

CAUSE NO. DC-16-03561

KALLE MCWHORTER and, PRESTIGIOUS PETS, LLC,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFFS,	§	
	§	
V.	§	DALLAS COUNTY, TEXAS
	§	
ROBERT DUCHOUQUETTE and MICHELLE DUCHOUQUETTE,	§	
	§	
DEFENDANTS.	§	160TH JUDICIAL DISTRICT

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' APPLICATION FOR FEES, COSTS, EXPENSES, AND SANCTIONS**

Plaintiffs Prestigious Pets, LLC and Kalle McWhorter file this Response and request denial of Defendants' Application for Fees, Costs, Expenses, and Sanctions:

**I.
RESPONSIVE ARGUMENTS AND AUTHORITIES**

This Court must deny Defendants' application for fees, costs, and sanctions because such an award is not supported by Texas law or the facts of this case. Any financial award for a successful TCPA movant is limited by the authority of TEX. CIV. PRAC. REM. CODE § 27.009(a): "(1) court costs, **reasonable** attorney's fees, and other expenses **incurred** in defending against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to **deter** the party who brought the legal action from bringing similar actions described in this chapter." (emphasis supplied).

A. Defendants Have Not "Incurred" Fees Recoverable in an Anti-Slapp Case

Defendants cannot recover attorneys' fees and costs for time spent by their attorneys because each lawyer was—by their own admission—pro bono counsel that was not actually charging Defendants for services. Even if such a recovery is permitted, however, Defendants fail to carry their burden to support the outrageous request of nearly \$200,000 in fees and costs.

Additionally, Defendants cannot recover fees from a pending appeal in a separate court.

1. Dallas Court of Appeals, 2014: A party cannot incur or recover fees under the TCPA when utilizing pro bono counsel

This Court cannot award any fees to Defendants because Defendants have been represented pro bono in this case. The TCPA only authorizes an award of costs, fees, and expenses that have been “incurred in defending against the legal action.” TEX. CIV. PRAC. REM. CODE § 27.009(a)(1). The Dallas Court of Appeals holds that a prevailing plaintiff under the TCPA represented by pro bono counsel may not recover attorneys’ fees of that pro bono counsel because they have not been “incurred” under the TCPA:

Because the undisputed evidence before us establishes that their attorneys represented them pro bono, the BOR defendants did not incur any attorney's fees in defending against Cruz's lawsuit. Accordingly, they were not entitled an award for attorney's fees pursuant to the Act.

Cruz v. Van Sickle, 452 S.W.3d 503, 524 (Tex. App.—Dallas 2014, pet. denied). *See also Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 877 (Tex. App.—Dallas 2014) (“incur” is construed to mean “become liable to pay.”).¹ *Cruz* remains controlling law and has not been overturned or modified by any opinions of the Dallas Court of Appeals or Texas Supreme Court.

Defendants’ erroneously rely on *Sullivan v. Abraham* to escape the plain impact of *Cruz* as *Sullivan* merely reaffirms *Cruz*. In *Sullivan*, the Texas Supreme Court was deciding whether the phrase “as justice and equity may require” in the TCPA fees statute meant the trial court must consider justice and equity when determine an award of “reasonable attorney’s fees” to a successful movant. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).²

¹ Quoting *Keever v. Finlan*, 988 S.W.2d 300, 308 (Tex. App.—Dallas 1999, pet. dism'd).

² The Austin Court of Appeals agreed as to the limited scope of the *Sullivan* opinion. *See In re Elliott*, No. 03-16-00231-CV, 2016 Tex. App. LEXIS 11010, at *52 n.51 (App.—Austin 2016) (“*See Sullivan v. Abraham*, 488 S.W.3d 294, 297-99 (Tex. 2016) (relying on last-antecedent canon and punctuation to conclude that ‘as justice and equity may require’ modifier in Section 27.009(a)(1)’s mandatory award of ‘court costs, reasonable attorney’s fees, and other expenses incurred in defending against the legal action as justice and equity may require’ applies only to ‘other expenses incurred’ and not ‘court costs’ or ‘reasonable attorney’s fees’”).

Sullivan, however, did not address, much less overturn the pro bono portion of *Cruz*. *See id.* Instead, *Sullivan* provided more support for *Cruz*'s holding that use of pro bono counsel means the "incurred" requirement is not met because the Court held

By referring to court costs, reasonable attorney's fees, and "other expenses incurred," the statute reflects both that **costs and attorney's fees are "expenses" and that they must all be "incurred in defending the legal action."**

Sullivan, 488 S.W.3d at 298 (emphasis supplied). The reaffirmation of *Cruz* could hardly be more clear—attorneys' fees are expenses that must be incurred in defending the legal action, which is not the case with pro bono counsel as determined in *Cruz*.

