22-2080

IN THE

United States Court of Appeals

FOR THE

Second Circuit

MICHAEL RAPAPORT AND MICHAEL DAVID PRODUCTIONS, INC.,

Plaintiffs-Appellants,

– v. –

BARSTOOL SPORTS, INC., ADAM SMITH, KEVIN CLANCY,
ERIC NATHAN AND DAVID PORTNOY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES BARSTOOL SPORTS, INC., ADAM SMITH, KEVIN CLANCY, ERIC NATHAN AND DAVID PORTNOY

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee Barstool Sports, Inc. ("Barstool") hereby states that Barstool is a subsidiary of PENN Entertainment, Inc., which is a publicly held corporation that owns 10% or more of Barstool's stock.

DATED: April 5, 2023

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I. PRELIMINARY STATEMENT

Plaintiff and Appellant Michael Rapaport calls himself the "MVP of Talking Trash" and proudly proclaims: "I can give it and I can take it." Rapaport certainly gave it, engaging in a public war of words in which he attacked and insulted the company paying him, defendant and Appellee Barstool Sports, Inc., along with Barstool's employees and fans. Yet, after Barstool fired Rapaport and proceeded to mock him on social media and on Barstool's website, Rapaport couldn't take it. Instead, Rapaport and his production company, Michael David Productions, Inc. (collectively, "Rapaport") filed a defamation lawsuit against Barstool and four of its employees (collectively, "Barstool"),[1] claiming that their schoolyard insults were defamatory. These claims have no merit.

In a detailed and comprehensive 64-page ruling, the district court correctly found that the allegedly defamatory statements were non-actionable statements of opinion. As the law requires, the district court properly considered the entirety of the statements at issue and the overall context in which those statements were made in order to determine whether any reasonable reader, viewer, or listener would have understood them as statements of fact.

[1] As no party below raised a distinction between Rapaport and his company or between Barstool and its employees for purposes of the court's defamation analysis, we use the terms "Rapaport" and "Barstool" for clarity to refer to Appellants and Appellees, respectively.

Rapaport criticizes the district court for not beginning its defamation analysis by examining whether limited excerpts taken from the complained-of statements were "linguistically" and "grammatically" statements of fact, "which can only be transformed into inactionable statements of opinion via context." Appellants' Opening Brief ("AOB"), 32. Rapaport's analysis is entirely backwards. The law requires the Court to *first* examine the entirety of the challenged statements and their overall context in order to determine whether the portions at issue may be considered statements of fact.

Throughout his opening brief, Rapaport studiously (and disingenuously) avoids referring to the many public comments made by Rapaport himself which provide critical support and justification for the allegedly defamatory statements at issue. Rapaport also avoids examining the statements in their entirely, an examination which makes abundantly clear that they are all non-actionable insults—the very same "trash-talking" that Rapaport claims as his own stock-in-trade. Because Rapaport does not properly consider the allegedly defamatory statements in context and as a whole, he fails to demonstrate any error. In addition, Rapaport cannot meet his burden to show falsity or actual malice. The district court's judgment should be affirmed in full.

II. STATEMENT OF THE ISSUES

1. Did the district court err by examining the entirety of the challenged

statements and their overall context to determine that the allegedly defamatory statements were non-actionable opinions?

2. Even if the district court was incorrect that the allegedly defamatory statements were non-actionable statements of opinion, can Rapaport establish falsity?

3. Even if the district court incorrectly decided that the allegedly defamatory statements were non-actionable statements of opinion and even if Rapaport can establish falsity, can Rapaport also establish by clear and convincing evidence that Barstool acted with actual malice?

III. STATEMENT OF THE CASE

A. Rapaport is the Self-Proclaimed "MVP of Talking Trash" Who Had a Reputation for Engaging in Offensive Conduct and Making Offensive Statements Before This Dispute

Rapaport is a well-known actor, comedian and personality with over 100 credited acting roles. Appendix[2] ("A"):1829, ¶¶ 1, 2. Rapaport also developed, produces and hosts the podcast "I AM RAPAPORT: STEREO PODCAST" ("IAR"), in which he shares his "strong, funny, and offensive points of view."

[2] Although Rapaport purported to designate a "Joint Appendix," his Appendix was not in fact prepared jointly. Rapaport did not serve Barstool with an advance designation of the parts of the record he intended to include in the appendix in accordance with Federal Rule of Appellate Procedure 30(b)(1), and his Appendix omits Barstool's record evidence below. Accordingly, Barstool has prepared a Supplemental Appendix in accordance with L.R. 30.1(g) and has concurrently filed an unopposed motion to file the Supplemental Appendix.

A:1829, ¶ 2; Supplemental Appendix ("SA"):336-337. Rapaport is known for providing his "unfiltered views" on politics, sports, and pop culture, including via short video "rants" that he posts to social media. A:1829, ¶ 4.

Rapaport is the self-proclaimed "MVP of Talking Trash." A:1830, ¶ 5; SA:1080; SA:13-14. Trash-talking is a genre of humor that involves insulting or attacking other people in exaggerated terms. A:1830, ¶ 6; SA:1080-1083. Rapaport testified that making exaggerations that some may consider offensive to achieve a humorous effect is "one of the great mechanisms of comedy." A:1830, ¶ 7; SA:1084. He testified that not everything he says as a comedian is literal, and that whether a particular statement is meant to be true "depends on the context," "[t]one," and "intention"—for example, when Rapaport told a story about having gonorrhea, it was meant to be a joke, and he "didn't think anyone would actually take it seriously." A:1830, ¶ 7; SA:1084; A:1860, ¶ 55; SA:1080-1083; SA:1084; SA:1084-1086; SA:1089-1090; SA:1115-1119; SA:1099; A:1861, ¶ 58; SA:1115-1119. He testified that not only are context and tone important, but that exaggeration and hyperbole are the cornerstones of comedy. A:1860, ¶ 55; SA:1080-1083; SA:1084; SA:1084-1086; SA:1089-1090; SA:1115-1119; SA:1099.

Rapaport had a reputation for engaging in offensive conduct and making offensive comments long before the events giving rise to this dispute. For

example:

Rapaport's Reputation for Harassing His Ex-Girlfriend: In 1998, Rapaport pled guilty to the aggravated harassment of his ex-girlfriend, actress Lili Taylor. A:1830, ¶ 8; SA:1092-1095. Rapaport's guilty plea was publicized in the news and became associated with him on social media before Barstool made the allegedly defamatory comments. A:1831-1832, ¶ 9; SA:15-16; SA:17-20; SA:21-24; SA:25-26; SA:27-28; SA:29-30; SA:31-32; SA:659-661.

Rapaport's Reputation for Appearing to Have Herpes: In April 2015, a wire service posted a photo of Rapaport with a large red lesion under his lower lip:

A:1831, ¶ 10; SA:338-339. After the photo was posted, many social media users commented that Rapaport had herpes. A:1831, ¶ 12; SA:25-26; SA:33-34; SA:35-36; SA:37-39; SA:40-41; SA:42; SA:43-46; SA:47-48; SA:49-51; SA:52-53; SA:54-55; SA:56-57; SA:659-661. Most notably, in February 2017, Rapaport

engaged in a highly publicized trash-talking feud with a well-known national sports personality, Dan Le Batard. A:1831-1832, ¶ 13; SA:58-61; SA:62-67; SA:68-72; SA:73-79; SA:80-88. In connection with the feud, the producer of Le Batard's show tweeted the image of Rapaport with the red lesion and wrote, "[t]hat herpe was most the most standout performance you've had since 1994." A:1831-1832, ¶ 13; SA:59. The trash talking between Rapaport and Le Batard, including the producer's tweet of the image of Rapaport with the red lesion and reference to Rapaport having a "herpe," gained widespread attention. A:1831-1832, ¶ 13, SA:59. On his podcast, Rapaport himself acknowledged that: "In the picture, it looks like I got like a cut, infection or if you wanna pop shit, a herpe." A:1831, ¶ 11; SA:312 (audio at 22:58-23:05); SA:1097.

Rapaport's Reputation for Making Racially Charged Comments: Rapaport has made comments that have been criticized for being racially charged. A:1832-1833, ¶¶ 14, 15; SA:62-67; SA:89-93; SA:94-96; SA:97-100; SA:101-102; SA:103-104; SA:105-106; SA:340-350. For example, in connection with his February 2017 feud with Le Batard, Rapaport tweeted to one of Le Batard's producers, who is black, an image that one publication described as "evok[ing] old-America racial caricature imagery":

A:1832, ¶ 14; SA:62-67; SA:89-93; SA:94-96; SA:659-661. After Barstool fired Rapaport, he continued to engage in conduct that has been criticized as racially motivated. A:1832-1833, ¶ 15; SA:97-100; SA:101-102; SA:103-104; SA:105-106; SA:340-350. Such conduct included, among other things, an Instagram post of actress Kenya Moore (who is African American) next to the image of a gorilla. SA:97-100; SA:101-102; SA:103-104; SA 105-106.

