CAUSE NO. DC-16-03561

KALLE MCWHORTER and Prestigious Pets, LLC,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFFS,	§	
	§	
V.	§	DALLAS COUNTY, TEXAS
	§	
ROBERT DUCHOUQUETTE and MICHELLE DUCHOUQUETTE	§	
	§	
DEFENDANTS.	§	160th JUDICIAL DISTRICT

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS UNDER TEXAS CITIZENS' PARTICIPATION ACT AND BRIEF IN SUPPORT

Defendants Robert Duchouquette and Michelle Duchouquette (collectively, the "Duchouquettes" or "Defendants") file this Motion to Dismiss Plaintiffs' Claims Under the Texas Citizens' Participation Act and Brief in Support and would respectfully show the Court as follows:

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SUMMARY OF THE ARGUMENT

Plaintiffs, a Dallas pet-sitting business and its owner, allege three claims against the Duchouquettes arising out of an unfavorable review Michelle Duchouquette posted about their business on Yelp. Plaintiff Prestigious Pets LLC first brought its claims—identical to its claims here—in Justice Court on November 19, 2015 (the "JP Action"). After the local and national media picked up the story, and in response to the Defendants' motion to dismiss the claims in the JP Action under the Texas Citizens Participation Act ("TCPA"), the business non-suited the JP Action. Prestigious Pets, now joined by its owner (collectively, "Plaintiffs"), has refiled suit against the Duchouquettes in this Court, seeking up to one million dollars in monetary relief based entirely on the Duchouquettes' allegedly defamatory online review and statements made in media interviews after Prestigious Pets had sued the Duchouquettes in Justice Court.

Plaintiffs' claims should be dismissed for several reasons. There is no doubt that all of Plaintiffs' claims relate to the Duchouquettes' exercise of their rights to free speech. Thus, the burden is on the Plaintiffs to establish, by clear and specific evidence, each essential element of each of their claims. They cannot do so: the business owner has no claims for defamation or breach of contract because the review says nothing about her, and she is not a party to or protected by the contract sought to be enforced. For its part, Prestigious Pets cannot establish by clear and specific evidence that the review was (1) a statement of fact, (2) defamatory, (3) not made with actual malice (or, in the alternative, published negligently), (4) or caused damages to Prestigious Pets; or (5) that the alleged non-disparagement clause in the parties' contract waived the Duchouquettes' right to free speech. Finally, even if Prestigious Pets can make such a showing, the Duchouquettes are able to establish several valid defenses to its claims, including truth and privilege as to the defamation and business disparagement claims, and

unconscionability and violation of public policy as to the breach of contract claim. Accordingly, the Court should dismiss Plaintiffs' claims under the TCPA and award Defendants their costs and reasonable attorneys' fees.

INTRODUCTION AND BACKGROUND

In October 2015, Defendants Robert Duchouquette ("Robert") and Michelle Duchouquette ("Michelle") hired Prestigious Pets to take care of their pets while on vacation. Michelle Aff. ¶ 2. Prestigious Pets' representative, Amanda Jones, met with the Duchouquettes to learn about the pets' needs and the Duchouquettes' expectations, and to have a service contract signed. *Id.*; Robert Aff. ¶ 2.

The contract contained a non-disparagement clause that reads as follows:

> NON-DISPARAGEMENT / INJUNCTION In an effort to ensure fair and honest public feedback, and to prevent the publishing of false or libelous content in any form, your acceptance of this agreement prohibits you from taking any action that negatively impacts Prestigious Pets LLC, its reputation, products, services, management, employees or independent contractors. Prestigious Pets, LLC will make every reasonable attempt to resolve or assist in any dispute or disagreement in services. Any violation of this clause is to be determined by Prestigious Pets LLC in its sole discretion. In the event that Prestigious Pets LLC determines litigation is required for resolution, client accepts responsibility of legal fees encountered by Prestigious Pets LLC as a result. Customer acknowledges that any damages awarded would be inadequate and insufficient remedy for breach of this Non Disparagement Clause, and that breach of such clause will result in immeasurable and irreparable harm to Prestigious Pets. Therefore, in addition to any other remedy to which Prestigious Pets may be entitled or awarded by the customers breach of this clause, Prestigious Pets shall be entitled to seek temporary, preliminary, and permanent injunctive relief from any court of competent jurisdiction restraining customer from committing or continuing any breach of this Non Disparagement Clause. This clause shall survive any termination of this agreement. Prestigious Pets shall be entitled to preliminary and/or permanent injunctive relief for a violation, or a threatened violation of the restrictive covenants herein.

Robert Aff. ¶ 7 and Exhibit D.

Most of the conversation occurred between Jones and Robert, *id.* ¶ 2, and it was Robert who signed the service agreement after Jones highlighted only two provisions, which Robert was

asked to initial. *Id.* ¶ 7. There was no mention of a non-disparagement clause, and no explanation of what that clause entailed. *Id.* ¶ 10. Nor did Robert notice that the contract contained a clause allegedly waiving his free speech rights. *Id.* Had he and Michelle known of the clause, they would have hired a different company, both because they would not have waived their free speech rights, and also because the very presence of such a clause would have signaled to them that Prestigious Pets would be a bad choice. *Id*; Michelle Aff. ¶ 20.

In addition to asking her to feed and walk their dogs, the Duchouquettes asked Jones to feed their fish. Robert Aff. ¶ 3. After Jones agreed to do so, Robert demonstrated the amount of food to be given to the fish daily by placing four or five pellets in his hand. Robert Aff. ¶ 4. Jones never told the Duchouquettes that she was unable to make an agreement on behalf of Prestigious Pets—in fact, she was the only one who signed the contract on Prestigious Pets' behalf, on the line for "Representative of Prestigious Pets." Robert Aff. ¶¶ 4, 7.

While on vacation, the Duchouquettes noticed from a "fish cam" that the fish bowl was getting cloudy, which is a sign the fish was being overfed. Robert Aff. ¶¶ 5, 6, Exh. B; Michelle Aff. ¶ 4. As per Prestigious Pets' policies, Jones had not given the Duchouquettes any way to contact her directly. The Duchouquettes were also displeased that Prestigious Pets' web site and service contract alike indicated that Prestigious Pets' office was open only during short daytime hours and that, even if the pet owners needed to reach Prestigious Pets in an emergency, they could expect a response only during office hours. Still, Michelle sent an email about the cloudiness of the bowl, which the company acknowledged. Michelle Aff. ¶ 4, Exh. A. Upon their return from vacation, the Duchouquettes could see that piles of fish food had accumulated at the bottom of the fish tank. *See* Robert Aff. ¶ 6, Exh. C.

