CAUSE NO. JS15-00559H

PRESTIGIOUS PETS LLC,	§	**IN THE JUSTICE COURT**
	§	
Plaintiff,	§	
	§	
v.	§	**PRECINCT 1, PLACE 1**
	§	
ROBERT AND MICHELLE DUCHOUQUETTE,	§	
	§	
	§	
Defendants,	§	**DALLAS COUNTY, TEXAS**

"ANTI-SLAPP" MOTION TO DISMISS

Defendants Robert and Michelle Duchouquette file this Motion to Dismiss Plaintiff's Petition pursuant to the Texas Citizens Participation Act (Chapter 27 of the Texas Civil Practice and Remedies Code, the "TCPA"), and show the following in support:

I. INTRODUCTION

This case concerns an online review written by Defendant Michelle Duchouquette regarding services provided by Plaintiff Prestigious Pets LLC, published on Yelp.com. Prestigious Pets may not like this review, but Michelle Duchouquette had a constitutionally-protected free speech right to post it. When Plaintiffs like Prestigious Pets bring lawsuits like this in an attempt to silence legitimate criticism in the marketplace, the Texas Citizens Participation Act requires courts to dismiss the lawsuit *and* award attorneys' fees to the Defendants.

II. EVIDENCE

The TCPA asks the Court to consider pleadings and affidavits in deciding a motion to dismiss. TEX. CIV. PRAC. & REM. CODE § 27.006. Attached to this motion are the affidavits of Michelle and Robert Duchouquette. The affidavits address the relevant matters in this lawsuit in detail, but in short they show the following:

The Duchouquettes met with a representative of Prestigious Pets on October 2, 2015, to discuss pet sitting the Duchouquettes' two dogs and fish during October 16–20, when they would be out of town. The Duchouquettes had several problems with Prestigious Pets' services. Among other things, the Duchouquettes could not contact the pet sitter directly, Prestigious Pets overcharged them, Prestigious Pets would not leave the house keys at the home and instead have asked for a $15 return fee, and it appeared that Prestigious Pets overfed the Duchouquettes' fish. After taking these issues up with Prestigious Pets directly, Michelle Duchouquette posted a one-star review of Prestigious Pets on Yelp.com on October 28, 2015 (the "Yelp Review"). This review reflected Mrs. Duchouquette's honest opinion of Prestigious Pets' services, and included the factual basis for her opinion. On October 30, 2015, the Duchoquettes received a letter from counsel for Prestigious Pets blaming the Duchouquettes for their service problems, demanding that the Duchouquettes cease and desist from further publishing false statements regarding Prestigious Pets, and threatening litigation. This lawsuit followed.

III. ARGUMENT AND AUTHORITIES

The Texas legislature enacted the TCPA in 2011 to give defendants a way to dismiss lawsuits that chill free speech. The TCPA uses a three-step analysis. First, the Court establishes that "the legal action is based on, relates to, or is in response to" the exercise of free speech rights. TEX. CIV. PRAC. & REM. CODE § 27.005(b). Second, the Court tests whether the Plaintiff "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). This means Prestigious Pets must show clear and specific evidence—evidence that is "unambiguous" and "explicit"—that if un-contradicted, would establish each element of its claims. *See In re Lipsky*, 460 S.W.3d 579, 589–91 (Tex. 2015). If Prestigious Pets cannot do this, its claims must be dismissed. Third, even if Prestigious Pets could show clear and specific evidence supporting its case, the Court must still dismiss Prestigious Pets' case if the

Duchouquettes show any valid defense by a preponderance of the evidence. TEX. CIV. PRAC. & REM. CODE § 27.005(b). The Duchouquettes win at each step of this analysis.

a. The Yelp Review Is Protected Free Speech.

Michelle Duchouquette's online review fits the statutory definition of "Exercise of the right of free speech," meaning "a communication made in connection with a matter of public concern," which specifically includes issues related to "a good, product, or service in the marketplace." *Id.* §§ 27.001(3), (7)(E). Online reviews of service providers are a matter of public concern because of the community interest in staying informed about the quality of services rendered by businesses. *See Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 108 (Tex. App.—Austin 2003, no pet.) (finding dissatisfied homeowners had free speech right to criticize homebuilders). Here, Michelle Duchouquette expressed her truly-held beliefs about Prestigious Pets' services, and as a result, her statements are protected speech.

b. Prestigious Pets Cannot Show Clear and Specific Evidence of Its Case.

Prestigious Pets' complaint in the Petition reads: "Violation of non-Disparagement clause from signed agreement. Irreparable and continued harm. Libelous and slanderous harm. Monetary damages due to legal fees, and lost work opportunities. Tort. Intentional misrepresentation and fraud by omission. Continued lost work opportunities." Prestigious Pets also seeks $6,766.00 in damages. These claims are meritless.

