

**IN THE CIRCUIT COURT OF WILSON COUNTY, TENNESSEE**

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NANDIGAM NEUROLOGY, PLC, and	§	
KAVEER NANDIGAM, M.D.,	§	
	§	
<i>Plaintiffs,</i>	§	Circuit Court Case No.: 2020-cv-89
	§	
<i>v.</i>	§	Judge Clara W. Byrd
	§	
KELLY BEAVERS	§	Appeal from Wilson County General
	§	Sessions Case No.: 2020-cv-152
<i>Defendant.</i>	§	

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**DEFENDANT BEAVERS’S MEMORANDUM IN SUPPORT OF HER MOTION  
TO DISMISS AND TENN. CODE ANN. § 20-17-104(a) PETITION TO  
DISMISS THE PLAINTIFFS’ COMPLAINT PURSUANT TO THE TENNESSEE  
PUBLIC PARTICIPATION ACT**

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**I. INTRODUCTION**

The Plaintiffs have appealed—to the wrong court—the Wilson County General Sessions Court’s February 13, 2020 Order dismissing the Plaintiffs’ second Strategic Lawsuit Against Public Participation (“SLAPP-suit”) against Defendant Kelly Beavers regarding a truthful but critical Yelp! review. Significantly, Plaintiff Nandigam Neurology previously filed the same claims against Ms. Beavers in Wilson County Circuit Court Case No. 2019-CV-663. This Court ultimately dismissed those claims with prejudice. *See **Collective Exhibit A***, Circuit Court Order and Feb. 21, 2020 Transcript of Proceedings.

The instant appeal, however, stems from the Plaintiffs re-filing their claims against Ms. Beavers in Wilson County General Sessions Court following their dismissal in Circuit Court. Upon re-filing, the Plaintiffs’ claims were dismissed with prejudice by the General Sessions Court, too, pursuant to the Tennessee Public Participation Act (TPPA), *see **Exhibit B***, General Sessions Court Order—a protective anti-SLAPP statute that the

General Assembly enacted in 2019 to ensure prompt dismissal of frivolous speech-based lawsuits like this one. *See* TENN. CODE ANN. § 20-17-101, *et seq.* Under TENN. CODE ANN. § 20-17-106, however, the General Sessions Court’s Order dismissing the Plaintiffs’ claims under the Tennessee Public Participation Act is “appealable as a matter of right **to the court of appeals**”—not to this Court, which lacks subject matter jurisdiction to consider it. *See id.* (emphasis added). As such, beyond the fact that the Plaintiffs’ claims lack merit and fail to state any cognizable claim for relief for the myriad reasons set forth below, this Court lacks subject matter jurisdiction to adjudicate the Plaintiffs’ appeal at all.

Of note, the Plaintiffs themselves are aware that this appeal should have been filed in the Court of Appeals, having previously acknowledged and *argued*—on the record—that as a matter of statute, an order granting a TPPA petition is “appealable to the Court of Appeals.” *See Exhibit C*, Transcript of February 13, 2020 Hearing in General Sessions Court, p. 13, lines 16–17 (Mr. Huong: “It’s statutory. It says it’s immediately appealable to the Court of Appeals.”). This contention by Plaintiffs’ counsel constitutes a conclusive and binding judicial admission on the matter. *See, e.g., Loftis v. Rayburn*, No. M2017-01502-COA-R3-CV, 2018 WL 1895842, at \*11 (Tenn. Ct. App. Apr. 20, 2018) (“a statement of counsel in pleadings or stipulation or orally in court is generally regarded as a conclusive, judicial admission . . . .”) (collecting cases). Even so, the Plaintiffs have inexplicably appealed the General Sessions Court’s Order granting Ms. Beavers’ TPPA petition to this Court instead. This Court, of course, both is not the Court of Appeals and does not adjudicate controversies using “[t]he Tennessee Rules of Appellate Procedure”—the rules that TENN. CODE ANN. § 20-17-106 makes clear are “applicable to appeals” regarding TPPA petitions. *See id.* Separately, and independently, given that Ms. Beavers’s claims for fees, costs, and sanctions still remain pending in General Sessions

Court but have now been delayed as a consequence of this untimely appeal, *see Exhibit C*, p. 12, line 23—p. 13, line 2, this appeal additionally cannot be taken for the additional reason that the General Sessions Court’s order is not yet a final judgment.

For all of these reasons, and for the additional reasons detailed below, the instant appeal must be dismissed for lack of subject matter jurisdiction; the Plaintiffs’ Complaint must be dismissed with prejudice; and Ms. Beavers is entitled to recover her costs, fees, and sanctions against the Plaintiffs pursuant to Tennessee Code Annotated §§ 20-17-107(a) and 20-12-119(c).

## **II. SUMMARY OF ARGUMENT**

Upset about Dr. Kaveer Nandigam’s extraordinarily disturbing behavior toward Ms. Beavers and her father coming to light, the Plaintiffs—Nandigam Neurology, PLC, and Dr. Kaveer Nandigam himself—have sued Ms. Beavers regarding a constitutionally protected Yelp! review that she posted after taking her father to the doctor. Ms. Beavers’s Yelp! review, of course, was not illegal, and it falls safely within the protections guaranteed by the First Amendment. For a wealth of additional reasons, this Court lacks jurisdiction to consider the Plaintiffs’ appeal at all, and the Plaintiffs’ Complaint fails to state a cognizable claim under any pleaded theory of relief regardless. Because the Plaintiffs have baselessly sued Ms. Beavers for exercising her right to free speech, Ms. Beavers further petitions this Court to dismiss the Plaintiffs’ Complaint and to sanction the Plaintiffs and their counsel under the newly enacted Tennessee Public Participation Act. *See* TENN. CODE ANN. § 20-17-107(a)(2).

The Plaintiffs’ Complaint and appeal of the General Sessions Court’s February 13, 2020 Order dismissing this action must be dismissed with prejudice for several independent reasons:

First, under Tennessee Code Annotated § 20-17-106, this Court lacks subject matter jurisdiction to consider this appeal—which must be taken “to the court of appeals,” *see id.*—and the judgment that the Plaintiffs have appealed also is not yet final.

Second, the Plaintiffs’ complaint fails to comport with threshold pleading requirements and fails to set forth the substance of any of the statements that the Plaintiffs allege are defamatory or placed Dr. Nandigam in a false light.

Third, for several reasons, the statements in Ms. Beavers’s Yelp! review are inactionable as defamation or false light and are incapable of conveying a defamatory meaning as a matter of law.

Fourth, Nandigam Neurology, PLC, cannot sue Ms. Beavers regarding statements made about Dr. Nandigam.

The Plaintiffs’ Complaint also falls squarely within the protections of the newly enacted Tennessee Public Participation Act. *See* TENN. CODE ANN. § 20-17-101, *et seq.* Pursuant to the Tennessee Public Participation Act, Ms. Beavers has submitted sworn, admissible evidence setting forth several outcome-determinative defenses to this action. *See, e.g., Exhibit D*, Affidavit of Kelly Beavers. In furtherance of the Tennessee Public Participation Act’s substantive protections, Ms. Beavers additionally demands that the Plaintiffs establish a *prima facie* case for each essential element of its claims in order to avoid dismissal. *See* TENN. CODE ANN. § 20-17-105(b).

### **III. LEGAL STANDARDS**

#### **A. MS. BEAVERS’S MOTION TO DISMISS**

“A threshold question in all cases is whether the court has jurisdiction over the lawsuit’s subject matter. Because courts cannot act where jurisdiction is lacking, a trial court has an inescapable duty to determine whether the dispute is within its subject

matter jurisdiction.” *Wilson v. Sentence Info. Servs.*, No. M1998-00939-COA-R3CV, 2001 WL 422966, at \*4 (Tenn. Ct. App. Apr. 26, 2001) (citing *Edwards v. Hawks*, 222 S.W.2d 28, 31 (Tenn. 1949); *State v. Seagraves*, 837 S.W.2d 615, 617 (Tenn. Crim. App. 1992)). Notably, “the plaintiff bears the burden of proving facts establishing that the court has jurisdiction[,]” *id.* at \*5, and “[t]he parties cannot confer subject matter jurisdiction on a trial or an appellate court by appearance, plea, consent, silence, or waiver.” *Staats v. McKinnon*, 206 S.W.3d 532, 542 (Tenn. Ct. App. 2006) (cleaned up). “Tennessee Rule of Civil Procedure 12.02(1) governs a motion to dismiss for lack of subject matter jurisdiction.” *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712 (Tenn. 2012). Where, as here, subject matter jurisdiction is lacking, a plaintiff’s complaint must be dismissed. *See id.*

Separately, “[a] motion to dismiss a complaint for failure to state a claim pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure asserts that the allegations in the complaint, accepted as true, fail to establish a cause of action for which relief can be granted.” *Conley v. State*, 141 S.W.3d 591, 594 (Tenn. 2004). Where, as here, it “appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief[,]” a defendant’s motion to dismiss for failure to state a claim must be granted. *See Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

## **B. HEIGHTENED CONSTITUTIONAL REQUIREMENTS GOVERNING DEFAMATION CLAIMS**

To establish a prima facie case of defamation under Tennessee law, a plaintiff must prove that: “(1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.” *Davis v.*

*The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001).

Further, given the constitutional requisites of defamation claims, “[a] party may not skirt the requirements of defamation law by pleading another, related cause of action.” *Boladian v. UMG Recordings, Inc.*, 123 F. App’x 165, 169 (6th Cir. 2005) (unpublished) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988)). *See also Seaton v. TripAdvisor LLC*, 728 F.3d 592, 601, n.9 (6th Cir. 2013) (“Seaton’s claims for false-light invasion of privacy, trade libel/injurious falsehood, and tortious interference with prospective business relationships appear to be an attempt to bypass the First Amendment.” (citing *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007))). Thus, the Plaintiffs’ false light claims are subject to the same heightened constitutional requirements as their defamation claims. *See id.* *See also Moldea v. New York Times Co.*, 22 F.3d 310, 319–20 (D.C. Cir. 1994) (“a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim”); *Montgomery v. Risen*, 875 F.3d 709, 713 (D.C. Cir. 2017). *Cf. Loftis v. Rayburn*, No. M201701502COAR3CV, 2018 WL 1895842, at \*8 (Tenn. Ct. App. Apr. 20, 2018) (“For the reasons we found the statements in Mr. Myers’ article fail to imply a defamatory meaning, we also find they are not susceptible to the requisite inferences casting Mr. Loftis in a false light.” (citing *West v. Media General Convergence, Inc.*, 53 S.W.3d 640, 645 n.5 (Tenn. 2001))).

Critically, “the Supreme Court of the United States has constitutionalized the law of libel[.]” *Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978). *See also N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964). Thus, defamation claims present several threshold and outcome-determinative questions of law that do not require any deference to the Plaintiffs’ own characterizations of the statements that it has sued over. *See, e.g., Moman*

*v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at \*3 (Tenn. Ct. App. Apr. 10, 1997) (“If the [allegedly defamatory] words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation.”). See also *Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012); *McWhorter v. Barre*, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003).

Given the constitutional limitations that govern defamation claims, “ensuring that defamation actions proceed only upon statements which may actually defame a plaintiff is an essential gatekeeping function of the court.” *Pendleton v. Newsome*, 772 S.E.2d 759, 763 (Va. 2015) (internal quotation omitted). With this “essential gatekeeping function” in mind, *see id.*, both our Court of Appeals and our Supreme Court have instructed that in defamation cases, “the issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance . . . .” *Brown*, 393 S.W.3d at 708. See also *Aegis Scis. Corp. v. Zelenik*, No. M2012-00898-COA-R3CV, 2013 WL 175807, at \*6 (Tenn. Ct. App. Jan. 16, 2013) (“[T]he preliminary question of whether a statement ‘is capable of conveying a defamatory meaning’ presents a question of law.” (quoting *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000))); *McWhorter*, 132 S.W.3d at 364 (“The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is ‘capable of being so understood is a question of law to be determined by the court.’” (quoting *Memphis Publ’g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978))). If an allegedly defamatory statement is not capable of being understood as defamatory as a matter of law, then a plaintiff’s complaint must be dismissed for failure to state a claim. *McWhorter*, 132 S.W.3d at 364.

In keeping with the heightened constitutional requirements that govern

defamation claims, Tennessee courts have also adopted several categorical bars that prevent claimed defamations from being actionable as a matter of law, several of which are outcome-determinative here:

First, our courts have held that opinions enjoy robust constitutional protection under the First Amendment. *See generally Stones River Motors, Inc. v. Mid-S. Publ'g Co.*, 651 S.W.2d 722 (Tenn. Ct. App. 1983), *abrogation on other grounds recognized by Zius v. Shelton*, No. E199901157COAR9CV, 2000 WL 739466, at \*3 (Tenn. Ct. App. June 6, 2000). As a result, “an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts.” *Id.* at 722.

Second, an allegedly defamatory statement “must be factually false in order to be actionable.”<sup>1</sup> *Moman*, 1997 WL 167210, at \*4. Thus, any statement that is not capable of being proven false as a matter of fact or that constitutes mere rhetorical hyperbole cannot serve as the basis of a defamation claim. *See id.*

Third, merely unpleasant or embarrassing statements are not capable of conveying a defamatory meaning as a matter of law. *Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at \*3 (Sept. 30, 2015).  
Instead,

[f]or a communication to be [defamatory], **it must constitute a serious threat to the Plaintiffs’ reputation.** A [defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. **The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element “of disgrace.”**

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<sup>1</sup> In Tennessee, defamatory implications regarding an allegedly tortious publication are governed by a distinct and independent tort. *See Loftis v. Rayburn*, No. M201701502COAR3CV, 2018 WL 1895842, at \*5–6 (Tenn. Ct. App. Apr. 20, 2018) (describing Tennessee’s independent recognition of “defamation by implication or innuendo”). In this case, the Plaintiffs’ Complaint exclusively alleges defamation and false light claims. *See* Complaint.

*Id.* (quoting *Brown*, 393 S.W.3d at 708) (emphases added), *appeal denied* (Tenn. Feb. 18, 2016).

Fourth, Tennessee has adopted the “substantial truth doctrine” with respect to defamation cases. *See Isbell v. Travis Elec. Co.*, No. M199900052COAR3CV, 2000 WL 1817252, at \*5 (Tenn. Ct. App. Dec. 13, 2000). Thus, statements that are true or substantially true are not actionable as defamation as a matter of law. *Id.*

Fifth, damages cannot be presumed; instead, a plaintiff is “required to prove actual damages in all defamation cases.” *Hibdon v. Grabowski*, 195 S.W.3d 48, 68 (Tenn. Ct. App. 2005) (citing *Handley v. May*, 588 S.W.2d 772, 776 (Tenn. Ct. App. 1979)).

### **C. THE TENNESSEE PUBLIC PARTICIPATION ACT**

Tennessee’s newly enacted Public Participation Act—which the legislature adopted to deter, expediently resolve, and punish SLAPP-suits like this one—provides that “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action” subject to the specialized provisions of Tennessee Code Annotated § 20-17-104(a). The Tennessee Public Participation Act “provide[s] an additional substantive remedy to protect the constitutional rights of parties” that “supplement[s] any remedies which are otherwise available . . . under the Tennessee Rules of Civil Procedure.” TENN. CODE ANN. § 20-17-109. As such, nothing in the Act “affects, limits, or precludes the right of any party to assert any defense, remedy, immunity, or privilege otherwise authorized by law[.]” TENN. CODE ANN. § 20-17-108(4).

In enacting the Tennessee Public Participation Act, the Tennessee General Assembly forcefully established that:

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury. This chapter is consistent with and necessary to implement the rights protected by Article I, §§ 19 and 23, of the Constitution of Tennessee, as well as by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent.

TENN. CODE ANN. § 20-17-102.

Substantively, the Tennessee Public Participation Act also provides, among other things, that:

(1) When a defendant has been sued in response to the party's exercise of the right to free speech, he or she is entitled to file a special petition to dismiss the legal action, TENN. CODE ANN. § 20-17-104(a); and

(2) Discovery is automatically stayed by statute pending the entry of an order ruling on the petition, TENN. CODE ANN. § 20-17-104(d).

A petition to dismiss an action under the Tennessee Public Participation Act "may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper." *See* TENN. CODE ANN. § 20-17-104(b). Under the TPPA, "[t]he petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association." TENN. CODE ANN. § 20-17-105(a). Thereafter, the Court "shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action." TENN. CODE ANN. § 20-17-105(b). Separately, "[n]otwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action." TENN.

CODE ANN. § 20-17-105(c).

Critically, a “court’s order dismissing or refusing to dismiss a legal action pursuant to a petition filed under [the Tennessee Public Participation Act] is immediately appealable as a matter of right **to the court of appeals.**” TENN. CODE ANN. § 20-17-106 (emphasis added). As a consequence, this appeal of the General Sessions Court’s Order dismissing the Plaintiffs’ legal action under the TPPA should have been taken “to the court of appeals.” *See id.* Additionally, “[t]he Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right governs such appeals.” *Id.*

#### **IV. FACTS**

##### **A. PROCEDURAL HISTORY**

Upset about Dr. Nandigam’s horrific bedside manner coming to light, on November 27, 2019, Plaintiff Nandigam Neurology, PLC, sued Ms. Beavers in Wilson County Circuit Court over her negative Yelp! review. *See Exhibit E*, Wilson Cty. Cir. Ct. Case No.: 2019-cv-663 Record (Complaint). In response, Ms. Beavers filed a timely motion and TPPA petition to dismiss Nandigam Neurology’s Complaint under the Tennessee Public Participation Act. Rather than allowing Ms. Beavers’s dispositive TPPA petition to be set for hearing, however, Nandigam Neurology non-suited all of its claims. Because Ms. Beavers’s motion and TPPA petition to dismiss Nandigam Neurology’s claims against her functioned as a motion for summary judgment and sought affirmative relief, however, this Court held that Nandigam Neurology lacked the right to non-suit its claims without prejudice, and it dismissed Nandigam Neurology’s claims against Ms. Beavers with prejudice as a consequence. *See Exhibit A.*

On January 21, 2020, the Plaintiffs re-filed their claims against Ms. Beavers by initiating the present lawsuit in Wilson County General Sessions Court. *See Exhibit F,*

General Sessions Complaint. Ms. Beavers responded by filing a TPPA Petition to Dismiss the Plaintiffs' new action as well, *see Exhibit G*, in response to which the Plaintiffs filed what they called an "Answer." *See Exhibit H*. Thereafter, Ms. Beavers filed a Reply to the Plaintiffs' "Answer" on February 5, 2020. *See Exhibit I*. A hearing on Ms. Beavers's TPPA Petition was set for February 6, 2020. *See Exhibit G*, TPPA Petition, p. 27.

On February 6, 2020, the General Sessions Court held a hearing on Ms. Beavers's TPPA Petition as scheduled. *See Exhibit J*, General Sessions Hearing Transcript, Feb. 6, 2020. Following the hearing, the General Sessions Court indicated that it would take the matter under advisement and issue a ruling on February 13, 2020. *See id.* at p. 23, lines 22–24; p. 24, lines 7–8. Six days after the Court's February 6th hearing, however, and without seeking leave, on February 12, 2020, the Plaintiffs filed an impermissible sur-reply that purported to be a "Supplemental Answer" to Ms. Beavers's TPPA Petition. *See Exhibit C*, p. 5, lines 9–10 & Exhibit #1 to Hearing Transcript. Despite having been filed in the "afternoon" on February 12, 2020, *see id.* at p. 4, lines 22–23, the Plaintiffs strategically withheld service of their "Supplemental Answer" until 5:08 p.m. on February 12, 2020—after the clerk's office closed and the evening before the Court was set to rule—in order to prevent Ms. Beavers from responding to it. *See id.* at p. 10, lines 7–15 and Exhibit #1 to Hearing Transcript. The Plaintiffs' impermissible sur-reply was also egregiously untimely; by statute, a response to a TPPA petition "may be served and filed by the opposing party no less than five (5) days **before** the hearing or, in the court's discretion, at any **earlier** time that the court deems proper"—not six days after the hearing takes place. TENN. CODE ANN. § 20-17-104 (emphases added). Accordingly, the Plaintiffs' "Supplemental Answer" was deemed untimely, and the General Sessions Court did not consider it. *See Exhibit C*, p. 5, lines 13–15. Thereafter, finding that the Plaintiffs

had failed to state a cognizable claim for relief or to carry their burden under the TPPA, *see* **Exhibit C**, p. 8, line 16–p. 9, line 14, the General Sessions Court granted Ms. Beavers’s TPPA petition and dismissed the Plaintiffs’ claims with prejudice. *See* **Exhibit B**.

Of note, Ms. Beavers’s claims for attorney’s fees, costs, and sanctions under the TPPA still remain pending in General Sessions Court. *See* **Exhibit C**, pp. 12, line 23–p. 13, line 2. During the Parties’ February 13, 2020 hearing, Plaintiffs’ counsel additionally indicated and argued—on the record—that as a matter of statute, an order granting a TPPA petition is “appealable to the Court of Appeals.” *See* **Exhibit C**, p. 13, lines 16–17 (Mr. Huong: “It’s statutory. It says it’s immediately appealable to the Court of Appeals.”). Nonetheless, on February 18, 2020, the Plaintiffs filed a notice of appeal seeking review in Wilson County Circuit Court instead. *See* **Exhibit K**, Notice of Appeal.

## **B. FACTUAL HISTORY**

The Plaintiffs’ General Sessions Complaint, now before this Court on appeal, fails to plead the substance of the allegedly defamatory statements at issue in this action in any regard. *See* **Exhibit F**. As set forth below, this omission is fatal and compels dismissal. *See infra*, pp. 17–18. Assuming, for the sake of argument, that the facts of this case arise out of the same circumstances as Nandigam Neurology, PLC’s Circuit Court action, however, the underlying facts involved in this lawsuit are as follows:

“In early November 2019, Defendant Beavers accompanied her father to a medical consultation at the office of Plaintiff Nandigam.” *See* **Exhibit E** (Circuit Court Complaint), p. 1, ¶ 6. “On November 7, 2019, Defendant Beavers posted a negative Yelp review on the internet[.]” *Id.* at ¶ 7. The Plaintiffs do not indicate what the Yelp! review at issue says, and they have also failed to append the review as an exhibit to either of their

complaints. *See* **Exhibit E**; **Exhibit F**. *But see* Tenn. R. Civ. P. 10.03.<sup>2</sup> Nonetheless, the Plaintiffs assert, without explanation, that Ms. Beavers’s statements were defamatory and placed Dr. Nandigam in a false light. *Id.*

The Yelp! review at issue was posted after Ms. Beavers brought her elderly father—who was experiencing dizziness and memory loss—to a doctor’s appointment. *See* **Exhibit D**, p. 1, ¶ 5. Ms. Beavers’s father has significant difficulty remembering what occurred during his doctors’ appointments. *Id.* at pp. 1–2, ¶ 6. As a result, once in a private room and away from other patients, Ms. Beavers routinely (and lawfully, *see* TENN. CODE ANN. § 39-13-601) records her father’s medical appointments so that she can later play them for her father and remind him what doctors and other medical professionals have told him to ensure that he is following their advice and receiving proper care. *Id.*

On this occasion, when Dr. Nandigam saw Ms. Beavers recording the visit, he became enraged, slammed his clipboard, demanded Ms. Beavers’s phone, and demanded that she delete the recording. *Id.* at p. 2, ¶¶ 7 & 9. Shocked and frightened by Dr. Nandigam’s behavior, Ms. Beavers complied and deleted the recording. *Id.* at ¶ 10. Ms. Beavers then exercised her constitutional right to post a truthful review on Yelp! about the service she had received. *See id.* at ¶ 11. Her Yelp! review stated, in its entirety:

This “Dr’s” behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does

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<sup>2</sup> Plaintiffs’ failure to comply with Rule 10.03 should similarly result in dismissal. *See, e.g., Clear Water Partners, LLC v. Benson*, No. E2016-00442-COA-R3-CV, 2017 WL 376391, at \*8 (Tenn. Ct. App. Jan. 26, 2017) (“Rule 10.03 applies to this claim by Clear Water. In response to Clear Water’s argument that Rule 10.03 does not contemplate dismissal as a sanction for failing to comply with the rule, we note that Rule 41.02(1) provides that a plaintiff’s complaint may be dismissed if the plaintiff fails to comply with the rules set forth in the Tennessee Rules of Civil Procedure.” (citing Tenn. R. Civ. P. 41.02(1))). *See also id.* (citing *Maynard v. Meharry Med. Coll.*, No. 01-A-01-9408-CH-00400, 1995 WL 41598, at \*1 (Tenn. Ct. App. Feb. 1, 1995) (granting defendants’ motion to dismiss complaint due to failure to attach copy of contract documents to complaint as required by Rule 10.03)).

not belong in the medical field at all.

**Exhibit L**, Yelp! Review.

## **V. ARGUMENT**

### **A. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS APPEAL.**

This Court lacks subject matter jurisdiction to consider this appeal for two independent reasons. First, only the Court of Appeals may adjudicate the Plaintiffs' appeal of the General Sessions Court's February 13, 2020 Order granting Ms. Beavers's TPPA petition. Second, the General Sessions Court's judgment is not yet final in light of Ms. Beavers's pending claims for attorney's fees, costs, and sanctions.

#### **1. Tennessee Code Annotated § 20-17-106 provides that appeals regarding TPPA Petitions are appealable “to the court of appeals.”**

By statute, only the Court of Appeals may adjudicate the Plaintiffs' appeal of the General Sessions Court's February 13, 2020 Order granting Ms. Beavers's TPPA petition—an appeal that must also be governed by the “Tennessee Rules of Appellate Procedure.” *See* TENN. CODE ANN. § 20-17-106. Accordingly, this Court lacks subject matter jurisdiction to adjudicate the instant appeal, and pursuant to Tennessee Rule of Civil Procedure 12.02(1), the Plaintiffs' appeal must be dismissed.

Irrespective of the fact that this case originated in General Sessions Court, the Tennessee Public Participation Act expressly states that an appeal of an order dismissing a legal action pursuant to a TPPA petition is “to the court of appeals”—not to this Court. *See* TENN. CODE ANN. § 20-17-106 (“The court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals.”) (emphasis added). Notably, the Public Participation Act also instructs that “[t]he Tennessee Rules of Appellate Procedure

applicable to appeals as a matter of right governs such appeals,” *id.*, which this Court both does not and cannot apply. *See* Tenn. R. Civ. P. 1 (“the Rules of Civil Procedure shall govern procedure in the circuit . . . courts in all civil actions”). As such, this Court cannot adjudicate this appeal, and the Plaintiffs’ appeal must be dismissed for lack of subject matter jurisdiction.

**2. The General Sessions Court’s judgment is not an appealable final order.**

This Court additionally lacks subject matter jurisdiction to adjudicate this appeal because the judgment from which this appeal originates is not yet final. Absent specified exceptions, an appellate court “only has subject matter jurisdiction over final orders.” *See Grand Valley Lakes Prop. Owners’ Ass’n, Inc. v. Gunn*, No. W200801116COAR3CV, 2009 WL 981697, at \*3 (Tenn. Ct. App. Apr. 13, 2009) (citing *Bayberry Assoc. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990)). By definition, “an order adjudicating fewer than all the claims of the parties is not a final, appealable order.” *Id.* The Court of Appeals has additionally made clear repeatedly and beyond dispute that the final judgment rule applies to cases in General Sessions Court. *See, e.g., Wells Fargo Bank, N.A. v. Dorris*, 556 S.W.3d 745, 753–54 (Tenn. Ct. App. 2017) (holding that “[t]he same principle [of finality] applies with regard to appeals in general sessions courts”). *See also Graham v. Walldorf Prop. Mgmt.*, No. E200800837COAR3CV, 2009 WL 723837, at \*5 (Tenn. Ct. App. Mar. 19, 2009) (“before such an appeal can be taken, there must have been a final judgment entered in the general sessions court, and an appeal under this statute cannot be had for the review of interlocutory orders”) (cleaned up).