After she and her husband returned from vacation, Michelle contacted Prestigious Pets both by email and telephone to raise several concerns about its policies. Michelle Aff. ¶ 6 and Exh. B. Michelle posted this review on Yelp:

> My usual pet sitter/walking company, Great Paws was closed so I decided to try Prestigious Pets based on all the good reviews. We have 2 dogs and a fish that were being cared for while we were gone a Friday through Tuesday evening.
>
> I knew in the initial meeting that I did not think the company was a good fit. The walker would not share her phone number and said any communications had to be emailed through the company. Since their hours are M-F 9 am - 4 pm or Sat. 11 am - 3pm and closed Sunday, this leaves a lot of time where you cannot contact your walker if needed. We would have liked to contact her when we saw the alarm was not set and also when we saw the fish bowl had gone from clear to cloudy.
>
> I also did not like their fee and the services you receive. It is $20 to come to the house, but that does not include a walk. That is $5 extra. Granted they charged us $10 and it took multiple emails to get that credited back on my card.
>
> They also don't give you updates on the visit. That has to be requested each day via email. I like to know the walk and visit happened and that the dogs are doing well.
>
> Finally, I left a note asking for our keys to be left when the walker left the last day. They charge $15 to get them back at a later date. The walker did not leave the keys and they are going to charge me to get them back.
>
> The one star is for **almost killing my fish**, otherwise it would have been 2 stars. We have a camera on the bowl and we watched the water go from clear to cloudy. There was a layer of food on the bottom from way too much being put in it. Even if you don't have fish, you should be able to see the change in the bowl and stop putting in food. Better yet, ask us how much to feed if you are unsure.
>
> The care of our dogs was fine. It is just the company is not one I would recommend due to their policies. I did share this feedback with them and they wanted to discuss it. However, I have no plans to use them again and did not want to take the time to discuss the issues.
>
> Michelle Aff. ¶ 7; Levy Aff. Exhibit B.

Prestigious Pets responded to Michelle's review. The response explained some of the policies about which Michelle had expressed concern; it never took issue with the review's

assertion that the fish had been overfed or, indeed, that it had been "almost killed." Michelle Aff., ¶ 15; Levy Aff., Exh. B.

In addition, Tom Fleischer, Prestigious Pets' attorney, sent the Duchouquettes a demand letter complaining that the review contained false statements. Michelle Aff., Exhibit C. He did not claim that the statement that the fish had been overfed was inaccurate, though he did challenge the review's statement that the fish had been "almost killed" and claimed that Jones "did not notice any issues involving the fish." *Id.*

The letter also accused the Duchouquettes of violating the "spirit and the terms of the 'Non-disparagement' provisions" of the service contract, and threatened to sue for libel or business disparagement if they did not cease and desist from making false statements, including on Yelp. *Id.*

In response to Prestigious Pets' demand letter, Michelle made several changes to the review, including changing "The one star is for potentially killing my fish" to: "The one star is for **potentially harming my fish**, otherwise it would have been 2 stars." Michelle Aff. ¶ 12.[1]

On November 19, 2015, Prestigious Pets filed a small claims action against the Duchouquettes in the Justice Court. The petition form alleged that Michelle's Yelp review was defamatory and also claimed breach of the non-disparagement provision of the Service Contract.

[1] Michelle Duchouquette's prompt response to the demand letter that she and her husband received on October 30, 2015, shows both their complete good faith and their scrupulous efforts to make sure that their review was both accurate and fair. Although Michelle believed that she had had ample grounds for saying what she had said in her initial review, she made several changes in the review to try to accommodate the company's concerns. Michelle Aff. ¶¶ 12, 15. For example, insofar as the cease and desist letter explained that the company's actual policies were different from what she had understood Jones to have said, she revised her review to say what the company's policy was, making clear that is was not the company that was at fault. *Id.* She did not, however, change her account of the facts relating to the overfeeding. *Id.* The demand letter not only did not claim that the factual account was false, but offered to make good on any problems. Michelle Aff., Ex. C. Furthermore, Michelle's changes constitute timely mitigation under section 73.055(b)(2) of the Civil Practice and Remedies Code, so Plaintiffs may not maintain an action based on the original review.

The petition sought an award of $6,766 and an injunction compelling compliance with the non-disparagement clause. Michelle Aff. Exh. D.

After being sued, Michelle reached out to "Tatiana N," another reviewer who had given Prestigious Pets a negative review. Upon learning that she and Robert were not the only Prestigious Pets customers who had been sued for expressing an opinion about Prestigious Pets, Michelle decided to speak out to the media to warn about the consequences of consumer contracts with non-disparagement clauses. Michelle Aff. ¶ 22.

The media were interested in the Duchouquettes' story and Prestigious Pets' lawsuit, and several media outlets interviewed the Duchouquettes. During the interviews, Michelle did most of the talking, although Robert was present with her, sometimes appearing on camera and occasionally speaking. The great bulk of the discussion was about the non-disparagement clause, although questions were occasionally directed to the subject of the disparagement, mainly to show what a small dispute had given rise to the lawsuit on the clause. During one of the television appearances, Robert said that their fish had been "overfed."

The Duchouquettes filed an anti-SLAPP motion—similar to this motion—in Justice Court. Shortly thereafter, Prestigious Pets non-suited its claims. Immediately after non-suiting the first action, Prestigious Pets and Kalle McWhorter filed this action for defamation, business disparagement, and breach of the non-disparagement clause. The first two causes of action allege claims relating to the statements contained in the review that Prestigious Pets "'almost kill[ed] my fish,' which was later changed to 'potentially harmed my fish,'" as well at Robert's televised statement that the fish was "overfed." Original Petition ¶ 20.

The breach of contract claim is based solely on Robert's alleged violation of the non-disparagement clause by making statements to the media **after** Prestigious Pets filed its first suit.

It does not appear to rely on the Yelp review (or any other pre-JP Action communication). *Id.* ¶¶ 13-17.

ARGUMENTS AND AUTHORITIES

I. Plaintiffs' action, based solely on the Duchouquettes' Yelp review and their statements in the media coverage following the JP Action, must be dismissed in its entirety under the Texas Citizens Participation Act.

