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

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

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs Prestigious Pets, LLC and Kalle McWhorter file this Response and request denial of Defendants' Motion to Dismiss under the Texas Citizens Participation Act:

## I.
## SUMMARY AND KEY FACTS

This case is about breaches of a non-disparagement clause and false statements that caused substantial harm to a small, local pet-sitting business and its owner. Defendants hope to twist this case into one about what Texas law *should* be based on the laws of other states and a draft bill in Congress. But Defendants' motion to dismiss must be denied under *existing* Texas law because Plaintiffs present in this Response clear and specific evidence to show a prima facie case on each element of their claims: (1) breach of contract regarding a non-disparagement clause; (2) defamation *per se* regarding a private dispute between private figures; and (3) business disparagement that has caused substantial harm to a local, DFW business.

Prestigious Pets, LLC is a small pet sitting company founded in 2009 by Kalle (*nee* Gregory) McWhorter. Kalle has been the sole owner and has had a full time commitment to the business of pet care since day one based on her love of animals. She has been assisted by her husband for the last few years in managing their team of employees and independent pet sitters.

In early October 2015, Prestigious Pets was approached to care for the two dogs of Defendants Robert and Michelle Duchouquette while they were on vacation. On October 2, 2015, the independent pet-sitter of Prestigious Pets conducted a visit to Defendants' home called a "meet and greet." That day, Mr. Duchouquette signed a contract regarding the care of Defendants' two dogs, along with a variety of other provisions regarding how to get visit updates (email daily) and a bar on disparaging the company (the "Agreement"; Ex. A-2). The care was to take place a few weeks later on the days of October 16, 2015 through October 20, 2015. Ex. A-2.

Unbeknownst to Prestigious Pets and Kalle, Defendants demanded at the meet and greet with the pet sitter that the pet-sitter also take care of the Duchouquettes' betta fish. None of the paperwork provided by Defendants indicated they even had a fish, much less that they expected Prestigious Pets to care for it. *See* Ex. A-2. After returning from their vacation, Defendants claimed that the small fish bowl became cloudy because Plaintiffs fed the fish more than instructed. This was despite the fact that the fish was fed per Defendants' instructions (Ex. B, ¶ 6-8), the food packaging says "Pellet-shaped food won't cloud water" and "they're the perfect size to prevent overfeeding" (R.D. Aff., Ex. A), the fish showed no signs of illness or health deterioration (Ex. B, ¶ 8).

Although Defendants admitted that their two dogs were well cared for, Defendants decided to declare publicly that Prestigious Pets and Kalle agreed to care for their betta fish, fed the fish more than Defendants instructed, and—inexplicably—almost killed the fish and potentially harmed the fish (without any evidence to support such a claim). Ex. A-10, A-11, A-16. These statements have been made repeatedly by Defendants, both on Yelp!, birdeye.com, and in at least one national television interview that featured the fish alive and well. Furthermore, Mr. Duchouquette has made numerous negative statements (in television interviews, on social media,

etc.) adopting the reviews and disparaging the company's policies, actions, contractors, and owners in complete disregard for the non-disparagement clause in the Agreement.

As a result of the defamatory and disparaging statements of Defendants, Plaintiffs have seen a dramatic decrease in new business and the loss of current clients. Further, Kalle and her husband have lost their main source of income and have had to deal with numerous rape and death threats, among other forms of harassment including identify theft, impersonations and crank calls, that have come on the heels of Defendants' media campaign. This lawsuit seeks to enforce the common-law, statutory, and contractual rights of Prestigious Pets as a small, local business and Kalle as its owner and recover for the damages caused by Defendants.

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## IV.
## STANDARD FOR ANTI-SLAPP MOTION

Under TEX. CIV. PRAC. & REM. CODE § 27.005(c), upon a showing that a plaintiff's claim relates to the defendant's exercise of free speech rights, the plaintiff must "establish by clear and specific evidence a prima facie case for reach essential element of the claim in question."

A "prima facie case" means evidence "sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted"—*i.e.*, it is "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (citation omitted). "Clear and specific" evidence can take the form of pleadings and affidavits, and it can include circumstantial or indirect evidence. *See id.*

The TCPA, however, "does not impose a higher burden of proof than that required of the plaintiff at trial." *Id.* at 591. Thus, Plaintiffs need only present clear and specific evidence to carry their burden to show a prima facie case on each element of their claims, without having to overcome any rebuttal or contradictory evidence presented by Defendants, if any, related to those elements.

## V.
## BREACH OF CONTRACT REGARDING NON-DISPARAGEMENT CLAUSE

Prestigious Pets has asserted a breach of contract claim against Defendant Robert Duchouquette regarding his violation of the parties' non-disparagement clause. This claim has only been asserted against Mr. Duchouquette because he is the only signatory.

### A. Plaintiff's Prima Facie Case for Breach of Contract

**"**The elements for breach of contract are (1) the existence of a valid contract, (2) the plaintiff's performance or tendered performance, (3) the defendant's breach of the contract, and (4) damages as a result of the breach." *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 882 (Tex. App.—Dallas 2007, no pet.). In this case, the satisfaction of these

elements is not in dispute. Prestigious Pets and Robert Duchouquette both executed the contract attached as Exhibit A-2. Under that contract, Mr. Duchouquette agreed not to make negative comments about Prestigious Pets and not to disparage Prestigious Pets. *Id.* at p. 2. The non-disparagement provision was in the same legible style, size, and font as the remainder of the Agreement, and it was immediately above the signature line on the second page of the two-page contract:

> NON-DISPARAGEMENT / INJUNCTION In an effort to ensure fair and honest public feedback, and to prevent the publishing of false or libelous content in any form, your acceptance of this agreement prohibits you from taking any action that negatively impacts Prestigious Pets, LLC, its reputation, products, services, management, employees or independent contractors. Prestigious Pets, LLC will make every reasonable attempt to resolve or assist in any dispute or disagreement in services. Any violation of this clause is to be determined by Prestigious Pets LLC in its sole discretion. […]

*Id.* Prestigious Pet performed or tendered performance for all of its duties. Ex. A, ¶ 21.

Mr. Duchouquette breached the contract by making disparaging comments about Prestigious Pets, its policies, its conduct, its employees, and its owner (Kalle), which include:

- During a Fox News television interview that was rebroadcast online:
    - Robert accused Plaintiffs of feeding the fish more than he instructed: "Well, with regard to the fish, um, it was overfed." Ex. A, ¶ 15; Ex. A-10.
    - Robert criticized Prestigious Pets' policies and handling of their alleged fish issues: "[T]heir same policy that didn't allow us to have the contact information of the person watching our pets in our house um.. it handcuffed them as well because they were not able to reach out to us and say 'hey we forgot how much we were supposed to feed the fish.' Umm… And they couldn't do that. But I think the broader the uh, their policy of not allowing us to have the contact information and uh also we were not allowed to get an update on our dogs unless we sent them and email each and every day uh to get the status of the dogs." Ex. A, ¶ 15; Ex. A-10.
- Numerous Facebook Posts criticizing Prestigious Pets, accusing it of bad policies, bad operations, and forgery of reviews:

    - 2/17/2016: “Had the owner seemed genuinely concerned with our feedback, we would probably not be here today, this is a sad and situation on both sides.” Ex. A-13.
    - 2/17/2016: "Speaking of Yelp reviews, did you notice the other thread? Someone that knows them is claiming they forged many reviews, and others were family, friends and employees. That person posted screen shots, you might want to have a look." Ex. A-13.

