order on April 17,
25 2013. Makaeff v. Trump University, LLC, 715 F.3d 254, 271(2013). Although the
26 Ninth Circuit agreed with Judge Gonzalez’s conclusion that Makaeff had met her initial
27 burden of showing Trump University’s defamation claim arose from an act in
28 furtherance of Makaeff’s free speech rights, and that Makaeff’s statements were not

1 protected by California’s litigation privilege, the Ninth Circuit reversed Judge
2 Gonzalez’s holding that Trump University was not a public figure. See id. In particular,
3 the court of appeals found that Trump University is a limited-purpose public figure and
4 therefore must show by clear and convincing evidence that Makaeff made her
5 statements with actual malice. Id. at 270. The court remanded the matter for further
6 factual findings as to whether Trump University can meet this burden. Id. at 271-72.
7 In addition, the court of appeals granted Makaeff’s unopposed request that the issue of
8 appellate attorney’s fees be transferred to the district court. (Dkt. No. 284.)

9 Pursuant to this Court’s direction, (Dkt. No. 283), the parties have filed
10 supplemental briefs on the issue of whether Makaeff made the statements at issue with
11 actual malice. (Dkt. Nos. 294; 300; 312).

12 DISCUSSION

13 **I. Special Motion to Strike**

14 SLAPP suits are lawsuits that “ ‘masquerade as ordinary lawsuits’ but are
15 brought to deter common citizens from exercising their political or legal rights or to
16 punish them for doing so.” Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)
17 (quoting Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816 (1994), overruled on
18 other grounds, Equilon Enter. v. Consumer Cause, Inc., 29 Cal. 4th 53 (2002)). The
19 Ninth Circuit allows the use of motions to strike state law claims arising under
20 California’s anti-SLAPP statute, California Code of Civil Procedure section 425.16,
21 in federal court. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003);
22 but see Makaeff v. Trump University, LLC, 715 F.3d 254, 275 (2013) (Paez, J.,
23 concurring) (“California’s anti-SLAPP statute is ‘quintessentially procedural,’ and its
24 application in federal court has created a hybrid mess that now resembles neither the
25 Federal Rules nor the original state statute.”).

26 To prevail on an anti-SLAPP motion to strike, a party must satisfy a two-step
27 inquiry. Vess, 317 F.3d at 1110. First, the defamation defendant moving to strike a
28 SLAPP suit “must make an initial prima facie showing that the defamation plaintiff’s

1 suit arises from an act in furtherance of the defendant's rights of petition or free
2 speech." Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d
3 1127, 1128 (N.D. Cal. 1999).

4 Once the defendant makes this initial prima facie showing, the burden shifts to
5 the defamation plaintiff (Trump University) to show with a "reasonable probability"
6 it will prevail on the merits of the challenged claim. Cal. Code Civ. P. § 425.16(b)(1);
7 Coulter v. Murrell, No. 10-cv-102-IEG (NLS), 2010 WL 1289070, at *4 (S.D. Cal.
8 Mar. 30, 2010). The defamation plaintiff must therefore demonstrate that the
9 defamation defendant (1) published a statement of fact that (2) is false; (3) is
10 defamatory; (4) is unprivileged; and (5) has a natural tendency to injure or cause
11 special damage. Taus v. Loftus, 40 Cal. 4th 683, 720 (2007) (citing 5 Witkin, Summary
12 of Cal. Law (10th ed. 2005) Torts, § 529). In cases where the defamation plaintiff is a
13 public figure, the plaintiff must also show by clear and convincing evidence that the
14 defendant made her statements with actual malice. Gertz v. Robert Welch, Inc., 418
15 U.S. 323, 342 (1974).

