

CAUSE NO. 2017-35441

**ADB INTERESTS, LLC AND
ASHLEY BLACK, INDIVIDUALLY,**

Plaintiffs,

v.

**KAREN WALLACE, INDIVIDUALLY,
AND D/B/A JOURNEYZ SPA &
PRODUCTS,**

Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

334th JUDICIAL DISTRICT

**DEFENDANTS KAREN WALLACE, INDIVIDUALLY
AND D/B/A JOURNEYZ SPA & PRODUCTS' MOTION TO DISMISS
BASED ON THE TEXAS CITIZENS' PARTICIPATION ACT**

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Defendants Karen Wallace and Journeyz Spa & Products file their Motion to Dismiss Based on the Texas Citizens' Participation Act and show the following:

INTRODUCTION

Ashley Black and the company she owns, ADB Interests, LLC ("ADB"), seek to stop Mrs. Wallace's First Amendment right to criticize the Plaintiffs' product publicly based on health concerns.

Mrs. Wallace's statements are protected by the First Amendment of the United States and Texas Constitutions. Plaintiffs' lawsuit is a classic example of a strategic lawsuit against public participation ("SLAPP"). The Texas Citizens Participation Act ("TCPA"), Texas's anti-SLAPP statute, was enacted to protect speech about public matters from lawsuits designed to stop that speech.¹ The TCPA applies here because the topics of the controversy—speech about reports of harm to women's bodies that use Plaintiffs' product—are public matters unquestionably covered by the TCPA. The TCPA mandates dismissal of Plaintiffs' lawsuit because they cannot establish a prima facie case for each element of their claims by "clear and specific evidence." Moreover, dismissal is warranted because the alleged defamatory statements of Mrs. Wallace about Plaintiffs and their product are true and Plaintiffs cannot prove they are false as is their burden under TCPA.

STATEMENT OF FACTS

Plaintiffs Ashley Black and the Company that makes the FasciaBlaster.

Plaintiff Ashley Black is a self-described multi-millionaire who uses the moniker Ashley Black Guru.² She invented a tool known as the FasciaBlaster which is rubbed on one's body and is purported to "massage tangled fascia back into its even, smooth place." In 2017, Ms. Black

¹ Ex. 1 (TEX. CIV. PRAC. & REM. CODE §§ 27.001 – 27.011).

² Ex. 2 ("Ashley Black" WIKIPEDIA page).

published a book *The Cellulite Myth: It's Not Fat, It's Fascia*.³ This is purported to be a national best-selling book as well as “an instructional guide to ‘FasciaBlasting’” and a biography of Ms. Black.⁴

Ms. Black refers to herself as a “scientist”⁵ in her book which opines on health issues and the biology of fascia and how it can be treated to improve one’s health.⁶ Plaintiff was interviewed by the Houston Chronicle which reported Ms. Black “received a bachelor’s and master’s degree in civic and mechanical engineering from Auburn University.”⁷ The in-house legal counsel for Auburn University wrote counsel for Defendants that no one matching Ms. Black’s social security number and/or name graduated from Auburn University.⁸ Defendants are unable to find Ms. Black graduating from any institution of higher education past high school.⁹

Ms. Black represents that the FasciaBlaster is FDA approved.¹⁰ There is no approval for the FasciaBlaster. This device is identified specifically by name on the FDA website.¹¹ This

³ *Id.*; Ex. 3 at 25 (Lacy Johnson, *Best Selling Author, Celebrity Trainer & Millionaire Inventory Ashley Black Is Changing the World One Blaster at a Time*, THE CONNECT, Spring 2017).

⁴ *Id.*

⁵ Ex. 4 at 24 (Black, Ashley and Hunt, Joanna. *The Cellulite Myth*. Post Hill Press, 2017) (stating: “On the other hand, if you are a scientist like me...”).

⁶ *Id.* at v.

⁷ Ex. 5 (Valerie Sweeten, *Faces in the Crowd: Ashley Black*. THE HOUSTON CHRONICLE, (April 28, 2005)).

⁸ Ex. 6 (Email from Marian White of Auburn University to Jim Yarbrough, in-house investigator for Rusty Hardin & Associates, LLP, dated July 18, 2017).

⁹ “Scientist” generally refers to “a person learned in science and especially natural science.” (“Scientist.” MERRIAM-WEBSTER, n.d. Web. 20 July 2017).

¹⁰ Ex. 7 (“Ashley Black Guru” Facebook post).

¹¹ Ex. 8 (FDA Establishment Registration & Device Listing of “FasciaBlaster.”). The FDA identifies the FasciaBlaster under the “Product Code” as “IOD” and the “Regulation Number” as “890.5350.”

device is exempt from the requirement for FDA approval and it is simply “registered,” thus, it does not have approval from the FDA.¹²

Ms. Black refers to herself as a licensed massage therapist to the Facebook groups using her product.¹³ She is not a licensed massage therapist according to her own webpage¹⁴ and according to the State of Texas.¹⁵

Three days prior to filing this lawsuit, Plaintiffs amended the Terms and Conditions on their webpage to include health “warnings” identifying potential side effects from using Plaintiffs’ products.¹⁶ These are the same side effects Mrs. Wallace complained about, and it is these statements regarding the side effects for which Plaintiffs are suing Mrs. Wallace.

Ms. Black refers to the people using the FasciaBlaster as “a microcosm of a movement of women sweeping the globe.”¹⁷ She indeed has many followers and people that post regarding the FasciaBlaster. She also has critics. The critics include people that have filed complaints with the FDA¹⁸ as well as made postings on Facebook and elsewhere.¹⁹ Ms. Black has taken an aggressive response to quiet these critics: (1) she has left a voicemail threatening to sue one critic if she did

¹² See Ex. 9 (FDA Production Classification website) (identifying “Regulation Number 890.5350” as a “class I device” which is exempt from regulation).

¹³ Ex. 10 (“Ashley Black Guru” Facebook post) (“Hey girl, I have been an LMT for many years...”)

¹⁴ Ex. 11 (“Ashley Black FasciaBlaster” webpage, under Terms and Conditions) (stating: “Ashley Black Company does not identify itself or any of its personnel, as a licensed...massage therapist.”).

¹⁵ Ex. 19 (Texas Department of Health and Human Services’ licensed massage therapist database search results).

¹⁶ Ex. 11.

¹⁷ Ex. 4 at xviii.

¹⁸ Ex. 12 (Compilation of fifty FDA Complaints regarding the FasciaBlaster (“FDA Complaints”)).

¹⁹ Ex. 13 (Chart of customer complaints posted on Facebook and other social media, with accompanying corresponding documents (“Collected Posts”)).

not stop the criticism;²⁰ (2) she threatens criminal prosecution to critics online;²¹ and (3) she has employed a “security firm” that infiltrates social media posts and makes threats online as well as other tactics to chill free speech.²²

Ms. Black has targeted Mrs. Wallace and her dba in an effort to thwart the wave of criticism.²³

Mrs. Wallace dares to criticize Ms. Black and her product.

Mrs. Wallace is a licensed esthetician who has a small business in which she is the sole employee. She has a dba of Journeyz Spa & Products (“Journeyz Spa” or “dba”). Journeyz Spa is based on Corpus Christi. Mrs. Wallace is married, has five children ages 23, 18, 11, 7, and 3 and lives in Falfurrias, Texas.

As an esthetician Mrs. Wallace primarily provides bikini waxes and other types of wax treatments to women.²⁴ Contrary to Plaintiffs’ allegation in Plaintiffs’ First Amended Petition and Application for Injunctive Relief (“Petition” or “Pet.”), Mrs. Wallace is not a massage therapist and has never represented she was.

Mrs. Wallace does not sell the FasciaBlaster and never has. She provides the beauty services of an esthetician. She began using the FasciaBlaster in January 2015. Given the side effects of the product, Mrs. Wallace started to criticize the product publicly on Facebook.

²⁰ Ex. 14 (Certified transcript of audio file posted on YouTube of telephone call from Ashley Black to a customer).

²¹ Ex. 15 (“Ashley Black Guru” Facebook post, May 18, 2017).

²² Ex. 16 (“Black Ryno Security Group” Facebook page, June 15, 2017).

²³ Ex. 17 (“Ashley Black Guru” website, “Legal” page) (Ms. Black posts on her website, Ashley Black Guru, the Petition in this case against Mrs. Wallace as a warning to others not to criticize her product).

²⁴ Ex. 18 (Webpage of Mrs. Wallace).

Numerous other women were already criticizing the product on Facebook as well as filing complaints with the Food & Drug Administration.²⁵ It was shortly after these criticisms that Ms. Black filed this lawsuit.

In response to the criticism, Ms. Black engaged in a threatening, and bullying on-line campaign to stop the criticism of her product. This includes Ms. Black: (1) writing to other women on Facebook and elsewhere that she has sued Mrs. Wallace for similar speech and attaching the Petition in this case;²⁶ (2) stating that it is “illegal” to say certain things about the FasciaBlaster or Ms. Black and that individuals can be prosecuted;²⁷ and (3) having the head of her security team publicly name individuals, including Mrs. Wallace, that Ms. Black believes are criticizing her product.²⁸

Further, Ms. Black instructed Mrs. Wallace that the side effects she was having from the FasciaBlaster were not caused by the FasciaBlaster.²⁹

Mrs. Wallace was served with process in this lawsuit on May 26, 2017. On June 5, 2017, Plaintiffs’ counsel sought to settle this matter.³⁰ In response, counsel for Mrs. Wallace sent a letter

²⁵ Ex. 12 (FDA Complaints); Ex. 13 (Collected Posts).

²⁶ Ex. 20 (Facebook post, “Blaster ‘The Real Story’”, June 3, 2017).

²⁷ Ex. 15.

²⁸ Ex. 21 (Series of posts on “Ashley Black Guru” Facebook page by Black Ryno Security, dated June 15, 2017).

²⁹ Ex. 22 (Series of posts on “Ashley Black Guru” Facebook page between Karen Wallace and Ashley Black, dated December 22, 2016).

³⁰ Ex. 23 (Letter from George Kurisky, Jr., counsel for Ashley Black, to Karen Wallace, dated June 5, 2017).

to Plaintiffs' counsel asking that Plaintiffs dismiss their lawsuit or be subject to the anti-SLAPP motion that would be filed.³¹ Plaintiffs refused to do so.