<u>Rapaport's Reputation for Making Sexist and Other Offensive Comments</u>: Rapaport also has faced criticism for making sexist, misogynistic and other offensive comments. For example:

• In February and March 2017, it was widely reported that Twitter suspended Rapaport's account after he attacked political commentator Laura Ingraham, including by calling her a "dog-faced animal" who Donald Trump

"wouldn't even grab . . . by the pussy." A:1833, ¶ 16; SA:107-110; SA:111-115; SA:116-121.

• In April 2018, Rapaport, who was then 48 years old, falsely Tweeted to Barstool employee Henry Lockwood that he had "fucked Yo Bitch," referring to Lockwood's then 19-year-old girlfriend, a Barstool personality. When, in response, a third party asked whether Lockwood's girlfriend had herpes, Rapaport replied: "Nah but she got this Pipe." A:1834, ¶ 18; SA:351-352; SA:148-150.

• In July 2018, Rapaport was criticized for tweeting about the Thai youth soccer team trapped in a cave: "I haven't seen someone try to get a Thai boy out of a hole this frantically since I walked in on Kevin Spacey in the men's room at Chuckie Cheese." A:1834, ¶ 20; SA:161-164.

• Rapaport has faced widespread criticism for using the word "retard" while at the same time starring on a Netflix show in which he plays the father of a special-needs child. A:1834, ¶ 19; SA:151-154; SA:155-157; SA:158-160.

• Rapaport was widely denounced for making sexist attacks on singer Ariana Grande's appearance, including by stating that "there's hotter women at Starbucks – no disrespect to Starbucks." A:1833, ¶ 17; SA:122-125; SA:126-129; SA:130-133; SA:134-139; SA:140-145; SA:146-147; SA:1102-1104.

Rapaport testified that some of these comments (such as those about Ingraham) were meant to be serious, while others (such as those about Grande)

were meant to be a joke, that "context is important" in interpreting them, that his fans "totally understand" him, and that "what I deem funny is okay." A:1834, ¶ 21; SA:1084-1086; SA:1101.

B. Barstool is a Media Company and Humor Brand That Does Not Try to Be Politically Correct

Barstool is a media company and humor brand "[k]nown for its original takes and unfiltered view of most everything" that "people love or love to hate." A:1835, ¶ 22; SA:1254-1255; SA:1277. Barstool does not try to be politically correct and has been involved in its share of public controversies. A:1835, ¶ 23; SA:1219-1220; SA:1276; SA:1277; SA:1301. Barstool's backbone is its devoted fan base, known as "Stoolies." A:1835, ¶ 27; SA:1242-1243. Barstool is an "authentic" brand, meaning that it tries to stay true its brand of humorous, no-holds barred discourse that its fans have come to expect. A:1835, ¶ 24; SA:1223-1224.

C. Rapaport Brings His Content to Barstool

In October 2016, Barstool reached out to Rapaport about hiring him, writing that Rapaport would "fit perfectly with our style of comedy." A:1836, ¶ 29; SA:353-354. Rapaport and Barstool proceeded to negotiate and ultimately entered a talent agreement with an effective date of June 17, 2017. A:1837-1840, ¶ 33-36; SA:372-381; SA:382-391; SA:392-400; SA:1134; SA:411-421; SA:494-495; SA:496-498; SA:401-410; SA:422-431; SA:432-445; SA:446-469; SA:470-493.

D. Rapaport and Barstool Personality "Smitty" Feud Over Bets

Within months of joining Barstool, Rapaport began feuding with Barstool personality Adam "Smitty" Smith. A:1841, ¶ 40; SA:508-530. Smith complained that Rapaport made a fantasy football bet with him, lost it, and did not pay; Rapaport denied making the bet. *Id*. In November 2017, Smith wrote a blog post describing what he believed had happened titled "Michael Rapaport Is A Fraudulent Sack of Shit." *Id*.

In February 2018, Rapaport and Smith had another dispute over a bet. A:1841, ¶ 41; SA:531-541. Smith was fighting in an amateur boxing contest owned by Barstool, and Rapaport bet that Smith would lose. *Id*. When Smith won, Rapaport refused to pay, asserting that Smith had used steroids. *Id*. On February 14, 2018, Smith posted another blog describing what he believed had happened titled "Michael Rapaport Is A Fraudulent Sack of Shit – Part II." *Id*.

E. Rapaport Calls Stoolies Losers, Causing Barstool to Fire Him

Rapaport then proceeded to post a barrage of public tweets accusing Smith of taking steroids. A:1841, ¶ 42; SA:167-256. He thereafter started attacking Stoolies and other Barstool personalities. A:1841-1842, ¶¶ 42, 43; SA:167-184; SA:227-256; SA:542-549; SA:180-182; SA:183-184; SA:185-187; SA:188-193; SA:194-199; SA:200-205. For example, on February 16, 2018, one Twitter user replied to a Rapaport tweet about Smith taking steroids by asking: "Did your

girlfriend ask you to get tested for PEDS after you beat her?" A:1841-1842, ¶ 43; SA:180-182. Rapaport replied: "Only thing I ever beat is my dick & your moms pussy." *Id*. The user responded by posting the image of Rapaport with the red lesion and writing: "My mom doesn't have herpes tho." *Id*. Rapaport replied: "Where do you think that pig got it from?" *Id*.

Rapaport's attacks on Stoolies culminated in a tweet he made on the evening of February 17, 2018. A:1841-1842, ¶ 43; SA:542-549. A Twitter user replied to an exchange between Smith and Rapaport by asking Smith to start a poll "asking Stoolies if they like @MichaelRapaport." *Id*. Rapaport responded: "[I]f you call yourself a fucking stoolie for real, you've already lost in life." *Id*.

Rapaport's tweet enraged Stoolies and Barstool personalities, many of whom commented that he did not understand Barstool's culture or appreciate its fans. A:1842-1843, ¶¶ 44, 45; SA:542-549; SA:257-258; SA:259-260; SA:261-262; SA:263-264; SA:265-266; SA:267-273; SA:274-280; SA:281-283; SA:284-290; SA:291-297. Many Stoolies reacted by leaving negative reviews and ratings on Rapaport's IAR podcast.[3] A:2080-2082, ¶¶ 452, 453, 455-457; SA:542-549; SA:180-182; SA:183-184; SA:185-187; SA;188-193; SA:194-199; SA:200-205; SA:257-258; SA:259-260; SA:261-262; SA:263-264; SA:265-266; SA:550-552;

[3] In response to Stoolies leaving bad reviews and ratings, Rapaport tweeted on February 21, 2018: "Nobody gives a fuck about Podcast reviews." SA:1337-1340.

SA:298-301; SA:314-315; SA:302-306; SA:316-317. Barstool's founder and Head of Content David Portnoy testified that "nobody in the history" of Barstool, much less a newcomer, had "ever said anything remotely similar" to what Rapaport said in attacking Stoolies, and that it should be "common sense" not to "bite the hand that feeds you." A:1901-1902, ¶¶ 89, 90; SA:1218.

The next morning, Portnoy wrote to Rapaport that Barstool had to fire him "after last night." A:1843, ¶ 46, SA:550-552. Portnoy then posted a video to Twitter and Barstool's website explaining that he was firing Rapaport because he had "insult[ed] our entire" fan base, Stoolies are the reason "we all have jobs," and "we love our fucking fans, they're the best." A:1843, ¶ 47; SA:298-301.