The Texas Citizens Participation Act is codified in Chapter 27 of the Civil Practice and Remedies Code. The statute erects a two-step procedure, under which the defendants must first show that the action against them is "based on, relates to, or is in response to [the] party's exercise of the right of free speech, right to petition, or right of association." Tex. Civ. Prac. & Rem. Code §§ 27.003(a), 27.005(b). Once the defendants make that showing, the action must be dismissed unless plaintiffs "establish by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code § 27.005(c). Even if a plaintiff makes such a showing, the defendants can secure dismissal by "establish[ing] by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." Tex. Civ. Prac. & Rem. Code § 27.005(d); *Better Bus. Bureau of Metro. Dallas v. BH DFW, INC.*, 402 S.W.3d 299, 305 (Tex. App.—Dallas 2013, pet. denied). The TCPA also requires courts to award successful defendants their court costs and attorney fees, any other expenses incurred in defending against the lawsuit, and such sanctions as may be needed to deter similar actions in the future. Tex. Civ. Prac. and Rem. Code § 27.009(a).[2]

As the Dallas Court of Appeals has explained,

> Chapter 27 [of the Texas Civil Practice and Remedies Code] creates an early-dismissal mechanism intended to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise

[2] Some of the grounds for granting the motion to dismiss under the Texas Citizens Participation Act could also provide the basis for counterclaims under the Texas Deceptive Trade Practices Act ("DTPA").

> participate in government to the maximum extent permitted by law" while simultaneously protecting the rights of persons with meritorious claims. Statutes like Chapter 27 are commonly known as "anti-SLAPP statutes" because they are intended to curb "strategic lawsuits against public participation."

Am. Heritage Capital v. Gonzalez, 436 S.W.3d 865, 868-69 (Tex. App.—Dallas 2014, no pet.) (internal citations omitted).

A. Plaintiffs' action is based on the Duchouquettes' exercise of their right of free speech and their right to petition.

First, the Duchouquettes must show that the Plaintiffs' claims are based on, relate to, or are in response to the exercise of a protected constitutional right, such as the right to free speech. The Duchouquettes have made this showing: the lawsuit by Prestigious Pets is based on two such rights, the Duchouquette's exercise of their right to free speech and their right to petition.

First, Plaintiffs' claims are based on the Duchouquettes' exercise of their right of free speech. Under the statute, "'[e]xercise of the right of free speech' means a communication made in connection with a matter of public concern," and "matter of public concern," in turn, is defined as including "an issue related to . . . a good, product, or service in the marketplace." Tex. Civ. Prac. & Rem. Code §§ 27.001(3), (7)(E). *All* of Plaintiffs' claims—defamation, business disparagement, and breach of contract—are based on Michelle's Yelp review of Prestigious Pets' services or the Duchouquettes' statements about the terms of the Prestigious Pets contract for services; this is precisely the type of speech that the statute protects. *Better Bus. Bureau of Metro. Dallas v. Ward*, 401 S.W.3d 440, 444 (Tex. App.—Dallas 2013, pet. denied) (holding that "the TCPA applies to a business review communicated to the public by the Better Business Bureau").

Moreover, to the extent that Prestigious Pets' claims relate to interviews that the Duchouquettes gave to the media about Prestigious Pets' first lawsuit against them, those statements are protected by the right to petition, because that right is defined to include any

"communication . . . pertaining to (i) a judicial proceeding," any "communication in connection with an issue under consideration or review by a legislative [or] judicial . . . body," and any "communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative. . . body." Tex. Civ. Prac. & Rem. Code § 27.001(4). The communications pertained to: first, Prestigious Pets' claims against the Duchouquettes in the JP Action, and second, the permissibility of non-disparagement clauses in consumer contracts, a topic of current debate at various legislative levels. *See*, *e.g.*, Consumer Review Freedom Act of 2015, S. 2044, 114th Cong. (2015); Cal. Civil Code 1670.8 (enacted Sept. 9, 2014); Md. Gen. Assembly, House Bill 131 (enacted Apr. 12, 2016, effective Oct. 1, 2016). Thus, the statements by the Duchouquettes over which plaintiffs have sued are squarely within the protection of the TCPA.

B. Plaintiffs cannot present clear and specific evidence establishing a prima facie case on each essential element of their claims.

Each of Plaintiffs' claims is subject to dismissal because neither Plaintiff can present clear and specific evidence supporting a prima facie case on each essential element of these claims. Tex. Civ. Prac. & Rem. Code § 27.005(c). First, Prestigious Pets cannot do so as to defamation because the statements are privileged, expressions of opinion, substantially true, and were not made with actual malice or negligently published; nor did the statements cause special damages. Second, because Plaintiffs cannot establish each essential element of a defamation claim, they certainly cannot meet the higher burden of a business disparagement claim, which has similar, but more stringent, elements. Third, Plaintiffs cannot establish a prima facie case of their breach of contract claim because Robert's post-JP Action statements are privileged and because Prestigious Pets cannot prove that any of the Duchouquettes' statements were the

proximate cause of their injuries. Fourth, Plaintiff McWhorter cannot do so for any of her claims, because none of the statements refer to her.

1. Plaintiffs cannot present clear and specific evidence supporting their defamation claim because the Duchouquettes' statements are privileged, true or substantially true, not published with actual malice or negligence, and because Plaintiffs cannot prove special damages.

The elements of a defamation claim are "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages." *In re Lipsky*, 460 S.W.3d 579, 593-94 (Tex. 2015). Additionally, "a plaintiff claiming defamation based on a publication as a whole must prove . . . that the publication is not otherwise privileged." *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000); *accord D Magazine Partners, L.P. v. Rosenthal*, 475 S.W.3d 470, 481, n.6 (Tex. App.—Dallas 2015, pet. filed). Prestigious Pets' defamation claim fails because three of these essential elements are missing: (1) the Duchouquettes' statements are neither false nor statements of fact, (2) they were not made with the requisite degree of fault, and (3) Prestigious Pets cannot establish damages as a result of the Duchouquettes' actions. Additionally, Plaintiffs bear the burden of proving that the Duchouquettes' statements were not privileged, which they cannot do.

a. All of the statements the Duchouquettes made after Prestigious Pets filed the JP Action are privileged.

According to the Dallas Court of Appeals, "[w]hether the lack of privilege is an element of the plaintiff's case, or whether the existence of a privilege is an affirmative defense, is not clear." *D Magazine Partners, L.P. v. Rosenthal*, 475 S.W.3d 470, 481, n.6 (Tex. App.—Dallas 2015, pet. filed). The Texas Supreme Court appears to treat it as both: in *Turner v. KTRK Television*, 38 S.W.3d 103, 114, the Court included the lack of a privilege as part of the plaintiff's burden of proof. In *Neely v. Wilson*, 418 S.W.3d 52, 56 (Tex. 2013), the Court indicated it was a defense. Thus, the Dallas Court of Appeals treats it as **both**, "first

consider[ing] whether [the plaintiff] established a prima facie case of the element of lack of privilege by clear and specific evidence, and then we consider whether [the defendant] established a privilege as an affirmative defense by a preponderance of the evidence." *Rosenthal*, 475 S.W.3d at 481, n.6. Because Plaintiffs cannot present clear and specific evidence that the Duchouquettes' statements are not privileged, their claims must be dismissed.