Mrs. Wallace and Journeyz Spa (hereinafter "dba") file this Motion to Dismiss because the statements of Mrs. Wallace³² consist of constitutionally-protected free speech and association, because the statements do not defame Plaintiffs, and because all of the statements are true and Plaintiffs cannot prove they are false as is their burden.

ARGUMENT & AUTHORITIES

Texas's anti-SLAPP legislation, codified in Chapter 27 of the Texas Civil Practices and Remedies Code, safeguards the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law," while simultaneously protecting "the rights of a person to file meritorious lawsuits for demonstrable injury."³³ By enacting the TCPA, Texas joined some twenty-seven other states, the District of Columbia, and Guam³⁴ that have laws permitting the dismissal of SLAPP suits in the early stages of litigation, before attorney's fees and litigation costs become exorbitant. The TCPA is not

³¹ Ex. 24 (Letter from Rusty Hardin, counsel for Karen Wallace, to George Kurisky, Jr., dated June 19, 2017).

³² Plaintiffs do not identify any statements made by the dba or attributable to the dba in their Petition. All statements are attributed in the Petition to Mrs. Wallace.

³³ TEX. CIV. PRAC. & REM. CODE § 27.002.

³⁴ Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) (Senate Committee Report on the TCPA, and noting that 27 other states had passed anti-SLAPP legislation); *see generally* Dena M. Richardson, *Power-Play: An Examination of Texas' Anti-SLAPP Statute and Its Protections of Free Speech Through Accelerated Dismissal*, 45 ST. MARY'S L.J. 245, 254 (2014) (listing state anti-SLAPP statutes).

limited to lawsuits involving media defendants or libel charges, and numerous Texas appellate cases dealing with the anti-SLAPP law do not involve media entities.³⁵

Dismissal motions under the TCPA involve a shifting burden.³⁶ As a threshold matter, a movant-defendant must show “by a preponderance of the evidence that the lawsuit is based on, relates to, or is in response to the party’s exercise of its right to free speech, the right to petition or the right of association.”³⁷ If this threshold burden is met, then the non-movant must justify suit by producing “clear and specific evidence a prima facie case for each essential element” of Plaintiffs’ claims.³⁸ If the non-movant cannot carry that burden, the TCPA requires dismissal of the entire case.³⁹

³⁵ See, e.g., *Serafine v. Blunt*, 466 S.W.3d 352 (Tex. App.—Austin 2015, no pet.) (trial judge should have partially granted anti-SLAPP motion filed in trespass to try title suit when defendant counterclaimed for tortious interference with draining contract and fraudulent *lis pendens*); *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 308, 312 (Tex. App.—Dallas 2013, pet. denied) (trial judge should have granted anti-SLAPP motion in contract dispute action between Better Business Bureau and swimming pool company); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353-54 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (mem. op.) (trial judge should have granted BBB’s anti-SLAPP motion in home-repair company’s defamation and business disparagement lawsuit); *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *7 (Tex. App.—Austin April 7, 2015, no pet. h.) (mem. op.) (trial judge should have partially granted anti-SLAPP motion in slander dispute between condominium owners and property manager for homeowners association); *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *1, 7 (Tex. App.—Austin April 11, 2014, pet. denied) (mem. op.) (upholding anti-SLAPP dismissal of lawsuit by attorney recruiting company against former employee who “trashed” the company online).

³⁶ *Rehak Creative Servs. Inc. v. Witt*, 404 S.W.3d 716, 723 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

³⁷ TEX. CIV. PRAC. & REM. CODE § 27.005(b).

³⁸ *Rehak*, 404 S.W.3d at 723–24 (quoting CPRC § 27.005(c)).

³⁹ *Id.*

Finally, even if a plaintiff establishes a prima facie case for each element of the disputed claims, the Court still must dismiss the action if the moving party establishes by a preponderance of the evidence each element of a valid defense.⁴⁰

I. This lawsuit is subject to dismissal under CPRC § 27.003 because the claims relate to Mrs. Wallace’s and her dba’s constitutionally-protected free speech and association rights.

The TCPA applies to the exercise of the right of free speech, which it broadly defines as “a communication made in connection with a matter of public concern.”⁴¹ All doubts must be resolved in favor of the statute’s application because the TCPA is “construed liberally to effectuate its purpose and intent fully.”⁴² In deciding when a claim is “based on, relates to, or is in response to the party’s exercise of its right to free speech, the right to petition or the right of association,”⁴³ courts do not look merely at the label placed on the claim.⁴⁴ Rather, “it is sufficient that a challenged ‘legal action’ seeks relief predicated on alleged injury from some communication that can be said to fall within the TCPA’s definitions.”⁴⁵

⁴⁰ TEX. CIV. PRAC. & REM. CODE § 27.005(d)

⁴¹ *Id.* § 27.001(3).

⁴² *Id.* § 27.011(b).

⁴³ *Id.* § 27.005(b).

⁴⁴ *Murphy v. Gruber*, 241 S.W.3d 689, 697 (Tex. App.—Dallas 2007, pet. denied) (holding that the court must discern the true substance of the claim); *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App. —Fort Worth 2002, pet. denied) (disregarding theory pled by plaintiff and looking at crux of complaint to determine whether plaintiff asserted claim for professional malpractice).

⁴⁵ *Serafine v. Blunt*, 466 S.W.3d 352, 373 (Tex. App.—Austin 2015, no pet.).

A claim can “relate to” protected conduct without being “based on such conduct” as the term “relating to” considers a link between the relevant concepts.⁴⁶ “The terminology ‘relates to’ is very broad in its ordinary usage, and we must presume that the legislature used such a broad formulation purposely.”⁴⁷ Thus, Plaintiffs’ claims do not have to “arise from” a protected act; they just need “a connection with” or “concern” acts covered under the TCPA’s definitions.

All of Plaintiffs’ claims relate to Mrs. Wallace’s exercise of her free speech and association rights. Each claim is based on Mrs. Wallace’s protected communications about Plaintiffs’ product and her personal experience with the product and her criticism and review of the product.

Section 27.001(3) defines the “exercise of free speech” as “a communication made in connection with a matter of public concern.”⁴⁸ Communication is “the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.”⁴⁹ And “public concern” encompasses seven categories, including issues “relating to”: “(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or, (E) a good, product, or service in the marketplace.”⁵⁰ A communication that is the subject of a dismissal motion must only fall within one category of “public concern” outlined in § 27.001(7).

⁴⁶ *Id.* at 391 (Pemberton, J., concurring) (“The ordinary meaning of ‘relates to’ would denote some sort of connection, reference, or relationship.”).

⁴⁷ *See generally Texas Dept. of Pub. Safety v. Abbott*, 310 S.W.3d 670, 674-75 (Tex. App.—Austin 2010, no pet.).

⁴⁸ TEX. CIV. PRAC. & REM. CODE § 27.001(3).

⁴⁹ *Id.* § 27.001(1).

⁵⁰ *Id.* § 27.001(7).

The present litigation qualifies for the TCPA’s protection under at least four independent realms of “public concern” because (1) Ashley Black and ADB are public figures; (2) the statements deal with health and safety issues; (3) the statements deal with the community well-being; and (4) the statements deal with a product in the marketplace.

A. The first independent reason TCPA applies is because Plaintiffs are public figures.

Plaintiffs are considered public figures for purposes of the TCPA. Therefore, communications “relating to” them constitute a matter of public concern. The term “public figure” is not defined by the TCPA, but Texas courts considering the issue have relied upon an analysis similar to ones performed in First Amendment cases.⁵¹ Under such a consideration, courts first weigh whether an individual is a general-purpose public figure or a limited-purpose public figure and then apply the TCPA’s considerations.

“General-purpose public figures are those individuals who have achieved such pervasive fame or notoriety that they become public figures for all purposes and in all contexts.”⁵² A general-purpose public figure assumes “‘a role of especial prominence in the affairs of society’ and the general public ‘recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment worthy of its attention or because he actively pursues that consideration.’”⁵³

Plaintiffs are general-purpose public figures having recognized themselves as such in a book published by Ms. Black:

⁵¹ *Pickens v. Cordia*, 433 S.W.3d 179, 185 (Tex. App.—Dallas 2014, no pet.); *Rauhauser v. McGibner*, 508 S.W.3d 377, 386 (Tex. App.—Fort Worth 2014, no pet.).

⁵² *Pickens*, 433 S.W.3d at 185.

⁵³ *Id.* (quoting *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980)).

- “There wasn’t a ‘Famous’ pill or a ‘*Becoming Famous for*’ Dummies book or I would have been all over both. (Of course, I could write that book now!).”⁵⁴
- “[T]hey drove THIS book to #1 on Amazon in just four hours. This is ‘fame’ redefined and the fascia movement, as it has turned out is as powerful as a title wave. Fame and fascia...check, check!”⁵⁵
- “While I had all these ideas about how to ‘get famous,’ which I now know is just a way of assuming a position of influence so I could present this science to the world, I wanted to do it the right way.”⁵⁶
- “At least I knew the assignment—go make me famous or go make fascia famous. Done deal.”⁵⁷
- “I ran a contest among my private Facebook group, which is the largest female support group on Facebook with over 100,000 members, at the time this book was printed.”⁵⁸
- “What I quickly realized is that in order for me to fund my own research, join the ranks of billion-dollar businesses, and launch a product globally, the fame and the money are necessary.”⁵⁹

A second category is the limited-purpose public figure who “‘inject themselves or are drawn into a particular public controversy assuming special prominence in the resolution of public questions.’”⁶⁰

Plaintiffs meet the Texas standard for both a general-purpose as well as a limited-purpose public figure. In Texas, courts consider the following factors:

⁵⁴ Ex. 4 at 219.

⁵⁵ *Id.* at 220.

⁵⁶ *Id.* at 219.

⁵⁷ *Id.* at 218.

⁵⁸ *Id.* at xi.

⁵⁹ *Id.* at 219.

⁶⁰ *Rauhauser*, 508 S.W.3d at 386 (quoting *Klentzman v. Brady*, 312 S.W.3d 886, 904-05 (Tex. App.—Houston [1st Dist.] 2009, no pet.)).

