IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CLARK BAKER and THE OFFICE OF MEDICAL & SCIENTIFIC JUSTICE, INC., Plaintiffs, v. JEFFERY TODD DESHONG, Defendant.	Case No.: 4:13-CV-00552-C **BRIEF IN SUPPORT OF DEFENDANT JEFFERY TODD DESHONG'S SPECIAL MOTION TO DISMISS UNDER TEXAS CITIZENS PARTICIPATION ACT, (Tex. Civ. Prac. & Rem. Code Ann. § 27.001-011)**

BRIEF IN SUPPORT OF PLAINTIFF'S SPECIAL MOTION TO DISMISS

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INTRODUCTION AND FACTS

1. Plaintiffs Clark Baker ("Baker") and the Office of Medical & Scientific Justice ("OMSJ") (collectively "plaintiffs") filed their Complaint against defendant Jeffery Todd DeShong for the sole purpose of silencing a critic writing truthful accounts on matters of public concern - including matters involving health and safety, community well-being, public figures, and services in the marketplace. Accordingly, DeShong brings this special motion to dismiss plaintiffs' state law claims. All of plaintiffs' claims, including plaintiffs' federal trademark infringement claim, must also be dismissed under Federal Rule 12(b).

2. Baker is a licensed private investigator and founder of OMSJ. Complaint (Compl.) at ¶1. Baker publicly argues that the medical, pharmaceutical, and research industries conspire to exaggerate the link between the human immunodeficiency virus (HIV) and Autoimmune Deficiency Syndrome (AIDS) in order to promote the sale of HIV-suppressing drugs and that the link between HIV and AIDS is based on "scientific and medical corruption" and "junk science." Compl. at ¶¶7, 12.

3. Plaintiffs operate the HIV Innocence Group, which purports to defend people charged with civil or criminal offenses related to HIV by arguing that the medical and pharmaceutical industries promote flawed HIV testing. Compl. at ¶¶ 9, 12.

4. DeShong is the owner and creator of hivinnocencegrouptruth.com and hivinnocenceprojecttruth.com - blogs through which he critiques the services plaintiffs purport to provide. Appx. p. 5, Declaration of J. Todd DeShong (DeShong Decl.) at ¶2.

5. DeShong agrees with the overwhelming majority of scientific research that HIV causes AIDS and that the overwhelming evidence shows that HIV testing, when performed properly, is an accurate indicator of the presence of HIV antibodies in a patient's blood.

However, the focus of DeShong's website is not plaintiffs' views about HIV. Rather, DeShong uses the blogs to evaluate the truthfulness of plaintiffs' statements regarding their participation in the defense of defendants charged with HIV offenses and to demand that plaintiffs provide proof of their claims. Appx. pp. 8-9, DeShong Decl. at ¶11. Many of DeShong's statements on the blog are purely opinion and thus not subject to defamation or disparagement claims. To the extent that DeShong reported on facts, he reasonably believed those facts to be true. Appx. p. 6, DeShong Decl. at ¶5.

6. Plaintiffs first attempted to quell DeShong's criticism by harassing him. Baker called DeShong's mother and threatened to sue her. Appx. p. 4, Declaration of Freda DeShong. He also called DeShong's place of employment and made false accusations. Appx. p. 6, DeShong Decl. at ¶6. Next, OMSJ filed a complaint under Uniform Domain Name Dispute-Resolution Procedures ("UDRP") in an attempt to gain control over DeShong's domain names. Appx. p. 8, DeShong Decl. at ¶9, Ex. F. Plaintiffs were represented by counsel; Mr. DeShong was not. Nonetheless, DeShong successfully defended against this spurious action. When plaintiffs failed to shut down DeShong's criticism through these other means, they turned to this Court. Although the venue is different, the methods are the same: bring unwarranted and specious claims against a dissenter and attempt to quell his speech through threats and intimidation.

7. The Texas Citizens' Participation Act (TCPA), which Texas enacted on June 17, 2011, provides for the early dismissal of preciously this type of legal action. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–27.011. Lawsuits designed to prevent citizens from participating in public debate are referred to as Strategic Lawsuit Against Public Participation or "SLAPP" suits. The TCPA is considered to be an anti-SLAPP statute designed to protect and promote

public debate. *Jennings v. Wallbuilder Presentations, Inc.*, 378 S.W.3d 519, 521 n. 1 (Tex.App.-Fort Worth 2012, pet. filed).

8. "Even though the TCPA is of recent origin, it has been the genesis for numerous appeals and original proceedings." *Summersett v. Jaiyeola*, 2013 WL 3757208, n.2 (Tex. App. July 18, 2013)(citing examples). Moreover, the TCPA is similar in scope and design to California's anti-SLAPP statute which has been in place for over twenty years, and Texas courts have looked to California decisions for guidance. *See e.g., Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 2013 WL 1867104 (Tex. App. May 2, 2013) (finding that the exemption for commercial speech found at § 27.010(b) as defined at §27.001(b) was similar to the commercial speech exemption in the California statute); *Ascend Health Corp. v. Wells*, 2013 WL 1010589 (E.D.N.C. Mar. 14, 2013) (TCPA represents state substantive law and court therefore applies it in a federal court sitting in diversity, citing to the analysis of California's anti-SLAPP law in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir.1999)).