16 Here, the Ninth Circuit affirmed Judge Gonzalez's finding that defamation
17 defendant Makaeff has made an initial prima facie showing that Trump University's
18 defamation counterclaim arises out of Makaeff's protected rights.² See Makaeff, 715
19 F.3d at 263. Thus, the burden now shifts to Trump University to demonstrate a
20 reasonable probability of succeeding on the merits of its defamation claim. Because the
21 Ninth Circuit determined that Trump University was a "limited public figure," id. at

22
23 ²The Court notes that, for the first time at oral argument, Trump University raised
24 the argument that Makaeff has not made this prima facie showing as to the letter she
25 sent to Bank of America seeking a refund. The Court rejects this argument for two
26 reasons. First, Trump University did not raise this issue in its briefing, and the Court
27 need not consider issues raised for the first time during oral argument. See Visto Corp.
28 v. Sproqit Techs., Inc., 413 F. Supp. 2d 1073, 1088 n.8 (N.D. Cal. 2006); see also In
re Pacific Pictures Corp., 679 F.3d 1121, 1130 (9th Cir. 2012). Second, the Ninth
Circuit already rejected Trump University's argument, stating that the judges had
"doubts about Trump University's claim that Makaeff wrote her letters to her bank and
the Better Business Bureau with purely private motives" and affirming Judge
Gonzalez's finding that Makaeff has made her initial prima facie showing. Makaeff v.
Trump University, LLC, 715 F.3d 254, 263 (9th Cir. 2013). The Ninth Circuit's
determination is binding on this Court.

1 270, this Court must first determine if Makaeff made her allegedly defaming statements
2 with “actual malice”; if Trump University cannot make such a showing, “it has no
3 possibility of success on the merits” and the Court must grant Makaeff’s motion to
4 strike. Id. at 265. As directed by the Ninth Circuit, the Court may “assume the falsity
5 of the statements [at issue] and proceed directly to the actual malice inquiry.” Id. at 270
6 n. 13.

7 **A. Actual Malice**

8 **1. Legal Standard**

9 To prove actual malice, a defamation plaintiff must show by clear and
10 convincing evidence that the defendant knew her statements were false at the time she
11 made them, or that she acted with reckless disregard of the truth or falsity of the
12 statements made. Gertz v. Robert Welch, Inc., 418 U.S. 323, 328 (1974). The clear and
13 convincing standard “requires that the evidence be such as to command the
14 unhesitating assent of every reasonable mind.” Rosenauro v. Scherer, 105 Cal. Rptr. 2d
15 674, 684 (Ct. App. 2001). “A defamation plaintiff may rely on inferences drawn from
16 circumstantial evidence to show actual malice.” Christian Research Inst. v. Alnor, 55
17 Cal. Rptr. 3d 600, 612 (Ct. App. 2007) (citing Reader’s Digest Assn v. Superior Ct.,
18 208 Cal. Rptr. 137, 145–46 (1984)).

19 Actual malice is a subjective standard. See St. Amant v. Thompson, 390 U.S.
20 727, 731 (1968). “[R]eckless conduct is not measured by whether a reasonably prudent
21 man would have published, or would have investigated before publishing. There must
22 be sufficient evidence to permit the conclusion that the defendant in fact entertained
23 serious doubts as to the truth of [her] publication.” Id.

24 Actual malice “has nothing to do with bad motive or ill will,” and “may not be
25 inferred alone from evidence of personal spite, ill will or intention to injure on the part
26 of the writer.” Harte-Hanks Commc’ns, Inc. v. Connaughton, 491 U.S. 657, 666 n.7
27 (1989). However, in appropriate cases, factors such as “[a] failure to investigate, anger
28 and hostility toward the plaintiff, reliance upon sources known to be unreliable, or

1 known to be biased against the plaintiff . . . may . . . indicate that the publisher [herself]
2 had serious doubts regarding the truth of [her] publication.” Reader’s Digest, 208 Cal.
3 Rptr. at 145-46 (citations omitted).