(1) the controversy at issue must be public both in the sense that people are discussing it and in the sense that 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.⁶¹

The first prong is met because hundreds if not thousands of posts have appeared in social media and it has been discussed extensively on the internet.⁶² Additionally, there have been numerous complaints filed with the Food and Drug Administration regarding Plaintiffs and their product.⁶³

The test's second prong is met because Ashley Black has admitted to her central role in the controversy. She repeatedly submits posts on the internet and social media centered on combating the criticism of the FasciaBlaster and her role in the controversy.⁶⁴

On Ms. Black's webpage she posted the following regarding this controversy:

Valued FasciaBlaster® Device User,

A serious issue has come to our attention, and we feel it is our duty at Ashley Black Guru to provide you the information that you need to make informed choices. Recently, we have become aware of a number of public claims about negative effects of the FasciaBlaster device...[W]e also need our audience to be aware that knowingly making false or fraudulent injury or defect claims is illegal and may subject you to criminal and civil liability.

Under 18 U.S.C. 1001, anyone who makes a materially false, fictitious, or fraudulent statement to the U.S. Government is subject to criminal

⁶¹ *Id.* (citing to *WFAA-TV v. McLemore*, 978 S.W.2d 568, 572 (Tex. 1998)).

⁶² *See*, e.g., Ex. 13 (Collected Posts); Ex. 26 ("Ashley Black and Fascia" Google Search (reflecting 7,840,000 results), obtained July 20, 2017).

⁶³ Ex. 12 (FDA Complaints).

⁶⁴ Ex. 13 (Collected Posts); Ex. 16 (Black Ryno, the "Head of Security" for Ashley Black and "Ashley Black Guru Companies", posts on Facebook on June 15, 2017 that they are purporting to combat the "[i]belous, slanderous comments, and any other posts, photos, videos, messages, comments."); Ex. 21 (Facebook posts on June 15, 2017 of Black Ryno Security Facebook group identifying Mrs. Wallace and at least 53 other individuals and urging people to block these individuals because they are criticizing FaciaBlaster and/or Ms. Black).

penalties....These laws are available at Justice.gov. There are places on this website to report these trolling crimes.⁶⁵

These posts and webpage submissions, along with Ms. Black's admissions regarding her involvement, demonstrate that Ms. Black plays a central role in the issue of the safety and criticism of the FasciaBlaster.

Finally, the third prong of the test is met because the alleged defamatory statements are germane to Ms. Black's role in the controversy. Plaintiffs' petition alleges that Mrs. Wallace made statements that defamed Plaintiffs.⁶⁶ The alleged defamation is directly related to Plaintiffs' role in the controversy over the safety of the FasciaBlaster.

In *Gertz v. Robert Welch Inc.*,⁶⁷ the Supreme Court elaborated on the public figure doctrine. A public figure is a person who voluntarily injects himself or is drawn into a particular matter of public concern.⁶⁸ The relevant inquiry turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."⁶⁹

⁶⁵ Ex. 15.

⁶⁶ Pet. ¶¶ 13, 16-17, 19, 22-26, 31-37, 45-47, 49-51 and 56.

⁶⁷ *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

⁶⁸ *Id.* at 345, 351; accord *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 84 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). A public figure is a person whose actions invite public attention and comment. *Gertz*, 418 U.S. at 345.

⁶⁹ *Gertz*, 418 U.S. at 352; *San Antonio Express News v. Dracos*, 922 S.W.2d 242, 251 (Tex. App.—San Antonio 1996, no writ). The question of public figure status is one of federal constitutional law for the court to decide. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987).

As a self-described “best-selling author” regarding fascia, and the product sold by Plaintiffs, as well as touting on her own website that she is a “multimillionaire inventor and **one of the most buzzed-about public figures on the internet**,” Ms. Black is a self-described public figure.⁷⁰ Ms. Black cannot hold herself out as a popular internet personality and “public figure on the internet” and yet deny she is a public figure for the purposes of attacking Mrs. Wallace’s comments on the internet about that very product. She cannot, in other words, have it both ways—stepping into the limelight as a public commentator, yet avoiding it for purposes of defamation law and the First Amendment.⁷¹



⁷⁰ See Ex. 3 (Article from THE CONNECT magazine found on the webpage of Ashley Black) (emphasis added).

⁷¹ Ex. 27 (The cover of the Spring 2017 edition of THE CONNECT, featuring Ms. Black on the cover and obtained from the webpage of Plaintiffs).

Further, Ms. Black has considerable access to channels of communication, an important indicator of public figure status cited by *Gertz*.⁷² Ms. Black wrote a book about her role with FasciaBlaster⁷³ and appeared on the Today Show to discuss the product,⁷⁴ she has a webpage devoted to herself and the FasciaBlaster,⁷⁵ a blog devoted to Ms. Black and the purported benefits of the FasciaBlaster,⁷⁶ a Twitter page dedicated to Ms. Black and the FasciaBlaster⁷⁷ and refers to herself as a “Guru” and speaks frequently regarding the FasciaBlaster.⁷⁸ Additionally, Ms. Black’s name is directly on the product.⁷⁹

The article that Ms. Black posts on her webpage which refers to Ms. Black as “one of the most buzzed-about public figures on the internet” also reports on Ms. Black’s promotional effort:

Already a multi-millionaire from her busy clinics and sophisticated clientele, Black saturated her fortune in mass manufacturing of the FasciaBlaster, while joining forces with a team of savvy social media experts to help her spread the word. A website, Facebook page and private group were among the key promotional efforts.⁸⁰

⁷² *Gertz*, 418 U.S. at 344.

⁷³ Ex. 4.

⁷⁴ Ex. 28 at 9 (Certified transcript of *NBC Today Show* interview of Ashley Black on March 8, 2017).

⁷⁵ Ex. 29 (Ashley Black Guru webpage, “Who Is Ashley Black?”).

⁷⁶ Ex. 30 (Ms. Black’s online blog) (touting the FasciaBlaster’s benefits along with links to numerous articles and media publications regarding Ms. Black and the benefits she touts of the FasciaBlaster).

⁷⁷ *Id.*

⁷⁸ Ex. 27.

⁷⁹ See illustration, *infra*, of the FasciaBlaster with Ms. Black’s name prominently displayed on the illustration, *infra*.

⁸⁰ Ex. 3 at 26-27.

Ms. Black is the managing member of Plaintiff ADB Interests.⁸¹ She is the inventor and developer of ADB products of which the FaciaBlaster is the “cornerstone of ADB’s product line.”⁸² Ms. Black’s acts are deemed ADB’s acts and as such, ADB is deemed a public figure.⁸³

By meeting the legal definition of a public figure, Plaintiffs’ Petition in this lawsuit falls under the “public concern” protections of the TCPA.⁸⁴

B. The second, third and fourth independent reasons the TCPA applies is because the alleged defamatory statements relate to (a) health and safety; (b) community well-being; and (c) a product in the marketplace.

Independent of Plaintiffs’ status as a public figure, the statements at issue in this lawsuit also qualify as a “public concern” under the TCPA as they relate to (a) health or safety; (b) community well-being; and (c) a product in the marketplace.

1. The statements relate to health or safety.

Mrs. Wallace’s statements address the FasciaBlaster’s “health or safety.”⁸⁵ This includes statements in the Petition in which Mrs. Wallace expresses issues with the FasciaBlaster related to

⁸¹ Pet. ¶ 8.

⁸² *Id.* at ¶ 8, 9.

⁸³ *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995) (“Corporations, by their very nature, cannot function without human agents. As a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation’s acts.”); *Powell Industries v. Allen*, 985 S.W.2d 455, 457 (Tex. 1998) (“a corporate officer’s acts on the corporation’s behalf usually are deemed corporate acts.”); *Hoggett v. Brown*, 971 S.W.2d 472, 491 (Houston [14th Dist.] 1997) (“because a corporation can only act through its officers or agents, the actions of a corporate agent on behalf of the corporation are deemed the corporation’s acts.”). ⁸³ See also *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980) (even a local Pittsburgh steak chain was a “public figure” based on its \$16,000 advertising campaign). There are no statements alleged to have been made by Mrs. Wallace or the dba about the Plaintiff ADB or specifically mentioning ADB. The only statements complained of mention Ms. Black or the product FasciaBlaster.

⁸⁴ *Rauhauser*, 508 S.W.3d at 387-388.

⁸⁵ See, generally, Pet. ¶¶ 13, 22, 23, 26, 30, 31, 33 (Defendants’ Petition contains two paragraphs which are numbered 33), 34, 36, 39, and 40.

her health and that of others.⁸⁶ The statements alleged in the Petition address Mrs. Wallace discussing adverse effects she experienced from the FasciaBlaster such as “extreme detox,”⁸⁷ “trips to the hospital,”⁸⁸ “fibromyalgia,”⁸⁹ blood “clots,”⁹⁰ and “increased cortisol.”⁹¹ The Petition also states Mrs. Wallace reposts a warning by Ms. Black’s ex-husband to not use the FasciaBlaster “on children.”⁹²

Clearly all of these alleged defamatory statements relate to “health or safety” of using the FasciaBlaster.

2. The statements relate to community well-being.

Adhering to the legislative requirement of an expansive interpretation of the TCPA,⁹³ Texas courts have broadly interpreted the terms “community well-being” and “community concern.” Courts have concluded that these requirements were met by statements relating to: (1)

⁸⁶ For example, see Pet. ¶ 13 (suing over statements that Mrs. Wallace made that tests done on Mrs. Wallace are showing she has inflammation and stating “If you are using these tools and experience ANY adverse symptoms please stop and get your cortisol, hormones and ‘free numbers’ checked by your doctor.”).

⁸⁷ Pet. ¶ 16 (alleging damage due to Mrs. Wallace describing her weight gain, extreme detox and inflammation were caused by the FasciaBlaster).

⁸⁸ Pet. ¶ 22 (alleging damage due to Mrs. Wallace attributing her trip to the hospital on the FasciaBlaster).

⁸⁹ Pet. ¶ 23 (alleging damage due to Mrs. Wallace attributing FasciaBlaster to her obtaining fibromyalgia).