Additionally, had the Texas Supreme Court intended to modify or overturn *Cruz*, it had the opportunity to do so: the Court denied the motion for rehearing of petition for review on Feb. 26, 2016, more than a month after the Court heard oral arguments in *Sullivan* (Jan. 14, 2016). *See Cruz v. Van Sickle*, App. No. 15-0129, 2016 Tex. LEXIS 194, *1 (Tex. 2016). But the Texas Supreme Court did not and has not modified or overturned *Cruz* on the issue of pro bono counsel, making *Cruz* controlling in this lawsuit.³

2. Public Citizen's Fees Were Not Incurred and are Not Recoverable

The record before the Court shows the undisputed fact that Defendants did not incur fees, costs, or expenses as a result of Public Citizen's representation in this case. One need only look the admission of Paul Levy and the April 2016 fee agreement with Defendants to prove this:

- On July 2, 2016, Defendants' attorney Paul Levy posted a public blog post stating "We are grateful that three lawyers from the Dallas-based firm of Thompson and Knight...have agreed to **join us in providing pro bono representation to the Duchouquettes.**" Ex. A-1, p.2.

³ Defendants, as in their motion to dismiss, again seek to inject non-Texas law into a Texas dispute by arguing the policy (i.e. extrajudicial) reasons why this Court should follow the conduct of other states' handling of their own anti-slap statutes. *See* Defs' App., pp. 8-9. This Court must decline Defendants' invitation to legislate from the trial bench. To base a legal determination of a fees award or sanctions (see § D below) on non-controlling foreign opinions or aspirational legislative changes would be "arbitrary" and in an "unreasonable manner without reference to any guiding rules or principles." *See Gonzalez*, 436 S.W.3d at 881.

- Public Citizen's fee agreement admits they have been "supplying our representation without charging you for our time." Defs' Ex. 1G.
- That agreement goes on to confirm that any fees and costs awarded are immediately property of Public Citizen and its local counsel: "[A]ny such fees awarded for time that we spent on the case would belong to Public Citizen (and to local counsel to the extent they were working pro bono or for less than the awarded hourly rate)." Defs' Ex. 1G.

Moreover, Levy's own affidavit admits that as a public interest group, Public Citizen generally does not bill clients for legal services due to non-profit tax status limitations. Defs. Ex. 1, ¶ 12. Under the controlling precedent of *Cruz* (as implicitly affirmed by *Sullivan* on this issue), Public Citizen's admissions of being pro bono show Defendants do not meet the "incurred" requirement of the TCPA fees provision. Accordingly, this Court must deny Defendants' fee application.

3. Thompson & Knight's Fees Were Not Incurred and are Not Recoverable

Thompson & Knight has simply manufactured its claim for attorneys' fees by signing a "fee agreement" *the same day it filed its fee application—September 26, 2016*. See Defs' Ex. 2D (dated 9/9, signed 9/26). This was nearly two months after the motion to dismiss. This belated fee agreement provides no basis for concluding that T&K's representation was anything more than pro bono, as was publicly admitted by Levy. Ex. A-1, p. 2 (Levy's admission that Public Citizen and T&K were "providing pro bono representation to the Duchouquettes.").

Even the language of T&K's agreement with Defendants shows Defendants never incurred fees and costs. T&K's agreement with Defendants shows that T&K "[i]n consideration for the legal fees incurred by the FIRM pursuant to the Legal Representation" would be paid almost entirely to T&K and Public Citizen. Defs' Ex. 2-D at p. 3. The agreement also shows that any award of costs or expenses "shall be used to reimburse the Firm for any unreimbursed expenses incurred in the Legal Representation." Defs' Ex. 2-D at p. 3. This demonstrates that Defendants themselves did not incur fees, costs, or expenses for T&K's representation.

Defendants fail to present any evidence that T&K's representation has caused them to actually incur any amounts. Thus, pursuant to *Cruz*, Defendants cannot recover these non-incurred amounts regarding T&K's representation.

4. Defendants Fail to Show the Fees and Costs Sought are Reasonable, Moderate, Fair, and Supported by Adequate Evidence

Defendants fail to satisfy their burdens to show that the fees sought are reasonable, moderate, and fair. An award of fees under the TCPA must be reasonable, which means it must be "not excessive or extreme, but rather moderate or fair." *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).⁴ Additionally, any award of fees to a successful TCPA movant must be "supported by the evidence." *Avila v. Larrea*, No. 05-14-00631-CV, 2015 Tex. App. LEXIS 6340, at *8 (Tex. App.—Dallas 2015).⁵

In this case, Defendants' request for nearly \$200,000 in fees, costs, and expenses is not reasonable, not moderate, and not fair. Defendants unreasonably "hired" six different attorneys (in two time zones) over the course of eight months, and Defendants have provided no basis for "employing" so many lawyers. Furthermore, the amount of time and money "spent" does not match the necessary tasks of this case: there was no demonstrated need for the Public Citizen group from Washington D.C. to handle a Texas case on Texas law;⁶ there was no written discovery or depositions; there were only two hearings; and Defendants' motion to dismiss was merely a slightly revised version of its original Justice Court motion.⁷ On a per page cost basis, Defendants "spent" \$3,431.85 per page for their 52 pages of briefing (motion to dismiss and

⁴ Citing TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1) and *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010).

⁵ Citing *Cruz*, 452 S.W.3d at 522 (pursuant to plain wording of the TCPA, successful movants for dismissal "are entitled to an award of attorney's fees that is supported by the evidence").

⁶ Levy admits that Public Citizen attorneys generally do not represent client on the merits in cases at the trial court level where libel is the principal or main issue, thus making it unreasonable that he was "hired" to travel from Washington D.C. to work on this particular case. *See* Defs' Ex. A, ¶ 10.