4 **2. Discussion**

5 Although Trump University’s defamation counterclaim alleges Makaeff
6 published at least twenty defamatory statements to various third parties in various
7 forums, (Dkt. No. 4 at ¶ 22), Trump University focuses its showing of “actual malice”
8 for the purposes of the present motion to three statements made by Makaeff in her letter
9 to Bank of America. (Dkt. No. 300 at 5 n.1.) In particular, Trump University claims in
10 making her accusations that Trump University committed “grand larceny,” “identity
11 theft,” and “unsolicited taking of personal credit and trickery into opening credit cards
12 without approval” (collectively, the “Specific Crimes”), Makaeff demonstrated
13 knowledge of falsity or reckless disregard for falsity of the statements sufficient to
14 meet the “actual malice” standard. (Id. at 14.) Trump University makes four main
15 arguments in favor of a finding of “actual malice”: (1) that Makaeff’s testimony shows
16 Makaeff knew the Specific Crimes accusations were false when she made them; (2)
17 Makaeff’s actions were inconsistent with the actions of someone who genuinely
18 believed the Specific Crimes had been committed; (3) an inference of actual malice
19 arises from Makaeff’s anger and hostility toward Trump University; and (4) Makaeff’s
20 failure to investigate her Specific Crimes accusations demonstrates actual malice. The
21 Court addresses each argument in turn.

22 **a. Knowledge of Falsity**

23 Trump University first argues it can demonstrate Makaeff acted with actual
24 malice because Makaeff’s Specific Crimes statements were fabricated and Makaeff
25 knowingly and selectively published these false statements only to her credit card
26 company in order to seek a refund. (Dkt. No. 300 at 8, 15.) In support of its claim,
27 Trump University argues Makaeff’s Specific Crimes statements are false, as Makaeff
28 herself admitted in both a July 2010 declaration and an April 2012 deposition. (Dkt.

1 No. 300 at 7) (citing Dkt. No. 17-2, Makaeff Decl. at 5) (declaring that the specific
2 crimes statements were not in relation to Trump University); (Dkt. No. 300 at 8) (citing
3 Dkt. No. 300-2 Ex. 3, Makaeff Depo. at 775) (Makaeff responded “no” when asked
4 “Did Trump University ever open a credit card in your name without your approval?”).

5 Trump University claims this case is similar to Nguyen-Lam v. Cao, 171 Cal.
6 App. 4th 858 (2009), in which the California Court of Appeals upheld a trial court’s
7 conclusion that malice could be inferred “where, for example, a story is fabricated by
8 the defendant, is the product of his imagination, or is based wholly on an unverified
9 anonymous telephone call.” Id. at 869 (citing Christian Research Institute v. Alnor, 148
10 Cal. App. 4th 71, 85 (2007)) (internal quotation marks omitted). Trump University
11 argues Makaeff, like the defamation defendant in Nguyen-Lam, “has no ‘place to go
12 for her belief’ that Trump University illegally took the property of anyone, stole
13 anyone’s identity, or opened any credit card without approval.” (Dkt. No. 300 at 15-
14 16.)

15 The Court finds Nguyen-Lam distinguishable from the present matter. In that
16 case, the California Court of Appeals considered a defamation defendant who had
17 learned about the defamation plaintiff, then a candidate for a public position, only
18 through media reports yet accused her of being a Communist. 171 Cal. App. 4th at 868-
19 69. The evidence in Nguyen-Lam indicated the defamation defendant had no personal
20 knowledge of the defamation outside of the media reports, none of which had
21 mentioned Communism, and thus had no basis for his claim that the defamation
22 plaintiff was in fact a Communist. Id. at 869.

23 Here, Makaeff’s “Specific Crimes” statements to her bank were made in the
24 context of a detailed four-page letter setting forth Makaeff’s personal experiences with
25 Trump University and the interactions that formed the bases for her accusations.
26 Furthermore, although Makaeff has since testified that Trump University did not
27 commit the Specific Crimes, Makaeff has set forth many reasons why she believed
28 entities related to Trump University, including Profit Publishing Group, were