⁹⁰ Pet. ¶ 26 (alleging damage due to Mrs. Wallace alleging the FasciaBlaster caused clots, pituitary gland and cognitive issues).

⁹¹ Pet. ¶ 31 (alleging damage due to Mrs. Wallace claiming alleged increase in cortisol caused her to suffer two miscarriages).

⁹² Pet. ¶ 30 (alleging damage due to Mrs. Wallace reposting a video from Ms. Black’s ex-husband to not use the FasciaBlaster on children). Ms. Black’s book recommends using the FasciaBlaster on children. Ex. 4 at 174 (“As far as kids go, you can blast them if they let you, but it’s far better to teach them to blast themselves.”).

⁹³ § 27.011.

a little league coach's angry and aggressive behavior during a public game;⁹⁴ (2) assertions of misconduct by the property manager of a homeowner's association;⁹⁵ and, (3) accusations of identity theft.⁹⁶

The TCPA does not require that the statements specifically 'mention' health, safety, environmental, or economic concerns, nor does it require more than a 'tangential relationship' to the same; rather, TCPA applicability requires only that the defendant's statements are 'in connection with' 'issues related to' health safety, environmental, economic, and other identified matters of public concern chosen by the Legislature. TEX. CIV. PRAC. & REM. CODE 27.001(3), (7).⁹⁷

The issue of the safety of the FasciaBlaster is being discussed by countless people on social media and webpages as well as over 50 complaints being made to the Food and Drug Administration.⁹⁸ Courts have found "community well-being" at stake under the TCPA in matters far more mundane than the safety of a product used on one's body.⁹⁹

Here, the allegedly defamatory statements fall under the TCPA's standard for "community well-being."

⁹⁴ *Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 WL 1120921, at *11 (Tex. App.-Fort Worth Mar. 12, 2015, no pet.).

⁹⁵ *Neyland*, 2015 WL 1612155, at *5.

⁹⁶ *Deaver v. Desai*, 483 S.W.3d 668, 673 (Tex. App.-Houston [14th Dist.] 2015, no pet.).

⁹⁷ *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017).

⁹⁸ Ex. 12 (FDA Complaints); Ex. 13 (Collected Posts).

⁹⁹ *See Deaver*, 483 S.W.3d at 673 (accusing man of identity theft); *Neyland*, 2015 WL 1612155, at *5 (feud within homeowner's association); *Bilbrey* 2015 WL 1120921, at *11 (statements about coach's angry behavior during children's baseball game).

3. The Statements relate to a product in the marketplace.

The FasciaBlaster is part of a “product in the marketplace” and is thus a public concern.¹⁰⁰ Because Mrs. Wallace’s comments relate to this product, they involve a “matter of public concern” under the TCPA.¹⁰¹



In sum, Plaintiffs’ causes of action based on Mrs. Wallace’s statements implicate at least four of the “public concerns” which qualify as “free speech” and are thus subject to dismissal under the TCPA.

¹⁰⁰ See TEX. CIV. PRAC. & REM. CODE § 27.001(7)(E).

¹⁰¹ See, e.g., *Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 308 (online review of pool builder was “public concern” under TCPA); *MacFarland v. Le-Vel Brands, LLC*, No. 05-16-00672-CV, 2017 WL 1089684, at *16 (Tex.App.—Dallas Mar. 23, 2017, no pet. hist.) (a blog post calling Le-Vel’s dietary supplements a scam constituted “public concern” under TCPA); *Epperson v. Mueller*, No. 01-15-00231-CV, 2016 WL 4253978, at *10 (Tex.App.—Houston [1st Dist.] Aug. 11, 2016, no pet.) (mem. op.) (posts on an online forum questioning the authenticity of signed memorabilia was a matter of “public concern” under the TCPA); *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1363, 78 Cal.Rptr.2d 627, 638) (comments in a book about finding benzene in household products were a matter of public concern).

C. Plaintiffs' claims also impermissibly relate to Mrs. Wallace's right of association.

The TCPA also protects individual's right of association, which is broadly defined by the statute. Under section 27.001, the exercise of the right of association “[m]eans a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.”¹⁰² Constitutionally protected acts include attending protests, joining unions, or affiliating with ideological or political groups. Yet, the TCPA's definition of the “right of association” goes beyond those archetypal examples to achieve the underlying aims of this broad statute.¹⁰³ When interpreting the TCPA, Texas courts have held that communications between individuals collectively joined together to promote or defend a public or private common interest qualifies for TCPA's protection.¹⁰⁴ Although the TCPA protects speech only as to matters of “public concern,” the statute places no such limitations on protecting one's right to associate.¹⁰⁵ The “common interests” need not involve any public, let alone salutary, concerns.¹⁰⁶

All of Plaintiffs' claims are based on statements Mrs. Wallace posted on social media and the internet.¹⁰⁷ Such statements involve Mrs. Wallace's right of association with like-minded

¹⁰² § 27.001(2).

¹⁰³ § 27.002 (“The purpose of this chapter is to encourage and safeguard the constitutional rights of person to . . . associate freely . . . to the maximum extent permitted by law.”).

¹⁰⁴ See e.g. *Fawcett v. Rogers*, 492 S.W.3d 18, 24 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (finding that private emails about mismanagement of Mason lodge constituted “right of association”); *Backes v. Misko*, 486 S.W.3d 7, 20 (Tex. App.—Dallas 2015, pet. denied); *Combined Law Enforcement Ass’n of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *5 (Tex. App.—Austin Jan. 31, 2014, pet. denied).

¹⁰⁵ Compare § 27.001(3) with § 27.001(2).

¹⁰⁶ See *Fawcett*, 492 S.W.3d at 24 (holding that “right of association” encompasses private emails about mismanagement of Mason lodge).

¹⁰⁷ Pet. ¶¶ 12-43 (all alleged to be on Facebook). Texas courts have applied the TCPA to online speech. See, e.g., *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509-510 (Tex. 2015) (per curiam) (applying TCPA to email communications). In applying the TCPA to email communications, the Texas Supreme Court relied on the inclusion of electronic communications to the definition of “exercise of free speech.” *Id.* at 509.

advocates. Like others, Mrs. Wallace uses social media in the hopes that supporters will “express, promote, pursue, or defend” the common interest they share with Mrs. Wallace—promoting dialogue as to whether the product they use on their body is safe.

Here, Plaintiffs’ Petition specifically relates to communications between and among people on social media discussing the FasciaBlaster among themselves, thereby attacking their constitutional right to association. For example, all of the allegations in Plaintiffs’ Petition relate to Mrs. Wallace’s posts and communications with others on social media such as Facebook and her website and the internet.¹⁰⁸ Working in concert toward a common goal of ascertaining the safety to their health of the FasciaBlaster required communications among users of the product which constitutes the protected activity of association under the TCPA.

This Court must dismiss the Petition because its allegations relate to communications among Mrs. Wallace and others on social media who are collectively joined together to promote, pursue, and defend a shared interest: the safety of a product used on their body. Under the TCPA, this shared interest constitutes a protected right of assembly and cannot serve as the basis for litigation.

II. Plaintiffs’ claims are ripe for dismissal because Plaintiffs cannot establish by “clear and specific evidence” a prima facie case for each essential element of these claims.

Because Mrs. Wallace and her dba have shown by a preponderance of the evidence that their actions are related to their exercise of free speech and association, the burden shifts to Plaintiffs to establish a prima facie case with “clear and specific evidence” for each element of their claims. To do so, Plaintiffs must provide evidence that is “‘unambiguous,’ ‘sure,’ or ‘free

¹⁰⁸ See Pet. at ¶¶ 13-43 (all primarily relating to Facebook communications by Mrs. Wallace).

from doubt’” and “‘explicit’ or ‘relating to a particular named thing.’”¹⁰⁹ Bare, baseless assertions—even if offered in the form of testimony or an affidavit—are insufficient for the clear and specific evidence required to establish a prima facie case under the TCPA.¹¹⁰

Plaintiffs could attempt to defeat this motion by offering “clear and specific” evidence of a prima facie case for all elements of all claims.¹¹¹ Plaintiffs’ burden exceeds the “scintilla” standard that applies to no-evidence motions for summary judgment.¹¹²

A. Plaintiffs cannot provide “clear and convincing evidence” of each element of Plaintiffs’ defamation claims.

As a public figure, Plaintiffs must establish defamation by showing the following:¹¹³ (1) publication of a false statement to a third party; (2) that was defamatory concerning the plaintiff; (3) that defendants acted with actual malice; and, (4) damages.¹¹⁴ An actionable defamatory statement must “point to the plaintiff and to no one else.”¹¹⁵ Plaintiffs cannot establish a prima facie case on any of these elements.

¹⁰⁹ *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (quoting Black’s Law Dictionary 268, 1434 (8th ed. 2004)).

¹¹⁰ *In re Lipsky*, 460 S.W.3d at 592.

¹¹¹ TEX. CIV. PRAC. & REM. CODE § 27.005(c).

¹¹² *Rehak*, 404 S.W.3d at 726.

¹¹³ The elements for libel and slander are identical except that libel refers to printed false statements and slander refers to spoken communications.

¹¹⁴ For elements 1 and 2, see *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); for element 3, see *Klentzman v. Brady*, 312 S.W.3d 886, 897–98 (Tex. App.—Houston [1st Dist.] 2009, no pet.); for element 4, see *In re Lipsky*, 460 S.W.3d at 593.

¹¹⁵ *Tatum v. The Dallas Morning News, Inc.*, 493 S.W.3d 646, 658 (Tex. App.—Dallas 2015, pet. filed) (citing *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 894 (Tex. 1960)).

1. Plaintiffs cannot establish the falsity of the alleged defamatory statements as is their burden to avoid dismissal under TCPA.

