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**

DEFENDANTS' REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS UNDER THE TCPA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Defendants Robert Duchouquette and Michelle Duchouquette (together, "the Duchouquettes") file this Reply in Support of their Motion to Dismiss under the Texas Citizens Participation Act.

SUMMARY AND KEY FACTS

There exists in this country a vigorous public debate about the propriety of non-disparagement clauses in consumer contracts—particularly form contracts like the one utilized by plaintiff Prestigious Pets in its business. That company waded into these turbulent waters when it chose to respond to an honest, fair consumer review posted by a dissatisfied customer with a cease and desist letter and two lawsuits seeking up to one million dollars in damages for breach of such a clause. Because of the existing, national public controversy about non-disparagement clauses, this case became the latest in a long line of abusive litigations highlighted by local and national media that are reporting on the debate. Prestigious Pets now takes issue with the national exposure that resulted from its voluntary course of conduct, and is now trying to shift to the Duchouquettes the consequences of its use of this kind of controversial contract provision and the company's concomitant voluntary participation in an ongoing national controversy.

None of the Plaintiffs' arguments or their voluminous affidavits, change three simple facts, however. First, this company (in this case, joined by its owner, even though the Duchouquettes have never criticized her), filed not one but two legal actions against the Duchouquettes in direct response to the Duchouquettes' exercise of their right of free speech. Second, they cannot establish a prima facie case of each essential element of their claims by clear and specific evidence. Finally, even if the Plaintiffs could make this prima facie showing, the Duchouquettes are protected by the defenses of truth, privilege, the First Amendment, and unconscionability.

The Duchouquettes now submit this reply brief in support of their motion to dismiss to address the following issues raised by the Plaintiffs' Response to Defendants' Motion to Dismiss ("Plaintiffs' Response") and their supporting affidavits: (1) whether Kalle McWhorter has standing to bring a defamation action against the Duchouquettes; (2) whether the First Amendment protects the Duchouquettes' statements because they were criticizing public figures; (3) whether the First Amendment protects the Duchouquettes' statements because they are either true statements of fact or constitutionally protected expressions of opinion; (4) whether the First Amendment protects the Duchouquettes' criticisms because the Plaintiffs have failed to prove actual malice by clear and convincing evidence; (5) whether the judicial communications privilege protects the Duchouquettes' statements; (6) whether the Plaintiffs have shown that they suffered any damages as a result of the Duchouquettes' statements; and (7) whether the Duchouquettes are entitled to an award of attorneys' fees.[1]

ARGUMENT AND AUTHORITIES

A. Kalle McWhorter cannot sue for defamation because the allegedly defamatory statements were not about her.

Kalle McWhorter cannot assert a defamation claim against the Duchouquettes because she does not meet the fundamental First Amendment requirement that allegedly false statements must be "of and concerning" the plaintiff. *See Outlet Co. v. Int'l Sec. Grp.*, 693 S.W.2d 621, 625-26 (Tex. App.—San Antonio 1985 writ ref'd n.r.e in part, dism'd in part); *Kaufman v. Islamic Soc. of Arlington*, 291 S.W.3d 130, 145 (Tex. App.—Ft. Worth 2009, pet. denied) (holding that "a defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer," and

[1] The Duchouquettes reserve these, and all other arguments, for oral argument at the Motion to Dismiss hearing.

emphasizing that "settled law requires that the false statement point to the plaintiff **and to no one else**." (emphasis added).

The Plaintiffs respond with several Texas cases, all but one of which are plainly inapplicable: three are cases where an allegedly defamatory statement was made without naming **anybody**, but where the circumstances make clear that it is the plaintiff to whom the accusations were directed;[2] and one case which refers, in a passing footnote, to the proposition that a corporation may sue for libel, not just an individual.[3] In the last case that the Plaintiffs cite, *General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712-13 (Tex. 1972), the name of the individual plaintiff was in the company's name, which constitutes an exception to the general rule that company owners cannot sue when their companies are criticized. *See Adventure Outdoors, Inc. v. Bloomberg*, 519 F. Supp. 2d 1258, 1276 (N.D. Ga. 2007), *rev'd on other grounds*, 552 F.3d 1290 (11th Cir. 2008). That exception is inapplicable here.