Two privileges apply to the Duchouquettes' statements: the absolute judicial communications privilege and the qualified common interest privilege. An absolute privilege is "more properly thought of as an immunity," while a qualified privilege "arise[s] out of the occasion upon which the false statement is published." *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987). Qualified privileges can be destroyed by actual malice, while absolute privileges cannot. *Id.* Because the Duchouquettes have not acted with actual malice, the operation of either privilege blocks the Plaintiffs' claims.

i. Judicial Communications Privilege

"The question of whether an allegedly defamatory communication is related to a . . . judicial [] proceeding, and therefore absolutely privileged, is one of law to be determined by the court." *Senior Care Resources, Inc. v. OAC Senior Living, LLC*, 442 S.W.3d 504, 513 (Tex. App.—Dallas 2014, no pet.). "When deciding the issue," a court should "consider the entire communication in its context, and [] extend the privilege to any statement that bears some relation to an existing or proposed judicial [] proceeding." *Id.* The Dallas Court of Appeals has long held that "the privilege can extend to statements made out of court so long as they bear some relation to the proceeding," and that "all doubt should be resolved in favor of its relevancy." *Jenevein v. Friedman*, 114 S.W.3d 743, 747 (Tex. App.—Dallas 2003, pet.) (citing *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

Here, the Plaintiffs complain not only of the Duchouquettes' Yelp review, but also of their "subsequent oral interview and written statements." Original Petition ¶ 21. The Duchouquettes gave an oral interview and written statements to local and national media—all of which were prompted by and were directly related to the judicial proceeding filed by Prestigious Pets. Plaintiffs have not identified a single statement made by the Duchouquettes after the JP Action was filed that was not a direct reference to the lawsuit or the underlying facts. The statements, taken in context, clearly relate to an existing judicial proceeding, and hence are absolutely privileged.

ii. Common Interest Privilege

For any of the Duchouquettes' statements that are not absolutely privileged, they are certainly protected by the qualified common interest privilege. The common interest privilege attaches "to good-faith communications upon **any subject in which the author or the public has an interest** or with respect to which the author has a duty to perform to another owing a corresponding duty." *Iroh v. Igwe*, 461 S.W.3d 253, 263 (Tex. App.—Dallas 2015, no pet.) (emphasis added, internal quotations omitted). It protects "statements made under circumstances in which any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist that another, sharing that common interest, is entitled to know." *Holloway v. Texas Med. Ass'n*, 757 S.W.2d 810, 813 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

"[C]riticism of [a] business can be reasonably related to social views that are strongly held by the speakers," and warning fellow consumers about questionable business practices "arguably is an issue of public concern." *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 108 (Tex. App.—Austin 2003, no pet.). This privilege applies to Michelle's Yelp review,

because Yelp users are a community of consumers who have a common interest in learning about local businesses. *See* https://www.yelp.com/elite/dallas (describing community of Dallas-area Yelp users). Even within the Yelp community, reviews of a given business such as Prestigious Pets will only appear when a user conducts a search either for a particular kind of business or for Prestigious Pets by name. Moreover, by posting on Yelp, Michelle Duchouquette communicated only with members of that community.[3]

b. All of the Duchouquettes' statements were expressions of opinion based on disclosed facts, and the underlying facts are plainly true, not false.

The Original Petition pleads generally that the Defendants made "multiple" defamatory statements, but the petition only identifies eight words in the Yelp review, and a single spoken word in the course of a television interview as defamatory. Original Petition ¶ 19. However, Texas law requires that defamatory words be set forth verbatim in a petition for defamation; it is not enough to recite their substance and effect. *Perkins v Welch*, 57 S.W.2d 914, 915 (Tex. Civ. App.—San Antonio 1933, no writ); *see also Granada Biosciences v. Barrett*, 958 S.W.2d 215, 222 (Tex. App.—Amarillo 1997, pet. denied). Moreover, allegedly defamatory statements must be read in context, not in isolation. *Schauer v. Mem'l Care Sys.*, 856 S.W.2d 437, 446 (Tex. App.—Houston [1st Dist.] 1993, no writ). Consequently, this motion addresses the specific allegedly defamatory words that have been identified in the petition; however, as explained

[3] The petition also alleges that Michelle republished her Yelp review on a separate site called "birdeye.com." That allegation is incorrect. Not only did Michelle not publish anything at that website, but she had never heard of the site before she saw the petition in this case. Michelle Aff. ¶ 21. Birdeye.com engages in "scraping" of consumer reviews from other companies that host consumer reviews, to which some of those review hosting sites have objected. *See*, *e.g.*, http://birdeye.com/small-business/ (reflecting that the company "aggregates your reviews from all the top sites so you can easily monitor what your customers are saying about you — in real-time!").

below, the Plaintiffs cannot establish the essential elements of their claims as to any portion of the review.[4]

Under Texas law, as under the First Amendment, defamation claims may only be brought over statements of fact. "All assertions of opinion are protected by the first amendment of the United States Constitution and article I, section 8 of the Texas Constitution." *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). No defamation claim can be asserted against a "nonactionable statement of opinion [that] cannot be objectively verified." *Am. Heritage Capital v. Gonzalez*, 436 S.W.3d 865, 875 (Tex.App.—Dallas 2014, no pet.); *see also MKC Energy Investments v. Sheldon*, 182 S.W.3d 372, 377 (Tex. App.—Beaumont 2005, no pet.) (accusing landlord of maintaining "dangerous" and "unhealthy" building was not defamatory). Statements are of protected opinion when they are expressed in hyperbolic terms, *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562 (5th Cir. 1997); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App.—San Antonio 1988, writ denied), or when they express opinions based on disclosed facts which are themselves accurate. Restatement (Second) of Torts § 566, cmt. c (1977); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439-40 (9th Cir. 1995) ("A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning").

For example, in *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 82 (Tex. App.—Ft. Worth 1982, writ ref'd n.r.e.), the publication in question quoted the plaintiff's actual words, and characterized them as a "threat"; the court of appeals held that the First Amendment barred a defamation judgment based on differences about whether the true facts were properly

[4] Accordingly, any attempt by the Plaintiffs to amend their pleadings to expand the scope of their defamation allegations would be futile.

characterized as a "threat." The small number of statements that are specifically alleged as defamatory in the petition fall into one or both of these categories.

