

No. 19-0136-CV-A

Rob Burley; Burley Auction Group, Inc.;
Lois Gibson; Terry Verburgt,
Plaintiffs,

v.

James Preservation Trust; Eric F. James
d/b/a Stray Leaves, Leaves of Gas,
Defendants.

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§ **IN THE DISTRICT COURT**
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§ **OF GUADALUPE COUNTY, TEXAS**
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§ **25TH JUDICIAL DISTRICT**
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PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Plaintiffs Rob Burley, Burley Auction Group, Inc., Lois Gibson, and Terry Verburgt file this Motion for Summary Judgment and respectfully show the Court as follows:

I. SUMMARY OF MOTION

Defendant Eric F. James owns, operates, and writes the content for *Stray Leaves*, a website which holds itself out as the “Official Website - Family of Frank & Jesse James.” This case concerns defamatory publications by Defendant on *Stray Leaves*.

Plaintiff Lois Gibson is a professional forensic artist. She was retained by a client to perform a forensic examination of an old tintype photograph. Gibson ultimately concluded that, in her opinion, the tintype depicts the famous Wild West outlaws Jesse James and Robert Ford.

Defendant disagreed with Gibson’s assessment. However, this case has nothing do with mere differences of opinion. Rather, Defendant attacked Gibson with vicious lies. Defendant published articles on *Stray Leaves* in which he falsely asserted Gibson was a “con artist” and “fraudster” who created a “fake authentication” as part of a “hoax”—*i.e.*, what Defendant calls the “Bob Ford/Jesse James Photo Hoax.” And, Defendant also falsely asserted that Gibson had offered to provide a false opinion, for a fee, that a different tintype depicted Jesse James.

The owner of the tintype photograph eventually sold it to Plaintiff Terry Verbugt at an auction run by Plaintiffs Rob Burley and Burley Auction Gallery. Defendant attacked Burley and Burley Auction Gallery with scurrilous lies. Defendant falsely asserted they were “con artists” and partners (with Gibson and others) in the so-called “Bob Ford/Jesse James Photo Hoax.” Defendant accused the auction winner, Plaintiff Verbugt, of being part of the “hoax” and “sham auction.”

Defendant falsely asserted they conducted a “sham auction” of the tintype, and Defendant falsely accused them of lying about the \$35,000 purchase price actually being paid for winning bid for the tintype.

The gist of Defendant’s published attacks was to portray Plaintiffs as dishonest and unethical professionals who worked together to intentionally defraud others for fame and profit. The attacks are entirely false. In truth, there was no “*fraudulent* authentication,” there was no “*sham* action,” and there was no “Bob Ford/Jesse James photo *hoax*.” Instead, Gibson offered her good faith, professional opinion that a tintype depicted Jesse James and Robert Ford, and that tintype was sold to and paid for by Terry Verbugt at an auction run in a good faith, professional manner by Rob Burley and Burley Auction Gallery.

Plaintiffs Rob Burley, Burley Auction Group, Inc., Lois Gibson, and Terry Verbugt are entitled to summary judgment on their claims for defamation per se against Defendant Eric F. James. There are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law. Whether a statement constitutes defamation per se is a question of law for the Court. Here, Defendant’s published attacks against Plaintiffs clearly constitute defamation per se. Because Defendant’s statements constitute defamation per se, Plaintiffs are each entitled to an award of nominal damages of \$1.

II. STATEMENT OF FACTS

A. Defendant operates the website “Stray Leaves,” which holds itself out to the public as the “Official Website · Family of Frank & Jesse James.”

Eric F. James (hereafter “Defendant”) owns, operates, and writes the content for a website called *Stray Leaves* that is published and available to the public at <https://ericjames.org/wordpress/>. See Exhibit 1, Deposition of Eric F. James (hereafter “Depo”), at p. 20-21, 68, 155. On the website, Defendant describes *Stray Leaves* as the “Official Website · Family of Frank & Jesse James.” *Id.* at p. 68. The website states: “Our mission is to research, document, and report on the family history and genealogy of the family of Frank & Jesse James, their related families, plus their relevant social communities. What we learn, we make available for entertainment, informational, and educational purposes.”¹

Each month, the *Stray Leaves* website generally receives “more than 5,000 hits” from at least several hundred unique users. Depo, Ex. 1, at p. 155. This case concerns defamatory statements published by Defendant on the *Stray Leaves* website in March and April of 2018 and in February of 2019.

B. Plaintiff Lois Gibson conducted a forensic examination of the tintype and concluded the image depicts the famous outlaws Jesse James and Robert Ford.

Plaintiff Gibson has been a professional forensic artist, helping law enforcement agencies identify people, since 1982. See Exhibit 2, Affidavit of Lois Gibson (“Gibson Aff.”). She is a Certified Forensic Artist by the International Association for Identification. *Id.* Gibson’s work has been used in cases involving over 1,000 convictions and has earned her the title of “Most criminals

¹ See <https://ericjames.org/wordpress/terms-of-use/privacy-policy-genealogy/>

positively identified due to the composites of one artist” by the *Guinness Book of World Records*.
Id.

In addition to her decades of training and experience with forensic art in general and with distinguishing facial and body features in particular, Gibson also received facial recognition/identification training at the FBI Academy in Quantico, Virginia. *Id.* She has also received training regarding facial comparison on regular basis at the annual International Association for Identification Educational Conference. *Id.* Indeed, Gibson herself teaches facial recognition/identification in her forensic art classes, given formerly at Northwestern University Center for Public Safety and more recently at her own Institute for Forensic Art in Houston. *Id.* In her affidavit, Gibson elaborates as follows:

Beyond sketching perpetrators and victims for law enforcement, I also use my training, skills and experience to compare and identify people based on photographs. For example, my work has confirmed that Glenn McDuffie was the sailor in Alfred Eisenstaedt’s famous photo *V-J Day in Times Square* and I have authenticated a photograph as being a photograph of Billy the Kid. During my decades of working law enforcement agencies, I have consistently aided detectives determine whether an individual in a surveillance image is the same individual depicted in another image (typically a mug shot of a suspect). My identifications hold up in court, and I am not aware of any such identification determination by me being found to have been incorrect.

Id. In the affidavit, Gibson details her training and experience and explained her process for identifying individuals in photographs. *Id.* The process Gibson uses for comparison and identification of individuals in photographs is widely accepted and used by other professionals engaged in the forensic identification of individuals in photographs, including other members of the International Association for Identification. *Id.*

In 2015, Gibson was first retained to conduct a forensic examination of the tintype² photograph at the heart of this lawsuit. *Id.* As discussed in her affidavit, she ultimately concluded that the two people depicted in the tintype were famous outlaws Jesse James and Robert Ford (hereafter “the James-Ford Tintype”). *Id.* A copy of image in question is set forth below:



C. On *Stray Leaves*, Defendant states that Gibson is a “con artist” who conducted a “fake authentication” and that the tintype is a “fake” because “there are no photos of Jesse James or Bob Ford that are lost.”

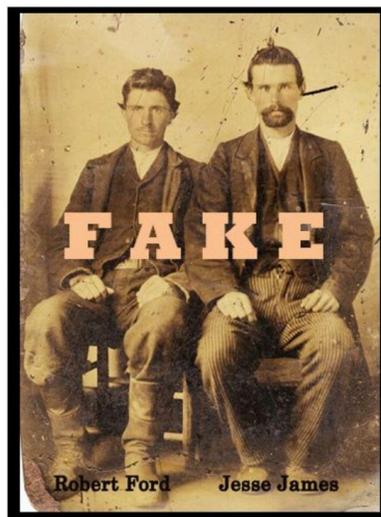
Defendant responded to a news report of Gibson’s opinion regarding the tintype by publishing a piece on Defendant’s *Stray Leaves* website piece entitled “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated.” *See* Exhibit 3, Affidavit of Michael Morris (“Morris Aff.”), at Ex. A thereto.³ In the piece, Defendant negligently and falsely asserted that Gibson’s

² The website for the Library of Congress provides the following description for tintypes: “The tintype is similar to the daguerreotype and ambrotype, since it is an image formed directly on a sheet of metal (a positive), and is sometimes found in a case. The sheet of metal serves the same function as the dark material used in ambrotypes to cause the image to appear positive. The image is reversed left-to-right. The tintype was a cheaper alternative to paper prints made from a negative.”
https://www.loc.gov/rr/print/coll/589_tintype.html.