Plaintiffs have also submitted an affidavit from a friend of Kalle McWhorter's attesting that, after she learned of Michelle's Yelp review in February, she read the post and "understood" that the post meant that "Prestigious Pets (and thus Kalle) were hired by the Duchouquette's." Plaintiffs' Response, Exhibit D ¶ 4 ("Christensen Affidavit"). The First Amendment's "of-and-concerning" requirement demands that the publication must "make at least an oblique reference to the plaintiff **as an individual**," *Cox Texas Newspapers v. Penick*, 219 S.W.3d 425, 436 (Tex. App.—Austin 2007, pet. denied) (emphasis added). That rule cannot be evaded so cheaply. What the cases say is that it is the "reasonable understanding" of the viewer of the publication that matters, *Allied Mktg. Grp. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 173 (Tex. App.–

[2] *Klentzman v. Brady*, 456 S.W.3d 239, 254 (Tex. App.—Houston 2014); *Backes v. Misko*, 486 S.W.3d 7, 24-25 (Tex. App.—Dallas 2015, pet. denied); *Tatum v. Dallas Morning News*, 2015 WL 9582903 (Tex. App.—Dallas Dec. 30, 2015).

[3] *Waste Mgmt. of Tex. v. Tex. Disposal Sys. Landfill,* 434 S.W.3d 142, 156 n.81 (Tex. 2014).

Eastland 2003, pet. denied), and that the reader must be behaving as a reasonable person. *Kaufman v. Islamic Soc. of Arlington*, 291 S.W.3d 130, 145 (Tex. App.—Ft. Worth 2009, pet. denied).[4] Thus, what matters is not what the Plaintiffs' affiant actually believes, but rather what she reasonably believes. The Plaintiffs cannot simply recruit an affiant to ignore corporate formalities and assume that anything said about a corporation must be aimed at its owner as an individual, and thereby escape the constitutional requirements for a defamation action. As the Texas Supreme Court said in *Cain v. Hearst Corp.*, 878 S.W.2d 577, 581-84 (Tex. 1994), every new evasion of the constitutional limits on defamation actions increases the impact on free speech.

Nor, indeed, does the Plaintiffs' affiant show that she is typical of the audience at which the Yelp review was directed. She admits that she did not read the review in the course of using Yelp to find or evaluate a prospective pet-sitting company; instead, she went to find the Yelp review after the news about this lawsuit broke. Christensen Affidavit, ¶ 3. There is no evidence suggesting that a reasonable, objective Yelp user generally knows who Kalle McWhorter is, or would have identified her as the owner of the company. Kalle McWhorter's claims should be dismissed.

B. The First Amendment defense for criticizing public figures applies to the statements made by the Duchouquettes after they were sued.

Plaintiffs mischaracterize the Duchouquettes' argument that their statements to the press (and in online comment sections of press web sites), made after they were sued, are protected by the high standards imposed by the First Amendment on criticisms of public figures. The

[4] "He or she does not represent the lowest common denominator, but reasonable intelligence and learning .... The person of 'ordinary intelligence' . . . is a prototype of a person who exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications. The appropriate inquiry is objective, not subjective . . . . Intelligent, well-read people act unreason-ably from time to time, whereas the hypothetical reasonable reader, for purposes of defamation law, does not." *Id.* quoting *New Times v. Isaacks*, 146 S.W.3d 144, 157-158 (Tex. 2004).

Duchouquettes have not argued that the Plaintiffs became public figures simply because they are having a dispute with the Duchouquettes about their brief business relationship, or just because they filed two lawsuits over that dispute. The Plaintiffs became public figures because (1) the lawsuits that they filed invoked a non-disparagement clause that their lawyer had designed for inclusion in their form contract, and (2) the imposition of such clauses in form contracts, and the enforcement of such clauses, has been the subject of intense public controversy over the past several years. The Plaintiffs never dispute that this is a public controversy.