9. Like Texas, California's legislative intent in enacting anti-SLAPP legislation was "to curtail the 'disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances' because such lawsuits discourage persons from 'participation in matters of public significance' and thereby constitute an 'abuse of the judicial process.'" *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1125, 969 P.2d 564, 576 (1999), quoting Cal. Code Civ. Pro. § 425.16(b)(1). SLAPP suits like plaintiffs' are meant not to "vindicate a legally cognizable right," but are instead brought to obtain an economic advantage over the defendant. *Id.* at 576-77. They are often targeted at individuals of modest means who cannot afford to mount a legal

defense. The Texas' legislature had the same rights and interests in mind when it passed the TCPA. "The purpose of [the] chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002. The statute "shall be construed liberally to effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem. Code § 27.011. Further, the scope of the statute is not limited only to protect speech directed toward the government. *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 2013 WL 3716693 *4 (Tex. App. July 16, 2013).

10. Plaintiffs' complaint is exactly the sort of action Texas' legislature sought to prevent when it enacted the TCPA. If plaintiffs are allowed to maintain this action against DeShong – an action brought only to silence constitutionally protected speech – it would result in great expense to DeShong and jeopardize his fundamental rights. For the reasons set forth herein, DeShong should not be required to bear the burden of maintaining a defense to this action. Pursuant to the TCPA, plaintiffs' claims must be dismissed as they constitute nothing more than a frontal attack on constitutionally protected speech.

LEGAL STANDARD

11. DeShong challenges both the legal sufficiency of plaintiffs' allegations and plaintiffs' ability to substantiate their state trademark, defamation, and business disparagement claims with evidentiary support.

12. The TCPA "sets forth the parties' burdens of proof upon the filing of a motion to dismiss." *Ascend Health Corp.*, 2013 WL 1010589 *3 (E.D.N.C. Mar. 14, 2013). The TCPA establishes a two-part test. First, DeShong must show by a preponderance of the evidence that

this suit is based on, relates to, or is in response to DeShong's exercise of his right to free speech. *Id.* at §27.003(b)(1). *John Moore Servs.*, 2013 WL 3716693 *3. A right to free speech is broad and includes communications made in connection with matters of public concern, (including statements relating to "health and safety," "environmental, economic, or community well-being," "a public official or public figure," or "a good, product, or service in the marketplace"). Tex. Civ. Prac. & Rem. Code § 27.001(1) and (7)(A)(B)(D) and (E); *John Moore Servs.*, 2013 WL 3716693 *4; *Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dallas, Inc.*, 2013 WL 3024692 *2 (Tex. App. June 14, 2013).

13. Once DeShong shows that plaintiffs' action relates to DeShong's exercise of free speech, the burden shifts to plaintiffs to establish "by clear and specific evidence a *prima facie* case for each essential element of the claim[s] in question." Tex. Civ. Prac. & Rem. Code § 27.005(c); *KTRK Television, Inc. v. Robinson*, 2013 WL 3483773 *5 (Tex. App. July 11, 2013). "Conclusory statements are not probative and accordingly will not suffice to establish a *prima facie* case." *John Moore Servs.*, 2013 WL 3716693 *5, *citing, In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223–24 (Tex.2004); *see also, Wholesale TV*, 2013 WL 3024692 *4. Since the TCPA directs courts to consider affidavits submitted by the parties, it is clear the standard of proof exceeds the level of evidence which is sufficient to show the existence of a valid cause of action if all testimony to the contrary is disregarded. *See Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, INC.*, 2013 WL 2077636 *8 (Tex. App. May 15, 2013). Courts must not accept conclusory statements that are unsupported by facts since Texas intended "to effectuate the purpose of the TCPA by ensuring that courts will dismiss SLAPP suits quickly and without the need for prolonged and costly proceedings." *See San Jacinto Title Servs. of Corpus Christi, LLC. v. Kingsley Properties, LP*, 2013 WL 1786632 *4 (Tex. App. Apr. 25, 2013). Even if

plaintiffs can establish by clear and specific evidence a *prima facie* case for each essential element of the claims in question, the Court must nonetheless dismiss any claim for which DeShong can establish by a preponderance of the evidence each essential element of a valid defense. Tex. Civ. Prac. & Rem. Code § 27.005(d).

14. If a movant demonstrates that his actions were made in furtherance of the right to free speech, it is irrelevant whether the plaintiff actually intended to chill the movant's free speech rights.[1] So long as plaintiffs' claims target DeShong's protected speech, the Court must strike them under § 27.005(b) regardless of plaintiffs' motives in bringing the action. In *In re Lipsky*, the Texas Court of Appeal found that "[t]the statutory definitions for the exercise of the right of free speech and the exercise of the right to petition do not include language requiring [the court] to determine the truth or falsity of communications when deciding whether a movant for dismissal has met its preliminary preponderance of the evidence burden under section 27.005(b)." 2013 WL 1715459 *7 (Tex. App. Apr. 22, 2013). Similarly, there is no language in the TCPA requiring the Court to analyze whether plaintiffs intended to quell speech. *See also Navellier v. Sletten*, 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530 (Cal. 2002)(finding no subjective intent requirement when interpreting California's similar provision at Cal. Code Civ. Pro. §425.16(b)(1)); *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 52 P.3d 685 (2002).

15. When considering a special motion to dismiss under the TCPA, the court bases its ruling on the pleadings, as well as affidavits. Tex. Civ. Prac. & Rem. § 27.006(a); *Jennings*, 378 S.W.3d at 526.