³ <https://ericjames.org/wordpress/2015/11/01/lost-jesse-jamesbobford-photo-not-lost-not-authenticated/>

authentication of the James-Ford Tintype was a “*fake* authentication,” that Gibson was a “*con artist*,” and that the James-Ford Tintype was not a lost Jesse James photo because “[t]he fact is, there are no photos of Jesse James or Bob Ford that are lost.” *Id.* Defendant asserted that “Gibson’s cardinal sin was first to *alter the image* to her preference by a process of image reversal” and “[i]n the field of legal evidence, this is termed ‘*tampering*,’ – a most compelling red flag.” *Id.* (emphasis added). Defendant did not realize that all tintypes must be reversed to see what was actually photographed. *See* note 2, *supra*, (explaining tintype “image is reversed left-to-right”); *see also* Gibson Aff., Ex. 2 (also explaining that tintypes are a reversed image); Depo, Ex. 1, at p. 120 (Defendant unaware that tintypes are reversed images).

The gist of Defendant’s piece is fairly encapsulated by an accompanying illustration:



Robert Ford & Jesse James as hoaxed by Sandy Mills & artist Lois Gibson

Morris Aff., Ex 3, at Ex A thereto. The illustration includes the word the word “FAKE” added by Defendant over a digital image of the James-Ford Tintype and the caption, “Robert Ford & Jesse James as *hoaxed* by Sandy Mills & artist Lois Gibson.” *Id.* (emphasis added); *see also* Depo, Ex. 1, at p. 164 (Defendant acknowledging he placed the word “FAKE” on top of image). This piece

by Defendant concludes by stating “Lois Gibson will stay on our watch list of *tricksters, con artists, and frauds* for some time.”

Defendant treated the James-Ford Tintype as an “ongoing story” and posted updates on *Stray Leaves* from time to time. In so doing, Defendant continued to publish additional and related defamatory statements on *Stray Leaves*, as will be shown below.

D. The tintype is brought to Plaintiff Rob Burley to be auctioned.

Plaintiffs Rob Burley (“Burley”) and Burley Auction Gallery (“Auction Gallery”) have been a leading source in Texas for quality American antiques at auction for about fifteen years, specializing in select collections and estate liquidations of American Antiques, Western Americana, and Texana. *See* Exhibit 4, Affidavit of Rob Burley (“Burley Aff.”). Burley and the Auction Gallery proudly conducted the final auction of the Roy Rogers & Dale Evans museum collection in 2011; the auction of Texas Ranger Captain and U.S. Marshal Jack Dean’s gun collection; the auction of an entire Texas ghost town the was the subject of a PBS documentary “The Grove, Texas”; and the auction of Austin’s Threadgill’s restaurant and Eddie Wilson’s Armadillo World Headquarters memorabilia collection. *Id.* The owner of the tintype, Sandy Mills, sought out Burley’s services to auction the tintype. *Id.*

E. Historian Freda Cruse Hardison researches Mills’ family and finds tie to James Family.

Although “Gibson’s authentication opinion of the tintype would have been sufficient evidence for it to be sold at auction,” Burley felt “a photograph of Jesse James and his murderer was interesting enough, as well as possibly valuable enough, that [he] investigated further.” *See* Ex. 4, Burley Aff. Burley eventually worked with Freda Cruse Hardison, a historian of the Ozark Region in Arkansas and Missouri who was working at the time on a project concerning the extended family and community of Frank and Jesse James. *Id.* Hardison was able to identify Sandy

Mills' familial relationship to Jesse James, which gave more credence to the authenticity of the tintype. *Id.* Hardison found that Mill's great great grandmother was the first cousin, once-removed, of Jesse's sister-in-law, Annie Ralston James (the wife of Jesse's brother Frank James). *Id.* According to Hardison, this would have been a fairly tight connection for towns on the Midwestern frontier at the time and means they plausibly would have lived nearby. *Id.* According to Hardison, Mill's ancestor could easily have been a part of the extended family and extended community of the James brothers. *Id.* Burley found that "Hardison's findings were consistent with and supported what Mills had heard from her family as well as Gibson's identification opinion" of the tintype. *Id.*

D. Burley and his Auction Gallery announce the tintype will be auctioned.

Plaintiffs Burley and Auction Gallery announced an auction of the James-Ford Tintype to take place on January 14, 2017. Ex. 4, Burley Aff. For the record, Burley and Auction Gallery never represented that they had determined the tintype was an authentic tintype of Jesse James and Robert Ford. *Id.* Rather, they advertised the tintype as having been authenticated by Lois Gibson and Freda Cruse Hardison. *Id.* A press release regarding the auction is attached as Ex. B to the Burley Aff., Ex. 4.

D. On *Stray Leaves*, Defendant states that Burley and Auction Gallery are "partners" in a "hoax" to "enable, promote, and disseminate fraudulent and fake Jesse James imagery."

Defendant responded to the announcement of the upcoming James-Ford Tintype auction by publishing a false and defamatory piece on Defendant's *Stray Leaves* website entitled "Burley Auction Gallery Partners in Jesse James Hoax." *See* Morris Aff., Ex. 3, at Ex. B thereto.⁴ The gist of this piece by Defendant was to (falsely) assert that Rob Burley and Burley Auction Gallery had

⁴ <https://ericjames.org/wordpress/2017/01/07/burley-auction-jesse-james-photo-hoax/>

joined in a conspiracy with Plaintiff Gibson and others to fraudulently exploit what Defendant called the “*Fake* Bob Ford-Jesse James Photo.” *See id.* (emphasis added). The piece concluded: “Burley Auction Gallery is on the hunt for the next sucker in this *proven swindle*. The James family now adds Burley Auction Gallery to its listed cabal of those – and their successors – who enable, promote, and disseminate *fraudulent and fake* Jesse James imagery in their exercise of Jesse James family identity *theft*.” *Id.* (emphasis added).

F. Burley emails Defendant: “Correct your lies.”

Burley emailed Defendant regarding Defendant’s publications about Plaintiffs and the James-Ford Tintype. *See* Ex. 4, Burley Aff., at Ex. A thereto. Addressing his due diligence related to the upcoming auction, Burley pointed out that “the photo has two legitimate experts that back it with provable genealogical times” to the James family. *Id.* Burley noted to Defendant: “you have a right to believe what you chose (sic), but it does not give you the right to slander those that disagree with you.” *Id.* Burley asked Defendant to “[c]orrect your lies.” *Id.*

Defendant did not correct anything. Instead, as will be shown, Defendant not only published additional false and defamatory statements concerning Plaintiffs, but Defendant republished the very false and defamatory statements concerning Plaintiffs that Defendant had been requested to retract.

E. The James-Ford Tintype is sold at auction for only \$35,000 to Terry Verburgt.

Burley and Auction Gallery held the auction for the James-Ford Tintype. Burley Aff., Ex. 4. Several bidders placed bids on the tintype. *Id.* The high bidder was collector Terry Verburgt, and the high bid was \$35,000. *Id.* The tintype sold at auction for a price substantially less than estimates of its worth and substantially less than sales of similar tintypes because of the ongoing false and defamatory publications by Defendant *Id.*

Verburgt “purchased the tintype for \$35,000 and paid the \$35,000, in addition to a 15% Buyer’s Premium, to Burley Auction Gallery.” *See* Exhibit 5, Affidavit of Terry Verburgt (“Verburgt Aff.”). Verburgt is “a regular at the Burley Auction Gallery” and was well-known to Burley. Burley Aff., Ex. 4. Indeed, Verburgt’s career has him often attending auctions and, in particular, auctions run by Burley Auction Gallery. Verburgt Aff., Ex. 5. For more than 40 years, Verburgt’s primary occupation has been buying and selling gold, jewelry, art, antiquities, and other items. *Id.* He often works with Ernesto’s Jewelry, the premier jewelry store in the New Braunfels area, as their primary silver, gold, diamond, artwork, real estate and jewelry buyer. *Id.*

“As is typical for auctions at Burley Auction Gallery, the winner bidder (Terry Verburgt) paid the amount due to Burley Auction Gallery and, in turn, Burley Auction Gallery paid the seller (Sandy Mills).” Burley Aff., Ex. 4. “Any suggestion that the winning \$35,000 bid for the tintype was not actually paid for the tintype is completely false.” *Id.*

E. Defendant refuses to retract his defamatory statements.

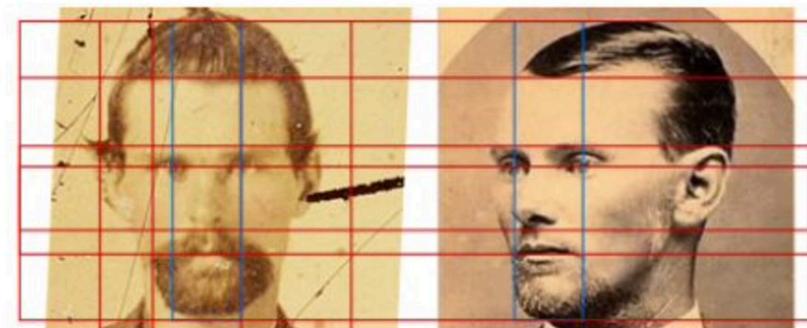
Burley had his attorney write Defendant and demand Defendant retract his false and defamatory statements made up to that point concerning Plaintiffs and the James-Ford Tintype. Burley Aff, Ex. 4, at Ex. C thereto. The request identified the statements in question and explained reasons that said statements were defamatory and should be retracted. *Id.* Despite the request, said statements remained publicly posted to Defendant’s websites as of the filing of this lawsuit and still remain online. *See* Morris Aff., Ex. 3 Furthermore, as described below, despite the request for retraction, Defendant published additional false and defamatory statements concerning Plaintiffs.