- During the CBS television interview, Robert accused Prestigious Pets of failing to properly respond to and handle the criticisms he and Michelle made in their Yelp! review: “I was surprised. Yeah that the business owner took it that far. […] -- “Everything we said in there would help him if he’d listen to it” in reference to a Prestigious Pets employee.” Ex. A-10; Ex. A, ¶ 15.
- Robert adopted the Yelp! review that alleged feeding the fish more than instructed, almost killing it, and potentially harming it:
    - CBS TV Interview--“Everything ***we*** said in there would help him if he’d listen to it” in reference to a Prestigious Pets employee.” Ex. A-10; Ex. A, ¶ 15. (emphasis supplied); and
    - Facebook Post on 2/17/2016: “I have a Yelp ID and could have also written a negative review also but did not want to do any more than necessary to get ***our opinions*** out there which my wife did." Ex. A-13.
- In comments to a web article on DailyMail.co.uk, Robert posted numerous comments criticizing the company for suing him and allegedly not providing policies upfront: “The Beta [sic] has little to do with the issues. This [is] about someone being sued for expressing their opinion about policies that were not provided upfront or on the web page and then turning around and saying they are the little guy….” A true and correct copy of the article and comments are attached hereto as Exhibit A-11.[1]
- Robert’s attorney and agent, Paul Alan Levy, also made disparaging comments attributable to Robert about Prestigious Pets’ policies, operations, and staff with regard to the underlying events and the lawsuit at issue via Mr. Levy’s personal blog and personal Twitter account, along with having his organization Public Citizen do the same in a blog post and Facebook post. Ex. A-9.

This evidence of disparaging statements satisfies Prestigious Pets’ burden to show clear and convincing evidence of a prima facie case on this element.

Further, Prestigious Pets has suffered actual economic damages as a result of Mr. Duchouquette’s disparaging comments and harmful conduct, including a significant drop in new

[1] In the immediate following comment (later deleted), “Michelle” wrote “Best part is their business will suffer more for making it so well known that the clause exists.” Ex. A-11.

customer registrations, loss of existing customers, and corresponding loss of gross revenue and net profits. Ex. A, ¶ 19-20.

## B. The Non-Disparagement Clause is Not Unconscionable

Defendants raise two theories for the defense of unconscionability: (1) traditional unconscionability of contract as set forth by the Texas Supreme Court; and (2) a novel principle that requires knowing, voluntary, and intelligent waiver of First Amendment rights. On both, Defendants bear the burden of proof, yet Defendants prevail on neither.

### 1. The Clause Language, Circumstances of Execution, and Sophistication of Mr. Duchouquette Show No Unconscionability

"A contract is unenforceable if, 'given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.'" *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348-49 (Tex. 2008) (citations omitted). Unconscionability is a multi-factor analysis regarding whether a contract is "grossly one-sided" that aims "to prevent oppression and unfair surprise." *Id.* Said another way, a contract is only unconscionable where it is "grossly unfair" and is one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 228 (Tex. 2014).[2] "The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 892 (Tex. 2010).

In this case, the non-disparagement clause is not unconscionable. **First**, Defendants fail to carry their burden because they to no evidence to support unconscionability. *See* Defs' MTD,

[2] *Quoting Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100, 2 Ves. Sr. 125, 155 (1751); *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 896 (Tex. 1991) (Mauzy, J. concurring and quoting *Janssen*). Contextually, it is important to note that the "[t]he Texas Constitution protects the freedom of contract." *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768-71 (Tex. 2011) (citing, e.g., TEX. CONST. art. I, § 16).

p. 24. **Second**, Mr. Duchouquette has a deep commercial and legal-related background that renders absurd his claim that a two-page pet-sitting contract unfairly surprised him:

- Mr. Duchouquette is the owner of an information technology services company called SBS Security, which focuses on "regulatory compliance." Ex. A-7; Ex. 8. For fifteen years, he has worked at SBS Security (f/k/a "Secure Banking Solutions, LLC) regarding government audits ("FDIC/OCC audits"). Ex. A-7.
- Previously, Mr. Duchouquette had over three years of experience as a healthcare law technology expert regarding "HIPAA assessment methodologies" and "reducing risks to acceptable levels for GLBA compliance…." Ex. A-7.

**Third**, a review of the entire record submitted by Defendants fails to show Mr. Duchouquette was oppressed, unfairly surprised, or that the non-disparagement clause was a provision to which only a delusional man would agree. Rather, Amanda the pet sitter specifically pointed out to Mr. Duchouquette the non-disparagement provision by reading the title of that paragraph as part of her explanation of the entire Agreement. Ex. B, ¶ 4. Further, Mr. Duchouquette's signature is immediately under the non-disparagement provision. Ex. A-2. Given these facts and that Defendants point to no cases in which a Texas court ruled a non-disparagement clause was unconscionable, the Court must deny the motion.[3]

### 2. Mr. Duchouquette Knowingly, Voluntarily, and Intelligently Agreed to the Non-Disparagement Clause

At the outset, this Court should not adopt Defendants' novel defense because that theory has not been adopted by the Dallas Court of Appeals and the Texas Supreme Court. Defendants erroneously rely on a heightened standard for enforcing contractual restraints of free speech only adopted by two Texas appellate courts.[4] In *Brammer*, KB Home signed a non-disparagement

[3] Defendants' motion points to the attorneys' fee provision of the Agreement as evidence that the non-disparagement clause is unconscionable, but Defendants provide no basis for imputing the alleged one-sidedness of a provision against another provision.

[4] *See Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101 (Tex. App.—Austin 2003, no pet.) (injunction); *Walls v. Klein*, 2013 Tex. App. LEXIS 2462, at *7-8 (Tex. App.—San Antonio 2013, no pet.) (injunction; found that knowing, voluntary, and intelligent waiver occurred).

agreement with Brammer and obtained an injunction. The Austin Court of Appeals, citing a Ninth Circuit Court of Appeals opinion, held that the prior restraint on speech had to be supported with evidence that Brammer waived his First Amendment rights knowingly, voluntarily, and intelligently. Because the Brammers never testified at the hearing and KB home presented no evidence of waiver, the appellate court would not imply a waiver and thus dissolved the injunction.

In this case, Defendants provide no basis for this Court to now adopt a legal principle never embraced by the Dallas Court of Appeals or Texas Supreme Court, particularly one with such little support and that is based on out-of-state precedent. Even the Austin Court of Appeals stepped-back on *Brammer* when it later held in *Taylor v. DeRosa* that a prior restraint injunction of First Amendment rights "merely serves to enforce a bargained-for provision of the parties' settlement contract—the non-disparagement clause."[5] Accordingly, this defense cannot support granting of Defendants' motion to dismiss.

But even if this Court were to adopt the *Brammer* waiver theory, Prestigious Pets still prevails because Mr. Duchouquette knowingly, voluntarily, and intelligently agreed to the non-disparagement clause. Both Defendants were present when Amanda the pet-sitter handed over the Agreement and while she read the headings and explained the provisions. Ex. B, ¶ 3-5, 7. There is no evidence that the pet-sitter coerced or unduly influenced Mr. Duchouquette by signing the agreement, nor is there evidence of fraud or other circumstances that would even suggest duress. Rather, as in *Taylor*, the non-disparagement clause between these parties should be enforced so that Mr. Duchouquette complies with the terms of his bargained-for agreement.

[5] *Taylor v. DeRosa*, 2010 Tex. App. LEXIS 2199, at *7-8 (Tex. App.—Austin 2010) ("The effect of the injunction here is simply to force Taylor to comply with the terms of a bargained-for agreement that provided him with substantial monetary compensation. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 671, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991) ('The parties themselves...determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.'").

It is irrelevant (and absurd) that Mr. Duchouquette, a business owner, now claims he did not read the non-disparagement provision. "Under the general rule, every person who has the capacity to enter into a contract is held to know what words were used in the contract, to know their meaning, and to understand their legal effect. […] The parties to a contract have an obligation to protect themselves by reading what they sign." (citation omitted). *In re Green Tree Servicing LLC*, 275 S.W.3d 592, 599 (Tex. App.—Texarkana 2008, no pet.) ("The failure to read a contract does not ordinarily void a contract absent fraud or misrepresentations.").[6] There are no allegations of fraud or misrepresentation by Defendants.