Here, Ms. Beavers’s claim for fees, costs, and sanctions under the Tennessee Public Participation Act indisputably remain pending before the General Sessions Court. *See*

**Exhibit C**, pp. 12, line 23—p. 13, line 2. As a consequence, the General Sessions Court’s judgment is not yet final. *See id.* *See also Fink v. Crean*, No. M2005-01364-COA-R3-CV, 2006 WL 3783541, at \*5 (Tenn. Ct. App. Dec. 21, 2006) (holding that the trial court’s order that did not resolve the attorney’s fee issue was not final and appealable); *Scott v. Noland Co.*, No. 03A01-9407-CV-00248, 1995 WL 11177, at \*1 (Tenn. Ct. App. Jan. 12, 1995) (dismissing appeal because amount of attorney’s fees granted had not been resolved by the trial court). Accordingly, the Plaintiffs’ appeal is premature; it is not properly before the Court; and pursuant to Tennessee Rule of Civil Procedure 12.02(1), it should be dismissed for lack of subject matter jurisdiction. *See id.*

**B. THE PLAINTIFFS’ COMPLAINT FAILS TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

**1. The Plaintiffs have failed to plead the substance of any of the statements over which they are suing.**

Plaintiffs who sue for defamation—and by extension, false light—are required to plead, at minimum, the substance of the statements over which they are suing. *See, e.g., Rose v. Cookeville Reg’l Med. Ctr.*, No. M200702368COAR3CV, 2008 WL 2078056, at \*4 (Tenn. Ct. App. May 14, 2008) (noting requirement that a plaintiff plead, at minimum, “the substance of the slanderous statement” even under relaxed pleading standards (citing *Handley*, 588 S.W.2d at 774–75)); *Webb v. Stanley Jones Realty, Inc.*, No. 04-1288-T/AN, 2005 WL 1959160, at \*2 (W.D. Tenn. Aug. 11, 2005) (“the substance of the utterance must be set forth” (citing *Handley*, 588 S.W.2d at 775)). A plaintiff’s failure to set forth the substance of an allegedly defamatory statement compels dismissal. *See, e.g., Markowitz v. Skalli*, No. 13-2186-JDT-CGC, 2013 WL 4782143, at \*4 (W.D. Tenn. Sept. 5, 2013) (“In the instant case, Plaintiff merely makes the conclusory statement that

Defendant made “slanderous remarks” without providing Defendant with “the substance of the slanderous utterance [ . . . ] along with notice of the time and place of the utterance [to appraise Defendant] of the allegations that he must defend against. Therefore, it is RECOMMENDED that the Court DISMISS the complaint for failure to state a claim on which relief may be granted . . . .” (citing *Handley*, 588 S.W.2d at 775)).

Here, despite describing the statements at issue as defamatory or having placed Dr. Nandigam in a false light, the Plaintiffs have not bothered to set forth the substance of any of the statements over which they have sued. See **Exhibit F**. As noted, however, such bald, conclusory allegations are insufficient to state a cognizable claim for relief as a matter of law. See, e.g., *Rose*, 2008 WL 2078056, at \*4; *Webb*, 2005 WL 1959160, at \*2. Given this context, the Plaintiffs’ failure to plead the substance of their defamation and false light claims as required compels their dismissal for failure to state a claim. See *Markowitz*, 2013 WL 4782143, at \*4.

**2. The statements contained in Ms. Beavers’s Yelp! review are inactionable as defamation as a matter of law.**

To state a claim for defamation, a statement must, at minimum, be capable of conveying a defamatory meaning. Crucially, “whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance . . . .” *Brown*, 393 S.W.3d at 708. See also *Aegis Scis. Corp.*, 2013 WL 175807, at \*6 (“[T]he preliminary question of whether a statement ‘is capable of conveying a defamatory meaning’ presents a question of law.” (quoting *Revis*, 31 S.W.3d at 253)); *McWhorter*, 132 S.W.3d at 364 (“The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is ‘capable of being so understood is a question of law to be

determined by the court.” (quoting *Memphis Publ’g Co.*, 569 S.W.2d at 419)).

Consequently, the Plaintiffs’ allegations that the statements at issue are reasonably capable of conveying a defamatory meaning represent questions of law that must be decided by this Court without any deference to the Plaintiffs’ characterizations. See *Brown*, 393 S.W.3d at 708–09 (“The issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance . . . To make this determination, courts ‘must look to the words themselves and are not bound by the Plaintiffs’ interpretation of them.’”); *Moman*, 1997 WL 167210, at \*3 (“If the words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation.”). Additionally, every statement that the Plaintiff insists is defamatory “should be read as a person of ordinary intelligence would understand it in light of the surrounding circumstances.” *Aegis Scis. Corp.*, 2013 WL 175807, at \*6 (quoting *Revis*, 31 S.W.3d at 253).

For the reasons provided in the following subsections, none of the statements that appear to form the basis of the Plaintiffs’ Complaint comes anywhere close to clearing these hurdles. As such, the Plaintiffs have failed to state a cognizable claim for defamation or false light as a matter of law.

- i. The statements in Ms. Beavers’s Yelp! review are not capable of conveying a defamatory meaning as a matter of law.

Setting aside the fact that the Plaintiffs’ Complaint does not set forth the substance of the statements over which they are suing, the statements in Ms. Beavers’s Yelp! review are not capable of conveying a defamatory meaning as a matter of law. The Plaintiffs’ lawsuit is premised entirely upon Ms. Beavers’ Yelp! review, which states—in its entirety—as follows:

This “Dr’s” behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all.

**Exhibit L.**

For the reasons detailed below, none of these statements is capable of conveying a defamatory meaning or giving rise to a claim for false light invasion of privacy.

- a. *Subjective opinions based on disclosed facts and statements of future intent are categorically inactionable.*

Because the Plaintiffs have not specified which statements within Ms. Beavers’s review they contend are tortious, it is not clear whether the Plaintiffs are claiming that Ms. Beavers’s statements that “[t]his ‘Dr’s’ behavior today was totally unprofessional and unethical to put it mildly[,]” “[h]ow this guy is in business is beyond me[,]” and “[h]e does not belong in the medical field at all” were defamatory or placed Dr. Nandigam in a false light. *See id.* Regardless, none of these statements is capable of a defamatory meaning or being actionable as a matter of law for several reasons. In particular, these statements: (1) are based on fully disclosed, non-defamatory facts; (2) are statements of subjective opinion; and (3) are incapable of being proven false. *See, e.g., Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 (“[C]omments upon true and nondefamatory published facts are not actionable, even though [the comments] are stated in strong or abusive terms.”) (cleaned up); *Weidlich v. Rung*, No. M2017-00045-COA-R3-CV, 2017 WL 4862068, at \*6 (Tenn. Ct. App. Oct. 26, 2017) (holding that “[a] writer’s comments upon true and nondefamatory published facts are not actionable” as a matter of law); *Cummins v. Suntrust Capital Markets, Inc.*, 649 F. Supp. 2d 224, 255

(S.D.N.Y. 2009) (“the characterization of the Plaintiffs’ complicity in the June 15 option grants as self-interested, dishonest and unethical was a non-actionable statement of opinion based on fully disclosed facts”), *reconsideration denied*, No. 07 CIV. 4633(JGK), 2010 WL 985222, at \*1 (S.D.N.Y. Mar. 17, 2010), *and aff’d*, 416 F. App’x 101 (2d Cir. 2011); *Clark v. Viacom Int’l Inc.*, 617 F. App’x 495, 508 (6th Cir. 2015) (“[T]he falsity requirement is met only if the statement in question makes an assertion of fact—that is, an assertion that is capable of being proved objectively incorrect.”). As another court recently explained in a similar setting:

Henry’s statements that Tamburo’s actions were “unethical” and “deceitful” are not actionable. The First Amendment protects opinions that do not misstate actual facts. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990); *see also Moriarty v. Greene*, 315 Ill. App. 3d 225, 247 Ill. Dec. 675, 732 N.E.2d 730, 739 (2000). A plainly subjective remark is not actionable. *Wilkow v. Forbes*, 241 F.3d 552, 555 (7th Cir. 2001). Whether a person’s actions are ethical or deceptive is not objectively verifiable. *See Lifton v. Bd. of Educ. of the City of Chicago*, 416 F.3d 571, 579 (7th Cir. 2005). *See also Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 233 Ill. Dec. 456, 701 N.E.2d 99, 104 (1998) (concluding that the statement “fired because of incompetence” did not have a “precise and readily understood meaning,” and that “the veracity of the statement” was unverifiable).

*Tamburo v. Dworkin*, 974 F. Supp. 2d 1199, 1213 (N.D. Ill. 2013).

Further, as a statement regarding her future intent, Ms. Beavers’s indication that she “will be reporting [Dr. Nandigam] to the State of TN Medical Review Board and be filing a formal complaint” similarly is not capable of a defamatory meaning as a matter of law because it cannot be proven false. *See, e.g., S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 120 (D. Mass. 2010) (“Because Orr’s statement is unambiguously an expression of opinion about a future event, he cannot be held liable for defamation as to this statement.”); *Caesars Entm’t Operating Co. v. Appaloosa Inv. Ltd. P’ship I*, No. 652392/2014, 2015 WL 4430268, at \*8 (N.Y. Sup. Ct.

July 20, 2015) (“As for the Second Lien Holders’ litigation threats, they too cannot give rise to a defamation claim because they are expressions of future intent, not facts.”). Put differently: Statements concerning Ms. Beavers’s anticipated future actions cannot be proven false, and they cannot be construed as objectively verifiable false facts as a consequence. *See, e.g., Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (“[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” (citing *Milkovich*, 497 U.S. at 17–21) (other citations omitted)); *Oracle USA, Inc. v. Rimini Street, Inc.*, No. 2:10–CV–00106–LRH–PAL, 2010 WL 4386957, at \*3 (D. Nev. Oct. 29, 2010) (“[Defendant’s] statements are predictions of the future that could not be proven true or false at the time the statements were made. Therefore, these statements are not defamatory. Accordingly, the court will grant [the defendant’s] motion to dismiss as to these allegations of defamation.”).

Nor is Ms. Beavers’s question: “Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset?” capable of any defamatory meaning. It is a “widely adopted defamation principle that questions are questions.” *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1339 (D.C. Cir. 2015). Thus, “inquiry itself, however embarrassing or unpleasant to its subject, is not accusation.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993).

For all of these reasons, Ms. Beavers’s Yelp! review is not capable of a defamatory meaning as a matter of law, and the Plaintiffs’ defamation and false light claims must be dismissed as a consequence.

- b. *Ms. Beavers's statements were, at worst, merely annoying, offensive, or embarrassing.*

To provide substantial breathing room to promote free speech, unfettered communication, and commentary on issues of public importance, Tennessee's courts have additionally held that statements that are merely "annoying, offensive or embarrassing" are categorically inactionable. *Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 (quoting *Brown*, 393 S.W.3d at 708). "[T]he crux of free-speech rights is that generally they can be exercised even if (and perhaps especially when) they cause disruption and disharmony." *Bennett v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:17-CV-00630, 2019 WL 1572932, at \*12 (M.D. Tenn. Apr. 11, 2019). Consequently,

[f]or a communication to be [defamatory], it must constitute a serious threat to the Plaintiffs' reputation. A [defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element "of disgrace."

*Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 (quoting *Brown*, 393 S.W.3d at 708).

Here, the Plaintiffs have not sued over any implications. Even if they had, however, the only statements underlying the Plaintiffs' Complaint that could even plausibly imply statements of fact—whether the Dr. Nandigam "thr[ew] a complete temper tantrum" and whether he "slam[s] things when [he] get[s] upset[,]" see **Exhibit L**—cannot be considered defamatory as a matter of law. Considered in the most generous fashion possible, the Yelp! review at issue, and each statement within it, was—at most—merely "annoying, offensive or embarrassing"—a deficiency that renders the statements at issue inactionable. *Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 (quoting *Brown*, 393 S.W.3d at 708). Certainly, none of the statements in Ms. Beavers's Yelp! review can

plausibly be considered “disgrace[ful]” or “a serious threat to the Plaintiffs’ reputation.” See *Davis*, 83 S.W.3d at 128 (quoting *Stones River Motors*, 651 S.W.2d at 719). Consequently, notwithstanding the Plaintiffs’ own characterizations, none of the statements in the Yelp! review at issue is capable of conveying a defamatory meaning as a matter of law. See *id.*

- ii. The statements in Ms. Beavers’s Yelp! review are mere rhetorical hyperbole that cannot reasonably be read as objective assertions of false fact.

The statements in Ms. Beavers’s Yelp! review also qualify as constitutionally protected rhetorical hyperbole, rather than unprotected defamation or false light invasion of privacy. The doctrine of rhetorical hyperbole exists to provide essential breathing space for expression in a free society. Ms. Beavers’s innocuous Yelp! review easily falls within its protection.

The U.S. Supreme Court has emphasized that heated and emotionally charged rhetoric is entitled to free-speech protection under the doctrine of rhetorical hyperbole. For example, in *Old Dominion No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974), the Supreme Court ruled that labor union members did not defame non-union members when they referred to them as “scabs.” *Id.* The Court characterized the use of the term “scab” as “a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.” *Id.* at 286.

Similarly, in *Greenbelt Co-Op. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970), the U.S. Supreme Court ruled that a newspaper engaged in constitutionally protected rhetorical hyperbole when it referred to a developer’s contract with a city as “blackmail.” The Court reasoned that “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered

[the developer's] negotiating position extremely unreasonable.” *Id.* at 14. Accordingly, the Court determined that “[n]o reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the plaintiff] with the commission of a criminal offense.” *Id.*

In keeping with the U.S. Supreme Court’s guidance on the matter, the Sixth Circuit has similarly held that TripAdvisor’s use of the term “dirtiest” to describe a hotel in a review was constitutionally protected rhetorical hyperbole. *See Seaton*, 728 F.3d at 598. There, the court explained that: “‘Dirtiest’ is a loose, hyperbolic term because it is the superlative of an adjective that conveys an inherently subjective concept,” and thus, it held that “no reader of TripAdvisor’s list would understand Grand Resort to be, objectively, the dirtiest hotel in all the Americas, the North American continent, or even the United States.” *Id.* (citing *Greenbelt Coop. Publ’g Ass’n*, 398 U.S. at 14). The Sixth Circuit has similarly held that lyrics in a rap song that referred to someone as “a ‘disgrace to the species’” constituted mere rhetorical hyperbole that could not be deemed actionable as a matter of law. *Boladian, Inc.*, 123 F. App’x at 170.

Suffice it to say that extensive legal authority supports the proposition that the statements in Ms. Beavers’s Yelp! review referring to Dr. Nandigam as “totally unprofessional and unethical” and having “throw[n] a complete temper tantrum in front of Patients” amounted to plain rhetorical hyperbole—exactly the type of heated and emotional expression protected by the First Amendment. *See supra*, pp. 24–25. *See also* David L. Hudson, Jr., *Rhetorical Hyperbole Protects Free Speech*, FREEDOM FORUM INST. (Oct. 28, 2018), <https://www.freedomforuminstitute.org/2018/10/28/rhetorical-hyperbole-protects-free-speech/>. Accordingly, the statements at issue are inactionable as defamation or false light, and the Plaintiffs’ claims should be dismissed as a result.

iii. The Plaintiffs have failed to plead actual malice.

Where—as here—an allegedly defamatory statement or claimed false light invasion of privacy involves a matter of public interest, a plaintiff is required to prove actual malice. *See, e.g., West*, 53 S.W.3d at 647 (“In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed.2d 456 (1967), the Court extended the actual malice standard to alleged defamatory statements about matters of public interest.”). Critically, statements about the quality of services offered to the public are *per se* deemed matters of public interest for both First Amendment and Anti-SLAPP purposes. *See* TENN. CODE ANN. § 20-17-103(6)(D). *See also Neumann v. Liles*, 369 P.3d 1117, 1126 (Or. 2016) (finding statements critical of wedding planning services were matters of public concern under Oregon Anti-SLAPP statute, and holding that a defendant’s review was “an expression of opinion on matters of public concern that is protected under the First Amendment”); *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1363 (1998) (holding that “the public has a well-recognized interest in knowing about the quality and contents of consumer goods” and finding that statements alleging that products were unhealthy were “matters of obvious widespread public interest”); *DuPont Merck Pharmaceutical Co. v. Superior Ct.*, 78 Cal. App. 4th 562, 566 (2000) (holding that statements comparing the quality and effectiveness of drug products were made “in connection with a public issue” for Anti-SLAPP purposes).

In this case, the Plaintiffs’ Complaint is devoid of even an allegation of actual malice. *See Exhibit F*. As noted, such an allegation is also an affirmative requirement. *See West*, 53 S.W.3d at 647. Dismissal is appropriate as a consequence.

**3. Plaintiff Nandigam Neurology may not sue over statements that do not concern it, and Dr. Nandigam may not maintain his defamation action through a PLC.**

Ms. Beavers’s Yelp! review was expressly about—and it unambiguously concerns—

Dr. Kaveer Nandigam *the human being*, making explicit reference to “[t]his ‘Dr,’” “he” “him,” and “this guy.” See **Exhibit L**. That fact is necessarily fatal to Nandigam Neurology’s defamation claim, because “[a] plaintiff may not support a claim for defamation based on an alleged defamatory statement made ‘of and concerning’ a third party.” *Steele v. Ritz*, No. W200802125COAR3CV, 2009 WL 4825183, at \*3 (Tenn. Ct. App. Dec. 16, 2009) (citations omitted). As the Court of Appeals explained in *Stones River Motors*, 651 S.W.2d at 717:

As an essential element of a cause of action for defamation, the plaintiffs must prove a false and defamatory statement *concerning another*. RESTATEMENT (SECOND) OF TORTS § 558 (1977). Otherwise stated at common law, one of the required elements of proof was the “colloquium,” a showing that the language was directed to or concerning *the charging party*.”

(partial emphasis added).

Put differently: Dr. Nandigam cannot prosecute—through the veil of a PLC—defamation claims over statements that concern him personally. See *id.* Accordingly, Nandigam Neurology, PLC’s defamation claim must be dismissed as a matter of law for failure to satisfy colloquium. See *Steele*, 2009 WL 4825183, at \*3 (“This [colloquium] requirement—often referred to as the ‘of and concerning’ requirement—confines actionable defamation to statements made against an ‘ascertained or ascertainable person, and that person must be the plaintiff.” (quoting 53 C.J.S. LIBEL AND SLANDER; INJURIOUS FALSEHOOD § 35 (2005))).

## **C. THE PLAINTIFFS’ COMPLAINT SHOULD BE DISMISSED PURSUANT TO THE TENNESSEE PUBLIC PARTICIPATION ACT.**

### **1. Applicability of the Tennessee Public Participation Act**

The Tennessee Public Participation Act provides that “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of

association, that party may petition the court to dismiss the legal action” subject to the TPPA’s specialized provisions. TENN. CODE ANN. § 20-17-104(a). Under Tennessee Code Annotated § 20-17-103(3), “[e]xercise of the right of free speech’ means a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution.” In turn, Tennessee Code Annotated § 20-17-103(6) provides that:

“Matter of public concern” includes an issue related to:

- (A) **Health or safety;**
- (B) Environmental, economic, or **community well-being;**
- (C) The government;
- (D) A public official or **public figure;**
- (E) A good, product, or **service in the marketplace;**
- (F) A literary, musical, artistic, political, theatrical, or audiovisual work;  
or
- (G) **Any other matter deemed by a court to involve a matter of public concern[.]**

(emphases added).

Here, Ms. Beavers’s statements qualify as “a communication made in connection with a matter of public concern” under several independent criteria. *See id.* *See also* **Exhibit E** (Circuit Court Complaint), p. 1, ¶¶ 5–7; **Exhibit L**. Consequently, for purposes of the Tennessee Public Participation Act, this action qualifies as one filed in response to Ms. Beavers’s exercise of the right of free speech in several independent regards. *See* TENN. CODE ANN. §§ 20-17-104(a); 20-17-103(3); 20-17-103(6).

## **2. Grounds for Granting Ms. Beavers's TPPA Petition**

- i. This Court must dismiss the Plaintiffs' claims if the Plaintiffs fail to meet their respective burdens under the TPPA.

The Tennessee Public Participation Act provides that “[t]he petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” TENN. CODE ANN. § 20-17-105(a). As noted above, the Yelp! review over which Ms. Beavers has been sued involves, at minimum, services in the marketplace, and that basis alone—along with several others—qualifies this action as one filed in response to a party’s “exercise of the right of free speech” within the meaning of the Tennessee Public Participation Act. *See* TENN. CODE ANN. §§ 20-17-104(a); 20-17-103(3); 20-17-103(6)(E). *See also* TENN. CODE ANN. § 20-17-103(6)(A), (B), (D), & (G). Thus, Ms. Beavers having met her initial burden of production, *see* TENN. CODE ANN. § 20-17-105(a), this Court “shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.” TENN. CODE ANN. § 20-17-105(b).

- ii. Ms. Beavers has established valid defenses to the Plaintiffs' claims.

Separately, “[n]otwithstanding [§ 20-17-105(b)], the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.” TENN. CODE ANN. § 20-17-105(c). Pursuant to this section, Ms. Beavers expressly incorporates into this Petition each argument set forth above in support of her defenses: (1) that this Court lacks subject matter jurisdiction to consider this appeal, and (2) that the Plaintiffs have failed to state any cognizable claim for relief. Ms. Beavers has additionally appended a sworn Affidavit as **Exhibit D** to provide factual support for the

defenses raised above, to refute the factual allegations underlying the Plaintiffs' claims, and to establish the following additional defenses to this action:

- (1) The Yelp! review at issue was true or substantially true, *see id.* at p. 1, ¶ 11 & p. 3, ¶¶ 17–18;
- (2) The Yelp! review at issue was not posted with actual malice or negligence in failing to ascertain the truth, *see id.* at p. 3, ¶ 19; and
- (3) The Plaintiffs—particularly having attributed in excess of \$25,000 in damages to a non-party to this action, *see Exhibit E*, and having further indicated that, rather than “trying to get a bunch of money,” they initiated this action “to make a point,” *see Exhibit J*, p. 21, lines 16-22—cannot prove actual damages.<sup>3</sup>

*See* TENN. CODE ANN. § 20-17-105(d) (“The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.”).

Further, Tennessee recognizes the libel-proof plaintiff doctrine, which provides that a plaintiff with a severely tarnished reputation may not maintain a defamation action. *See Rogers v. Jackson Sun Newspaper*, No. CIV. A. C-94-301, 1995 WL 383000, at \*1 (Tenn. Cir. Ct. Jan. 30, 1995) (“This Court finds and holds, as a matter of law, Plaintiff’s reputation in the community at the time of the article’s publication was so severely tarnished, he is ‘libel-proof’ and may not maintain this defamation action for an allegedly erroneous report of his criminal record.”). The doctrine “essentially holds that ‘a notorious person is without a ‘good name’ and therefore may not recover for injury to it.’”

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<sup>3</sup> Plaintiff Nandigam Neurology initially represented that it had suffered in excess of \$25,000.00 in damages. *See Exhibit E*, p. 3. In a hearing held on February 21, 2020, however, the Plaintiffs later indicated that they “realized” the damages they had claimed were not accurate and could not even trigger the requisite jurisdictional amount. *See Exhibit A*, Transcript of Proceedings, p. 15, lines 15–17 (representing that “we realized that the damages amount was going to be less than 25,000 on this case”).

*Davis v. The Tennessean*, 83 S.W.3d at 128 (quoting ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS 35 (Cum. Supp. 1998)).

The libel-proof plaintiff doctrine is premised upon the notion that “[t]o suffer injury to one’s standing in the community, or damage to one’s public reputation, one must possess good standing and reputation for good character to begin with.” *Id.* at 130. As a consequence, in defense of this matter, Ms. Beavers has appended affirmative evidence indicating that in the context within which Ms. Beavers’s statements were made, Dr. Nandigam is a libel-proof plaintiff who enjoys a reputation for egregious verbal abuse and lacks a reputation that is capable of being impaired, as evidenced by a former employee’s indication that Dr. Nandigam:

is horrendous, both at his job and personally. Would rather work for the devil. Wouldn’t even send Hitler to this practice. If you like to be treated poorly, verbally abused, or just ready to have your day ruined at a moments [sic] notice, this job is for you. If you like to be blamed for things out of your control, because the NP or more importantly the doctor don’t know how to do their jobs properly, I highly recommend. This is by far the worst place I’ve worked for, with some of the worst people I’ve worked for. I wouldn’t apply if you are a woman, unless you like being hated for existing. The office manager does her best to keep the peace, however, this proves to be a difficult task when you work for complete nutjobs who absolutely refuse to take responsibility for their actions.

See **Exhibit M**, Medical Assistant (former employee), *Do you like being verbally abused?*

*This job might be perfect for you.*, INDEED.COM (Feb. 20, 2019), <https://www.indeed.com/cmp/Nandigam-Neurology/reviews?fcountry=US&floc=Murfreesboro%2C+TN>.

Further still, “[t]ruth is an absolute defense to a claim for defamation when the otherwise defamatory meaning of the words used turns out to be true.”<sup>4</sup> *Sullivan v.*

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<sup>4</sup> Tennessee law provides that establishing truth is a defendant’s burden. See *Memphis Publ’g Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978). Although Ms. Beavers has no difficulty establishing truth as a defense to this action under the circumstances of this case, Ms. Beavers nonetheless preserves and

*Wilson Cty.*, No. M2011-00217-COA-R3CV, 2012 WL 1868292, at \*12 (Tenn. Ct. App. May 22, 2012), *appeal denied* (Tenn. Sept. 18, 2012). Here, Ms. Beavers maintains that everything written in her Yelp! review is true, *see Exhibit D*, p. 1, ¶ 11 & p. 3, ¶¶ 17–18, and she relies on that absolute defense in support of her Tennessee Public Participation Act Petition. Of note, substantially true statements are privileged pursuant to the substantial truth doctrine as well, which Ms. Beavers similarly relies upon as a defense to this action. *See Isbell*, 2000 WL 1817252, at \*5. Ms. Beavers’s Yelp! review additionally was not posted with actual malice or even negligence. *See Exhibit D*, p. 3, ¶ 19. Instead, it was premised upon her own good-faith recollection and personal observations of Dr. Nandigam’s conduct during her father’s visit. *See generally id.*

Separately, Plaintiff Nandigam Neurology’s claims are barred by the doctrine of *res judicata*, as they have been previously adjudicated. *See Exhibit A*. “Res judicata is a claim preclusion doctrine that promotes finality in litigation.” *Young v. Barrow*, 130 S.W.3d 59, 64 (Tenn. Ct. App. 2003). More specifically, the doctrine precludes “a second suit between the same parties or their privies on the same cause of action with respect to all the issues which were or could have been litigated in the former suit.” *Id.* Res judicata applies when “the prior judgment [concluded] the rights of the parties on the merits.” *Id.* A party asserting a res judicata defense must prove: “(1) that a court of competent jurisdiction rendered the prior judgment, (2) that the prior judgment was final and on the merits, (3) that both proceedings involved the same parties or their privies, and (4) that both proceedings involved the same cause of action.” *Id.*

In support of her *res judicata* defense, Ms. Beavers has appended as **Exhibit A**

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maintains the claim that the presumption of falsity doctrine recognized under Tennessee law should be overruled.

this Court's order and associated bench ruling dismissing, with prejudice, the identical claims that Nandigam Neurology is alleging against Ms. Beavers in this case. Because this Court was a Court of competent jurisdiction; because this Court's ruling was final and on the merits; because the same parties are involved; and because the ruling involves the same causes of action, Plaintiff Nandigam Neurology's claims are barred by the doctrine of res judicata.

Critically, given Dr. Nandigam's insistence that he is in privity with Plaintiff Nandigam Neurology regarding the claims at issue in this litigation, all of the claims filed by Dr. Kaveer Nandigam are barred by the doctrine of res judicata as well. "Privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject matter of the litigation." *Harris v. St. Mary's Med. Ctr., Inc.*, 726 S.W.2d 902, 905 (Tenn. 1987). Thus, "[t]he existence of privity or an identity of interest for purposes of res judicata depends on the facts of each case." *Carson v. Challenger Corp.*, No. W2006-00558-COA-R3CV, 2007 WL 177575, at \*3 (Tenn. Ct. App. Jan. 25, 2007).

Of note, to establish privity, "perfect identity of the parties is not required, only a substantial identity of interests that are adequately presented and protected by the first litigant." *Dillard v. Bank of Am., N.A.*, No. 13-2253-JDT-DKV, 2013 WL 4590541, at \*7 (W.D. Tenn. Aug. 28, 2013) (cleaned up). *See also Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1109 (6th Cir. 1981) (stating that privity is "a shorthand designation for those persons who have a sufficiently close relationship with the record parties to be bound by the judgment") (internal quotation marks omitted). Critically, it is also "well settled that a principal-agent relationship satisfies the privity requirement of res judicata where the claims alleged are within the scope of the agency relationship." *Jefferson v. Ferrer, Poirot, & Wansbrough*, No. 3:10-0754, 2011 WL 3025894, at \*4 (M.D. Tenn. July 25,

2011) (internal quotation marks omitted) (citing *ABS Industries, Inc. v. Fifth Third Bank*, 333 F. App'x 994, 999–1000 (6th Cir.2009)). An employer-employee relationship is sufficient to establish privity as well. *See, e.g., Harris*, 726 S.W.2d at 905 (“Clearly, there was privity between St. Mary’s and Dr. Montgomery under plaintiffs’ allegations of employer-employee relationship”); *Dillard*, 2013 WL 4590541, at \*7 (“In particular, the test for privity among the parties is met when the parties stand in an employer-employee relationship.”) (cleaned up).

Here, the Plaintiffs have conclusively established their privity for purposes of this litigation through their own February 12, 2020 filing in Case No. 2019-CV-663, in which the Plaintiffs themselves contend without qualification that “Dr. Nandigam [wa]s a party” to Case No. 2019-CV-663 by virtue of his officer, employee, and agent relationship to Nandigam Neurology, PLC. *See Exhibit N*, p. 6. Specifically, the Plaintiffs argued:

**PLAINTIFF [NANDIGAM NEUROLOGY, PLC] MAY NOT SUE OVER STATEMENTS THAT CONCERN A NON-PARTY, BUT DR. NANDIGAM IS A PARTY.**

\* \* \* \*

The false and negative statements left by Defendant Beavers were posted on the “Nandigam Neurology, PLC” Yelp review website—not on any personal website of Dr. Nandigam individually. By intentionally placing her review on the Nandigam Neurology business website, **Beaver’s statements were directed at Nandigam Neurology, PLC via the disparagement of its employees, workers, and agents. Since it is undisputed that a corporation or entity cannot act except through its officers, employees, and agents, any false statements as to the acts of its officers, employees, and agents consequently defame the company itself.**

If Defendant Beavers’ statements were only directed by Dr. Nandigam individually and had no relationship or bearing to the Nandigam Neurology office, then there would have been no need for Defendant Beavers to have posted such statements to the Nandigam Neurology Yelp website.