F. March 22, 2018 (and February 25, 2019): Defendant defames Gibson, Burley and Auction Gallery on *Stray Leaves* by falsely stating the Plaintiffs are “con artist[s]” who, with “no substantive evidence to support the image claim,” engaged in the “Bob Ford/Jesse James photo hoax”—“dragging the Houston, Texas Police Department into the gutter”—by conducting a “sham auction” and then “claiming a final bid of \$35,000” when “[n]o record exists of the money being paid.”

On March 22, 2018, Defendant published a piece on Defendant’s Stray Leaves website entitled “Jesse James Family Discredits 7£ Ebay Find of Justin Whiting.” *See* Morris Aff., Ex. 3, at Ex. C thereto.⁵ The gist of the piece is to assert that a man purporting to have Jesse James tintage for sale in the UK is a fraudster, criminal, and “fool huckster who seeks fifteen minutes of fame [via] claims a fake Jesse James photo is authentic” just like, according to Defendant, other “merchants of identity theft” including the Plaintiffs and their “Bob Ford/Jesse James photo hoax.” *Id.*

Defendant’s piece begins: “Can’t a year go by without some fool huckster who seeks fifteen minutes of fame claims a fake Jesse James photo is authentic?” *Id.* The piece goes on to describing Mr. Whiting as “[f]aithfully following the proven template of sharpies and swindlers of fake Jesse James photos, these amateurs step readily and willingly into a template for a crime.” Defendant adds, “The family of Jesse James brands them as merchants of identity theft.” Then, turning to focus specifically on the Plaintiffs, the piece continues with the following:

Recent Fake Jesse James Images



Linear forensics applied by Mark Bampton to Lois Gibson’s alleged authentication of the claimed Jesse James image yields plainly visible discrepancies in the Bob Ford/Jesse James photo hoax.

⁵ <https://ericjames.org/wordpress/2018/03/22/justin-whiting-ebay-find/>

In 2016-2017, hoo-ha raged over the [Bob Ford/Jesse James photo hoax](#). In its first stage, a standard template of con artistry failed miserably, dragging the Houston, Texas Police Department into the gutter with it. With no substantive evidence to support the image claim, the hoax then advanced to a surprising second level. The hoax transitioned into [a reality TV show](#). Television produced a sham auction of the tintype, claiming a final bid of \$35,000 that was literally unbelievable. No record exists of the money being paid. More so, no image of Jesse James ever has sold for more than \$2,000. Justin Whiting laughably waits for his tintype to fetch him \$2 million US.

Id. Later, Defendant’s piece asserts that “America has grown weary of fake Jesse James photos” and “[d]elusional con artists abound, and self-appointed ‘authenticators’ always are ready to aid the con.” *Id.*

With regard to Plaintiffs, the gist is that Plaintiffs are criminals and fraudsters who staged a sham auction of a fake tintype. *See id.* After identifying Plaintiff Gibson and her “alleged authentication” as being part of a so-called “Bob Ford/Jesse James photo hoax,” Defendant’s piece then states that “[i]n 2016-2017, hoo-ha raged over the **Bob Ford/Jesse James photo hoax**.” *Id.* The boldface, underlined text (shown in green in the above screenshot) is a hyperlink included by Defendant in his article to explain to readers of his March 2018 piece just what Defendant means when he accuses (in March 2018) the Plaintiffs of carrying out “the Bob Ford/Jesse James photo hoax.” *See id.*

The piece then states that the “hoax” followed “a standard template of *con artistry*” that somehow was responsible for “dragging the Houston, Texas Police Department into the gutter with it.” *Id.* Defendant’s piece then states that there was “no substantive evidence to support the image claim.” *Id.* Defendant states “*the hoax* then advanced to a surprising second level” with “*sham action*” for “**a reality TV show**” and false claims of \$35,000 of a final bid that were

“**literally unbelievable**” and “[*n*]o record exists of the money being paid.” *Id.* The boldface, underlined text (shown in green in the above screenshot) is a hyperlink included by Defendant in his article to explain to readers of his March 2018 piece what Defendant means when he accuses Plaintiffs (in March 2018) of conducting a “sham auction” for television. *Id.*

As noted, Defendant included a hyperlink as part of his March 2018 piece to explain what he means by “**Bob Ford/Jesse James photo hoax**.” *Id.* Readers of the March 2018 piece were directed to Defendant’s piece entitled “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated,” wherein Defendant states that Gibson’s authentication of the James-Ford Tintype was a “fake authentication,” that Gibson was a “con artist,” and that the James-Ford Tintype was not a lost Jesse James photo because “[t]he fact is, there are no photos of Jesse James or Bob Ford that are lost.” *See Morris Aff.*, Ex 3, at Ex A thereto. The gist of “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated” was that Plaintiff Gibson was a fraudster and con artist who deliberately conspired with others to benefit by falsely purporting to authenticate a fake tintype. *Id.*

Defendant also include a hyperlink as part of his March 2018 piece to further explain what he means, in March 2018, when he claims “the hoax transitioned into **a reality TV show**” and “sham auction.” Readers of the March 2018 piece were thus directed to Defendant’s piece entitled “Fox Business News Proves Bob Ford/Jesse James Photo Hoax is Reality TV.” *See Morris Aff.*, Ex 3, at Ex. D thereto.⁶ The gist of “Fox Business News Proves Bob Ford/Jesse James Photo Hoax is Reality TV” is to (falsely) assert that Plaintiffs Gibson, Burley, Auction Gallery, Verburgt and others deliberately carried out a “hoax” auction of a “fake” tintype. *Id.*

⁶ <https://ericjames.org/wordpress/2017/04/14/fox-news-jesse-james-photo-reality-tv/>

Defendant's "Fox Business News Proves Bob Ford/Jesse James Photo Hoax is Reality TV" was also updated and republished by Defendant on February 25, 2019. *See id.* Defendant updated and republished the piece in February 2019 to add that a Fox employee implicated by Defendant as being part of the so-called sham auction "no longer is an employee of Fox News." *Id.* As to Plaintiffs, the gist of this piece is that Plaintiffs Gibson, Burley, Auction Gallery and Verburgt were among the central participants in "*a hoax faked about a fake historical artifact.*" *Id.* (emphasis added). In the piece, Defendant claims that "we" (in truth, there is no "we" at *Stray Leaves*) performed "due diligence" regarding the auction and winning bid. *Id.* Thus, when Defendant falsely asserts Verburgt, the winning bidder, was "unknown" and that there is "no evidence [Burley] actually received \$35,000," Defendant does so in the context of claiming to have conducted an investigation, including information from auction house "regulars" who were at the auction. In other words, Defendant goes to great lengths to make it appear to the reader that *Stray Leaves* is reporting facts following an actual investigation rather than Defendant's personal, delusional conspiracy theory.

G. April 12, 2018: Defendant defames Gibson on *Stray Leaves* by falsely stating that Plaintiff Gibson offered to provide, for a fee, a false opinion that a tintype depicted Jesse James; that she has "the reputation of a con artist"; and that she was the "haywire authentication artist" involved in the "Bob Ford/Jesse James Photo Hoax." Defendant also again defames Gibson, Burley and Auction House by falsely stating they participated in a "Bob Ford/Jesse James Photo Hoax" by conducting a "sham auction" of a "fake" image.

