**CAUSE NO. DC-16-03561**

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|---|---|---|
| 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' APPLICATION FOR FEES, COSTS, EXPENSES, AND SANCTIONS IN CONNECTION WITH TCPA MOTION TO DISMISS**

Pursuant to the direction in the final paragraphs of the Court's August 26, 2016 Order granting their motion to dismiss under the Texas Citizens Participation Act ("TCPA"), Defendants Robert Duchouquette and Michelle Duchouquette (the "Duchouquettes") move for an award of attorney's fees, court costs, other expenses, and sanctions in connection with their motion to dismiss pursuant to the TCPA and respectfully show the Court as follows:

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## I. INTRODUCTION AND BACKGROUND

On August 26, 2016, the Court dismissed with prejudice all of Plaintiffs' claims against the Duchouquettes, ending the Plaintiffs' campaign of litigation against the Duchouquettes relating to a Yelp! review about the Plaintiffs' pet-sitting services. Plaintiffs' campaign included not one, but two lawsuits, with this suit filed the first business day after the first suit was dismissed. Plaintiff Prestigious Pets, LLC filed its first lawsuit against the Duchouquettes relating to the Yelp! review in the justice court (the "Justice Court Lawsuit"). Prestigious Pets non-suited its claims in the Justice Court Lawsuit after the Duchouquettes, represented by lawyers at Carrington, Coleman, Sloman & Blumenthal, LLP ("CCSB"), filed a motion to dismiss under the TCPA. CCSB charged the Duchouquettes nearly $10,000 in legal fees attributable to CCSB's representation of them in the Justice Court Lawsuit. Despite prevailing (through Prestigious Pets' dismissal of its claims) in the Justice Court Lawsuit, the Duchouquettes have not recovered those fees to date.

Undeterred, Plaintiffs filed the above-captioned case ***one business day later***, increasing their damages allegations to between $200,000 and $1 million, and seeking an award of attorney's fees on top of those damages. The Duchouquettes retained Paul Alan Levy of Public Citizen, a litigator with nearly 40 years of experience and expertise in First Amendment law, and Nicole Williams, a partner at Thompson & Knight LLP, to defend them against the Plaintiffs' second lawsuit. Public Citizen and Thompson & Knight, which have represented the Duchouquettes in this Court, expended time worth more than $166,302.15 in reasonable attorney's fees in the successful defense of the Duchouquettes.

As authorized by the Court's August 26, 2016 Order and the TCPA, the Duchouquettes seek a mandatory award of attorney's fees, costs, expenses, and sanctions sufficient to deter

Plaintiffs' conduct in the future. *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1). As explained below, the Court should: (a) award the Duchouquettes their attorney's fees and litigation costs attributable to the defense of both the Justice Court Lawsuit and this case; and (b) award sanctions equal to $200,000 (the minimum amount sought by Plaintiffs in their Original Petition) to discourage and deter Plaintiffs from continuing in their quest to infringe upon the Duchouquettes' constitutional right of free speech.

## II. ATTORNEY'S FEES, COSTS, EXPENSES, AND SANCTIONS SOUGHT

As provided by Section 27.009(a)(1), the Duchouquettes ask the Court to award the $178,456.25 attributable to their defense of this legal action to date, which consists of:

1) $166,302.15 in attorney's fees attributable to the defense of the above-captioned lawsuit; and

2) $10,415.47 in attorney's fees attributable to the defense of the Justice Court Lawsuit, which was substantially based upon the same underlying events and factual allegations; and

3) $1,738.63 in costs and expenses.

Additionally, the Duchouquettes seek an award of:

1) $50,000 in the event that Plaintiffs unsuccessfully appeal to the Court of Appeals; plus

2) $100,000 in the event that Plaintiffs unsuccessfully appeal to the Supreme Court of Texas, consisting of $25,000 if a petition for review is sought but denied, and an additional $75,000 in the event that the Supreme Court requests full briefing on the merits.

Additionally, the Duchouquettes seek mandatory sanctions pursuant to Section

27.009(a)(2) in the amount of $200,000, which is a sum equal to the minimum amount of damages Plaintiffs sought to recover from the Duchouquettes and sufficient to deter Plaintiffs from bringing similar actions in the future.