*Id.* (partial emphases added)

In other words, as the Plaintiffs themselves argue, Nandigam Neurology, PLC and Dr. Nandigam himself are in privity for purposes of Case No. 2019-CV-663 and this litigation. Further, because Nandigam Neurology's claims against Ms. Beavers in Case No. 2019-CV-663 were dismissed with prejudice, *see Exhibit A*, Dr. Nandigam's identical claims in this litigation are barred by the doctrine of res judicata. *See Young*, 130 S.W.3d at 64.

## **VI. COSTS, ATTORNEY'S FEES, & SANCTIONS**

Pursuant to Tennessee Code Annotated § 20-17-107(a):

If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party:

- (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition; and
- (2) Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.

The Plaintiffs' prosecution of this facially frivolous action merits costs, fees, and severe sanctions. The transparent purpose of this lawsuit is to silence, censor, intimidate, and retaliate against Ms. Beavers and her family because Ms. Beavers had the audacity to post a truthful, negative Yelp! review of Dr. Nandigam's abusive behavior, which this litigation itself evidences in spades. No litigant or attorney acting in good faith could reasonably believe that the Plaintiffs' claims in this lawsuit had merit. Both mandatory costs and attorney's fees and severe sanctions to deter further misconduct should be awarded accordingly.

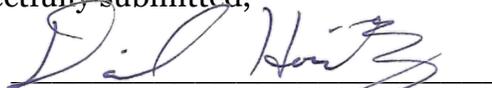
## **VII. CONCLUSION**

For the foregoing reasons, Defendant Beavers's Motion to Dismiss and Tennessee Public Participation Act Petition to dismiss this action should be **GRANTED**; the

Plaintiffs should be ordered to pay Defendant Beavers's court costs, reasonable attorney's fees, and discretionary costs pursuant to Tennessee Code Annotated §§ 20-17-107(a)(1) and § 20-12-119(c); and this Court should assess sanctions against the Plaintiffs and their counsel as necessary to deter repetition of their conduct pursuant to Tennessee Code Annotated § 20-17-107(a)(2).

Respectfully submitted,

By:

  
Daniel A. Horwitz, BPR #032176  
1803 Broadway, Suite #531  
Nashville, TN 37203  
daniel.a.horwitz@gmail.com  
(615) 739-2888

Sarah L. Martin, BPR #037707  
1020 Stainback Avenue  
Nashville, TN 37207  
Sarahmartin1026@gmail.com  
(615) 335-3118

*Counsel for Defendant Kelly Beavers*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of March, 2020, a copy of the foregoing was served via UPS mail, postage prepaid, and/or e-mailed to the following parties:

Angello L. Huong  
435 Park Avenue, Professional Building  
Lebanon, Tennessee 37087  
angellohuong@hotmail.com

Bennett Hirschhorn  
800 South Gay Street, Suite 700  
Knoxville, TN 37929  
bh@bennetthirschhorn.com

*Counsel for Plaintiff*

By:   
Daniel A. Horwitz, Esq.

**NOTICE OF HEARING**

A hearing on the above Motion/Petition will be held on the 20th day of March, 2020, at 9:00 a.m. CST at 134 South College Street, Lebanon, Tennessee, 37087. Failure to appear or respond may result in this Motion/Petition being granted.

# Exhibit A



judgment under Rule 56 of the Tennessee Rules of Civil Procedure.

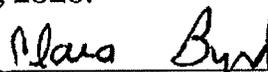
2. Defendant Beavers's *Motion to Dismiss and Tennessee Code Annotated § 20-17-104(a) Petition to Dismiss the Plaintiff's Complaint Pursuant to the Tennessee Public Participation Act* was pending when the Plaintiff dismissed its claims against her. As such, pursuant to Tennessee Rule of Civil Procedure 41.01(1), the Plaintiff lacked a right to take a voluntary nonsuit to dismiss its claims against Ms. Beavers without prejudice, and the Court's January 14, 2020 Order is accordingly amended to reflect that the Plaintiff's claims against Ms. Beavers are dismissed with prejudice.

3. The affirmative claims raised in Defendant Beavers's Tennessee Public Participation Act Petition, including her claims for "[c]ourt costs, reasonable attorney's fees, discretionary costs, and other expenses" and "[a]ny additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated" pursuant to Tennessee Code Annotated § 20-17-107(a), survive the Plaintiff's dismissal of this action and remain pending. Accordingly, following entry of this order, Defendant Beavers shall set her Tennessee Public Participation Act Petition for hearing.

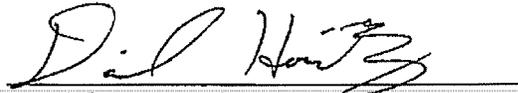
4. For the reasons set forth in Defendant Beavers's Reply, Plaintiff's motion to stay these proceedings and to consolidate the Plaintiff's appeal of General Sessions Case Number 2020-CV-152, raised in Plaintiff's Response to Defendant Beavers's Motion to Alter or Amend, is not properly before the Court, is not well-taken, and is **DENIED**.

It is so **ORDERED**.

ENTERED this 5 day of March, 2020.

  
\_\_\_\_\_  
**Judge Clara Byrd**  
Circuit Court Judge

**APPROVED FOR ENTRY BY:**



Daniel A. Horwitz, BPR #032176  
1803 Broadway, Suite #531  
Nashville, TN 37203  
daniel.a.horwitz@gmail.com  
(615) 739-2888

Sarah L. Martin, BPR #037707  
1020 Stainback Avenue  
Nashville, TN 37207  
Sarahmartin1026@gmail.com  
(615) 335-3118

*Counsel for Defendant Kelly Beavers*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of February, 2020, a copy of the foregoing was sent via USPS, postage prepaid, and/or by email to the following:

Angello L. Huong  
435 Park Avenue, Professional Building  
Lebanon, Tennessee 37087

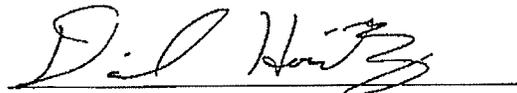
Bennett Hirschhorn  
800 South Gay Street, Suite 700  
Knoxville, TN 37929

*Counsel for Plaintiff*

John Nefflen  
SHACKELFORD, BROWN, MCKINLEY, & NORTON  
47 Music Square East  
Nashville, TN 37203

*Counsel for Defendant Yount*

By:

  
Daniel A. Horwitz, Esq.

**NANDIGAM NEUROLOGY, PLC, et al.**

**vs.**

**BEAVERS**

---

**TRANSCRIPT OF PROCEEDINGS**

**February 21, 2020**



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1                   IN THE CIRCUIT COURT OF WILSON COUNTY, TENNESSEE

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2                   NANDIGAM NEUROLOGY, PLC,

3                                 Plaintiff,

4                   vs.

  Case No. 2019-CV-663

5                   KELLY BEAVERS

6                                 and

7                   DEVIN YOUNT,

8                                 Defendants.

---

9

10

11

12

13

14                                 BE IT REMEMBERED that the above-captioned cause  
15 came on for hearing, on this, the 21st day of February,  
16 2020, before Judge Clara W. Byrd, when and where the following  
17 proceedings were had, to wit:

18

19

20

21

---

22   Elite Reporting Services  
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  (615)595-0073

A P P E A R A N C E S

For the Plaintiff:

MR. ANGELLO L. HUONG  
Attorney at Law  
Law Office of Angello L. Huong  
435 Park Ave.  
Lebanon, TN 37087  
615)453-7530  
angellohuong@hotmail.com

For the Defendant:

MS. SARAH L. MARTIN  
Attorney at Law  
Law Offices of Daniel Horwitz  
1020 Stainback Ave.  
Nashville, TN 37207  
(615)335-3118  
sarahmartin1026@gmail.com

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\* \* \*

P R O C E E D I N G S

(WHEREUPON, the above-captioned matter was heard in open court as follows:)

THE COURT: Nandigam Neurology versus beavers. 08:46:07  
09:31:05

MR. HUONG: We're here, Your Honor. 09:31:07

MS. MARTIN: Good morning, Your Honor. 09:31:09  
My name is Sarah -- 09:31:11

THE COURT: Is this a motion to alter, amend a notice of voluntary dismissal? 09:31:45  
09:31:47

MS. MARTIN: Correct, Your Honor. The Court's final order. 09:31:50  
09:31:54

Good morning, Your Honor. My name is Sarah Martin and I'm here on behalf of Defendant Beavers. 09:31:54  
09:31:56  
My cocounsel, Daniel Horwitz, couldn't be here this morning. 09:31:59  
09:32:04

We're here on a motion to alter or amend this Court's order dismissing the Plaintiff's claims against Ms. Beavers. Specifically, Ms. Beavers has asked this Court to amend its order to reflect that the complaint against Ms. Beavers is dismissed with prejudice, not without; and secondly, that her claims for attorney's fees, costs, and sanctions pursuant to 09:32:06  
09:32:06  
09:32:07  
09:32:10  
09:32:14  
09:32:17  
09:32:20

1 the Tennessee Public Participation Act survive that 09:32:23  
2 voluntary dismissal by the Plaintiff. 09:32:26

3 I was speaking with Mr. Huong before the 09:32:29  
4 hearing, and it sounds like he's willing to stipulate 09:32:32  
5 as to the second point that our claims remain live, 09:32:34  
6 and if that's the case, I'll just skip that part of 09:32:38  
7 my argument. 09:32:41

8 THE COURT: Is that -- 09:32:42

9 MR. HUONG: I agree it remains live, but 09:32:43  
10 it requires a hearing. So it's not automatically. 09:32:45

11 MS. MARTIN: So we're just in 09:32:48  
12 disagreement about the first issue, which is whether 09:32:50  
13 the dismissal's with prejudice, Your Honor. 09:32:52

14 This is a strategic lawsuit against public 09:32:57  
15 participation or a SLAPP over a truthful but critical 09:33:01  
16 Yelp review that Ms. Beavers posted that falls safely 09:33:06  
17 within the protections guaranteed by the First 09:33:10  
18 Amendment. She filed a petition to dismiss the 09:33:12  
19 Plaintiff's lawsuit under Tennessee's newly enacted 09:33:15  
20 Public Participation Act, and in her petition she 09:33:18  
21 sought those attorney's fees, costs, and sanctions 09:33:20  
22 pursuant to that act. And rather than allowing 09:33:23  
23 Ms. Beavers's petition to be set for hearing or 09:33:27  
24 responding to it, the Plaintiff nonsuited its 09:33:29  
25 complaint. 09:33:31

1           And so as to the first issue, under the TPPA, 09:33:32  
2           the Plaintiff is not entitled to a voluntarily 09:33:35  
3           dismissal without prejudice, because the Plaintiff 09:33:38  
4           failed to meet its evidentiary burden under the Act 09:33:41  
5           in response to Ms. Beavers's anti-SLAPP petition. I 09:33:44  
6           do have a statute for you, Your Honor, if you'd like 09:33:46  
7           it. 09:33:49  
8           THE COURT: Let me -- you all go ahead 09:33:51  
9           and sit down, let me take you all up later. Because 09:33:55  
10          I have got to review all this. I didn't realize -- 09:33:57  
11          all I did was sign an agreed order, I thought. 09:34:02  
12          MS. MARTIN: Okay. Your Honor. 09:34:07  
13          THE COURT: You know, notice of voluntary 09:34:07  
14          dismissal, I didn't know we had all these other 09:34:09  
15          claims. I'll have to look at this. 09:34:11  
16          MS. MARTIN: Okay, Your Honor. I 09:34:14  
17          appreciate it. 09:34:15  
18          THE COURT: So let me take the shorter 09:34:15  
19          matters first. 09:34:17  
20          MS. MARTIN: Okay. 09:34:18  
21          THE COURT: Something that doesn't 09:34:19  
22          require me to do a lot of reading. 09:34:20  
23          MS. MARTIN: Thank you, Your Honor. 09:34:21  
24          THE COURT: Thank you. 09:34:23  
25          (Short break.) 09:34:23

1 THE COURT: Ms. Ross (sic), now I'm ready 09:51:54  
2 for your argument. 10:48:13  
3 MS. MARTIN: Thank you, Your Honor. 10:48:15  
4 THE COURT: I understand you all have a 10:48:18  
5 stipulation. Now, if you -- wait, let me get his 10:48:21  
6 poor man's court reporter up here. 10:48:26  
7 MR. HUONG: Poor attorney court reporter. 10:48:30  
8 THE COURT: Poor attorney's court 10:48:33  
9 reporter. 10:48:35  
10 MR. HUONG: Poor attorney's court 10:48:35  
11 reporter. 10:48:35  
12 THE COURT: Now we're ready. What is the 10:48:35  
13 stipulation? 10:48:37  
14 MS. MARTIN: Your Honor, the one thing 10:48:37  
15 that we are in agreement about is that Ms. Beavers's 10:48:38  
16 claims for attorney's fees, costs, and sanctions do 10:48:41  
17 survive the voluntary dismissal. We are in 10:48:45  
18 disagreement over whether the dismissal is with 10:48:49  
19 prejudice and whether a hearing is required for the 10:48:51  
20 petition. 10:48:57  
21 THE COURT: Okay. 10:48:58  
22 MS. MARTIN: If I can just start again -- 10:48:58  
23 THE COURT: A hearing on which petition? 10:49:00  
24 MS. MARTIN: The petition for the 10:49:02  
25 attorney's fees, costs, and sanctions. Mr. Huong is 10:49:03

1 going so argue that a hearing is required. 10:49:07

2 THE COURT: We should have a hearing on 10:49:09  
3 just the attorney's fees. 10:49:11

4 MS. MARTIN: Yes, your Honor. 10:49:12

5 THE COURT: Okay. 10:49:13

6 MS. MARTIN: On the petition -- the 10:49:15  
7 merits of the petition and then the attorney's fees, 10:49:17  
8 costs, and sanctions. 10:49:19

9 MR. HUONG: I don't know if she's saying 10:49:21  
10 that the way that I thought we agreed. I mean, my 10:49:23  
11 position was that -- they're situation isn't 10:49:26  
12 dismissed as in their request for attorney's fees, 10:49:30  
13 but it requires a hearing and the Court's approval 10:49:32  
14 that issue be granted. So it's not something that 10:49:34  
15 where they just submit a fee affidavit and say we 10:49:38  
16 won. So it requires a hearing to determine -- 10:49:41

17 THE COURT: So you want an opportunity to 10:49:45  
18 be heard on the reasonableness of the attorney's 10:49:47  
19 fees. 10:49:50

20 MR. HUONG: Yes. 10:49:50

21 THE COURT: I get that. But you're not 10:49:51  
22 denying they're entitled to that hearing. 10:49:54

23 MR. HUONG: No -- yes, that's correct. 10:49:57  
24 They are entitled to a hearing on that. 10:50:00

25 MS. MARTIN: Well, I think I'm confused 10:50:01

1 now, Your Honor. I'm not sure if opposing counsel -- 10:50:03

2 THE COURT: I think there's no doubt that 10:50:06  
3 we should not have had a voluntary nonsuit at this 10:50:12  
4 period of time, because this motion to dismiss that 10:50:20  
5 had been filed, would have been treated as a motion 10:50:23  
6 for summary judgement. 10:50:26

7 MS. MARTIN: That's our position, yes, 10:50:28  
8 Your Honor. 10:50:29

9 THE COURT: So, therefore, he couldn't 10:50:30  
10 take a nonsuit, voluntary nonsuit. 10:50:32

11 MS. MARTIN: Correct, Your Honor. 10:50:36

12 THE COURT: He could take a dismissal 10:50:38  
13 with prejudice, as you all claim, which -- 10:50:40

14 MS. MARTIN: That's certainly 10:50:48  
15 Ms. Beavers's position. 10:50:49

16 THE COURT: -- technically didn't have 10:50:50  
17 claims, so -- because it was a corporation. 10:50:52

18 MS. MARTIN: Yes, your Honor. That gets 10:50:58  
19 into the merits of the petition itself. 10:51:00

20 THE COURT: Okay. 10:51:03

21 MS. MARTIN: But our position is that 10:51:04  
22 either under the Tennessee -- 10:51:06

23 THE COURT: Okay. Well, I think there's 10:51:08  
24 no doubt I need to set aside the order granting the 10:51:09  
25 voluntary nonsuit. 10:51:15

1 MS. MARTIN: Okay, Your Honor. 10:51:17  
2 MR. HUONG: And I agree with that one, 10:51:19  
3 too. 10:51:20  
4 THE COURT: All right. So you draw that 10:51:21  
5 order. Now where are we? 10:51:22  
6 MS. MARTIN: We -- 10:51:25  
7 THE COURT: Now you're wanting to be 10:51:26  
8 heard on whether or not your client is entitled to 10:51:29  
9 attorney's fees. 10:51:34  
10 MS. MARTIN: Well, we're not at that 10:51:35  
11 point, Your Honor. Today the purpose was to just 10:51:36  
12 alter or amend the order that the nonsuit would have 10:51:40  
13 to be with prejudice. 10:51:43  
14 THE COURT: Is that where you are, 10:51:48  
15 Mr. Huong? 10:51:53  
16 MR. HUONG: We dispute that it is with 10:51:54  
17 prejudice. We don't mind setting aside the nonsuit, 10:51:58  
18 but if they want their motion to dismiss, it's not 10:52:02  
19 automatically. There has to be a hearing and the 10:52:05  
20 Court has to decide that there is no valid claims 10:52:06  
21 that we can pursue. 10:52:08  
22 THE COURT: And I can't help but notice 10:52:10  
23 that Mr. Huong's already filed a general sessions 10:52:12  
24 complaint. 10:52:15  
25 MS. MARTIN: Yes, your Honor. 10:52:15

1 THE COURT: But it's not on the 10:52:17  
2 corporation, it's on the individual doctor. 10:52:19  
3 MS. MARTIN: Both, Your Honor. 10:52:22  
4 THE COURT: Was it both? 10:52:24  
5 MS. MARTIN: Yes, your Honor, the 10:52:25  
6 Nandigam Neurology and Dr. Nandigam. 10:52:28  
7 THE COURT: Okay. 10:52:32  
8 MS. MARTIN: So there are some 10:52:35  
9 overlapping plaintiffs and overlapping claims, but 10:52:36  
10 there are some distinct claims as well, and, of 10:52:41  
11 course, Dr. Nandigam is not a party to this suit. 10:52:44  
12 THE COURT: Correct. 10:52:48  
13 MS. MARTIN: Yes. And so the issue for 10:52:49  
14 Ms. Beavers is there are two suits going, our 10:52:53  
15 position is that the nonsuit here should have been 10:52:57  
16 with prejudice because under the Act, the Plaintiff 10:53:01  
17 did not meet their affirmative burden of providing 10:53:05  
18 evidence to both establish the prima facie case of 10:53:09  
19 all of its claims and to rebut Ms. Beavers's defenses 10:53:14  
20 that she has raised. And for that reason, under 10:53:19  
21 Section 105 of the TPPA, mandatory dismissal is with 10:53:22  
22 prejudice, not without. 10:53:26  
23 And then, of course, the second argument is 10:53:28  
24 what Your Honor has already raised, which is that 10:53:30  
25 this operates as a motion for summary judgement, and 10:53:33

1 as such, a voluntary dismissal without prejudice is 10:53:36  
2 precluded. 10:53:41

3 THE COURT: Okay. 10:53:46

4 MS. MARTIN: Okay. As to the second 10:53:47  
5 issue, to the extent that the Plaintiff is arguing 10:53:50  
6 that we have to hear the merits of the petition 10:53:56  
7 today, that's simply not the case. 10:53:59

8 The Plaintiff filed at literally the 11th 10:54:02  
9 hour last night, close to midnight, a response to the 10:54:09  
10 TPPA petition, but to the extent they were intending 10:54:13  
11 for this hearing to be on the merits of the petition, 10:54:15  
12 that response was due five days ago under the 10:54:18  
13 statute. So that -- 10:54:23

14 MR. HUONG: We are not intending that to 10:54:24  
15 be a hearing on the TPPA today, that was just a 10:54:25  
16 submittal to show that we did have a response for a 10:54:28  
17 later hearing. 10:54:31

18 MS. MARTIN: But our position, of course, 10:54:33  
19 is that it was due before they nonsuited the case. 10:54:35

20 THE COURT: Okay. Did y'all already have 10:54:41  
21 a hearing in Judge Wootten's court? 10:54:45

22 MS. MARTIN: No, your Honor. We were 10:54:48  
23 coordinating -- I think Exhibit A included the 10:54:50  
24 e-mails of the back and forth between opposing 10:54:53  
25 counsel and counsel for Ms. Beavers. We were 10:54:56

1 intending to set a hearing on the merits of the 10:55:00  
2 petition and had landed on a date and then found out 10:55:03  
3 that they -- that the Plaintiff had actually 10:55:08  
4 dismissed the claim the prior day, and we had just 10:55:10  
5 gotten notice of it. So that's where we were at the 10:55:14  
6 time of the dismissal. 10:55:18

7 THE COURT: Okay. Was there any reason I 10:55:21  
8 can't just set aside the dismissal, they're order, 10:55:23  
9 and re-set this matter for a hearing? 10:55:30

10 MS. MARTIN: I'm not prepared to set it 10:55:34  
11 for a hearing today -- 10:55:35

12 THE COURT: Well, you're not prepared to 10:55:36  
13 hear the case, so I can't hear the case today. 10:55:38

14 MS. MARTIN: Yes, your Honor. My 10:55:43  
15 cocounsel is out of town right now, but, again, our 10:55:44  
16 position is just that we can alter the motion -- 10:55:49  
17 excuse me, the order dismissing the case to reflect 10:55:53  
18 that it's with prejudice. 10:55:55

19 THE COURT: Okay. So that's really all 10:56:01  
20 you want today. 10:56:07

21 MS. MARTIN: Yes, your Honor. Because 10:56:07  
22 under Section 107 of the Act, its expressly stated 10:56:10  
23 purpose of the sanctions in particular is to deter 10:56:13  
24 repetition of the conduct by the party who brought 10:56:17  
25 the legal action or by other similarly situated. 10:56:18

1           And the statute's deterrent purpose would 10:56:23  
2           obliterated if plaintiffs were permitted to file 10:56:25  
3           frivolous speech-base claims, force defendants to 10:56:29  
4           incur significant time and litigation cost defending 10:56:32  
5           against them, and then nonsuit their complaints 10:56:36  
6           without any consequence. And, of course, the broader 10:56:38  
7           public policy implication is that free speech is 10:56:40  
8           chilled. And that's the entire purpose of the 10:56:44  
9           Tennessee Public Participation Act, it's to deter 10:56:47  
10          claims like this claim that's been brought against 10:56:49  
11          Ms. Beavers and her codefendant. 10:56:52

12           And so to that end, it's our position that if 10:56:55  
13          the Plaintiff fails to meet that affirmative 10:56:59  
14          evidentiary burden once the burden shifts to them 10:57:02  
15          with the filing of the petition, that they're 10:57:07  
16          precluded from dismissing without prejudice. And, 10:57:09  
17          again, that's consistent with the rules -- Rule 41.01 10:57:12  
18          of the Tennessee Rules of Civil Procedure as well. 10:57:17

19           And, Your Honor, I'll also address opposing 10:57:20  
20          counsel's argument that this case should be 10:57:29  
21          consolidated with the general sessions appeal. I 10:57:31  
22          don't know if you want to hear us on that. 10:57:33

23           THE COURT: It can't be. If the -- if 10:57:35  
24          they had asked for a motion to amend, that would have 10:57:43  
25          been a different matter. To amend circuit to include 10:57:47

1 additional plaintiff or additional claims, that would 10:57:51  
2 be one thing and that's governed by one rule. That 10:57:55  
3 didn't happen. This was filed in general sessions, 10:57:57  
4 this new matter, which is a whole different case. 10:58:02

5 MS. MARTIN: Yes, your Honor, we agree. 10:58:11

6 Does Your Honor have any other questions for 10:58:14  
7 me? 10:58:16

8 THE COURT: No, ma'am. 10:58:16

9 MS. MARTIN: Okay. Thank you. 10:58:17

10 THE COURT: Let me hear from Mr. Huong. 10:58:19

11 MR. HUONG: Well, yes, your Honor, this 10:58:21  
12 case ended up being a little more convoluted. Few 10:58:26  
13 reasons, because the statute is so new, it only took 10:58:27  
14 effect in mid last year -- 10:58:30

15 THE COURT: Correct. 10:58:31

16 MR. HUONG: -- and so there hadn't been 10:58:32  
17 any Tennessee precedence or guidance as to procedural 10:58:33  
18 requirements and all that other stuff, other than -- 10:58:37

19 THE COURT: This is the first one I've 10:58:40  
20 had. 10:58:41

21 MR. HUONG: Other than what the statute 10:58:41  
22 says. We initially filed this suit -- and we did try 10:58:42  
23 to coordinate some dates, but none were available. 10:58:46  
24 Judge Wootten had just -- I guess now he's in 10:58:49  
25 retirement so he was not taking any more cases. And 10:58:53

1 I think at that point -- 10:58:54

2 THE COURT: I'm sorry. I had this case 10:58:55

3 was assigned to me, I don't know where y'all got 10:58:57

4 Judge Wootten in the case. The case was originally 10:59:00

5 assigned to me. Otherwise this would be a huge 10:59:04

6 orange file, instead of a huge red file. 10:59:07

7 MR. HUONG: Yeah, okay. Well, I say that 10:59:09

8 in their motion to dismiss, the notice of hearing 10:59:11

9 said due to unavailable of Judge Wootten, a hearing 10:59:14

10 date will be later set. That's why I assumed that 10:59:18

11 they already contacted the clerk and figured out that 10:59:21

12 Judge Wootten was going. But anyway -- 10:59:23

13 THE COURT: I didn't know why that was an 10:59:26

14 assumption. 10:59:29

15 MR. HUONG: So, you know, we realized 10:59:29

16 that the damages amount was going to be less than 10:59:32

17 25,000 on this case and we wanted to streamline the 10:59:36

18 trial process, so we nonsuited and re-filed in 10:59:39

19 general sessions. It wasn't an attempt to, like, 10:59:41

20 sidestep anything, we just felt it was more efficient 10:59:44

21 to do it that way. 10:59:49

22 Now, understandably, that jumbles up with the 10:59:49

23 statute in terms of what you're allowed to do or not 10:59:52

24 do, and that's where we're here to unsort. But, Your 10:59:55

25 Honor, if I may approach, there's one case, this is 10:59:58

1 the Baker Vertz (ph) case that deals with this exact 11:00:00  
2 situation. 11:00:04

3 Now, Tennessee doesn't have any precedent, so 11:00:04  
4 we are required to look at other states for 11:00:07  
5 precedent. And this is a Court of Appeals case from 11:00:09  
6 Texas, where similar -- almost exact same fact 11:00:12  
7 pattern happened. There's a lawsuit for defamation. 11:00:17  
8 The defendant filed a motion to dismiss under the 11:00:19  
9 Texas version of this Participation Act. The 11:00:21  
10 plaintiff nonsuited and then the defendant demanded 11:00:26  
11 that the nonsuit be done with prejudice. 11:00:31

12 And so the Court of Appeals in Texas said no, 11:00:34  
13 to do it with prejudice, the motion to dismiss has to 11:00:36  
14 be considered by the Court on the merits. So they 11:00:39  
15 opened -- they remanded the case back to the trial 11:00:42  
16 court to go consider the motion to dismiss on the 11:00:46  
17 merits. So that would be our citation for this 11:00:47  
18 particular situation where there's a nonsuit with a 11:00:51  
19 motion to dismiss pending and it's not automatically 11:00:54  
20 dismissed with prejudice, it has to be -- the Court 11:00:56  
21 has to look at the motion, the Plaintiff's response 11:01:00  
22 and affidavits, and also make a decision which side 11:01:03  
23 completed their burden of proof on the motion. And I 11:01:06  
24 have highlighted the sections -- 11:01:20