1 “indistinguishable in her mind” when she made the Specific Crimes accusations.³ (Dkt.
2 No. 294 at 18.) In particular, Makaeff argues: “(1) both entities’ names contain the
3 words ‘Trump University’; (2) payment was made to ‘Trump University’; (3) Trump
4 University Coaching personnel, Justin Kramer, said he was with ‘Trump University’s
5 Educational Department’; (4) Trump University Coaching shared the same name, logo,
6 coat of arms and company branding [as Trump University]; (5) there was a link to
7 ‘Trump University Coaching’ on the Trump University website; and (6) the Trump
8 Entities routinely promoted each other to students.” (Dkt. No. 294 at 18, 27.) In
9 addition, Makaeff asserts Trump University “pitched” “Childers Financial Group aka
10 Childers Finley, PA, aka Profit Publishing Group” to Trump University students as
11 “experts in corporate structure, real estate structure, [and] the legalities of such
12 transactions” who would help them create real estate entities such as limited liability
13 companies and trusts to assist them in protecting their assets while investing in real
14 estate transactions. (Dkt. No. 294-2 at 14.)

15 Having reviewed Makaeff’s deposition testimony, the Court finds that Makaeff
16 has consistently testified that at the time she wrote her letter to Bank of America, she
17 referred to the “Trump Entities” “all together,” (Dkt. No. 300-2, Martin Decl. Ex. 2,
18 Makaeff 2012 Depo at 601:7-8), “comingled . . . in [her] writing,” (Dkt. No. 300-2,
19 Martin Decl. Ex. 3, Makaeff 2014 Depo at 774:22-23). As such, the Court concludes
20 that while Trump University has introduced evidence that Makaeff no longer believes
21 Trump University (rather than the affiliated entities) committed the Specific Crimes in
22 question, Trump University has failed to show that Makaeff “fabricated” her
23 allegations. Accordingly, the Court finds Trump University’s evidence of Makaeff’s
24 current knowledge of the falsity of her statements to Bank of America fail to
25 demonstrate with clear and convincing evidence that Makaeff made the Specific
26 Crimes statements with actual malice.

27
28 ³These entities included: (i) Trump University Coaching; (ii) Trump Institute;
(iii) Profit Publishing Group; and (iv) Prosper, Inc. (Dkt. No. 294 at 18.)

1 America with actual malice. Throughout Makaeff's deposition testimony and briefing,
2 Makaeff explains that she did not publish the Specific Crimes statements until October
3 2009 because her negative experiences with Trump University culminated on June 18,
4 2009, when she received a letter from the Orange County District Attorney's Office
5 regarding the illegal posting of bandit signs. (See Dkt. No. 294 at 8.) According to
6 Makaeff, this letter "pulled back the curtain" and allowed her "to begin to realize that
7 she had been had" by Trump University. (Id. at 8.) Makaeff asserts that after she
8 received the letter from the District Attorney, she took time to reflect on her
9 experiences with Trump University and conduct her own investigations, which
10 included gathering information from other former Trump University students, talking
11 to friends and family, and doing online research. (Id. at 8-9.) Makaeff then made the
12 decision to expose Trump University's "scam and recover her money." (Id. at 9.)

13 Furthermore, as to Makaeff's failure to repeat the Specific Crimes statements in
14 other writings, Makaeff asserts that after she sent the letter to Bank of America, Trump
15 University Coaching said it would provide a refund in connection with the HSBC
16 charge and subsequently resolved the matter. (Dkt. No. 312 at 13) (citing Dkt. No. 312-
17 1, Jensen Decl. Ex. 17, Makaeff Depo. at 603:1-7.) Makaeff asserts her additional
18 letters to the Better Business Bureau and draft letters to the New York Attorney
19 General and District Attorney are all dated after Trump University Coaching issued a
20 refund for the HSBC credit card. In these letters, she only accused Trump University
21 of engaging in "unlawful" conduct, but not the Specific Crimes. (Dkt. No. 312 at 13.)

22 As the Ninth Circuit found,

23 The gist of Makaeff's complaint about Trump University is that it
24 constitutes an elaborate scam. As the recent Ponzi-scheme scandals
25 involving one-time financial luminaries like Bernard Madoff and Allen
26 Stanford demonstrate, victims of con artists often sing the praises of their
victimizers until the moment they realize they have been fleeced. Makaeff's initial enthusiasm for Trump University's program is not probative of whether she acted with actual malice.