[1] Here the censorious nature of the complaint, and plaintiffs' other efforts to intimidate DeShong, lay bare plaintiffs' intent.

16. Upon a successful motion, the Court must award the movant's costs and reasonable attorneys fees. §27.009(a)(1); *Ramsey v. Lynch*, 10-12-00198-CV, 2013 WL 1846886 *5 (Tex. App. May 2, 2013); *Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dallas, Inc.*, 2013 WL 3024692 *1 (Tex. App. June 14, 2013); *See also, Bernardo v. Planned Parenthood Federation of America*, 115 Cal.App.4th 322, 329, 9 Cal.Rptr.3d 197 (Cal. Ct. App. 2004)(interpreting California's similar provision at Cal. Code Civ. Pro. §425(c)(2)). Additionally, the Texas statute specifically allows a court to award sanctions "against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions." Tex. Civ. Prac. & Rem. Code §27.009(a)(2); *Summersett v. Jaiyeola*, 2013 WL 3757208 *1 (Tex. App. July 18, 2013).

ARGUMENT

I. THE TCPA APPLIES TO TEXAS STATE LAW CLAIMS IN FEDERAL COURT.

17. As a threshold issue, the Fifth Circuit has held that state anti-SLAPP statutes apply in federal court under *Erie*. *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009); *Brown v. Wimberly*, 477 F. App'x 214, 216 (5th Cir. 2012). Other courts have ruled similarly. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-73 (9th Cir.1999) (holding that a similar motion to strike under California state law applies in federal court); *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206, 1207 (9th Cir.2005) (per curiam) (reaffirming *Newsham*); *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010)(applying Maine's anti-SLAPP statute). Although the Ninth Circuit and several district courts have held that state anti-SLAPP statutes cannot be applied to federal claims, the question remains unanswered in the other circuits including the Fifth Circuit. *See In re Bah*, 321 B.R. 41, 46 (B.A.P. 9th Cir. 2005)(refusing to apply the standards of the California anti-SLAPP statute to federal claims brought in federal court).

18. Plaintiffs filed a complaint against DeShong asserting claims for federal trademark infringement, Texas trademark infringement, defamation, and business disparagement. With the exception of federal trademark infringement, plaintiffs' claims arise under Texas law and must be dismissed under the TCPA. For the reasons stated in defendant's concurrently filed Federal Rule 12(b)(6) Motion, plaintiffs' federal trademark infringement claim must be dismissed for failure to state a claim even if the Court concludes the TCPA does not apply to this claim.

II. THE TCPA APPLIES TO PLAINTIFFS' STATE LAW CLAIMS BECAUSE THOSE CLAIMS ARE BASED ON, RELATE TO, OR ARE IN RESPONSE TO DESHONG'S EXERCISE OF HIS RIGHT TO FREE SPEECH.

19. Claims subject to a special motion to dismiss under the TCPA are not limited to claims for defamation, but may include any claim based on, related to, or in response to DeShong's exercise of his right to free speech. Texas courts have specifically applied the TCPA to claims for defamation and business disparagement. *John Moore Servs.*, 2013 WL 3716693 *6-8. Courts have also held that claims similar to trademark infringement are subject to a special motion to dismiss. In *Rehak Creative Servs., Inc. v. Witt*, plaintiff brought claims for conversion and misappropriation based on the defendant speaker's linking to copyrights and trademarks from his website. 2013 WL 2211654 (Tex. App. May 21, 2013). The Court found that the claims where subject to a special motion to dismiss under the TCPA, writing that the "inquiry does not focus on whether the conversion and misappropriation claims arise from the assertedly libelous nature of the website's statements. *Id*. at *15. The correct analysis focuses on Chapter 27's unambiguous words. The statute broadly encompasses a 'cause of action' that 'relates to, the movant's 'exercise of ... the right of free speech.'" . Even a claim for breach of contract can qualify for dismissal under the Act. *BH DFW, INC.*, 2013 WL 2077636.

20. Plaintiffs' claims for defamation and business disparagement relate to DeShong's statements about the plaintiffs. Plaintiffs' claim for state trademark infringement also relates to DeShong's free speech expression, just as the claims for conversion and misappropriation applied to the defendant's speech in *Rehak.* In fact, the complaint specifically states that the trademark claims are based on DeShong's allegedly defamatory statements. Comp. at ¶15. ("DeShong took clear and deliberate steps to defame plaintiffs by using OMSJ's trade name as a vehicle to disparage plaintiffs' business reputations.")

21. Since plaintiffs' state law claims are based on, relate to, and are in response to DeShong's exercise of his free speech rights, plaintiffs must establish by clear and specific evidence a *prima facie* case for each essential element of the claims in question, or the Court must dismiss those claims and award fees.

III. PLAINTIFFS CANNOT ESTABLISH BY CLEAR AND SPECIFIC EVIDENCE A *PRIMA FACIE* CASE FOR EACH ESSENTIAL ELEMENT OF THEIR TEXAS TRADEMARK INFRINGEMENT CLAIM.