25 THE COURT: I'm still stuck on Rule 41, 11:01:22

1 the Rules of Civil Procedure. It's sort of like 11:01:26  
2 this -- under this new statute, their claim for 11:01:31  
3 attorney's fees is like a counterclaim. And it's 11:01:36  
4 sort of like if you nonsuit yours, then fine, the 11:01:39  
5 Defendant's still allowed to go forward on their 11:01:43  
6 counterclaim because they didn't nonsuit. 11:01:46  
7 MR. HUONG: Right. 11:01:49  
8 THE COURT: Maybe I'm looking at it wrong 11:01:49  
9 -- 11:01:51  
10 MR. HUONG: I'm not disputing -- sure. 11:01:51  
11 THE COURT: -- but your claim should be 11:01:53  
12 dismissed, but she is still allowed go forward, the 11:01:56  
13 Defendants, on that -- 11:02:05  
14 MR. HUONG: With their claim for attorney 11:02:05  
15 fees. 11:02:06  
16 THE COURT: -- for their claim for 11:02:07  
17 attorney fees. 11:02:09  
18 MR. HUONG: But our claim was dismissed 11:02:09  
19 without prejudice, they want our claim dismissed with 11:02:12  
20 prejudice. So that way it's barred from ever being 11:02:15  
21 litigated. 11:02:19  
22 THE COURT: Well, it should be, but that 11:02:20  
23 doesn't affect your claim in general sessions as to 11:02:23  
24 the individual doctor. That's a whole new matter 11:02:25  
25 over there. This claim was by the corporation, not 11:02:27

1 the individual doctor. 11:02:33

2 MR. HUONG: The claim in general 11:02:37

3 sessions -- okay. This claim -- 11:02:39

4 THE COURT: I looked at the claim in 11:02:41

5 general sessions, it actually named the doctor. 11:02:42

6 MR. HUONG: It named both. We -- 11:02:45

7 THE COURT: Well, both, but still, this 11:02:47

8 claim, as far as the corporation is concerned, should 11:02:49

9 be dismissed with prejudice. 11:02:54

10 MR. HUONG: Okay. 11:02:59

11 THE COURT: And they should be allowed to 11:03:01

12 go forward on their petition for attorney's fees in 11:03:02

13 this matter. Your case over there in general 11:03:08

14 sessions is a different lawsuit because you've got 11:03:11

15 the individual doctor. Now, they can always allege 11:03:14

16 that the corporation should be dismissed as the 11:03:18

17 plaintiff over there, but you've still got your 11:03:21

18 complaint in general sessions by the doctor, and 11:03:24

19 that's a different case, I think. 11:03:28

20 MR. HUONG: Okay. Well, and just for 11:03:33

21 clarification -- 11:03:35

22 THE COURT: Like I said, this is a -- 11:03:36

23 MR. HUONG: Yeah. 11:03:39

24 THE COURT: This is not the law, but the 11:03:40

25 only way I can ration -- rationalize it is to think 11:03:42

1 of it, just like under the rules, is if they had a 11:03:47  
2 counterclaim against the corporation to file the 11:03:50  
3 lawsuit against. And so when you dismissed your 11:03:53  
4 claim, it was over, but not their counterclaim in 11:03:57  
5 this lawsuit. So your case should be -- your 11:04:02  
6 dismissal is with prejudice as to the corporation. 11:04:06  
7 MR. HUONG: Okay. So our nonsuit -- 11:04:12  
8 THE COURT: Ms. Ross, do you understand 11:04:17  
9 my ruling well enough to draw up an order? 11:04:18  
10 MS. MARTIN: Yes, your Honor. So the 11:04:22  
11 motion to alter or amend is granted. 11:04:25  
12 THE COURT: Is granted in terms of the 11:04:28  
13 dismissal, is with prejudice as to -- 11:04:31  
14 MR. HUONG: Nandigam Neurology. 11:04:44  
15 THE COURT: -- Nandigam Neurology. 11:04:46  
16 MS. MARTIN: And that Ms. Beavers's 11:04:49  
17 claims are impending. 11:04:51  
18 THE COURT: Right. 11:04:53  
19 MR. HUONG: Okay. And just for 11:04:53  
20 clarification -- 11:04:55  
21 THE COURT: Pursuant to Rule 41. Now, if 11:04:55  
22 they Court of Appeals or Supreme Court believes under 11:04:59  
23 the new statute that's going to change this, I don't 11:05:04  
24 know, but that's the only way I can figure they 11:05:07  
25 intended the law to be. 11:05:12

1 MS. MARTIN: Yes, your Honor, I think I 11:05:14  
2 understand that. 11:05:15  
3 Mr. Huong, did you need any clarification? 11:05:16  
4 MR. HUONG: Yes, I do. 11:05:19  
5 THE COURT: So you will be able to get -- 11:05:22  
6 have your hearing on your petition. 11:05:22  
7 MR. HUONG: Yes, okay. I do have one 11:05:23  
8 question. 11:05:26  
9 THE COURT: And you'll be able to defend 11:05:26  
10 it. You are considering yourself like a 11:05:28  
11 counter-defendant here. 11:05:33  
12 MS. MARTIN: I do have one point of 11:05:34  
13 clarification. 11:05:36  
14 THE COURT: Yes. 11:05:37  
15 MS. MARTIN: So under the Act, if a suit 11:05:38  
16 is dismissed with prejudice, once -- in response to 11:05:41  
17 an anti-SLAPP petition, is there actually a need for 11:05:48  
18 a hearing? Because -- 11:05:54  
19 THE COURT: You've still got to prove 11:05:56  
20 your attorney's fees and your costs. 11:05:58  
21 MS. MARTIN: So just a hearing on the 11:05:59  
22 fees itself. 11:06:01  
23 THE COURT: The Court can't just take 11:06:02  
24 your word for it. 11:06:03  
25 MS. MARTIN: Okay. 11:06:04

1 THE COURT: He's entitled to notice and 11:06:04  
2 questions. 11:06:07  
3 MS. MARTIN: So a hearing on the fees and 11:06:10  
4 costs. 11:06:12  
5 THE COURT: We have attorney -- we have 11:06:12  
6 hearings on attorney's fees in other cases, so -- and 11:06:14  
7 cost. 11:06:17  
8 MS. MARTIN: Yes, your Honor, I think I 11:06:18  
9 understand. 11:06:19  
10 THE COURT: And usually they go into 11:06:19  
11 the reasonableness of it and whether it involved 11:06:21  
12 -- well, I'll -- how complex the matter was, 11:06:24  
13 etcetera. 11:06:31  
14 MR. HUONG: Okay. 11:06:31  
15 MS. MARTIN: Thank you, Your Honor. 11:06:32  
16 MR. HUONG: And just to be a little bit 11:06:33  
17 more detailed about this. Okay. So on a voluntary 11:06:35  
18 nonsuit, when there has not been a hearing on a 11:06:39  
19 SLAPP motion to dismiss, it's still dismissed 11:06:42  
20 with prejudice. I just want to understand that 11:06:46  
21 that's -- 11:06:48  
22 THE COURT: Well, because there was a 11:06:49  
23 motion to dismiss pending that would be treated as a 11:06:50  
24 motion for summary judgement under Rule 41.01. 11:06:53  
25 MR. HUONG: Okay. Even without the Court 11:06:57

1 having a hearing on the merits of that, it would 11:06:59  
2 still be dismissed with prejudice. 11:07:01

3 THE COURT: Court never has hearings on 11:07:03  
4 the merits of voluntary nonsuits. 11:07:05

5 MR. HUONG: No, but there was never a 11:07:08  
6 hearing on their motion to dismiss. 11:07:10

7 THE COURT: Right. 11:07:11

8 MR. HUONG: Okay. 11:07:13

9 MS. MARTIN: Under this anti-SLAPP 11:07:14  
10 statute there's not one required, because once the 11:07:16  
11 dismissal has happened with prejudice, then it's the 11:07:19  
12 same as the petition being granted, because the 11:07:22  
13 Plaintiff failed to meet their burden. 11:07:26

14 Mr. Huong is arguing that there should be a 11:07:29  
15 hearing on the merits of the petition and then a 11:07:31  
16 subsequent hearing on the amount of fees. 11:07:34

17 MR. HUONG: In order to be dismissed with 11:07:37  
18 prejudice. That's what I'm asking if that's the 11:07:38  
19 Court's -- 11:07:40

20 THE COURT: I'm not going rule on that 11:07:41  
21 whether the petition -- because I think that's a 11:07:43  
22 whole different area of the law. I still think he 11:07:45  
23 has a right to defend against her petition, the 11:07:48  
24 relief under her petition. 11:07:54

25 MS. MARTIN: Okay, Your Honor. 11:07:55

1 THE COURT: I believe that may be the 11:07:58  
2 intent. If not, go check with the legislature on 11:08:00  
3 that, they'll tell you what their intent was. 11:08:03  
4 MR. HUONG: Well, unfortunately, not -- 11:08:07  
5 THE COURT: Whoever the authors were 11:08:08  
6 involved. 11:08:10  
7 MR. HUONG: Well, I'll have to talk with 11:08:10  
8 the Court of Appeals to interpret the legislature. 11:08:13  
9 THE COURT: Might be easier to go get the 11:08:15  
10 legislature to interpret. 11:08:18  
11 MR. HUONG: Well -- so as a corollary 11:08:20  
12 then, then it's presumed that you're granting their 11:08:22  
13 motion to dismiss -- 11:08:25  
14 THE COURT: With prejudice. 11:08:27  
15 MR. HUONG: Right. So the motion to 11:08:29  
16 dismiss that they filed that there was not a hearing 11:08:31  
17 on, it's implied that it is granted -- 11:08:33  
18 THE COURT: No, I'm not granting that 11:08:36  
19 motion, there wasn't a hearing on their, quote, 11:08:37  
20 motion to dismiss. This is a hearing on setting 11:08:40  
21 aside your nonsuit without prejudice. 11:08:44  
22 MR. HUONG: And then making it with 11:08:49  
23 prejudice. 11:08:51  
24 THE COURT: Right. 11:08:51  
25 MR. HUONG: Okay. Okay. We'll try to 11:08:53

1 sort it out as best we can. 11:08:56

2 THE COURT: Okay. 11:08:57

3 MS. MARTIN: Thank you very much, Your 11:08:58

4 Honor. We appreciate it. 11:09:00

5 MR. HUONG: Thank you. 11:09:01

6 (WHEREUPON, the foregoing proceedings

7 were concluded at 11:09 a.m.)

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STATE OF TENNESSEE

COUNTY OF SUMNER

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LCR #153 - Expires: 6/30/2020

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# Exhibit B

JAN 21 2020

ORIGINAL

615-444-2045

STATE OF TENNESSEE, COUNTY OF WILSON

To Any Lawful Officer to Execute and Return:

Summon to appear before the General Sessions Court of Wilson County, Tennessee, on the 13 day of February 2020, at 9 am/pm, then and there to answer in a civil action brought by Nandigam Neurology, PLC and

For Kaveer Nandigam, M.D.

Defamation as to Nandigam Neurology, PLC and Kaveer Nandigam, M.D.; and False light invasion of privacy as to Kaveer Nandigam, M.D.

CIVIL SUMMONS

Under \$25,000

Judgement for Del against for \$ plus interest at the rate of % and cost of suit, for which execution may issue.

JUDGEMENT

Judgement entered by: [ ] Default [ ] Agreement [ ] Trial

Dismissed: [ ] Without Prejudice [ ] With Prejudice [ ] Non Suit

Costs taxed to [ ] Plaintiff [ ] Defendant

Defendant(s) in court and admitted to jurisdiction of court.

This the 13 day of Feb, 2020 Judge, Div. I

ORDER

D/M Pursuant to Photo taken on SLAD

This the day of 20 Judge

AFFIDAVIT

To the best of my information and belief, after investigation of Defendant's employment, I hereby make affidavit that the Defendant is / is not a member of a military service.

Angella L. King Attorney for Plaintiff or Plaintiff

ADA FOR ASSISTANCE CALL 615-444-2045

Notary Public My Comm. Exp.

Case Number 2020-CV-152 Nandigam Neurology, PLC and

Kaveer Nandigam, M.D. vs. Plaintiff(s)

Kelly Beavers 398 Saundersville Ferry Rd Defendant

Mt. Juliet, TN 37122 Address

Defendant

Address

Defendant

Address

CIVIL WARRANT Wilson County General Sessions Court Debbie Moss, Clerk

By ASR Deputy Clerk Issued 1/21, 2020

Set for February 13, 2020 At 9am Reset for

Served Upon: [ ] All Named Defendants

[ ] All Defendants Except:

Wilson County Sheriff 105 East High St.

Served Lebanon, TN 37061 2020

Sheriff / Constable / Process Server Bennett Hirschhorn, BPR# 025937

Angello Huang, BPR# 021209 Attorney for Plaintiff Telephone (615) 453-7530

Attorney for Defendant Telephone

# Exhibit C

**NANDIGAM NEUROLOGY, PLC, et al.**

**vs.**

**BEAVERS**

---

**JUDGE'S RULING**

**February 13, 2020**



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IN THE GENERAL SESSIONS COURT OF WILSON COUNTY, TENNESSEE

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NANDIGAM NEUROLOGY, PLC, and  
KAVEER NANDIGAM, M.D.,

Plaintiffs,

vs.

No. 2020-CV-152

KELLY BEAVERS,

Defendant.

---

JUDGE'S RULING

BE IT REMEMBERED that the above-captioned cause came on for hearing, on this, the 13th day of February, 2020, before Judge Barry Tatum, when and where the following proceedings were had, to wit:

---

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A P P E A R A N C E S

For the Plaintiffs:

MR. ANGELLO L. HUONG  
Attorney at Law  
435 Park Avenue, Professional Building  
Lebanon, TN 37087  
(615)453-7530  
angellohuong@hotmail.com

For the Defendant:

MR. DANIEL A. HORWITZ  
Attorney at Law  
1803 Broadway, Suite 531  
Nashville, TN 37203  
(615)739-2888  
daniel.a.horwitz@gmail.com

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E X H I B I T S

Page

Exhibit No. 1  
E-Mail Dated 2/12/20

10

1 \* \* \*

2 P R O C E E D I N G S

3 (WHEREUPON, additional matters were heard  
4 previously by the Court; after which, the Court's  
5 ruling was as follows:) 10:17:14

6  
7 THE COURT: Now, full disclosure on 10:17:14  
8 something like this. We got a notice faxed in 10:17:17  
9 yesterday that Channel 5 News had sent in one of 10:17:19  
10 those written requests that they are required to do 10:17:26  
11 if they want to cover some case involving court. 10:17:29

12 It says, "Good afternoon. Request to be 10:17:32  
13 in Judge Tatum's courtroom Thursday, February 13th, 10:17:35  
14 for the case involving Kelly Beavers at 9:00 a.m. 10:17:38  
15 The attorney is Daniel Horwitz. Thank you, 10:17:42  
16 Dalton Hammonds." 10:17:45

17 They just have to send notice ahead of 10:17:46  
18 time. Obviously there doesn't appear to be anybody 10:17:49  
19 or television cameras here. And I told the sheriff's 10:17:52  
20 office if they come in, to set them up over yonder 10:17:56  
21 (indicating). So that's a moot point. 10:18:00

22 Second of all, Madam Clerk yesterday 10:18:02  
23 afternoon sent me -- what do you call those things 10:18:05  
24 where you take a picture? 10:18:12

25 /// 10:18:16

1 (Conference between the Court and the 10:18:16  
2 Clerk.) 10:18:17

3 THE COURT: It's a picture, yeah. Sent 10:18:17  
4 me a picture showing that something else had been 10:18:18  
5 filed. 10:18:22

6 MR. HORWITZ: Your Honor, I wanted to 10:18:22  
7 address that briefly, if I could. 10:18:23

8 THE COURT: What's that? 10:18:26

9 MR. HORWITZ: Well, it was a supplemental 10:18:27  
10 answer. The statute under which this was filed is 10:18:29  
11 pretty clear. 10:18:32

12 THE COURT: Yeah. 10:18:33

13 MR. HORWITZ: That had to be filed five 10:18:34  
14 days before the hearing, which was last week. 10:18:36

15 THE COURT: Right. 10:18:39

16 MR. HORWITZ: Not six days after the 10:18:39  
17 hearing. 10:18:42

18 THE COURT: Well, obviously it came -- I 10:18:42  
19 saw it this morning for the first time. 10:18:43

20 (Conference between the Court and the 10:18:43  
21 Clerk.) 10:18:43

22 MR. HORWITZ: I was served with it after 10:18:52  
23 the clerk's office closed. It is not timely. I'm 10:18:52  
24 going to ask this Court to not consider it. 10:18:52

25 THE COURT: Well, before I get to the 10:18:55

1 issue that y'all are dying to know, which was brought 10:18:57  
2 to us last week, I'm a bit confused. Because there 10:19:00  
3 was a suit filed in Circuit Court, was it not? 10:19:05  
4 MR. HUONG: Yes. If you want me to give 10:19:08  
5 -- 10:19:08  
6 THE COURT: Wilson Circuit Court. 10:19:11  
7 MR. HUONG: Yes. 10:19:13  
8 THE COURT: Circuit Court. 10:19:14  
9 And was that voluntarily nonsuited? 10:19:14  
10 MR. HUONG: It was nonsuited, yes. 10:19:17  
11 THE COURT: But a motion has since been 10:19:19  
12 filed over there that is pending; is that correct? 10:19:22  
13 MR. HUONG: Yes. Mr. Horwitz filed it to 10:19:24  
14 request the case be reopened and then dismissed with 10:19:26  
15 prejudice. Because normally a nonsuit is without 10:19:29  
16 prejudice, but he wanted the Circuit Court to dismiss 10:19:31  
17 it with prejudice. 10:19:33  
18 THE COURT: So that is correct? I don't 10:19:35  
19 want to put words in your mouth. A suit was filed 10:19:37  
20 over there. The Plaintiffs took a voluntary nonsuit. 10:19:40  
21 The only thing that's pending before the Circuit 10:19:43  
22 Court right now is a motion on your client's behalf 10:19:46  
23 to reopen the case? 10:19:49  
24 MR. HORWITZ: (Shakes head negatively.) 10:19:51  
25 THE COURT: No? 10:19:52

1 MR. HORWITZ: To alter the judgment -- 10:19:53  
2 MR. HUONG: Okay. 10:19:54  
3 MR. HORWITZ: -- to reflect that it is a 10:19:55  
4 dismissal with prejudice and that the claims for 10:19:59  
5 sanctions and fees remain. 10:19:59  
6 Now, it's worth noting that there is a 10:20:01  
7 different -- there are different parties here, too. 10:20:03  
8 They've added Dr. Nandigam himself, who is the 10:20:06  
9 Plaintiff in this case. 10:20:10  
10 THE COURT: Right. 10:20:10  
11 MR. HORWITZ: So, yes, with that 10:20:10  
12 qualification, that's correct. 10:20:12  
13 THE COURT: Okay. I've looked through -- 10:20:15  
14 I've read your briefs from last week. And first of 10:20:17  
15 all, the statute that is at issue is a statute that 10:20:20  
16 involves the Rules of Procedure in courts of record 10:20:24  
17 across the state. But the rules are fairly clear, in 10:20:28  
18 that if you are going to make a claim for any kind of 10:20:32  
19 libel or slander, even if it's in Sessions Court, 10:20:35  
20 that there should be a clear and succinct statement 10:20:39  
21 as to what the basis for the cause of action is. 10:20:45  
22 And, I mean, that's the law in Sessions Court, that's 10:20:48  
23 the law at the Court of Appeals, that's the law of 10:20:52  
24 the trial courts. 10:20:55  
25 And as y'all both are fully aware, courts 10:20:56

1 are a forum to give people an opportunity to answer 10:21:01  
2 any charges or claims that have been brought against 10:21:05  
3 them. 10:21:09

4 I look at this civil warrant that was 10:21:10  
5 filed here on behalf of Nandigam Neurology and 10:21:13  
6 Dr. Nandigam, and it says, "Defamation as to Nandigam 10:21:18  
7 Neurology, PLC, and Kaveer Nandigam, and false light 10:21:24  
8 invasion of privacy as to Kaveer Nandigam." It 10:21:29  
9 doesn't specify any date, location, much less what 10:21:34  
10 any causable action was with regard to the type of 10:21:37  
11 claim. There's -- it doesn't indicate that it was an 10:21:42  
12 electronic statement. It doesn't indicate that it 10:21:45  
13 was a written statement. It doesn't indicate that it 10:21:48  
14 was a billboard, somebody standing in the parking 10:21:52  
15 lot, et al. 10:21:55

16 So I think before we even got to the 10:21:55  
17 SLAPP issue, that would -- failure to state a claim 10:21:58  
18 or a cause of action would be actionable with regard 10:22:03  
19 to that. 10:22:05

20 In reading the statute, regardless of 10:22:06  
21 what the function and purpose of that statute is, I 10:22:10  
22 think it's clear that any court is subject to that 10:22:13  
23 statutory outcome. I cannot pick and choose which 10:22:17  
24 one -- no judge can pick and choose; say, well, I 10:22:21  
25 don't agree with this, I don't think this is 10:22:25

1 appropriate. You have to follow what the law says. 10:22:27  
2 And the law doesn't give any such discretion to say 10:22:31  
3 that it may dismiss. It says shall dismiss, if it 10:22:34  
4 doesn't meet those particular claims. 10:22:38

5 Now, the issue gets into the issue about 10:22:40  
6 sanctions and penalties and damages, which I think is 10:22:44  
7 something that y'all are seeking. And I haven't 10:22:46  
8 heard anything as to what would be an appropriate 10:22:48  
9 amount for that. 10:22:50

10 MR. HORWITZ: That's correct, Your Honor. 10:22:51  
11 So I don't think we get there until you grant the 10:22:52  
12 TPPA motion to dismiss. So in the event that you are 10:22:56  
13 granting that -- 10:22:59

14 THE COURT: I'm granting it. 10:22:59

15 MR. HORWITZ: Thank you. 10:23:00

16 I guess we will file a fee petition with 10:23:00  
17 itemized time entries and -- 10:23:04

18 THE COURT: And I'm assuming any denial 10:23:07  
19 of that would be appealable directly to the Court of 10:23:08  
20 Appeals. 10:23:12

21 MR. HORWITZ: I believe that's correct, 10:23:12  
22 Your Honor. I want to go back and check to make sure 10:23:13  
23 that's right, but I believe that's correct. 10:23:16

24 THE COURT: I'm going to dismiss it. 10:23:18

25 MR. HORWITZ: Thank you, Your Honor. 10:23:21

1 THE COURT: Grant the petition for 10:23:22  
2 dismissal. 10:23:23

3 MR. HUONG: And just for clarification, 10:23:23  
4 Your Honor, so you're denying our motion to request a 10:23:25  
5 stay because of the Circuit Court pending action? 10:23:28

6 THE COURT: Yes. Yes. 10:23:29

7 MR. HORWITZ: Your Honor, if I may, just 10:23:29  
8 to create a record on this as to when the 10:23:31  
9 supplemental answer was filed and served on me, I 10:23:33  
10 received this at 5:08 p.m. last night, six days after 10:23:37  
11 the hearing. I just want to pass this to the court 10:23:41  
12 reporter and make it Exhibit 1. 10:23:45

13 THE COURT: Sure. 10:23:50

14 (WHEREUPON, the above-mentioned document 10:23:50  
15 was marked as Exhibit 1.) 10:23:51

16 (Off-the-record discussions.) 10:23:51

17 MR. HUONG: And there's something I need 10:24:52  
18 to clarify. Mr. Hirschhorn, the other attorney that 10:24:54  
19 was here last week that argued it, he was the lead 10:24:56  
20 counsel. 10:24:57

21 THE COURT: Yes. 10:24:57

22 MR. HUONG: Unfortunately he couldn't 10:24:57  
23 show up today, so I'm here to argue as best as I can 10:24:58  
24 based on, you know, being second chair. 10:25:01

25 Now, at the hearing last week, 10:25:04

1 Mr. Hirschhorn was arguing, not this motion itself, 10:25:06  
2 but whether this anti-SLAPP statute even applied to 10:25:08  
3 General Sessions. 10:25:14

4 THE COURT: I think it applies. And 10:25:14  
5 that's what I was saying there or trying to make 10:25:16  
6 clear. It's a codified Rule of Procedure. 10:25:19

7 MR. HUONG: Yes. 10:25:21

8 THE COURT: And not only that, as it -- 10:25:21  
9 not only is it applicable to courts of record, but 10:25:26  
10 because it has been codified as a statute, I think it 10:25:30  
11 has application in any court. 10:25:33

12 MR. HUONG: And then the second issue is 10:25:35  
13 Mr. Hirschhorn took last week to be the first setting 10:25:37  
14 of this case, so -- 10:25:40

15 THE COURT: We're here on his petition to 10:25:41  
16 dismiss pursuant to that statute. And I'm granting 10:25:43  
17 that. 10:25:46

18 MR. HUONG: Okay. I just wanted to 10:25:46  
19 clarify that, that Mr. Hirschhorn was requesting if 10:25:48  
20 it is granted or if it does apply to the General 10:25:50  
21 Sessions statute, that he be given the passthrough to 10:25:57  
22 have a hearing and provide our witnesses and 10:26:00  
23 affidavits. So that's already foreclosed because 10:26:01  
24 Your Honor has already -- 10:26:03

25 THE COURT: The best I remember, if you 10:26:05

1 take a voluntary nonsuit on a case in the Circuit 10:26:07  
2 Court, you certainly have the right to bring that 10:26:11  
3 cause of action back up there. 10:26:14

4 I'm making a ruling down here with regard 10:26:15  
5 to -- that the SLAPP statute seemed to apply to the 10:26:17  
6 facts, or lack of facts that we have here in 10:26:22  
7 evidence. And that opens the door for y'all to 10:26:25  
8 proceed in Circuit, or whatever would be the 10:26:31  
9 appropriate jurisdiction, with the proper claim 10:26:33  
10 alleging defamation or slander or invasion of 10:26:37  
11 privacy. 10:26:41

12 MR. HUONG: That's fine. I just wanted 10:26:41  
13 to get -- 10:26:42

14 THE COURT: So you've still got your day 10:26:42  
15 in court. 10:26:43

16 MR. HUONG: -- behind the -- whatever -- 10:26:44  
17 behind your thinking process. 10:26:48

18 MR. HORWITZ: Just to clarify that for 10:26:49  
19 the record, the anti-SLAPP petition, the Tennessee 10:26:52  
20 Public Participation Act petition, has been granted; 10:26:53  
21 is that correct? 10:26:55

22 THE COURT: Yes. 10:26:55

23 MR. HORWITZ: Thank you, Your Honor. I'm 10:26:55  
24 going to file the transcript with the Court, and 10:26:57  
25 we'll be back here on a motion for fees and sanctions 10:26:59

1 at some later date. 10:27:02

2 THE COURT: All right. Well, just 10:27:04

3 remember that question I asked you. 10:27:05

4 MR. HORWITZ: Which one, Your Honor? 10:27:07

5 THE COURT: If you file a petition for 10:27:09

6 damages and sanctions and penalties, if I were to 10:27:11

7 dismiss that or deny that, would that be appealable 10:27:14

8 directly to the Court of Appeals? 10:27:17

9 MR. HORWITZ: Yes, Your Honor. I will 10:27:19

10 keep that in mind. 10:27:20

11 THE COURT: Not making up my mind about 10:27:21

12 it. I'm just kind of asking you that question. 10:27:24

13 MR. HORWITZ: I can say with certainty 10:27:25

14 that the denial or the granting of a TPPA petition is 10:27:27

15 appealable to the Court of Appeals. 10:27:33

16 MR. HUONG: It's statutory. It says it's 10:27:33

17 immediately appealable to the Court of Appeals. 10:27:34

18 THE COURT: That's highly unusual, but I 10:27:38

19 kind of see the logic in it. 10:27:40

20 MR. HUONG: And again, that kind of is a 10:27:40

21 weird thing because normally you're used to Circuit 10:27:42

22 Court going to the Court of Appeals, no problem. But 10:27:46

23 apparently General Sessions, it can skip straight to 10:27:47

24 Court of Appeals without going to Circuit in between. 10:27:51

25 THE COURT: Now, what were the margins on 10:27:54

1 the vote totals in both houses? 10:27:58

2 MR. HORWITZ: Unanimously in the Senate, 10:28:01

3 I believe. 10:28:02

4 THE COURT: 33, nothing. 10:28:03

5 MR. HORWITZ: And I believe there were a 10:28:04

6 handful of votes against it in the House. Signed by 10:28:07

7 the Governor. Senator Dickerson was a sponsor. 10:28:10

8 We're very appreciative of him. 10:28:17

9 THE COURT: Oh, yeah. 10:28:18

10 MR. HORWITZ: Thank you. 10:28:18

11 (WHEREUPON, the foregoing proceedings  
12 were concluded at 10:28 a.m.)