⁷ Levy admits the motion to dismiss in this case utilized the motion to dismiss previously drafted for the Justice Court action. Defs' Ex. A, ¶ 19.

reply). Likewise, the astronomical Washington D.C. hourly rates charged by the Public Citizen attorneys' directly conflict with the appropriate hourly rates stated by T&K's Ms. Williams and should be reduced by at least 40%. Thus, even if this Court were to award fees, costs, and expenses, a reasonable amount is not more than \$35,000. However, as noted above, there is no basis in law to award attorneys' fees under the TCPA's plain language and the holding in *Cruz*.

B. Fees From the Justice Court/County Court Proceeding are Not Recoverable Here

Defendants cannot recover legal fees for the pending Justice Court/County Court proceeding now on appeal in Dallas Court of Appeals because the TCPA only authorizes an award of fees in this "legal action."

While pro se, Plaintiffs brought an initial suit in Justice Court, which was non-suited. Subsequently, Defendants filed a new suit in this Court with different claims and an additional party. Although the Justice Court denied Defendants any fees award, Defendants appealed to the County Court. The County Court also denied Defendants any fees award. Defendants have since appealed that suit to the Dallas Court of Appeals, still seeking the approximately \$10,000 in fees incurred by Carrington Coleman as counsel for Defendants in the Justice Court proceeding.

Section § 27.009(a)(1) only allows recovery of fees, costs, and expenses "incurred in defending against the legal action[.]" Only one legal action has been resolved in Defendants' favor, and that is "the legal action" for purposes of § 27.009(a)(1). While Defendants try to stretch the definition of "legal action" to cover multiple, contemporaneous actions, this defies the plain language of § 27.001(6), which defines "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." The use of "a" is instructive because it unequivocally denotes the singular use, which rebuts Defendants claim of recovering in this District Court case for fees

pending in a separate appeal. Regardless of the overlap in facts and issues in the two actions, the actions are separate and cannot be collapsed simply so Defendants can recover fees.

That statutory interpretation and application to these facts comports with Texas law, which holds that legal fees incurred in another suit are neither relevant nor recoverable in a different suit. *See Dalisa, Inc. v. Bradford*, 81 S.W.3d 876, 880 (Tex. App.—Austin 2002, app. dism'd).⁸ The simple fact that Defendants persist in appealing the County Court decision shows the lack of merit in simultaneously seeking the same relief in different courts. Additionally, there is no evidence that Defendants actually incurred the CCSB fees and are legally obligated to pay for them. For all these reasons, this Court must deny Defendants' application for fees, costs, and expenses incurred in the separate Justice Court action.

C. No Basis for Conditional Appellate Fees Award

Texas law limits the award of attorneys' fees to circumstances where they have been authorized by statute or law. In this case, Defendants provide no statutory or common law basis to support an award of conditional appellate fees. The TCPA does not provide any mechanism or authorization related to appellate fees. Accordingly, Defendants cannot recover such fees in this case. Even if appellate fees are recoverable, Defendants have failed to meet their burden to show that the conditional appellate fees sought are moderate, fair, and reasonable. Defendants' only evidence on the appellate fees are conclusory statements of counsel without any foundation, support, or evidence. Accordingly, Defendants cannot recover such fees in this case.

D. Arbitrary Request for \$200,000 in Sanctions

A trial court may only award sanctions it determines are needed to “**deter** the party...from bringing similar actions.” TEX. CIV. PRAC. REM. CODE § 27.009(a)(2). There must

⁸ *Citing Nat'l Union Fire Ins. Co. v. Care Flight Air Ambul. Serv., Inc.*, 18 F.3d 323, 330 (5th Cir.1994) (fees incurred in defending a separate lawsuit cannot be recovered even where the separate lawsuit is on the same issues).

exist a “direct nexus between the improper conduct and the sanction imposed” and a determination that “less severe sanctions would not have been sufficient to promote compliance.” *Kinney v. BCG Att’y. Search, Inc.*, No. 03-12-00579-CV, 2014 Tex. App. LEXIS 3998, at *34 (Tex. App.—Austin 2014). A trial court is firmly within its discretion to determine no sanctions are necessary for deterrence based on the circumstances of a particular case. *See, e.g., Avila v. Larrea*, 2015 Tex. App. LEXIS 6340, at *16 (Tex. App.—Dallas 2015).

While case law is scant on the issue of TCPA sanctions given the rarity of their award, the factors considered in this analysis have included whether the instant lawsuit is the “culmination of multiple actions” by the plaintiff and whether prior actions had resulted in sanctions against the plaintiff. *Kinney*, 2014 Tex. App. LEXIS 3998, at *34 (finding it relevant that the plaintiff had already been sanctioned for \$45,000 on the same claims in a different forum). Other factors that have been considered include the plaintiff’s intent in filing, “aggressive” threats by the plaintiff against the defendants, the financial status of the plaintiff and/or an entity-plaintiff’s owners, and the plaintiff’s history of prosecuting similar lawsuits. *See Gonzalez*, 436 S.W.3d at 881.