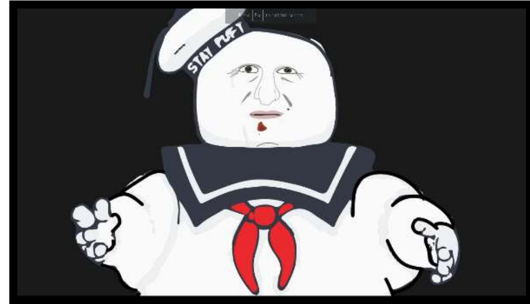
F. After Rapaport is Fired, the Parties Trade Over-the-Top Insults

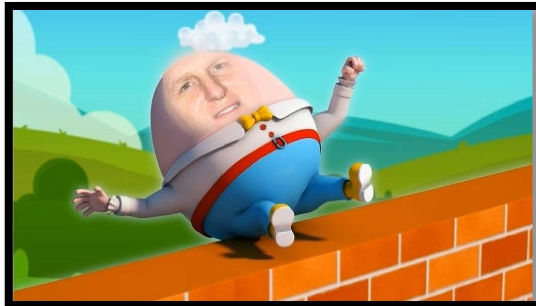
After Rapaport was fired, the parties continued to trade over-the-top insults. For example, on the same day he was fired, Rapaport logged into Barstool's main Twitter account without its permission and posted a video in which he said that Portnoy was a "dumb mother fucker," a "dumb fuck," and a "bitch." A:1843, ¶ 48; SA:302-306; SA:316-317. On February 21, 2022, Rapaport posted a photoshopped image to his Twitter account in which he appeared to be having anal sex with Portnoy:

Barstool responded in kind by joking about what had happened and making fun of Rapaport. For example, Barstool promoted and sold a "Rapaport Clown" t-shirt depicting the photograph of Rapaport with a red lesion under his chin that it modified by adding a clown nose and coloring both the nose and lesion the same shade of red. A:1941-1942, ¶ 190; SA:1246-1247:

On February 23, 2018, Barstool posted a cartoon video titled "Fired Up." The cartoon depicted Rapaport as having a talking red lesion on his face who was also his producer; imagined Rapaport as the Stay-Puft Marshmallow Man, Humpty

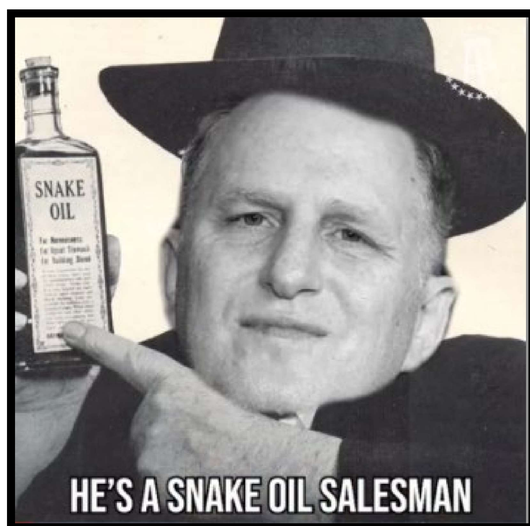
Dumpty, and a litigious ghost; and featured a doctor telling Rapaport's "fake son" that "your fake dad has herpes" and "Ding Dongs for Brains." The images featured in the video include the following:





SA:1315. Rapaport asserts that many of the statements in this cartoon are defamatory. A:2106, ¶ 46; SA:659-661.

On February 26, 2018, Barstool posted a "diss track" song and video created by several Barstool personalities. A:1843, ¶ 50; SA:318. Among other things, the Barstool personalities referred to Rapaport in the diss track as a "10-gallon drum of curdled milk," a "walking blob of jizz," and a "chemo Yertle the Turtle." *Id*. The images featured in the video included the following:



A:1843, ¶ 50; SA:318. Rapaport asserts that many of the statements in the diss track are defamatory. A:2106, ¶ 46; SA:659-661.

G. Rapaport's Career Thrives After Being Fired by Barstool

Rapaport's career thrived after Barstool made the allegedly defamatory statements. For example, in 2018, after he was fired from Barstool, Rapaport received a $700,000 podcast guarantee from the Luminary podcast network, which

was well above the $400,000 podcast guarantee he had received from Barstool. A:1541, ¶ 71; A:1776-1797; A:1772. Rapaport also continued to star in the Netflix show "Atypical." A:2070, ¶ 424; SA:151-154; SA:155-157; SA:158-160. Rapaport testified that he had no difficulty continuing to obtain work in the entertainment industry after the allegedly defamatory statements were made. SA:1105-1107. For these and other reasons, Barstool's expert testified that Rapaport's reputation suffered no harm. SA:1361.

H. Rapaport Files Suit, and the Court Denies Rapaport's Summary Judgment Motion and Grants Barstool's Motion

Rapaport—the self-proclaimed "MVP of Talking Trash" whose mantra is "you got to give it; you got to take it" (A:1830, ¶ 5; SA:1080; SA:13-14; and A:1861, ¶ 56; SA:1100)—decided to bring the parties' schoolyard feud to federal court by filing this lawsuit on September 25, 2018. A:1.

Rapaport asserted 11 different claims, including for fraud, defamation and breach of contract. He sought over $15 million in damages. A:29-64, 649. Rapaport's defamation claims consisted of more than 75 written, audio and visual comments made by Barstool personalities on social media and on Barstool platforms. A:1844-1860, ¶¶ 52, 53. Rapaport filed a motion for summary judgment as to each of these claims and Barstool's single breach of contract counterclaim based on 407 purportedly undisputed facts. A:114-212. Barstool filed a motion for summary adjudication that was solely directed at Rapaport's

fraud and defamation claims. A:2134-2173.

On March 29, 2021, Southern District of New York District Court Judge Naomi Reice Buchwald issued a detailed 64-page decision in which the court denied Rapaport's motion for summary judgment in its entirety and granted Barstool's motion for summary adjudication in its entirety. Special Appendix ("SPA"):1-64. Rapaport filed a motion for reconsideration, which Judge Buchwald denied in a detailed 27-page order on June 25, 2021. SPA:65-91. On September 12, 2022, Judge Buchwald granted the parties' stipulation and order dismissing their respective breach of contract claims with prejudice and permitting Rapaport to bring an appeal solely with respect to his defamation claims. A:27-28.

IV. <u>SUMMARY OF THE ARGUMENT</u>

Rapaport cannot establish essential elements of his defamation claims. Specifically, Rapaport cannot establish that Barstool made any actionable statements of fact—each of the allegedly defamatory statements was a non-actionable opinion. And, even if any of the allegedly defamatory statements was an actionable statement of fact, Rapaport cannot demonstrate falsity or actual malice.

Statements of fact are actionable; statements of opinion are not. *Steinhilber v. Alphonse*, 501 N.E.2d 550, 552 (N.Y. 1986). Here, the district court correctly found that all of the allegedly defamatory statements were non-actionable opinions.

The district court properly began its analysis by looking at the entirety of the statements at issue and the context in which they were made. The district court recognized that the allegedly defamatory comments were made in the context of a trash-talking feud between two public figures known for their highly charged opinions on matters of public interest. The feud began with a dispute about unpaid bets and escalated when Rapaport attacked Barstool and its fans, calling Stoolies losers, posting an image of himself having anal sex with Portnoy, and falsely insinuating that he had sex with a 19-year-old Barstool personality.

As the district court properly recognized, any reasonable reader, viewer or listener would consider the identities and reputations of the parties who made these comments in understanding whether they were statements of fact or opinion. Rapaport, the "MVP of Talking Trash," readily admits that his fans understand that many of the comments he makes are not meant to be true and that context matters in determining whether something is a joke. Likewise, Barstool is a humor brand with a no-holds-barred approach to popular culture where "politically incorrect" speech and behavior is widely accepted. Fans of both would expect comments of hyperbole and opinion, not a "rigorous and comprehensive presentation of factual matter." *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1280 (N.Y. 1991) (internal quotation marks omitted). Although Rapaport makes much of the fact that Barstool considers itself "authentic" and "real," this is in no way a

representation that Barstool reports factual matters. Indeed, those statements imply just the opposite—that Barstool will be true to its brand, pull no punches and be opinionated.

Moreover, Rapaport improperly attempts to cherry-pick isolated words and phrases from larger publications in order to characterize them as defamatory statements of fact. But, as the district court correctly recognized, the law requires that the allegedly defamatory publications be viewed in their entirety and in context in determining whether they are statements of fact or opinion. Here, each of the challenged statements is part of a larger publication that clearly demonstrates its nature as rhetorical hyperbole and opinion.

Indeed, many of the allegedly defamatory statements are contained in Barstool's "diss track" rap video, which is a collection of insults and trash talk aimed at mocking Rapaport for humorous effect. Rapaport also challenges the cartoon video "Fired Up" in which Rapaport is depicted as cartoon characters such as Humpty Dumpty and the Stay-Puft Marshmallow Man from *Ghostbusters*. These publications, which contain dozens of the allegedly defamatory statements, are obviously designed to be humorous, hyperbolic trash talk and nothing more. No reasonable person would understand these publications to contain statements of fact.

Finally, as the law makes clear, reasonable people take into consideration

where these comments were made. Statements made on social media and Barstool's virtual platforms are less likely to be understood as objective statements of fact. The "culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a freewheeling, anything-goes writing style" that signals to readers that statements made in these forums should be interpreted as opinion or hyperbole rather than fact. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 339 (Sup. Ct. 2017) (internal quotation marks omitted); *SI03, Inc. v. Bodybuilding.com*, LLC, 2008 WL 11348458, at *10 (D. Idaho May 1, 2008) ("[I]n the context of Internet postings and the casual dialogue that typically accompanies such 'cyber-smackdowns,' name-calling, hyperbole, and, generally, juvenile behavior is not unusual; indeed, it is not only expected at times, but often encouraged."). The comments at issue are precisely this type of Internet-based insult and heated rhetoric.