27 Makaeff v. Trump University, LLC, 715 F.3d 254, 271 (9th Cir. 2013). Similarly, the
28 Court finds Makaeff's initial consenting to the charging of additional Profit courses on

1 a new credit card not probative of whether she acted with actual malice. As Makaeff
2 testified in her deposition, she “agreed to sign up for the program after three hours of
3 being – using reverse psychology and being berated . . .” (Dkt. No. 294-2, Jensen Decl.
4 Ex. 7, Makaeff Depo at 23:22-24.) The Court finds Makaeff’s explanation consistent
5 with her claim to be a victim of a scam and of identity theft and therefore her initial
6 consent to the charges is not probative of whether she acted with actual malice when
7 later complaining about the charges to her bank.

8 Likewise, the Court rejects Trump University’s claim that if Makaeff believed
9 she was a victim of the Specific Crimes, Makaeff would have reported the crimes to the
10 authorities and warned other consumers. As an initial matter, the Court notes “actual
11 malice” is a subjective, not objective standard. See St. Amant v. Thompson, 390 U.S.
12 727, 731 (1968). Arguments regarding what a reasonable person would do in Makaeff’s
13 shoes are not evidence of whether Makaeff made the statements in question with actual
14 malice. Id. at 731 (“[R]eckless conduct is not measured by whether a reasonably
15 prudent man would have published, or would have investigated before publishing.
16 There must be sufficient evidence to permit the conclusion that the [defamation]
17 defendant in fact entertained serious doubts as to the truth of his publication.”).

18 Furthermore, both parties have submitted substantial evidence that Makaeff
19 wrote many complaint letters, complained about Trump University on the internet, and
20 brought the present lawsuit to address what Makaeff appears to perceive as various and
21 substantial wrongs committed by Trump University. Although the three “Specific
22 Crimes” statements focused on by Trump University only appear in Makaeff’s letter
23 to Bank of America, the letter contains many other allegations of wrongdoing by
24 Trump University over the course of its four pages. The Court is not convinced by
25 Trump University’s argument that the Specific Crimes were made with actual malice
26 because they differ in kind from Makaeff’s other serious charges of fraud, bait and
27 switch, “illegal predatory high pressure closing tactics,” and “enrolling students for
28 new credit cards they cannot afford.” (Dkt. No. 294-2, Jensen Decl. Ex. 1.) The Court

1 therefore does not find Makaeff's failure to report the three Specific Crimes to the
2 authorities probative of whether she made the Specific Crimes statements with actual
3 malice.

4 **c. Hostility and Motive**

5 Third, Trump University points to evidence of Makaeff's anger and hostility
6 toward Trump University, as well as a motive to get a refund, as evidence of actual
7 malice. (Dkt. No. 300 at 17) (citing Christian Research Institute v. Alnor, 148 Cal.
8 App. 4th 71, 84-85 (2007) ("anger and hostility toward the plaintiff . . . may, in an
9 appropriate case, indicate that the publisher himself had serious doubts regarding the
10 truth of his publication"); Harte-Hanks Commc'ns, Inc., 491 U.S. 657, 669 ("it cannot
11 be said that evidence concerning motive or care never bears any relation to the actual
12 malice inquiry"); Widener v. Pacific Gas & Elec. Co., 75 Cal. App. 3d 415, 436 (1977)
13 (finding an engineer's motive of wanting to suppress the making of a film and his anger
14 with the film's producer "sufficient evidence from which the jury could have found that
15 [the engineer] knew [his libelous statement about the producer] was false, or was
16 recklessly indifferent as to whether his statement was accurate or not")). Trump
17 University asserts anger and hostility is evident in Makaeff's letters, in an Internet
18 posting entitled *20 Ways to Trump Them*, in an e-mail to her then-boyfriend where she
19 took credit for a negative New York Daily News article about Trump University, and
20 in her statement to Trump University that she was "willing to go to whatever lengths
21 necessary" to get her money back from Trump University. (Dkt. No. 300 at 18.) Trump
22 University further argues Makaeff only made the Specific Crimes statements because
23 she knew if she made grandiose allegations of specific criminal conduct to her bank,
24 she would have a better chance of getting a refund than if she simply explained what
25 really happened – that "she was not satisfied with the services provided to her." (Dkt.
26 No. 300 at 13.) Trump University grounds this argument in the following testimony
27 from Makaeff's February 10, 2014 deposition:

28 I'm a writer and this—I write certain ways and this is how I write, and I
felt like if I included anything to do with the law, which I felt these laws

1 were broken, the bank would understand that this is an important issue,
2 and they need to look into this matter.