The only allegedly defamatory words that the petition sets forth relate to the statements made in the Yelp review that Prestigious Pets' pet sitter "overfed" the fish, "almost killed" it,[5] or "potentially harmed" it. In context, however, whether the fish was "potentially harmed" or almost killed" were hyperbole or opinion based on disclosed fact: the review stated that the tank had became cloudy while Jones was sitting for the Duchouquettes' pets, and that, upon the Duchouquettes' return from vacation, there was a layer of food on the bottom of the fish bowl. The many authorities available online that indicate the dire consequences for Betta fish that can ensue from overfeeding support the opinions stated in the review. *E.g.*, http://www.bettatalk.com/food.htm; *Feeding Bettas*, http://nippyfish.net/bettas-101/feeding-bettas/; *Bloating and Constipation,* http://nippyfish.net/sick-betta/bloating-and-constipation/*;* Hikari, *Betta Care* http://www.hikariusa.com/articles/betta-care/. And the truth of the underlying statements of fact is confirmed both by the affidavits of Michelle and Robert Duchouquette and by the photographs attached to their affidavits. *See* Robert Aff. ¶ 6, Exh. B, C; Michelle Aff. ¶ 5. Plaintiffs therefore cannot establish by clear and specific evidence that the allegedly defamatory statement was a statement of fact capable of defamatory meaning.

c. The Duchouquettes' statements were neither made with actual malice nor published negligently.

Plaintiffs cannot identify clear and specific evidence supporting a prima facie case with respect to the Duchouquettes' requisite level of fault for a valid defamation claim. They must show that one or both of the Duchouquettes made false statements of fact with actual malice—

[5] This particular statement also cannot be actionable because it was revised in accordance with the Texas Defamation Mitigation Act. *See* note 2, *supra*.

that is to say, with knowledge of falsity or reckless disregard of probable falsity—because the Duchouquettes' statements are protected by the judicial or common interest privilege. *See* Section I.B.1.a, *supra*.

Even if neither privilege applies, Plaintiffs nevertheless must prove actual malice for the statements that both Robert and Michelle Duchouquette made after they learned that Prestigious Pets had sued them, because Prestigious Pets became a limited purpose public figure by voluntarily entering into a substantial public controversy over the creation and enforcement of non-disparagement clauses in form consumer contracts. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). In *McLemore*, the Texas Supreme Court adopted the Fifth Circuit's "generally accepted test"

> to determine whether an individual is a limited-purpose public figure . . .: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

978 S.W.2d at 571 (Tex. 1998).

Prestigious Pets didn't just sue the Duchouquettes; it has also filed an additional lawsuit against a different Yelp reviewer, Tatiana Narvaez. By bringing two lawsuits, against three different defendants, Plaintiffs became limited purpose public figures. Prestigious Pets did not stop there, however—it also intentionally participated in the media circus surrounding the JP Action, giving a statement to CBS News via email in which it labeled its employees as "honest people" and the Duchouquettes as "dishonest people." *See* http://dfw.cbslocal.com/2016/02/17/yelp-review-lands-couple-in-court/. *Cf. Neely v. Wilson*, 418 S.W.3d 52, 71 (Tex. 2013) (holding that it would be "exceedingly rare" for a defamation plaintiff to become a public figure involuntarily—limited purpose public figures must "thrust themselves

to the forefront of particular controversies," and that the plaintiff at issue was not a public figure because he declined to give a quote to the local TV station covering the controversy).

There is no question that there is broad public discussion about the use of clauses in form consumer contracts to try to block criticism of businesses. *See*, *e.g.*, Consumer Review Freedom Act of 2015, S. 2044, 114th Cong. (2015); Cal. Civil Code 1670.8 (enacted Sept. 9, 2014); Md. Gen. Assembly, House Bill 131 (enacted Apr. 12, 2016, effective Oct. 1, 2016).[6] Consequently, Prestigious Pets has—by adopting controversial non-disparagement clauses into its standard consumer contract, filing suit against the Duchouquettes, and then *voluntarily* engaging in the media firestorm by giving at least one statement to local TV news—made itself a limited purpose public figure with respect to all statements that defendants made after they were sued.[7]

"Actual malice in a defamation case is a term of art. Unlike common-law malice, it does not include ill-will, spite, or evil motive." *Huckabee v. Time Warner Entm't Co. L.P.*, 19 S.W.3d 413, 420 (Tex. 2000). The actual malice standard requires Plaintiffs to establish that the defamatory statements in the review were made either with knowledge that they were false or with reckless disregard of their falsity. *Neely v. Wilson*, 418 S.W.3d 52, 69 (Tex. 2013). Reckless disregard requires the defendant to have "in fact entertained serious doubts as to the truth of his publication." *Id.* Even "the failure to investigate the facts before speaking as a reasonably prudent person would do is not, standing alone, evidence of a reckless disregard for the truth." *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002). Finally, a higher standard of

[6] *See also* http://www.chicagotribune.com/lifestyles/travel/sns-201411110000--tms--travelpkctnxf-a20141111-20141111-column.html (alerting consumers to the "plague" of non-disparagement clauses and referring to them as "contracts of adhesion"); http://venturebeat.com/2015/10/05/non-disparagement-clauses-and-negative-online-reviews/ (discussing the then-newly-introduced Senate bill banning consumer non-disparagement clauses and advocating for businesses to voluntarily refrain from their usage); https://consumerist.com/2015/11/04/things-are-looking-up-for-federal-law-banning-gag-clauses-that-prevent-customers-from-writing-honest-reviews/ (same).

[7] Also, as explained in Section I.B.1.a.i, all statements made after Prestigious Pets filed its JP Action are protected by the absolute judicial communications privilege.

proof attaches to actual malice at trial—it must be proven by clear and convincing evidence. *Id.* at 596.

Even if Plaintiffs are not deemed limited public figures, the Duchouquettes cannot be held liable unless Plaintiffs prove that the Duchouquettes negligently published false statements. *McLemore*, 978 S.W.2d at 571; *see also Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 86 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("Fault is a constitutional prerequisite for defamation liability").

No evidence supports Plaintiffs' allegations that the Duchouquettes published their statements about the overfeeding of the fish with either actual malice or negligence. First, as explained above, there is no clear and specific evidence that the statements are false at all. The Duchouquettes' affidavits establish that they genuinely believed that Jones had overfed their fish, and that the overfeeding posed a significant threat of harm to the fish, including death. *See* Robert Aff. ¶ 6, Exh. B, C; Michelle Aff. ¶ 5. The images from the fish cam, as well as the state of the fish bowl when they returned, show that more food was being placed in the bowl than the fish was eating. *Id.*

The record evidence, therefore, shows the Duchouquettes' complete good faith and, indeed, their carefulness, about the truthfulness of their statements on the one subject that is at issue in this libel action. Plaintiffs cannot introduce clear and specific evidence otherwise, because none exists.

d. Prestigious Pets cannot produce clear and specific evidence of damages because other contemporaneous reviews about Prestigious Pets are even more damaging.