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C E R T I F I C A T E

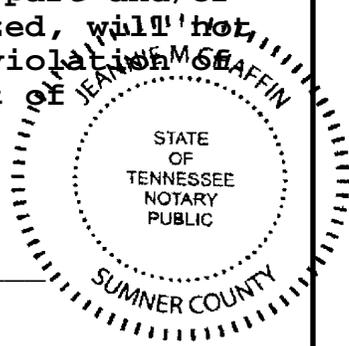
STATE OF TENNESSEE

COUNTY OF SUMNER

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<p>13:5,14</p> <p><b>pick</b> 8:23,24</p> <p><b>picture</b> 4:24 5:3,4</p> <p><b>Plaintiff</b> 7:9</p> <p><b>Plaintiffs</b> 6:20</p> <p><b>PLC</b> 8:7</p> <p><b>point</b> 4:21</p> <p><b>prejudice</b> 6:15, 16,17 7:4</p> <p><b>pretty</b> 5:11</p> <p><b>previously</b> 4:4</p> <p><b>privacy</b> 8:8 12:11</p> <p><b>problem</b> 13:22</p> <p><b>Procedure</b> 7:16 11:6</p> <p><b>proceed</b> 12:8</p> <p><b>proceedings</b> 14:11</p> <p><b>process</b> 12:17</p> <p><b>proper</b> 12:9</p> <p><b>provide</b> 11:22</p> <p><b>Public</b> 12:20</p> <p><b>purpose</b> 8:21</p> <p><b>pursuant</b> 11:16</p> <p><b>put</b> 6:19</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qualification</b> 7:12</p> <p><b>question</b> 13:3,12</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>read</b> 7:14</p> <p><b>reading</b> 8:20</p> <p><b>received</b> 10:10</p> <p><b>record</b> 7:16 10:8 11:9 12:19</p> <p><b>reflect</b> 7:3</p>	<p><b>regard</b> 8:10,18 12:4</p> <p><b>remain</b> 7:5</p> <p><b>remember</b> 11:25 13:3</p> <p><b>reopen</b> 6:23</p> <p><b>reopened</b> 6:14</p> <p><b>reporter</b> 10:12</p> <p><b>request</b> 4:12 6:14 10:4</p> <p><b>requesting</b> 11:19</p> <p><b>requests</b> 4:10</p> <p><b>required</b> 4:10</p> <p><b>Rule</b> 11:6</p> <p><b>rules</b> 7:16,17</p> <p><b>ruling</b> 4:5 12:4</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>sanctions</b> 7:5 9:6 12:25 13:6</p> <p><b>seeking</b> 9:7</p> <p><b>Senate</b> 14:2</p> <p><b>Senator</b> 14:7</p> <p><b>send</b> 4:17</p> <p><b>served</b> 5:22 10:9</p> <p><b>Sessions</b> 7:19,22 11:3,21 13:23</p> <p><b>set</b> 4:20</p> <p><b>setting</b> 11:13</p> <p><b>shakes</b> 6:24</p> <p><b>sheriff's</b> 4:19</p> <p><b>show</b> 10:23</p> <p><b>showing</b> 5:4</p> <p><b>Signed</b> 14:6</p> <p><b>skip</b> 13:23</p> <p><b>slander</b> 7:19 12:10</p> <p><b>SLAPP</b> 8:17 12:5</p> <p><b>sponsor</b> 14:7</p>	<p><b>standing</b> 8:14</p> <p><b>state</b> 7:17 8:17</p> <p><b>statement</b> 7:20 8:12,13</p> <p><b>statute</b> 5:10 7:15 8:20,21 11:2,10, 16,21 12:5</p> <p><b>statutory</b> 8:23 13:16</p> <p><b>stay</b> 10:5</p> <p><b>straight</b> 13:23</p> <p><b>subject</b> 8:22</p> <p><b>succinct</b> 7:20</p> <p><b>suit</b> 6:3,19</p> <p><b>supplemental</b> 5:9 10:9</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>Tatum's</b> 4:13</p> <p><b>television</b> 4:19</p> <p><b>Tennessee</b> 12:19</p> <p><b>thing</b> 6:21 13:21</p> <p><b>things</b> 4:23</p> <p><b>thinking</b> 12:17</p> <p><b>Thursday</b> 4:13</p> <p><b>time</b> 4:18 5:19 9:17</p> <p><b>timely</b> 5:23</p> <p><b>today</b> 10:23</p> <p><b>told</b> 4:19</p> <p><b>totals</b> 14:1</p> <p><b>TPPA</b> 9:12 13:14</p> <p><b>transcript</b> 12:24</p> <p><b>trial</b> 7:24</p> <p><b>type</b> 8:10</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>Unanimously</b> 14:2</p>	<p><b>unusual</b> 13:18</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>voluntarily</b> 6:9</p> <p><b>voluntary</b> 6:20 12:1</p> <p><b>vote</b> 14:1</p> <p><b>votes</b> 14:6</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wanted</b> 5:6 6:16 11:18 12:12</p> <p><b>warrant</b> 8:4</p> <p><b>week</b> 5:14 6:2 7:14 10:19,25 11:13</p> <p><b>weird</b> 13:21</p> <p><b>Wilson</b> 6:6</p> <p><b>witnesses</b> 11:22</p> <p><b>words</b> 6:19</p> <p><b>worth</b> 7:6</p> <p><b>written</b> 4:10 8:13</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>y'all</b> 6:1 7:25 9:7 12:7</p> <p><b>yesterday</b> 4:9,22</p> <p><b>yonder</b> 4:20</p>
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Daniel Horwitz <daniel.a.horwitz@gmail.com>

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## Motion to Stay and Supplemental Answer

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**Bennett Hirschhorn** <bh@bennethirschhorn.com>  
To: Daniel Horwitz <daniel.a.horwitz@gmail.com>, sarahmartin1026@gmail.com  
Cc: Angello Huong <angellohuong@hotmail.com>

Wed, Feb 12, 2020 at 5:08 PM

Daniel,

Please see the attached that we filed today.

**Bennett Hirschhorn** | Attorney at Law | 865-773-7337  
800 South Gay Street, Suite 700 | Knoxville, TN 37929

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### 2 attachments

 **Plaintiff's Motion to Stay the GS Proceedings with exhibit.pdf**  
1707K

 **Plaintiff's Supplemental Answer to Defendants Motion to Dismiss - Google Docs with exhibits.pdf**  
1294K



# Exhibit D



during his medical appointments, so I routinely attend his medical appointments. Once in a private room and away from other patients, I also record his appointments so that I can later remind him what doctors and other medical professionals told him and ensure that he is following medical advice and receiving proper care.

7. When Dr. Nandigam saw that I was recording my father's medical appointment, Dr. Nadigam began yelling, slammed his clipboard, and demanded my phone.

8. Dr. Nadigam's behavior scared me and deeply upset my father. In my opinion, his behavior was unprofessional and incompatible with, among other things, doctors' ethical responsibility to do no harm.

9. Dr. Nandigam demanded that I delete the recording of my father's medical appointment before leaving his office.

10. Although having recordings of my father's appointments is important to his health, because I was shocked and frightened by Dr. Nandigam's behavior, I deleted the recording as Dr. Nandigam demanded. Thereafter, even though the visit was not complete, my father and I left.

11. I ultimately posted a critical but truthful review on Yelp! about my experience with Dr. Nandigam. The Plaintiff is currently suing me for that review.

12. The Yelp! review I posted was based upon my personal opinion of Dr. Nandigam's behavior. My opinion was based on the facts that I disclosed within the review.

13. I genuinely intend to report Dr. Nandigam to the State of Tennessee Medical Review Board and to file a formal complaint regarding his behavior.

14. I genuinely do not know how, behaving as he did, Dr. Nandigam is still in

business.

15. In my opinion, Dr. Nandigam does not belong in the medical field.

16. I posted the Yelp! review at issue in furtherance of my right of free speech under the Tennessee and United States Constitutions in connection with a matter of public concern.

17. All of the statements in my Yelp! review were based on my truthful recollection of Dr. Nandigam's behavior.

18. I do not and did not have any reason to believe that any of the statements in my Yelp! review were false.

19. I did not communicate any of the information in my Yelp! review with reckless disregard of its falsity or with negligence in failing to ascertain the truth.

20. Instead, I posted the review based on my own personal observations during my father's medial appointment with Dr. Kaveer Nandigam of Nandigam Neurology.

21. No other person requested that I post the Yelp! review, nor did I work with or in conjunction with anyone in posting the Yelp! review. I did not conspire to post the Yelp! review or any other review with Devin Yount or any other person.

22. The other Defendant in Wilson County Circuit Court Case No.: 2019-cv-663, Devin Yount, is the son of a friend of mine.

23. It is my understanding that Mr. Yount posted a review on Google after overhearing a conversation between his mother and I about my father's appointment with Dr. Nandigam.

24. The statements in Mr. Yount's Google review were true.

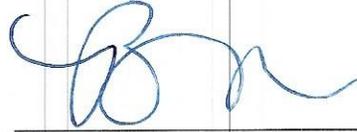
25. I did not ask or encourage Mr. Yount to post any review of Dr. Nandigam.

26. I did not conspire with Mr. Yount to harm the Plaintiff in any way.

27. The Plaintiff's allegations regarding an alleged conspiracy between Mr. Yount and me are unequivocally false.

Further affiant sayeth not.

Pursuant to Tennessee Rule of Civil Procedure 72, I declare under penalty of perjury that the foregoing is true and correct.



Kelly Beavers

December 23<sup>rd</sup>, 2019

Date Executed

# Exhibit E

IN THE CIRCUIT COURT OF WILSON COUNTY, TENNESSEE

NANDIGAM NEUROLOGY, PLC, )  
PLAINTIFF )  
VS. )  
KELLY BEAVERS and )  
DEVIN YOUNT )  
DEFENDANTS. )

CASE NO. 2019-CV-663

DEBRA YONS  
CIRCUIT CLERK  
WILSON COUNTY, TN  
2019 NOV 27 PM 2:28  
FILED #

**COMPLAINT**

Comes now the Plaintiff, NANDIGAM NEUROLOGY, PLC, and complains of Defendants KELLY BEAVERS and DEVIN YOUNT, as follows:

**PARTIES**

1. Plaintiff NANDIGAM NEUROLOGY, PLC (hereinafter referred to as "Plaintiff" or "Plaintiff Nandigam"), is a Tennessee professional limited liability company with its principle office located at 516 Uptown Square, Murfreesboro, TN 37129.
2. Defendant KELLY BEAVERS (hereinafter referred to as "Defendant Beavers") is an adult citizen and resident of Wilson County, Tennessee. Her place of residence is 398 Saundersville Ferry Road, Mt. Juliet, TN 37122.
3. Defendant DEVIN YOUNT (hereinafter referred to as "Defendant Yount") is an adult citizen and resident of Wilson County, Tennessee. Upon information and belief, his place of residence is 3025 Cairns Drive, Mt. Juliet, TN 37122.
4. This Court has jurisdiction over the parties and venue is proper.

**BACKGROUND**

5. Plaintiff Nandigam owns and operates a medical office in Murfreesboro, TN which provides neurology treatment and neurological medical services.
6. In early November 2019, Defendant Beavers accompanied her father to a medical consultation at the office of Plaintiff Nandigam.
7. On November 7, 2019, Defendant Beavers posted a negative Yelp review on the internet regarding Plaintiff Nandigam's medical office which contained false, disparaging, and misleading statements.

8. On November 20, 2019, Defendant Yount additionally posted a negative Google regarding Plaintiff Nandigam's medical office which also contained false, disparaging, and misleading statements. Plaintiff Nandigam has never met Defendant Yount and has never had any contact or communication with Defendant Yount. Plaintiff Nandigam does not even know who Defendant Yount is.

9. Upon information and belief, Defendant Yount was an acquaintance of Defendant Beavers who was specifically recruited by Defendant Beavers for the purpose of posting false and misleading statements on Google concerning Plaintiff Nandigam's medical office.

10. Neither Defendant Beavers nor Defendant Young were ever patients of Plaintiff Nandigam's medical office.

### **COUNT I-DEFAMATION AND LIBEL**

11. Plaintiff Nandigam incorporates each and every allegation set forth above.

12. The actions of Defendant Beavers and Defendant Yount constitute defamation and libel which resulted in injury to Plaintiff Nandigam's business.

13. The actions of Defendant Beavers and Defendant Yount were done in a reckless and/or intentional manner with disregard for the truth and were performed by the Defendants in order to cause damage to Plaintiff's business.

### **COUNT II-FALSE LIGHT**

14. Plaintiff Nandigam incorporates each and every allegation set forth above.

15. The actions of Defendant Beavers and Defendant Yount constitute statements of false light which resulted in injury to Plaintiff Nandigam's business.

16. The actions of Defendant Beavers and Defendant Yount were done in a negligent, reckless, and/or intentional manner and resulted in damage to Plaintiff's business.

### **COUNT III-CONSPIRACY**

17. Plaintiff Nandigam incorporates each and every allegation set forth above.

18. The actions of Defendant Beavers and Defendant Yount constitute a civil conspiracy between the two Defendants which resulted in injury to Plaintiff Nandigam's business.

19. The actions of Defendant Beavers and Defendant Yount were intentionally coordinated by the Defendants in order to cause damage to Plaintiff's business reputation.

### DAMAGES

20. Due to the acts of Defendant Beavers and Defendant Yount, Plaintiff Nandigam suffers from damage to its business reputation, potential loss of patients and business revenue, loss of income, internet “clean up” expenses, and legal expenses.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiff Nandigam Neurology, PLC hereby demands:

1. Process be issued upon the Defendants and an *Answer* to this *Complaint* be filed within the time frame prescribed by law.
2. Judgment be entered against Defendant KELLY BEAVERS and Defendant DEVIN YOUNT, jointly and severally, for an amount to be determined at trial, but no less than \$25,000, with interest and costs.
3. An additional award of punitive damages be entered against both Defendant BEAVERS and Defendant DEVIN YOUNT, jointly and severally, for their actions, with interest and costs.
4. The court award Plaintiff’s attorney fees against Defendants.
5. The court order Defendants to remove their defamatory statements from the internet and to pay for any associated costs for such removal.
6. The court issue an injunction against Defendants prohibiting them from posting any further statements against Plaintiff on the internet.
7. Any further legal and equitable relief to which Plaintiff may be entitled.

RESPECTFULLY SUBMITTED:

  
\_\_\_\_\_  
ANGELLO L. HUONG #021209  
Attorney for Plaintiff  
435 Park Avenue, Professional Building  
Lebanon, Tennessee 37087  
Phone (615) 453-7530

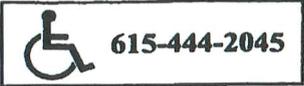
**SURETY**

I, Angello L. Huong, state that I am the surety for the costs of this case.

  
\_\_\_\_\_  
ANGELLO L. HUONG

# Exhibit F

STATE OF TENNESSEE, COUNTY OF WILSON



To Any Lawful Officer to Execute and Return:

Summon \_\_\_\_\_ to appear before the General Sessions Court of Wilson County, Tennessee, on the 13 day of February 20 20, at 9 am/pm, then and there to answer in a civil action brought by Nandigam Neurology, PLC and

For Kaveer Nandigam, M.D.

CIVIL SUMMONS

Defamation as to Nandigam Neurology, PLC and Kaveer Nandigam, M.D.; and False light invasion of privacy as to Kaveer Nandigam, M.D.

Under \$25,000

Judgement for \_\_\_\_\_ against \_\_\_\_\_ for \$ \_\_\_\_\_ plus

JUDGEMENT

interest at the rate of \_\_\_\_\_ % and cost of suit, for which execution may issue.

Judgement entered by:  Default  Agreement  Trial

Dismissed:  Without Prejudice  With Prejudice  Non Suit

Costs taxed to:  Plaintiff  Defendant

Defendant(s) \_\_\_\_\_ in court and admitted to jurisdiction of court.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

\_\_\_\_\_, Judge, Div. \_\_\_\_\_

ORDER

FILED

9:37 A.M. JAN 21 2020 P.M.

DEBBIE MOSS, GENERAL SESSIONS COURT CLERK WILSON COUNTY, TN

This the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_, Judge \_\_\_\_\_

AFFIDAVIT

To the best of my information and belief, after investigation of Defendant's employment, I hereby make affidavit that the Defendant is/is not a member of a military service.

Angello L. Huong Attorney for Plaintiff or Plaintiff

Notary Public My Comm. Exp. \_\_\_\_\_

Case Number 2020-CV-152 Nandigam Neurology, PLC and Kaveer Nandigam, M.D. vs. Kelly Beavers 398 Saundersville Ferry Rd Mt. Juliet, TN 37122 Plaintiff(s) Defendant Address Defendant Address Defendant Address

COPY

CIVIL WARRANT Wilson County General Sessions Court Debbie Moss, Clerk

By Angello L. Huong, Deputy Clerk

Issued 1/21, 2020

Set for February 13, 2020 At 9am

Reset for \_\_\_\_\_

Served Upon:  All Named Defendants

All Defendants Except:

SERVICE

Served \_\_\_\_\_, 20 \_\_\_\_\_

Sheriff/ Constable/ Process Server

Bennett Hirschhorn, BPR# 025937

Angello Huong, BPR# 021209

Attorney for Plaintiff

Telephone (615) 453-7530

Attorney for Defendant

Telephone \_\_\_\_\_

# Exhibit G

IN THE GENERAL SESSIONS COURT OF WILSON COUNTY, TENNESSEE

FILED  
JAN 23 2020  
S.O.S  
KA

NANDIGAM NEUROLOGY, PLC, and §  
KAVEER NANDIGAM, M.D., §

*Plaintiffs,* §

v. §

KELLY BEAVERS §

*Defendant.* §

Case No.: 2020-CV-152

DEBBIE MOSS, GENERAL SESSIONS COURT CLERK  
WILSON COUNTY, TN

**DEFENDANT BEAVERS’S TENN. CODE ANN. § 20-17-104(a) PETITION TO DISMISS THE PLAINTIFFS’ COMPLAINT PURSUANT TO THE TENNESSEE PUBLIC PARTICIPATION ACT**

This is the Plaintiffs’ second Strategic Lawsuit Against Public Participation (“SLAPP-suit”) regarding a truthful Yelp! review authored by Defendant Kelly Beavers. After previously initiating the same underlying claims against Ms. Beavers in Wilson County Circuit Court Case No.: 2019-cv-663, Nandigam Neurology non-suited its Complaint the moment Ms. Beavers filed a petition to dismiss it under the newly enacted Tennessee Public Participation Act—a protective statute that the General Assembly adopted to ensure prompt dismissal of frivolous speech-based lawsuits like this one.

Unable to state a cognizable claim for relief in Circuit Court, the Plaintiffs now seek to take advantage of what they perceive to be this Court’s more forgiving pleadings standards. For the reasons provided below, however, the Plaintiffs’ claims fare no better here; their Complaint must be dismissed with prejudice; and Ms. Beavers is entitled to costs, fees, and severe sanctions pursuant to Tennessee Code Annotated § 20-17-107(a).

**I. INTRODUCTION**

Upset about Dr. Kaveer Nandigam’s extraordinarily disturbing behavior toward

Ms. Beavers and her father coming to light, the Plaintiffs—Nandigam Neurology, PLC, and Dr. Nandigam himself—have sued Ms. Beavers regarding a constitutionally protected Yelp! review that she posted after taking her father to the doctor. Ms. Beavers’s Yelp! review, of course, was not illegal, and it falls safely within the protections guaranteed by the First Amendment. For a wealth of additional reasons, the Plaintiffs’ Complaint also fails to state a cognizable claim under any pleaded theory of relief. Because the Plaintiffs have baselessly sued Ms. Beavers for exercising her right to free speech, Ms. Beavers further petitions this Court to dismiss the Plaintiffs’ Complaint and to sanction the Plaintiffs and their counsel under the newly enacted Tennessee Public Participation Act. *See* TENN. CODE ANN. § 20-17-104(a)(2).

The Plaintiffs’ Complaint—and every cause of action alleged in it—must be dismissed with prejudice for several independent reasons:

*First*, the Plaintiffs’ Complaint does not comport with threshold pleading requirements governing defamation claims and fails to set forth the substance of any of the statements that it alleges are defamatory.

*Second*, for several reasons, the statements in Ms. Beavers’s Yelp! review are inactionable as defamation and are incapable of conveying a defamatory meaning as a matter of law.

*Third*, Nandigam Neurology, PLC cannot sue Ms. Beavers regarding statements made about Dr. Kaveer Nandigam.

*Fourth*, Nandigam Neurology, PLC’s claims may not be maintained in any regard, because its previous dismissal of the same claims could only be taken with prejudice.

The Plaintiffs’ Complaint also falls squarely within the protections of the newly enacted Tennessee Public Participation Act. *See* TENN. CODE ANN. § 20-17-101, *et seq.*

Pursuant to the Tennessee Public Participation Act, Ms. Beavers has submitted sworn, admissible evidence setting forth several outcome-determinative defenses to this action. *See Exhibit A*, Affidavit of Kelly Beavers. In furtherance of the Tennessee Public Participation Act's substantive protections, Ms. Beavers additionally demands that the Plaintiffs establish a prima facie case for each essential element of its claims in order to avoid dismissal. *See* TENN. CODE ANN. § 20-17-105(b).

## **II. LEGAL STANDARDS**

### **A. HEIGHTENED CONSTITUTIONAL REQUIREMENTS GOVERNING DEFAMATION CLAIMS**

To establish a prima facie case of defamation under Tennessee law, a plaintiff must prove that: “(1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.” *Davis v. The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001). Further, given the constitutional requisites of defamation claims, “[a] party may not skirt the requirements of defamation law by pleading another, related cause of action.” *Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir. 2005) (unpublished) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988)). *See also Seaton v. TripAdvisor LLC*, 728 F.3d 592, 601, n.9 (6th Cir. 2013) (“Seaton’s claims for false-light invasion of privacy, trade libel/injurious falsehood, and tortious interference with prospective business relationships appear to be an attempt to bypass the First Amendment.” (citing *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007))). Thus, the Plaintiffs’ false light claims are subject to the same heightened constitutional requirements as their defamation claims. *See id.* *See also Moldea v. New York Times*

Co., 22 F.3d 310, 319–20 (D.C. Cir. 1994) (“a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim”); *Montgomery v. Risen*, 875 F.3d 709, 713 (D.C. Cir. 2017). *Cf. Loftis v. Rayburn*, No. M201701502COAR3CV, 2018 WL 1895842, at \*8 (Tenn. Ct. App. Apr. 20, 2018) (“For the reasons we found the statements in Mr. Myers’ article fail to imply a defamatory meaning, we also find they are not susceptible to the requisite inferences casting Mr. Loftis in a false light.” (citing *West v. Media General Convergence, Inc.*, 53 S.W.3d 640, 645 n.5 (Tenn. 2001))).

Critically, “the Supreme Court of the United States has constitutionalized the law of libel[.]” *Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978). *See also N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964). Thus, defamation claims present several threshold and outcome-determinative questions of law that do not require any deference to the Plaintiffs’ own characterizations of the statements over which they have sued. *See, e.g., Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at \*3 (Tenn. Ct. App. Apr. 10, 1997) (“If the [allegedly defamatory] words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation.”). *See also Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012); *McWhorter v. Barre*, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003).

Given the constitutional limitations that govern defamation claims, “ensuring that defamation actions proceed only upon statements which may actually defame a plaintiff is an essential gatekeeping function of the court.” *Pendleton v. Newsome*, 772 S.E.2d 759, 763 (Va. 2015) (internal quotation omitted). With this “essential gatekeeping function” in mind, *see id.*, both our Court of Appeals and our Supreme Court have instructed that in defamation cases, “the issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance . . . .”

*Brown*, 393 S.W.3d at 708. See also *Aegis Scis. Corp. v. Zelenik*, No. M2012-00898-COA-R3CV, 2013 WL 175807, at \*6 (Tenn. Ct. App. Jan. 16, 2013) (“[T]he preliminary question of whether a statement ‘is capable of conveying a defamatory meaning’ presents a question of law.” (quoting *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000))); *McWhorter*, 132 S.W.3d at 364 (“The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is ‘capable of being so understood is a question of law to be determined by the court.’” (quoting *Memphis Publ’g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978))). If an allegedly defamatory statement is not capable of being understood as defamatory as a matter of law, then a plaintiff’s complaint must be dismissed for failure to state a claim. *McWhorter*, 132 S.W.3d at 364.

In keeping with the heightened constitutional requirements that govern defamation claims, Tennessee courts have also adopted several categorical bars that prevent claimed defamations from being actionable as a matter of law, several of which are outcome-determinative here:

First, our courts have held that opinions enjoy robust constitutional protection under the First Amendment. See generally *Stones River Motors, Inc. v. Mid-S. Publ’g Co.*, 651 S.W.2d 722 (Tenn. Ct. App. 1983), *abrogation on other grounds recognized by Zius v. Shelton*, No. E199901157COAR9CV, 2000 WL 739466, at \*3 (Tenn. Ct. App. June 6, 2000). As a result, “an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts.” *Id.* at 722.

Second, an allegedly defamatory statement “must be factually false in order to be

actionable.”<sup>1</sup> *Moman*, 1997 WL 167210, at \*4. Thus, any statement that is not capable of being proven false as a matter of fact or that constitutes mere rhetorical hyperbole cannot serve as the basis of a defamation claim. *See id.*

*Third*, merely unpleasant or embarrassing statements are not capable of conveying a defamatory meaning as a matter of law. *Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at \*3 (Sept. 30, 2015). Instead,

[f]or a communication to be [defamatory], **it must constitute a serious threat to the Plaintiffs’ reputation.** A [defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. **The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element “of disgrace.”**

*Id.* (quoting *Brown*, 393 S.W.3d at 708) (emphases added), *appeal denied* (Tenn. Feb. 18, 2016).

*Fourth*, Tennessee has adopted the “substantial truth doctrine” with respect to defamation cases. *See Isbell v. Travis Elec. Co.*, No. M199900052COAR3CV, 2000 WL 1817252, at \*5 (Tenn. Ct. App. Dec. 13, 2000). Thus, statements that are true or substantially true are not actionable as defamation as a matter of law. *Id.*

*Fifth*, damages cannot be presumed; instead, a plaintiff is “required to prove actual damages in all defamation cases.” *Hibdon v. Grabowski*, 195 S.W.3d 48, 68 (Tenn. Ct. App. 2005) (citing *Handley v. May*, 588 S.W.2d 772, 776 (Tenn. Ct. App. 1979)).

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<sup>1</sup> In Tennessee, defamatory implications regarding an allegedly tortious publication are governed by a distinct and independent tort. *See Loftis v. Rayburn*, No. M201701502COAR3CV, 2018 WL 1895842, at \*5–6 (Tenn. Ct. App. Apr. 20, 2018) (describing Tennessee’s independent recognition of “defamation by implication or innuendo”). In this case, the Plaintiffs’ Complaint exclusively alleges defamation and false light claims. *See Complaint.*

## **B. THE TENNESSEE PUBLIC PARTICIPATION ACT**

Tennessee’s newly enacted Public Participation Act—which the legislature adopted to deter, to expediently resolve, and to punish SLAPP-suits like this one—provides that “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action” subject to the specialized provisions of Tennessee Code Annotated § 20-17-104(a). The Tennessee Public Participation Act “provide[s] an additional substantive remedy to protect the constitutional rights of parties” that “supplement[s] any remedies which are otherwise available . . . under the Tennessee Rules of Civil Procedure.” TENN. CODE ANN. § 20-17-109. As such, nothing in the Act “affects, limits, or precludes the right of any party to assert any defense, remedy, immunity, or privilege otherwise authorized by law[.]” TENN. CODE ANN. § 20-17-108(4).

In enacting the Tennessee Public Participation Act, the Tennessee General Assembly forcefully established that:

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury. This chapter is consistent with and necessary to implement the rights protected by Article I, §§ 19 and 23, of the Constitution of Tennessee, as well as by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent.

TENN. CODE ANN. § 20-17-102. Substantively, the Tennessee Public Participation Act also provides, among other things, that:

(1) When a defendant has been sued in response to the party’s exercise of the right to free speech, he or she is entitled to file a special petition to dismiss the legal action, TENN. CODE ANN. § 20-17-104(a);

(2) Discovery is automatically stayed by statute pending the entry of an order ruling on the petition, TENN. CODE ANN. § 20-17-104(d); and

(3) In the event that the petition is denied, the petitioning party is entitled to an immediate interlocutory appeal to the Court of Appeals as of right. *See* TENN. CODE ANN. § 20-17-106.

A petition to dismiss an action under the Tennessee Public Participation Act “may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court’s discretion, at any later time that the court deems proper.” *See* TENN. CODE ANN. § 20-17-104(b). Under the Act, “[t]he petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” TENN. CODE ANN. § 20-17-105(a). Thereafter, the Court “shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.” TENN. CODE ANN. § 20-17-105(b). Separately, “[n]otwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.” TENN. CODE ANN. § 20-17-105(c).

### **III. FACTS**

The Plaintiffs’ newest Complaint fails to plead the substance of the allegedly defamatory statements at issue in this action in any regard. *See* Plaintiffs’ Complaint. As set forth below, this omission is fatal and compels dismissal. *See infra*, pp. 10–11. Assuming, for the sake of argument, that the facts of this case arise out of the same circumstances as Nandigam Neurology, PLC’s recently non-suited Circuit Court action, however, the underlying facts involved in this action are as follows:

“In early November 2019, Defendant Beavers accompanied her father to a medical consultation at the office of Plaintiff Nandigam.” *See Exhibit B*, Wilson Cty. Cir. Ct. Case No.: 2019-cv-663 Record (Complaint), p. 1, ¶ 6. “On November 7, 2019, Defendant Beavers posted a negative Yelp review on the internet[.]” *Id.* at ¶ 7. The Plaintiffs do not indicate what the Yelp! review at issue says, and they have also failed to append the review as an exhibit. *See* Complaint. Nonetheless, the Plaintiffs assert, without explanation, that Ms. Beavers’ statements were defamatory and placed Dr. Nandigam in a false light. *Id.*

The Yelp! review at issue was posted after Kelly Beavers brought her 67-year-old father—who was experiencing dizziness and memory loss—to a doctor’s appointment. *See Exhibit A*, p. 1, ¶ 5. Ms. Beavers’s father has significant difficulty remembering what occurred during his doctors’ appointments. *Id.* at pp. 1–2, ¶ 6. As a result, once in a private room and away from other patients, Ms. Beavers routinely (and lawfully, *see* TENN. CODE ANN. § 39-13-601) records her father’s medical appointments so that she can later play them for her father and remind him what doctors and other medical professionals have told him in order to ensure that he is following medical advice and receiving proper care. *Id.*

On this occasion, when Dr. Nandigam saw Ms. Beavers recording the visit, he became enraged, slammed his clipboard, demanded Ms. Beavers’s phone, and demanded that she delete the recording. *Id.* at p. 2, ¶¶ 7 & 9. Shocked and frightened by Dr. Nandigam’s behavior, Ms. Beavers complied and deleted the recording. *Id.* at ¶ 10. Ms. Beavers then exercised her constitutional right to post a truthful review on Yelp! about the service she had received. *See id.* at ¶ 11. Her Yelp! review stated, in its entirety:

This “Dr’s” behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me.

Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all.

**Exhibit C**, Yelp! Review. Thereafter, this action followed. See Complaint.

#### **IV. ARGUMENT**

##### **A. THE PLAINTIFFS' COMPLAINT FAILS TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

###### **1. The Plaintiffs have failed to plead the substance of any of the statements over which they are suing.**

Plaintiffs who sue for defamation—and by extension, false light—are required to plead, at minimum, the substance of the statements over which they are suing. See, e.g., *Rose v. Cookeville Reg'l Med. Ctr.*, No. M200702368COAR3CV, 2008 WL 2078056, at \*4 (Tenn. Ct. App. May 14, 2008) (noting requirement that a plaintiff plead, at minimum, “the substance of the slanderous statement” even under relaxed pleading standards (citing *Handley*, 588 S.W.2d at 774–75)); *Webb v. Stanley Jones Realty, Inc.*, No. 04-1288-T/AN, 2005 WL 1959160, at \*2 (W.D. Tenn. Aug. 11, 2005) (“the substance of the utterance must be set forth” (citing *Handley*, 588 S.W.2d at 775)). A plaintiff’s failure to set forth the substance of an allegedly defamatory statement compels dismissal. See, e.g., *Markowitz v. Skalli*, No. 13-2186-JDT-CGC, 2013 WL 4782143, at \*4 (W.D. Tenn. Sept. 5, 2013) (“In the instant case, Plaintiff merely makes the conclusory statement that Defendant made “slanderous remarks” without providing Defendant with “the substance of the slanderous utterance [ . . . ] along with notice of the time and place of the utterance [to appraise Defendant] of the allegations that he must defend against. Therefore, it is RECOMMENDED that the Court DISMISS the complaint for failure to state a claim on which relief may be granted . . . .” (citing *Handley*, 588 S.W.2d at 775)).

Here, despite describing the statements at issue as defamatory, the Plaintiffs have not bothered to set forth the substance of any of the statements over which they have sued. *See* Complaint. As noted, however, such bald, conclusory allegations are insufficient to state a cognizable claim for defamation as a matter of law. *See, e.g., Rose*, 2008 WL 2078056, at \*4; *Webb*, 2005 WL 1959160, at \*2. Given this context, the Plaintiffs' failure to plead the substance of their defamation and false light claims as required compels dismissal as a matter of law. *See Markowitz*, 2013 WL 4782143, at \*4.

**2. The statements contained in Ms. Beavers's Yelp! review are inactionable as defamation as a matter of law.**

To state a claim for defamation, a statement must, at minimum, be capable of conveying a defamatory meaning. Crucially, "whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance . . . ." *Brown*, 393 S.W.3d at 708. *See also Aegis Scis. Corp.*, 2013 WL 175807, at \*6 ("[T]he preliminary question of whether a statement 'is capable of conveying a defamatory meaning' presents a question of law." (quoting *Revis*, 31 S.W.3d at 253)); *McWhorter*, 132 S.W.3d at 364 ("The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is 'capable of being so understood is a question of law to be determined by the court.'" (quoting *Memphis Publ'g Co.*, 569 S.W.2d at 419)).

Consequently, the Plaintiffs' allegations that the statements at issue are reasonably capable of conveying a defamatory meaning represent questions of law that must be decided by this Court without any deference to the Plaintiffs' characterizations. *See Brown*, 393 S.W.3d at 708–09 ("The issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first

instance . . . To make this determination, courts ‘must look to the words themselves and are not bound by the Plaintiffs’ interpretation of them.’”); *Moman*, 1997 WL 167210, at \*3 (“If the words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation.”). Additionally, every statement that the Plaintiff insists is defamatory “should be read as a person of ordinary intelligence would understand it in light of the surrounding circumstances.” *Aegis Scis. Corp.*, 2013 WL 175807, at \*6 (quoting *Revis*, 31 S.W.3d at 253).

For the reasons provided in the following subsections, none of the statements that form the basis of the Plaintiffs’ Complaint comes anywhere close to clearing these hurdles. As such, the Plaintiffs have failed to state a cognizable claim for defamation as a matter of law.

- i. The statements in Ms. Beavers’s Yelp! review are not capable of conveying a defamatory meaning as a matter of law.

Setting aside the fact that the Plaintiffs’ Complaint does not set forth the substance of the statements over which they are suing, the statements in Ms. Beavers’s Yelp! review are not capable of conveying a defamatory meaning as a matter of law. The Plaintiffs’ lawsuit is premised entirely upon Ms. Beavers’ Yelp! review, which states—in its entirety—as follows:

This “Dr’s” behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all.

### **Exhibit C.**

For the reasons detailed below, none of these statements is capable of conveying a

defamatory meaning.

- a. *Subjective opinions based on disclosed facts and statements regarding future intent are not capable of defamatory meaning.*

Because the Plaintiffs have not specified which statements within Ms. Beavers's review they contend are tortious, it is not clear whether the Plaintiffs are claiming that Ms. Beavers's statements that "[t]his 'Dr's' behavior today was totally unprofessional and unethical to put it mildly[,] " [h]ow this guy is in business is beyond me[,] " and "[h]e does not belong in the medical field at all" were defamatory. *See id.* Regardless, none of these statements is capable of a defamatory meaning as a matter of law for several reasons. In particular, these statements: (1) are based on fully disclosed, non-defamatory facts; (2) are statements of subjective opinion; and (3) are incapable of being proven false. *See, e.g., Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 ("[C]omments upon true and nondefamatory published facts are not actionable, even though [the comments] are stated in strong or abusive terms.") (cleaned up); *Weidlich v. Rung*, No. M2017-00045-COA-R3-CV, 2017 WL 4862068, at \*6 (Tenn. Ct. App. Oct. 26, 2017) (holding that "[a] writer's comments upon true and nondefamatory published facts are not actionable" as a matter of law); *Cummins v. Suntrust Capital Markets, Inc.*, 649 F. Supp. 2d 224, 255 (S.D.N.Y. 2009) ("the characterization of the Plaintiffs' complicity in the June 15 option grants as self-interested, dishonest and unethical was a non-actionable statement of opinion based on fully disclosed facts"), *reconsideration denied*, No. 07 CIV. 4633(JGK), 2010 WL 985222, at \*1 (S.D.N.Y. Mar. 17, 2010), and *aff'd*, 416 F. App'x 101 (2d Cir. 2011); *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 508 (6th Cir. 2015) ("[T]he falsity requirement is met only if the statement in question makes an assertion of fact—that is, an assertion that is capable of being proved objectively

incorrect.”). As another court recently explained in a similar setting:

Henry’s statements that Tamburo’s actions were “unethical” and “deceitful” are not actionable. The First Amendment protects opinions that do not misstate actual facts. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990); *see also Moriarty v. Greene*, 315 Ill. App. 3d 225, 247 Ill. Dec. 675, 732 N.E.2d 730, 739 (2000). A plainly subjective remark is not actionable. *Wilkow v. Forbes*, 241 F.3d 552, 555 (7th Cir. 2001). Whether a person’s actions are ethical or deceptive is not objectively verifiable. *See Lifton v. Bd. of Educ. of the City of Chicago*, 416 F.3d 571, 579 (7th Cir. 2005). *See also Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 233 Ill. Dec. 456, 701 N.E.2d 99, 104 (1998) (concluding that the statement “fired because of incompetence” did not have a “precise and readily understood meaning,” and that “the veracity of the statement” was unverifiable).

*Tamburo v. Dworkin*, 974 F. Supp. 2d 1199, 1213 (N.D. Ill. 2013).

Further, as a statement regarding her future intent, Ms. Beavers’s indication that she “will be reporting [Dr. Nandigam] to the State of TN Medical Review Board and be filing a formal complaint” similarly is not capable of a defamatory meaning as a matter of law because it cannot be proven false. *See, e.g., S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 120 (D. Mass. 2010) (“Because Orr’s statement is unambiguously an expression of opinion about a future event, he cannot be held liable for defamation as to this statement.”); *Caesars Entm’t Operating Co. v. Appaloosa Inv. Ltd. P’ship I*, No. 652392/2014, 2015 WL 4430268, at \*8 (N.Y. Sup. Ct. July 20, 2015) (“As for the Second Lien Holders’ litigation threats, they too cannot give rise to a defamation claim because they are expressions of future intent, not facts.”).

Put differently: Statements concerning Ms. Beavers’s anticipated future actions cannot be proven false, and they cannot be construed as objectively verifiable false facts as a consequence. *See, e.g., Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (“[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively

verifiable facts, the statement is not actionable.” (citing *Milkovich*, 497 U.S. at 17–21) (other citations omitted)); *Oracle USA, Inc. v. Rimini Street, Inc.*, No. 2:10–CV–00106–LRH–PAL, 2010 WL 4386957, at \*3 (D. Nev. Oct. 29, 2010) (“[Defendant’s] statements are predictions of the future that could not be proven true or false at the time the statements were made. Therefore, these statements are not defamatory. Accordingly, the court will grant [the defendant’s] motion to dismiss as to these allegations of defamation.”).

Nor is Ms. Beavers’s question: “Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset?” capable of any defamatory meaning. It is a “widely adopted defamation principle that questions are questions.” *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1339 (D.C. Cir. 2015). Thus, “inquiry itself, however embarrassing or unpleasant to its subject, is not accusation.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993).

For all of these reasons, Ms. Beavers’s Yelp! review is not capable of a defamatory meaning as a matter of law, and the Plaintiffs’ defamation claim against her must be dismissed as a consequence.

b. *Ms. Beavers’s statements were, at worst, merely annoying, offensive, or embarrassing.*

To provide substantial breathing room to promote free speech, unfettered communication, and commentary on issues of public importance, Tennessee’s courts have additionally held that statements that are merely “annoying, offensive or embarrassing” are categorically inactionable. *Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 (quoting *Brown*, 393 S.W.3d at 708). “[T]he crux of free-speech rights is that generally they can be exercised even if (and perhaps especially when) they cause

disruption and disharmony.” *Bennett v. Metro. Gov’t of Nashville & Davidson Cty.*, No. 3:17-CV-00630, 2019 WL 1572932, at \*12 (M.D. Tenn. Apr. 11, 2019). Consequently,

[f]or a communication to be [defamatory], it must constitute a serious threat to the Plaintiffs’ reputation. A [defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element “of disgrace.”

*Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 (quoting *Brown*, 393 S.W.3d at 708).

Here, the Plaintiffs have not sued over any implications. Even if they had, however, the only statements underlying the Plaintiffs’ Complaint that could even plausibly imply statements of fact—whether the Dr. Nandigam “thr[ew] a complete temper tantrum” and whether he “slam[s] things when [he] get[s] upset[,]” see **Exhibit C**—cannot be considered defamatory as a matter of law. Considered in the most generous fashion possible, the Yelp! review at issue, and each statement within it, was—at most—merely “annoying, offensive or embarrassing”—a deficiency that renders the statements at issue inactionable. *Covenant Presbyterian Church*, 2015 WL 5766685, at \*3 (quoting *Brown*, 393 S.W.3d at 708). Certainly, none of the statements at issue can plausibly be considered “disgrace[ful]” or “a serious threat to the Plaintiffs’ reputation.” See *Davis*, 83 S.W.3d at 128 (quoting *Stones River Motors*, 651 S.W.2d at 719). Consequently, notwithstanding the Plaintiffs’ own characterizations, none of the statements in the Yelp! review at issue is capable of conveying a defamatory meaning as a matter of law. See *id.*

- ii. The statements in Ms. Beavers’s Yelp! review are mere rhetorical hyperbole that cannot reasonably be read as objective assertions of false fact.

The statements in Ms. Beavers’s Yelp! review also qualify as constitutionally

protected rhetorical hyperbole, rather than unprotected defamation. The doctrine of rhetorical hyperbole exists to provide essential breathing space for expression in a free society. Ms. Beavers's innocuous Yelp! review easily falls within its protection.

The U.S. Supreme Court has emphasized that heated and emotionally charged rhetoric is entitled to free-speech protection under the doctrine of rhetorical hyperbole. For example, in *Old Dominion No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974), the Supreme Court ruled that labor union members did not defame non-union members when they referred to them as "scabs." *Id.* The Court characterized the use of the term "scab" as "a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286.

Similarly, in *Greenbelt Co-Op. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970), the U.S. Supreme Court ruled that a newspaper engaged in constitutionally protected rhetorical hyperbole when it referred to a developer's contract with a city as "blackmail." The Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Id.* at 14. Accordingly, the Court determined that "[n]o reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the plaintiff] with the commission of a criminal offense." *Id.*

In keeping with the U.S. Supreme Court's guidance on the matter, the Sixth Circuit has similarly held that TripAdvisor's use of the term "dirtiest" to describe a hotel in a review was protected rhetorical hyperbole. *See Seaton*, 728 F.3d at 598. There, the court explained that: "'Dirtiest' is a loose, hyperbolic term because it is the superlative of an adjective that conveys an inherently subjective concept," and thus, it held that "no reader

of TripAdvisor’s list would understand Grand Resort to be, objectively, the dirtiest hotel in all the Americas, the North American continent, or even the United States.” *Id.* (citing *Greenbelt Coop. Publ’g Ass’n*, 398 U.S. at 14). The Sixth Circuit has similarly held that lyrics in a rap song that referred to someone as “a ‘disgrace to the species’” constituted mere rhetorical hyperbole that could not be deemed defamatory as a matter of law. *Boladian, Inc.*, 123 F. App’x at 170.

Suffice it to say that extensive legal authority supports the proposition that the statements in Ms. Beavers’s Yelp! review referring to Dr. Nandigam as “totally unprofessional and unethical” and having “throw[n] a complete temper tantrum in front of Patients” amounted to plain rhetorical hyperbole—exactly the type of heated and emotional expression protected by the First Amendment. *See supra*, pp. 16–18. *See also* David L. Hudson, Jr., *Rhetorical Hyperbole Protects Free Speech*, FREEDOM FORUM INST. (Oct. 28, 2018), <https://www.freedomforuminstitute.org/2018/10/28/rhetorical-hyperbole-protects-free-speech/>. Accordingly, the statements at issue are inactionable as defamation, and the Plaintiffs’ defamation claim should be dismissed as a result.

iii. The Plaintiffs have failed to plead actual malice.

Where—as here—an allegedly defamatory statement involves a matter of public interest, a plaintiff is required to prove actual malice. *See West*, 53 S.W.3d at 647 (“In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed.2d 456 (1967), the Court extended the actual malice standard to alleged defamatory statements about matters of public interest.”). Critically, statements about the quality of services offered to the public are *per se* deemed matters of public interest for both First Amendment and Anti-SLAPP purposes. *See* TENN. CODE ANN. § 20-17-103(6)(D). *See also Neumann v. Liles*, 369 P.3d

1117, 1126 (Or. 2016) (finding statements critical of wedding planning services were matters of public concern under Oregon Anti-SLAPP statute, and holding that a defendant’s review was “an expression of opinion on matters of public concern that is protected under the First Amendment”); *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1363 (1998) (holding that “the public has a well-recognized interest in knowing about the quality and contents of consumer goods” and finding that statements alleging that products were unhealthy were “matters of obvious widespread public interest”); *DuPont Merck Pharmaceutical Co. v. Superior Ct.*, 78 Cal. App. 4th 562, 566 (2000) (holding that statements comparing the quality and effectiveness of drug products were made “in connection with a public issue” for Anti-SLAPP purposes).

In this case, the Plaintiffs’ Complaint is devoid of even an allegation of actual malice. *See* Complaint. As noted, such an allegation is also an affirmative requirement. *See West*, 53 S.W.3d at 647. Dismissal is appropriate as a consequence.

**3. Plaintiff Nandigam Neurology may not sue over statements that do not concern it, and Dr. Nandigam may not maintain his defamation action through a PLC.**

Ms. Beavers’s Yelp! review was expressly about—and it unambiguously concerns—Dr. Kaveer Nandigam *the human being*, making explicit reference to “[t]his ‘Dr,’” “he” “him,” and “this guy.” *See Exhibit C*. That fact is necessarily fatal to Nandigam Neurology’s defamation claims, because “[a] plaintiff may not support a claim for defamation based on an alleged defamatory statement made ‘of and concerning’ a third party.” *Steele v. Ritz*, No. W200802125COAR3CV, 2009 WL 4825183, at \*3 (Tenn. Ct. App. Dec. 16, 2009) (citations omitted). As the Court of Appeals explained in *Stones River Motors*, 651 S.W.2d at 717:

As an essential element of a cause of action for defamation, the plaintiffs must prove a false and defamatory statement *concerning another*. RESTATEMENT (SECOND) OF TORTS § 558 (1977). Otherwise stated at common law, one of the required elements of proof was the “colloquium,” a showing that the language was directed to or concerning *the charging party*.”

(partial emphasis added).

Put differently: Although he may attempt to maintain them himself, Dr. Nandigam cannot prosecute—through the veil of a PLC—defamation claims over statements that concern him personally. *See id.* Accordingly, Nandigam Neurology, PLC’s defamation claims must be dismissed as a matter of law for failure to satisfy colloquium. *See Steele*, 2009 WL 4825183, at \*3 (“This [colloquium] requirement—often referred to as the ‘of and concerning’ requirement—confines actionable defamation to statements made against an ‘ascertained or ascertainable person, and that person must be the plaintiff.’” (quoting 53 C.J.S. LIBEL AND SLANDER; INJURIOUS FALSEHOOD § 35 (2005))).

**4. Plaintiff Nandigam Neurology’s claims may not be maintained because its previous dismissal could only be taken with prejudice.**<sup>2</sup>

Plaintiff Nandigam Neurology additionally may not maintain its claims in the instant case because they have previously been adjudicated. Specifically, given that dismissal of its claims with prejudice was compelled in Wilson County Circuit Court Case No.: 2019-cv-663 after Nandigam Neurology failed to meet its affirmative burden of proof in response to Ms. Beavers’ TPPA Petition, its identical claims in this action are res judicata.

When Plaintiff Nandigam Neurology filed its first baseless action against Ms. Beavers in Wilson County Circuit Court, she responded by filing a petition to dismiss the

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<sup>2</sup> Nandigam Neurology also has not yet paid Ms. Beavers’s discretionary costs following its previous non-suit regarding the same claims. *But see* Tenn. R. Civ. P. 41.04.

Plaintiff's Complaint under the Tennessee Public Participation Act. See **Exhibit B** (Wilson County Circuit Court TPPA Petition). Critically, the Tennessee Public Participation Act mandates that after a petitioning party has met its

burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association[,] . . . the court **shall dismiss** the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.

TENN. CODE ANN. § 20-17-105(a)–(b) (emphasis added). The dismissal compelled by the TPPA is also with prejudice. See § 20-17-105(e) (“If the court dismisses a legal action pursuant to a petition filed under this chapter, the legal action or the challenged claim is dismissed with prejudice.”).

After Nandigam Neurology sued Ms. Beavers in Wilson County Circuit Court, Ms. Beavers met her initial burden of proving that Nandigam Neurology's claims were based on, related to, or were filed in response to her exercise of the right to free speech. See **Exhibit B** (Wilson County Circuit Court TPPA Petition); § 20-17-105(a). Thereafter, rather than attempting to meet its mandatory and affirmative burden under the Tennessee Public Participation Act, see § 20-17-105(b), Plaintiff Nandigam Neurology non-suited its case. See **Exhibit B** (Notice and Order of Voluntary Dismissal). For the reasons set forth above, however, Nandigam Neurology's failure to meet its burden compelled dismissal of its Wilson County Circuit Court Complaint with prejudice,<sup>3</sup> see TENN. CODE ANN. § 20-17-105(a)–(b) & (e), and as a consequence, Nandigam Neurology is barred from maintaining its identical and previously dismissed claims in this action.

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<sup>3</sup> A motion to alter or amend the order of dismissal at issue to reflect that mandate is impending.

**B. THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED PURSUANT TO THE TENNESSEE PUBLIC PARTICIPATION ACT.**

**1. Applicability of the Tennessee Public Participation Act**

The Tennessee Public Participation Act provides that “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action” subject to the TPPA’s specialized provisions. TENN. CODE ANN. § 20-17-104(a).<sup>4</sup> Under Tennessee Code Annotated § 20-17-103(3), “[e]xercise of the right of free speech’ means a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution.” In turn, Tennessee Code Annotated § 20-17-103(6) provides that:

“Matter of public concern” includes an issue related to:

- (A) **Health or safety;**
- (B) Environmental, economic, or **community well-being;**
- (C) The government;
- (D) A public official or **public figure;**
- (E) A good, product, or **service in the marketplace;**
- (F) A literary, musical, artistic, political, theatrical, or audiovisual work;  
or
- (G) **Any other matter deemed by a court to involve a matter of public concern[.]**

(emphases added).

Here, Ms. Beavers’s statements qualify as “a communication made in connection

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<sup>4</sup> The petition “may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court’s discretion, at any later time that the court deems proper.” See TENN. CODE ANN. § 20-17-104(b). As a consequence, having been filed within sixty (60) days of service, Ms. Beavers’s Tennessee Public Participation Act petition to dismiss this action is timely filed. See *id.*

with a matter of public concern” under several independent criteria. *See id.* *See also* **Exhibit B** (Complaint), p. 1, ¶¶ 5 & 7; **Exhibit C**. Consequently, for purposes of the Tennessee Public Participation Act, this action qualifies as one filed in response to Ms. Beavers’s exercise of the right of free speech in several independent regards. *See* TENN. CODE ANN. §§ 20-17-104(a); 20-17-103(3); 20-17-103(6).

## **2. Grounds for Granting Ms. Beavers’ TPPA Petition**

The Tennessee Public Participation Act provides that “[t]he petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” TENN. CODE ANN. § 20-17-105(a). As noted above, the Yelp! review over which Ms. Beavers has been sued involves, at minimum, services in the marketplace, and that basis alone—along with several others—qualifies this action as one filed in response to a party’s “exercise of the right of free speech” within the meaning of the Tennessee Public Participation Act. *See* TENN. CODE ANN. §§ 20-17-104(a); 20-17-103(3); 20-17-103(6)(E). *See also* TENN. CODE ANN. § 20-17-103(6)(A), (B), (D), & (G). Thus, Ms. Beavers having met her initial burden of production, *see* TENN. CODE ANN. § 20-17-105(a), this Court “shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.” TENN. CODE ANN. § 20-17-105(b).

Separately, “[n]otwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.” TENN. CODE ANN. § 20-17-105(c). Pursuant to this section, Ms. Beavers expressly incorporates into this Petition each argument set forth above in support of her defense

that the Plaintiffs have failed to state any cognizable claim for relief. Ms. Beavers has additionally appended a sworn Affidavit as **Exhibit A** to provide further factual support for the defenses raised above; to refute the factual allegations underlying the Plaintiffs' claims; and to establish the following additional defenses to this action:

- (1) The Yelp! review at issue was true or substantially true;
- (2) The Yelp! review at issue was not posted with actual malice or negligence in failing to ascertain the truth; and
- (3) The Plaintiffs—particularly having attributed in excess of \$25,000 in damages to a non-party to this action, see **Exhibit B** (Complaint)—cannot prove actual damages.

See TENN. CODE ANN. § 20-17-105(d) (“The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.”).

“Truth is an absolute defense to a claim for defamation when the otherwise defamatory meaning of the words used turns out to be true.”<sup>5</sup> *Sullivan v. Wilson Cty.*, No. M2011-00217-COA-R3CV, 2012 WL 1868292, at \*12 (Tenn. Ct. App. May 22, 2012), *appeal denied* (Tenn. Sept. 18, 2012). Here, Ms. Beavers maintains that everything written in her Yelp! review is true, see **Exhibit A**, p. 1, ¶ 11 & p. 3, ¶¶ 17–18, and she relies on that absolute defense in support of her Tennessee Public Participation Act Petition. Of note, substantially true statements are privileged pursuant to the substantial truth doctrine as well, which Ms. Beavers similarly relies upon as a defense to this action. See

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<sup>5</sup> Tennessee law provides that establishing truth is a defendant's burden. See *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978). Although Ms. Beavers has no difficulty establishing truth as a defense to this action under the circumstances of this case, Ms. Beavers nonetheless preserves and maintains the claim that the presumption of falsity doctrine recognized under Tennessee law should be overruled.

*Isbell*, 2000 WL 1817252, at \*5. Ms. Beavers's Yelp! review additionally was not posted with actual malice or even negligence. See **Exhibit A**, p. 3, ¶ 19. Instead, it was premised upon her own good-faith recollection and personal observations of Dr. Nandigam's conduct during her father's visit. See *generally id.*

## **V. COSTS, ATTORNEY'S FEES, & SANCTIONS**

Pursuant to Tennessee Code Annotated § 20-17-107(a):

If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party:

- (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition; and
- (2) Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.

The Plaintiffs' prosecution of this facially frivolous action merits costs, fees, and severe sanctions. The transparent purpose of this lawsuit is to silence, censor, intimidate, and retaliate against Ms. Beavers and her family because Ms. Beavers had the audacity to post a truthful, negative Yelp! review of Dr. Nandigam's abusive behavior, which this litigation itself evidences in spades. No litigant or attorney acting in good faith could reasonably believe that the Plaintiffs' claims in this lawsuit had merit—and certainly not after being served with and recognizing Nandigam Neurology's inability to overcome Ms. Beavers' first TPPA petition. Both mandatory costs and attorney's fees and severe sanctions to deter further misconduct should be awarded accordingly.

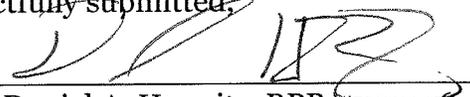
## **VI. CONCLUSION**

For the foregoing reasons, Defendant Beavers's Tennessee Public Participation Act Petition to dismiss this action should be **GRANTED**; the Plaintiffs should be ordered to

pay Defendant Beavers's court costs, reasonable attorney's fees, and discretionary costs pursuant to Tennessee Code Annotated §§ 20-17-107(a)(1) and § 20-12-119(c); and this Court should assess sanctions against the Plaintiffs and their counsel as necessary to deter repetition of their conduct pursuant to Tennessee Code Annotated § 20-17-107(a)(2).

Respectfully submitted,

By:

  
Daniel A. Horwitz, BPR #032176  
1803 Broadway, Suite #531  
Nashville, TN 37203  
daniel.a.horwitz@gmail.com  
(615) 739-2888

Sarah L. Martin, BPR #037707  
1020 Stainback Avenue  
Nashville, TN 37207  
Sarahmartin1026@gmail.com  
(615) 335-3118

*Counsel for Defendant Kelly Beavers*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of January, 2020, a copy of the foregoing was served via UPS mail, postage prepaid, and/or e-mailed to the following parties:

Angello L. Huong  
435 Park Avenue, Professional Building  
Lebanon, Tennessee 37087

Bennett Hirschhorn  
800 South Gay Street, Suite 700  
Knoxville, TN 37929

*Counsel for Plaintiff*

By:   
Daniel A. Horwitz, Esq.

**NOTICE OF HEARING**

The above petition to dismiss is scheduled to be heard in the General Sessions Court of Wilson County, Tennessee on February 6, 2020 at 9:00 a.m. before Judge Barry Tatum. Failure to respond or appear for the scheduled hearing may result in relief being granted.

# Exhibit H



against Defendant for her abuse of the First Amendment by making defamatory statements and publishing them on the internet with the intent to harm Plaintiffs, Plaintiffs' Business, and to cast a false light on Plaintiff Dr. Nandigam to the public. Plaintiff meets the pleading requirements for general sessions court.

5. Plaintiffs are entitled to be heard on the merits of the case prior to any decision of This Court, just as Defendant is entitled to put on evidence to defend allegations of her committing tortious acts before being ordered to remove her defamatory language and pay for the monetary damages that she caused.

6. Plaintiffs are entitled to put on evidence at trial of damages suffered, and are entitled to recover them if it is shown that Defendant committed the tortious acts.

7. Plaintiffs are not aware of any legitimate pleading threshold governing defamation claims in general sessions court, as Defendant alleges on page 2 of their motion. They provide no authority to support this contention.