Even if Rapaport had demonstrated that any of the allegedly defamatory statements were actionable statements of fact, he failed to prove falsity. To the contrary, Barstool presented evidence that its statements were substantially true. Importantly, literal accuracy is not required. *Printers II, Inc. v. Professionals Publishing, Inc.*, 784 F.2d 141, 146-47 (2d Cir. 1986). Instead, an allegedly defamatory statement is considered true if the "gist" or "sting" of the statement is supported by facts. Here, the allegedly defamatory statements were substantially

true.

Rapaport claims the supposedly defamatory herpes statements were false because he does not have herpes. However, even Rapaport himself conceded that the photo of him with a lesion under his lip made it look like he had herpes. A:1831, ¶¶ 10, 11; SA:1097; SA:312 (audio at 22:58-23:05). Each of Barstool's allegedly defamatory statements about Rapaport and herpes was based on that photo which did, in fact, look like Rapaport had herpes.

Rapaport claims the race comments were false because he is married to a black woman and often has black guests on his podcasts. However, Barstool's evidence demonstrates that Rapaport has a long history of making racially insensitive jokes and comments that many have publicly characterized as racist. A:1832-1833, ¶ 14, 15; SA:62-67; SA:89-93; SA:94-96; SA:97-100; SA:101-102; SA:103-104; SA:105-106; SA:340-350. Those insensitive jokes and comments fully support Barstool's race comments.

Rapaport next claims that Barstool's fraud comments are false because he disputes defendant Smith's story about the bets on which Rapaport reneged. Barstool reasonably believed that Rapaport had reneged on bets with defendant Smith and therefore was not who he publicly pretended to be. A:1841, ¶ 40; SA:508-530; A:1841, ¶ 41; SA:531-541. These facts fully support the statements that Rapaport was a fraud.

Finally, Rapaport claims the stalking statements are false because he was not convicted of "stalking." However, Rapaport was convicted of aggravated harassment of his ex-girlfriend. A:1830, ¶ 8; SA:1092-1095. "Stalking" is simply common parlance for excessive, unwanted communications and contact to the point of harassment. *Lawrence v. Altice USA*, 841 F. App'x 273, 275 (2d Cir. 2021). Accordingly, Barstool's comments about Rapaport stalking his ex-girlfriend were substantially true.

Finally, even if any of the allegedly defamatory comments were not literally or substantially true, as a public figure, Rapaport was required to prove by clear and convincing evidence that Barstool acted with actual malice. *James v. Gannett Co.*, 353 N.E.2d 834, 839 (N.Y. 1976). In order to make this showing, Rapaport had to establish that Barstool intended to make a statement of fact and did so with either actual knowledge of falsity or reckless disregard for the truth. *New Times, Inc. v. Issacks*, 146 S.W.3d 144, 165 (Tex. 2004). That Barstool may have acted with ill will is not sufficient. *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001).

Here, the foregoing facts clearly demonstrate that Barstool did not intend any of the allegedly defamatory statements to be a statement of fact. Rather, Barstool intended each of the allegedly defamatory statements to be a humorous, hyperbolic insult as part of the ongoing trash-talking feud between the parties.

Further, even if Rapaport had presented evidence that Barstool intended to make a statement of fact, the above analysis demonstrates that Barstool had a reasonable basis on which to make each of the allegedly defamatory statements. Accordingly, Rapaport cannot prove actual malice.

V. STANDARD OF REVIEW

The Order granting Barstool's motion for summary judgment is reviewed *de novo*, and should be upheld if the evidence, viewed in the light most favorable to Rapaport, demonstrates that there are no genuine issues of material fact and that the judgment is warranted as a matter of law. *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 75 (2d Cir. 2010). This Court may affirm the judgment of the district court on any ground appearing in the record, whether or not considered by the district court. *Boy Scouts of America v. Wyman*, 335 F.3d 80, 90 (2d Cir. 2003).

VI. ARGUMENT

Rapaport's defamation claim encompasses more than 75 written, audio and visual comments and references made by Barstool personalities on social media and on Barstool platforms. A:1844-1860, ¶¶ 52, 53. Rapaport cherry-picks isolated words, phrases or sentences from these larger works, ignoring the entirety of the communications and their larger context. *Id*. The purportedly defamatory comments fall into one or more of four categories: (1) comments allegedly claiming that Rapaport has herpes (the "Herpes Comments"); (2) comments

allegedly claiming that Rapaport is racist (the "Race Comments"); (3) comments allegedly claiming that Rapaport is a fraud, hack, wannabe or liar (the "Fraud Comments"); and (4) comments allegedly claiming that Rapaport committed stalking and domestic violence (the "Stalking Comments"). *Id.*

The elements of a claim for defamation under New York law are: (1) a false and defamatory statement of fact concerning the plaintiff; (2) that was published by the defendant to a third party; (3) fault (either negligence or actual malice depending on the status of the libeled party); and (4) special damages or "per se actionability." *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 176 (2d Cir. 2000). Rapaport cannot satisfy these elements. First, none of the comments at issue is an assertion of fact capable of being proven true or false. Second, to the extent any statement could be deemed a statement of fact, it was substantially true when made. Third, Rapaport is a public figure and Rapaport cannot prove that Barstool made any of the statements with actual malice.[4]

A. <u>The District Court Correctly Concluded That the Allegedly Defamatory Comments Were Non-Actionable Statements of Opinion</u>

Statements of fact are actionable; statements of opinion are not. *Steinhilber*, 501 N.E.2d at 552. A "pure opinion" is one that either includes a "recitation of the facts upon which it is based" or that "does not imply that it is based upon

[4] While Rapaport also has not established special damages, Barstool did not assert lack of damage as a basis for summary judgment below.

undisclosed facts." *Id*. Opinions can only be actionable if they imply that the speaker knows certain facts which are detrimental to the plaintiff and false. *Id*. at 553. Moreover, even apparent statements of fact may assume the character of opinion—and are therefore privileged—when made under circumstances in which the audience would anticipate the use of "epithets, fiery rhetoric or hyperbole." *Id*. at 556 (internal quotation marks omitted).

The question of whether a statement is one of fact or opinion is an issue of law to be determined by the Court. *Id*. at 553. The Court must decide what a reasonable person hearing, viewing or reading the communication would understand it to mean. *Id*. In order to make this determination, New York courts consider four factors: (1) whether the specific language at issue has a precise meaning that is readily understood; (2) whether the statement is capable of being objectively characterized as true or false; (3) the full context of the communication in which the statement appears; and (4) "the broader social context or setting surrounding the communication . . . which might 'signal to readers or listeners that what is being read or heard is likely to be opinion, not fact[.]'" *Id*. at 554 (quoting *Ollman v. Evans*, 750 F.2d 970, 983 (D.C. Cir. 1984)).

Contrary to Rapaport's position, the court's defamation analysis is not to be conducted in a mechanical, step-by-step manner. *Flamm v. Am. Ass'n. of Univ. Women*, 201 F.3d 144, 153 (2d Cir. 2000). Rather, courts must take a "holistic"

approach to the analysis, looking at the overall context of the publications rather than just the allegedly defamatory portions. *Davis v. Boeheim*, 22 N.E.3d 999, 1005 (N.Y. 2014). Each of the allegedly defamatory comments constitutes a non-actionable opinion under this analysis.

1. The District Court Was Not Required to Determine Whether the Allegedly Defamatory Comments Were "Linguistically" or "Grammatically" Statements of Fact

Rapaport's analysis of whether the allegedly defamatory comments are statements of fact or of opinion is precisely **backwards**. Without acknowledging the entirety of the publications containing the allegedly actionable statements or quoting the language from any of the larger comments, Rapaport simply asserts that the cherry-picked phrases he complains about are "linguistically" and "grammatically" statements of fact. Rapaport then argues about whether the overall context or content of any of those comments could possibly transform them into statements of opinion. AOB, 32. Rapaport's arguments have no basis in the law.

New York law is clear that even statements that might be considered factual and defamatory in nature when viewed in isolation are frequently held to be statements of opinion when viewed within their larger context. *See Steinhilber*, 501 N.E.2d at 556. As a result, allegedly defamatory statements "must first be viewed in their context in order for courts to determine whether a reasonable

person would view them as expressing or implying *any* facts." *Immuno AG.*, 567 N.E.2d at 1281 (emphasis in original). It is wholly improper to isolate words or phrases of larger publications and evaluate those selected portions to determine whether "linguistically" or "grammatically" they are factual assertions.