Plaintiffs do argue that the defamatory words about the fish over which they have sued in **this** Court have no relationship to the public controversy about non-disparagement clauses. But at the time the Plaintiffs filed their lawsuit, the **only** allegedly disparaging words that either of the defendants had published were contained in the Yelp review that Michelle placed online. Hence, in any discussion of the Plaintiffs' invocation of the non-disparagement clause to obtain damages and injunctive relief, the statements that allegedly gave rise to liability are germane, and indeed necessary, to the conversation. Moreover, it was Plaintiffs who decided to link a non-disparagement clause claim with a defamation claim in the same lawsuit; thus it was the plaintiffs who made their defamation claims, and the words claimed to be defamatory, germane to the controversy about non-disparagement clauses.[5]

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[5] David McWhorter avers that he had an email exchange with CBS's Cristin Severance, and attaches such an exchange to his affidavit. Plaintiffs' Response, Exhibit C (David McWhorter Affidavit"), ¶ 9. The exchange does not include the two paragraphs published on the CBS web site, identified as being from David McWhorter and attached as Exhibit A-18 to their Response (Kalle McWhorter Affidavit), which the Duchouquettes cited in their Motion to Dismiss at p. 16 in support of their argument that the company is a limited-purpose public figure. Neither David nor Kalle McWhorter offers any explanation for the absence of these two paragraphs.

C. The allegedly defamatory statements are protected by the First Amendment because they are either true statements of fact or constitutionally protected expressions of opinion based on disclosed facts.

The Plaintiffs' Petition alleges that a short portion of Michelle Duchouquettes' Yelp review relating to the fish being overfed is false. The Duchouquettes therefore moved to dismiss because that statement is indisputably true.[6] In response, the Plaintiffs provided no evidence that the "overfed" statement is false; rather, they now argue that their case, rather than being based on the actual statements identified in their pleadings, is based on the overall "gist" of the review, and not so much over individual words. This is not pleaded in their Petition.

Moreover, Plaintiffs' Response misstates the gist of Michelle's Yelp review, which is that Prestigious Pets' policies disserve its customers and that other customers should consider those policies carefully before deciding to use that company. The incident with the fish is simply offered as an **example** of the flaw in Prestigious Pets' policy that the Duchouquettes were unable to contact their sitter directly when their remote cameras showed them that two things (the alarm and the fishbowl) were going wrong. The criticism of Prestigious Pets' policies is a matter of non-actionable opinion, and in any event, nothing in the Plaintiffs' evidence or briefs suggests that **this** gist of the review is false.

The Plaintiffs' Petition does allege, however, that defendants "falsely convey[ed] by implication that Plaintiffs agreed to care for the Duchouquettes' fish and failed to do so"—an implication Prestigious Pets alleges to be false because "the Duchouquettes knew they had not agreed with Plaintiffs (either orally or in writing) that Plaintiffs would be responsible for the care of their fish." Based on statements in Kalle McWhorter's affidavit about whether Prestigious

[6] To the extent that the Plaintiffs complain about any other statements contained within the Yelp review, such as the statement that Prestigious Pets "almost killed," or "potentially harmed" the Duchouquettes fish, these statements are constitutionally protected opinion because they were either (1) based on disclosed facts (that the fish was overfed) or (2) rhetorical hyperbole.

Pets agreed to care for the fish, Plaintiffs' Response repeatedly contends that the implication that the company agreed to "care for" the fish as a defamatory statement, asserts that the company never agreed to "care for" the fish, and that Defendants supposedly **knew** that the company had never agreed to care for the fish but insisted on repeating the lie.[7] Plaintiffs' Response pp. ii, 8, 12, 13, 18, 20, 25, 26, 30. But the evidence in the record squarely contradicts Kalle McWhorter's sworn statement in this respect.[8]

First, only Michelle Duchouquette, Robert Duchouquette, and Amanda Jones were at the meet-and-greet, and each has attested that the issue of the fish **was** raised during the meet and greet, that Jones **was** told about the fish, that she said she would feed the fish, and that Robert Duchouquette showed her how much to feed the fish.[9] The Plaintiffs now contend that Amanda Jones agreed to care for the fish in her personal capacity, rather than as Prestigious Pets' designated agent, but in these circumstances, the Duchouquettes were entitled to assume that she was acting for her principal, Prestigious Pets, and binding it by her oral agreement. *Biggs v. U.S. Fire Ins. Co.*, 611 S.W.2d. 624, 629 (Tex. 1981).