## III. EVIDENCE IN SUPPORT

The Duchouquettes offer the following evidence in support of this motion:

**Exhibit 1**: Declaration of Paul Alan Levy

- **Exhibit 1-A**: Paul Alan Levy Bio
- **Exhibit 1-B**: *Web Bully's Worst Enemy*
- **Exhibit 1-C:** Scott Michelman CV
- **Exhibit 1-D:** Laffey Matrix from U.S. Attorney's Office
- **Exhibit 1-E:** Adjusted Laffey Matrix
- **Exhibit 1-F:** Redacted Public Citizen Litigation Group Time Records
- **Exhibit 1-G:** Public Citizen Litigation Group Retainer

**Exhibit 2**: Declaration of Nicole L. Williams

- **Exhibit 2-A**: Curriculum Vitae of Nicole L. Williams
- **Exhibit 2-B**: Curriculum Vitae of Christopher O. Dachniwsky
- **Exhibit 2-C**: Redacted Thompson & Knight time records
- **Exhibit 2-D**: Thompson & Knight Engagement Letter

**Exhibit 3**: Carrington, Coleman, Sloman & Blumenthal, LLP Redacted Time Records

**Exhibit 4:** Affidavit of Matthew Chan

**Exhibit 5:** Narvaez Petition

## IV. ARGUMENTS AND AUTHORITIES

As the Court held in its August 26, 2016 Order, the Duchouquettes, as prevailing parties on their motion to dismiss under the TCPA, are entitled to recover "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(1); August 26, 2016 Order; *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (holding that an award of reasonable attorney's fees under the TCPA is mandatory and not limited by considerations of justice and equity). The Duchouquettes are also entitled to recover "sanctions against [the Plaintiffs] as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(2); August 26, 2016 Order.

**A. The Duchouquettes are entitled to recover all attorney's fees attributable to their defense against the Plaintiffs' entire campaign of litigation.**

**1. The Duchouquettes are entitled to recover $166,302.15 in attorney's fees attributable to their representation by Public Citizen Litigation Group and Thompson & Knight in this Court.**

Public Citizen Litigation Group and Mr. Levy have represented the Duchouquettes on a pro bono basis since the Justice Court Lawsuit relating to the Yelp! Review and have spearheaded their successful defense. Thompson & Knight agreed to represent the Duchouquettes pro bono shortly after this lawsuit was filed.[1] Plaintiffs have previously argued that the Duchouquettes are not entitled to any award of attorney's fees attributable to their

[1] Thompson & Knight's engagement agreement provides that it is entitled to be reimbursed for its attorney's fees from any monetary award rendered in the Duchouquettes' favor. Thus, even if pro bono counsel is not entitled to recover attorney's fees because they are not "incurred" (as explained below, that argument is based on a case that is no longer good law), the Duchouquettes are entitled to recover for Thompson & Knight's fees attributable to their defense. *Cf. Sloan v. Owners Ass'n Of Westfield, Inc.*, 167 S.W.3d 401, 404 (Tex. App.—San Antonio 2005, no pet.) ("Because the Association is liable to its counsel for services provided, even if provided on a contingent fee basis, and because the Association would be required to pay its counsel out of any proceeds received as a result of this litigation, we conclude the Association has 'incurred' the legal fees that are secured by the lien in this case.").

defense in this case because counsel represent them pro bono.[2] Plaintiffs' argument is misguided, contravenes the core purposes of the TCPA, and should be rejected.

Following the lead of federal courts interpreting fee shifting statutes, Texas courts have long held that statutory provisions for the award of attorney's fees support an award of fees even when the lawyer appears on a pro bono basis. *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 684 (Tex. App.—San Antonio 1998, no pet.); *Garza v. Allied Fin. Co.*, 566 S.W.2d 57, 65 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *see also O'Carolan v. Hopper*, 414 S.W.3d 288, 314 (Tex. App.—Austin 2013, no pet.). Plaintiffs contend that those precedents do not apply here because of a 2014 ruling by the Dallas Court of Appeals in *Cruz v. Van Sickle,* 452 S.W.3d 503 (Tex. App. – Dallas 2014, pet denied). But the Texas Supreme Court effectively overruled *Cruz* in *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016).