**C. Privilege(s)**

It is unclear from Defendants' motion whether they assert privilege as a defense to Prestigious Pets' breach of contract claim. Regardless, this fails as a matter of law. First, Defendants haven't pleaded qualified privilege as a defense of this claim but only as against the defamation and business disparagement claims. *See* Defs' Orig. Answer, ¶ 13. Second, Defendants have not pleaded the "absolute privilege" (aka "judicial communications privilege") at all. *See, e.g.*, *Jenevein v. Friedman*, 111 S.W.3d 743, 745-748 (Tex. App.—Dallas 2003, no pet.) (discussing the pleaded defense of "absolute" privilege regarding judicial communications, with no mention of any related "qualified" privilege).

Furthermore, Texas law holds that privileges only apply to *defamation* claims. *See, e.g.*, *Shell Oil Co. v. Writt*, 464 S.W.3d 650, 654 (Tex. 2015) ("Texas recognizes two classes of privileges applicable to defamation suits: absolute privilege and conditional or qualified privilege."). Accordingly, there is no basis for dismissal of the breach of contract claim on any "privilege" basis.

[6] *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002) ("The only cases under Texas law in which an agreement was found procedurally unconscionable involve situations in which one of the parties appears to have been incapable of understanding the agreement.").

## VI.
## DEFAMATION CLAIMS

Plaintiffs have each alleged defamation claims against both Defendants. As shown below, each Plaintiff meets the prima facie burden with clear and specific evidence. To maintain a defamation cause of action, a plaintiff must prove that the defendant (1) published a statement, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault (negligence or actual malice), and (4) damages (if not defamation *per se*). *See, e.g.*, *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

### A. Published a Statement of Fact

While a statement must assert an objectively verifiable fact, "a statement couched as an opinion may be actionable if it expressly or implicitly asserts facts that can be objectively verified." *Tatum v. Dall. Morning News, Inc.*, No. 05-14-01017-CV, 2015 Tex. App. LEXIS 13067, at *9 (Tex. App.—Dallas 2015) (citing *Avila v. Larrea*, 394 S.W.3d 646, 658 (Tex. App.—Dallas 2012, pet. denied)). The publication must be construed "as a whole in light of the surrounding circumstances and based on how a person of ordinary intelligence would perceive it." *Id.* "The hypothetical 'person of ordinary intelligence' is one who exercises care and prudence, but not omniscience, when evaluating an allegedly defamatory communication." *Id.* (citing *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004)).

Context of the statement is also a factor. For example, in *Tatum*, where a publication's tone was "generally sober" and purported "to be grounded in factual details," there was no "extravagant exaggeration" that would suggest rhetorical, hyperbolic opinion. *Id.*

In this case, Defendants have alleged that Plaintiffs agreed to care for Defendants' fish, fed the fish more than instructed, almost killed it, and potentially harmed it. In the context of which they were repeatedly provided, an ordinary person would view a pet owner's evaluation of

its animal's health status—particularly when conveyed as being so negative as "almost killed" or "potentially harmed"—as statements of fact based on viewing the animal in question.

Defendants disingenuously couch their statements as mere opinions when their context and meaning conveyed them as affirmative, objectively verifiable facts that Plaintiffs fed the pet more than was healthy and so much that its health was threatened and it appeared near death. *See Avila*, 394 S.W.3d at 658. Particularly in the context of the reviews and media statements, Defendants have presented these alleged "opinions" as fact. Defendants have even done so in their brief, arguing that the allegations are substantially true (and to be true, facts must be capable of being objectively verified).

**B. Defamatory Nature of Statements**

Defendants' statements at issue were against both Plaintiffs and were defamatory *per se*. Even if the Court relies on defamation *per quod*, however, Plaintiffs prevail.

**1. Defamatory Toward Prestigious Pets, LLC and Kalle McWhorter (owner of Prestigious Pets, LLC)**

Defendants do not challenge the statements are about Prestigious Pets, but they do argue that Kalle cannot individually sue as she was not specifically named in the defamatory statements. This argument is without merit. A defamation plaintiff need not be specifically named in the defamatory communication, and "need not prove that the defendant intended to refer to him." *Klentzman v. Brady*, 456 S.W.3d 239, 254 (Tex. App.—Houston [1st Dist.] 2014). Rather, a "defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer." *Id.*

"It is not necessary for the individual referred to be named if those who knew and were acquainted with her understood from reading that it referred to her." *Backes v. Misko*, 486 S.W.3d 7, 24-25 (Tex. App.—Dallas 2015, pet. denied). It is enough that the evidence supports a

"reasonable inference that some people" who read the statement knew it was about the plaintiff. *Tatum*, 2015 Tex. App. LEXIS 13067, at *16. Thus, in *Backes* and *Tatum*, affidavits showing that some people understood the defamatory statements to be about individuals not specifically named in the statements were enough to carry the plaintiffs' burden.

In this case, Plaintiffs submit an individual who read the defamatory statements and understood them to refer to and be about Kalle as the owner of Prestigious Pets. Ex. D. As in *Backes* and *Tatum*, this is enough to show the statements are of and concerning Mrs. McWhorter. Accordingly, Plaintiffs have carried their prima facie burden on this issue.

Furthermore, Texas law allows an individual business owner to file suit both in her own capacity as an individual and through the business entity. Defamation is one "of the owner of the business and not of the business itself," and that the damages are "of the owner, whether the owner be an individual, partnership or a corporation." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 156 n.81 (Tex. 2014). The Texas Supreme Court allowed an individual business owner and the company itself to both sue for defamation. *See, e.g.*, *Gen. Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712-13 (Tex. 1972) ("The proof further shows that Howard was known by the bank president to be the president of Howard Motor Company, the owner of its capital stock and the person responsible for its actions."). *Accord Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013) ("In *Howard*, Howard Motor Company, Inc. and its owner, Hugh Howard, both sued General Motors Acceptance Corporation (GMAC), alleging it had libeled them in a letter to Howard's bank.") (*citing Howard*, 487 S.W.2d at 709-10).

**2. Defamation *Per Se***

Defendants' defamatory statements are defamatory *per se* for two reasons: they accuse Plaintiffs of a crime; and they injure Plaintiffs' reputations in their business, profession, or occupation. *See Lipsky*, 460 S.W.3d at 596.

### *a. Accusation of Crime: Animal Cruelty (TEX. PEN. CODE § 42.092)*

The accusation of a crime merely must be "made by reasonable implication or insinuation" or "consists of a statement of facts which naturally and presumably would be understood as a charge of crime by those who hear it, or if the language was calculated to induce those who heard it to understand that the person to whom it relates is guilty of a crime." *Mitre v. Brooks Fashion Stores, Inc.*, 840 S.W.2d 612, 619 (Tex. App.—Corpus Christi 1992, writ denied).[7]

The Fort Worth Court of Appeals in 2015 found defamation *per se* where a wildlife conservationist was accused of allegedly harming animals entrusted to her care. *Cummins v. Bat World Sanctuary*, No. 02-12-00285-CV, 2015 Tex. App. LEXIS 3472, at *37 n. 85 (Tex. App.—Fort Worth 2015). In that case, the court found that accusations regarding mistreatment of animals in the conservationist's care that led to health issues and death implied animal neglect in violation of Texas Penal Code § 42.092, which makes it a crime to fail "unreasonably to provide necessary…care…for an animal in the person's custody." *Id.* at *34-35. Although the defendant claimed her allegations of animal neglect were mere opinion, the court found them defamatory *per se* because they were set out as affirmative facts. *Id.*[8]

In this case, like in *Cummins*, Defendants falsely accused Plaintiffs of the overfeeding, almost killing, and potentially harming their pet fish, all of which are crimes under TEX. PENAL CODE § 42.092 as animal cruelty. Under § 42.092, it is a crime when one "fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person's custody" or "without

[7] *Abrogated on other grounds by Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (citations omitted).