Second, the post-signing course of conduct by the parties shows that there **was** an agreement by the company to feed the fish. Amanda Jones was not the only pet sitter who visited the Duchouquettes' home to care for their dogs and fish. As the Supplemental Affidavit of Robert Duchouquette notes, the security cameras maintained in the Duchouquettes home reflect that a **different** sitter, wearing a Prestigious Pets t-shirt and driving a car with the company's logo, visited their home on the morning of October 18, 2015, and that it was

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[7] The Plaintiffs never explain how a statement that is so innocuous, even if false, could be considered defamatory.

[8] The Duchouquettes object to the portions of Kalle McWhorter's affidavit that refer to meetings at which she was not present as being improper hearsay testimony.

[9] Jones avers that it was Michelle who told her this information, but this discrepancy is immaterial.

immediately after **her** visit that the fishbowl could be seen with a very large number of fish food pellets floating on top of the water. *Id.* Only a few hours later, the water in the fishbowl was already murky and uneaten pellets could be seen at the bottom. *Id.* Plaintiffs have submitted no evidence to explain why, if the company was never aware of any agreement to care for the Duchouquettes' fish and Amanda Jones agreed to do so solely in her individual capacity, at least one Prestigious Pets pet-sitter in addition to Amanda Jones entered the Duchouquettes home to feed their fish.

Third, the demand letter sent by Prestigious Pets' attorney implicitly took responsibility for any mistakes about the feeding that had taken place, and he said that in feeding the fish, the sitter had followed the **company's** standard policy about how much food should be given when the amount was uncertain. Later in the letter, Prestigious Pets' attorney continued in the same vein, stating that if the sitter had noticed any problem with the fish, "she would have contacted the Prestigious Pets office staff immediately in order to fix the issue." Both statements recognize that the feeding of the fish was among the company's responsibilities under the arrangement between the parties.

The meaning and contact of an agreement can be proved by the course of conduct between the parties. *Preston Farm & Ranch Supply v. Bio-Zyme Enterprises*, 625 S.W.2d 295, 298 (Tex. 1981). Here, the preponderance of the evidence shows that the company agreed to feed the fish. But in the end, the issue here is **not** whether Prestigious Pets formed a legally binding agreement, nor whether the Duchouquettes could have sued it for mistreating the fish. Instead, the issue is whether the Duchouquettes' statements that Prestigious Pets overfed their fish are true or false. The uncontroverted facts are (1) that the company sent a representative to the Duchouquettes' home who agreed to feed the fish, (2) that the Duchouquettes became aware

that this company representative fed their fish far more food than was appropriate, and (3) that the Duchouquettes posted a Yelp review stating that their fish had been overfed. This statement, and any implication that the company was responsible for the overfeeding, is there protected by the "truth" defense.

The other two phrases the Plaintiffs allege are defamatory in the Petition are statements of opinion, not fact. Texas courts agree that context, including "the general tenor and reputation of the source itself," is a key factor in assessing whether words or articles are defamatory. *Rehak Creative Services v. Witt*, 404 S.W.3d 716, 729 (Tex. App.—Houston 2014), citing *City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005)). Plaintiffs' Response, which relies on an expert affidavit, makes clear that these are statements of opinion, not fact. After all, experts opine on opinions, not facts. Tex. R. Evid. 702.

D. The Duchouquettes' criticisms are protected by the First Amendment because the Plaintiffs have not proven actual malice by clear and convincing evidence.

In their Motion to Dismiss, the Duchouquettes showed that they did not act with actual malice (or, indeed, negligence) in publishing the Yelp review, or in repeating the word "overfed" in media interviews . Motion, pp. 17-18. The Plaintiffs admit that they must prove actual malice by clear and convincing evidence. *See* Plaintiffs' Response p. 13; *see also* Plaintiffs' Response at p. 1 (level of proof needed to defeat a TCPA motion should match the level of proof needed at trial). However, the Plaintiffs cite cases that either merely state the standard for actual malice in general terms, or are wholly inapposite to the facts of this case because of the nature of the defamatory remarks and the willful ignorance of undisputable facts in those cases.