Plaintiffs must establish the falsity of each statement they allege is defamatory.¹¹⁶ For a statement to be defamatory, it “must be sufficiently factual to be susceptible of being proved objectively true or false, as contrasted from a purely subjective assertion.”¹¹⁷ The distinction lies in whether “a reasonable factfinder could conclude that the statement implies an actual assertion of the purported fact, as contrasted from loose, figurative, or hyperbolic language.”¹¹⁸ If the statement is, “by its nature, an indefinite or ambiguous individual judgment,” it cannot be defamatory.¹¹⁹ Most of Mrs. Wallace’s comments are black letter illustrations of “individual judgment.”¹²⁰ The focus of Plaintiffs’ case is that in April and May 2017, Mrs. Wallace criticizes Plaintiffs’ product on social media and webpages and spoke about it “cause[ing] a variety of serious medical diseases and conditions.”¹²¹

These statements are not “susceptible of being proved objectively true or false.”¹²² Nor can Plaintiffs prove they are false, which is their burden. Courts in Texas and nationwide have

¹¹⁶ *Hearst Corp. v. Skeen*, 159 S.W.3d 633, 637 n.1 (Tex. 2005) (citing *Bentley v. Bunton*, 94 S.W.3d 561, 586-87 (Tex. 2002)) (“Proving falsity in a public-figure defamation case is the plaintiff’s burden of proof; in such a case, the defendant does not have the burden of proving substantial truth as an affirmative defense.”).

¹¹⁷ *Thomas-Smith v. Mackin*, 238 S.W.3d 503, 507 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

¹¹⁸ *Id.* at 507.

¹¹⁹ *Avila v. Larrea*, 394 S.W.3d 646, 659 (Tex. App.—Dallas 2012, pet. denied) (calling lawyer’s result a “nightmare” for client was non-actionable opinion).

¹²⁰ *See Avila*, 394 S.W.3d at 659.

¹²¹ Pet. ¶ 12.

¹²² *Thomas-Smith*, 238 S.W.3d at 507.

dismissed cases involving statements just like, and far worse than, what Mrs. Wallace said here.¹²³

As Justice Frankfurter explains, “to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like ‘unfair’ or ‘fascist’—is not to falsify facts.”¹²⁴

Mrs. Wallace’s statements about medical risks to herself and other are constitutionally off-limits. Diagnoses and observations about whether behavior puts someone “at risk” or potentially causes side-effect are classic, albeit expert, opinions. For instance, when Dateline NBC said that a trucker was “putting people at risk by driving long hours,” a federal appeals court ruled that the statement “expresses Dateline’s protected opinion that [the] behavior was risky.”¹²⁵

At the very least, Mrs. Wallace’s comments are substantially true. “A statement need not be perfectly true; as long as it is substantially true, it is not false.”¹²⁶ A report is only false if “taken

¹²³ *Rehak*, 404 S.W.3d at 729 (“bilking” and “ripping off” are just “rhetorical hyperbole”); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 875 (Tex. App.—Dallas 2014, no pet.) (“Whether someone can ‘barely speak English’ is a matter of subjective opinion, because what one person may view as non-proficient English may be completely acceptable to another person.”); *Falk & Mayfield L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (“lawsuit abuse” is subjective); *Beverly Hills Foodland, Inc. v. UFCW Local 655*, 39 F.3d 191, 195 (8th Cir. 1994) (“unfair to black employees” is opinion); *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1288–89 (5th Cir. 1981) (reference to church as a “rip-off, money motivated operation” not defamatory).

¹²⁴ *Cafeteria Employees Union, Local 302, v. Angelos*, 320 U.S. 293, 295 (1943).

¹²⁵ *Veilleux v. Nat’l Broad. Co.*, 206 F.3d 92, 116 (1st Cir. 2000); see also *Yohe v. Nugent*, 321 F.3d 35, 41 (1st Cir. 2003) (statement that arrestee “was suicidal” is “plainly” a protected opinion about mental condition).

¹²⁶ *KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710, 714 (Tex. 2016). In *KBMT*, for instance, a news story suggested that a doctor was investigated for abusing a child patient. *Id.* at 712. But because the doctor actually was investigated for abusing an adult patient, the report was substantially true, and the Supreme Court held that the TCPA required dismissal of the defamation claim. *Id.* at 715–17; see also *Avery v. Baddour*, No. 04-16-00184-CV, 2016 WL 4208115, at *6 (Tex. App.—San Antonio Aug. 10, 2016, pet. denied) (affirming anti-SLAPP dismissal because, even if article falsely said plaintiff was a secessionist who had renounced his U.S. citizenship, article was “substantially true” in that plaintiff did belong to “volunteer, non-violent organization premised on the belief that Texas is a sovereign nation”).

as a whole [it] is more damaging to the plaintiff's reputation than a truthful [report] would have been.”¹²⁷

In sum, Plaintiffs cannot prove that the statements were false as they are required to do by clear and specific evidence to overcome a motion to dismiss under TCPA.

2. Plaintiffs have no clear and specific evidence of actual malice.

Other than asserting conclusory and baseless allegations, Plaintiffs have not pleaded a single fact purporting to show that Mrs. Wallace or her dba had “actual knowledge” of falsity or a “reckless disregard” for the truth. Under the TCPA, “a civil defendant enjoys the benefit of a presumption that he spoke the truth.”¹²⁸

To defeat this motion, Plaintiffs must supply clear and convincing evidence that Mrs. Wallace published the statements with actual malice. That standard applies because Mrs. Wallace's comments pertain to matters of public concern¹²⁹ and because Plaintiffs are public figures.¹³⁰ “Actual malice” means that, before publishing the statement, the defendant knew it was false or subjectively entertained serious doubts about its accuracy.¹³¹ Plaintiffs' reference to “malice” is in paragraph 25 of the Petition. It states that malice is shown because Mrs. Wallace published on Facebook pictures of Ms. Black and her daughter from Ms. Black's own webpage

¹²⁷ *Id.*

¹²⁸ *Alphonso v. Deshotel*, 417 S.W.3d 194, 199 (Tex. App.—El Paso 2013, no pet.), disapproved on other grounds *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015).

¹²⁹ Speech about the effects of a product on one's health is “fairly considered as relating to any matter of political, social, or other concern to the community.” *See Connick v. Myers*, 461 U.S. 138, 146 (1983); *see also Scott v. Godwin*, 147 S.W.3d 609, 618 (Tex. App.—Corpus Christi 2004, no pet.) (“Speech made in the context of ongoing commentary and debate in the press is of public concern to the public.”).

¹³⁰ *Casso v. Brand*, 776 S.W.2d 551, 554 (Tex. 1989).

¹³¹ *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 171 (Tex. 2003).

and that Mrs. Wallace falsely stated that Ms. Black claimed pictures of her daughter were really pictures of herself.¹³² The actual post is of Mrs. Wallace stating that there is an 18 year old and that Ms. Black appears to be claiming that is a picture of herself.¹³³ This statement and post cannot be proven false as it is an opinion. It does not rise to the level of malice.¹³⁴

Indeed, the following circumstances have been found to not constitute actual malice with regard to the truth of the statement:

- Publishing the statement with ill will, spite, hatred, or wanton desire to injure.¹³⁵
- Difference of opinion about the truth of the statement.¹³⁶
- Not investigating or verifying the story before publishing it.¹³⁷
- Knowledge that the plaintiff denied harmful allegations or offered an alternative explanation of events.¹³⁸
- Poor word choice or use of imprecise language.¹³⁹

¹³² Pet. ¶ 25.

¹³³ Ex. 31 (Karen Wallace post on Fascia Info Unplugged Facebook page on May 5, 2017).

¹³⁴ *See Forbes, Inc.*, 124 S.W.3d at 171 (“there must be evidence the defendant entertained serious doubts about the trust of the publication or had a high degree of awareness of the probable falsity of the published information.”); *Harte-Hanks Comm’cns, Inc. v. Connaughton*, 491 U.S. 657, 681 (1989) (“Difference of opinion as to the truth of a matter—even a difference of 11 to 1—does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity. . .”).

¹³⁵ *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991); *Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 857-58 (Tex. 2005); *Leyendecker & Assoc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984).

¹³⁶ *Harte-Hanks*, 491 U.S. at 681.

¹³⁷ *New York Times v. Sullivan*, 376 U.S. 254, 287-88 (1964); *Bentley*, 94 S.W.3d at 591; *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex. 1969); *Fox Entm’t Grp. v. Abdel-Hafiz*, 240 S.W.3d 524, 545 (Tex.App.—Fort Worth 2007, pet. denied).

¹³⁸ *Freedom Newspapers*, 168 S.W.3d at 858.

¹³⁹ *Forbes Inc.*, 124 S.W.3d at 174; *Fox Entm’t*, 240 S.W.3d at 559.

- Publishing statements obtained from a biased source.¹⁴⁰

Other than asserting conclusory and baseless allegations, Plaintiffs have not pleaded a single fact purporting to show that Mrs. Wallace or her dba had “actual knowledge” of falsity or a “reckless disregard” for the truth. Under the TCPA, “a civil defendant enjoys the benefit of a presumption that he spoke the truth.”¹⁴¹

3. The statements are not defamatory per se, and Plaintiffs have no proof that Mrs. Wallace or her dba proximately caused any actual damages.

In some defamation cases, general damages are presumed. This is not one of them. Plaintiffs must prove actual damages to avoid dismissal. This is true for two reasons. First, damages can be presumed only if the statement was defamatory per se. Mrs. Wallace’s comments were not.¹⁴² Second, “the Constitution only allows juries to presume the existence of general damages in defamation per se cases where: (1) the speech is not public, or (2) the plaintiff proves actual malice.”¹⁴³

As shown above, Mrs. Wallace’s speech was of a public concern, and Plaintiffs failed to prove malice. Consequently, Plaintiffs must prove that each of Mrs. Wallace’s statements caused actual damage.¹⁴⁴ In *Lipsky* itself, for example, the Supreme Court found that a business

¹⁴⁰ *Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 440-41 (Tex.App.—Austin 2007, pet denied).

¹⁴¹ *Alphonso*, 417 S.W.3d at 199, disapproved on other grounds *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015).

¹⁴² Simply because the statements pertain to Ms. Black’s business does not make them defamatory per se. The issue is whether the statement accuses a professional of lacking a peculiar or unique skill necessary for the proper conduct of the profession. *Hancock v. Variyam*, 400 S.W.3d 59, 66–67 (Tex. 2013). For example, accusing a doctor of lying is not defamatory per se because that fault is not special to the medical profession. *Id.* While statements that the product can cause side effects may turn away customers, it is does not accuse the Plaintiffs of lacking a necessary trait unique to preparing a product to use on one’s body. *Id.*

¹⁴³ *Id.* at 65–66.