In this case, Defendants’ sanction fails to meet the required elements, and the great weight of relevant factors fall in favor of denying any sanction. At the outset, Defendants provide absolutely no evidence to demonstrate this lawsuit was brought in bad faith or without a reasonable basis in law and fact. The very fact that Defendants needed six lawyers in two organizations working nearly 300 hours speaks to the good faith legal basis of Plaintiffs’ pleadings in a relatively new area of law. Likewise, Plaintiffs’ unchallenged evidence of the harm suffered by them—both financially and mentally—directly attributable to Defendants’ public appearances and statements shows the Plaintiffs’ good faith intent to bring claims they

believed to be meritorious.

The relevant factors do not support any sanction as necessary to deter further action. The fact of Plaintiff McWhorter's significant loss of personal revenue over the last year (60% decrease) and Plaintiff Prestigious Pets, LLC's dramatic decrease in profits (down to just \$3,450/month) and customers (down by 85% year over year) militates against imposing any additional harm. Ex. A, ¶ 6. The fact of Plaintiff McWhorter and her husband being subjected to months of threats of death, rape, arson, and other harm, which have required law enforcement intervention, similarly cuts against the need for imposing more penalty against Plaintiffs. Ex. A, ¶ 3-4; Ex. B, ¶ 6. Plaintiffs attempted time and again to resolve these issues with Defendants amicably before the resort to litigation, to no avail, and they did not resort to any aggressive or malicious threats against Defendants. Ex. A, ¶ 3; Ex. B, ¶ 3. The cumulative circumstances of this case show no need for additional punishment to deter Plaintiffs.

Defendants request for \$200,000 in sanctions is well beyond reason and plainly arbitrary. There is no "direct nexus" that justifies awarding \$200,000 in sanctions merely because Plaintiffs pleaded and brought evidence to show they suffered over \$200,000 in damages. Likewise, it would be arbitrary and without basis in law to award a sanction that Defendants say "compensates" them and their lawyers considering no statute or law allows for an award as compensation. *See* Defs' App., p. 16. Moreover, Defendants' three main "factors" do not support a sanction:

- Defendants' reference to an unprosecuted small claims petition filed nearly two years ago (Defs' Ex. 5) is a red herring. Plaintiff filed—but did not prosecute—a claim against a person that made false statements of fact about her alleged interactions with the company, despite the fact this person was not a customer and did not even own the cat at issue. Ex. A, ¶ 8.
- Plaintiffs' request to Chan that defamatory statements be taken down was a privileged act done under the First Amendment and under the auspices of the Texas Defamation Mitigation Act. Ex. B, ¶ 7. Defendants' double-standard on free speech, as shown by their argument on this point, is unbelievable.

- Defendants' reliance on Defendant Michelle Duchouquette's "distress" is entirely irrelevant to the required finding of a "necessary deterrent" or the other factors courts have considered when determining whether any sanction is appropriate. *See* TEX. CIV. PRAC. REM. CODE § 27.009. Moreover, Michelle and her husband Robert (the owner of a technology security company) have reveled in the media spotlight of their multiple news interviews and TV appearances about these issues in blatant attempts to provoke public revenge against Plaintiffs, despite walking back their original allegation that Plaintiffs "almost killed" their fish. They continued to prod for public backlash even after being told about the death, rape, and arson threats being made against Plaintiff and her husband.

Given the harsh consequences that have already taken a grievous toll on both Kalle McWhorter and her business, a sanction is inappropriate in this case and would not be for deterrent purposes. Rather, it would be to punish Plaintiffs and compensate Defendants' counsel, *neither of which are statutorily-authorized grounds under the TCPA*. In fact, the egregious amount of sanctions (and fees) sought will likely push both Plaintiffs into bankruptcy given their current financial situations. Accordingly, Plaintiffs request that this Court deny Defendants' request for a sanction.

II. OBJECTIONS TO DEFENDANTS' EVIDENCE

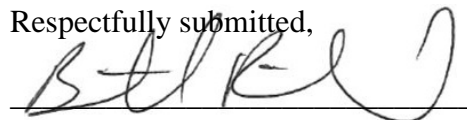
Exhibit	Objection(s)
Ex. 1 – Levy Aff.	¶ 6 - Statements about Michelman's conduct and statements lack foundation, are speculative, and are hearsay.
¶ 7	Statements about Levy's past out of court statements are hearsay.
¶ 8	Levy's statement about purported recognition by others as a "nationally known expert" are speculative, lack foundation, and are hearsay.
¶ 12-14	Statements about the " <i>Laffey</i> matrix" are hearsay, hearsay within hearsay, inadmissible expert testimony, and not best evidence.
¶ 15	Statements about other cases in other courts are irrelevant, lack foundation, prejudicial, hearsay, and inadmissible expert testimony.
¶ 16 et seq.	Plaintiffs object that Levy's opinions about the necessity and reasonableness of his organization's attorneys' fees have not been properly supported by timely, requisite expert disclosures under TEX. R. CIV. P. 194.2(f).
¶ 21-34	Levy's lecture about the political and/or policy reasons for allowing pro bono counsel to be awarded fees are entirely improper and inadmissible as containing hearsay, hearsay within hearsay, speculation, statements made without personal knowledge, ultimate opinions, legal opinions, and improper expert opinions.
Ex. 1B	The Washingtonian article about Levy is irrelevant, hearsay, contains hearsay within hearsay, is not properly authenticated, contains improper legal and expert opinions, and contains speculation.