[8] In *Mitre*, defamation *per se* existed where two individuals were merely listed as "suspects" on a flyer posted throughout a mall when read together with a warning about counterfeit $100 bills because a crime was reasonably implied. 840 S.W.2d at 619. In another case, statements were defamatory *per se* criminal accusations when "an article's gist was that appellee had lied to HHSC to receive SNAP benefits of 'a cool $10,276' to which she was not entitled under the law[.]"*See D Magazine Partners, L.P. v. Rosenthal*, 475 S.W.3d 470, 484 (Tex. App.—Dallas 2015) (concluding this satisfied the TCPA's requirement of "a prima facie case by clear and specific evidence that the article's gist was defamatory because it falsely accused her of committing a crime").

the owner's effective consent, causes bodily injury to an animal." Here, Defendants—as the owners of the fish at issue—repeatedly accused Plaintiffs of harming or injuring their pet fish, which reasonably implied or insinuated that Plaintiffs had run afoul of § 42.092. Accordingly, the statements are defamatory *per se*.

***b. Injurious to Profession, Business, Occupation***

"Some statements are so obviously injurious to a plaintiff's reputation that they require no proof of injury to make them actionable, and general damages are presumed; such statements are considered defamatory per se." *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 Tex. App. LEXIS 3337, at *17 (Tex. App.—Austin 2015) (citations omitted). Statements that are defamatory *per se* include those that "injures a person in his office, profession, or occupation…" *Id.* "With regard to a statement concerning a person's profession or occupation, the proper inquiry is whether a defamatory statement accuses a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of the profession." *Id.* (quotation omitted).

In *Cummins*, the defendant's statements against a wildlife conservationist because the accusation of animal neglect ascribed to plaintiff conduct, characteristics, or a condition that would adversely affect plaintiff's fitness for the proper conduct of her lawful profession. *Cummins*, 2015 Tex. App. LEXIS 3472, at *36. Although the defendant claimed her allegations of animal neglect were mere opinion, the court found them defamatory per se because defendant set out her opinion as affirmative facts that animal neglect had occurred. *Id.*

In this case, like in *Cummins*, Plaintiffs are in the business of caring for animals. Thus, the accusations that Plaintiffs agreed to care for Defendants' fish but then overfed it in spite of their instructions, almost killed it, and potentially harmed it are direct attacks on Plaintiffs' fitness to conduct their business. Although Defendants try to couch their statements as opinions, Defendants have repeatedly asserted the accusations in numerous news mediums and online as

facts based on their own personal observations. For these reasons, the defamatory statements are also defamation *per se* as injurious to Plaintiffs' office, profession, or occupation.

#### 3. Defamation *Per Quod*

Even if the Court does not find the statements are defamation *per se*, Plaintiffs prevail because the statements are defamation *per quod*. There is no legitimate dispute that defamation *per quod* occurred via Defendants' accusations—that Plaintiffs agreed to care for Defendants' fish, fed it more than instructed, almost killed it, and potentially harmed it. Defamation *per quod* is merely defamation that is not actionable as defamation *per se*. *Lipsky*, 460 S.W.3d at 596. Thus, statements are defamation *per quod* "if it tends to (i) injure the subject's reputation, (ii) expose him to public hatred, contempt, ridicule, or financial injury, or (iii) impeach his honesty, integrity, or virtue." *Tatum*, 2015 Tex. App. LEXIS 13067, at *16 (finding defamation *per quod* based only on statements that "reflect a theme of alleged dishonesty"). Thus, there is clear and convincing evidence of defamation *per quod*, and, as shown below, Plaintiffs prevail even if required to show actual damages.

### C. The Requisite Degree of Fault is Negligence Because the Parties are all Private Figures, and that Fault is Shown by Clear and Convincing Evidence.

Defamation requires a showing of fault: for private figures, negligence; for general public figures and limited-purpose public figures, actual malice. *Lipsky*, 460 S.W.3d at 593. Defendants erroneously assert that Plaintiffs are limited-purpose public figures. To determine whether an individual is a limited-purpose public figure, Texas 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.

### 1. This is a Private Dispute Between Private Figures; Plaintiffs Cannot Be Made Involuntary Public Figures By Defendants' Media Campaigns

The only whiff of public controversy surrounding this lawsuit was sparked and fanned by Defendants themselves through their ongoing media campaign. Texas law, however, bars the creation of involuntary public figures for the analysis of defamation claims.

#### *a. The parties' dispute was not a public controversy*

To determine whether a public controversy existed and its scope, a court must examine "whether persons actually were discussing some specific question." *Klentzman*, 312 S.W.3d at 905 (*quoting McLemore*, 978 S.W.2d at 572). A general concern or interest of the public will not suffice, and a public controversy is more than simply a controversy of interest to the public. *Id.* (citing *Time Inc. v. Firestone*, 424 U.S. 448, 454 (1976)). "A court may also look at whether 'the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.'" *Id.* (*citing McLemore*, 978 S.W.2d at 572).

"In short, there must first be a controversy before it can be a public one" and "its resolution must affect people beyond its immediate participants." *Tatum*, 2015 Tex. App. LEXIS 13067, at *50.[9] In *Tatum*, the Dallas Court of Appeals found no public controversy as to an article about a suicide even though there was evidence of some people discussing it before the article was published because that was insufficient, and there was no evidence the outcome of the alleged controversy affected anyone but the victim's family. *Id.*

In this case, the public was not discussing the dispute between Plaintiffs and Defendants until the Defendants contacted CBS Channel 11's investigative reporter in February 2016. *See* Ex. C-1 (reporter says she was contacted by Duchouquettes). While others besides the immediate

[9] *See also Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.) ("A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.").

participants were aware of the defamatory statements given they were published online, the publication did not affect anyone beyond the defamed Plaintiffs. While this dispute is of vital importance to the parties, nothing suggests the general public had any concern about it. Following Defendants' media pleas, the press did cover the issues, report on public comment, and uncover facts and theories—but this evidence, as a matter of law, cannot be used to make Plaintiffs' involuntarily public figures.

Defendants' attempt to tag the parties' private dispute as a public controversy related to non-disparagement clauses is without merit considering the Yelp! reviews at issue did not even mention the non-disparagement clause. It was not until Defendants did live TV interviews that the non-disparagement aspect of the dispute became a subject of widespread public discussion.

***b. Plaintiffs' role in any existing public controversy was trivial or tangential before Defendants' media campaigns***

Defendants erroneously manufacture a role in the separate public controversy of non-disparagement clauses based on a single responsive email declining to be interviewed by media. Rather, Plaintiffs had no more than a trivial or tangential role in any public controversy.

Whether a role in a controversy is trivial or tangential is based on three factors: whether the plaintiff (1) actively sought publicity surrounding the controversy; (2) had access to the media; and (3) voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation. *Neyland*, 2015 Tex. App. LEXIS 3337, at *19-20. A private person does not become a public figure merely because he is discussed in the media. *Id.* A defamation defendant "must show more than newsworthiness to justify application of the demanding burden of [actual malice]." *Id.*

Further, a person does not become a public figure merely because his actions become a

matter of controversy as a result of the defendant's actions. *Klentzman*, 312 S.W.3d at 905.[10] Rather, the role is more than trivial or tangential only when the plaintiff publishes its views and voluntarily enters into a submarket of public ideas and opinions[11] or he "thrust himself into the vortex of the public issue ... and engaged the public's attention in an attempt to influence its outcome." *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 84 (Tex. App.—Fort Worth 1982, writ. ref'd n.r.e.).[12]

In this case, Plaintiffs did not publish their views at all, did not voluntarily submit their views to any public submarket of ideas and opinions, thrust themselves into the public issue, or engage the public's attention to influence the controversy over non-disparagement clauses. Ex. A, ¶ 12; Ex. C, ¶ 9. Rather, Plaintiff's employee only made one short, general response in an email response to a reporter asking for an interview (in which he declined multiple requests for interview), which falls well short of "publishing" Plaintiffs' views or thrusting Plaintiffs into a public controversy.