On April 12, 2018, Defendant published a piece on Defendant's *Stray Leaves* website entitled "Photo Experts of Convenience Juke Identity Theft." *See Morris Aff.*, Ex 3, at Ex. E thereto.⁷ The piece describes the efforts of Justin Whitling to authenticate an image as being of Jesse James. *Id.* The piece states that, after Whitling's image was "rejected by the Jesse James

⁷ <https://ericjames.org/wordpress/2018/04/12/identity-theft-experts-convenience/>

family as a fake image of Jesse James, Whiting turned to *experts of convenience*” to provide “the validation required to bring his tintype to auction.” *Id.* (emphasis added).

The piece states that Lois Gibson was one of the “experts of convenience” turned to by Whiting. *Id.* The piece states that “Lois Gibson was known to [Defendant] James as *the haywire authentication artist* in the **Bob Ford/Jesse James Photo Hoax** of 2017.” *Id.* In the next sentence and within a section of the piece devoted entirely to Whiting’s efforts with Plaintiff Gibson, the piece then states that Defendant “James warned Whiting to be wary of whom he associated with, lest Whiting acquire the *reputation of a con artist* himself.” *Id.* (emphasis added). Defendant thus clearly implies that Gibson has “the reputation of a con artist” by stating that associating with Gibson can lead to one acquiring “the reputation of a con artist himself.” *Id.*

The piece then refers to the James-Ford Tintype as “Gibson’s Jesse James image authenticated in *her hoax*.” The piece then describes the James-Ford Tintype as a “*fake* image of Jesse James.” The piece then implies (falsely) that Plaintiff Gibson offered to provide, for a fee, a false opinion that a tintype depicted Jesse James: “Regardless any reason, or the lack thereof, Lois Gibson offered to authenticate Whiting’s image for \$750 plus an additional \$750 to authenticate Whiting’s comparison image.” *Id.*

As noted, the April 2018 piece further states that “Lois Gibson was known to [Defendant] James as the haywire authentication artist in the **Bob Ford/Jesse James Photo Hoax** of 2017.” *Id.* The boldface, underlined text is a hyperlink included by Defendant in his article to explain to readers of his April 2018 piece just what Defendant means when he accuses (in April 2018) the Plaintiffs of carrying out “the Bob Ford/Jesse James photo hoax.” *Id.* Readers of the April 2018 piece were directed to Defendant’s piece entitled “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated,” wherein Defendant states that Gibson’s authentication of the James-Ford

Tintype was a “fake authentication,” that Gibson was a “con artist,” and that the James-Ford Tintype was not a lost Jesse James photo because “[t]he fact is, there are no photos of Jesse James or Bob Ford that are lost.” *See* Morris Aff., Ex 3, at Ex A thereto. The gist of “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated” was that Plaintiff Gibson was a fraudster and con artist who deliberately conspired with others to benefit by falsely purporting to authenticate a fake tintype. *Id.*

G. After this lawsuit is filed, Defendant republishes his claims and articles on *Stray Leaves*.

On January 15, 2019, Plaintiffs initiated this defamation suit against Defendant. *See* Plaintiffs’ Original Petition. On February 20, 2020, Defendant published “Lawsuit Defense Fund for Jesse James.” *See* Morris Aff., Ex 3, at Ex. F thereto.⁸ Given the lawsuit, Defendant’s rhetoric was relatively muted but the gist—and it is the gist that matters—remained the same: the gist of the piece is that Defendant is being sued by “identify thieves” because Defendant “researched” the facts and “reveal[ed]” that Plaintiffs are fraudsters who perpetuated “what now is known as the Bob Ford/Jesse James Photo Hoax.” *Id.* Gibson is described by Defendant as merely “a self-proclaimed authenticator”, with “no scientific credentials,” and is “notorious for her false assessments in fake images[.]” *Id.* Defendant imputes that Burley and Auction Gallery knew the tintype was “falsely identified” and collaborated in the “hoax” by “conduct[ing] no investigation” of the tintype. Defendant imputes Verburgt did not actually pay (“reported ... purchaser”) and claims Verburgt “was unknown to Burley Auction Gallery regulars.” *Id.* The gist of Defendant’s piece is that he needs help to “to stop *photo fraud identity theft*” by prevailing against Plaintiffs because Plaintiffs are responsible for a “Photo *Hoax*” that is an example of “photographic identify

⁸ <https://ericjames.org/wordpress/2020/02/20/jesse-james-lawsuit-defense-fund/>

fraud”, “the true identity of Jesse James [being] applied to *fake* images and tintypes.” *Id.* (emphasis added).

Defendant also includes a hyperlink as part of his February 2020 piece to further explain what he means, in February 2020, when he claims the “Photo Hoax” involved filming the auction for “**a reality TV program**.” Readers of the March 2020 piece were thus directed to Defendant’s piece entitled “Fox Business News Proves Bob Ford/Jesse James Photo Hoax is Reality TV.” *See* Morris Aff., Ex 3, at Ex. D thereto. The gist of “Fox Business News Proves Bob Ford/Jesse James Photo Hoax is Reality TV” is to (falsely) assert that Plaintiffs Gibson, Burley, Auction Gallery, Verburgt and others deliberately carried out a “hoax” auction of a “fake” tintype. *Id.*

As part of his February 2020 piece, Defendant affirmatively republished his “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated” as well as his other “posts about this story” of what Defendant calls “the Bob Ford/Jesse James photo hoax.” Morris Aff., Ex 3, at Ex. F. Specifically, Defendant’s February 2020 publication includes:

To read the entire story of the Bob Ford/Jesse James tintype photo hoax from its beginning in November of 2015 to the present lawsuit, click [HERE](#).

At the bottom of the hoax story, you also will find [RELATED](#) links to all the posts about this story that followed.

*Id.*⁹

Defendant’s green “HERE” takes readers directly to “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated.” *Id.* And, as Defendant states in his February 2020 piece, “[a]t the bottom of the hoax story, you also will find RELATED links to all the posts about this story that

⁹ <https://ericjames.org/wordpress/2020/02/20/jesse-james-lawsuit-defense-fund/>

followed.” *Id.*; *see also* Morris Aff., Ex 3, at Ex. A thereto (the “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated” piece).¹⁰ Defendant affirmatively linked to his other pieces in order to explain to readers of his February 2020 piece what he means when he accuses Plaintiffs, in February 2020, of “the Bob Ford/Jesse James tintype photo hoax.” *See id.* at Ex. F. thereto. As discussed above, the gist of these published attacks by Defendant was to portray Plaintiffs as dishonest and unethical professionals who worked together to intentionally defraud others for fame and profit. *See id.* at Exs. A-E thereto (Defendant’s publications).

H. The truth: Plaintiff Gibson provided her good faith, professional opinion regarding the tintype, and the tintype was sold to Terry Verburgt at an auction run in a good faith, professional manner by Rob Burley and Burley Auction Gallery.

As discussed above, the gist of Defendant’s published attacks was to portray Plaintiffs as dishonest and unethical professionals who partnered together to intentionally defraud others for fame and profit by conducting a “sham auction” of a “fake” image. The charges are entirely false. The truth is there was no “Bob Ford/Jesse James photo *hoax*,” there was no “*fraudulent* authentication,” and there was no “*sham* action.” *See* Gibson, Aff., Ex 2 and Burley Aff., Ex. 2. Instead, Gibson offered her good faith, professional opinion that the tintype depicted Jesse James and Robert Ford. *See* Gibson Aff., Ex 2. There is no evidence, nor could there be that Gibson tried to hoax, defraud or con anyone. And, the tintype was sold to Terry Verburgt at an auction run in a good faith, professional manner by Rob Burley and Burley Auction Gallery. *See* Burley, Aff., Ex. 4; Verburgt Aff., Ex. 5. There is no evidence, nor could there be, that it was a “sham auction” or that Plaintiffs tried to hoax, defraud or con anyone.