Indeed, *Immuno AG.* explicitly rejected the analysis proffered by Rapaport, holding that the analysis of whether an allegedly defamatory statement is fact or opinion ***must begin*** with the "***whole*** communication, its ***tone*** and ***apparent purpose***." *Id*. (emphasis added.) "The difference is more than theoretical." *Id*. Context matters, as even Rapaport himself has admitted. SA:1085, 1121-1122. The Court in *Immuno AG.* held that, even though the allegedly defamatory statements appeared to be factual on their face, because they were made in the context of a letter to the editor, a reasonable reader would have understood those statements to convey the personal opinions of the author, not statements of fact. *Immuno AG.,* 567 N.E.2d at 1281.

Simply put, in deciding whether any of the allegedly defamatory comments contain defamatory statements of fact, the Court must first examine the entirety of the communications in context to determine whether any statements contained within those communications may be understood as factual assertions. *Brian v. Richardson*, 660 N.E.2d 1126, 1130 (N.Y. 1995); *Immuno AG.,* 567 N.E.2d at 1281; *Tannerite Sports, LLC v. NBCUniversal News Group*, 864 F.3d 236, 249-50

(2d Cir. 2017) (court must consider "entire publication, as well as the circumstances of its issuance, to interpret its meaning").

Here, Rapaport fails to provide the Court with any of the relevant context for the statements about which he complains. For this reason alone, Rapaport cannot demonstrate any error by the district court. *See Niagra Mohawk Power Corp. v. Hudson River-Black Regulating Dist.*, 673 F.3d 84, 107 (2d Cir. 2012) (failure to make or properly support an argument is deemed waiver of that issue).

Rapaport ignores the relevant context because when the allegedly defamatory comments are viewed in their full context, there can be no question they are all non-actionable opinions.

2. The Context in Which the Allegedly Defamatory Comments Were Made Demonstrates That They Were Non-Actionable Opinions

Rapaport himself concedes that context is important in determining whether something is meant to be taken seriously or as a joke. Rapaport testified that not only are context and tone important, but that exaggeration and hyperbole are cornerstones of comedy. A:1860, ¶ 55; SA:1080-1081; SA:1084-1086; SA:1089-1090; SA:1099; SA:1115-1119; SA 1121-1122. Indeed, when Rapaport himself joked about having had a sexually transmitted disease, he "didn't think anyone would actually take it seriously." A:1861, ¶ 58; SA:1115-1116. Here, the overall context of the allegedly defamatory statements demonstrates that any reasonable

person would understand that they all are opinions.

The Statements Were Made During a Trash-Talking Feud: All of the allegedly defamatory comments were made in the context of a trash-talking feud that first started when Smith and Rapaport exchanged insults about unpaid bets. Rapaport then escalated that feud by attacking Barstool and its fans, calling Stoolies losers, posting a photoshopped image of himself having anal sex with Portnoy, and falsely insinuating that he had sex with a 19-year-old female Barstool personality. A quick review of the allegedly defamatory comments demonstrates that they are precisely the type of colorful insults made during trash-talking—*e.g.*, "herpes-riddled fuck," "old crusty herpe," "herp-infested horse," "fraudulent sack of shit," "pasty, sickly, race-baiting fraud hack." A:1844-1860. Indeed, these statements are, in the words of one court, "puerile attempts . . . to outdo each other." *Finkel v. Dauber*, 906 N.Y.S.2d 697, 701-02 (Sup. Ct. 2010).

The Statements Were Made by the "MVP of Talking Trash" and a Humor Brand: A reasonable reader would consider who made these statements. Rapaport, the "MVP of Talking Trash," readily admits that his fans understand that many of the statements he makes are not meant to be true. Likewise, Barstool is a humor brand with a no-holds-barred approach to popular culture where "politically incorrect" speech and behavior is widely accepted. Fans of both would expect statements of hyperbole and opinion, not a "rigorous and comprehensive

presentation of factual matter." *Immuno AG.,* 567 N.E.2d at 1280 (internal quotation marks omitted); *McDougal v. Fox News Network, LLC*, 489 F. Supp. 3d 174, 183 (S.D.N.Y. 2020) ("general tenor" of television program that "aims to challenge political correctness" would inform a viewer that host is not "stating actual facts" about the topics he discusses and is instead engaging in "exaggeration" and "non-literal commentary"). Indeed, the fact that 80% of those who read the blogs containing the allegedly defamatory statements were repeat visitors to Barstool's site demonstrates that a reasonable reader would consider them in this context. SA:951.

The Statements Were Made on Social Media and Barstool Platforms: A reasonable reader or viewer would consider where these statements were made. They were not made in *The New York Times* but on social media and Barstool's virtual platforms. The "culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a freewheeling, anything-goes writing style" that signals to readers that statements made in these forums should be interpreted as opinion or hyperbole rather than fact. *Jacobus*, 51 N.Y.S.3d at 339 (internal quotation marks omitted); *SI03, Inc.*, 2008 WL 11348458, at *10 ("[I]n the context of Internet postings and the casual dialogue that typically accompanies such 'cyber-smackdowns,' name-calling, hyperbole, and, generally, juvenile behavior is not unusual; indeed, it is not

only expected at times, but often encouraged."). The statements at issue constitute precisely this type of Internet-based insult and heated rhetoric.

Rapaport contends that the district court erred by ruling that all statements made on the Internet are necessarily deemed opinions. AOB, 42. The court did no such thing. Instead, the district court properly recognized that readers and viewers of content posted to the Internet understand that such content is more likely to contain the personal opinions of the author than content which appears in other publications. That is particularly true here, given the nature of Barstool's business and brand. Consumers of Barstool content understand that Barstool's personalities offer commentary and opinions on the world of sports and entertainment. That is Barstool's business.

The district court was clearly correct in viewing the allegedly defamatory comments through the prism of the forums in which they were made. The law requires the court to do just that. Even the cases cited by Rapaport recognize that the fact that statements are made on the Internet is part of the contextual analysis in determining whether the statements are opinion or fact. For example, Rapaport cites *Zuckerbrot v. Lande*, 167 N.Y.S.3d 313 (Sup. Ct. 2022) for the proposition that statements on the Internet can be defamatory. But Rapaport ignores the critical passage in *Zuckerbrot*, in which the court states: "Ultimately, context is more than just the medium through which a statement is conveyed; it is a holistic

inquiry concerning the content of the communication as a whole, including its tone and apparent purpose." 167 N.Y.S.3d at 332, citing *Brian*, 660 N.E.2d at 1130. That does not mean that *all* statements made on the Internet are necessarily opinions. But it does mean that the district court properly considered this factor when making its decision.

3. The District Court Correctly Ruled That Comments About Rapaport Having Herpes Were Non-Actionable Opinions

Rapaport argues that Barstool repeatedly asserted that Rapaport has herpes, even though he does not. Therefore, according to Rapaport, Barstool made defamatory statements of fact. As the district court correctly analyzed, Barstool's references to Rapaport having herpes were nothing more than insults and personal attacks that would not have been understood by a reasonable reader or listener as statements of fact.

To begin with, contrary to Rapaport's entire argument, the herpes-related statements highlighted in Rapaport's Opening Brief cannot even be considered statements of fact on their face. Rapaport complained about insults such as "Herpes-riddled fuck," "herpe-having, race baiting, D-list actor," and "75-year old, herpe-having piece of shit." AOB, 13. But, of course, Rapaport is not 75 years old, nor is he literally a portion of excrement. Therefore, none of these phrases can be considered factual or "true" in any way. They are simply hyperbolic insults, made to poke fun at the lesion on Rapaport's mouth, that no reasonable person

would believe is anything other than figurative over-the-top trash talk.

More to the point, however, many of the supposed statements of fact about Rapaport having herpes are contained within the "diss track" video entitled "Fire Rap." A:1843, ¶ 50; SA:318. The entire purpose of diss tracks is to insult another person. This video contains, among others, the statements calling Rapaport a "herpes-riddled fuck" and a "75-year-old, herpe-having piece of shit." *Id.* Rapaport refuses to acknowledge the very nature of this video, which is to attack and insult Rapaport for humorous effect as part of parties' ongoing feud.

As the district court correctly noted, the video begins by summarizing the nature of the dispute between Barstool and Rapaport, to let viewers know that the statements to follow should be viewed in context of the ongoing trash talking feud between the parties. *See Steinhilber*, 501 N.E.2d at 556 (when the "audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole" statements are more likely to be understood as opinion) (citation omitted); *see also Brian*, 660 N.E.2d at 1131 (statements were considered opinions when the publication made clear that the author was "not a disinterested observer") (citation omitted).

After providing viewers with that context, the diss track proceeds to hurl a rapid-fire collection of hyperbolic insults at Rapaport, calling him a "10-gallon drum of curdled milk," a "walking blob of jizz," and stating that he looks like "Larry Bird's mom's sister," a "puddle of pudding," a "chemo Yertle the Turtle"

and more. SA:318. The video also contains fanciful images, depicting Rapaport as a cartoon cracker and a snake oil salesman. *Id*. Rapaport is not "literally" any of these things. All of these insults and images clearly signal to the viewer of the "diss track" that it is not meant to be taken seriously but is instead intended for humorous effect.