¹⁴⁴ *Id.* at 71-72.

disparagement claim failed because the only proof of damages—an affidavit asserting “direct pecuniary and economic losses . . . and loss of goodwill in the communities in which it operates . . . in excess of three million dollars”—was too “conclusory” to count as “clear and specific” evidence.¹⁴⁵

The only damage allegation by Plaintiffs is simply a general statement that damages have been suffered but no specifics of how or what amount or when or showing causation of the statements with damages suffered.¹⁴⁶ The conclusory statements about damages in Plaintiffs’ Petition fall well short of the needed proof.¹⁴⁷

4. There are other alternative causes for the alleged damages that Plaintiffs have purportedly suffered. Plaintiffs cannot prove by “clear and convincing evidence” that the alleged damages are attributable to Mrs. Wallace.

Mrs. Wallace and her dba also defeat the defamation claim by Plaintiffs given they are unable to prove by “clear and convincing evidence” that the purported damages, if any, are due to causes other than Mrs. Wallace’s speech.¹⁴⁸ Mrs. Wallace has identified alternative causes of the alleged reputational harm that are at least as probable as those advanced by Plaintiffs, shifting the burden to Plaintiffs to negate the alternative causes.¹⁴⁹

¹⁴⁵ *Lipsky*, 460 S.W.3d at 592.

¹⁴⁶ See Pet. ¶¶ 47 and 51

¹⁴⁷ *Lipsky*, 460 S.W.3d at 592-93.

¹⁴⁸ TEX. CIV. PRAC. & REM. CODE 27.005(d) (specifying that anti-SLAPP movant may prevail by proving “valid defense”).

¹⁴⁹ See *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 218 (Tex. 2010) (applying this rule in personal injury context).

Prior to and during the time Mrs. Wallace made the statements at issue in April and May of 2017, countless citizens were already criticizing Plaintiffs and their product. Most of the public criticism was in forums with a much higher profile than where Mrs. Wallace published.¹⁵⁰

Plaintiffs cannot establish proximate cause between Mrs. Wallace's statements and damages. Indeed, with so many other voices criticizing the product and Ms. Black on social media, webpages, and with government agencies the necessary proximate cause for damages cannot be established.¹⁵¹ Plaintiffs have not presented any causation theories and thus for this reason alone the Petition is required to be dismissed under the TCPA.

Below are just some of the examples of the criticism of FasciaBlaster and Ms. Black by others besides Mrs. Wallace:

"I have seen my Dr. several times...he told me not to use anything like that [FasciaBlaster] ever again on my body."¹⁵²

"Have permanent damage to my thighs, arms and calves. Was also diagnosed with TMJ from using [FasciaBlaster] on my jaw line and neck as indicated."¹⁵³

"I used a tool called the FasciaBlaster. It causes sever[e] bruising and inflammation. It has caused damage to my connective tissue and caused me to gain weight due to inflammation in my body...I went to the Doctor and she told me to stop using it and that it was most likely causing inflammation which contributed to my weight gain and achy joints."¹⁵⁴

¹⁵⁰ See, e.g., Ex. 12 (FDA Complaints).

¹⁵¹ See *Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991) ("When the circumstances are equally consistent with either of two facts, neither fact may be inferred.").

¹⁵² Ex. 12 at Tab 1 (FDA Report Number MW5070065).

¹⁵³ *Id.* at Tab 2 (FDA Report Number MW5069983).

¹⁵⁴ *Id.* at Tab 9 (FDA Report Number MW5069945).

“Seller is stating false claims that [FasciaBlaster] is safe to use during pregnancy and it is not.”¹⁵⁵

“Weight gain and serious health issues seem to be a common occurrence with many women using the FasciaBlaster.”¹⁵⁶

“Its [FasciaBlaster] worse than a fraud because it actually harms you. It’s not safe I don’t understand why it’s legal for them to advertise like they do.”¹⁵⁷

“There are hundreds of women whose bodies have responded poorly and have had inflammation from use of the product.”¹⁵⁸

“This product caused more harm than good. It left my body looking and feeling worse than ever before. The owner gets very defensive when questioned and then blocks you from leaving a review. She has her lawyers inboxing dissatisfied customers with threats and nonsense. This is a horrible business.”¹⁵⁹

“It is a scam, this product doesn’t work and has a lot of side effects, hopefully will be recalled soon.”¹⁶⁰

“BIGGEST SCAM EVER! I was very skeptical going into this. After I was assured by Miss Black, herself that this works 100% of the time...My skin became SAGGY CREPEY and I GAINED WEIGHT that won't come off... I made NO CHANGES except for blasting. I am positive this stupid stick, caused my hormones to become erratic and now I am left to repair the damage...DO NOT USE THIS!”¹⁶¹

“This is a horrible product that is ruining lives and health all over the world. Only a matter of time before the creator, Ashley Black ‘Guru’ lands herself a cell in a federal prison for fraud. Claiming to be the worlds only fascia ‘scientist’, her scam is quickly crumbling as long term users of her dangerous products are experiencing

¹⁵⁵ *Id.* at Tab 18 (FDA Report Number MW5069855).

¹⁵⁶ *Id.* at Tab 29 (FDA Report Number MW5069620).

¹⁵⁷ *Id.* at Tab 36 (FDA Report Number MW5069603).

¹⁵⁸ *Id.* at Tab 43 (FDA Report Number MW5069513).

¹⁵⁹ Ex. 13 at Tab 10 (6/19/17 BBB complaint by Arlene R.)

¹⁶⁰ *Id.* at Tab 1 (3/27/17 BBB complaint by Evalina S.)

¹⁶¹ *Id.* at Tab 5 (5/15/17 complaint on Influenster.com by member 3275fc4e4).

permanent and complicated health conditions which doctors can't even always explain.”¹⁶²

Additionally, Plaintiffs are given an “F” rating by the Better Business Bureau. This is the lowest rating provided by BBB.¹⁶³ Plaintiffs’ product has received numerous complaints in the RipoffReport.¹⁶⁴

Plaintiffs were in a lawsuit filed on February 9, 2017 in which they allege the entity they were suing had possession of 30,000 FasciaBlasters that were being withheld from Plaintiffs and not delivered to customers as agreed.¹⁶⁵ Indeed, Plaintiffs allege this, not Mrs. Wallace, has “tarnished” their business reputation and “ability to retain current orders and to grow clientele.”¹⁶⁶ There is no mention of Mrs. Wallace in that lawsuit.

Plaintiff ADB also sued Mrs. Dorenkamp on July 21, 2017, alleging she was part of a study examining the effects of the FasciaBlaster on healthy women.¹⁶⁷ In suing for disparagement, Plaintiff ADB alleged Mrs. Dorenkamp:

¹⁶² *Id.* at Tab 19 (7/8/17 post on Facebook by Rob Margel). And at this stage, Mrs. Wallace and the dba are not offering the above reviews for the truth of what they assert, *i.e.*, that the Plaintiffs’ product causes adverse health consequences. Instead, the reviews are offered to prove an alternative cause for any reputational harm that Plaintiffs may have suffered. The comments are admissible for that limited purpose.

¹⁶³ Ex. 32 (BBB Rating Scorecard for Ashley Black Fasciology).

¹⁶⁴ Ex. 33 (“Ripoff Reports” on Ashley Black Guru).

¹⁶⁵ Ex. 34 at ¶ 10 (Declaration in Support of Application for Injunctive Relief by Laney Coffee in *ADB Innovation, LLC v. ID Commerce & Logistics Services LLC*; Cause No. 2017-09344).

¹⁶⁶ Ex. 35 (Plaintiff’s Original Petition in *ADB Innovation, LLC v. ID Commerce & Logistics Services LLC*; Cause No. 2017-09344, ¶¶ 6, 21 and 22).

¹⁶⁷ Ex. 25 (Plaintiff’s Original Petition in *ADB Interests, LLC v. Tilly Begemann Dorenkamp*; Cause No. 2017-48632); Ex. 45 (Michelle Casady, *FasciaBlaster Sues Over ‘Defamatory’ Facebook Posts*, LAW360, (July 24, 2017)).

- “made false and unproven medical claims that the use of the FasciaBlaster can cause bodily harm and body deterioration”;¹⁶⁸
- made statements that “the use of the FasciaBlaster can cause nausea, vomiting, extreme weight loss, and destruction of the body’s connective tissue”;¹⁶⁹
- made statements that “ADB’s representatives were stalking [Mrs. Dorenkamp]”;¹⁷⁰ and
- made statements that “she complained of nerve pain during the study.”¹⁷¹

Countless other criticisms exist on the internet, some of which are catalogued on Exhibit 12 (FDA Complaints) and Exhibit 13 (Complaints Posts).

Plaintiffs cannot reach into the years-old litany of public criticism, cherry-pick the tiny fraction of comments made by Mrs. Wallace in April and May of 2017, and claim “clear and specific” evidence that it was Mrs. Wallace’s comments—rather than the thousands made by other speakers since at least 2015—that hurt Plaintiffs’ reputation.

It is at least equally plausible that the overwhelming amount of bad publicity by Plaintiffs’ own customers caused the unidentified purported damages that Plaintiffs seek in this case. In other words, the customer reviews and other posts, including posts with the FDA, mean that Plaintiffs’ inferences about the effects of Mrs. Wallace’s statements are anything but “unambiguous” and “free from doubt” as required to survive an anti-SLAPP motion.¹⁷²

¹⁶⁸ Ex. 25 at ¶ 15.

¹⁶⁹ *Id.* at ¶ 16.

¹⁷⁰ *Id.* at ¶ 23.

¹⁷¹ *Id.* at ¶ 23.

¹⁷² *See Lipsky*, 460 S.W.3d at 590.

5. Plaintiffs' tag-along claims

All of Plaintiffs' claims assume that Mrs. Wallace's statements were defamatory.¹⁷³ To the extent the Court agrees there was no defamation, then "the tag-along tort claims predicated on the same [statements] also fail."¹⁷⁴ Even if Plaintiffs had established a defamation predicate, however, all the "tag-along" claims still fail based on the proof deficiencies and valid defenses already established.

a. Plaintiffs' tag-along claim of business disparagement must be dismissed as Plaintiffs cannot provide "clear and specific evidence" of each element of Plaintiffs' business disparagement claim.