In *Cruz*, the plaintiff sued three defendants—two associated with a website that hosted an allegedly defamatory story about the plaintiff as well as the actual author of the article. The website defendants were represented pro bono, while the author had paid counsel. The court held that the paid counsel could receive fees under the TCPA, but the pro bono counsel could not, based on the structure of the section 27.009(a)(1) of the Texas Civil Practice and Remedies Code, which reads as follows:

> If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:
>
> (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require . . . .

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2 *See* Plaintiffs' Response to Defendants' Motion to Dismiss Under the TCPA (filed July 19, 2016) at 31-32. Plaintiffs' counsel reiterated this argument at the hearing on the Duchouquettes' Motion.

The losing plaintiff argued that the phrase "incurred in defending against the legal action as justice and equity may require" modifies the entire series "court costs, reasonable attorney's fees, and other expenses," but the prevailing defendants who had been represented by pro bono counsel argued for the court to apply the "last antecedent rule" canon of statutory construction. Under that rule, "a qualifying phrase in a statute must be confined to the words and phrases immediately preceding it." *Cruz*, 452 S.W.3d at 523. The court of appeals rejected the last antecedent rule, explaining it was neither controlling nor inflexible. *Id.* at 523. The court further explained that the use of the term "other" before "expenses" suggested that court costs and attorney's fees are also expenses, and hence controlled by the same "incurred" phrase as "other expenses." *Id.* at 523. To the court of appeals, this meant that defendants being represented pro bono had not "incurred [any fees] in defending against the legal action obligations." *Id.* at 526.

In *Sullivan v. Abraham*, the Texas Supreme Court construed the same statutory language in the TCPA and reached the opposite conclusion, expressly considering and rejecting the court of appeals' analysis in *Cruz*. The issue in *Sullivan* was not whether attorney's fees were incurred, but whether the phrase "attorney's fees" was modified by the words "as justice and equity may require." *Sullivan*, 488 S.W.3d at 295-96. That is, whether a trial judge has discretion to award fees that are less reasonable as measured against the normal marker for legal services when the judge thinks that a lower award would be more equitable. The Supreme Court held that no such discretion applied to the fee award required by the TCPA. *Id.* at 299.

The Supreme Court's reasoning is key: it treated the issue as a choice between the "last antecedent rule" canon of construction and the "series qualifier" canon, under which "a prepositive or postpositive modifier normally applies to the entire series." *Id.* at 297. The Court, in contrast to the *Cruz* court, held that the last antecedent canon governed construction of section

27.009(a)(1). *Id.* at 298-99. One reason for this was the absence of a comma before "as justice and equity may require." *Id.* at 298-99. Specifically, the Supreme Court reasoned that had the Legislature wanted the modifying phrase to govern the entire series, it would have placed a comma before the phrase. *Id.* at 298.

In addition, the Court was influenced by the presence of an Oxford comma in the phrase "costs, attorney's fees, and other expenses." *Id.* at 298-99. The Oxford comma is placed before the coordinating conjunction in a series of three or more terms, and if the Legislature had intended the "equity and justice part of the statute to govern attorney's fees as well as "other expenses," it would have omitted the Oxford comma. *Id.* at 299. The court found the Oxford comma argument "not definitive," but deemed it controlling when combined with the absence of the other comma and the presence of the word "other" before expenses. *Id.* at 299.

Thus, as authoritatively construed by the Texas Supreme Court, in the clause "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require," **only** "other expenses" is governed by the qualifying phrase "incurred in defending against the legal action as justice and equity may require." And most notably, the main Texas precedent that plaintiff Abraham cited for the proposition that "justice and equity" could be used to award less than full reasonable attorney's fees, was *Cruz v. Van Sickle*, which reasoning the Supreme Court expressly rejected. Although *Sullivan* addressed the "as justice and equity may require" part of the qualifying phrase, the same logic applies to the "incurred in defending" part.