Ex. 1D	The “USAO Attorney’s Fees Matrix” is irrelevant, not properly authenticated, hearsay, contains hearsay within hearsay, improper legal and expert opinions, and speculative.
Ex. 1E	The “Laffey Matrix” is irrelevant, not properly authenticated, is hearsay, contains hearsay within hearsay, represents improper legal and expert opinions, and is speculative.
Ex. 2 – Williams Aff.	Plaintiffs object that Williams’s opinions about the necessity and reasonableness of her firm’s attorneys’ fees have not been properly supported by timely, requisite expert disclosures under TEX. R. CIV. P. 194.2(f). Plaintiffs object that Williams’s opinions in ¶ 8-9 regarding contingent appellate fees are conclusory, speculative, and improper expert opinions. Plaintiffs object that Williams’s opinions in ¶ 8 about Levy’s legal work are conclusory, speculative, without personal knowledge, and improper expert opinions.
Ex. 2C	Plaintiffs object that the time sheets of T&K are over-redacted and thus fail to meet the lodestar evidentiary standard of providing adequate information for a factfinder to evaluate the tasks taken, time allotted, and reasonableness thereof.
Ex. 3 – CCSB Time Recs	The time records of CCSB for a separate lawsuit in a different court that is still pending (due to the appeal of Defendants) are irrelevant to the case before this Court.
Ex. 4 – Chan Aff.	¶ 6 contains speculation made without personal knowledge regarding the mental state of the words in an email, its intent, and its intended meaning.
Ex. 5 – Narvaez Pet.	This document is not authenticated, hearsay, and not best evidence (considering the redactions).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request an order of this Court denying Defendants’ application, sustaining Plaintiffs’ evidentiary objections, and for all other relief at law and equity to which Plaintiffs have shown themselves entitled.

Dated: November 23, 2016

Respectfully submitted,



WILLIAM S. RICHMOND

State Bar No. 24066800

brichmond@pcrfirm.com

PLATT CHEEMA RICHMOND PLLC

3906 Lemmon Ave., Suite 212

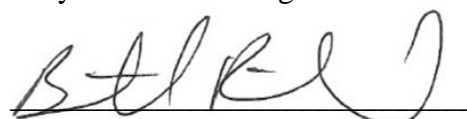
Dallas, Texas 75219

214.559.2700 Main

214.559.4390 Fax

COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE: Counsel for Plaintiffs certifies that this pleading and all exhibits thereto were served on all counsel of record by electronic filing and/or electronic mail on or about November 23, 2016.



WILLIAM S. RICHMOND

EXHIBIT A

DECLARATION OF KALLE MCWHORTER

1. My name is Kalle McWhorter. I am over 18 years old and am fully competent to make this Declaration. I have personal knowledge of the facts stated herein and they are true and correct. I am a Plaintiff in the above-captioned lawsuit.

2. Prestigious Pets, LLC is a small, local pet care company I founded. To this day, I have been the sole owner of what was previously a well-regarded and successful pet care company in the DFW Metroplex. I have had a nearly 365-days-a-year commitment to the business of pet care since day one based on my love of animals. My husband David has helped me run the business for the last few years as we manage our employees and a team of independent pet sitters.

3. Following their return from vacation, Defendants complained about some aspects of their experience with Prestigious Pets, but at no point did they communicate that they believed their fish was almost killed or that it was potentially harmed, that it had exhibited any visible characteristics indicating deteriorated health, or that they had had any pet care professionals investigate the health of the fish. We resolved the substance of their minor issues raised at the time.

4. Since the posting of Defendants' Yelp! review, I—along with my husband—have received countless communications of threats to our physical safety, including threats of death, rape, and arson. A true and correct copy of those communications are attached to my prior declaration (Ex. 12). After the initial wave of threats, our lawyer sent a letter to the lawyers for Defendants asking them to refrain from making further public statements because of the threats, but Defendants appeared again for news interviews and even had their lawyer appear in an interview. A true and correct copy of our counsel's correspondence is attached to my prior declaration (Ex. 12); and a true and correct copy of online articles showing subsequent news media interviews by Defendants are attached to my prior declaration (Ex. 16). The impact of these media campaigns and resulting threats have caused me significant mental anguish, depression, anxiety, and concern for physical safety, all of which have made my day-to-day life extremely difficult. After the latest event in which a CBS reporting crew came and camped outside our home, along with the ongoing threats, I have remained on edge and extremely concerned about my physical safety at all hours of the day, particularly when leaving my home to try and keep the business running. The anxiety and stress related to those threats and the accusations against my company and me have forced me to seek the assistance of medical professionals.

5. Since the posting of Defendants' Yelp! review, the business has suffered a significant decrease in the number of new client applications—whereas in the months prior to the publication we were seeing 75 a month on average, it began decreasing in November 2015 and dramatically decreasing in March 2016. Even with a ramped up marketing campaign, significant new marketing expenses, and a reduction in rates, the company is signing up 85% less customers per month than it was previously (approximately 34 from September 1, 2016 to the date of this declaration). We have also lost numerous commercial relationships that generated business, such as with apartment complexes, that were large sources of new business. *See* Ex. A-14 to my prior declaration. Additionally, our Google page has now been completely deleted, which had been a key marketing platform for our business.