For example, the Plaintiffs argue strongly a claim that the Duchouquettes allegedly failed to conduct an "investigation" or to "verify" the facts before reporting their personal experiences and expressing their opinions about what the possible consequences were for their fish.

However, both the United States and Texas Supreme Courts have held that proof of failure to investigate and to verify do not constitute actual malice. *E.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-54 (1967); *Bentley v. Bunton*, 94 S.W.3d 561, 595-596 (2002). *See also Alaniz v. Hoyt*, 105 S.W.3d 330 (Tex. App.—Corpus Christi 2003, no pet.). Plaintiffs cite *Alaniz* and *Bentley* in support of their actual malice argument, but they ignore these parts of the decisions. Indeed, even if failures to investigate or verify might have some bearing on the mens rea of a reporter covering a story, these concepts have little relevance to consumers who are posting online reviews. Moreover, the Texas Supreme Court has held that when the defendant's affidavits show (1) their genuine belief in what they said, and (2) a lack of reckless disregard of probably falsity, and there is no probative controverting proof to the contrary, that the defendant is entitled to summary judgment due to a lack of actual malice. *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989); *see also Cox Texas Newspapers v. Penick*, 219 S.W.3d 425, 437-438 (Tex. App.—Austin 2007, pet. denied).

The Plaintiffs apparently contend that the Duchouquettes' failed to sufficiently investigate because they did not have their fish tested to see whether it was actually sick, and did not hire an expert witness to express an opinion about whether overfeeding a betta fish has the "potential" to harm the fish. In other words, the Plaintiffs suggest that Texas consumers must have an expert witness clear everything they wish to state in an online review before posting it. This is not the law. This proposed standard imposes an unreasonable burden upon Texas consumers who wish to publicly post reviews of goods and services on sites like Yelp.

Moreover, Michelle's review did not say that the fish was **actually** harmed, she said only that the fish was "potentially harm[ed]." Further, the Duchouquettes' Motion identified three online articles—the sort of information to which consumers have ready access—that discussed

how betta fish are harmed by overfeeding, including possible fatality, *see* Motion to Dismiss, p. 15, and they could have cited many more.[10] Even if a difference of opinion about the potential for harm were enough to make out a case of actual malice or even negligence, plaintiffs do not explain why these are not reliable sources, and their expert witness does not address them. *See Huckabee v. Time Warner Ent'mt Co.*, 19 S.W.3d 413, 427 (Tex. 2000) (even when a reporter **knew** before publishing that an expert had a different opinion, "the mere fact that an expert has a view on a dispute is not evidence that a defamation defendant who offers a different view does so with actual malice").

Plaintiffs cite three cases for the proposition that a mixture of factors that might not individually make out a case of actual malice can, in combination, support an inference of actual malice at the summary judgment or trial stages of a case. *Bentley, supra*; *Cummins v. Bat World Sanctuary*, No. 02-12-000285-CV2015 WL 1641144 (Tex. App.—Fort Worth Apr. 9, 2015, pet. denied); *Tatum v. Dall. Morning News*, No. 05-14-010017-CV, 2015 WL 9582903 (Tex. App.—Dallas Dec. 30, 2015, pet. filed). But the Plaintiffs ignore the fact that the defamatory statements in those cases were far more egregious than the statements about which the Plaintiffs complain here, and the worse the accusation, the greater the degree of care should reasonably be expected of the speaker. *Bentley*, 94 S.W.3d at 593 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (where a newspaper's editors "recognized the seriousness of the charges being made and the importance of a full investigation," but failed to so investigate, they acted with actual malice)).

[10] https://www.youtube.com/watch?v=HxUc-g80YeI; http://bettafishbasicz.weebly.com/ learning-the-ropes-of-betta-fish-feeding.html; http://www.wikihow.com/Save -a- Dying-Betta-Fish; http://www.bettafishcenter.com/ Betta-Fish-Food.shtml; http://pets.thenest.com/ much-feed-betta-3817.html;https://www.quora.com/What-can-cause-a-betta-fish-to-die; http://www.bettaboxx.com/betta-care/betta-fish-feeding-guide/; http://femalebettafish.org/; http://bettafishawarenessday.blogspot.com/p/faq.html?m*1.