First, the Supreme Court held that the "last antecedent" canon governs construction of this provision. *Sullivan*, 488 S.W.3d at 297-99. *Cruz* was predicated on the Court of Appeals' rejection of that canon. Second, the **absence** of a comma before "incurred" shows that the

Legislature did not intend that language to govern all three parts of the "court costs, reasonable attorney's fees, and other expenses" series. Third, the **presence** of the Oxford comma before "and other" further signals the Legislature's intent not to apply the words after "and other expenses" to the first two terms in the series. And finally, it would be nonsensical to apply different parts of the same qualifying phrase differently; in other words, "incurred" cannot qualify "court costs [and] reasonable attorneys' fees" if "as justice and equity may require" do not qualify it.

Moreover, *Sullivan*'s construction of the statutory text best advances the underlying purposes of the TCPA and its attorney fee provisions—enabling those who are sued without a substantial basis based upon their exercise of their rights of free speech, of association, or to petition to stand up for their rights in court. Although media companies, or people who carry libel insurance because they are in the business of criticizing others, can routinely afford to hire lawyers and pay them hourly rates for the defense of libel cases, individuals like the Duchouquettes generally cannot. And unlike plaintiffs who are suing for an award of damages, defendants who successfully fend off libel suits do not accrue, by settlement or by judgment, a pot of money that can be divided with counsel under a traditional contingent-fee arrangement. Levy Affidavit ¶¶ 22-23. Consequently, mandatory fee-shifting statutes like the TCPA provide a vital incentive for lawyers in private practice to defend these cases even when their clients cannot pay by the hour, making them effectively contingent-fee cases.

In states with a long-standing anti-SLAPP statute, where the judges have a history of awarding attorney fees to winning anti-SLAPP movants, a First Amendment defense bar emerges who are willing to take on SLAPP defense work on a contingent fee basis, and the consistent application of the fees provision is a vital part of funding mechanism that enables

ordinary people who face unjustified suits to find lawyers to defend them. Levy Affidavit ¶¶ 27-32. Implementing the text of the TCPA, as authoritatively construed by the Texas Supreme Court, and rejecting plaintiffs' attempt to evade the law's mandatory attorney fees provision, will best enable the TCPA to accomplish the legislative purpose. Levy Affidavit ¶ 33.

Therefore, contrary to Plaintiffs' contention, the Duchouquettes are entitled to recover the "reasonable attorney's fees" attributable to the work of every attorney that participated in the defense against the Plaintiffs' campaign of litigation, including Public Citizen's and Thompson & Knight's representation of the Duchouquettes on a pro bono basis. As explained in Mr. Levy's affidavit, three attorneys at Public Citizen Litigation Group represented the Duchouquettes in the defense of this suit, and fees are sought for the work of two of those lawyers based on reasonable hourly rates. Ms. Williams provides further support in her affidavit for the reasonableness of the hourly rates charged by Mr. Levy and his co-counsel under the factors set forth in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). Ms. Williams further attests to the reasonableness of Thompson & Knight's fees attributable to their defense of the Duchouquettes under the factors in *Arthur Andersen*.

Public Citizen's reasonable attorney's fees attributable to its defense of the Duchouquettes totaled $126,892.50, and Thompson & Knight's reasonable attorney's fees attributable to its defense of the Duchouquettes totaled $39,409.65. The Court should therefore award the Duchouquettes $166,302.15 for the reasonable attorney's fees attributable to their defense by Public Citizen Litigation Group and Thompson & Knight in this Court.