***c. The defamation is not germane to any alleged public controversy regarding non-disparagement clauses***

Even if a public controversy existed regarding non-disparagement clauses and even if Plaintiffs played more than a trivial role in that controversy, the defamation at issue is not germane to that controversy. The defamatory statements at issue here are not related to or about the non-disparagement clause but rather the allegations that Plaintiffs agreed to care for Defendants' pet fish, fed the fish more than instructed, almost killed the fish, and potentially harmed the fish. *See* Pltfs' Orig. Pet., ¶ 20-21. Those statements do not mention the non-

[10] *Citing Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (noting that the subject of plaintiff's writings became matter of controversy only as consequence of defendant's action and proclaiming that, "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.").
[11] *Klentzman*, 312 S.W.3d at 905 (citing *McLemore*, 978 S.W.2d at 572-73).
[12] *Lacombe v. San Antonio Express News*, No. 04–99–00426–CV, 2000 Tex. App. LEXIS 556, at *7–8, 2000 WL 84904 (Tex. App.—San Antonio Jan. 26, 2000, pet. denied) (mem.op.).

disparagement clause; and in fact, the Yelp! reviews at issue do not mention the non-disparagement clause at all. *See* M. Duchouquette Aff. at ¶ 7. Thus, this element of limited-purpose public figures fails, and this Court must conclude Plaintiffs are private figures.

***d. Plaintiffs cannot be made public figures involuntarily***

"[T]he allegedly defamatory statement cannot be what brought the plaintiff into the public sphere…." *Neely v. Wilson*, 418 S.W.3d 52, 71 (Tex. 2013). The Texas Supreme Court acknowledged that neither the United States Supreme Court nor this Court has found circumstances in which a person involuntarily became a limited-purpose public figure." *Id.* (citations omitted). In *Neely*, the court declined to find "the exceedingly rare case in which a person has become a limited-purpose public figure against his will." *Id.* In this case, there is no basis in fact or law to conclude that this Court should do what neither the Texas Supreme Court or United States Supreme Court has done and find that Plaintiffs are involuntary public figures.

**2. Defendants Acted with Negligence**

Negligence occurs in defamation when a defendant should have known of the statement's falsity, but failed to use reasonable care to ascertain the truth of the statement's gist. *Tatum*, 2015 Tex. App. LEXIS 13067, at *9 (citing *Neely*, 418 S.W.3d at 72). Said another way, "[n]egligent conduct is determined by asking 'whether the defendant acted reasonably in checking the truth or falsity or defamatory character of the communication before publishing it.'" *Rosenthal*, 475 S.W.3d at 485-86.

"The following factors may be considered in determining the thoroughness of the check that a reasonable person would make before publishing a statement: (1) the time element; (2) the nature of the interests the defendant was seeking to promote by publishing the communication; and (3) the extent of the damage to the plaintiff's reputation, or the injury to his sensibilities that would be produced if the communication proved to be false." *Rosenthal*, 475 S.W.3d at 486. For

example, negligence was found where a reporter and his staff "did nothing to check the credibility" of the source of their statements and "they did not confirm the truth" of those statements. *Id.* (finding prima facie case of negligence).

Here, the evidence shows the statements were made negligently. The pet-sitter confirms the fish showed no signs of health deterioration despite the slight cloudiness. Ex. B, ¶ 8. And Defendants, despite admitting that they have prior experience with a prior betta fish showing "signs of illness," never once communicated to Plaintiffs in their numerous communications that the betta fish at issue had showed any signs of illness. *See* M. Duchouquette Aff., ¶ 5; Ex. A, ¶ 7; Ex. C, ¶ 6; Ex. A-4. Further, on Defendants' communications with Plaintiffs and their TV interviews, Defendants make no mention of having checked with any fish or pet care professionals about the actual impact of the slight cloudiness in the tank water nor the cause, nor do they mention ever confirming their theories that the fish had been almost killed or potentially harmed. *See, e.g.,* x. A-10; Ex. A-11; Ex. A-16.

In fact, Defendants were negligent in alleging that Plaintiffs agreed to even care for their fish or had any duty to care for the fish given the Agreement was only for the care of two dogs. Ex. A-2. By failing to check their information or confirm the truth of their accusations, particularly given the fish showed no signs of health deterioration (Ex. B, ¶ 8), Defendants acted negligently with respect to their accusations that Plaintiffs agreed to care for the fish, fed the fish more than instructed, almost killed the fish, and potentially harmed the fish.

**3. Defendants Acted with Actual Malice**

Plaintiffs prevail in this case even if required to prove actual malice. "Actual malice" in this context means the statement was made with knowledge of its falsity or with reckless disregard for its truth. *Lipsky*, 460 S.W.3d at 593. "Reckless disregard" means the defendant entertained serious doubts as to the truth of his publication or had a high degree of awareness of

the probable falsity of the information. *Isaacks*, 146 S.W.3d at 158.

Actual malice can be proved through "objective evidence about the circumstances surrounding the alleged defamatory words" and "circumstantial evidence of the defendant's state of mind." *Alaniz v. Hoyt*, 105 S.W.3d 330, 347 (Tex. App.—Corpus Christi 2003) (citing *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000)). Even an "omission of critical facts that distorts the entire character of a communication raises an inference that the defendant acted with actual malice. *Id.* "[P]urposeful avoidance of the truth" and "[i]nherently improbable assertions and statements made on information that is obviously dubious may show actual malice." *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002) (*withdrawn on other grounds*).

For example, the Dallas Court of Appeals in *Tatum* found evidence of actual malice through circumstances surrounding a reporter's publication: he misrepresented his investigation and sources; he had some motive not to probe in the truth of his sources; he did not investigate his statements with his usual thoroughness; and he could have investigated further to learn the true facts. *Tatum*, 2015 Tex. App. LEXIS 13067, at *53-54. Similarly, in *Cummins*, the Fort Worth Court of Appeals found actual malice where the defendant posted numerous derogatory statements about the plaintiff. *Cummins*, 2015 Tex. App. LEXIS 3472 at *37. The appellate court concluded this evidence showed a "specific intent to cause substantial injury or harm" and an intent to ruin the plaintiff, her credibility, and her standing in her profession. *Id.*

In this case, Plaintiffs have clear and specific evidence of actual malice based on the objective evidence about the circumstances surrounding the defamation and circumstantial evidence of Defendants' states of mind. When emailing during their vacation after seeing the slight cloudiness of the tank on their webcam, Defendants made no mention that they were concerned that the fish had been almost killed or potentially harmed. Ex. A-3. The pet-sitter

confirmed the fish was properly fed per Defendants' instructions and that the fish showed no signs of deteriorating health. Ex. B, ¶ 8; Ex. A-10. In the subsequent communications with Prestigious Pets after Defendants returned home, Defendants made no mention that they thought their fish had been almost killed or potentially harmed. Ex. A-4; Ex. A, ¶ 7; Ex. C, ¶ 6. At no point during their numerous media appearances did Defendants assert that they actually believed the fish was almost killed or potentially harmed. *See* Ex. A-10, A-11, A-16. In contrast, the evidence shows reckless disregard for the truth given that Defendants claim to have had prior experience with a prior betta fish showing "signs of illness" yet they did not mention in any of their emails, media appearances, or affidavits the current betta fish at issue showing any such signs. *See* M. Duchouquette Aff., ¶ 5 and *id.*

Even the pictures of the fish tank are evidence of actual malice because they show the unreasonable mental leap made by Defendants that the slight cloudiness almost killed the fish or potentially harmed the fish. Defendants knew at the time they posted their Yelp! review and months later were on national television that there was no evidence the fish was almost killed or potentially harmed given the fish was still very much alive (Ex. A-10; Ex. A-11) and that the fish food itself was specifically formulated to "prevent overfeeding" and is "pellet-shaped food [that] won't cloud the water." *See* R. Duchouquette Aff. at Ex. A.