To show business disparagement, Plaintiffs need clear and specific evidence that (1) Mrs. Wallace published false and disparaging information about them, (2) with malice, (3) without privilege, (4) that resulted in special damages.¹⁷⁵ As described above, Plaintiffs cannot prove Mrs. Wallace's opinions are false or that Mrs. Wallace acted with malice. The damage component is also missing.

Business disparagement requires proof of special damages. General reputational harm is not enough.¹⁷⁶ To avoid dismissal, Plaintiffs must provide "clear and specific" evidence, for example, of particular sales that it lost as a direct result of Mrs. Wallace's statements.¹⁷⁷

¹⁷³ Pet. ¶¶ 44 and 49.

¹⁷⁴ *Rehak*, 404 S.W.3d at 733; *Provencio v. Paradigm Media, Inc.*, 44 S.W.3d 677, 682–83 (Tex. App.—El Paso 2001, no pet.) ("The same protections which the First Amendment affords defendants from libel claims also protect them from non-libel claims [based on the same publication]."); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (same).

¹⁷⁵ *Lipsky*, 460 S.W.3d at 592.

¹⁷⁶ *Waste Mgmt. of Texas, Inc. v. Texas Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014).

¹⁷⁷ *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App.—Fort Worth 2007, pet. denied) ("To prove special damages, the plaintiff must prove that the disparaging communication played a

Plaintiffs allege: “The publication of the false and disparaging words caused Plaintiffs to suffer special damages, recovery of which is sought herein.”¹⁷⁸ But without proof of “particular . . . prospective customer[s]” who heard Mrs. Wallace’s statements, were otherwise planning to buy the FasciaBlaster, and then did not, Plaintiffs have no special damages.¹⁷⁹ Mere “negative feedback” is not a “realized or liquidated” harm, and a “general decline in sales” is not special damage.¹⁸⁰

Even if Plaintiffs had shown that customers stopped buying the FasciaBlaster in response to negative publicity surrounding the product, Plaintiffs offer no “clear and specific” proof that those customers were responding to Mrs. Wallace comments—as opposed to other, non-Mrs. Wallace speakers on social media, webpages, and the FDA filings.¹⁸¹ For these reasons, the disparagement claim fails.

b. Plaintiffs’ tag-along claim of IIED must be dismissed as Plaintiffs cannot provide “clear and convincing evidence” of each element of Plaintiffs’ IIED claim.

Plaintiffs cannot establish the elements of Plaintiffs’ claim for intentional infliction of emotional distress (“IIED”). Such a claim requires: (1) the plaintiff is an individual; (2) the defendant acted intentionally or recklessly; (3) the emotional distress suffered by the plaintiff was severe; (4) the defendant’s conduct was extreme and outrageous; (5) the defendant’s conduct

substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings.”).

¹⁷⁸ Pet. ¶ 47.

¹⁷⁹ *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987).

¹⁸⁰ *See Astoria Indus.*, 223 S.W.3d at 628; *Fluor Enterprises, Inc. v. Conex Int’l Corp.*, 273 S.W.3d 426, 440 (Tex. App.—Beaumont 2008, pet. denied).

¹⁸¹ *See supra*.

proximately caused the plaintiff's emotional distress; and, (6) no alternative cause of action that would provide a remedy for the severe emotional distress caused by the defendant's conduct.

In addition to being unable to meet any of the elements other than Plaintiff Ashley Black being an "individual", Plaintiffs' IIED claim fails because Plaintiffs cannot show that they lack an alternative cause of action to provide a remedy for this alleged injury.¹⁸² An IIED claim is "a 'gap-filler' tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress."¹⁸³ As such, "where the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available."¹⁸⁴ Plaintiffs' Petition does not present any basis for their IIED claim other than actions that serve as the basis for Plaintiffs' defamation claims.¹⁸⁵ Because the gravamen of Plaintiffs' IIED claim is another tort (defamation), it should be summarily dismissed.¹⁸⁶

c. Plaintiffs' Lanham Act tag-along claim must be dismissed as Plaintiffs cannot provide "clear and convincing evidence" of each element of the Lanham Act claim.

All of the allegations regarding purported Lanham Act violations are based on the statements made by Mrs. Wallace as described above which are protected. The Plaintiffs do not

¹⁸² See Pet ¶ 56.

¹⁸³ *Bilbrey*, 2015 WL 1120921, at *13 (citing *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004)).

¹⁸⁴ *Id.*

¹⁸⁵ See Pet. ¶ 56.

¹⁸⁶ See *Bilbrey*, 2015 WL 1120921, at *14 (dismissing a plaintiff's intentional infliction of emotional distress claim under the TCPA because "the factual basis" of the claim was "the same as his defamation claim").

provide any further information as to how Mrs. Wallace's statements violate the Lanham Act. As such, this tag-along claim should be dismissed under the TCPA.

d. Plaintiffs' tag-along claim of invasion of privacy must be dismissed as Plaintiffs cannot provide "clear and convincing evidence" of each element of Plaintiffs' invasion of privacy claim.

To prove invasion of privacy by intrusion, there are three elements to establish: (1) an intentional intrusion, physically or otherwise, upon the solitude, seclusion, or private affairs or concerns of another; (2) that such intrusion would be highly offensive to a reasonable person; and (3) that he suffered injury as a result of the intrusion.¹⁸⁷

Plaintiffs allege that the publication of a picture from Ms. Black's Facebook page by Mrs. Wallace is an invasion of privacy.¹⁸⁸ The actual post referenced is attached as Exhibit 37.¹⁸⁹ As alleged these are pictures that Ms. Black put on her Facebook page. Accordingly, they are on the internet and available to users of Facebook. Commenting about such pictures is a reasonable expectation when one publicly posts pictures on the internet.¹⁹⁰

¹⁸⁷ *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied) (citing *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex.1993); *Phar-Mor, Inc. v. Chavira*, 853 S.W.2d 710, 712 (Tex. App.—Houston [1st Dist.] 1993, writ denied)).

¹⁸⁸ See Pet. ¶¶ 25 and 52.

¹⁸⁹ Ex. 37 (Karen Wallace post on Fascia Info Unplugged Facebook page on May 5, 2017 at 8:57 p.m.).

¹⁹⁰ *Roberts v. CareFlite*, No. 02-12-00105-CV, 2012 WL 4662962, at *5 (Tex.App.—Fort Worth Oct. 4, 2012, no pet.) (mem. op.). The plaintiff asserts the use of her personal and private message postings on Facebook, including a comment about wanting to slap a patient, invaded her privacy both through the public disclosure of private facts and intrusion upon her seclusion on motion for summary judgment. The court emphasized that Plaintiff's comment on another Facebook user's "wall", comments that were viewable by a third party, did not constitute an intrusion upon plaintiff's seclusion.); see also *Moreno v. Hanford Sentinel, Inc.*, 172 Cal.App.4th 1125, 1129 (2009) (once the article was posted on Myspace, the article was available to the public and as a result, the court found that the plaintiff could not recover for invasion of privacy for public disclosure of private facts.).

As these are public posts made by Ms. Black, the re-posting of these same images cannot be such an intrusion as to be “highly offensive.”

6. Injunctive Relief Is Not Authorized.

Plaintiffs seek injunctive relief to require Mrs. Wallace and her dba to remove disparaging comments. The law does not authorize forced retractions. “At this time there is no statutory authorization for such a remedy in any state,” and “[t]he draconian remedy of compulsory retraction or right of reply is probably best kept a theory.”¹⁹¹ Judicial coercion to “correct” one’s speech “at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.”¹⁹²

Plaintiffs have neither pleaded nor proven a wrongful act, imminent harm, irreparable injury, or the absence of an adequate remedy at law. In any event, “the Texas Constitution does not permit injunctions against future speech following an adjudication of defamation. Trial courts are simply not equipped to comport with the constitutional requirement not to chill protected speech in an attempt to effectively enjoin defamation.”¹⁹³

7. The commercial speech exemption is not applicable because Plaintiffs and Defendants are in separate businesses which do not compete with one another and Mrs. Wallace is criticizing a product which she does not sell.

As described in the facts section, Mrs. Wallace is an esthetician who provides primarily bikini waxes to her customers.¹⁹⁴ She does not sell any products that compete with Plaintiffs. She does not sell any products, period. She provides a service—bikini waxes. She is a former user of

¹⁹¹ Rodney A. Smolla, 2 LAW OF DEFAMATION § 9:92 (2017).

¹⁹² *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

¹⁹³ *Kinney v. Barnes*, 443 S.W.3d 87, 99 (Tex. 2014).

¹⁹⁴ Ex. 18 (Webpage of Karen Wallace).

the FasciaBlaster as are/were some of her customers. **Mrs. Wallace does not sell the FasciaBlaster or any products made by the Plaintiffs and never has.** *Id.* Mrs. Wallace is not in competition with the FasciaBlaster which is a product that is sold as opposed to a service provided in Corpus Christi.

Given these facts, and the fact that Mrs. Wallace is not a competitor of Plaintiffs, Mrs. Wallace's comments are not an exception to the TCPA based on "commercial speech." Indeed, she is reviewing and providing her experience with a product she does not even contemplate selling. She is in a different business altogether. This is exactly the type of speech protected by the TCPA. "Reviews and rating by organizations such as better business bureaus have been held to be communications made in connection with a matter of public concern under the TCPA, not commercial speech."¹⁹⁵

Mrs. Wallace would need to compete or sell a competing product for the commercial exemption to apply.¹⁹⁶ This is not the case. She is criticizing the product as a consumer of the product and a concerned citizen. This has routinely been held to be protected speech under the TCPA and not subject to the "commercial speech" exemption.¹⁹⁷

¹⁹⁵ *Moldovan v. Polito*, No. 05-15-01052-CV, 2016 WL 4131890, at * 3, (Tex.App.—Dallas Aug. 2, 2016, no pet.).