22. The complaint alleges Texas trademark infringement under Texas Business and Commerce Code Chapter 16 et seq. Compl. at ¶¶18-20. The chapter includes two relevant sections: Infringement of a Registered Mark (Tex. Bus.& Com. §16.102) and Injury to Business Reputation and Dilution (Tex. Bus.& Com.§16.103). Section 16.103 clearly does not apply here, since is reserved for the holders of famous marks, i.e. marks that are "widely recognized by the public throughout this state." *Id*. at §16.103(a). Clearly, the "HIV Innocence Group" is not a famous mark. Even if the mark were famous, "[a] person may not bring an action under this section for...fair use in connection....(B) with identifying and parodying, *criticizing, or commenting on* the famous mark owner or the famous mark owner's goods or services." *Id*. at §16.103(d)(1)(B)(emphasis added). Section 16.102 creates a cause of action for Infringement of a "Registered Mark." Tx. Bus.& Com. Code §16.103(a). However, the statute is only applicable

to marks that are registered under Chapter 18 which provides for registering marks with the State of Texas. Plaintiffs' claim the registered their mark under federal law, but have not registered the mark (nor do they contend such registration) with the state of Texas. Thus, plaintiffs have no statutory cause of action for Texas trademark infringement.

23. At best, Plaintiffs could argue for a Texas common law unfair business competition cause of action. However, plaintiffs did not plead a claim for unfair business competition. Even if they had, the claim would still fail, because like Federal law trademark infringement, unfair business competition claims only apply to uses commercial uses. *See Philip Morris USA Inc. v. Lee*, 549 F. Supp. 2d 839, 847 n.6 (W.D. Tex. 2008). DeShong's blog is wholly non-commercial. Appx. p. 3, DeShong Decl. at ¶5. Moreover, any use DeShong made of the mark was fair use in connection with commenting on and criticizing the HIV Innocence Group. *See* DeShong's Motion to Dismiss.

24. It is clear on the face of the complaint that plaintiffs will not be able to establish by clear and specific evidence a *prima facie* case for each essential element for a trademark infringement claim under Texas Business and Commerce Code §16.001 et. seq. Thus, the Court must dismiss plaintiffs' Texas trademark infringement claim and award fees.

IV. PLAINTIFFS CANNOT ESTABLISH BY CLEAR AND SPECIFIC EVIDENCE A *PRIMA FACIE* CASE FOR EACH ESSENTIAL ELEMENT OF THEIR DEFAMATION AND BUSINESS DISPARAGEMENT CLAIMS.

25. Defamation is a generalized term encompassing two specific causes of action - libel and slander. Libel involves statements in print; slander involves oral statements. The complaint addresses statements DeShong made on his website, i.e. statements made in print. Compl. at ¶22. Thus, plaintiffs' defamation claims are more specifically libel claims.

26. Under current Texas law, libel is entirely statutory and is defined as "a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that

tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury." Tex. Civ. Prac. & Rem. Code § 73.001. Common law defenses apply to the statutory cause of action. *Id*. at §73.006.

27. "The general elements of a claim for business disparagement are publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and special damages." *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987).

A. The Applicable Statute of Limitations Bars Plaintiffs' Defamation and Business Disparagement Claims because DeShong Published the Statements More Than One Year Prior to the Filing of the Complaint.

28. Under a June 14, 2013 clarifying amendment to the TCPA, the court must dismiss a legal action if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim. 2013 Tex. Sess. Law Serv. Ch. 1042 (H.B. 2935). Examination of the complaint on its face establishes by a preponderance of the evidence DeShong's statute of limitation defense to the defamation and business disparagement claims.

29. A defamation cause of action accrues when the matter is published or circulated, and suit must be brought within one year after. Tex.Civ.Prac. & Rem.Code § 16.002; *Dwyer v. Sabine Min. Co.*, 890 S.W.2d 140, 142 (Tex. App. - Texarkana 1994). When applied to online speech, the single publication rule requires that the statute of limitations begins to run on the date that an article is first posted and made available to the public on the Internet. *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 143-46 (5th Cir. 2007); *Shanklin v. Fernald*, 539 F. Supp. 2d 878, 883 (W.D. Tex. 2008).

30. Although under Texas law a two-year statute of limitations typically applies to some business disparagement claims (Tex. Civ. Prac. & Rem. Code § 16.003), courts have held that when allegedly defamatory statements form the sole basis for a plaintiff's claim, defamation's one-year statute of limitations applies. *See Martinez v. Hardy,* 864 S.W.2d 767, 776 (Tex.App. - Houston [14th Dist.] 1993, no writ) (tortious interference claim); *Moore & Associates v. Metro. Life Ins. Co.*, 604 S.W.2d 487, 491 (Tex. App. - Dallas 1980, no writ); *Laird v. Texaco, Inc.*, 722 S.W.2d 519, 521 (Tex. App. - Beaumont 1986, no writ)(court determined that "appellant's claim for tortious interference with his business is, under this record, indistinguishable from his claim for libel and slander. Therefore, the same limitation period applies which is the one-year statute."). The Fifth Circuit applies this rule to business disparagement claims. *Nationwide Bi-Weekly Admin., Inc.*, 512 F.3d at 146-47 (The plaintiff failed to distinguish a business disparagement claim from a defamation claim).

31. Here, plaintiffs' defamation claims and business disparagement claims are indistinguishable. Both claims rely heavily on the lengthy recitation of facts common to all claims. The sections of the complaint setting forth the defamation claim and the business disparagement claim are distinguishable only in terms of the elements of the causes of action; the facts supporting the claims are identical. The two claims are based on the same allegedly defamatory words. Plaintiffs brought the defamation claim on behalf of Baker and brought the business disparagement claim on behalf of OMSJ. The alleged cause of the harm is the same; the only difference is which plaintiff allegedly suffered harm. This is a typical case where the business disparagement claim relies solely on alleged defamatory statements; the one-year statute of limitations therefore applies.