Rapaport also complains that a post written by defendant Eric Nathan referring to Rapaport as a "D List Actor with A Slight STD Problem" contains factual assertions that Rapaport has herpes. But the post is manifestly a parody of a real news article about Rapaport stopping a plane passenger from opening the exit door while in flight. SA:784-792. After linking to the original TMZ news article, Nathan's entire blog jokingly theorizes that the passengers were trying to jump out of the plane in mid-air to avoid being near Rapaport. *Id*. Indeed, the fact that Nathan includes a link to the true story about the incident reveals that Nathan's article is pure satire. No one would understand anything in this post to be factual.

Next, Rapaport claims that the "Fired Up" cartoon contains statements of fact that Rapaport has herpes. But, as with the "diss track" video, the cartoon begins by reminding viewers of the history of the dispute between Barstool and Rapaport in order to put the statements in context. The cartoon then contains numerous fanciful images, including depicting Rapaport as Humpty Dumpty and the Stay-Puft Marshmallow Man from *Ghostbusters*. SA:1315. The cartoon also

introduces the lesion on Rapaport's lip as its own character that actually speaks. Then, when the cartoon discusses Rapaport having herpes, the cartoon doctor diagnoses him with "Ding Dongs for brains," along with an image of an X-ray of Homer Simpson with a box of Ding Dongs in his head. No reasonable viewer of this cartoon would understand any of its contents to be statements of fact.

Finally, Rapaport takes issue with the t-shirt depicting Rapaport as a clown with a red lesion on his lip and statements made by Barstool regarding that t-shirt. As the district court correctly recognized, no reasonable viewer of the t-shirt would understand it to be asserting that Rapaport has herpes. Instead, it is nothing more than an unflattering, mocking portrayal of Rapaport as a clown. Moreover, the statements made in connection with the promotion of the t-shirt refer to Rapaport as a clown or contain other insults. In context, it is clear that Barstool simply used a pre-existing unflattering image of Rapaport with a lesion, to which it added a clown nose and colored the lesion red, in order to make fun of him.

Accordingly, Rapaport has failed to demonstrate that any of the statements about Rapaport having herpes were actionable statements of fact.

4. The District Court Correctly Ruled That Comments about Domestic Abuse or Stalking Were Non-Actionable Opinions

Rapaport focuses much of his Opening Brief on the assertion that Barstool supposedly stated that he physically abused his ex-girlfriend. AOB, 14-15. This assertion is based on the single "black and blue" comment that appears near the

end of the "diss track" video. SA:318. The phrase about which Rapaport complains is the last line in the following stanza:

> You look like a chemo version of Yertle the Turtle
> Shooting blanks on Twitter like Portnoy the infertile
> You're all bark, no bite, a fraud and a hack
> The only place you're tough is behind people's backs
> And if you wanna go in real life just come at me and flex
> I'll end up making you look as black and blue as your ex.

Id. Rapaport also takes issue with the line in the "diss track" stating that Rapaport gives "girls the heebie jeebies so you stalk them." Neither of these comments can be considered a statement of fact.

As discussed above, no reasonable viewer would understand any of the "diss track" video, let alone the "black and blue" line or the stalking line, as an assertion of fact. Each of the six lines in the foregoing stanza is clearly a hyperbolic insult. It begins with an absurd reference to Rapaport looking like Yertle the Turtle undergoing chemotherapy, then turns its insults towards defendant Dave Portnoy before returning to insulting Rapaport. In this context, no one would understand the "black and blue" line as being literal or factual. It is simply part of a trash-talking rap video designed to insult Rapaport. As the Southern District of New York recently noted, "It has long been the law that simply invoking a criminal act or accusing a person of a crime does not transform an otherwise nonfactual statement into a factual assertion if the accusation, in light of the surrounding context, is 'rhetorical hyperbole' or where the record is 'devoid of evidence' that

anyone thought a crime was actually committed." *McDougal*, 489 F. Supp. 3d at 182. Such so-called "criminal accusations" are "often construed as merely rhetorical hyperbole" where, as here, "they are not accompanied by additional specifics of the actions purportedly constituting the crime." *Id.*

Rapaport also takes issue with comments made by Defendant Portnoy about Rapaport having had a stalking case filed against him. AOB, 15. Yet again, Rapaport ignores the context. As an initial matter, as the Second Circuit recently noted in *Lawrence*, 841 F. App'x at 275, the common definition of "stalking" encompasses generally harassing behavior, not necessarily a particular crime. In any event, each of Portnoy's comments about a "stalking" case or charge against Rapaport coincide directly with a full description of the conduct engaged in by Rapaport against his ex-girlfriend—conduct which resulted in Rapaport pleading guilty to aggravated harassment. Therefore, the use of the word "stalking" by Portnoy would be properly understood by any reasonable viewer to refer to Portnoy's opinion about the meaning of the harassment charges filed against Rapaport. Because the basis for Portnoy's opinion that Rapaport was charged with "stalking" was fully disclosed, it is not actionable. *Steinhilber*, 501 N.E.2d at 552; *see also Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) (if "the author presents the factual basis for his statement, [it] can only be read as his personal conclusion about the information presented, *not as a statement of fact*") (emphasis

in original) (quotation marks omitted).

5. The District Court Correctly Ruled That Statements About Rapaport Being a Fraud, Hack or Liar Were Non-Actionable Opinions

Rapaport complains about numerous statements calling Rapaport a "fraud," a "wannabe," a "hack" and a "liar." Each of these statements is nothing more than an insult based on Barstool's subjective evaluation of Rapaport's character. As such, none of these statements can be proven true or false because they are inherently subjective. *See e.g.*, *Eros Int'l, PLC v. Mangrove Partners, No. 13070,* 2021 WL 432837, at *1 (N.Y. App. Div. Feb. 9, 2021) (citations omitted) (finding that a tweet describing a subject as "a fraud" was a non-actionable opinion); *Sherr v. HealthEast Care Sys*., 416 F. Supp. 3d 823, 843 (D. Minn. 2019) (holding that calling someone a "hack" is a non-actionable opinion).

Moreover, these comments are readily recognized as nothing more than rhetorical hyperbole, *i.e*., exaggerations employed for rhetorical effect. *See, e.g*., *Clifford v. Trump*, 339 F. Supp. 3d 915, 925-26 (C.D. Cal. 2018) (statement that plaintiff was "engaging in a 'con job' or is lying" was rhetorical hyperbole). Indeed, many of these comments are found in the series of articles entitled "Michael Rapaport is Fraudulent Sack of Shit" written by defendant Smith. A:941, 960, 967. Smith begins that series of articles by referring to his dispute with Rapaport as a "middle-school drama" and states that "my entire existence is based

on being wrong about everything." *Id.* These statements are clear signals to any reasonable reader that nothing in those articles should be taken seriously—they are made for humorous effect. And, because the article disclosed the facts supporting the accusation that Rapaport is a "fraud"—*i.e.*, Smith's belief that Rapaport had refused to pay on a bet—they can only be considered a pure opinion. *Partington*, 56 F.3d at 1156.

Accordingly, the comments about Rapaport being a "fraud," "hack," "wannabe" or "liar" are non-actionable opinions.

6. The District Court Correctly Concluded That Comments about Rapaport Being Racist Were Non-Actionable Opinions

Rapaport finally contends that Barstool's comments about Rapaport being a racist are actionable because they imply some form of undisclosed facts. AOB, 17. Yet, Rapaport offers no explanation whatsoever of how Barstool's comments created such an implication. They do not.

Moreover, Rapaport ignores his own testimony which establishes that the term "racist" is an inherently subjective term. Specifically, Rapaport testified that, "[i]f someone calls me a racist, that's their right to say that I'm a racist if that's how they feel." A:1861; SA:1098. New York courts agree, and "have consistently held that terms like 'racist' constitute nonactionable opinion." *Cummings v. City of New York*, 2020 WL 882335, at *20 (S.D.N.Y. Feb. 24, 2020). This is because the term "racist" lacks a precise meaning and is nothing more than a non-

actionable insult. *See, e.g., id*. at *22 ("Descriptions of Plaintiff as a 'bigot,' 'white devil' and 'cracker-ass-cracker' are not actionable."); *Torain v. Liu*, 2007 WL 2331073, at *2-3 (S.D.N.Y. Aug. 16, 2007) (statement during "war of words" that the plaintiff was a "racist pedophile" was non-actionable opinion); *Silverman v. Daily News, L.P.*, 11 N.Y.S.3d 674, 675 (App. Div. 2nd Dept. 2015) (statements that the plaintiff had authored "'racist writings,'" and that he had ties to a "'white supremacist group'" were non-actionable opinions); *see also Ganske v. Mensch*, 480 F. Supp. 3d 542, 553-54 (S.D.N.Y. 2020) (statement that plaintiff was "xenophobic" was subjective opinion incapable of being proved true or false).