6. Additionally, the business has suffered a loss of revenue from existing customers.

In some instances, specific customers have said they will no longer use Prestigious Pets as a result of the negative atmosphere created by Defendants' false and disparaging statements. The loss of existing business and decrease in new business has resulted in lower gross revenue and net profits for the company, as reflected in lower average charges in each month from December 2015 to the present when compared to the prior year and, for example, a 22% drop in revenue from June 2015 to June 2016 (despite, before November 2015, years of steady upward growth and despite higher costs presently). Between September 2016 to now, the company has had net profits of approximately \$3,450 per month. Correspondingly, my husband and I have lost approximately 60% of our personal income (year over year) due to the harm to the business's revenues.

7. The company and I have paid \$15,250.00 to date in attorneys' fees and costs related to the litigation.

8. I have reviewed Exhibit 5 to Defendants' Application for Fees. Although this petition was filed on behalf of Prestigious Pets, LLC based on the facts known to us at the time, the company decided not to pursue the case beyond this filing. We filed the petition because the named she had falsely stated she was a customer of Prestigious Pets (she signed no contract with the company), made false representations about owning the cat at issue (the cat's true owner expressly stated he was the only owner), made false representations about conversations with Prestigious Pets staff (she did not make the visit bookings), and made false representations about alleged requests for email updates (the true owner sent only two update requests during the week of visits). Again, however, the company did not pursue the case, did not serve the lawsuit, and has no intention of doing so. Attached hereto as Exhibit A-2 is a true and correct copy of an email correspondence between the company and the true owner of that pet. Attached hereto as Exhibit A-1 is a true and correct copy of the Paul Levy blog post dated June 2, 2016.

9. Furthermore, there have been disparaging reviews that breach our customer contract over the years that, some even that contained outright falsehoods, that we have not instituted any litigation over. Even for the events of this past year, we have taken no litigation action against the flood of false and disparaging statements leveled against us personally and the company. We have and continue to be, even more than in the past, deterred from filing claims such as these.

10. I respect the Court's decision on the merits of our claims. I was disappointed that the Defendants, when offered, were not interested in a mutual walkaway but have insisted on punitive measures such as collecting their pro bono lawyer fees and imposing an excessive sanction. If my business and I are subjected to the sanction and fees award sought by Defendants, it is likely that we must file for bankruptcy protection.

My date of birth is October 15, 1986 and my address is 3839 McKinney Ave., Suite 155-724, City of Dallas, 75204, Dallas County, Texas, United States of America. I declare under penalty of perjury that the foregoing is true and correct. Declared and executed in Dallas County, State of Texas on the 23rd day of November 2016:


Declarant Kalle McWhorter



Consumer Law & Policy Blog

Sponsored by Public Citizen Litigation Group

Thursday, June 02, 2016

Dallas Pet-Sitting Firm Raises the Ante, Seeks Up to a Million Dollars in Damages for Yelp Review

by Paul Alan Levy

I [blogged back in February](#) about a small-claims act proceeding that a Dallas pet-sitting company called “Prestigious Pets” had filed against a couple named Michelle and Robert Duchouquette over the fact that Michelle Duchouquette had posted a Yelp review presenting some fairly mild criticisms of the company’s policies. The company claimed that the review was both defamatory and a violation of the non-disparagement clause (interestingly, [in an email to a TV reporter](#), the company’s spokesman blamed “assistance from [unnamed] professionals” for the fact that this clause is in its service agreement). The couple had found counsel to file a motion to dismiss under the state’s anti-SLAPP statute, and first the local media, and then some national outlets, reported on the story because it relates to the controversy about whether companies should be able to use non-disparagement clauses to quash honest online criticism and hence skew the data available to consumers in choosing the companies with which they do business. It seemed likely at the time that, wholly apart from whether a non-disparagement clause could be sustained, the defendants would prevail on their anti-SLAPP motion because, as their [anti-SLAPP motion](#) explained, only Robert Duchouquette had signed the contract but only Michelle Duchouquette had posted the review, and the review, in turn, was pretty milquetoast and unlikely to be found defamatory.

Soon thereafter, the case took another turn: Prestigious Pets itself retained counsel (presumably, to respond to the anti-SLAPP motion), but instead of just arguing the merits of the lawsuit, it raised the ante by dismissing its small claims proceeding ten days before the scheduled anti-SLAPP hearing and [refiling the suit](#) as a claim for up to a million dollars in damages in addition to attorney fees. (The Texas Justice Court then declined to hold a hearing on the anti-SLAPP motion, apparently concluding that the motion had been mooted out by the voluntary dismissal).

The company claims that the relief in its new lawsuit is justified because its business dried up in the face of the publicity about its lawsuit, and it brought new claims against Robert Duchouquette because he had appeared in media interviews where he objected to having been sued in the first place. But at this point, the Duchouquettes were not only defendants in a lawsuit for a potentially bankrupting amount of damages, but they had to consider the significant up-front expense of having to pay their lawyers for the hourly expense of defending themselves against a SLAPP suit – the small claims suit alone had subjected them to a ten thousand dollar legal bill.