32. DeShong published all of his blog postings more than one year prior to the filing of the complaint, with the exception of blog entries published on September 10, 2012 and June 24, 2013. Appx. p. 7-9., DeShong Decl. at ¶¶10-12. None of plaintiffs' claims are based on these more recently published articles. Plaintiffs' Complaint is based on alleged statements that were published prior to July 9, 2013. For example, the complaint refers to DeShong's first article, in which DeShong sets forth the purpose of the website. Compl. at ¶16(a). DeShong published that article on July 14, 2011. Appx. pp. 42-43., DeShong Decl. at ¶2, Ex. A. The complaint also identifies content publication dates of September 28, 2011, October 29, 2011, November 2, 2011, December 13, 2011, March 5, 2012, and March 26, 2012. Compl. at ¶¶16(b)-(g). All of these publications fall outside the applicable one-year statute of limitations.

33. Although the complaint also references a date of June 24, 2013, this is the date that an unidentified "searcher" entered the search term "HIV innocence Group" into an unidentified search engine and produced a result that included the phrase "Why the HIV Innocence Group is sick and evil bullshit" and a link to DeShong's website. Compl. at ¶16(h). There is no allegation that the statement appeared on DeShong's website or that he published it, which he did not. Appx. pp. 9, 90-94, DeShong Decl. at ¶13, Exs. H and I. There is also no allegation that the statement was originally published by anyone within the applicable limitations period. *See* Compl. at ¶16(h). Therefore, DeShong has established by a preponderance of the evidence, a defense to plaintiffs' defamation and business disparagement claims.

34. Nothing in the complaint indicates that plaintiffs based their defamation claims on anything that appeared in the September 10, 2012 or June 24, 2013 blog entries. The complaint identifies the dates of the allegedly actionable entries and all those dates were more than a year prior to the filing of the complaint. Compl. at 16(b)-(g). Moreover, even if plaintiffs now

attempt to hang their defamation and business disparagement claims on the more recently published blog entries, the claims still fail because all the statements in the two blog entries are either non-defamatory, objectively unverifiable facts (i.e. opinions), or truthful statements of fact. Thus, plaintiffs cannot establish by clear and specific evidence a *prima facie* case for each essential element of claims based on any of DeShong's blog entries.

B. Plaintiffs Cannot Establish by Clear and Specific Evidence the Required Element of Actual Malice Necessary to Succeed on their Defamation and Business Disparagement Claims.

35. Public figures are subject to a different and higher standard to establish the essential elements of a defamation claim. Because plaintiffs here are public figures or limited purpose public figures, United States and Texas law require that they establish through clear and convincing evidence that DeShong made his statements with actual malice. Tex. Civ. Prac. & Rem. Code § 73.002; *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-82 (1964) (requiring public figure to show "actual malice" in order to recover for defamation); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). As explained further *infra*, actual malice in this context has a meaning apart from the simple ill will definition from common law. Specifically, actual malice requires a plaintiff to prove with clear and convincing evidence that the statement was made with knowledge that the statement was false or with reckless disregard of whether the statement was false.

36. "The question of public-figure status is one of constitutional law for courts to decide." *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). "Public figures fall into two categories: (1) all-purpose, or general-purpose, public figures, and (2) limited-purpose public figures. 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. Limited-purpose public

figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy." *Id., citing Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351 (1974).

37. To determine whether an individual is a limited-purpose public figure, the Fifth Circuit has adopted a three-part test: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy. *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 434 (5th Cir. 1987). Under this test plaintiff Baker[2] is a public figure. The complaint admits as much stating, "[w]hile Plaintiff Baker is a private individual, he may be a 'public figure for a limited purpose' specifically for purposes within the HIV/AIDS criminal field." Compl. at ¶22.

38. Further, the complaint's other alleged facts clearly place Baker and OMSJ within the definitions of limited issue public figures. There can be no doubt that the underlying issues involve controversies people are discussing and people other than the parties are likely to feel the impact of the resolution of those issues. For example, "[t]he pharmaceutical industry has a

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[2] There is a split of opinion as to whether a business entity may bring a claim for defamation. *Spectators' Commc'n Network, Inc. v. Anheuser-Busch Inc.*, 1998 WL 874848 (N.D. Tex. Nov. 24, 1998) *aff'd in part, rev'd in part sub nom. Spectators' Commc'n Network Inc. v. Colonial Country Club*, 231 F.3d 1005 (5th Cir. 2000) *opinion modified and superseded on denial of reh'g*, 253 F.3d 215 (5th Cir. 2001) and *aff'd in part, rev'd in part sub nom. Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215 (5th Cir. 2001)("[T]he law clearly does not recognize an action for defamation brought by a corporation... In the alternative...a corporation can bring an action for "business disparagement.'"); *But see Newspapers, Inc. v. Matthews*, 161 Tex. 284, 289, 339 S.W.2d 890, 893 (1960)("[T]he very wording of the libel statute precludes its application to a business" but this "does not alter the situation that a corporation may be libeled."). To the extent OMSJ intends to join in the claim for defamation, and can legally do so, it too is a public figure.

vested financial interest in advancing a specific set of HIV and AIDS related 'facts.'" Compl. at ¶12. Plaintiffs have a vital interest in the controversy and the alleged defamation is germane to the plaintiffs' participation in the controversy. "Baker and OMSJ assist both private and government defense counsel in the defense of persons accused of assault under criminal statutes that make it a crime to knowingly transmit the HIV virus." Comp. at ¶9. The facts alleged in the Complaint make it clear that plaintiffs have placed themselves squarely in the center of a very public controversy.