Furthermore, the evidence of purposeful disregard of falsity was much stronger in each of the three cases cited by the Plaintiffs. In *Bentley*, a radio host repeatedly accused a sitting judge of corruption, and continued to repeat that accusation even though others were telling the host that his charges were baseless, and even though official investigations of many of the examples he was citing had found the judge not guilty.[11] *Bentley,* 94 S.W.3d at 574, 584.

In *Cummins*, a blogger "engaged in a persistent, calculated attack on [the plaintiff] with the intention to ruin both [the plaintiff's] life's work and her credibility and standing in the animal rehabilitation community. Cummins posted innumerable derogatory statements about [the plaintiff] impugning her honesty and her competency, and she repeatedly and relentlessly reported [the plaintiff] to multiple government agencies." 2015 WL 1641144, at *24. These derogatory statements included accusations of welfare fraud, tax fraud, donor fraud, very specific examples of experimenting on living animals, hacking an animal to death, and other serious accusations, even though the public authorities to whom she was complaining told her that there was no cause for complaint and refused to investigate further.[12]

Finally, in *Tatum*, a newspaper columnist accused parents who published an obituary for their son of covering up the fact that he had committed suicide, rather than having died in a car accident, and of bearing some responsibility for the son's suicide. *Tatum,* 2015 WL 9582903, at *2-3, *9. The plaintiffs there established actual malice by proving not simply that the writer had

[11] By contrast, the fact that the plaintiff has denied the truth of the charges, and communicated that denial to the defendant, "is no evidence that the defendant doubted the allegations. As the United States Supreme Court has noted, 'such denials are so commonplace … that they hardly alert the conscientious reporter to the likelihood of error.'" *Huckabee v. Time Warner Ent'mt Co.*, 19 S.W.3d 413, 427 (Tex. 2000) (quoting *Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 692 n. 37 (1989)).

[12] Ultimately, Cummins' trial testimony was rejected for lack of credibility, which also supporting a finding of actual malice. *Id.* at *24. *See also Alaniz,* 105 S.W.3d at 349 (where the defendant kept repeating statement accusing a CPA of "skimming" funds even after receiving a KPMG audit report to the contrary and after two colleagues warned the defendant that he was accusing the plaintiff of a crime).

failed to investigate, but also that the writer's investigation fell short of his own usual journalistic standards for investigating. *Id.* at *20. Further, there was evidence that the writer had testified falsely about what her sources told him. *Id.* at *19-*20.

The Plaintiffs argue that, during their media interviews and other public comments after they were sued, the Duchouquettes did not talk about how their fish had been potentially harmed, and instead, played down the importance of that aspect of the Yelp review. This is not, as the Plaintiffs apparently believe, evidence that the Duchouquettes did not really believe that their fish had been potentially harmed, and is insufficient to establish actual malice.

E. The Duchouquettes' statements about the lawsuit are protected by the judicial communications privilege.

Plaintiffs argue that the Duchouquettes' post-Yelp-review statements are not protected by the judicial communications privilege based on cases which, they contend, demonstrate that only communications made to or in the court proceedings themselves can be covered by the privilege. However, their cases are inapposite: in both *Levatino v. Apple Tree Café Touring,* 486 S.W.3d 724, 728-29 (Tex. App.—Dallas 2016, pet. filed), and *Herrera v. Stahl*, 441 S.W.3d 739, 744 (Tex. App.—San Antonio 2014, no pet.), the courts addressed **only** whether the defendants there had met their initial burden under the TCPA of showing that the suits against them were within the scope of the TCPA. The judicial communications privilege was never at issue in *Levatino,* and although the defendant in *Herrera* invoked that privilege in his TCPA motion to dismiss, the court never reached the issue.