Finally, Plaintiffs' defamation claim should be dismissed because there is no clear and specific evidence that Michelle Duchouquette's review—as opposed to other negative reviews or conduct of the business—have caused harm to the Plaintiffs. *Bos v. Smith*, No. 13-14-456-CV,

2016 WL 1317691, at *19 (Tex. App.—Corpus Christi Mar. 10, 2016, pet. filed) (Plaintiffs must establish that the "defamatory statements were the proximate cause of any damages suffered").[8] Prestigious Pets has already sued another Yelp reviewer for a prior negative review. Further, a series of reviews of Prestigious Pets on the "Pissed Consumer" website make several harsh criticisms, including one review stating that the reviewer's cat **died** due to Prestigious Pets' negligent pet-sitting. Levy Aff. Exh. E. Against this backdrop, there is no clear and specific evidence that the Duchouquette's review caused any harm to Plaintiffs whatsoever.[9]

For all of these reasons, Plaintiffs' defamation claims should be dismissed.

2. Plaintiffs cannot present clear and specific evidence supporting their business disparagement claim because the Duchouquettes did not act with actual malice, and because Plaintiffs cannot prove special damages.

The United States Supreme Court has held that a plaintiff cannot evade the First Amendment limitations on defamation claims by changing the name of the tort. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). Consequently, Plaintiffs' business disparagement claim is subject to dismissal under the TCPA for the same First Amendment reasons as their defamation claims. *Nelson v. Pagan*, 377 S.W.3d 824, 837 (Tex. App.—Dallas 2012, no pet.); *MKC Energy Investments v. Sheldon*, 182 S.W.3d 372, 377 (Tex. App.—Beaumont 2005, no pet.); *Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847, 853 n.3 (Tex. 2005); *Rogers v. Dallas Morning News*, 889 S.W.2d 467, 474 (Tex. App.—Dallas 1994, writ denied); *Granada*

[8] Additionally, this litigation appears to have caused Yelp to independently post a notification on Prestigious Pets' page titled "Consumer Alert: Questionable Legal Threats" criticizing Prestigious Pets' pursuit of this lawsuit. Levy Aff. Exh. F.

[9] In their Petition, Plaintiffs assert that the review's statements are defamatory per se, based on a Texas law against animal cruelty. The Duchouquettes have never accused Prestigious Pets of animal cruelty, nor is there any indication that law enforcement would pursue Prestigious Pets criminally for overfeeding a Betta fish. Plaintiff's argument is simply incorrect.

Biosciences v. Forbes, Inc., 49 S.W.3d 610, 617 (Tex. App.—Houston [1st Dist.] 2001, *rev'd on other grounds*, 124 S.W.3d 167 (Tex. 2003)).

When the claim is for business disparagement, "[m]ore stringent requirements have always been imposed on the plaintiff," even beyond what a libel plaintiff must prove. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766-67 (Tex. 1987). These requirements include proof of malice and special damages. *In re Lipsky*, 460 S.W.3d 579, 592 (Tex. 2015) ("To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff").

Moreover, it must have been the **false** disparaging remarks published with malice and without privileges "that resulted in special damages." *Lipsky*, 460 S.W.3d at 592 (Tex. 2015). Further, those pecuniary losses must be traceable to the false statements. *Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V.*, 202 S.W.3d 250, 267 (Tex. App.—Corpus Christi 2006, pet. denied).

As noted above, Plaintiffs lack clear and specific evidence that the Duchouquettes acted with actual malice. Plaintiffs also cannot produce clear and specific evidence of special damages caused by the nine allegedly false and disparaging words in the review (or the review as a whole). Consequently, Plaintiffs' business disparagement claim should be dismissed.

3. Plaintiffs cannot present clear and specific evidence supporting their breach of contract claim.

Plaintiffs' breach of contract claim falls on its face. Michelle did not sign the contract containing that clause, and "a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002), quoted with approval in *Neel v. Tenet HealthSystem Hosps. Dallas*, 378 S.W.3d 597, 611-12 (Tex. App.—Dallas 2012, pet. denied). Plaintiffs now allege that only

Robert breached his non-disparagement clause by making statements in media interviews after Prestigious Pets sued the Duchouquettes in JP Court. However, as detailed in Section I.B.1.a, *supra*, all of Robert's post-JP Action statements and actions are protected by the judicial communications privilege. Further, as detailed in Section I.B.1.d *supra*, Plaintiffs cannot present clear and specific evidence that Robert's alleged breach of the non-disparagement clause proximately caused any damages to the Plaintiffs. Accordingly, their claims must be dismissed.

4. Kalle McWhorter has no cognizable claims.

Regardless of whether Prestigious Pets has any tenable defamation claims, its owner, Kalle McWhorter individually has no such claims. The First Amendment requires that a libel plaintiff allege and prove that the allegedly defamatory statements referred to a specific individual, and that the plaintiff is that individual—that is, the alleged libel must be "of and concerning" the plaintiff. *New York Times v. Sullivan*, 376 U.S. 254, 288 (1964); *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966); *Cox Texas Newspapers v. Penick*, 219 S.W.3d 425, 433 (Tex. App. – Austin 2007, pet. denied). "[S]ettled law requires that the false statement point to the plaintiff **and to no one else**." *Kaufman v. Islamic Soc. of Arlington*, 291 S.W.3d 130, 145 (Tex. App.—Ft. Worth 2009, pet. denied). Whether a statement refers to the plaintiff is based on the reactions of the reasonable readers, and the "of and concerning" requirement is an issue of law to be decided by the court. *Id.* at 145. Although the allegedly defamatory statement need not name the plaintiff, it must be clear to the prospective audience that the publication was really speaking about that individual (and nobody else). *Id.* at 144-145; *compare Outlet Co. v. Int'l Sec. Grp.*, 693 S.W.2d 621, 625-26 (Tex. App.—San Antonio 1985, writ ref'd n.r.e) (text referred to the company's owner by name and laid blame at the feet of "the management"). Cases in other jurisdictions routinely hold that the owner of a business operated in limited liability form cannot sue for defamation when it is the business itself, rather than the owner individually, that is

criticized in the allegedly defamatory matter. *Schaecher v. Bouffault*, 772 S.E.2d 589, 598 (Va. 2015); *Adventure Outdoors, Inc. v. Bloomberg*, 519 F. Supp. 2d 1258, 1276 (N.D. Ga. 2007), *rev'd on other grounds*, 552 F.3d 1290 (11th Cir. 2008) (recognizing an exception when the owner's name is in the business name); *see also Dexter's Hearthside Rest., Inc. v. Whitehall Co.,* 508 N.E.2d 113, 115 (Mass. Ct. App. 1987); *Sims v. Kiro, Inc.*, 580 P.2d 642, 646 (Wash. App. 1978); *Brown v. Kitterman*, 443 S.W.2d 146, 151 (Mo. 1969).