¹⁰ <https://ericjames.org/wordpress/2015/11/01/lost-jesse-jamesbobford-photo-not-lost-not-authenticated/>

III. ARGUMENT

A. The law regarding defamation per se.

1. The basic elements of a claim defamation.

The elements of a defamation claim include: (1) the defendant published a false statement; (2) that defamed the plaintiff (3) with negligence regarding the truth of the statement. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (*Rosenthal*); *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). If a statement constitutes defamation per se, damages are not a required element. *Id.*; see also, *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 146 at n. 7 (Tex. 2014). Rather, harm is presumed and the plaintiff may recover nominal damages without presenting evidence of harm. *Id.*

2. Whether a statement constitutes defamation per se is a question of law.

Whether a statement qualifies as defamation per se is a question of law to be decided by the court. *In re Lipsky*, 460 S.W.3d at 596; *Hancock*, 400 S.W.3d at 66. The court determines, from the perspective of an ordinary reader in light of the surrounding circumstances, whether the statement is defamatory per se and an ordinary reader could only view the statement as defamatory. *Id.*; *Rosenthal*, 529 S.W.3d at 438-39. “Only when the court determines the language is ambiguous or of doubtful import should the jury then determine the statement’s meaning and the effect the statement’s publication has on an ordinary reader.” *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987); *Hancock*, 400 S.W.3d at 66 (same).

“Statements that (1) unambiguously charge a crime, dishonesty, fraud, rascality, or general depravity or (2) are falsehoods that injure one in his office, business, profession, or occupation are defamatory per se.” *Ford v. Bland*, 14-15-00828-CV, 2016 WL 7323309, at *5 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, no pet.) (citations omitted). “Remarks that adversely reflect

on a person's fitness to conduct his or her business or trade are also deemed defamatory per se." *Id.*; see also, *Lipsky*, 460 S.W.3d at 596, citing *Hancock*, 400 S.W.3d at 66.

3. To determine whether a publication is defamatory, the Court considers its "gist."

To determine whether a publication is defamatory, the court considers its "gist." *Rosenthal*, 529 S.W.3d at 434, citing *Neely*, 418 S.W.3d at 63. "That is, we construe the publication 'as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.'" *Id.*, at 434, quoting *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000); see also *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) ("It is well settled that 'the meaning of a publication and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements.'" (quoting *Turner*, 38 S.W.3d at 115)). Accordingly, "a plaintiff can rely on an entire publication to prove that a defendant has implicitly communicated a defamatory statement." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 628 (Tex. 2018). Indeed, "even if all the publication's individual statements are literally true, the story 'can convey a false or defamatory meaning by omitting or juxtaposing facts.'" *Rosenthal*, 529 S.W.3d at 434; see, e.g., *In re Lipsky*, 460 S.W.3d at 594 ("While some of the statements may, in isolation, not be actionable, in looking at the entirety of Lipsky's publications the gist of his statements were that Range was responsible for contaminating his well water and the Railroad Commission was unduly influenced to rule otherwise."). For example, in *Rosenthal*, the supreme court concluded:

The article never expressly accuses Rosenthal of lying or fraudulently obtaining benefits, and D Magazine insists that each statement in the article is literally, or at least substantially, true. But the article's gist is based on "a reasonable person's perception of the entirety of [the article] and not merely on individual statements." [...] Properly evaluating the article "as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it," *Neely*, 418 S.W.3d at 80, we hold that a reasonable view of the article's gist is that Rosenthal fraudulently obtained SNAP benefits. [...]. Because the article could

reasonably be construed to accuse Rosenthal of committing a crime, it is defamatory per se, and Rosenthal need not show actual damages.

529 S.W.3d at 438-39.

B. Application of the law to the facts.

1. Plaintiffs have established all required elements.

As will be shown below, Plaintiffs have established: (1) Defendant published a false statement on *Stray Leaves*; (2) that defamed the Plaintiffs (3) with negligence regarding the truth of the statement. *Rosenthal*, 529 S.W.3d at 434; *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). The publications at issue constitute defamation per se and thus Plaintiffs may recover nominal damages without any need to show actual damages. *Rosenthal*, 529 S.W.3d at 434

2. Defendant's publications constitute defamation per se.

As mentioned, whether the publications qualify as defamation per se is a question of law to be decided by the court. *In re Lipsky*, 460 S.W.3d at 596; *Hancock*, 400 S.W.3d at 66. "Only when the court determines the language is ambiguous or of doubtful import should the jury then determine the statement's meaning and the effect the statement's publication has on an ordinary reader." *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987); *Hancock*, 400 S.W.3d at 66 (same).

The court determines, from the perspective of an ordinary reader in light of the surrounding circumstances, whether the statement is defamatory per se and if an ordinary reader could only view the statement as defamatory. *Id.*; *Rosenthal*, 529 S.W.3d at 438-39. "[T]he proper inquiry is whether a defamatory statement accuses a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of the profession." *Hancock v. Variyam*, 400 S.W.3d 59, 67 (Tex. 2013), citing RESTATEMENT (SECOND) OF TORTS § 573 cmt. c, e. Statements that (1) charge a crime, dishonesty, fraud, rascality, or general depravity or (2) are falsehoods that injure one in his

office, business, profession, or occupation are defamatory per se. *Ford*, 2016 WL 7323309, at *5. “Remarks that adversely reflect on a person’s fitness to conduct his or her business or trade are also deemed defamatory per se.” *Id.*; see also, *Lipsky*, 460 S.W.3d at 596.

For example, in *Rosenthal*, the Texas Supreme Court found that “[v]iewing the article as a whole, we conclude that a reasonable person could perceive it as accusing Rosenthal of providing false information to the Commission (either affirmatively or by omission) in order to obtain benefits to which she was not entitled.” 529 S.W.3d at 438-39. Therefore, [b]ecause the article could reasonably be construed to accuse Rosenthal of committing a crime,” the Supreme Court held “it is defamatory per se.” And, in *In re Lipsky*, the Texas Supreme Court held that falsely accusing a natural gas producer of contaminating an aquifer was actionable as defamation per se because the statements “adversely affect the perception of [the company’s] fitness and abilities as a natural gas producer.” 460 S.W.3d at 596.

Viewing Defendant’s March 2018 article and April 2018 (and February 2019) articles from the perspective of an ordinary reader in light of the surrounding circumstances, the publications clearly constitute defamation per se. The gist of Defendant’s statements was to describe Plaintiffs as fraudsters and con artists who engaged in a “hoax” and “sham action.”

“A hoax is a falsehood deliberately fabricated to masquerade as the truth. It is distinguishable from errors in observation or judgment[.]”¹¹ Webster’s defines hoax as “to trick into believing or accepting as genuine something false and often preposterous” (verb) and “an act intended to trick or dupe” or “something accepted or established by fraud or fabrication” (noun). Webster’s provides the following example of hoax in a sentence: “a skilled forger who hoaxed the

¹¹ *Hoax*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Hoax> (emphasis added).

art world into believing that the paintings were long-lost Vermeers.”¹² Webster’s equates sham with hoax: “a trick that deludes: HOAX.”¹³

A con artist is “a person who tricks other people in order to get their money.” Webster’s provides the following example: “The couple lost their savings to a con artist who told them he was an investment broker.”¹⁴ A con artist is “[t]he perpetrator of a confidence trick.”

A confidence trick is an attempt to defraud a person or group after first gaining their trust. Confidence tricks exploit victims using their credulity, naïveté, compassion, vanity, irresponsibility, and greed. Researchers have defined confidence tricks as “a distinctive species of fraudulent conduct ... intending to further voluntary exchanges that are not mutually beneficial”, as they “benefit con operators (‘con men’) at the expense of their victims (the ‘marks’).”¹⁵

The publications at issue are defamatory per se because a reasonable person would conclude Defendant was accusing Plaintiffs of fraud. Defendant accused Gibson of providing a fake opinion of the tintype and participated in a hoax and sham auction of the tintype. Defendant also accused Gibson of offering to sale a fraudulent opinion of a different tintype. Defendant thus accused a professional of lacking the integrity and honesty that is necessary for the proper conduct of a professional who provides such forensic examination opinions. *See* Gibson Aff., Ex. 2 (describing her profession).

Similarly, Defendant accused Burley, Auction Gallery and Verburgt of participating in the “hoax” by conducting a “sham auction.” Once again, Defendant thus accused a professional of

¹² *Hoax*, MERRIAM WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/hoax> (emphasis added).

¹³ *Sham*, MERRIAM WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/sham>

¹⁴ *Con artist*, MERRIAM WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/con%20artist>

¹⁵ *Confidence trick*, WIKIPEDIA, https://en.wikipedia.org/wiki/Confidence_trick, quoting Barak Orbach & Lindsey Huang, *Con Men and Their Enablers: The Anatomy of Confidence Games*, 85 SOC. RES. 795, 822 (2018).

lacking the integrity and honesty that is necessary for the proper conduct of a professional auctioneer, an auction business, and a buyer/seller/collector. *See* Burley Aff., Ex. 4; Verburgt Aff., Ex. 5 (describing their professions).