The Specifics of the New Lawsuit

The [small-claims action claim form](#) was maddeningly vague about what the defamation had been, and the [anti-SLAPP motion](#) filed in response to that claim had to shoot in the dark about just what statements in the review had to be defended. There had been a [demand letter](#) from the company that raised a number of issues. The new lawsuit, however, specifies one statement from the review in particular: that the company’s assigned pet-sitter had potentially caused serious harm to the couple’s fish by putting too much food in a fish-bowl while the couple were away on vacation for a few days. The complaint alleges that a charge of overfeeding a fish is libel per se because it amounts to the criminal offense of animal cruelty under Texas law (if giving too much food to a pet fish were really a crime, I expect there would be thousands of Texas second-graders facing jail time every year!) As our filing in the case indicates, though, there are photos showing that the fish water became cloudy and that food accumulated at the bottom of the tank, which must have been caused by overfeeding, and apparently overfeeding is a serious issue for this kind of tropical fish. The suit also charges Robert Duchouquette with breach of the non-disparagement clause, not because of Michelle Duchouquette’s original Yelp review, but because of what he said in self-defense after he had been sued.

When a consumer posts non-commercial criticism of a business, from which the author has derived no financial benefit, is faced with defense against litigation over that speech, the might have to lay out tens of thousands of dollars just to avoid having to retract fair criticism not to speak of issuing a groveling apology. No financial benefit from the speech, great financial expense from standing up for

[EX A-1]

the speaker's First Amendment right (and the ability of other consumers to get useful information) -- in financial terms, this is a losing proposition for the speaker! Anti-SLAPP laws provide some comfort about getting the legal fees back, but many ordinary people can't even afford to finance litigation to the point of getting repaid through a fee award. And Texas' anti-SLAPP law is not yet well-enough ingrained in lawyers' consciousness, nor the standards well-enough developed, that private practitioners will regularly provide contingent fee defense with confidence in receiving a fee award as, for example, commonly happens in California or, indeed, as many lawyers will do for plaintiffs in civil rights cases, or consumer cases brought under statutes that provide for mandatory awards of attorney fees.

New Anti-SLAPP Motion from New Counsel

Consequently, we decided that simply offering advice to the Duchouquettes' lawyers about their defense of the litigation was an insufficient contribution to their protection; given the importance of the non-disparagement clause issue, we have entered the case as lead counsel for the Duchouquettes. Last month, we filed an appeal from the refusal to consider the anti-SLAPP motion filed in Justice Court which, under Texas law, is tantamount to an appealable denial of the motion. In that appeal, we hope to get the Duchouquettes' outlay to their private counsel reimbursed. And today, we filed a renewed anti-SLAPP motion over the newly filed lawsuit. We argue both that the libel claim is unjustified and that the non-disparagement clause is unconscionable under Texas law as overly one-sided and, therefore, is not an enforceable waiver of the Duchouquettes' First Amendment right to make fair comments about the plaintiff company. We have some counterclaims awaiting under the Texas Deceptive Practices Act but we hope the case will be resolved on a motion to dismiss, avoiding the need to bring such claims.

In several previous cases in which we have represented consumers against companies employing non-disparagement clauses to suppress criticisms, the companies have run abroad and accepted the entry of default judgments which they then defied rather than litigate the legitimacy of their contracts. Prestigious Pets, however, is an on-going Dallas business that cannot simply pull up stakes the way Stacy Makhnevich or Kleargear did. This case, consequently, bears watching because until Congress passes the Consumer Review Freedom Act, it could be our best chance to get one of these clauses declared unenforceable.

We are grateful that three lawyers from the Dallas-based firm of Thompson and Knight (Nicole Williams, Andrew Cookingham and Chris Dachniwsky) have agreed to join us in providing pro bono representation to the Duchouquettes.

Posted by Paul Levy on Thursday, June 02, 2016 at 12:08 PM | [Permalink](#)

Comments



These anti-disparagement clause cases are fascinating. Thank you for your important work in this area.

I hope it won't be necessary, but also consider how Prestigious Pet's arguments about the scope of the contract might plead them right out of court. They alleged in paragraph 2 that the agreement is "regarding the care of the two dogs," and that "the Agreement did not mention fish care." Accordingly, I don't see how the anti-disparagement clause could reach extra-contractual services.

Posted by: Connor Gants | [Friday, June 03, 2016 at 11:20 AM](#)

Verify your Comment

Previewing your Comment

Posted by: |

This is only a preview. Your comment has not yet been posted.

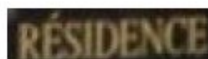
Your comment could not be posted. Error type:

Your comment has been saved. Comments are moderated and will not appear until approved by the author. [Post another comment](#)

The letters and numbers you entered did not match the image. Please try again.

As a final step before posting your comment, enter the letters and numbers you see in the image below. This prevents automated programs from posting comments.

Having trouble reading this image? [View an alternate.](#)



Type the text

[Privacy & Terms](#)

Continue



Fw: Key Delivery

1 message

Prestigious Pets <prestigiouspetsdallas@yahoo.com>
Reply-To: Prestigious Pets <prestigiouspetsdallas@yahoo.com>
To: 11David McWhorter <mcwhorterdpp@gmail.com>

Tue, Sep 27, 2016 at 11:21 AM

Thank you!