¹⁹⁶ *Kinney v. BCG*, 2014 WL 1432012, at *6 ("We agree with the reasoning of our sister courts in *Newspaper Holdings* and *BH DFW, Inc.* that the plaintiff has the burden under section 27.010(b) to show that the statements arise from the sale of the defendant's services so that the exemption applies...On the facts of this case, we do not find this argument persuasive."); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88-89 (Tex.App.—Houston [1st Dist.] 2013, pet. filed) (competitors complaints to state and local authorities and the newspaper were not commercial speech because they were not directed to secure sale of goods or services).

¹⁹⁷ *See Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 308-309 (the appellate court held that BBB's online business reviews were protected speech under the TCPA because the review and rating related to a good, product or service in the marketplace); *Wholesale TV & Radio Advert., LLC v. Better Bus. Bureau of Metro Dallas, Inc.*, No. 05-11-01337-CV, 2013 WL 3024692, at *4-5 (Tex. App.—Dallas June 14, 2013, no pet.) (mem. op.) (holding again that online business reviews were protected speech).

As recently summarized the Appellate court:

In *Backes*, we concluded the claimant failed to make a showing that the commercial speech exemption applied. *See Backes*, 486 S.W.3d at 21–23. We explained that **the commercial speech exemption “has been construed to mean that for the exemption to apply, the statement must be made for the purpose of securing sales in the goods or services of the person making the statement.”** *Id.* at 21; *see also Whisenhut v. Lippincott*, 474 S.W.3d 30, 42–43 (Tex. App.–Texarkana 2015, no pet.) **(disparaging comments about plaintiffs were not made for the purpose of securing sales of defendant’s services because plaintiffs and defendants were in different businesses and did not compete with each other.)**.¹⁹⁸

III. The statements are true.

Mrs. Wallace’s statements which are alleged by Plaintiffs to be defamatory overwhelmingly concern how the FasciaBlaster affected Mrs. Wallace’s health.¹⁹⁹ Each of these statements cannot be defamatory as they are true by a “preponderance of the evidence” for two primary reasons.

First, Plaintiffs’ own webpage includes in the “Terms & Conditions” section the very side effects that Mrs. Wallace complains of in her statements which are alleged to be defamatory.²⁰⁰

“WARNING: Toxins may be pulled out of the tissue and can cause **rashes, bumps, redness, irritation, itching, nausea, emotional reactions, vomiting, hormone changes, increased sensitivity, headaches, acute inflammation, changes in cycle, reoccurrence of pre-existing condition, weight gain and other toxicity-associated symptoms.** We do not know the exact process which toxins are released.”

“DO NOT USE the FasciaBlaster® line of products”: (1) if you have “blood clots,” (2) if you have “Deep Vein Thrombosis,” (3) “directly on varicose veins and

¹⁹⁸ *Moldovan*, 2016 WL 4131890, at *4 (emphasis added).

¹⁹⁹ Of the statements alleged to be defamatory, all of them other than 19, 25 and 41 deal with the health effects Mrs. Wallace experienced from using the FasciaBlaster. It is noted that Plaintiffs misrepresent the statements of Mrs. Wallace in paragraphs 22, 25, 26, 33 (Plaintiffs have two paragraph #33 in their Petition and this refers to the second #33), and 36. Compare the allegations with the actual posts in Ex. 36 (BLACK000132) (#22); Ex. 37 (BLACK000141) (#25); Ex. 38 (BLACK000142) (#26); Ex. 39 (BLACK000047) (#33); and Ex. 40 (BLACK000063) (#36).

²⁰⁰ Ex. 41 (Comparison Chart of Allegations in Plaintiffs’ First Amended Petition and Terms and Conditions listed on ashleyblackguru.com).

discontinue use if you develop them during use of the FasciaBlaster(s),” (4) “if you have recently, are currently, or will be taking blood thinners,” (5) “If you are pregnant,” (6) “on the belly.”

“Consult an OBGYN and decide with your provider if the FasciaBlaster(s) is right for you.”

“WARNING: The FasciaBlaster® line of products and other Ashley Black Company products or services can cause a release of toxins, so USE AT YOUR OWN RISK. Please see our scientific findings relative to evidence known as well as unknown.”²⁰¹

These warnings were NOT on the Plaintiffs’ webpage prior to the statements being made by Mrs. Wallace and were added to the Plaintiffs’ webpage 3 days prior to this lawsuit being filed.²⁰² The changes to the Terms & Conditions were also made after Mrs. Wallace’s statements were made. Accordingly, Mrs. Wallace’s statements as to the side-effects she is complaining of cannot be defamatory as the Plaintiffs warn of these exact or substantially similar side effects. “A statement need not be perfectly true; as long as it is substantially true, it is not false.”²⁰³ A report is only false if “taken as a whole [it] is more damaging to the plaintiff’s reputation than a truthful [report] would have been.”²⁰⁴ “The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement.”²⁰⁵

For example, Plaintiffs allege in paragraph 16:

²⁰¹ Ex. 11 (emphasis added).

²⁰² Compare Ex. 42 (Ashley Black FasciaBlaster” website, “Terms and Conditions” page as of March 27, 2017) with Ex. 11 (“Ashley Black FasciaBlaster” website “Terms and Conditions” page as of May 22, 2017, which is 3 days prior to filing this lawsuit on May 25, 2017).

²⁰³ *KBMT*, 492 S.W.3d at 714.

²⁰⁴ *Id.*

²⁰⁵ *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987).

"On April 25, 2017, at 12:34 p.m., Defendant published a defamatory and disparaging narrative on the Facebook group page called 'Fasciablaster-WOMEN OVER 40,' alleging that Defendant's **weight gain, extreme detox, acne, estrogen release and inflammation**, were caused by her use of the FasciaBlaster® ."²⁰⁶

This matches up directly with the warning provided by Plaintiffs from using the FasciaBlaster: "weight gain," "hormone changes," "inflammation," "reoccurrence of pre-existing condition."²⁰⁷

Second, Mrs. Wallace's statements about the health effect from using this product on herself are constitutionally off-limits. Diagnoses and observations about whether behavior puts someone "at risk" or potentially causes side effects are classic, albeit expert, opinions.²⁰⁸

As to the two remaining allegations²⁰⁹ not already addressed in the Petition that do not directly deal with the side effects experienced by Mrs. Wallace, those are not defamatory as they are truthful for the following reasons.

- Paragraph 19 alleges that after Mrs. Wallace published the May 1, 2017 post (in which she lists the side effects of using the FasciaBlaster) she stated that she feared Plaintiffs would retaliate against her for her comments. Mrs. Wallace's "fear", of course, turned out to be true as the Plaintiffs have sued Mrs. Wallace.
- Paragraph 41 alleges defamation based on Mrs. Wallace's May 22, 2017 post referring to Ms. Black as a "liar." As detailed in the Petition this statement was all part of the May 22nd post in which Mrs. Wallace details her side effects from using the FasciaBlaster. Ms. Black contends these side effects are not from the FasciaBlaster and Mrs. Wallace contends she is lying. Mrs. Wallace is correct in asserting Ms. Black is a liar given the very side effects that Mrs. Wallace complains of are warned about by Plaintiffs themselves merely three days prior to Ms. Black filing this lawsuit.²¹⁰

²⁰⁶ Pet. at ¶ 16.

²⁰⁷ Ex. 11 (Current Terms and Conditions on Plaintiffs' webpage).

²⁰⁸ *Veilleux*, 206 F.3d at 116; see also *Yohe*, 321 F.3d at 41 (statement that arrestee "was suicidal" is "plainly" a protected opinion about mental condition).

²⁰⁹ The allegations not dealing with Mrs. Wallace's side-effects from using the FasciaBlaster are 19, 25 and 41. Paragraph 25 which alleges defamation for publishing pictures on a Facebook page which were obtained from Ms. Black's Facebook page has already been addressed *supra*.

²¹⁰ See Ex. 11 (the Terms and Conditions page from Ms. Black's webpage effective May 22, 2017).

IV. Because dismissal is proper, Texas law requires awarding Mrs. Wallace and her dba its attorneys' fees and fining Plaintiffs to discourage future SLAPP suits.

If the Court dismisses Plaintiffs' claims, then it "shall" award Mrs. Wallace and her dba its "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require."²¹¹ In other words, the TCPA mandates the award of fees and costs if Mrs. Wallace or the dba prevails.²¹²

Additionally, the TCPA requires "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."²¹³ Because the TCPA says "shall," the issuance of some sanction is mandatory.²¹⁴ In previous cases involving dismissal under the TCPA, courts have determined sanctions by consulting (a) the plaintiff's annual profits, (b) the amount of attorneys' fees incurred, (c) the plaintiff's history of filing similar suits, and (d) any aggravating misconduct, among other factors.²¹⁵ The overriding question is what sanction will deter the plaintiff from pulling the trigger so quickly on future SLAPPs.²¹⁶

Given that Plaintiff Ms. Black and her company are both described as multi-millionaires, and that they are actively chilling free speech on the internet and using this case to advertise what

²¹¹ TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1).

²¹² *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) ("Based on the statute's language and punctuation, we conclude that the TCPA requires an award of 'reasonable attorney's fees' to the successful movant.").

²¹³ TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2).

²¹⁴ *Kinney v. BCG*, 2014 WL 1432012, at *11.

²¹⁵ *Id.* at 2014 WL 1432012, at *12; *Am. Heritage Capital*, 436 S.W.3d at 880-81.

²¹⁶ *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2).

happens when you criticize Ms. Black or her product²¹⁷—i.e., you get sued—a large fine is needed to meaningfully deter Plaintiffs and other corporate behemoths from continuing to pursue SLAPPs against individuals exercising their First Amendment rights.

CONCLUSION

Plaintiffs brought a lawsuit related to constitutionally-protected conduct. Pursuant to Texas Civil Practice and Remedies Code Chapter 27, Defendants request that the Court dismiss all of Plaintiffs' legal claims. Furthermore, Defendants request an award of attorneys' fees, sanctions, and court costs as provided by the statute, as well as all other relief to which Defendants are justly entitled.

Respectfully submitted,

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²¹⁷ Ex. 43 (June 10, 2016 letter from Gary Solomon, counsel for Ashley Black, to Mr. Shawn Belles); *see also* Ex. 44 (March 6, 2017 letter from Gary Solomon to Julia Day Lefebvre).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel of record on July 25, 2017, pursuant to Rule 21a:

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