Indeed, as the district court correctly noted, even the evidence proffered by Rapaport to prove the supposed falsity of the "racist" comments is inherently subjective. Rapaport suggests that the fact that he invites diverse guests to appear on his podcast and has a black wife means he's not racist. But, of course, whether those facts mean Rapaport is not racist is entirely in the eye of the beholder. Accordingly, Barstool's Race Comments are non-actionable opinions.

7. The Fact That Barstool Brands Itself as "Authentic" Does Not Mean Everything It Publishes is Factual or True

Rapaport makes much of the fact that Barstool brands itself as "authentic" and that Defendant Smith responded to an audience member's comment during a video by saying: "That's all we spit. Truth and justice baby. Truth and justice." According to Rapaport, these statements mean that everything Barstool says is

understood to be truthful and factual. Rapaport is wrong again.

To begin with, "authentic" is not synonymous with "truthful." Rather, Barstool calls itself "authentic" to convey to its audience that Barstool is genuine and true its brand. That simply means that Barstool is going to "call it as they see it" and not pull punches when commenting on issues. This distinction is commonplace with comedians and media commentators such as Howard Stern, Don Imus, Joe Rogan, Charles Barkley, and others, who are often viewed as "authentic," even if they are not known for factual and truthful discussion of issues.

Smith's comment about "spitting" truth and justice itself demonstrates the flaw in Appellant's position. No reasonable hearer of that statement would interpret it literally to mean that Barstool only says truthful and just things. Smith's statement, which was delivered within a humorous, stream-of-consciousness digression during an online video of Smith playing a video game, was simply another form of rhetorical hyperbole designed to reinforce the fact that Barstool stays true to its brand and doesn't shy away from controversy. Accordingly, Smith's statement offers no support for Rapaport's position.

Rapaport argues that he presented evidence that Barstool's fans believed its statements to be factual and true. The supposed evidence for this assertion is that Barstool fans repeated many of the allegedly defamatory statements in reviews of

Rapaport's podcast and other comment pages on the Internet. Of course, this evidence is rank hearsay—it assumes these anonymous posters believed the things they were saying were true. But, more to the point, whether someone repeated Barstool's insults of Rapaport proves nothing. As the district court properly recognized, the mere fact that someone repeats an opinion does not mean the person believes the opinion to be factual or true. It simply means they liked the opinion and repeated it. Here, the fact that fans came to the defense of Barstool and participated in the verbal attacks on Rapaport in no way supports the assertion that those fans considered Barstool's insults to be factual or truthful.

B. Even if Any of the Allegedly Defamatory Statements Could Be Considered Statements of Fact, They Are Substantially True

"Despite truth often being framed as a defense to libel, the burden of proving the falsity of a statement rests with the plaintiff." *Leidig v. BuzzFeed, Inc.*, 371 F. Supp. 3d 134, 143 (S.D.N.Y. 2019). Rapaport is required to establish falsity by clear and convincing evidence. *Palin v. New York Times Co.*, 588 F. Supp. 3d 375, 399 (S.D.N.Y. 2022), reconsideration denied, 604 F. Supp. 3d 208 (S.D.N.Y. 2022). *See* 2 Committee on Pattern Jury Instructions, New York Pattern Jury Instructions–Civil, PJI 3:34, at 276 ("Fourth, plaintiff must prove by clear and convincing evidence that the statement was false, meaning substantially untrue.").

"The standard for assessing falsity is informed by the common law of libel, which overlooks minor inaccuracies and concentrates on substantial truth." *Id.*,

citing *Blair v. Inside Edition Prods.*, 7 F. Supp. 3d 348, 357 (S.D.N.Y. 2014) (cleaned up). It is "fundamental that truth is an absolute, unqualified defense to a civil defamation action, and 'substantial truth' suffices to defeat a charge of libel." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 (2d Cir. 1986) (citations omitted). "Under New York law, it is not necessary to demonstrate complete accuracy to defeat a charge of libel. It is only necessary that the gist or substance of the challenged statements be true." *Printers II, Inc*., 784 F.2d at 146-147.

A statement is substantially true if it "would not have a different effect on the mind of the reader from which the pleaded truth would have produced." *Tannerite Sports, LLC*, 864 F.3d at 242-43 (quoting *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012)) (internal quotation marks omitted). In applying this standard, courts must "read [the statement] in context to test [its] effect on the average reader, not to isolate particular phrases but to consider the publication as a whole." *Immuno AG.,* 567 N.E.2d at 1278.

Summary judgment for a defendant is appropriate if "no rational jury could find . . . that the statements at issue are false." *Leidig*, 371 F. Supp. 3d at 143-44, (quoting *Blair*, 7 F. Supp. 3d. at 358). "Put another way, if a defendant can conclusively establish the statements' truth or substantial truth, the libel claim must fail, resulting in summary judgment in favor of the defendant." *Id. See, e.g.*, *Blair*, 7 F. Supp. 3d. at 359 (granting summary judgment for defendant media company

after finding that a statement calling plaintiff a "squatter[,]" even if "literally false[,]" sufficiently captured the "'substance' or 'gist'" of the truth); *Chung v. Better Health Plan*, 1997 WL 379706, at *2-*3 (S.D.N.Y. July 9, 1997) (statements that plaintiff "had a sexual harassment lawsuit" pending against her employer and that plaintiff had been "terminated" from her employment held to be substantially true when plaintiff had an EEOC charge pending and had been "constructively discharged").

Here, the allegedly defamatory statements about Rapaport were substantially true:

<u>The Herpes Comments</u>. A widely circulated photo of Rapaport showed a large lesion on his chin, which Rapaport himself admitted "looks like I got . . . a herpe." A:1831, ¶ 11; SA:312 (audio at 22:58-23:05). Long before any of the Barstool personalities made any of the Herpes Comments, many others on the Internet had commented, based on that photo, that Rapaport had herpes. SA:25-26; SA:33-34; SA:35-36; SA:37-39; SA:40-41; SA:42; SA:43-46; SA:47-48; SA:49-51; SA:52-53; SA:54-55; SA:56-57; SA:659-661. Indeed, Rapaport's Opening Brief itself refers to Barstool's t-shirt with Rapaport's face on it as "depicting him as having herpes" (AOB, 13) even though the cited evidence simply refers to a "clown shirt." A:151.

In fact, Rapaport was widely associated with having herpes or appearing to

have herpes before Barstool made any of its allegedly defamatory comments. In particular, in February 2017, Dan Le Batard's producer tweeted about Rapaport having herpes as part of a highly publicized feud between Rapaport and Le Batard. A:1831-1832, ¶ 13; SA:59 (February 2017 Tweet from producer of Le Batard's show stating to Rapaport: "[Y]ou should be proud. That herpe was the most standout performance you've had since 1994"). This tweet gained widespread attention, following which numerous people made comments on social media relating to Rapaport having herpes. A:1831, ¶ 12; SA:25-26; SA:33-34; SA:35-36; SA:37-39; SA:40-41; SA:42; SA:43-46; SA:47-48; SA:49-51; SA:52-53; SA:54-55; SA:56-57; SA:659-661.

Thus, to the extent that Barstool's comments about Rapaport's "herpes infested mouth," "herpes mouth" or "herpes face" could be considered statements of fact, they truthfully describe Rapaport's own appearance in a photo which he admits makes it look like he has herpes. *See Leidig*, 371 F. Supp. 3d. at 149 (granting summary judgment for defendants on falsity when substantial truth of statement supported with plaintiff's own words).

<u>The Stalking Comments</u>. The "stalking" comments are also substantially true. Barstool's statements referred to the fact that Rapaport was arrested for and pled guilty to two counts of aggravated harassment of his former girlfriend, Lili Taylor. These charges stemmed from complaints that, after they broke up,

Rapaport called Taylor two dozen times over a three-day period and showed up at her apartment at 1 a.m. after she refused to return his calls. As a result, a judge issued a protective order directing Rapaport to stay away from Taylor. A:1830, ¶¶ 8, 9; SA:1092-1095; SA:15-32.

As the Second Circuit recently noted in *Lawrence*, 841 F. App'x at 275, the common definition of stalking is "to pursue obsessively to the point of harassment." *Id.*, citing Merriam-Webster's Online Dictionary. In *Lawrence*, the Court upheld summary judgment in favor of a media defendant that reported that the plaintiff was facing charges for stalking even though he was actually arrested for breaching the peace. "News 12's use of the term 'stalking' would not have affected average readers' and viewers' perceptions of Lawrence because the gist of its reporting established that Lawrence's behavior met the common definition of stalking." *Id.* at 276. As in *Lawrence*, Rapaport's conduct with respect to his ex-girlfriend meets the common definition of stalking and Barstool's comments about his criminal record, "when viewed in context and from the vantage point of the average audience member," were substantially true and therefore not defamatory. *Id.* at 277.