Defendant's statements at issue are clearly the sort of statements that Texas courts have found to be defamatory per se. *See, e.g., Rosenthal*, 529 S.W.3d at 438-39 (where gist of article was to accuse "Rosenthal of providing false information to the Commission (either affirmatively or by omission) in order to obtain benefits to which she was not entitled," article was defamatory per se); *In re Lipsky*, 460 S.W.3d at 596 (accusing a natural gas producer of contaminating an aquifer was actionable as defamation per se because the statements "adversely affect the perception of [the company's] fitness and abilities as a natural gas producer."); *Bentley v. Bunton*, 94 S.W.3d 561, 583 (Tex. 2002) (accusing a judge of being corrupt is defamation per se); *Weber v. Fernandez*, 02-18-00275-CV, 2019 WL 1395796, at *15 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.) (falsely stating that plaintiff was a "robber" and "engaged in a 'failed robbery'" was defamation per se); *Ford*, 2016 WL 7323309, at *6 (statement that jewelry store "used a different diamond than the one he chose for a price of \$7,700 in the ring" was defamation per se because "[a]t the very least, Richard's statements unambiguously charged" the store with being "dishonest"); *Fawcett v. Grosu*, 498 S.W.3d 650, 662 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("[S]tatements that Grosu committed crimes of moral turpitude, including theft, fall within the categories of statements that are defamatory per se."); *Downing v. Burns*, 348 S.W.3d 415, 424 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("The Burnses' statements that Downing stole from them and from their clients fall within the categories of statements that are defamatory per se."); *Allied Mktg. Group, Inc. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 176 (Tex. App.—Eastland 2003, pet. denied) (statements that company "was a sham company that 'con men'

created for the purposes of engaging in sweepstakes scams ... would ordinarily tend to injure the company's business reputation and result in financial injury to it."); *Gray v. HEB Food Store No. 4*, 941 S.W.2d 327, 329 (Tex. App.—Corpus Christi 1997, writ denied) (grocery store employer's statement—"What are you getting free today?"—constituted defamation per se because it imputed that customer was stealing/shoplifting); *Bradbury v. Scott*, 788 S.W.2d 31, 38 (Tex.App.-Houston [1st Dist.] 1990, writ denied) (a statement that an employee was dishonest in his dealings with his employer is defamatory per se because it falls within the general classification of "words that affect a person injuriously in his profession or occupation"); *Bolling v. Baker*, 671 S.W.2d 559, 571 (Tex. App.—San Antonio 1984, writ dismissed w.o.j.) ("[W]ords imputing that a person is dishonest or unethical in the practice of his employment have been held to be actionable per se.").

3. Defendant published with negligence regarding the truth of the statements.

The parties may disagree as to whether Jesse James and Robert Ford are depicted in the tintype, but Plaintiffs' defamation per se claims against Defendant have nothing to do with any mere difference of opinion. Rather, the gist of Defendant's March and April 20178 publications was to accuse Gibson was *intentionally* perpetuating a *fraud*. "Hoax," "con artist," "fraud" and "sham" hardly reflect mere criticism of Gibson's abilities or efforts. Defendant accused Gibson of intentionally providing a false opinion regarding the James-Ford Tintype. And, Defendant also accused Gibson of offering to sell a false opinion regarding another tintype. Further, Defendant falsely asserted that Plaintiffs Burley and Gallery also participated in a "hoax" by conducting a "sham auction" of the tintype and lying about there being a \$35,000 winning bid for the tintype.

As noted above, an ordinary reader understands “hoax” and “sham” as referring to “an act *intended* to trick or dupe” or “something accepted or established by *fraud* or fabrication” (noun).¹⁶ “A hoax is a falsehood *deliberately* fabricated to masquerade as the truth” and “[i]t is *distinguishable from errors* in observation or judgment[.]”¹⁷ “Texas courts have defined negligence in the defamation context as the ‘failure to investigate the truth or falsity of a statement before publication, and [the] failure to act as a reasonably prudent [person].’” *Hoskins v. Fuchs*, 517 S.W.3d 834, 843 (Tex. App.—Fort Worth 2016, pet. denied) (citations omitted). Defendant’s accusations that Gibson deliberately fabricated her opinion was made by Defendant with negligence as to the truth. Indeed, there is no evidence that Gibson was deliberately or intentionally trying to hoax, con, trick and/or defraud anyone with regard to the James-Ford Tintype. Similarly, Defendant’s accusations that Burley and Auction Gallery conducted a “sham action” and were not paid the winning \$35,000 bid were made by Defendant with negligence as to the truth. There is not, nor could there be, any evidence that the auction was a “sham” or that the winner did not pay the winning \$35,000 bid

A. Defendant was negligent as to statements regarding Plaintiff Gibson.

Defendant tries to defend himself by quibbling with Gibson’s opinion. But even his critique relies on nothing but hearsay, speculation, conclusory remarks, and subjective belief. More importantly, there is nothing to support Defendant’s repeated and false claims that Gibson intentionally perpetuated a fraud.

To begin with, Defendant published his attacks on Gibson without knowing or looking into Gibson’s credentials. *See* Depo, Ex. 1, at p. 114 (Q. [Y]ou did ***no investigation*** into what her

¹⁶ *Hoax*, MERRIAM WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/hoax> (emphasis added).

¹⁷ *Hoax*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Hoax> (emphasis added).

qualifications were? A. *No.*) (emphasis added); *id.*, at p. 135 (“Q. ... And you don’t know whether or not Lois Gibson belongs to the Facial Identification Scientific Workgroup? A. No, I do not. Q. Do you know what Ms. Gibson’s certifications or education was for the FBI? A. No, I do not. Q. Do you know if it was in the field of facial recognition? A. I do not know.”); *id.* at p. 112 (Q. Let’s talk about her qualifications. Are you aware that Lois Gibson went to dental school? A. No. Q. Did you ever read Lois Gibson’s CV? A. She never provided it to me. Q. Did you ever ask for it? A. No.”).

Defendant stated that Gibson had been “widely derided among the western artifact collector community.” *See Morris Aff.*, Ex 3, at Ex. A thereto. However, Defendant was unable to identify even a single individual “among the western artifact collector community” who had “derided” Gibson. *See Depo*, Ex. 1, at pp. 99-100.

At his deposition, Defendant vaguely criticized “software” used to creating transparencies and overlays for comparing images—claiming, without factual support, that “that software” was “unscientific” and being “discarded” by police departments “these days.” *See id* 109-110. However, with regard to Gibson’s work, Defendant admits he has *no idea what software Gibson used*. *Id.* at p. 110-11 (“I don’t know what software she was using.”). Defendant never attempted to find out what software Gibson used before publishing his attacks. *Id.* at pp 111-12 (Q? Did you ask A. In short, Defendant accused Gibson of failing to use “scientific” methods despite having *no knowledge* whether software Gibson used was “scientific or not.” *Id.* at p. 112 (“Q. ... The software she’s using, you have no idea whether or not that’s scientific software or not? A. I don’t, correct.”).

Defendant has brazenly stated that “[n]o evidence *exists* that Lois Gibson performed any scientific authentication of image assessment, or that she is qualified to do so.” *See Morris Aff.*,

Ex 3, at Ex. A thereto. Although it might have been true that no one voluntarily sent such “evidence” *to the Defendant* (why would they?), that is not at all what Defendant wrote. Defendant’s limited personal knowledge is hardly the standard for whether “evidence *exists*.” Defendant admits he did ***nothing to investigate*** his claim that “no evidence exists.” See Depo, Ex. 1, at Ex. 1, at p. 114 (Q. [Y]ou did no investigation into what her qualifications were? A. No.); *id.* at pp. 111-12 (“A. I don’t know what software she was using. [...] Q. Did you ask? A. No.”).

As for himself, Defendant has no relevant training or education regarding facial identification. *See, e.g., id.*, at pp. 13-14, 43-45. As Defendant admits, he is certainly no expert regarding tintype photographs. *Id.* at p. 120. Additionally, Defendant has never seen the actual tintype at issue. *Id.* at p. 47.