1. <u>Robert Duchouquette Did Not Violate Prestigious Pet's Non-Disparagement Clause, Which Is Unenforceable.</u>

The Service Contract of Prestigious Pets contains a non-disparagement clause that reads, in relevant part: "In an effort to ensure fair and honest public feedback, and to prevent the publishing of false and 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." This clause does not apply to the Yelp Review because it was written and posted by Michelle Duchouquette, who did not sign the Services Contract, and also because the Yelp Review was Mrs. Duchouquette's "fair and honest" feedback.

Even so, Texas law strongly disfavors restraints on free speech (in contracts and injunctions), and the court should find this non-disparagement clause unenforceable unless Prestigious Pets can show "clear and convincing" evidence that the Duchouquettes waived their free speech rights "knowingly, voluntarily, and intelligently." *See Brammer*, 114 S.W.3d at 110–11 (finding homebuilders could not enforce non-disparagement clause against dissatisfied homebuyers to restrain their speech). The evidence conclusively shows the opposite. Prestigious Pets did not even discuss the non-disparagement clause with the Duchouquettes. Prestigious Pets reviewed and had Robert Duchouquette initial several other provisions that it highlighted as important, but never mentioned non-disparagement, and certainly did not allow Mr. Duchouquette the opportunity to "knowingly, voluntarily, and intelligently" waive his free speech rights.

2. The Duchouquettes Have Not Committed Libel, Slander, Fraud, or Any Other Tort.

While Prestigious Pets fails to explain exactly what about the Yelp Review was "libelous," the gist of the Petition is that Prestigious Pets is unhappy with the review. But critical statements made in good faith with a basis in fact are protected speech, not libel. *See Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 86–87 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (finding accusations of "elderly abuse" were not defamatory in context of factual basis). A review of Michelle Duchouquette's affidavit and the Yelp Review itself shows that Mrs. Duchouquette made her statements in good faith, and explained the factual basis for her beliefs. The Yelp Review is therefore neither libelous nor fraudulent.

Nor can Prestigious Pets explain its damages. Prestigious Pets cannot recover attorneys' fees for any of its claims other than breach of contract, but as explained above, its breach of contract claim fails. And simply claiming that Prestigious Pets has "lost work opportunities" is not enough to avoid dismissal under the TCPA. *See Lipsky*, 460 S.W.3d at 593 (finding that "general averments of direct economic losses" do not satisfy the minimum requirements of the TCPA).

c. The Duchouquettes Have Established Truth and Qualified Privilege Defenses.

Even if Prestigious Pets could show each element of its claims by clear and specific evidence, the court should still dismiss the Petition because the Duchouquettes have established the defenses of truth and qualified privilege. Truth an absolute defense to libel claims. *See Neely v. Wilson*, 418 S.W.3d 52, 62 (Tex. 2013). It is enough that the Yelp Review is substantially true as to statements that are verifiably true or false, as opposed to opinions, which are not actionable. *Id.*

The only statement identified by Prestigious Pets as untrue in the Yelp Review is that "It is $20 to come to the house, but that does not include a walk. That is $5 extra." Prestigious Pets maintains that a 10 to 15-minute walk is included in its $20 fee, but that there is a $5 surcharge for an additional 10 minutes of walking. Mrs. Duchouquette recalls that the Prestigious Pets representative told her that a walk was *not* included in the $20 base fee, but regardless, this discrepancy is not itself defamatory and certainly did not cause Prestigious Pets to suffer $6,766.00 in damages.

Moreover, a qualified privilege attaches to statements on any subject in which the public has an interest when those statements are made to others who have a common interest in the matter. *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 92–93 (Tex. App.—Dallas 1996, writ denied). Michelle Duchouquette posted the Yelp Review because she values the candid feedback of the Yelp community about businesses, and felt obligated to provide her own candid

feedback about Prestigious Pets so that other pet owners could be informed before choosing to use Prestigious Pets. In this situation, even if the Yelp Review were factually wrong, it is protected by a qualified privilege because Michelle Duchouquette honestly believed what she wrote.

IV. CONCLUSION

Defendants Robert and Michelle Duchouquette respectfully request that this Court grant their Motion to Dismiss and dismiss Plaintiff Prestigious Pets LLC's Petition with prejudice. The TCPA also requires that the Court award parties prevailing on a motion to dismiss their "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require," as well as "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." TEX. CIV. PRAC. & REM. CODE § 27.009(a). Pursuant to this provision, the Duchouquettes respectfully request that the Court award them $7,500, and grant such further relief to which they may show themselves justly entitled.

Respectfully submitted,

/s/ Monica Latin

Monica W. Latin
State Bar No. 00787881
mlatin@ccsb.com
Alex More
State Bar No. 24065789
amore@ccsb.com
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.
901 Main Street, Suite 5500
Dallas, Texas 75202
Phone: 214-855-3000
Fax: 214-855-1333

Counsel to Defendants