8. T.C.A § 16-15-501 addresses the jurisdictional limits of the general sessions courts. 501(d)(1) states that jurisdiction extends to "\$25,000 in all civil cases, both law and equity." Jurisdiction also permits general sessions court to issue and enforce injunctions. This Court certainly has jurisdiction to hear the immediate matter.

9. Defendant improperly alleges that previous dismissal of Plaintiff's claim "could only be taken with prejudice." This is not so. It is well settled that plaintiff has an absolute right to voluntarily nonsuit a claim. The court in Hurley v. Pickens held, "We find and hold that Plaintiff had the right to take a voluntary dismissal even while a motion to dismiss was pending." Hurley v. Pickens, 536 S.W.3d 419 (Tenn. App. 2016).

10. Further, This Court does not have jurisdiction to overturn an order of circuit court.

11. There is no discovery in general sessions court, therefore no affidavit by Plaintiffs or Defendant is necessary or appropriate.

12. Defendant's lengthy motion fails to cite any authority that has any bearing on the matter before This Court.

13. General sessions court is a forum where pro se defendants appear without counsel regularly. To heighten the standard in general sessions to that of Title 20, Chapter 17 of Civil Procedure, meant for Circuit and Chancery Courts, would be to create more complexity and expense of discovery for both parties--not to lessen it. This flies in the face of the Tennessee legislature's purpose in drafting the Tennessee Public Participation Act. Defendant's counsel's interpretation would prevent all general sessions plaintiffs from having any recourse to defend themselves against defamation, and the bullies would win.

**WHEREFORE, PREMISES CONSIDERED,** Defendant prays that:

14. This Court make a finding that Defendant's Motion to Dismiss be DENIED.

Respectfully submitted on this the 30th day of January, 2020.



**BENNETT HIRSCHHORN, ESQ (BPR #025937)**  
Attorney for Plaintiffs  
800 South Gay Street, Suite 700  
Knoxville, TN 37929



**ANGELLO HUONG (BPR #021209)**  
Attorney for Plaintiffs  
435 Park Avenue, Professional building  
Lebanon, TN 37087

**CERTIFICATE OF SERVICE**

I certify that I hand delivered, emailed, faxed, or mailed by first-class mail, properly addressed, a true and correct copy of this paper to the person listed below at the address below:

Daniel A. Horwitz  
1803 Broadway, Suite #531  
Nashville, TN 37203

Sarah L. Martin  
1020 Stainback Avenue  
Nashville, TN 32707

*Counsels for Defendant*

This the 30th day of January, 2020.



**BENNETT HIRSCHHORN, ESQ. (BPR #025937)**  
Attorney for Plaintiffs



**ANGELLO HUONG (BPR #021209)**  
Attorney for Plaintiffs

# Exhibit I

**IN THE GENERAL SESSIONS COURT OF WILSON COUNTY, TENNESSEE**

**FILED**

NANDIGAM NEUROLOGY, PLC, and  
KAVEER NANDIGAM, M.D.,

*Plaintiffs,*

*v.*

KELLY BEAVERS

*Defendant.*

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FEB 05 2020

DEBBIE MOSS, GENERAL SESSIONS COURT CLERK  
WILSON COUNTY, TN

Case No.: 2020-CV-152

**DEFENDANT BEAVERS’S REPLY TO PLAINTIFFS’ ANSWER TO  
DEFENDANT’S § 20-17-104(a) [PETITION] TO DISMISS**

Comes now Defendant Kelly Beavers, by and through counsel, and respectfully replies to the Plaintiffs’ “Answer” to her Tennessee Code Annotated § 20-17-104(a) Petition to Dismiss the Plaintiffs’ claims against her pursuant to the Tennessee Public Participation Act (TPPA). For the reasons provided below, the TPPA applies to this action, and the Plaintiffs have failed to meet—or even attempt to meet—their evidentiary burden of proof in response. As a consequence, Ms. Beavers’s TPPA Petition must be granted, and the Plaintiffs’ claims must be dismissed with prejudice.

**I. LEGAL STANDARD**

“If a legal action is filed in response to a party’s exercise of the right of free speech,”<sup>1</sup> then Tennessee Code Annotated § 20-17-104(a) affords the party a statutory right to

<sup>1</sup> “‘Exercise of the right of free speech’ means a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution[.]” TENN. CODE ANN. § 20-17-103(3). “‘Matter of public concern’ includes an issue related to: (A) Health or safety; (B) Environmental, economic, or community well-being; (C) The government; (D) A public official or public figure; (E) A good, product, or service in the marketplace; (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or (G) Any other matter deemed by a court to involve a matter of public concern[.]” TENN. CODE ANN. § 20-17-103(6).

asserted defenses. Instead, the Plaintiffs have argued only that the TPPA does not apply to claims filed in General Sessions court.

### **III. ARGUMENT**

#### **A. THE PLAINTIFFS HAVE FAILED TO MEET THEIR EVIDENTIARY BURDEN OF PROOF.**

Because the Plaintiffs have failed to introduce any admissible evidence in response to Ms. Beavers's TPPA Petition, they have failed to "establish[] a prima facie case for each essential element of the claim in the legal action[,] " which compels dismissal of this action. *See* TENN. CODE ANN. § 20-17-105(b). The Plaintiffs have additionally failed to introduce any admissible evidence to overcome Ms. Beavers's defenses, which separately compels the dismissal of this action as well. *See* TENN. CODE ANN. § 20-17-105(c) ("[T]he court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action."). Accordingly, if the Tennessee Public Participation Act applies to this action, then the Plaintiffs have failed to meet their evidentiary burden of proof, and this action must be dismissed with prejudice. *See* TENN. CODE ANN. § 20-17-105(e).

#### **B. THE TENNESSEE PUBLIC PARTICIPATION ACT APPLIES TO THIS ACTION.**

The Plaintiffs stake the continued viability of this lawsuit upon just a single argument. Specifically, the Plaintiffs observe that "[t]he Rules of Civil Procedure shall not apply to general sessions courts," *see* Tenn. R. Civ. P. 1, and thus, they argue that "§ 20-17-104(a) is not applicable in general sessions court because it is a rule of Civil Procedure[.]" *See* Plaintiff's [sic] Answer, ¶ 1. For several straightforward reasons, however, the Plaintiffs' insistence that the Tennessee Public Participation Act is one of the Rules of Civil Procedure lacks merit.

**1. Tennessee Code Annotated § 20-17-104(a) is a statute, not one of the Rules of Civil Procedure.**

Tennessee Code Annotated § 20-17-104(a) is not, as the Plaintiffs claim, among the “Rules of Civil Procedure” that Rule 1 of the (actual) Tennessee Rules of Civil Procedure provides does not apply in General Sessions Court. Instead, Tennessee Code Annotated § 20-17-104(a) is a **statute**. By contrast, the Rules of Civil Procedure are conveniently labeled one through seventy-two. *See* Tenn. R. Civ. P. 1–72. Tennessee Code Annotated § 20-17-104(a), quite plainly, is not among them. *See id.*

**2. Tennessee Code Annotated § 20-17-104(a) is a substantive remedy that is separate from any remedy available under the Tennessee Rules of Civil Procedure.**

The TPPA is also a substantive remedy, not a procedural one. *See* TENN. CODE ANN. § 20-17-109. Indeed, it is expressly distinguished from the separate remedies that are available under the Tennessee Rules of Civil Procedure. *Id.* As Tennessee Code Annotated § 20-17-109 provides:

This chapter is intended to provide an additional **substantive remedy** to protect the constitutional rights of parties and **to supplement any remedies which are otherwise available** to those parties under common law, statutory law, or constitutional law or **under the Tennessee Rules of Civil Procedure.**

*Id.* (emphases added).

In other words, the TPPA provides “an additional substantive remedy,” and that remedy supplements the entirely different remedies that are otherwise available “under the Tennessee Rules of Civil Procedure,” of which the TPPA is not a part. *Id.*

**3. A General Sessions civil warrant is a “legal action.”**

Tennessee Code Annotated § 20-17-104(a) provides without ambiguity that it

applies to any “legal action” that is “filed in response to a party’s exercise of the right of free speech . . . .” *Id.* A General Sessions civil warrant, of course, is “a legal action.” *See, e.g., Davis v. Tenn. Rural Health Improvement Ass’n*, No. M201500573COAR3CV, 2015 WL 7748636, at \*1 (Tenn. Ct. App. Nov. 30, 2015) (“Mr. Davis pursued legal action and filed a civil warrant for breach of contract against TRH6 in the Davidson County General Sessions Court on December 16, 2011.”). *See also Moore v. Correct Care Sols., LLC*, No. W2012-01387-COA-R3CV, 2013 WL 1190821, at \*5 (Tenn. Ct. App. Mar. 25, 2013) (referencing “actions that originate in general sessions courts”). Accordingly, the Plaintiff’s civil warrant asserting multiple speech-based torts is a legal action, and Tennessee Code Annotated § 20-17-104(a) applies.

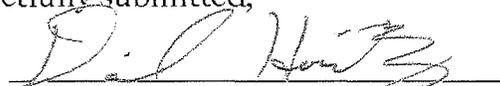
In sum: The TPPA applies to this action, and because the Plaintiffs have failed to meet their evidentiary burden of proof in response to Ms. Beavers’s TPPA Petition, this action must be dismissed with prejudice under both Tenn. Code Ann. §§ 20-17-105(b) and (c). Nothing about that result “flies in the face of the Tennessee legislature’s purpose in drafting the Tennessee Public Participation Act[,]” nor does it mean “the bullies would win.” *See* Plaintiff’s [sic] Answer, p. 2, ¶ 13. To the contrary, the entire purpose of the TPPA is to safeguard the right of free speech and provide speakers a means of quickly dispensing with bogus lawsuits like this one. *See* TENN. CODE ANN. § 20-17-102. Further, given that the Plaintiffs filed this speech-based lawsuit without any evidence to support it—a fatal omission that compels dismissal—the only “bullies” who are involved in this action will not win at all, and, indeed, they must be ordered to pay Ms. Beavers’s “[c]ourt costs, reasonable attorney’s fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition[.]” *See* TENN. CODE ANN. § 20-17-107(a)(1).

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant Beavers's Tennessee Public Participation Act Petition to dismiss this action should be **GRANTED**; the Plaintiffs should be ordered to pay Defendant Beavers's court costs, reasonable attorney's fees, and discretionary costs pursuant to Tennessee Code Annotated §§ 20-17-107(a)(1) and 20-12-119(c); and this Court should assess sanctions against the Plaintiffs and their counsel as necessary to deter repetition of their conduct pursuant to Tennessee Code Annotated § 20-17-107(a)(2).

Respectfully submitted,

By:

  
Daniel A. Horwitz, BPR #032176  
1803 Broadway, Suite #531  
Nashville, TN 37203  
daniel.a.horwitz@gmail.com  
(615) 739-2888

Sarah L. Martin, BPR #037707  
1020 Stainback Avenue  
Nashville, TN 37207  
Sarahmartin1026@gmail.com  
(615) 335-3118

*Counsel for Defendant Kelly Beavers*

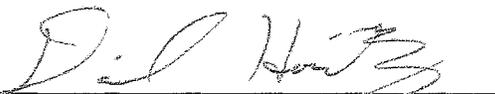
**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of February, 2020, a copy of the foregoing was served via UPS mail, postage prepaid, and/or e-mailed to the following parties:

Angello L. Huong  
435 Park Avenue, Professional Building  
Lebanon, Tennessee 37087

Bennett Hirschhorn  
800 South Gay Street, Suite 700  
Knoxville, TN 37929

*Counsel for Plaintiffs*

By:   
Daniel A. Horwitz, Esq.

**NOTICE OF HEARING**

The above petition to dismiss is scheduled to be heard in the General Sessions Court of Wilson County, Tennessee on February 6, 2020 at 9:00 a.m. before Judge Barry Tatum. Failure to respond or appear for the scheduled hearing may result in relief being granted.

# Exhibit J

**NANDIGAM NEUROLOGY, PLC, et al.**

**vs.**

**BEAVERS**

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**TRANSCRIPT OF PROCEEDINGS**

**February 06, 2020**



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1           IN THE GENERAL SESSIONS COURT OF WILSON COUNTY, TENNESSEE

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2           NANDIGAM NEUROLOGY, PLC, and  
3           KAVEER NANDIGAM, M.D.,

4                     Plaintiffs,

5           vs.

                                  Case No. 2020-CV-152

6           KELLY BEAVERS,

7                     Defendant.

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14                    BE IT REMEMBERED that the above-captioned cause  
15           came on for hearing, on this, the 6th day of February,  
16           2020 before Judge Barry Tatum, when and where the following  
17           proceedings were had, to wit:  
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22                           Elite Reporting Services  
23                   www.elitereportingservices.com  
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A P P E A R A N C E S

For the Plaintiffs:

MR. ANGELLO L. HUONG  
Attorney at Law  
435 Park Avenue, Professional Building  
Lebanon, TN 37087  
(615)453-7530  
Angellohuong@hotmail.com

MR. BENNETT HIRSCHHORN  
Attorney at Law  
First Horizon Building  
800 S. Gay Street, Suite 700  
Knoxville, TN 37929  
(865)999-4486  
Bh@bennetthirschhorn.com

For the Defendant:

MR. DANIEL HORWITZ  
Attorney at Law  
1803 Broadway, Suite 531  
Nashville, TN 37203  
(615)739-2888  
Daniel.a.horwitz@gmail.com

MS. SARAH L. MARTIN  
Attorney at Law  
1020 Stainback Avenue  
Nashville, TN 37207  
(615)335-3118  
Sarahmartin1026@gmail.com

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P R O C E E D I N G S

(WHEREUPON, the above-captioned matter was heard in open court as follows:)

THE COURT: All right. So we're set for next Thursday, or not? 12:49:20  
12:49:26

MR. HORWITZ: We are set, Your Honor. I don't think that proceeding has any possibility of going forward because if we win today, I assume they will appeal to Circuit, and if they win today, then I will appeal to the Tennessee Court of Appeals under the statute which allows me to go straight there. 12:49:26  
12:49:29  
12:49:32  
12:49:35  
12:49:37  
12:49:41

THE COURT: Okay. 12:49:44

MR. HIRSCHHORN: Actually, Your Honor, I would like to just say that next week is a first setting and so we were intending to set it for a trial date. We'd like to agree on a trial date today, Your Honor. I feel that while we're about to hear this motion, it's not really appropriate for General Sessions Court, and that's part of our argument which we tried to make pretty simple. So I would ask that Your Honor at least consider having us set the trial for a trial date so that we can have a trial in trial court. 12:49:44  
12:49:46  
12:49:46  
12:49:49  
12:49:51  
12:49:54  
12:49:57  
12:50:00  
12:50:02  
12:50:04  
12:50:09

1 THE COURT: Well, let's hear what y'all 12:50:09  
2 have to say first. 12:50:11

3 MR. HORWITZ: Thank you, Your Honor. 12:50:12  
4 Good morning. Daniel Horwitz of the Nashville Bar. 12:50:14  
5 I'm here with my co-counsel, Sarah Martin, on behalf 12:50:16  
6 of the defendant in this matter, Ms. Kelly Beavers. 12:50:19

7 Your Honor, this is a case about a bad 12:50:21  
8 Yelp review. And I recognize that the briefing in 12:50:25  
9 this matter was lengthy, but I assure you that this 12:50:27  
10 case will actually be the easiest that you decide 12:50:31  
11 today and the reason for that is simple. If I may 12:50:32  
12 approach you, Your Honor, I'd like to hand up the 12:50:39  
13 statute and this -- 12:50:42

14 THE COURT: Yes, sir. 12:50:42

15 MR. HORWITZ: -- petition that has been 12:50:43  
16 filed. Ms. Beavers has filed a petition to dismiss 12:50:43  
17 the plaintiff's claims under the Tennessee Public 12:50:53  
18 Participation Act which shifted the burden of proof 12:50:57  
19 to the plaintiffs to establish a prima facia case for 12:50:59  
20 each element of their claims. In response, however, 12:51:04  
21 the plaintiffs incontrovertibly failed to meet their 12:51:07  
22 burden of proof given that they failed to come 12:51:12  
23 forward with any evidence at all. As a result, under 12:51:14  
24 Tennessee Code Annotated Section 20-17-105, the 12:51:17  
25 plaintiff's claims must be dismissed. 12:51:21

1           In response, Your Honor, the plaintiffs           12:51:24  
2     do not argue that they did meet their burden of proof     12:51:25  
3     under the TPPA.  Instead, they argue that the           12:51:27  
4     Tennessee Public Participation Act is one of the           12:51:32  
5     Tennessee Rules of Civil Procedure and that as a           12:51:34  
6     result, it does not apply in General Sessions Court.     12:51:37  
7           Your Honor, that assertion is clearly           12:51:40  
8     wrong as a matter of law for three reasons:  First,     12:51:42  
9     Your Honor, the Tennessee Rules of Civil Procedure     12:51:46  
10    are labeled 1 through 72.  The Tennessee Public         12:51:51  
11    Participation Act is not one of them.  Instead, the       12:51:53  
12    Tennessee Public Participation Act is a statute.           12:51:57  
13           Second, the TPPA is a substantive remedy,         12:52:01  
14    not a procedural one.  The statute says as much.           12:52:05  
15    Tennessee Code Annotated Section 20-17-109 expressly     12:52:09  
16    indicates that it supplements the Tennessee Rules of     12:52:12  
17    Civil Procedure as a substantive remedy.                   12:52:15  
18           And third, Your Honor, Tennessee Code           12:52:18  
19    Annotated Section 20-17-104(a) makes it clear that it     12:52:20  
20    applies to legal actions, which this indisputably is.     12:52:24  
21           Accordingly, Your Honor, the plaintiffs           12:52:30  
22    having failed to meet their burden of proof to           12:52:32  
23    establish either a prima facia element for their           12:52:34  
24    claims or to meet Ms. Beavers' defenses, Ms. Beavers     12:52:38  
25    TPPA petition must be granted and this action must be     12:52:41

1 dismissed with prejudice as a matter of law. 12:52:45

2 Thank you, Your Honor. 12:52:47

3 THE COURT: Yes, sir. 12:52:50

4 MR. HIRSCHHORN: Your Honor, I would like 12:52:54  
5 to respond to that argument and then I also have 12:52:57  
6 another motion to make. So I'm gonna respond to the 12:53:01  
7 argument first, but I think the other motion is 12:53:04  
8 pretty relevant as well. 12:53:07

9 First, I'd like Your Honor to please give 12:53:09  
10 us a shot. The trial is set for next week. That's 12:53:10  
11 the first setting date. So typically, in any general 12:53:13  
12 sessions case that I've ever tried, we set it for a 12:53:17  
13 trial date and then we put on the evidence. 12:53:21

14 The defendant here would like to pretend 12:53:23  
15 like there is some law that requires us to put all of 12:53:25  
16 the evidence into affidavits like it's discovery but 12:53:28  
17 there's no discovery in General Sessions Court. If 12:53:32  
18 Your Honor would like to apply the statute -- we 12:53:34  
19 don't think it applies and I'll explain why -- then 12:53:36  
20 let's go ahead and just have the trial; then we'll 12:53:40  
21 put on our evidence, they'll put on their evidence, 12:53:41  
22 and Your Honor can decide who's right. 12:53:44

23 The first reason that we think it's not 12:53:46  
24 applicable is that the burden doesn't need to be 12:53:52  
25 shifted in General Sessions Court. It starts out 12:53:55

1 with a plaintiff filing a lawsuit. If another party 12:53:58  
2 would like to have another claim and they want to 12:54:02  
3 associate it, they're welcome to file a 12:54:06  
4 counter-claim, but, Your Honor, this is a motion to 12:54:08  
5 dismiss. A motion to dismiss is inappropriate at 12:54:10  
6 this point because of notice pleading. The actual 12:54:13  
7 pleading, itself, just says we're suing for liable 12:54:15  
8 and that's it. So because we're allowed to plead in 12:54:18  
9 the general and then put on our evidence at trial, 12:54:22  
10 that's one reason why it's wrong. We haven't had a 12:54:24  
11 chance to put on our evidence. 12:54:28

12 The second reason is the General Sessions 12:54:30  
13 Court is the least expensive form of litigation we 12:54:31  
14 have in this great state of Tennessee. So if we're 12:54:35  
15 gonna do a Circuit Court, there would be some reason 12:54:38  
16 that you could see that a defendant would say, well, 12:54:41  
17 if somebody's filing a lawsuit against us to terrify 12:54:42  
18 us, we have to spend all this money to be able to 12:54:45  
19 defend it, I understand why slap would be a good 12:54:47  
20 thing there. You have to make the plaintiff put on 12:54:50  
21 some evidence -- 12:54:53

22 THE COURT: Uh-huh. 12:54:53

23 MR. HIRSCHHORN: -- but in General 12:54:53  
24 Sessions Court, I mean, I don't know the exact 12:54:54  
25 specifications but I'm pretty sure that you've been 12:54:56

1 trying liable cases in this court for over a hundred 12:55:00  
2 years and it's been just fine. 12:55:03

3 THE COURT: I haven't been here that 12:55:06  
4 long. 12:55:08

5 MR. HIRSCHHORN: Well, I'll say we in the 12:55:08  
6 great state of Tennessee have been trying cases. So 12:55:10  
7 I would -- I would urge you to take a look at that. 12:55:14

8 In addition, the -- there was no 12:55:19  
9 authority in General Sessions Court to accomplish 12:55:21  
10 many of the things that are being pled in this motion 12:55:23  
11 by defendant. There is no sanctions in General 12:55:27  
12 Sessions Court. There's no frivolity bar. You can 12:55:30  
13 file anything against anybody really and then the 12:55:33  
14 remedy is it gets dismissed. If you have a 12:55:36  
15 counter-claim, you're welcome to file it. I don't 12:55:39  
16 know how all the counties deal with this, but in Knox 12:55:41  
17 County where I practice a lot, and in Davidson 12:55:45  
18 County, and in Shelby County, if you don't have a 12:55:47  
19 cross-claim filed and paid your filing fees, you 12:55:50  
20 can't recover anything. You can't recover attorney's 12:55:54  
21 fees. You can't recover damages. You have to state 12:55:57  
22 a claim upon which relief can be granted. 12:56:00

23 Further, the motion -- if you're going to 12:56:02  
24 consider this motion and Your Honor wishes to 12:56:08  
25 expedite the litigation so that the parties can have 12:56:12

1 their day in court, if you decide this motion to 12:56:16  
2 dismiss, what's going to happen is they're going to 12:56:19  
3 appeal the motion to dismiss and it's gonna further 12:56:22  
4 delay things. And there's a reason why further 12:56:24  
5 delaying it would be bad for our client, which I'll 12:56:27  
6 go into in a moment. But I would urge Your Honor to 12:56:30  
7 take this under advisement. If you're going to 12:56:33  
8 decide anything, wait until after you've seen the 12:56:36  
9 evidence, please, Your Honor. 12:56:38

10 So the reasons that we don't want to wait 12:56:39  
11 any further is because the allegations against the 12:56:43  
12 defendant are that the defendant has said some untrue 12:56:46  
13 things about our client. The defendant is not a 12:56:51  
14 patient of our client. Our doc- -- our client is a 12:56:54  
15 neurologist. And she put those things on the 12:56:56  
16 internet. But not only did those things go on the 12:56:59  
17 internet, there was press coverage; a lot of it by 12:57:02  
18 the defendant -- by the defendant's attorney, Mr. 12:57:05  
19 Horwitz. And that initial press coverage caused 12:57:08  
20 additional damage to our client because there were 12:57:12  
21 statements made in the press and then other people 12:57:14  
22 from Wisconsin, from California, from New York City, 12:57:17  
23 from India, a lot of people hopped up on that website 12:57:20  
24 and used it as a form for social media. This -- you 12:57:23  
25 know, this doctor does this, this doctor does that. 12:57:26

1 These people have no firsthand experience and they 12:57:30  
2 posted comments as if it were some kind of blog but 12:57:33  
3 on my client's, you know, Yelp, Google, and Facebook 12:57:36  
4 websites. 12:57:39

5 My client has gone to great expense. 12:57:40  
6 It's cost over \$5,000, Your Honor, to clean up those 12:57:42  
7 websites and to get the agencies that are out there 12:57:47  
8 protecting free speech. You've seen it in the news, 12:57:50  
9 I hope. Google, you know, they will not review 12:57:54  
10 things -- remove things that don't violate the terms 12:57:56  
11 of service so they are all about free speech. And, 12:57:58  
12 Your Honor, I am about free speech. We're not 12:58:03  
13 talking about First Amendment speech here. We are 12:58:03  
14 talking about trolling, bullies, facts that aren't 12:58:05  
15 true being alleged. So Google removed everything, 12:58:08  
16 everything, Your Honor. And it cost a lot of money 12:58:11  
17 to put those cases in front of Google to have Google 12:58:13  
18 get a person to remove it. 12:58:17

19 Yelp took all of the reviews that weren't 12:58:20  
20 valid and moved them to a place -- including Ms. 12:58:22  
21 Beavers' review -- moved them to a place where 12:58:24  
22 they're no longer visible, but the damage to my 12:58:25  
23 client's practice has already been done. We have 12:58:27  
24 actual dollar damages that we're gonna put on if 12:58:30  
25 we're allowed to put on some evidence at trial. 12:58:32

1                   And also, Your Honor, most recently on                   12:58:35  
2                   the 24th of January, Mr. Horwitz was quoted as saying                   12:58:38  
3                   something in the news and I'd like to ask Your Honor                   12:58:42  
4                   to please take a look at this. May I approach?                   12:58:44

5                   THE COURT: (Nods head affirmatively.)                   12:58:48

6                   MR. HIRSCHHORN: So, Your Honor, this is                   12:58:58  
7                   the second page of an article that was published on                   12:58:59  
8                   the internet. It was an article right here from the                   12:59:03  
9                   Wilson Post. And it says: Nandigam -- this is                   12:59:06  
10                  Horwitz being quoted: Nandigam's slap suit was                   12:59:10  
11                  frivolous and sanctionable the first time it was                   12:59:14  
12                  filed and dismissed and is still frivolous and                   12:59:17  
13                  sanctionable now.                   12:59:20

14                  Dr. Nandigam is about to learn an                   12:59:21  
15                  extremely expensive lesson about the First Amendment                   12:59:23  
16                  and he is also going to learn very quickly that                   12:59:26  
17                  prospective customers don't want to patronize sue                   12:59:29  
18                  happy businesses that can't take criticism and are                   12:59:34  
19                  inclined to sue patients and their family members.                   12:59:37  
20                  If you're looking for a doctor who is capable of                   12:59:40  
21                  decent behavior and who won't sue you or your                   12:59:43  
22                  children, cross Nandigam Neurology off your list.                   12:59:46

23                  I would put forward, Your Honor, that                   12:59:51  
24                  this crosses the line. It crosses the line --                   12:59:53  
25                  lawyers are held to a much higher standard than just                   12:59:56

1 normal citizens. To practice law in Tennessee is a 13:00:00  
2 privilege. It's a privilege that I guard very 13:00:03  
3 strongly because it's important to me. And if we 13:00:05  
4 allow lawyers to run around talking about other 13:00:09  
5 lawyer's clients in that way, it puts a black eye on 13:00:11  
6 the whole profession, Your Honor. It's -- in some 13:00:15  
7 ways, I think it's worse than being an ambulance 13:00:17  
8 chaser. 13:00:19

9 THE COURT: What relevance does that have 13:00:20  
10 because he's -- Mr. Horwitz is not a party to this 13:00:22  
11 suit? 13:00:24

12 MR. HIRSCHHORN: Not yet, Your Honor. I 13:00:25  
13 will say this, that the Rules of Professional 13:00:27  
14 Conduct, although I know this is just a guideline, 13:00:30  
15 state that this type of language is not First 13:00:33  
16 Amendment protected. And I'd like to approach and 13:00:36  
17 show you -- 13:00:36

18 THE COURT: Well -- 13:00:36

19 MR. HIRSCHHORN: -- the rule. 13:00:39

20 THE COURT: -- that's not an issue before 13:00:40  
21 us at this time. 13:00:42

22 MR. HIRSCHHORN: Well, Your Honor, I 13:00:43  
23 would like to make a motion that given the 13:00:45  
24 circumstances that you ask defendant to make no 13:00:47  
25 further comments in the media because we don't want 13:00:50

1 to cause further damage to our client's reputation. 13:00:53  
2 We have a case against his client for damaging his 13:00:57  
3 reputation. Now we have to defend against Mr. 13:01:00  
4 Horwitz destroying our client's reputation. We'd 13:01:03  
5 just ask that you enjoin the parties from speaking to 13:01:06  
6 the media. This -- 13:01:08  
7 THE COURT: Put a gag order down? 13:01:09  
8 MR. HIRSCHHORN: Your Honor, a gag order, 13:01:12  
9 you have the jurisdiction to ask the parties to do 13:01:14  
10 anything. All we're asking for is our day in court. 13:01:17  
11 Why try it in the media? The Rules of Professional 13:01:20  
12 Conduct are clear. They say you can't do this; 13:01:24  
13 especially, when you're talking about the character 13:01:26  
14 of a party. He is -- he is basically -- we're gonna 13:01:28  
15 get bad reviews from that media that we're gonna have 13:01:30  
16 to clean up that's gonna add to our damages. And we 13:01:32  
17 cannot recover them against his client. We will -- 13:01:36  
18 MR. HORWITZ: Your Honor, I object. 13:01:37  
19 MR. HIRSCHHORN: -- to sue -- 13:01:37  
20 MR. HORWITZ: None of this is before the 13:01:37  
21 Court -- 13:01:37  
22 MR. HIRSCHHORN: -- the defendant's 13:01:41  
23 attorney to recover those damages. I'm just asking, 13:01:41  
24 Your Honor, this is the forum to put on that evidence 13:01:45  
25 if Your Honor would allow us to put on the evidence. 13:01:47