Moreover the Dallas Court of Appeals has repeatedly held that the judicial communications privilege is **not** limited in statements made in the court itself, or in pleadings, or in other court proceedings. Rather, the privilege extends to communications made outside the judicial proceedings, but which are about those proceedings:

> [T]his Court [has held] that the privilege can extend to statements made out of court so long as they bear some relation to the proceeding. *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App.-Dallas 1981, writ ref'd n.r.e.). We held that "the privilege applies to any statement that bears some relation to an existing or proposed judicial proceeding," adding, "All doubt should be resolved in favor of its relevancy."

Jenevein v. Friedman, 111 S.W.3d 743, 745-748 (Tex. App.—Dallas 2003, no pet.); *see also Norman v. Borison*, 418 Md. 630, 640-642, 644, 661-665, 17 A.3d 697 (2011) (applying the privilege to a law firm's publication of a complaint on its web site and its accurate characterization of allegedly defamatory statements in the complaint in comments on the web site as well as in response to press questions); *Helena Chem. Co. v. Uribe*, 2012-NMSC-021, 281 P.3d 237, 244 (N. Mex. 2012); *Simpson Strong–Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18 (Tenn. 2007). Each of these cases involved communications with the press as a way of reaching potential **plaintiffs** who would have an interest in the litigation, but the same rationale applies to communications reaching out to potential defendants—here, other consumers who might incautiously sign form contracts that contain non-disparagement clauses—to alert them to the risks of the sort of abusive litigation that the Duchouquettes have been subjected to in this case. The Houston Court of Appeals has indicated that the question whether communicating the contents of pleadings to non-parties is protected by the judicial communication privilege is an open question in Texas, citing to other Texas cases which raise the possibility that once pleadings are in the public record, injuries for further disclosure of that information may be beyond the scope of defamation law. *Knox v. Taylor*, 992 S.W.2d 40, 53 n.7 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

F. The Plaintiffs have not shown that they suffered damages as a result of the allegedly defamatory statements.

The Plaintiffs argue, both in support of their business disparagement claim and in support of their defamation claim, that they have shown damages as a result of the Duchouquettes'

allegedly defamatory statements. But Plaintiffs have not made the required showing—that it was the allegedly defamatory words, and not the truthful statements that the defendants made—that were the cause of their damages. The Plaintiffs' do not dispute that they must prove specific causation of their damages. Nor do the Plaintiffs controvert the Duchouquettes' argument that reviews by some other consumers on Yelp, and on web sites other than Yelp such as "Pissed Consumer," were far more scathing. Motion to Dismiss, p. 19. Moreover, a review of many of the public comments attached to their papers reveals that the public outcry, and indeed the widespread media attention that this litigation has received, has not been about the nine words in the review about Gordy the fish that are alleged to have been defamatory. Instead, the public outrage is about the fact that Prestigious Pets requires its customers to sign contracts with a non-disparagement clause and has sued dissatisfied customers over a Yelp review.

For example, the communications appended by Kalle McWhorter to her affidavit, showing comments by someone named Kelly Pinsky to commercial complexes that had partnered with Prestigious Pets, show outrage over the non-disparagement clause and the fact that the company sued its own customer; the comments say nothing about Gordy the fish. Kalle McWhorter Affidavit, APPX000088-090. Similar patterns are apparent in the comments on the web page at DailyMail.co.uk that featured an article about the case; commenters criticizing Prestigious Pets were mostly upset that the company sued a customer or has a non-disparagement clause.[13] These are not clear and specific evidence of damages.

[13] Although some comments mentioned the fish, most of those comments make fun of the Duchouquettes either for having a fish cam or for having taken the time to write about feeding their fish. Kalle McWhorter Affidavit, APPX 0000069-077.

G. The Duchouquettes are entitled to a mandatory award of attorney fees, court costs, and sanctions.

The Plaintiffs' argue that no attorney fees can be awarded for legal services provided pro bono, citing *Cruz v. Van Sickle*, 452 S.W.3d 503 (Tex. App.-Dallas 2014, pet. denied), which held that fees for pro bono legal services are not "incurred" by the defendants within the meaning of section 27.009(a) of the TCPA. The Texas Supreme Court has since rejected the *Cruz v. Van Sickle* reading of the phrase "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." *Sullivan v. Abraham*, 488 S.W.3d 294, 298 (Tex. 2016). However, because there is no evidence showing that **all** of the legal services provided to the Duchouquettes in connection with this action have been pro bono,[14] and because no application for fees is pending, the issue of how to treat pro bono legal services is premature.[15]

CONCLUSION

The motion to dismiss under the TCPA should be granted.