3 (Dkt. No. 300 at 13) (citing Dkt. No. 300-2, Ex. 3, at 771–72).

4 However, as the court in Christian Research Institute recognized, although a
5 defamation plaintiff “may rely on inferences drawn from circumstantial evidence to
6 show actual malice,” 148 Cal. App. 4th at 84 (citing Reader’s Digest Ass’n v. Superior
7 Court, 37 Cal. 3d 224, 257-58 (1984)), the “clear and convincing” burden of proving
8 actual malice “requires a finding of high probability. The evidence must be so clear as
9 to leave no substantial doubt. It must be sufficiently strong to command the
10 unhesitating assent of every reasonable mind.” 148 Cal. App. 4th at 84 (citing Copp v.
11 Paxton, 45 Cal. App. 4th 829, 846 (1996)) (internal quotation marks omitted). Thus,
12 the court held that a court “may consider a defendant’s anger or hostility toward a
13 plaintiff in determining the presence of malice only to the extent it impacts the
14 defendant’s *actual belief* concerning the truthfulness of the publication.” Id. at 91
15 (emphasis in original). The Christian Research Institute court therefore found evidence
16 that a former employee’s harboring of ill will toward the defamation plaintiff failed to
17 demonstrate a connection between the alleged ill will and the former employee’s belief
18 about the truth of his publication. Id. (“That [defendant’s] objectivity and judgment
19 may have been impaired by hostility toward plaintiffs does not by itself demonstrate
20 malice.”).

21 Here, Trump University’s only argument linking Makaeff’s palpable hostility
22 toward Trump University to the Specific Crimes statements made in her letter to Bank
23 of America is a purported motive to accuse Trump University of exaggerated crimes
24 in order to obtain a refund. However, even in the quoted statement from her deposition
25 testimony, above, Makaeff qualified the testimony with the clause, “which I felt these
26 laws were broken.” (Dkt. No. 300-2, Ex. 3, at 771-72.) This qualification indicates that
27 Makaeff did not fabricate the Specific Crimes charges solely to obtain a refund, but
28 rather sought a refund because she believed the Specific Crimes had been committed.
 Furthermore, as discussed above, the sentences in which the Specific Crimes

1 accusations appear in Makaeff's letter to Bank of America also charge Trump
2 University with "outright fraud," "high pressure sales tactics," and "bait and switch."
3 The fact that these surrounding statements have formed the basis of Makaeff's class
4 action lawsuit against Trump University casts doubt on Trump University's claim that
5 Makaeff fabricated crime allegations solely to obtain a refund. Accordingly, the Court
6 finds that Trump University's evidence of Makaeff's hostility toward Trump University
7 and motive to obtain a refund fail to demonstrate actual malice by clear and convincing
8 evidence.

9 **d. Failure to Investigate**

10 Finally, Trump University argues that although a failure to investigate will
11 not alone support a finding of actual malice, Makaeff's failure to investigate the
12 Specific Crimes supports the finding that Makaeff acted with actual malice. (Dkt.
13 No. 300 at 19–20) (citing Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S.
14 657, 692 (1989)). Trump University argues despite Makaeff's claims that she (1)
15 spent time doing online research and investigating all of her statements before
16 making them; (2) spoke with other students and reviewed complaints posted online;
17 and (3) talked to loved ones, friends, and attorneys, (Dkt. No. 300 at 19) (citing Dkt.
18 No. 294 at 11), Makaeff "did not ask her lawyer if her allegations of Specific
19 Crimes were accurate and she did not research the meaning of the legal terms she
20 was using." (Dkt. No. 300 at 19) (citing 300-2, Ex. 3 at 754; 768-69; 795-96;
21 799–800). Trump University argues that by failing to consult her lawyer before
22 accusing Trump University of the Specific Crimes, Makaeff made a conscious
23 decision to avoid the truth. (Dkt. No. 300 at 20) (citing Harte-Hanks, 491 U.S. at
24 692 (holding that a purposeful avoidance of the truth "is in a different category"
25 from a failure to investigate)).