Nothing in the Duchouquettes' Yelp review identified or referred to McWhorter in any manner; it did not identify her as Prestigious Pets' owner, nor did it identify her (or any other individual) as the pet sitter whom the Duchouquettes criticized. Michelle Aff. ¶ 7; Levy Aff. Exh. B. The review was published on **Prestigious Pets'** Yelp page, and thus referred only to the company's reputation; there was nothing on that page, or anywhere else, informing prospective customers that an individual named Kalle McWhorter owned Prestigious Pets, much less that the review related to her. Plaintiff McWhorter therefore cannot establish any of the essential elements of her claims, and those claims should be dismissed.

C. Plaintiffs' claims should be dismissed because Defendants can establish defenses to those claims by a preponderance of the evidence.

Finally, even if Plaintiffs were to produce clear and specific evidence of their claims—which they cannot—their claims are still subject to dismissal because Defendants can establish defenses to these claims by a preponderance of the evidence. *D Magazine Partners, L.P. v. Rosenthal,* 475 S.W.3d 470, 479 (Tex. App.—Dallas 2015, pet. filed).[10]

1. Truth is a defense to defamation and business disparagement, and the

[10] The Duchouquettes reserve the right to submit additional evidence supporting these defenses in reply to Plaintiffs' response to this motion. In addition to these stated defenses, Michelle Duchouquette complied with the Defamation Mitigation Act, codified in section 73.055(b)(2) of the Civil Practice and Remedies Code, and so Plaintiffs may not maintain an action based on the original Yelp review. *See* Defendants' Original Answer and Special Exceptions ¶18.

Duchouquettes' statements were true or substantially true.

"Truth is a defense to all defamation suits." *Neely v. Wilson*, 418 S.W.3d 52, 56 (Tex. 2013). Further, "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." *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000). This test is often referred to as assessing the "gist" of a communication, and the "gist" of the Duchouquettes' review was clearly that Amanda Jones overfed their fish, which they believed endangered its safety. *See*, *e.g.*, *Neely v. Wilson*, 418 S.W.3d at 63; *Rosenthal*, 475 S.W.3d at 481. The filthiness of the fishbowl, and the cloudiness of its water—which Plaintiffs have not and cannot dispute—are themselves evidence of overfeeding. Thus, the one factual contention at the heart of this dispute—that Prestigious Pets overfed the Duchouquettes' Betta fish—is true or substantially true, and accordingly the Duchouquettes have established a defense by a preponderance of the evidence.

2. Unconscionability is a defense to breach of contract, and the non-disparagement clause is unconscionably one-sided.

Prestigious Pets sued Robert Duchouquette in Justice Court for breach of their non-disparagement clause. It would be unconscionable to enforce the clause because (1) Robert's waiver of his First Amendment rights was not made knowingly, voluntarily, or intelligently, and (2) the non-disparagement clause is procedurally and substantively unconscionable and in violation of public policy.

Unconscionability is a "generally applicable contract defense." *Venture Cotton Co-op. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014). The defense applies if, "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause

involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001).

Plaintiffs' claims depend on interpreting the non-disparagement clause to forbid a signatory from speaking out, among other things, truthfully to other consumers and publicly to defend himself and his wife against litigation. Not only is Robert's purported waiver of his First Amendment right insufficient, but application of this clause would be unconscionable under Texas law. Prestigious Pets' standard contract—which includes a non-disparagement clause—is shockingly one-sided. It strips consumers of their fundamental rights of free speech, arguably going so far as to even bar consumer actions protected by law such as filing a lawsuit in response to egregious wrongdoing by the company. It provides for the recovery of attorneys' fees—only **against** the consumer. It sets Prestigious Pets up as the sole judge and jury to determine whether the non-disparagement clause has been violated. Perhaps worst of all, the contract even goes beyond simply barring speech that injures Prestigious Pets, and actually seeks to bar "any action" that in any way—in Prestigious Pets' sole estimation—harms the company.

a. The non-disparagement clause cannot be enforced under the First Amendment because Robert Duchouquette's waiver was not knowing, voluntary, and intelligent.

Because "[f]ree speech rights are the heart of our democratic system and involve not only the right of the individual to speak freely, but also the citizenry's interest in public discourse," contractual waivers of speech rights are invalid absent "clear and convincing" evidence of a "knowledge, voluntary, and intelligent" waiver. *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 110 (Tex. App.—Austin 2003, no pet.).[11] Here, Plaintiffs do not allege in the

[11] Other jurisdictions set similar standards for finding a waiver of free speech rights. *See*, *e.g.*, *Perricone v. Perricone*, 972 A.2d 666, 681-83 (Conn. 2009); *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993); *Erie Telecommunications v. City of Erie* , 853 F.2d 1084, 1094 (3d Cir. 1988).

Petition—nor is there "clear and specific evidence" showing—that Robert knowingly, voluntarily, and intelligently waived his right to free speech under the contract.

Robert did not read the non-disparagement clause when he signed Prestigious Pets' "Service Contract" containing two full pages of small print. Robert Aff. ¶¶ 7, 10. When reviewing the contract with Prestigious Pets' representative Amanda Jones, he looked carefully only at the two parts of the contract that Jones specifically pointed out for him to initial.[12] Contrary to the allegation in paragraph 15 of the Petition, Jones did not call Robert's attention to the non-disparagement clause in any way. Even if she had, the non-disparagement clause did not by its terms mention "speech"; instead, it prohibited "taking any action" that has certain effects. There is no "clear and specific" evidence that Robert Duchouquette had the time to read the provision at all, much less the time or the legal training to recognize, in the legalistic language in the title of the clause ("Non-disparagement/Injunction"), a broad waiver of his free speech rights concerning Prestigious Pets. *See id.* (holding that a contract should be reformed to remove a waiver of free speech where plaintiffs did not establish that defendants knowingly, voluntarily, or intelligently made the waiver). The purported waiver is therefore invalid.

b. The non-disparagement clause is unenforceable because it is procedurally and substantively unconscionable.

Texas courts will not enforce an unconscionable contract. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 892 (Tex. 2010). "Unconscionability . . . may exist in one or both of two forms: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the [contract] provision, and (2) substantive unconscionability, which refers to the fairness of the [contract] provision itself." *Lucchese Boot Co. v. Rodriguez*, 473 S.W.3d 373,

[12] Those provisions notified customers that they would not necessarily have the same Prestigious Pets caregiver all the time, and that customers are responsible for providing Prestigious Pets access to the home and must pay a fee to recover any keys they give Prestigious Pets.

387-88 (Tex. App.-El Paso 2015); *accord Jones v. JGC Dallas LLC*, 2012 WL 4119994, at *4 (N.D. Tex. Aug. 17, 2012), report and recommendation adopted, 2012 WL 4169164 (N.D. Tex. Sept. 17, 2012) ("Unconscionability under Texas law can either be procedural . . . or substantive[.]").