All bookings and cancellations must be done though email, or online through your Power Pet Sitter account. Ask us how to access your Power Pet Sitter account. Its pretty cool and super easy!

Prestigious Pets, LLC
[214-912-7799](tel:214-912-7799)

Reg Office Hours:
M-F 9am-4pm
Sat 11am-3pm
Sun Closed

The contents of this e-mail message and any attachments are confidential and are intended solely for addressee. They may not be copied, distributed, forwarded or reproduced. The information may also be legally privileged. This transmission is sent in trust, for the sole purpose of delivery to the intended recipient. If you have received this transmission in error, any use, reproduction or dissemination of this transmission is strictly prohibited. If you are not the intended recipient, please immediately notify the sender by reply e-mail or phone and delete this message and its attachments, if any.

----- Forwarded Message -----

From: Julian Navarro <jjnavarro111@gmail.com>
To: Prestigious Pets <prestigiouspetsdallas@yahoo.com>
Sent: Wednesday, December 2, 2015 4:38 PM
Subject: Re: Key Delivery

Like I previously stated, I am the only legal owner of the cat. The contract does not need to be signed by anyone else. Please send me the keys like you previously said you would.

Thank you,

[EX A-2]

EXHIBIT B

DECLARATION OF DAVID MCWHORTER

1. My name is David McWhorter. I am over 18 years old and am fully competent to make this Declaration. I have personal knowledge of the facts stated herein and they are true and correct.

2. I am employed at Plaintiff Prestigious Pets, LLC. I am personally familiar with Kalle McWhorter. I have known Kalle for about nine years, and we were dating when she founded Prestigious Pets. She remains the sole owner of the company. We were married in 2012.

3. In the afternoon of October 28, 2015, Mr. Duchouquette returned Prestigious Pets call and spoke to our Office Manager. The intention for this call was to find a resolution however was needed, that would have included credits or even a refund. The call was on speaker, and I was also next to the Office Manager listening in on the call. Mr. Duchouquette spoke of several things in the contract that were discussed ahead of time and said they both knew beforehand that they did not like them; but because they were unable to find another pet sitter or service and their trip was coming up they decided not to cancel the services. Although it was discussed on the call that Prestigious Pets never agreed to care for the betta fish, Mr. Duchouquette did not mention during this call anything about his fish being almost killed or potentially harmed.

4. Even before the Duchouquettes' interviews and news stories aired, the company was being damaged by their false and defamatory statements through a decrease in new customer applications ahead of the typically busy holiday season in Fall/Winter 2015. However, after the February 2016 news interviews and articles, the company suffered exponentially. The story went viral, with the help from Defendants especially. Rumors, false reviews, hateful and fake stories, impersonating pages, hateful emails, hateful phone calls to the business and to our personal lines, hateful voicemails, hateful webform submissions, hundreds of other news stories and internet pages sharing misrepresented and fake and negative information, commentary from people who had no knowledge or interaction with the company, commentary from Defendants on online threads where others were exclaiming there negativity, impersonations of the business, and impersonations of Kalle personally have all damaged the company beyond repair.

5. Kalle and I have been ridiculed, and threatened personally with rape and murder several times by people who apparently know our home address. We still cannot consider our home a safe place. Sitters have been mocked or ridiculed by people in the public while out on jobs caring for pets, or even afterwards on their own time. We have even been threatened that the business will not be able to continue under new operation or name because it will be "found" and "called out."

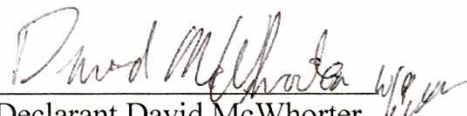
6. Trying to mitigate the damages of the Defendants' statements has been a full time effort. We had to report false reviews, ask news stories to be removed and document everything else that was happening. We filed reports with both the FBI and the Dallas Police Department. Both of us had to seek help from a doctor due the extreme stress. I cannot simply go to the grocery store without anxiety. I cannot simply go outside and mow the lawn. I have to look out the window before leaving home. I am worried to simply go to work at our office and park in the garage if

there is a car behind me on the street, so I have to circle the block before feeling safe. I can't simply come home and park in my garage if a car turns behind me onto our street, so I circle the block before going home. If asked for my name, even for making a doctor's appointment, I am worried to give it. Seeing my mother's tears as she and my father learned about the threats of murder and rape, and hearing her exclaim "You are going to have to change your name" was one of the worst experiences I have ever had. Despite all of the stress and issues that I can say for myself, it has been even more severe and damaging for my wife. I have had to see her go through all of this same anxiety and stress, and its amplified effects on her as well.

7. Plaintiffs' request to Mr. Chan that the defamatory statements be taken down was a privilege action done under the protection of the First Amendment as well as under the auspices of the Texas Defamation Mitigation Act. Mr. Chan was not threatened with a lawsuit nor has any legal action been taken against him.

My date of birth is October 25, 1976 and my address is 3839 McKinney Ave. #724, City of Dallas, 75204, Dallas County, Texas, United States of America. I declare under penalty of perjury that the foregoing is true and correct.

Declared and executed in Dallas County, State of Texas on the November 23, 2016:


Declarant David McWhorter