Rather, Defendants' assertions were made after a purposeful avoidance of investigation into the actual health of their pet. And the fact that Defendants falsely allege that Plaintiffs agreed to care for their fish (when the contract was clearly only for two dogs), demonstrates the ill will and ill intent of Defendants. Further, Defendants themselves admit the care of the fish was not meaningful to them: in response to a comment on the DailyNews.co.uk article criticizing Defendants for being "petty people mak[ing] big issues out of nothing," Mr. Duchouquette

responded "The Beta [sic] has little to do with the issues." Ex. A-11. Rather, Mr. Duchouquette said that this was about their displeasure regarding company policies and "then turning around and saying they are the little guy....". *Id.*

Additionally, like in *Cummins*, the repetition and pervasiveness of Defendants' media statements are evidence of an intent to harm Plaintiffs. The public was not discussing the parties' dispute until Defendants contacted CBS News and, within a matter of days, appeared on multiple TV news interviews and, as a result, in countless, global online news articles. *See* Ex. A, ¶ 14. For all these reasons, Plaintiffs have shown clear and specific evidence sufficient to carry their burden as to a prima facie presentation on this element.

**D. Plaintiffs Sustained Damages**

Because Plaintiffs have suffered defamation *per se* as shown above, they need not show any damages. However, Plaintiffs show a prima facie case of both "general damages (which are non-economic damages such as for loss of reputation or mental anguish) and special damages (which are economic damages such as for lost income)." *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013). As a result of Defendants' defamatory statements, Plaintiffs have suffered both general and special damages. Plaintiffs have seen a dramatic drop in new customer applications and a significantly higher than usual turnover of existing clients, both of which have resulted in a large reduction in gross revenues and net profits (and for Kalle individually, a loss of nearly all her income). Ex. A, ¶ 19-20. Furthermore, Plaintiffs have suffered loss of reputation due to the defamatory statements, and Kalle has suffered extensive mental anguish in the face of an avalanche of negativity arising from the defamatory statements, including threats of death, arson,

and rape. Ex. A, ¶ 19; Ex. A-12. Accordingly, Plaintiffs have satisfied their burden at this stage of showing a prima facie case of damages.[13]

**E. Affirmative Defense of Truth; Falsity**

Defendants have failed to carry their burden of proving truth as an affirmative defense. *See Randall's Food Mkts. v. Johnson*, 891 S.W.2d 640, 646-47 (Tex. 1995).[14] The truth defense "involves considering whether the alleged defamatory statement was more damaging to the plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been"—*i.e.*, the "gist" of the statement. *Neely*, 418 S.W.3d at 62. A publication's gist is its main point, material part, or essence, as perceived by a reasonable person. *Rosenthal*, 2015 Tex. App. LEXIS 9173, at *7.

Defendants' motion ignores the accusations of "almost killed" and "potentially harmed" to focus only on "overfed." Defendants' interpretation of the gist as limited to overfeeding is without merit. The "gist" of the Yelp! reviews was that Plaintiffs agreed to care for a pet fish, fed the fish more than instructed, and that led to ***almost killing or potentially harming the fish***. Defendants' three affidavits provide no evidence to support these accusations.

Even if Plaintiffs bear the burden of showing falsity, a prima facie case has been shown. According to a betta fish expert, a reasonable person would not then jump to the conclusion that the slight cloudiness almost killed or potentially harmed the fish's health under these circumstances. Ex. E, ¶ 4. Additionally, statements that are literally true when read in isolation can still convey a false and defamatory meaning by omitting or juxtaposing facts. *Neely*, 418

[13] While Defendants raise fact questions about categorizing the damages as related to defamation versus breach of contract and whether the Plaintiffs' damages may allegedly be partially explained by other factors, those issues are irrelevant at this stage because Plaintiffs need only prove a prima facie case of each element (thus rebuttal evidence or fact questions are ignored).

[14] *Cummins*, 2015 Tex. App. LEXIS 3472, at *28 ("[N]either the United States Supreme Court nor the Supreme Court of Texas has required a private plaintiff to prove the falsity of defamatory statements in suits against nonmedia defendants, even when the statements are on matters of public concern. Lollar is not a public figure, and Cummins is not a media defendant, and therefore the defamatory statements are presumed false.").

S.W.3d at 63. Here, the gist of Defendants' statements is false and defamatory because Plaintiffs never agreed to care for the fish (rather, only the two dogs in the contract), the fish was fed per Defendants' instructions (Ex. B, ¶ 6-8), and there is no evidence the fish was actually or potentially in danger given it exhibited no signs of harm (Ex. B, ¶ 8; Ex. E).

**F. Qualified Privilege (Common Interest)**

Defendants have not carried their burden on the defense of qualified privilege. Initially, the defense does not apply to the statements at issue given their wide dispersal by Defendants. Even if the defense applies, it is voided because Defendants acted with actual malice.

**1. The Privilege Does Not Apply Because Defendants' Statements were Broadcast Online to More than Those with a Legitimate Interest**

Qualified privilege against defamation liability occurs when "communication is made in good faith and the author, the recipient or a third person, or one of their family members, has an ***interest that is sufficiently affected*** by the communication.'" *Burbage v. Burbage*, 447 S.W.3d 249, 254-55 (Tex. 2014) (emphasis supplied; quotation omitted). *See Holloway v. Tex. Med. Assoc.*, 757 S.W.2d 810, 813-14 (Tex. App.—Houston [1st Dist.] 1988) (must be "entitled to know" the alleged facts).

But while the privilege applies when statements are made to those specific individuals with an affected, legitimate interest, it does not apply when those same statements are made to those "not so interested":

> If an individual voluntarily or for profit give false and injurious information to persons interested in the trade and commercial standing of another at the time the information is given, such communications would be privileged; but ***if he furnishes the same information to others not so interested,—to traders and merchants, as a class,—the communication would not be privileged***.

*See Dunn & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 900 (Tex. 1970) (emphasis supplied); *Randall's Food Mkts. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) ("The privilege remains

intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate."). "[A] communication loses its privileged character where it is made to those outside of the interest group in question." *Mitre*, 840 S.W.2d at 619.

In *Mitre*, a defamatory flyer accusing two individuals of passing counterfeit bills was privileged when given by store owners to their employees, *but was not privileged* when the store owners published the flyers to the general public by displaying them in their stores. *Id.* In another case, where an employee was privileged to report alleged wrongdoing to his manager, the Texas supreme court held that the privilege did not also apply when the employee "stepped outside the boundaries of this privilege by circulating a petition about [plaintiff] to ordinary employees and customers." *Johnson*, 891 S.W.2d at 646-47.

In this case, at most those with an interest were actual or potential customers of Plaintiffs who might be affected by severe allegations of animal mistreatment. But Defendants lost their ability to rely on qualified privilege because Defendants "stepped outside" the boundaries of the privilege by blasting their accusations far beyond those sufficiently affected or entitled to know those alleged facts. It is undisputed that Defendants' took to a globally-known, multi-million-user review website to post their false statements about feeding the fish more than instructed, almost killing it, and potentially harming it. Ex. A, ¶ 11. It is also undisputed that Defendants' sought out a popular CBS news reporter to interview them, then another national news station (ABC) and cable news station (Fox). Ex. C-1; Ex. 10. Like the store owners in *Mitre* who published the flyers to the general public and the employee in *Johnson* that published the reports to ordinary employees and customers, Defendants blew well past any limited group of individuals with affected interests in their zealousness to attack Plaintiffs by publishing their

defamatory statements for wide public consumption online, in print, and by broadcast. Accordingly, Defendants have voided their right to rely on qualified privilege.