"In general, the term 'unconscionability' describes a contract that is unfair because of its overall one-sidedness or the gross one-sidedness of its terms." *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 815 (Tex. App.—Dallas 1999, no pet.). Among the relevant considerations is whether "legitimate commercial reasons . . . justify the inclusion of" the challenged terms. *Id.* at 815-16. Unconscionability is a question of law for the court to decide. *Id.* at 815.

The non-disparagement clause at issue here is one-sided and sweeping in scope. It prohibits the consumer from "taking **any action** that negatively impacts Prestigious Pets, its reputation, products, services, management, employees or independent contractors." (emphasis added). The clause therefore prohibits any criticism of the company or its employees or contractors, regardless of whether it is related to the contract, is stated in private, or is true. The prohibition reaches beyond speech to "any action" that "negatively impacts" the company; the acts of terminating a contract with Prestigious Pets, opening a business that would competes with Prestigious Pets, or recommending a different pet-sitting company would all apparently violate this provision, because they all would "negatively impact" Prestigious Pets. Even **this motion** could fall within the prohibition, inasmuch as seeking to dismiss the lawsuits Prestigious Pets has filed and to recover the Duchouquettes' attorneys' fees would "negatively impact" Prestigious Pets. The clause could reach more broadly than that— in fact, to any conduct Prestigious Pets

wants to halt—because violations "are to be determined by Prestigious Pets LLC in its sole discretion."

The clause at issue runs in favor of only one party: Prestigious Pets. It provides no protection for the consumer. Thus, under Prestigious Pets' interpretation, in a public litigation such as this one, the non-disparagement clause allows Prestigious Pets to say whatever it wants about Robert Duchouquette, but he must avoid criticizing Prestigious Pets. And the attorneys' fee provision is also one-sided: fees may only be awarded against the consumer. The "gross one-sidedness" alone renders the clause unconscionable. *See Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 815 (Tex. App.—Dallas 1999, no pet.).

The absence of any "legitimate commercial reasons" for the non-disparagement clause also supports a finding of unconscionability. Defamation law already provides businesses with broad protection against false and defamatory criticisms. *Allied Mktg. Grp. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 174 (Tex. App.—Eastland 2003, pet. denied). The aim of the clause is clear: to mislead the public into forming an inflated view of Prestigious Pets. In addition to suppressing the speech of consumers and misleading others, the clause harms other pet-sitting businesses who have come by their reputations honestly but may lose business to Prestigious Pets based on its Yelp profile scrubbed of the criticism that might otherwise appear there.

The harshness of the one-sided contractual restrictions on Robert Duchouquette is exacerbated by the fact that they gag his speech — a type of restriction which Texas courts generally will not enforce. See *Brammer*, 114 S.W.3d at 110 ("Our state constitution requires that courts enforce its stringent preference for freedom of expression even for those who

advocate interference with other constitutional rights") (internal quotation marks, and source's alteration marks omitted).

Other states' regulation of non-disparagement clauses are similar. See Cal. Civil Code 1670.8 (enacted Sept. 9, 2014) (banning non-disparagement clauses entirely); Md. Gen. Assembly, House Bill 131 (enacted Apr. 12, 2016, effective Oct. 1, 2016) (same). A bipartisan federal bill to ban non-disparagement clauses (S. 2044) has passed the U.S. Senate by unanimous consent and awaits action in the House of Representatives. As the Senate Report on the bill explained, "[p]enalties and lawsuits that emanate from non-disparagement clauses stifle the speech of consumers, and thus interstate commerce, by not permitting fair criticism of a business even when that feedback is an honest reflection of consumers' experiences." S. Rep. 114-175 (Dec. 8, 2015).[13]

Finally, the clause in Prestigious Pets' agreement is procedurally unconscionable, because, as discussed above, there was not a knowing waiver of free speech rights. *See Arthur's Garage*, 997 S.W.2d at 816; *see generally Olshan Found. Repair Co.*, 328 S.W.3d at 892 (unconscionability prohibits unfair surprise). A consumer does not expect a provision that bars them, on pain of facing court proceedings and paying the opposing party's legal fees, from taking any action, including voicing honest opinions, that the company proffering the contract deems "in its sole discretion" to "negatively impact[]" the company to be hidden in contractual fine print.

[13] Additionally, the Federal Trade Commission obtained a stipulated preliminary injunction barring a company from enforcing the non-disparagement clause in its standard contract where the FTC alleged that, at the same time a company was promoting itself through inflated claims, it was preventing customers from posting complaints though enforcement of a non-disparagement clause. *FTC v. Roca Labs*, 15-cv-02231-MSS-TBM (M.D. Fla. Oct. 29, 2015).

Given the one-sidedness of this non-disparagement clause, the lack of a legitimate purpose justifying its use, the lack of a knowing waiver of speech rights, and the widespread view expressed by elected representatives of both parties nationwide that non-disparagement clauses in form contracts are illegitimate, the court should hold that the non-disparagement clause in the Prestigious Pets contract with Robert Duchouquette is unconscionable and therefore unenforceable.

3. All of the Duchouquette's statements and actions made after the JP Action are protected by absolute or qualified privilege.

As detailed *supra* in Section I.B.1.a, every one of the Duchouquettes statements and actions identified by the Plaintiffs as allegedly actionable is covered by an absolute or qualified privilege, which could be viewed as the Plaintiffs' failure to provide evidence of an essential element of their claims or as a defense shown by the defendants. Regardless, because the Duchouquettes have not acted with actual malice, even a qualified privilege is sufficient to overcome Plaintiffs' claims.

II. The Court should award the Duchouquettes their costs and attorneys' fees.

In addition to dismissing Plaintiffs' claims in their entirety, Section 27.009(a)(1) of the Civil Practice and Remedies Code requires the Court to award the Duchouquettes their court costs and attorney's fees, as well as any other such expenses they have incurred in defending against the legal action and that justice and equity may require. The Duchouquettes will submit a fee application showing their costs and attorneys' fees within seven (7) days of an Order dismissing Plaintiffs' claims in this case. *See El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012) (citing *Hensley v. Eckenhart*, 461 U.S. 424, 437 (1983)).

CONCLUSION AND PRAYER

Defendants Robert Duchouquette and Michelle Duchouquette therefore respectfully request that the Court dismiss all of the claims in Plaintiffs' Original Petition pursuant to the TCPA and that the Court award the Duchouquettes their court costs and attorneys' fees, and any additional sanction that justice and equity require. The Duchouquettes further request all other relief to which they have shown themselves justly entitled.

DATED: June 2, 2016

Respectfully submitted,

/s/ Paul Alan Levy
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Motion for admission *pro hac vice* pending

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record via electronic service on this the 2nd day of June, 2016.

/s/ Christopher O. Dachniwsky
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