The total time sought for the work of the attorneys on this case is as follows:

| Attorney | Hours | Hourly Rate | Total Fee |
|---|---|---|---|
| Levy | 160.3 | $750 | $120,225 |
| Michelman | 12.7 | $525 | $6,667.50 |
| Williams | 22.0 | $531 | $11,682.00 |
| Dachniwsky | 89.3 | $310.50 | $27,727.65 |
| Total | 289.8 | | $166,302.15 |

**2. The Duchouquettes are entitled to recover $10,415.47 in attorney's fees charged by CCSB in the Justice Court Lawsuit because it and this lawsuit constitute the same "legal action."**

In addition to awarding fees for the work of the two law firms that defended the lawsuit in this Court, the Court should also award the Duchouquettes the court costs and attorney's fees attributable to their defense against the Justice Court Lawsuit. As explained above, one of the Plaintiffs in this lawsuit, Prestigious Pets, LLC, filed the Justice Court Lawsuit against the Duchouquettes. The Justice Court Lawsuit alleged largely the same causes of action related to the same underlying events: the Duchouquettes' Yelp! review. The Duchouquettes have paid the fees relating to that suit out of pocket. Thus, those fees should, in fairness, be considered together with this lawsuit.

The TCPA supports awarding the attorney's fees incurred in defense of the Justice Court Lawsuit as well as this lawsuit. The statute contains a broad definition of the term "legal action:" "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." Tex. Civ. Prac. & Rem. Code § 27.001(6). In fact, the Dallas Court of Appeals has held that the TCPA allows prevailing defendants to recover fees for time spent by their counsel before a lawsuit is formally filed,

where counsel is retained as a result of an earlier demand or claim. *See Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 880 (Tex. App.—Dallas 2014, no pet.).

Here, the Justice Court Lawsuit and this lawsuit are part of the same "legal action" because they are based upon many of the same events, factual allegations, and theories, as admitted by the Plaintiffs in the appeal of the Justice Court Suit. The Duchouquettes have appealed the justice court's dismissal of their motion to dismiss under the TCPA and are also attempting to collect the attorney's fees they incurred in relation to it through that appeal, but have been unsuccessful in those attempts to date.[3] Plaintiff Prestigious Pets pointed to the proceedings in this Court as a basis for arguing that the appeal was moot because the Duchouquettes were seeking "the same relief" in their TCPA motion to dismiss in this court. *See* Pls.' Notice of Non-Suit and, in the Alternative, Plea to the Jurisdiction, at 3. Defendants motion for reconsideration of the County Court's dismissal for lack of jurisdiction was denied on September 9.[4]

According to the Texas Supreme Court, the "generally accepted meaning" of the term "cause of action" is "a fact or facts entitling one to institute and maintain an action which must be alleged and proved in order to obtain relief." *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 564 (Tex. 2014). Here, substantially the same facts underlay the Plaintiffs' claims in both the Justice Court Lawsuit and this case, and allegedly entitled Plaintiffs to institute and maintain their action. Indeed, Plaintiffs' course of conduct shows that they consider this case to be a

[3] Further, the Duchouquettes are not here seeking recovery of the legal fees attributable to that appeal—merely those fees attributable to their defense in the Justice Court.

[4] The Justice Court Lawsuit alleged claims for defamation and breach of the non-disparagement clause, and was even more frivolous than this action, in that the company sued Robert Duchouquette even though he had not posted the Yelp review. Plaintiffs also sued Michelle Duchouquette for breach of the non-disparagement clause even though she had not signed the contract. This action has one additional plaintiff (Kalle McWhorter) and one additional claim (for business disparagement). Unlike the Justice Court Lawsuit, this action does not seek relief against Robert Duchouquette for statements made before the Justice Court Lawsuit was filed, and it pursues the breach of contract claim only against Robert Duchouquette.

continuation of the Justice Court Lawsuit: Prestigious Pets, LLC nonsuited its claims in the Justice Court Lawsuit on March 25, 2016; Plaintiffs then re-filed their legal action in this Court ***the very next working day***. The re-filed lawsuit contains the same or substantially the same factual allegations, legal claims, and parties; the most important difference is that Plaintiffs sought damages of between $200,000 and $1 million in this lawsuit, whereas in the Justice Court Lawsuit, their recovery was capped at $10,000.

Given these facts, the Justice Court Lawsuit is the same "legal action" for purposes of the TCPA. As shown in the CCSB invoices attached as Exhibit 3, CCSB charged, and the Duchouquettes paid, $10,415.47 attributable to its defense of them in the Justice Court Lawsuit. CCSB's representation of the Duchouquettes, and the fees it charged for doing so, are reasonable under the factors set forth in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The Court should therefore award the Duchouquettes $10,415.47 for attorney's fees attributable to CCSB's defense of them in this litigation.