**2. Defendants Acted with Actual Malice**

Even if qualified privilege applies, Plaintiffs prevail because Defendants acted with actual malice. Actual malice means making a statement with reckless disregard of whether it is true. *Burbage*, 447 S.W.3d at 254*; see also Holloway*, 757 S.W.2d at 813-14 (listing malice in this context as "want of good faith" or "ill-will" (*citing Buck v. Savage*, 323 S.W.2d 363, 372 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.)). As stated above, evidence of actual malice can be the "circumstances surrounding the alleged defamatory words," "circumstantial evidence of the defendant's state of mind," or "omission of critical facts that distorts the entire character" of the communications. *Alaniz*, 105 S.W.3d at 347. For example, actual malice was found when considering the damaging nature of the statements, the context in which they were made, the lack of personal verification, and the statements' falsity. *Knox v. Taylor*, 992 S.W.2d 40, 57 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

In this case, the circumstances and context show Defendants acted with actual malice. Defendants' defamatory statements of animal abuse are demonstrably harmful as shown above, and were made without any personal verification of their truth and without a reasonable basis (given the lack of evidence that the fish was almost killed or potentially harmed). Ex. E, ¶ 4. And rather than limiting their publication to actual or existing customers, Defendants repeatedly broadcast their defamatory statements across multiple news mediums to the general public even after being made aware that the statements were resulting in death, rape, and arson threats against Plaintiff Kalle McWhorter. Ex. A-12. Critically, Defendants allege that Plaintiffs were hired to care for the fish at issue, leading to the impression that Plaintiffs were paid to care for

the fish but instead almost killed it, when in fact Plaintiffs were never hired to care for the fish at all but only the two dogs. *See* Ex. A-2 (contract); Ex. D.

The evidence further shows reckless disregard for the truth given that Defendants claim to have had prior experience with a prior betta fish showing "signs of illness" yet they did not mention in any of their emails, media appearances, or affidavits the current betta fish at issue showing any such signs. *See* M. Duchouquette Aff., ¶ 5; Ex. A, ¶ 7; Ex. A-10, A-11. Rather, the pet-sitter confirmed the fish showed no signs of health deterioration. Ex. B, ¶ 8. There was simply no basis for Defendants to conclude Plaintiffs fed the fish more than instructed, or that the slight cloudiness almost killed or potentially harmed the fish. For all these reasons, Defendants do not prevail on this defense.

**G. Absolute Privilege (Judicial Proceedings)**

Defendants cannot rely on the unpleaded defense of absolute privilege regarding judicial proceeding communications. Even if the defense is considered, however, Plaintiffs prevail.

**1. Defendants have not pleaded absolute privilege**

Defendants' motion asserts the affirmative defense of absolute privilege of judicial proceeding communications. Defs' Mtn., p. 11. But this defense has not been pleaded. *See, generally*, Defs. Orig. Answer. "The rule of absolute privilege provides that no communication uttered in the course of a judicial proceeding may serve as the basis of a civil action for libel or slander." *Kastner v. Kroger Co.*, 2012 Tex. App. LEXIS 8350, at *14-17 (Tex. App.—Houston [14th Dist.] 2012) (*James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982) (per curiam)).

In their motion, Defendants rely on *Jenevein v. Friedman* for the "judicial communications privilege." But *Jenevein* only discussed application of an absolute privilege—

the underlying claim by Friedman was based on "absolute immunity"[15] and the court analyzed at least four cases that all cite exclusively to "absolute privilege" or being "absolutely privileged" (*Reagan v. Guardian Life Ins. Co.*; *Jones v. Trice*; *Odeneal v. Wofford*; *Gaither v. Davis*). At no point does the *Jenevein* court talk about a "qualified" privilege as to judicial proceedings. Because Defendants have not pleaded the absolute privilege of judicial communications, the defense is not before the Court and cannot be the basis of its decision on Defendants' motion.

**2. Defendants' statements are not protected by absolute privilege**

Even if the Court determines that Defendants are permitted to assert absolute privilege, Defendants have not carried their burden. Defendants turn the concept of judicial privilege entirely on its head. Judicial privilege applies to "[a]ny communication, oral or written, uttered or published in the due course of a judicial proceeding." *Jenevein*, 114 S.W.3d at 745 (citing *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942)). Texas law is clear that the privilege extends to "any statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers in the case." *Id.* (citing *James v. Brown*, 637 S.W.2d 914,917-18 (Tex. 1982)).

The judicial privilege does not—as Defendants would have the Court believe—protect Defendants from statements made to the media after a lawsuit was filed. Defendants' reading of *Jenevein* is misplaced. Defs' Mtn., p. 11. In *Jenevein*, Ms. Jenevein (a lawyer) sued Mr. Friedman (also a lawyer) for libel based on a statement made in an amended petition filed by Friedman on behalf of his client, Universal Image, Inc. *Jenevein*, 114 S.W.3d at 744. The petition contained an allegation that the judge had given ad litem appointments to Ms. Jenevein

[15] *Jenevein*, 114 S.W.3d at 745 ("Friedman asserted the affirmative defense of privilege and moved for summary judgment, which the trial court granted, based on 'the absolute immunity applicable to pleadings filed by an attorney in pending litigation.'").

in exchange for sexual favors. Id. at 745. The Dallas Court of Appeals then considered whether the statement contained in the petition was related to the judicial proceeding. *Id.* at 745-46. The court did not consider whether the statement was made in the course of a judicial proceeding, because it was—in a pleading filed with the court. *Id.* at 744-45.

Defendants concede that statements here were made to "local and national media." Defs' Mtn., p. 12. These statements were not made in the course of a judicial proceeding. Defendants do not cite any authority (nor are Plaintiffs aware of any) that stand for the proposition that all statements made after a lawsuit is filed are privileged. Accordingly, Defendants' argument regarding judicial privilege is without merit.

Rather, Defendants' statements are more akin to demand letters sent before a judicial proceeding that were held not to be privileged. *See Levatino v. Apple Tree Café Touring, Inc.*, 486 S.W.3d 724, 728-29 (Tex. App.—Dallas 2016, pet. filed). Or the statements by condo association officers about certain owners made to other owners about a special commissioner's meeting, which were not privileged because the statements were made at the owners' meeting *after* the commissioner's meeting. *See Herrera v. Stahl*, 441 S.W.3d 739, 744 (Tex. App.—San Antonio 2014, no pet.). And Defendants statements bear no relation to furthering the judicial proceeding. *See, e.g.*, *Russell v. Clark*, 620 S.W.2d 865 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) ("The act to which the privilege applies must bear some relationship to the judicial proceeding in which the attorney is employed, and must be in furtherance of that representation."). For all these reasons, Defendants do not prevail on absolute privilege.

**H. Mitigation under TCPRC § 73.055**

Defendants incorrectly argue that Plaintiffs may no longer "maintain an action based on the original review" because Mrs. Duchouquette slightly revised her Yelp! review. Defs' Mtn., p. 5, n.2. But as the Texas Supreme Court recently held, TEX. CIV. PRAC. & REM. CODE § 73.055

only bars exemplary damages if the requisite mitigation request was not timely served. *Neely*, 18 S.W.3d at 63 ("Under this provision, a defamation plaintiff may only recover exemplary damages if she serves the request for a correction, clarification, or retraction within 90 days of receiving knowledge of the publication. *Id.* § 73.055(c)."). Because exemplary damages are not an element of any claim (nor a complete defense to any claim), Defendants' argument is irrelevant at this stage and cannot support a grant of their motion.

Regardless, Prestigious Pets timely served multiple requests for retraction on publishers of the defamatory statements, including at least one directly to Defendants on October 30, 2015. *See* Ex. A-6. Defendants, having failed to fully comply with the request, cannot rely on § 73.055.

## VII.
## BUSINESS DISPARAGEMENT

The elements of business disparagement are: "(1) the defendant published false and disparaging information about [plaintiff], (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff." *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003).[16] This claim is asserted by Prestigious Pets against both Defendants. Business disparagement is comparable to defamation but "differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests." *Id.* (citing *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987)).

### A. False and Disparaging Words

The principles of law regarding defamation otherwise apply to the element of "false and disparaging" words. *See, e.g.*, *Fluor Enters. v. Conex Int'l Corp.*, 273 S.W.3d 426, 434 (Tex.

[16] A corporation or other business entity that asserts a claim for defamation may assert an additional or alternative claim for business disparagement if it seeks to recover economic damages for injury to the business. *Lipsky*, 460 S.W.3d at 593 (citing *Burbage*, 447 S.W.3d at 261 n.6) ("Corporations and other business entities have reputations that can be libeled apart from the businesses they own, and such entities can prosecute an action for defamation in their own names.").