The Race Comments. To the extent comments about Rapaport being a "racist" a "low key racist" or a "race-baiter" can be considered statements of fact as opposed to non-actionable opinions, they are also substantially true based on

Rapaport's long history of making racially charged comments. This conduct has subjected Rapaport to criticism from the media and public alike. A:1832, ¶ 15. *See* SA:62-67 (article describing photo sent by Rapaport to a black producer as "evok[ing] old-America racial caricature imagery"); SA:89-92 (article titled "Michael Rapaport Is the Worst Kind of White Man"); SA:94-96 (article titled "Michael Rapaport And The Era Of The Disrespectful White Ally"); SA:103-106 (tweet stating that Rapaport has a "history of being abusive & racist towards women" and embedding a video titled "Michael Rapaport Compared Kenya Moore To A Gorilla!"). Barstool personalities testified that they made the allegedly defamatory statements related to race based on their belief that Rapaport intentionally made racially charged comments. A:1862, ¶ 63; SA:1173. SA:1252; SA:1252-1253; SA:1262. Rapaport also testified that "race is a definite area for irony and comedy," and that, "[i]f someone calls me a racist, that's their right to say that I'm a racist if that's how they feel." A:2085, ¶ 468; SA:1098; SA:1120.

<u>The Fraud Comments</u>. As the district court correctly held, Barstool's comments to the effect that Rapaport was a "fraud" were "simply amplifying Barstool's assessment that Rapaport is not genuine or trustworthy, an inherently subjective topic." SPA:36-37. The district court also correctly noted that "Rapaport does not even attempt to offer any objective evidence that would prove that the 'fraud,' 'hack,' 'wannabe,' or 'liar' comments are false in the 'Falsity of

Defendants' Statements' section of his Rule 56.1 Statement of Material Facts." SPA:37, n.17; A:190-191.

Even though it was not its burden to do so, Barstool introduced substantial evidence that defendant Smith believed that Rapaport had failed to pay bets he made with Smith, which was the basis to call him a fraud. A:1841, ¶ 40; SA:508-530; A:1841, ¶ 41; SA:531-541. In addition, the district court, in denying Rapaport's Motion for Reconsideration, explained in detail the evidence supporting Rapaport's refusal to consummate his bets. SPA:88-90 & 89, n.6. While such evidence underscores that Smith's statements merely reflected Barstool's subjective opinions regarding Rapaport's behavior and character, it also demonstrates the substantial truth of Smith's statements. Accordingly, Rapaport failed to establish the falsity of the allegedly defamatory fraud comments.

C. Even if the Allegedly Defamatory Statements Could Be Considered Statements of Fact, Rapaport Did Not Establish Actual Malice

Rapaport is a public figure. A:1829, ¶ 1; A:32-33. Therefore, Rapaport must establish by "clear and convincing evidence" that Barstool acted with actual malice in making the allegedly defamatory statements. *See James*, 353 N.E.2d at 839 ("public performers such as . . . television and movie actors" are public figures); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) ("a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine

issue of actual malice exists").

To meet this standard, Rapaport was required to present clear and convincing evidence that Barstool "had a subjective awareness of either falsity or probable falsity of the defamatory statement, or acted with reckless disregard of . . . its truth or falsity." *Celle*, 209 F.3d at 182. The actual malice standard does not "measure malice in the sense of ill will or animosity, but instead, the speaker's subjective doubts about the truth of the publication." *Church of Scientology Int'l*, 238 F.3d at 174.

Rapaport does not even attempt to make the required showing. Rather, he argues that Barstool acted with actual malice because it viewed itself to be "in a war" with Rapaport and its goal was to humiliate Rapaport and to "haunt him for the rest of his life." AOB, 29. But "evidence of intent to ridicule is not evidence of actual malice." *New Times, Inc.*, 146 S.W.3d at 165. And indeed, "[e]quating intent to ridicule with actual malice would curtail the 'uninhibited, robust, and wide-open' public debate that the actual malice standard was intended to foster, particularly if that debate was expressed in the form of satire or parody." *Id.* (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, Rapaport has made absolutely no showing that Barstool acted with actual malice. Nor can he.

Where the speech at issue involves fiction, humor, satire or parody, courts

must examine what the speaker subjectively intended to convey in order to determine whether the speaker acted with actual malice. *Greene v. Paramount Pictures Corp*., 340 F. Supp. 3d 161, 170-71 (E.D.N.Y. 2018) (defendant did not act with actual malice because it did not intend its fictional character to be "of and concerning" the plaintiff). In reaching this conclusion, the *Greene* court relied extensively on the *New Times, Inc.* decision referenced above, in which the court considered a satirical article commenting on the performance of a district attorney and a judge and affirmed summary judgment because "none of the witnesses knew or had reckless disregard for whether the satire would be taken as stating actual facts, nor is there any evidence that they intended such a result." *New Times*, 146 S.W.3d 144 at 148-49, 165. Other courts are in accord. *See e.g.*, *Hoppe v. Hearst Corp.*, 770 P.2d 203, 208-09 (Wash. App. 1989) (plaintiff failed to establish actual malice in publishing satirical article calling plaintiff "Hurley Herpes," because no evidence showed the defendants "intended the column to convey defamatory facts, or believed that the column did convey such facts"); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1194 (9th Cir. 1989) (plaintiff could not establish actual malice where the defendant did not intend for its satirical cartoons and articles about the plaintiff to be taken as factual or truthful assertions); *Miss Am. Pageant, Inc. v. Penthouse Int'l, Ltd.*, 524 F. Supp. 1280, 1287 (D. N.J. 1981) (plaintiff could not prove actual malice in defamation claim arising out of a fictional work

because "such works are not intended to convey truth").

Here, the evidence establishes that Barstool did not intend its statements about Rapaport to be taken as statements of fact. For example, Barstool testified that the Herpes Comments were "funny" and "trash talk for a joke." SA:1159; SA 1176-1177; SA:1184. The statements were part of the ongoing "war of words" between Barstool and Rapaport. SA:1086. They were based on a widely circulated photo of a Rapaport with a large red sore on this face that numerous individuals on the Internet noted looked like herpes; Rapaport himself admitted as much. A:1831, ¶ 11; SA:312 (audio at 22:58-23:05); SA:1097. Indeed, the fact that Rapaport himself refers to Barstool's t-shirt with Rapaport's face on it as "depicting him as having herpes" (AOB, 13) underscores the manner in which Rapaport's appearance in the photo may be perceived.

Even if Barstool had intended its statements to be factual, Rapaport still cannot prove actual malice because, contrary to Rapaport's assertions, Barstool had a reasonable basis to believe its statements were substantially true. Barstool had a reasonable basis to believe that Rapaport had herpes based on the photo with the red lesion and the many comments people had previously made on social media about Rapaport having herpes. Barstool had a reasonable basis to believe that Rapaport was a racist based on his history of making racially charged comments. Barstool had a reasonable basis to believe that Rapaport was a fraud based on its

belief that he twice refused to pay on bets that he had made. And Barstool had a reasonable basis to believe that Rapaport was a harasser and stalker based on the fact that he pleaded guilty to the aggravated harassment of his ex-girlfriend. Indeed, defendants testified that they made these statements based on information available online and ongoing jokes that were "all over the Internet." SA:1173-1175; SA: 1199; SA:1184; SA:1186; SA:1252-1253; SA:1262. Accordingly, Rapaport cannot prove that Barstool acted with actual malice.

VII. CONCLUSION

The district court correctly ruled that all of the allegedly defamatory statements were non-actionable opinions. Even if Barstool made certain statements of fact, those statement were substantially true, and Rapaport failed to establish actual malice. Accordingly, the Court should affirm the district court's decision in full.

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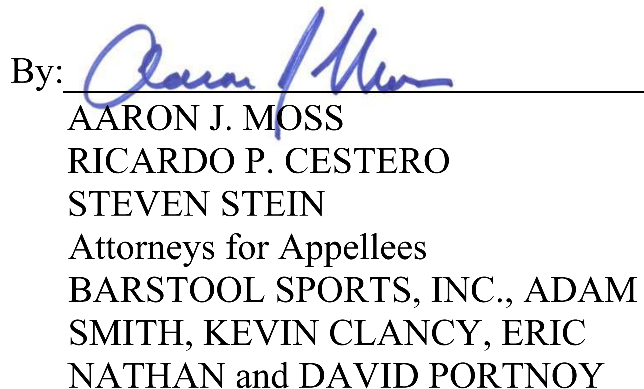

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FOR THE SECOND CIRCUIT

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