Defendant had first become aware of the James-Ford Tintype back in 2013 when its owner, Sandy Mills, emailed him a jpeg of it. *Id.* at 47 At the time, Mills explained she had been told by relatives it was a picture of Jesse James and a cousin. *Id.* at 47. Although Defendant admits the image seemed “familiar” to him., Defendant ***never checked his files*** for such an image or looked into it any further. *Id.* at 47. Instead, Defendant’s snap judgment was that he could “tell just by looking at it that it wasn’t Jesse James. The – there were too many *metrics* that were out of kilter.” p. 49 (emphasis added). First, Defendant dismissed the image without even knowing that it, like all tintypes, was reversed image. As his deposition in this lawsuit, Defendant still did not know that a tintype is a reversal of the scene photographed. *See id.* at p.120. Moreover, as to “metrics,” Defendant has no training whatsoever regarding any such “metrics.” *Id.* at p. 51. And, Defendant has no idea how the appearance of such “metrics” can be affected by the various factors that go into the photographic image created:

Q. These metrics that you’re referring to, the spacing of the eyes, how is that not dependent on how far the camera lens is from the subject?

A. *I have no idea.*

Q. How is that not dependent on the ratio of the lens taking the picture?

A. *I have no idea.*

Q. So how do those factors come into play with your metrics?

A. I don't factor them in. *I've got no knowledge of them.* I can't factor in something I have no knowledge of.

Id. at p. 53 (emphasis added).

Q. So lighting, shading, coloration, you don't know how those factor in to the metrics that you've described?

A. In order to consider those, I think I'd have to have the original image in my hand. That was not provided.

Id. at pp 53-54

Defendant proclaimed that an “authenticator would easily disqualify the image, based on mathematical formulas.” *Id.* at p. 55. In truth, Defendant does not know whether the only “authenticator” he could name even uses any “mathematical formulas.” *Id.* p. 55. As for himself, Defendant admits that he has “*no experience*” with any such “mathematical formulas.” *Id.* at 57. In short, Defendant's confidently-phrased pronouncement regarding what an expert would find after applying “mathematical formulas” was nothing but rank speculation.

Defendant's “Lost Jesse James/Bob Ford Photo – Not Lost, Not Authenticated” includes the following:

In 2002, Jesse's great-grandson, Judge James Randall Ross, and I founded the James Preservation Trust. Part of the mission of JPT is to archive the family history, as well as to address issues about the veracity of Jesse James family history, genealogy, images, and documents. **Upon receipt of a claimed image, the image is circulated first for preliminary review among family, respected historians, and/or specific authorities most relevant to the image's provenance.** If the image is believed to be possibly verifiable as authentic, the image owner is referred for full forensic investigation and analysis to a reputable authority fully trained in the metrics of

scientific forensic analysis and Jesse James history. The image owner then can chose to employ, or not to employ, such services.

The image Sandy Mills provided me was so blatantly false about being either Jesse James or Woot Hite, I told Mills not to waste any money for an authentication.

See Morris Aff., Ex 3, at Ex. A thereto (emphasis added). A reasonable reader would conclude that Defendant “circulated” the James-Ford Tintype “for preliminary review among family, respected historians, and/or specific authorities most relevant to the image’s provenance” in order to determine whether the image owner should be “referred for full forensic investigation and analysis to a reputable authority.” In fact, Defendant admits he has ***never*** “circulated” the image at issue “among family, respected historians, and/or specific authorities most relevant to the image’s provenance.”

Q. You indicate upon receipt of a claimed image, the image is circulated first for preliminary view among family. Do you see that?

A. Yes.

Q. Who did you circulate the Sandy Mills’ image in March of 2013 to?

A. ***No one***, I didn’t have to.

Depo, Ex. 1, at pp. 80-81

Q. What respected historians did you circulate the Sandy Mills’ image to?

A. None. None required.

Q. What specific authorities did you submit the –

A. None.

Id. at p. 81

Q. ...Who are the respected historians that you send images to?

A. ***I did not send this image to anybody.***

Id. at p. 87 (emphasis added).

Indeed, at his deposition, Defendant was unable to even name a single “reputable authority” he would an image owner to for a “full forensic investigation and analysis.” *See id.* at 140 (“Q. [W]hile you’re saying that this is how you would have authenticated it or how someone reputable would have authenticated it, you don’t know anybody who could have done that? A. It’s not my business.”). Furthermore, when Defendant wrote the above about the “mission” and work of “the James Preservation Trust,” the James Preservation Trust as an entity had long ceased to exist. In sum, there was no Trust, the image was not “circulated” and there were no “experts.” Defendant was lying; making readers believe there was some meaningful, authoritative process behind what was in reality merely his *personal*, unqualified and snap judgment.

Defendant is also critical of what he calls “the spare provenance [of the tintype] provided by Sandy Mills.” *Id.* at p. 123. In fact, Defendant admits he has *never investigated* the claims that Mills’ ancestors lived near and among Jesse James and his family in Missouri in the 1880—even after historian Freda Cruse Hardison researched Mills’ family and found a relevant connection. *See id.* at pp. 104-06, 132, 137-38. Instead, Defendant contends he had no need to investigate before dismissing those claims merely because “None of that rang a bell” to him. *Id.* at 132. In reality, Hardison had found that Mills’ great great grandmother was related to Annie Ralston James (Frank James’s wife) (*see*, Burley Aff., Ex 4), and Defendant obviously knew who Annie Ralston was. *See id.* at 104-05, (“Overlooked”). *See* Depo, Ex. 1, at p. 104-05, 132 (Defendant discussing Annie); *id.* at pp. 137-38 (Defendant claiming he “overlooked” Hardison’s reference to Annie).

Defendant ignorantly accused Gibson of the “cardinal sin” of “tampering” and “alter[ing] the image” because the reversed the tintype image. *See id.* at p. 118. In reality, reversing a tintype is necessary to view what was photographed. *See* note 2, *supra*; *see also* Gibson Aff., Ex 2. Thus, Gibson reversing the tintype was entirely proper and was not a “sin,” was not “tampering,” was

not “[a]ltering the image” and was not a “red flag.” Once again, Defendant had no idea what he was (aggressively and confidently) writing about. *See Depo, Ex. 1*, at p. 210 (“Q. ... Do you know whether or not a tintype, as of the type used in this photography, delivers a positive image or a reversed image? A. I do not know. I’m not an expert in tintypes.”).

Defendant also stated the tintype does not depict Jesse James because it “displays a full set of unharmed digits” and James had a missing fingertip. *See id.* at pp. 141-42. However, in reality, that fingertip is *not visible* on the tintype. *See, id.* at pp. 144-45 (“Q. You indicate in the last sentence there Mills’ faked Jesse James image displays a full set of unharmed digits. [...] But that’s not true, is it? You can’t see his unharmed digits, they’re curled under? A. Well, they look basically unharmed. Q. How could you tell if he’s missing a fingertip if his fingers are curled under? A. ***I can’t***, but I can tell it doesn’t look nothing like they’ve been harmed.”) (emphasis added).

Defendant has pointed to a “report” created by Mark Bampton, who is of the opinion that Jesse James and Robert Ford are not depicted in the tintype. First, Mr. Bampton is not a facial identification professional of any sort, and Defendant has *no idea* whether Brampton has any training to do such work. *See Depo, Ex. 1*, at p. 204-05 (“Q. Okay. Do you know what training [Bampton] has in facial recognition? A. No, I don’t.”); (“Q. Do you know what training he has in age progression? A. No. Q. Do you know what training he has in forensic science at all? A. Oh, okay. No.”). Second, although Mr. Bampton disagreed with Gibson’s conclusions, Mr. Bampton did not accuse Gibson of fraud or deliberate or intentional misconduct. Instead, Mr. Bampton recognized (correctly) that there may be more to Gibson’s opinions than he was aware of. Mr. Bampton’s opinion may be consistent with Defendant’s opinion. However, Defendant’s online attacks (*i.e.*, describing Plaintiffs as fraudsters) have nothing to do with differences of “opinion.

Defendant's accusations that Gibson deliberately fabricated her opinion was made by Defendant with negligence as to the truth. Defendant's accusations that Burley and Auction Gallery conducted a "sham action" and were not paid the winning \$35,000 bid were made by Defendant with negligence as to the truth. Defendant "failed to take reasonable steps to verify the accuracy of the story's gist and should have known the gist was false." *See Rosenthal*, 529 S.W.3d at 440.

B. Defendant was negligent as to statements regarding Burley, Auction Gallery and Verburgt.

As discussed above, Defendant falsely asserted that Plaintiffs Burley, Auction Gallery and Verburgt participated in a "hoax" by conducting a "sham auction" of the tintype and lying about there being a \$35,000 winning bid for the tintype. These accusations by Defendant are pure fantasy. There is not, nor could there be, any evidence that the auction was a "sham" or that the Verburgt did not pay the winning \$35,000 bid. *See Burley Aff.*, Ex. 4; *Verburgt Aff.*, Ex. 5.