**B. The Duchouquettes are entitled to recover $1,738.63 in court costs and other expenses attributable to their defense of this litigation.**

Section 27.009(a)(1) also entitles the Duchouquettes to recover their court costs attributable to the defense of this litigation. As explained above, under *Sullivan*, the qualifying phrase "incurred in defending against the legal action as justice and equity may require" does not modify court costs; thus, the Duchouquettes are entitled to recover all court costs attributable to this litigation. As set forth in Ms. Williams affidavit, further, the Duchouquettes were always responsible for paying court costs under their engagement agreement with Thompson & Knight. As Ms. Williams and Mr. Levy attest in their affidavits, there were $1,738.63 in court costs and

other expenses attributable to the defense of this lawsuit. This Court should therefore award the Duchouquettes $1,738.63 in court costs and other expenses.

**C. The Duchouquettes are entitled to an award of significant sanctions because such sanctions are necessary to deter Plaintiffs from bringing similar suits in the future.**

In addition to attorney's fees, court costs, and litigation expenses, a court that dismisses any cause of action under the TCPA "shall award . . . sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in [the TCPA]," as this Court recognized in its August 26, 2016 Order. Tex. Civ. Prac. & Rem Code § 27.009(a)(2); August 26, 2016 Order. In other words, "[s]ection 27.009(a)(2) requires the trial court to award sanctions if it dismisses a claim pursuant to section 27.003 and gives the trial court broad discretion to determine what amount is sufficient to deter the party from bringing similar actions in the future." *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *11 (Tex. App.—Austin Apr. 11, 2014, pet. denied)) (emphasis added); *see also Am. Heritage Capital,* 436 S.W.3d at 881. The court may issue any sanction that is not arbitrary or unreasonable, *see Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006), but unlike other statutes authorizing a court to grant sanctions, the TCPA "does not require the trial court to state the reasons for the sanction amount." *Kinney*, 2014 WL 1432012, at *12.

In previous cases involving dismissal under the TCPA, courts have determined sanctions by consulting (a) the plaintiff's annual profits,[6] (b) the amount of attorney's fees attributable to

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[6] The only evidence in the record of Prestigious Pets' annual profits or revenue comes from Kalle McWhorter's affidavit, filed in support of the Plaintiffs' response to the Duchouquettes' motion to dismiss. In her affidavit, Ms. McWhorter attests that the business suffered a 22% drop in revenue as an alleged result of the Duchouquettes' truthful statements online and to the media. Given that Plaintiffs

the legal work performed, (c) the plaintiff's history of filing similar suits, and (d) any aggravating misconduct, among other factors. *See Am. Heritage Capital*, 436 S.W.3d at 881; *Kinney*, 2014 WL 1432012, at *12. The overriding question is what sanction is sufficiently large enough to successfully deter the plaintiff from initiating similar baseless litigation in the future. *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(2).

**1. An award of sanctions equal to the minimum amount of damages sought in Plaintiffs' Original Petition is appropriate.**

As is evidenced in detail in the motion to dismiss filed in this case, Plaintiffs have a history of filing abusive and baseless litigation against the Duchouquettes. Plaintiff Prestigious Pets first filed its lawsuit against the Duchouquettes in the justice court on November 19, 2015. That suit was based on claims identical to those recently dismissed by this Court. After the local and national media picked up the story, and in response to the Duchouquettes' motion to dismiss under the TCPA, Prestigious Pets quickly non-suited the Justice Court Lawsuit. Plaintiffs then refiled suit against the Duchouquettes in this Court ***the very next business day***, and sought up to $1 million in monetary relief based entirely on the Duchouquettes' allegedly defamatory online review and statements made in media interviews after the Justice Court Lawsuit was filed. As is evidenced by Plaintiffs' pleadings, the lawsuits were filed to intimidate and discourage the Duchouquettes from expressing their views about Plaintiffs' business, in contravention of their First Amendment rights. As Michelle Duchouquette testified support of the Motion to Dismiss, the outrageous damages demand had the desired effect of distressing her, and the public statements of Plaintiffs' counsel to several media outlets about an appeal have compounded that distress. *See* Aff. of M. Duchouquette ¶ 23.