39. A plaintiff cannot establish a claim for business disparagement without proving actual malice, irrespective of whether or not the plaintiff is a public figure. *Hurlbut* 749 S.W.2d at 766.

40. Under U.S. and Texas law, actual malice is a term of art separate and distinct from traditional common law malice. In order to establish actual malice a claimant must establish that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not," in order to state and sustain a defamation claim. *Sullivan*, 376 U.S. at 280. "Reckless disregard" is defined as a high degree of awareness of probable falsity, for proof of which the plaintiffs must present sufficient evidence to permit the conclusion that DeShong in fact entertained serious doubts as to the truth of his publications. *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 772 (Tex. 1994). "***Actual malice is not ill will***; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true." *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989)(emphasis added). This is a high burden. For example, the failure to investigate information or the credibility of a source and negligence or failure to act as a reasonably prudent man does not establish that someone acted

with actual malice. *St. Amant v. Thompson*, 390 U.S. 727, 730; *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex. 1969).

41. Additionally, public figures face a higher burden of proof than normal litigants in proving that their opponents are liable for defamation. Public figures who sue for defamation must establish that they can produce ***clear and convincing evidence*** that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity. *Carr*, 776 S.W.2d at 571; *See also*, *Ampex Corp.*, 128 Cal. App. 4th 1569, 1578, 27 Cal. Rptr. 3d 863, 870 (Cal. Ct. App. 2005) (in the context of California's anti-SLAPP statute). Clear and convincing evidence has been defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *In Interest of G. M.*, 596 S.W.2d 846, 847 (Tex. 1980). It is more than a preponderance of the evidence but less than beyond a reasonable doubt. *Id*.; *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). Plaintiffs cannot meet this heightened burden.

42. Plaintiffs rely on the following statements to establish that DeShong acted with actual malice. First, plaintiffs rely on the fact that DeShong wrote that the purpose of his website is to "deconstruct" the HIV innocence Group. Compl. at ¶16. The complete statement on the website is a tagline that reads, "Truthfully Deconstructing The HIV Innocence Project." Appx. p. 5, 45., DeShong Decl. ¶4 and Ex. B. Plaintiffs interpret "deconstruct" to mean that DeShong's purpose is to economically destroy Baker and OMSJ. Compl. at ¶16(a). Plaintiffs' interpretation of the word "deconstruct" is unsupported and ignores the context in which the term was used. *See Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (for the premise that courts should interpret statements in context). Webster's defines deconstruct as: "to break down into constituent parts; dissect; dismantle." *Webster's Unabridged Dictionary of the English*

Language, Random House 2001. The word "deconstruct" is often used within the academic and scientific communities to denote the close examination of something by looking at its constitute parts. The entry for "deconstruction" in the Internet Encyclopedia of Philosophy explains that "deconstruct does not mean to destroy." Holland, Nancy J., Deconstruction, *Internet Encyclopedia or Philosophy: A Peer Reviewed Academic Resource*, http://www.iep.utm.edu/deconst/. This is the definition DeShong intended when he wrote that he would "deconstruct the HIV innocence Group" as should be clear from the word's context. Appx. p. 5., DeShong Decl. at ¶4. Moreover, even if DeShong intended to bring about the economic demise of OMSJ, that fact alone would not establish that DeShong acted with actual malice, as it does not suggest he intended to report untruthful defamatory statements.

43. The other fact that plaintiffs rely on to establish that DeShong acted with actual malice is the fact that he wrote, "[i]t is therefore the sole purpose of this site to provide the general public, and attorneys seeking Bakers help, and any interested parties, the proof that Clark Baker's Innocence project, now called the Innocence Group is a useless tool of AIDS denialist propaganda." Compl. at ¶16(a). Nothing in this statement suggests that DeShong intended to publish statements that he knew to be false. To the contrary, DeShong asserts that the website will provide "proof" which is the antithesis of falsity. DeShong may have held ill will toward plaintiffs; many people do. However, that does not establish actual malice. In the context of defamation, "actual malice" is a term of art distinct from traditional common-law malice and does not include ill will, spite, or evil motive. *Alaniz v. Hoyt*, 105 S.W.3d 330, 346 (Tex.App.-Corpus Christi 2003, no pet.) (citing *Hagler*, 884 S.W.2d at 771; *Wal–Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 291 (Tex.App.-Corpus Christi 2000, pet. denied)). "'Actual malice' requires proof that the defendant made the statement 'with knowledge that it was false or with reckless

disregard of whether it was true or not.'" *New York Times, Inc. v. Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004)(quoting *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex.2000)). "(I)ll will toward the plaintiff, or bad motives, are not elements of the New York Times standard." *Rosenbloom v. Metromedia, Inc*., 403 U.S. 29, 52 n. 18 (1971) (opinion of Brennan, J.); *Accord*, *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *Rosenblatt*, 383 U.S. at 84; *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 9-11 (1970).