[14] Before Thompson and Knight entered this case, defendants had been represented by counsel from Carrington Coleman. The record reflects that they were paid counsel. Michelle Affidavit ¶ 20.

[15] Plaintiffs ask the Court to award them $8750 in attorney fees by finding the anti-SLAPP motion frivolous. If the Court denies the Duchouquettes' Motion to Dismiss, and Plaintiffs believe that they can file a non-frivolous motion for an award for attorney fees, presenting evidence justifying a specific amount, the Duchouquettes will respond at that time.

Respectfully submitted,

/s/ Christopher O. Dachniwsky
Nicole Williams
Texas Bar No. 24041784
Andrew Cookingham
Texas Bar No. 24065077
Christopher O. Dachniwsky
Texas Bar No. 24097561

Thompson & Knight LLP
Suite 1500
One Arts Plaza, 1722 Routh Street
Dallas, Texas 75201
214-969-1538
Nicole.Williams@tklaw.com
Andrew.Cookingham@tklaw.com
Chris.Dachniwsky@tklaw.com

/s/ Paul Alan Levy
Paul Alan Levy
Admitted *pro hac vice*

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record via electronic service on this the 26th day of July, 2016.

/s/ Christopher O. Dachniwsky
Christopher O. Dachniwsky

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

SUPPLEMENTAL AFFIDAVIT OF ROBERT DUCHOUQUETTE

I declare the following is true and correct under penalty of perjury:

1. My name is Robert Duchouquette. I am over the age of twenty-one (21) years old, suffer no legal or mental disabilities, and am fully competent to make this Affidavit.

2. In addition to the "fish cam" mentioned in my previous affidavit, we have cameras that record locations within our house as well as outside the windows. Based on a review of the videos and still images, I can make the following statements about the Prestigious Pets personnel who fed our fish Gordy.

3. By reviewing the saved images from these cameras, I was able to determine that some, but not all, of the feedings of our fish Gordy were made by Prestigious Pets representative Amanda Jones. I recognize Amanda Jones from the images because we met her in person when I signed a contract with Prestigious Pets. An image of one of Amanda Jones' visits is attached as Exhibit 1

4. Amanda Jones was not the only Prestigious Pets representative who cared for our pets, however. Gordy's second feeding was by the replacement person, whose name I do not know. This individual, who does not look like Amanda, appears on an image at 7:53 AM on October 18, 2015

wearing a Prestigious Pets shirt (attached as Exhibit 2); an image of her car outside our house, with the Prestigious Pets logo, is Exhibit 3. It appears that she fed Gordy after she got back from walking our dogs: images at 8:35AM show maybe 100 pellets on top of the water and more already on the bottom of the tank at the sides of the rock. Exhibit 4. The images reveal that, even a few hours after this feeding, the water quality was diminished significantly, with food remaining both on the top surface of the water as well accumulated on the bottom. Exhibit 5.

5. Even though the water was cloudy at this point, with amounts of food plainly accumulated, the images reveal two more feedings, both by Amanda Jones. The second such feeding was administered after 7:20 PM on October 19, 2015. This, the feeding was after the October 19 email, attached as Exhibit A to the affidavit of my wife Michelle, in which she told Prestigious Pets to ask Amanda not to give the fish any more food.

Robert Duchouquette

SUBSCRIBED AND SWORN TO BEFORE ME this 21 day of July, 2016, to certify which my hand and official seal of office.

MELINDA FASEL NOTARY PUBLIC No. 15-416 STATE OF HAWAII

Printed Name: MELINDA FASEL

Notary Public in and for the State of Hawaii

My Commission Expires: 12/08/2019

Doc. Date: 07/21/16 # Pages: 2
Melinda Fasel Second Circuit
Doc. Description: SUPPLEMENTAL AFFIDAVIT OF ROBERT DUCHOUQUETTE

Notary Signature 07/21/2016 Date

NOTARY CERTIFICATION