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asked for a minimum of $200,000 in damages based on lost profits and reputational damage, Plaintiffs value their company's annual revenue at approximately $900,000/year based on that 22% figure.

This deliberate effort to suppress criticism is confirmed by the Plaintiffs' other conduct in relation to this litigation, and their threats and actions taken in relation to other pending or proposed litigation. As the Court may be aware, there has been significant media attention paid to this case. CITE The Duchouquettes are aware of at least one instance in which Prestigious Pets implicitly threatened to sue a blogger who posted about the case. Even more outrageously, Prestigious Pets cited the non-disparagement provision in its contracts with customers, which the blogger had never signed (because he had never been a Prestigious Pets customer), as a basis for demanding removal of the criticisms. Aff. of Matthew Chan ¶6. Additionally, the Duchouquettes are not the only consumers targeted by Prestigious Pets' abusive litigation strategy; it also sued at least one other dissatisfied customer who posted a negative review of the services she received.[7]

The TCPA requires the Court to award sufficient sanctions to discourage Plaintiffs from filing future groundless litigation. Those sanctions should be in an amount equal to the minimum amount Plaintiffs sought in their Original Petition after they non-suited the Justice Court Lawsuit to file in this Court. Although this may seem to be a substantial sum, "the amount [of the sanction] alone does not render the order unjust." *Wal–Mart Stores v. Davis*, 979 S.W.2d 30, 47 (Tex. App.—Austin 1998, pet. denied); *Kinney*, 2014 WL 1432012, at *12 ("large" sanction was appropriate in light of two separate frivolous lawsuits and attempted arbitration concerning claims for the same harm). Moreover, this amount is entirely appropriate given the psychological effect on the Duchouquettes resulting from Plaintiffs' repeated and prolonged campaign of litigation. Not awarding this amount would have the perverse effect of encouraging

[7] *See* Pet., *Prestigious Pets v. Tatiana Narvaez*, No. 15-00600-H, Justice Court, Precinct 1, Place 1, Dallas County (filed Dec. 14, 2015) (attached as Exhibit 6).

Plaintiffs' course of conduct—filing groundless litigation and then dismissing it after substantial fees have been incurred to avoid the award of attorney's fees compelled by the TCPA. Given the present circumstances, the minimum amount Plaintiffs represented their baseless lawsuit to be valued—$200,000—is an appropriate sanction.

### 2. In the alternative, a sanction equal to the amount of attorney's fees attributable to the Duchouquettes' defense, or equal to the value of legal work expended on their behalf, is an appropriate award.

In the event that the Court does not view the *minimum* amount of damages requested by Plaintiffs as a just and sufficient measure of the sanction required to deter Plaintiffs from bringing abusive litigation in the future, a sanction in the amount of the value of legal services required to overcome the Plaintiffs' sustained legal campaign would be appropriate. The Dallas Court of Appeals has approved a sanction roughly equal to the amount of legal fees incurred by the successful movant under the TCPA. *Am. Heritage Capital*, 436 S.W.3d at 881. This measure of sanctions is just and properly compensates the Duchouquettes and their counsel for the time, effort, and money expended to repel the Plaintiffs' groundless and abusive campaign of litigation. In this case, that sum would include all attorney's fees and expenses attributable to the defense of the Duchouquettes by Public Citizen, Thompson & Knight, and CCSB. This alternative measure of sanctions amounts to $166,302.15.

## V. CONCLUSION AND PRAYER

The Duchouquettes therefore respectfully request that the Court grant their application for fees, costs and expenses in connection with their TCPA motion to dismiss and award them $166,302.15 in attorney's fees attributable to their defense of this litigation, $1,738.63 in court costs, and at least $200,000 in sanctions under the TCPA. The Duchouquettes further request all relief to which they have shown themselves justly entitled.

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Respectfully submitted,

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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 26th day of September, 2016.

*/s/ Christopher O. Dachniwsky*
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