44. The integrity of his website is important to DeShong. Appx. p.6., DeShong Decl. at ¶5. In critiquing plaintiffs' involvement in the various cases identified on the HIV Innocence Group website, DeShong, reviewed articles, interviewed participants, and studied court documents. *Id*. He intended every statement of fact he has written on his website to be the truth and firmly believes everything he has written is in fact true. *Id*.

45. In order to avoid the dismissal of plaintiffs' defamation and business disparagement claims, plaintiffs must establish by clear and specific evidence a p*rima facie* case that at trial they will be able to show with clear and convincing evidence that DeShong published his statements knowing that they were false or that he had a high degree of awareness of probable falsity. Plaintiffs simply cannot meet this standard. Thus, plaintiffs cannot establish actual malice which is a required element of their defamation and business disparagement claims. Those claims must be dismissed and fees must be awarded.

C. Plaintiffs Fail to Plead Their Defamation and Business Disparity Claims with Sufficient Particularity to Establish Actionable Claims for Defamation and Business Disparagement.

46. Texas courts have repeatedly held, in concert with federal courts across the country, that claims for defamation must be pleaded *in haec verba*. *See, e.g., Perkins v. Welch*, 57 S.W.2d 914, 915 (Tex. Civ. App. - San Antonio 1933, no writ); *Newton v. Dallas Morning*

News, 376 S.W.2d 396, 400 (Tex. Civ. App. - Dallas 1964, no writ); *Kahn v. Beicker Eng'g, Inc.*, 1995 WL 612402 *2 (Tex. App. - San Antonio 1995, writ denied); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979). Similarly, Texas law requires business disparagement claims to be specifically pled. *See, e.g., Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215, 222 (Tex.App.—Amarillo 1997, pet. denied). As one court noted, only specific pleading gives the defendant a fair opportunity to file a proper answer to the complaint, or to discern whether the words alleged to be actionable may be subject to dismissal for such reasons as that they are because they are protected opinion. *Vantassell_Martin v. Nelson*, 741 F.Supp. 698, 707 (N.D.Ill.1990) (plaintiffs alleging defamation must recite the precise language alleged to be defamatory). Here, the complaint pleads the general subjects that are alleged to be defamatory or disparaging but leaves the defendant to guess exactly what specific language from his lengthy websites are alleged to be defamatory or disparaging. The libel and business disparagement claims should therefore be dismissed. DeShong reserves the right to reply to any affidavits and specifics on this point in a reply brief, which might therefore have to be longer than usual.

D. Statements of Opinion or Hyperbole Are Not Actionable Because They Are Not Assertions of Objectively Verifiable Fact.

47. Had plaintiffs alleged specific actionable statements, DeShong could evaluate whether those statements are actually rhetorical or hyperbolic expressions of opinion, which are non-defamatory as a matter of law and hence cannot support a defamation claim. Only those statements that assert provably false facts are actionable in defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990). To determine whether a statement asserts a provably false fact, the statement must be viewed in context. *Id. at 21.* The Texas Supreme Court adopted the test used by the United St*ates Su*preme Court in *Milkovich* to determine whether a statement is actionable in defamation. *Bentley*, 94 S.W.3d at 579, *citing Milkovich.* For a statement to be

actionable in defamation, it must expressly or impliedly assert facts that are objectively verifiable. *Milkovich*, 497 U.S. at 18-19; *Bentley*, 94 S.W.3d at 580.

48. Moreover, minor inaccuracies are permissible so long as the "gist" of the story is not changed. *Dolcefino v. Randolph*, 19 S.W.3d 906, 918 (Tex. App. Houston [14th Dist. 2000, pet. denied). Words have different meanings depending on the context in which they are used and a meaning not warranted by the whole publication should not be imputed." *Peroutka v. Streng*, 695 A.2d 1287, 1293 (Md. App. 1997), *quoting Batson v. Shiflett*, 602 A.2d 1191 (Md. App. 1992). Readers are likely to anticipate that newspaper commentators "will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere as a news reporting column." *Riley v. Moyed*, 529 A.2d 248, 252 (Del. 1987). Similarly, statements on a blog are often exaggerated and most readers will take them with a grain of salt rather than anticipating complete objectivity. *Global Telemedia Int'l v. Doe 1,* 132 F. Supp.2d 1261, 1267 (C.D. Cal. 2001). The very context here - a point-of-view-based blog - militates against a finding of defamatory meaning.

49. For example, plaintiffs complain that an unidentified "searcher" entered the search term "HIV innocence Group" into an unidentified search engine and produced a result that included the phrase "Why the HIV Innocence Group is sick and evil bullshit" and a link to DeShong's website. Compl. at ¶16(h). Again, there is no allegation that the statement appeared on DeShong's website or that he published it[3], which he did not. Appx. pp. 9, 90-94, DeShong Decl. at ¶13, Exs. H and I. Even if DeShong had published the statement, however, the

[3] At one time, when the term "hiv innocence" was entered, the Google search engine returned a result that associates the phrase "Why the HIV Innocence Group is sick and evil bullshit" with a different website altogether and a publication date of May 16, 2011. Appx. pp. 9, 90-94, DeShong Decl. at ¶13, Exs. H and I.

statement is clearly an expression of rhetorical hyperbole that a "person of ordinary intelligence would not perceive ...to be defamatory. *Rehak* 2013 WL 2211654 *11, *citing Am. Broad. Companies, Inc. v. Gill*, 6 S.W.3d 19, 30 (Tex. App. 1999).