Defendant was critical of Burley and Auction Gallery's "due diligence" before the auction. However, the truth is that Defendant has no idea what due diligence was actually performed by Burley and Auction Gallery before the auction. *See Depo*, Ex. 1, at p. 180 ("Q. ... You have no idea what due diligence they [Burley and Auction Gallery] actually did conduct? A. I have no idea."); *id.* at p. 240 (Q. ... [Y]ou didn't know what the due diligence was -- A. That's correct."). Defendant also does not know Auction Gallery "told the public" concerning the tintype. *Id.* at p. 173 ("Q. How do you know what Burley Auction Gallery told the public? A. I don't know what they told the public."). Moreover, Defendant admits that Burley and Auction Gallery properly advertised the tintype as having been authenticated by others (Gibson and Hardison). *See id.* at p. 187. Finally, and most importantly, whether Burley and Auction Gallery could have performed

additional or different due diligence has *nothing* to do with whether the auction was a “sham” or whether the winning bid was actually paid.

Defendant called the auction a “sham” for TV cameras and stated a \$35,000 winning bid is “literally unbelievable.” In truth, Defendant admits he is not qualified to opine as to the price. *See id.* at 171-72. To bolster his false charges, Defendant purports to speak with knowledge and authority as to the market value for Jesse James images: Defendant claims that “no image of Jesse James ever has sold for more than \$2,000.” In truth, Defendant admits that he does not know how much every “authentic photo of Jesse James has ever sold for.” *Id.* at p. 169. And, perhaps most significantly, Defendant also admits that he has “no evidence that money wasn’t paid” for the winning auction bid. *Id.* at p. 223 (“Q. ...[W]hat evidence do you have that money wasn’t paid? A. I have no evidence that money wasn’t paid.”).

Defendant’s accusation that Burley, Auction Gallery, and Verburgt conducted a “sham action” without an actual \$35,000 bid were made by Defendant with negligence as to the truth. Defendant “failed to take reasonable steps to verify the accuracy of the story’s gist and should have known the gist was false.” *See Rosenthal*, 529 S.W.3d at 440.

4. Plaintiffs are each entitled to nominal damages of \$1.

“Pleading and proof of particular damage is not required to prevail on a claim of defamation per se, and thus actual damage is not an essential element of the claim.” In re Lipsky, 460 S.W.3d at 596. Rather, “[i]f the statement is defamatory per se, then nominal damages may be awarded without proof of actual injury because mental anguish and loss of reputation are presumed.” *Belcher v. King*, 2020 WL 4726593, at *8 (Tex. App.—Austin July 30, 2020, pet. filed), quoting *Brady v. Klentzman*, 515 S.W.3d 878, 886 (Tex. 2017); *Jones v. Pozner*, 2019 WL 5700903, at *9 (Tex. App.—Austin Nov. 5, 2019, pet. denied) (same). In other words, “as defamation per se,

damages to its reputation are presumed” and the presumption will “support an award of nominal damages.” *In re Lipsky*, 460 S.W.3d at 596.

“Nominal damages is damages in name only. It should be in some trivial amount and is usually in the sum of \$1.” *Lucas v. Morrison*, 286 S.W.2d 190, 191-92 (Tex. Civ. App.—San Antonio 1956, no writ); *see, gen., MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 665 (Tex. 2009) (“[T]he usual meaning of the phrase ‘nominal damages’ refers to an award of one dollar.”); *see also, e.g. Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 434 (Tex. 1970) (holding plaintiff was entitled to \$1 as nominal damages). Because Defendant made statements about the Plaintiffs that are actionable as defamatory per se, Plaintiffs “need not show actual damages.” *Rosenthal*, 529 S.W.3d at 439. Plaintiff Gibson, Burley, Auction Gallery and Verburgt are each entitled to an award of \$1 as nominal damages from Defendant’s defamation per se.

5. Plaintiffs are entitled to summary judgment on defamation per se claims.

As demonstrated, the gist of Defendant’s published attacks was to portray Plaintiffs as dishonest and unethical professionals who partnered together to intentionally defraud others for fame and profit by conducting a “sham auction” of a “fake” image. The charges are entirely false. The trust is that there was no “Bob Ford/Jesse James photo *hoax*,” there was no “*fraudulent authentication*,” and there was no “*sham action*.” Instead, Gibson offered her good faith, professional opinion that the tintype depicted Jesse James and Robert Ford. And, the tintype was sold to Verburgt at an auction run in a good faith, professional manner by Rob Burley and Burley Auction Gallery.

There is no evidence, nor could there be, to support Defendant’s accusations that Gibson intentionally tried to hoax, defraud, or con anyone regarding the tintype. And, there is no evidence, nor could there be, to support Defendant’s accusations that there was a “sham auction” or that

Plaintiffs Burley and Auction Gallery intentionally tried to hoax, defraud or con anyone regarding the tintage. Defendant's reliance on "hearsay, speculation, conclusory remarks and subjective belief" do not create a genuine issue of material fact as to Defendant's negligence. *See, e.g., Hawbecker v. Hall*, 2016 WL 7187642, at *2 (W.D. Tex. Dec. 9, 2016) (granting summary judgment to plaintiff on claim for defamatory per se where defendant responded with "hearsay, speculation, conclusory remarks and subjective belief" to attempt to justify statements at issue).

Plaintiffs have established as matter of law that (1) Defendant published false statements on *Stray Leaves*; (2) that defamed the Plaintiffs (3) with negligence regarding the truth of the statement. *Rosenthal*, 529 S.W.3d at 434; *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). In order to recover nominal damages, Plaintiffs need only show that Defendant made one statement that is actionable as defamatory per se. Because Defendant made multiple statements about Plaintiffs that constitute defamation per se, Plaintiffs Gibson, Burley and Auction Gallery are entitled to judgement against Defendant for nominal damages of \$1 each.

6. Plaintiffs are entitled to injunction directing Defendant to delete the defamatory matter.

"If a plaintiff prevails in a defamation claim based on statements the defendant posted on the internet, the court can order the defendant to delete the defamatory matter and ask third-party republishers to do the same." *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 66 (Tex. App.—Houston [14th Dist.] 2018), citing *Kinney v. Barnes*, 443 S.W.3d 87, 93 (Tex. 2014); *see also, e.g., Hawbecker v. Hall*, 276 F. Supp. 3d 681, 690 (W.D. Tex. 2017) ("This Court will order Hall to remove any defamatory remarks directed toward Hawbecker already posted on her Facebook page or on the group's page[.]"); *Bui v. Dangelas*, 2019 WL 7341671, at *6 (Tex. App.—Houston [1st Dist.] Dec. 31, 2019, no pet.) (affirming "temporary mandatory injunction that requires the deletion of already-published Facebook post"). The Texas Supreme Court has

explained that “[s]uch an injunction does not prohibit future speech, but instead effectively requires the erasure of past speech that has already been found to be unprotected in the context in which it was made.” *Kinney*, 443 S.W.3d at 93. “As such, it is accurately characterized as a remedy for one’s abuse of the liberty to speak and is not a prior restraint.” *Id.*

As established above, Plaintiffs are entitled to judgment on their defamation per se claims based on statements the defendant posted on the internet. The Court should order the Defendant to delete the defamatory matter from his *Stray Leaves* website and ask third-party republishers to do the same.

PRAYER

Plaintiffs Rob Burley, Burley Auction Group, Inc., Lois Gibson, and Terry Verburgt are entitled to summary judgment on their claims for defamation per se for nominal damages of \$1 each against Defendant Eric F. James, as well as an injunction ordering Defendant to delete the defamatory matter from his *Stray Leaves* website and asking third-party republishers to do the same.

Respectfully submitted,

MORRIS & BERMUDEZ, PLLC
299 W. San Antonio St.
New Braunfels, TX 78130
Tel: (830) 626 – 8779
Fax: (830) 627 – 0890
E-mail: mmorris@mmbiblaw.com

By: /s/ Michael J. Morris
MICHAEL J. MORRIS
State Bar No: 24002651
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion for Summary Judgment was served on counsel of record for Defendant, Delphine James via email and certified first-class mail on the 12th day of April 2021.

/s/ Michael J. Morris

Michael J. Morris