App.—Beaumont 2008). For the reasons set forth above, which are adopted herein, Defendants made false and disparaging statements about Prestigious Pets: accusing Prestigious Pets of agreeing to care for Defendants' fish, feeding the fish more than instructed, almost killing the fish, and potentially harming the fish; by doing so accusing Prestigious Pets through insinuation and implication of the crime of animal cruelty and neglect under TEX. PEN. CODE § 42.092; and by injuring Prestigious Pets in its business.

**B. Malice**

The malice element of business disparagement is satisfied with a showing of any one of the following: (1) defendant knew the statements were false; (2) defendant acted with reckless disregard of the falsity of the statements; (3) defendant acted with "ill will"; or (4) defendant intended to interfere with the economic interest of the plaintiff in an unprivileged manner. *Forbes*, 124 S.W.3d at 170. In this case, the evidence (shown above and adopted herein) supports that Defendants acted with ill will, intent to interference, and reckless disregard of the falsity of their statements regarding the allegations that Plaintiffs agreed to care for Defendants' fish, fed the fish more than instructed, and almost killed or potentially harmed it, when in actuality Defendants knew Prestigious Pets never contracted to care for the fish, the fish was fed as instructed by Defendants, the fish never exhibited any signs of a deterioration of health, and Defendants never actually took action or made statements to support their alleged belief of a deterioration of the fish's health. Defendants' ill-will is further shown by the media campaigns they participated in and had their attorney conduct as well despite knowing those campaigns were resulting in death, rape, and arson threats against Prestigious Pets' owner and staff.

**C. Without Privilege**

Defendants did not act with privilege. As shown above, absolute privilege was not pleaded and is, regardless, inapplicable to Defendants' online statements and media campaigns.

Further, as shown above, the qualified privilege of public comment does not apply because the statements were knowingly published to a national audience both online (social media reviews and statements) and through print (news media) and broadcast (TV interviews) well beyond any conceivable audience of sufficiently interested, actually affected individuals. Even if it does apply, actual malice has been shown (above). Plaintiffs adopt herein all prior arguments made above regarding qualified privilege, which demonstrate Prestigious Pets has shown a prima facie case on this element of its business disparagement claim.

**D. Special Damages**

Special damages are realized economic damages, such as for lost income, lost sales, or loss of other dealings. *Hancock*, 400 S.W.3d at 65; *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App.—Fort Worth 2007). As a result of Defendants' defamatory statements, Prestigious Pets has suffered special damages. Following the publication of the defamatory statements and their republication through Defendants' media statements, Prestigious Pets has seen a dramatic drop in new customer applications and a significantly higher than usual turnover of existing clients. Ex. A, ¶ 19-20. These losses have resulted in a large reduction in gross revenues and net profits. Ex. A, ¶ 19-20. Accordingly, Prestigious Pets has satisfied its burden at this stage of showing a prima facie case of damages.

## VIII.
## AWARD OF FEES

Based on the arguments and evidence above, this Court should deny Defendants' motion and award Plaintiffs their reasonable attorneys' fees and costs related to their defense of the motion because Defendants' motion was frivolous and solely intended to delay and drive up the costs of litigation for Plaintiffs. TEX. CIV. PRAC. & REM. CODE § 27.009(b) ("If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court

may award court costs and reasonable attorney's fees to the responding party."). Defendants' motion, particularly with regard to the non-disparagement clause, is based on inapplicable non-Texas law and aspirational changes to the law that are reserved for the U.S. Congress or the Texas legislature. To bring those arguments in the form of a motion to dismiss was plainly intended to further an organizational goal of Defendants' attorney, delay Plaintiffs' requested discovery, and drive up the costs of litigation. Accordingly, Plaintiffs request an award of fees and costs of $8,750.00 as a partial amount of what Plaintiffs' have incurred.

Should the Court grant the motion, whether in whole or in part, the Court may not award any fees to Defendants because Defendants have been represented pro bono in this case. The Dallas Court of Appeals holds that a prevailing plaintiff under the TCPA may not recover attorneys' fees when represented pro bono. *Cruz v. Van Sickle*, 452 S.W.3d 503, 524 (Tex. App.—Dallas 2014, pet. denied) ("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."). Here, it is undisputed that Defendants are represented pro bono by both Paul Alan Levy and Thompson Knight, LLP. Ex. A-9. Accordingly, no fees related to this case may be awarded to Defendants.

Further, Defendants only evidence of incurred fees is a legal bill for services incurred related to the suit in Justice of the Peace court that was dismissed by non-suit (which was dismissed for lack of jurisdiction on appeal to Dallas County Court at Law No. 3). *See* MD Aff., ¶ 20. Besides not being fees "incurred in defending against the legal action" of this particular case (§ 27.009(a)(2)), 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).[17]

## IX.
## EVIDENTIARY OBJECTIONS

Although Plaintiffs' only burden is to show a prima facie case of each element of its claims (without consideration of any rebuttal or contradictory evidence), Defendants are required to demonstrate by a preponderance of the evidence any affirmative defenses they have pleaded and assert against Plaintiffs' claims. Plaintiffs object as follows to Defendants' evidence as follows:

| Exhibit | Objection(s) |
|---|---|
| R.D. Aff., ¶ 3-8 | Defendant's statements about his own statements are hearsay. |
| R.D. Aff., Ex. A-C | Not properly authenticated under TEX. R. EVID. 901-902; incomplete given Plaintiffs' denied request for the complete video and pictures of the fish tank. |
| M.D. Aff., ¶ 4. | Hearsay as to the condition of the water. TRE 801-802. Lack of personal knowledge (speculation) as to "suggested that Prestigious Pets was putting too much fish food into the tank." TRE 602. |
| M.D. Aff., ¶ 5. | Hearsay, lack of personal knowledge, and lack of foundation as to websites declarant has read or websites ready by declarant's husband and conveyed to her. TRE 602, 801-802. |
| M.D. Aff., ¶ 20. | Hearsay and not best evidence regarding allegedly incurred attorneys' fees and expenses from a prior lawsuit. TRE 801-802; 1001. |
| M.D. Aff., ¶ 22 | Hearsay regarding communications with a fake former customer. TRE 801-802. |
| M.D. Aff., Ex. E | Hearsay and hearsay within hearsay under TEX. R. EVID. 801-803; not properly authenticated under TEX. R. EVID. 901-902; not best evidence considering these are obviously altered snippets of an original online article (TEX. R. EVID. 1001). |
| P.A.L. Aff., ¶ 2 and Ex. A | With regards to alleged "print, online, and broadcast stories about the adoption and enforcement of clauses in consumer contracts": hearsay, hearsay within hearsay, lack of authentication, not best evidence, lack of personal knowledge. TRE 602, 801-803, 901-902, 1001. |
| P.A.L. Aff., ¶ 3 | With regards to alleged websites read by Mr. Levy: hearsay, hearsay within hearsay, lack of authentication, not best evidence. TRE 801-803, 901-902, 1001. |

[17] C*iting National Union Fire Ins. Co. v. Care Flight Air Ambulance Service, Inc.*, 18 F.3d 323, 330 (5th Cir.1994) (explaining that attorney's fees incurred in defending a separate lawsuit cannot be recovered even where the separate lawsuit concerned the same issues). It is undisputed that Thompson Knight, LLP has represented Defendants during the entirety of this lawsuit.

| | |
|---|---|
| P.A.L. Aff., Ex. B-F. | Lack of authentication; hearsay; hearsay within hearsay. TRE 801-803; 901-902. |

**WHEREFORE, PREMISES CONSIDERED**, Plaintiffs Prestigious Pets, LLC and Kalle McWhorter respectfully request an order of this Court denying Defendants' motion, sustaining Plaintiffs' evidentiary objections, awarding them their attorneys' fees and costs incurred, and for all other relief at law and equity to which Plaintiffs have shown themselves entitled.

Dated: July 19, 2016

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs hereby 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 July 19, 2016.

WILLIAM S. RICHMOND