E. To Be Actionable, Plaintiffs Must Prove a Statement's Falsity.

50. The Court should note that any statements plaintiffs can identify that 1) are within the statute of limitations, 2) are defamatory in nature, 3) were made with actual malice, and 4) assert facts that are objectively verifiable, ***will still not be actionable unless plaintiffs can prove that such statements are false***. Plaintiffs cannot establish falsity because any statements plaintiffs can bring forth that meet the above four requirements are truthful statements. In fact, every statement on the blog is true, and in order to establish their claims plaintiffs will have to prove that some statement was a defamatory and false factual assertion. *See McIlvain v. Jacobs,* 794 S.W.2d 14, 15 (Tex. 1990) ("[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant"), citing *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986). Plaintiffs have not even identified specific defamatory statements much less presented clear and specific evidence that any allegedly defamatory statements were false.

51. DeShong only published two articles within the relevant statute of limitations - the September 10, 2012 article titled "I'm coming Back" and the June 24, 2013 article title "Clark Baker & Office of Medical (Appx. pp. 8, 89, DeShong Decl. at ¶11, Ex. G) and Scientific Justice Found Guilty of Reverse Domain Name Hijacking" - neither of those articles form the basis of plaintiffs' allegations. Appx. pp. 16-17., DeShong Decl. at ¶2, Ex. A.

52. The case of Tarence C. Dixon which DeShong mentions in his September 10, 2012 post provides an example of how DeShong critiques Baker and OMSJ with factually

accurate statements. DeShong wrote, "Baker claims that he and HIV Innocence Group/Truth[4] [sic] have been more involved in the positive outcome of a military case of Sgt. Tarence C. Dixon than they have proven..." Put more succinctly, DeShong asserts that Baker has not provided proof that testimony provided by OMSJ is as responsible for Dixon's acquittal. To the extent this could be consider fact, it is true. In the blog entry, DeShong explained that Baker and OMSJ claimed to be responsible for the acquittal of Sgt. Terence C. Dixon. However, there is nothing on the OMSJ website to prove that their involvement in the case lead to Dixon's acquittal. DeShong reviewed at least one firsthand account of the case and understood that the Dixon had been charged with the intentional transmission of HIV, but that he had testified that he wore condoms during sexual activity. None of the women with whom he had sexual intercourse testified at the court martial and there was no evidence that any of them had been infected with HIV. Dixon had been tested for HIV using several different tests on several different occasions. It was DeShong's opinion that the judge likely acquitted Dixon because there was no evidence of intent to transmit HIV and no evidence of actual transmission. DeShong doubts (opinion) that the acquittal had anything to do with OMSJ-affiliated witnesses who called into question the accuracy of HIV testing. Baker had access to the defendant and the Record of Trial and DeShong believed that if there was any real evidence the judge acquitted Dixon based on OMSJ testimony, Baker would post the evidence on the site. There is no such evidence and thus DeShong's statement, "Baker claims that he and HIV Innocence Group [...] have been more involved in the positive outcome of a military case of Sgt. Tarence C. Dixon

[4] "HIV Innocence Group/Truth" was a typographical error which should have read "HIV Innocence Group/Project." Appx. p. 8., DeShong Decl. at ¶11 To the extent it may have changed the intended meaning it would have created doubt that DeShong was referring to OMSJ's HIV Innocence Group and thus would be even less likely to be an actionable statement.

than they have proven..." is true. This is an example of how and why DeShong operates his website. He is careful to report only truthful facts and opinions. When Baker and OMSJ claim to successfully defend someone based on theories associated with HIV/AIDS denialism, he demands that they provide evidence. Appx. p. 8, DeShong Decl. at ¶11.

53. In order to avoid the dismissal of plaintiffs' defamation and business disparagement claims, plaintiffs must establish by clear and specific evidence a p*rima facie* case that at trial they will be able to show that any defamatory statements DeShong made were false. Plaintiffs have not alleged any facts proving DeShong's statements were false and they will not be able to bring forth any such evidence.

F. Plaintiffs' Request for Injunctive Relief is a Remedy and Not a Claim, but Is Improper as an Attack on Free Speech.

54. Plaintiffs pray for injunctive relief and present it as a claim. However, injunctive relief is a remedy, and not a claim for damages. Even if plaintiffs' request for injunctive relief were an actual cause of action rather than a remedy, it constitutes yet another attack on DeShong's free speech rights and is premised on his Constitutionally protected conduct. As such, it too must be dismissed under the TCPA.

CONCLUSION

55. DeShong respectfully requests the Court to dismiss plaintiffs' state law claims under the TCPA. Plaintiffs' complaint is exactly the sort of action Texas' legislature sought to prevent by enacting the TCPA. If plaintiffs are allowed to pursue this action against DeShong solely to silence his constitutionally protected exercise of his free rights, it would result in great expense to DeShong and great harm to his fundamental rights. The TCPA exists for situations such as this one. Plaintiffs should not be permitted to use this Court to silence and punish DeShong for doing nothing more than exercising rights guaranteed to him by the United States

and Texas constitutions. Because plaintiffs' claims are nothing more than an attempt to censor and suppress DeShong's constitutionally protected speech, plaintiffs' claims must be dismissed pursuant to the TCPA. Further, DeShong must be awarded his costs and reasonable attorneys' fees for having to take action against plaintiffs under the TCPA. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1).

Respectfully submitted,

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