26 Trump University relies heavily on Harte-Hanks to support its claim that a
27 "jury could support a finding of malice based on Makaeff's failure to consult with
28 her counsel or do any research whatsoever before accusing Trump University of the

1 Specific Crimes.” (Dkt. No. 300 at 20.) In Harte-Hanks, the California Supreme
2 Court affirmed a finding that the evidence supported a finding of actual malice
3 where a newspaper defamation defendant relied on a third-party source without
4 interviewing a key witness or listening to a tape recording provided by the
5 defamation plaintiff. 491 U.S. at 692. The evidence showed that, prior to
6 publication, the published charges had been “denied not only by [the defamation
7 plaintiff], but also by five other witnesses.” Id. at 691.

8 The Court finds Harte-Hanks distinguishable. Here, Makaeff did not rely on a
9 third-party source that she failed to investigate. To the contrary, the evidence shows
10 that Makaeff based her claims on her personal experiences with Trump University
11 rather than charges made by unreliable third-party sources with indicia of
12 unreliability. Furthermore, Trump University has failed to demonstrate that
13 sufficient evidence permits “the conclusion that [Makaeff] actually had a ‘high
14 degree of awareness of . . . probable falsity.’ ” Harte-Hanks, 491 U.S. at 688 (citing
15 Garrison v. Louisiana, 379 U.S. 64, 74 (1964)). As the Supreme Court recognized in
16 Harte Hanks, “failure to investigate before publishing, even when a reasonably
17 prudent person would have done so, is not sufficient to establish reckless
18 disregard.” Id. Finding Trump University has failed to demonstrate, with clear and
19 convincing evidence, that Makaeff made the Specific Crime statements with actual
20 malice, the Court GRANTS Makaeff’s motion to strike Trump University’s
21 defamation counterclaim pursuant to California’s anti-SLAPP statute. Cal. Civ.
22 Proc. Code § 425.16(c)(1).

23 **II. Attorney’s Fees**

24 California’s anti-SLAPP statute allows a prevailing defamation defendant to
25 recover attorney’s fees and costs, unless the anti-SLAPP motion is frivolous or
26 intended to cause unnecessary delay. Cal. Civ. Proc. Code § 425.16(c)(1). As stated
27 above, the Ninth Circuit remanded the issue of appellate attorney’s fees to this
28 Court. Accordingly, Makaeff shall file a bill of fees and costs detailing the

1 reasonable attorney's fees and costs incurred to bring the original anti-SLAPP
2 motion, appeal, and supplemental briefing. Trump University shall have the
3 opportunity to file objections to the bill of costs.

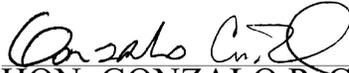
4 **CONCLUSION**

5 For the reasons set forth above, **IT IS HEREBY ORDERED** that Makaeff's
6 Special Motion to Strike Trump University's Counterclaim is **GRANTED**. (Dkt.
7 No. 14.)

8 **IT IS FURTHER ORDERED** that on or before July 3, 2014,
9 Plaintiff/Counter-Defendant Makaeff shall file with the Court substantiation of the
10 reasonable attorney's fees and costs associated with bringing the Motion to Strike,
11 related appeal, and supplemental briefing. Any objections to Plaintiff/Counter-
12 Defendant Makaeff's bill of fees and costs shall be filed in writing and served on
13 Plaintiff/Counter-Defendant no later than July 18, 2014.

14 **IT IS SO ORDERED.**

15 DATED: June 16, 2014

16 
17 HON. GONZALO P. CURIEL
18 United States District Judge
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