1 THE COURT: What little I know about this 13:01:50  
2 case so far just from what I've scanned over this 13:01:51  
3 morning from these briefs and what I've heard y'all 13:01:54  
4 say so far today is about your client's allegation 13:01:57  
5 that Mr. Horwitz' client has made some disparaging 13:02:04  
6 comments about a professional individual and their 13:02:09  
7 practice. Correct? 13:02:13  
8 MR. HIRSCHHORN: Correct, Your Honor, but 13:02:14  
9 his client's not a -- not a patient. 13:02:15  
10 THE COURT: Not a patient. 13:02:17  
11 MR. HIRSCHHORN: Right. 13:02:18  
12 THE COURT: But I mean, still, they're 13:02:19  
13 entitled to the protections of the First Amendment, 13:02:21  
14 are they not? 13:02:23  
15 MR. HIRSCHHORN: Your Honor, that is -- 13:02:24  
16 you get First Amendment freedom but there is a check. 13:02:27  
17 If you abuse the First Amendment, you pay for it. 13:02:31  
18 That's in the state constitution and it's in the 13:02:33  
19 First Amendment. 13:02:36  
20 THE COURT: We're not here about any suit 13:02:37  
21 that's been filed against Mr. Horwitz -- 13:02:38  
22 MR. HIRSCHHORN: Not yet, Your Honor. 13:02:41  
23 THE COURT: -- so we don't need to hear 13:02:42  
24 about any of that. 13:02:44  
25 MR. HIRSCHHORN: I'm just asking Your 13:02:45

1 Honor to please take a look at that statement that's 13:02:47  
2 in front of you. It doesn't take an imagination to 13:02:49  
3 see how the very thing we're suing his client for, he 13:02:52  
4 is now doing and hiding behind -- he can't hide 13:02:54  
5 behind that. I mean, it's -- the Rules of 13:02:58  
6 Professional conduct are clear. 3.6 says if it 13:02:59  
7 has -- if -- 13:03:02

8 THE COURT: Then there's a proper 13:03:02  
9 recourse for that. 13:03:04

10 MR. HIRSCHHORN: Oh -- 13:03:05

11 THE COURT: -- but we're not -- 13:03:05

12 MR. HIRSCHHORN: -- I agree. 13:03:05

13 THE COURT: -- here today for that. 13:03:06

14 MR. HIRSCHHORN: I agree, Your Honor. 13:03:08  
15 We're just asking let's have a trial. Please either 13:03:09  
16 take us under -- 13:03:12

17 THE COURT: That -- that begs another 13:03:12  
18 question that I wanted to touch on and it's alluded 13:03:13  
19 to in this quote that you just offered -- 13:03:17

20 MR. HIRSCHHORN: Yes. 13:03:20

21 THE COURT: -- that there was a suit that 13:03:21  
22 was frivolous and sanctionable the first time it was 13:03:23  
23 filed and dismissed. Now, has there been prior 13:03:25  
24 litigation somewhere? 13:03:29

25 MR. HIRSCHHORN: Your Honor, we filed 13:03:30

1 this lawsuit in Circuit Court. They responded to -- 13:03:32  
2 THE COURT: In Wilson County? 13:03:35  
3 MR. HIRSCHHORN: Yes, we did, Your Honor. 13:03:37  
4 And then when they responded with a slap motion, we 13:03:39  
5 looked at our suit, we nonsuited it, and we refiled 13:03:40  
6 it as we can do twice before we get a dismissal -- 13:03:43  
7 THE COURT: So it hasn't been dismissed 13:03:46  
8 on the merits -- 13:03:48  
9 MR. HIRSCHHORN: No, Your Honor. 13:03:48  
10 THE COURT: -- of the case? 13:03:49  
11 MR. HIRSCHHORN: No, Your Honor. And 13:03:49  
12 that's why -- I mean, if you read my response, I 13:03:51  
13 mean, all of the things he's asking for, he can't 13:03:53  
14 get. This is -- you can't even, you know, decide 13:03:53  
15 that it should have been dismissed with prejudice. 13:03:58  
16 He should take that upstairs if he thinks it should 13:03:59  
17 be but the Rules are very clear. You get two 13:04:01  
18 nonsuits without prejudice, it's voluntary, it's 13:04:03  
19 effective from the time the defend- -- the plaintiff 13:04:07  
20 makes the announcement. So I mean, there has been 13:04:09  
21 nothing on the merits. 13:04:12  
22 THE COURT: Okay. 13:04:13  
23 MR. HIRSCHHORN: We would just ask that 13:04:14  
24 you either decide to dismiss the -- you know, like 13:04:16  
25 a -- not grant the motion to dismiss, or rather to 13:04:20

1 just take it under advisement and let us put on 13:04:24  
2 evidence like so many other people are afforded the 13:04:27  
3 opportunity to do before Your Honor. 13:04:29

4 THE COURT: All right. I'm not making 13:04:31  
5 any kind of promises that I'm gonna hear your case by 13:04:32  
6 any stretch. If I don't make a ruling today, it's 13:04:36  
7 not showing any sort of favoritism one way or the 13:04:40  
8 other. I -- y'all have both put in a tremendous 13:04:44  
9 amount of work and effort it looks like with the 13:04:46  
10 pleadings that have been submitted here, with the 13:04:49  
11 motion to dismiss, and the responses that have been 13:04:51  
12 filed. And there was some prior litigation, which 13:04:52  
13 I'm not gonna delve off into that. But I'm not gonna 13:04:54  
14 go down some rabbit hole about concerns that you may 13:05:00  
15 have, whether they have any merit or not, about any 13:05:04  
16 quotes that an attorney has made in some sort of 13:05:07  
17 media press without any sort of pleadings to that 13:05:10  
18 effect. I'm not gonna put any sort of sanction. I'm 13:05:14  
19 not gonna do a knee-jerk reaction on some sort of gag 13:05:18  
20 order either when I decide this motion. 13:05:22

21 I do have a question for you, Mr. 13:05:26  
22 Horwitz. 13:05:28

23 MR. HORWITZ: Yes, Your Honor. 13:05:28

24 THE COURT: Is there anything in the 13:05:28  
25 statute that says that jurisdiction of this type of 13:05:30

1 case is exclusively related to Circuit Court? 13:05:33

2 MR. HORWITZ: No, Your Honor. This 13:05:34

3 statute applies broadly to any legal action. 13:05:36

4 THE COURT: So you concede that I would 13:05:40

5 have the authority, here or any General Sessions 13:05:42

6 Court that has personal jurisdiction would have 13:05:43

7 subject matter jurisdiction to hear this type of 13:05:46

8 case? 13:05:49

9 MR. HORWITZ: Yes, Your Honor. 13:05:49

10 THE COURT: All right. 13:05:49

11 MR. HORWITZ: But I would also argue that 13:05:51

12 you have to rule on this motion. This statute is -- 13:05:53

13 THE COURT: Not today, I don't. 13:05:55

14 MR. HORWITZ: No, no, not today. You 13:05:56

15 have to issue a ruling on the motion. That is -- it 13:05:58

16 is a statute that is designed to filter out -- 13:06:00

17 THE COURT: Right. 13:06:00

18 MR. HORWITZ: -- the need for trial to 13:06:02

19 avoid discovery. It's supposed to be very early on 13:06:05

20 in this case. And, respectfully, Your Honor, 13:06:08

21 returning to the only issue that's actually before 13:06:09

22 this Court, I heard opposing counsel say they haven't 13:06:11

23 had a chance to put on their evidence and ask you to 13:06:13

24 give them a shot. Your Honor, this was their shot. 13:06:16

25 Today was their shot. 13:06:19

1           If you just look at section (b) of the           13:06:20  
2     statute that I handed you --           13:06:20  
3           THE COURT: Uh-huh.           13:06:20  
4           MR. HORWITZ: -- this was their           13:06:23  
5     obligation. If the petitioning party meets their           13:06:24  
6     burden proving that the statute applies, the Court           13:06:28  
7     shall dismiss the legal action unless the responding           13:06:30  
8     party establishes a prima facia case for each           13:06:33  
9     essential element of the claims in the legal action.           13:06:37  
10          THE COURT: Yeah.           13:06:38  
11          MR. HORWITZ: And under (d), they have to           13:06:38  
12     do that with evidence, sworn evidence. There is           13:06:40  
13     nothing in this record. They have not met their           13:06:42  
14     burden. As a matter of law, this case has to be           13:06:45  
15     dismissed.           13:06:47  
16          THE COURT: And you very well may be           13:06:47  
17     right but there's a big stack of stuff over here that           13:06:50  
18     I didn't see until about five or ten minutes before           13:06:53  
19     court this morning. And like I said earlier, based           13:06:56  
20     upon the number of pages, I estimate it's gonna take           13:06:59  
21     45 minutes for me to go through it and then I'll have           13:07:02  
22     to peruse it somewhere. And I'm not gonna keep all           13:07:05  
23     these people waiting for that.           13:07:07  
24          MR. HORWITZ: Thank you, Your Honor. I           13:07:07  
25     would ask if -- if that's --           13:07:09

1 THE COURT: One thing else I noticed in 13:07:10  
2 here, there is no -- the language in the statute is 13:07:13  
3 not discretionary. It's mandated and it says shall 13:07:19  
4 be dismissed. 13:07:24

5 MR. HORWITZ: That's correct, Your Honor. 13:07:24  
6 It -- I understand Your Honor may take this under 13:07:25  
7 advisement. If that's the case -- 13:07:28

8 THE COURT: I am. 13:07:29

9 MR. HORWITZ: -- I would like all future 13:07:29  
10 proceedings put on hold while we get a ruling on 13:07:33  
11 this. The whole point is that she doesn't have to go 13:07:34  
12 through a trial, she doesn't have to be subjected to 13:07:37  
13 discovery. If we could wait for your ruling to come 13:07:39  
14 down before anything further happens in this case, I 13:07:42  
15 would appreciate that, Your Honor. 13:07:43

16 THE COURT: Well, it was already set for 13:07:44  
17 next Thursday. 13:07:47

18 MR. HIRSCHHORN: Your Honor, this is my 13:07:47  
19 point, you can't file the motion -- this is General 13:07:48  
20 Sessions where you can't file a motion to dismiss 13:07:51  
21 before you've heard the evidence. 13:07:51

22 THE COURT: You're saying the law doesn't 13:07:52  
23 apply here? 13:07:55

24 MR. HIRSCHHORN: I did not -- Your Honor, 13:07:56  
25 that law clearly does not apply in this court. If 13:07:57

1 Your Honor will take the time to read my very brief 13:08:01  
2 answer -- 13:08:02

3 THE COURT: I'm gonna look at that. 13:08:02

4 MR. HIRSCHHORN: -- it states -- I'm sure 13:08:04  
5 you will. So -- but all I'm saying, Your Honor, is 13:08:05  
6 it is not -- the intention of this statute which Mr. 13:08:07  
7 Horwitz worked on drafting -- but he's actually one 13:08:09  
8 of the drafters or maybe the drafter of the 13:08:12  
9 statute -- the intention was to cause Circuit Court 13:08:15  
10 and Chancery Court cases to shift the burden to the 13:08:18  
11 plaintiff so you couldn't just make allegations. But 13:08:21  
12 we're in sessions court, Your Honor. This is not 13:08:24  
13 a -- I mean, this is a case of first impression. 13:08:26  
14 We're not trying to get a bunch of money. We just, 13:08:29  
15 you know -- 13:08:32

16 THE COURT: You're trying to make a 13:08:32  
17 point? 13:08:34

18 MR. HIRSCHHORN: We're trying to make a 13:08:35  
19 point, Your Honor, and -- 13:08:37

20 THE COURT: So you'd be satisfied with a 13:08:38  
21 judgment of a dollar? 13:08:39

22 MR. HIRSCHHORN: We'll take it right now, 13:08:41  
23 Your Honor, but we'd like to put on evidence first. 13:08:42

24 THE COURT: What I'm getting at on here 13:08:45  
25 is if I remember -- if I recall correctly, the oath 13:08:47

1 that I take is to uphold the laws of the Constitution 13:08:50  
2 of the State of Tennessee and the United States of 13:08:53  
3 America. It doesn't say the laws which may or may 13:08:56  
4 not apply. This is a state law, is it not? 13:08:59  
5 MR. HIRSCHHORN: Yes, Your Honor, it's -- 13:09:03  
6 THE COURT: It's applicable -- 13:09:03  
7 MR. HIRSCHHORN: -- a civil procedure -- 13:09:04  
8 THE COURT: It's applicable -- 13:09:05  
9 MR. HIRSCHHORN: It's -- 13:09:05  
10 THE COURT: -- to every court in the 13:09:06  
11 state, is it not? 13:09:08  
12 MR. HIRSCHHORN: But it's a civil 13:09:08  
13 procedure and the laws of civil -- the Rules of Civil 13:09:12  
14 Procedure do not apply. This is in the same statute 13:09:12  
15 section Title 20 -- or it's Section 20 is where 13:09:14  
16 jurisdiction, all the different things that are 13:09:18  
17 talking about civil procedure in the state of 13:09:20  
18 Tennessee are there. It is not the intention of 13:09:23  
19 General Sessions Court to have discovery. Like, for 13:09:25  
20 example, if the purpose of that statute is to avoid 13:09:27  
21 discovery, we've done it. We've gone to sessions 13:09:30  
22 court. There is no discovery in sessions court; nor 13:09:34  
23 do we want to take any. We don't want to do a 13:09:37  
24 deposition. We don't need affidavits. All we want 13:09:39  
25 to do is put on evidence. 13:09:42

1                   But, Your Honor, the defendant is trying                   13:09:44  
2                   to delay and keep us from putting on a case. I                   13:09:45  
3                   wonder why. If his client is so innocent of what                   13:09:47  
4                   we're accusing, let's hear the witnesses' testimony                   13:09:52  
5                   like we do in every other case, Your Honor.                   13:09:54  
6                   THE COURT: Not in every other case. If                   13:09:56  
7                   there's a motion about jurisdiction that comes up --                   13:09:59  
8                   and jurisdiction is governed by statute as well, is                   13:10:02  
9                   it not?                   13:10:05  
10                   MR. HIRSCHHORN: It is, Your Honor.                   13:10:06  
11                   THE COURT: All right.                   13:10:06  
12                   MR. HIRSCHHORN: But if there's a -- if                   13:10:07  
13                   there's a jurisdictional requirement that says before                   13:10:08  
14                   you file the lawsuit you have to already have had                   13:10:10  
15                   affidavits, I mean, it doesn't make any sense. If                   13:10:14  
16                   Your Honor was going to decide this, the statute                   13:10:16  
17                   applies, then there would have to be some kind of                   13:10:19  
18                   safe harbor allowing us to create a response. But,                   13:10:21  
19                   again, I do not think that the defendant can recover                   13:10:25  
20                   anything: Sanctions, attorney's fees, damages in any                   13:10:29  
21                   way. They had to file the lawsuit, Your Honor.                   13:10:31  
22                   THE COURT: Okay. Since we're already                   13:10:34  
23                   set for next Thursday, I'll have you an answer next                   13:10:37  
24                   Thursday.                   13:10:40  
25                   MR. HIRSCHHORN: Thank you, Your Honor.                   13:10:41

1 THE COURT: Yes, sir. 13:10:42

2 MR. HORWITZ: We have to be here next 13:10:43

3 Thursday; is that correct? 13:10:46

4 THE COURT: Yes. 13:10:46

5 MR. HORWITZ: Okay. And we're here for a 13:10:47

6 sitting next Thursday? 13:10:49

7 THE COURT: You're here for my ruling on 13:10:51

8 the motion. 13:10:54

9 MR. HORWITZ: Okay. Thank you, Your 13:10:56

10 Honor. 13:10:56

11 THE COURT: If your motion is granted, 13:10:56

12 that renders the issue about setting it moot, does it 13:10:56

13 not? 13:11:00

14 MR. HORWITZ: It does. I just want to 13:11:00

15 know what I'm -- need to be prepared to do. 13:11:01

16 THE COURT: You're not gonna be trying a 13:11:03

17 case. All right. 13:11:05

18 MR. HORWITZ: Thank you, Your Honor. 13:11:06

19 THE COURT: I'm just gonna make a ruling 13:11:08

20 on the motions that have been set. All right. 13:11:10

21 (WHEREUPON, the foregoing proceedings

22 were concluded at 1:11 p.m.)

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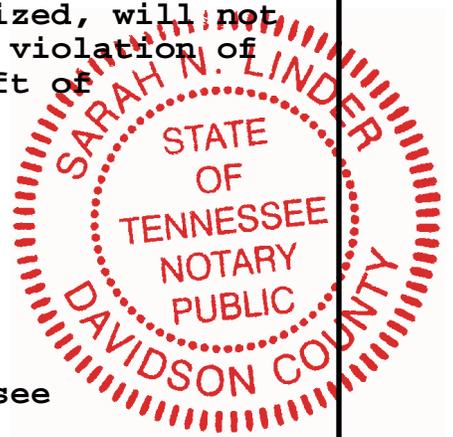
COUNTY OF DAVIDSON

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# Exhibit K

**FILED**

IN GENERAL SESSIONS COURT AT  
LEBANON, TENNESSEE

A.M. FEB 18 2020

235  
PM.  
EG

DEBBIE MOSS, GENERAL SESSIONS COURT CLERK  
WILSON COUNTY, TN

Nandigam Neurology <sup>PC</sup> &

Kaveer Nandigam, MD  
PLANTIFF

V.S.

CASE # 2020-CV-153

Kelly Beavers  
DEFENDANT

**NOTICE OF APPEAL**

The Appellant, in the above captioned case does hereby give notice that I desire to appeal the decision rendered in the case on Feb. 13, 2020.

I understand that by appealing this case, additional costs will incur and that I will need to be in a position to pay said costs on the date of my hearing in Wilson County Circuit Court.

Appellant Signature: X Angelle L. Huang

Date: 2/18/2020

Appellant Name: Angelle Lin Huang, Attorney

Address: 435 Park Ave  
Lebanon, TN 37087

Phone: (615) 453-7530

Filed Date: 2 / 18 / 2020

Debbie Moss, General Sessions Clerk

By: [Signature]  
Deputy Clerk

# Exhibit L



Kelly B.

236 likes, 3 stars, 0 photos



1 month ago

This "Dr's" behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all.

Useful 31

Funny 4

Cool 6

Teresa G. and 32 others voted for this review



Compliment

Swipe to browse more



Search



Activity



Me



Collections

New



More

# Exhibit M

1.0



## Do you like being verbally abused? This job might be perfect for you.

Medical Assistant (Former Employee) - Murfreesboro, TN - February 20, 2019

The doctor is horrendous, both at his job and personally. Would rather work for the devil. Wouldn't even send Hitler to this practice. If you like to be treated poorly, verbally abused, or just ready to have your day ruined at a moments notice, this job is for you. If you like to be blamed for things out of your control, because the NP or more importantly the doctor don't know how to do their jobs properly, I highly recommend. This is by far the worst place I've worked for, with some of the worst people I've worked for. I wouldn't apply if you are a woman, unless you like being hated for existing. The office manager does her best to keep the peace, however, this proves to be a difficult task when you work for complete nutjobs who absolutely refuse to take responsibility for their actions.

### ✓ Pros

Free lunch by drug reps

### ✗ Cons

Everything else.

Was this review helpful?

Yes 16

No 3

▶ Report  Share

## Share your experience

Let job seekers know what it's like to work at your company.



What is the vacation policy like at Nandigam Neurology? How many vacation days do you get per year?  
One person answered

How do you feel about the future of Nandigam Neurology?  
One person answered

[See all questions and answers](#)

### Nandigam Neurology Reviews by Job Title

Medical Assistant ..... (3)

Front Desk Manager ..... (1)

# Exhibit N

**IN THE CIRCUIT COURT OF WILSON COUNTY, TENNESSEE**

NANDIGAM NEUROLOGY, PLC  
Plaintiff,

vs.

KELLY BEAVERS  
Defendant.

No. 2019-CV-663

---

**PLAINTIFF’S RESPONSE TO  
DEFENDANT’S MOTION TO DISMISS AND  
PETITION TO DISMISS UNDER T.C.A. 20-17-104(a)**

---

**COME NOW** Attorneys for Plaintiff, BENNETT HIRSCHHORN and ANGELLO HUONG, and answers Defendant’s Motion & Petition to Dismiss as follows:

**PRELIMINARY STATEMENT OF FACTS**

Defendant Beavers encountered Dr. Nandigam, the owner of Nandigam Neurology, PLC when she accompanied her elderly father on his doctor’s appointment. Defendant Beavers surreptitiously recorded Dr. Nandigam’s examination of her father. To protect the privacy of all his patients, Nandigam Neurology does not allow recording in its office. Defendant Beavers did not react well when Dr. Nandigam asked her to stop the recording and delete the video. In response to her encounter at Nandigam Neurology, Defendant Beavers penned a false and defamatory review on the Yelp website:

This "Dr's" behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all.

After losing business and suffering over these malicious remarks, Plaintiff sued Defendant Beavers to recover for defamation and false light, seeking compensation for the actual damages caused by defendant's false and toxic review.

Defendant Beavers presents a combination of a general Motion to Dismiss under Tenn. R. Civ. Proc. under Rule 12, for failing to plead with particularity, failure to state a cause of action, and lack of standing by Plaintiff along with an additional Petition to Dismiss under T.C.A. 20-17-104(a) as to particular elements of the defamation claim itself.

This court should decline to grant certain portions of defendant's Motion to Dismiss as well as completely deny the Petition to Dismiss brought pursuant to T.C.A. 20-17, also known as the Tennessee Public Participation Act ("TPPA"). Plaintiff satisfies the necessary burden to have its case heard at a trial.

For the sake of convenience, Plaintiff will address the non-TPPA arguments under Defendant's general Motion to Dismiss and then discuss the particular elements of the defamation claim itself which relates to the TPPA Petition to Dismiss.

Plaintiff also attaches two affidavits to this pleading, to provide context to This Court, in support of the arguments and facts alleged herein--An affidavit from Dr. Nandigam of Nandigam Neurology (Exhibit A), as well as an affidavit from undersigned counsel (Exhibit B) as to true and correct copies of exhibits provided.

**I. PLAINTIFF'S FALSE LIGHT CLAIM IS INACTIONABLE AS A MATTER OF LAW, BUT CAN BE REPLED.**

Defendant first argues that a claim for false light cannot be sustained by a corporate entity and that only an individual person can bring a claim for false light. Defendant states that this should be dismissed under Rule 12. Upon review of the case law, Plaintiff agrees the claim for false light cannot be pursued as currently plead in the Complaint.

However, the false light claim against Ms. Beavers is not a matter of public concern, is not related to services in the marketplace, and it is not related to free speech--nor has Defendant pled that it is any of these things. It therefore does not fall under the scope of the TPPA. Rather, the false light claim is one where Plaintiff sues because Defendant removed important context from her defamatory comment when she published it--that she was found recording video of Plaintiff inside of his private doctor's office. The ability to record video is not a service offered by Plaintiff or their staff, to the contrary, recording video is prohibited by Plaintiff's office for a number of reasons, one of which is that HIPAA requires protection of privacy of other patients.

The invasion of Plaintiff's privacy pertains to Defendant's omission of the important context that she was recording video in Plaintiff's medical office. Therefore, Rule 12 would allow dismissal of this count without prejudice and it can therefore be properly repled and added to the lawsuit on behalf of Dr. Nandigam, himself, individually.

Because the false light claim under these set of facts is out of scope for the TPPA, and was never pled by Defendant as being in scope for the TPPA, no attorneys fees, costs, or sanctions can be awarded on this issue.

## **II. DEFENDANT FALSELY CLAIMS THAT PLAINTIFF HAS FAILED TO PLEAD THE SUBSTANCE OF ANY STATEMENTS OVER WHICH IT IS SUING.**

Defendant argues that Plaintiff has failed to reference the substance of the defamatory statements upon which it is suing and contends that only conclusory allegations of defamation have been made.

Plaintiff would show This Court that adequate identification of the defamatory statements made by Defendant were cited in the Complaint. On Paragraph 7 of the Complaint, Plaintiff identified the exact date the statements were made (November 7, 2019) and the exact location of the publication in which those statements were made (a Yelp review). Such specific reference gave Defendant adequate notice of the nature and substance of the statements which Plaintiff brings its claim. There is no requirement that a pleading must contain extensive detail and every possible minutia in order to be valid. Under Tenn. R. Civ. Proc. 8.01, a “short and plain statement of the claim” is adequate:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks.

It appears Defendant is confusing Rule 8.01 with Rule 9.02 which deal with the particular claims of “fraud or mistake” in which the circumstances constituting the fraud or mistake must be stated with particularity. However, since this matter is a defamation claim rather than a claim of fraud or mistake, the requirement of pleading “with particularity” is not applicable. See *Handley vs. May*, 588 S.W.2d 772, 1979 Tenn. App. LEXIS 354 at \*5 (Tenn. App. 1979) “There is no actual necessity that a court have the exact words of an allegedly defamatory statement in order to determine whether or not they are actionable . . . Rule 9, purports to list matters which

must be pleaded with particularity. Included are fraud, mistake, lack of capacity and other matters. No mention of defamation is made in this rule.”

Although Defendant appears to cite various cases which are favorable in support of her position on this issue, the cases cited by Defendant relate to oral defamation rather than written defamation. In cases of oral slander—where there is no physical evidence or recording of the verbal statements which were made—it is relevant to identify the particular verbal statements made by a defendant which were considered defamatory. However, in cases where the defamatory statements are reduced to writing or to publication and physical evidence of the statements exist, it is sufficient to identify the date of the publication and the location where such statements are contained.

Furthermore, Defendant Beavers specifically knows of the substance and nature of the particular statements which were made by her—as she attached the Yelp review that she posted on November 7, 2019 as Exhibit B of her Motion to Dismiss. Thus, it is inconceivable for Defendant Beavers to assert she does have knowledge of the substance of the defamatory statements on which Plaintiff is bringing its claims.

Accordingly, Plaintiff’s Complaint does not make “mere conclusory statements” that defamation occurred. Plaintiff cites the exact date and location in which such statements were published. Under the *Markowitz v. Skalli* case cited by Defendant, the only elements required to prove a defamation claim are 1) the defendant published a statement, 2) with knowledge that the statement was false and defaming to the other, or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.

Plaintiff's Complaint certainly alleges that Ms. Beavers published a statement, and that the statement was false and defaming to Plaintiff. That alone alleges a prima facie case for defamation. Defendant is fully aware of the substance of her statements by her own admission. Defendant's argument fails.

### **III. PLAINTIFF MAY NOT SUE OVER STATEMENTS THAT CONCERN A NON-PARTY, BUT DR. NANDIGAM IS A PARTY.**

Defendant argues the statements made by her only concern Dr. Nandigam (individually) rather than Nandigam Neurology, PLC per se. Thus, according to her argument, Plaintiff Nandigam Neurology PLC cannot bring an action for defamation over statements made regarding Dr. Nandigam. Although at first blush it initially appears to be a somewhat clever argument, it blindly overlooks one important point.

The false and negative statements left by Defendant Beavers were posted on the "Nandigam Neurology, PLC" Yelp review website—not on any personal website of Dr. Nandigam individually. By intentionally placing her review on the Nandigam Neurology business website, Beaver's statements were directed at Nandigam Neurology, PLC via the disparagement of its employees, workers, and agents. Since it is undisputed that a corporation or entity cannot act except through its officers, employees, and agents, any false statements as to the acts of its officers, employees, and agents consequently defame the company itself.

If Defendant Beavers' statements were only directed by Dr. Nandigam individually and had no relationship or bearing to the Nandigam Neurology office, then there would have been no need for Defendant Beavers to have posted such statements to the Nandigam Neurology Yelp website.

In addition, part of Defendant Beavers' Yelp review stated: "when did they start allowing Doctors to throw a complete temper tantrum in front of patients and slam things..." The word "they" is likely to be interpreted by an outside reader of the comments as Nandigam Neurology being "they" and that the business allows unqualified, out of control, and "unethical" doctors to practice in their office. Thus, Defendant Beavers statements were also directed at the offices of Nandigam Neurology, PLC per se.

#### **IV. PLAINTIFF'S CIVIL CONSPIRACY CLAIM DOES NOT FAIL AS A MATTER OF LAW**

Defendant argues that the claim of civil conspiracy involving co-defendant Devin Yount must fail as a matter of law. Since Devin Yount posted a similar negative and false Google review on Nandigam Neurology's website subsequently after Defendant Beavers posted her negative Yelp review, with both reviews containing the same exact set of alleged facts, it was reasonable to Plaintiff, upon information and belief at the time of filing the Complaint, that both Defendants had coordinated the information contained in their internet postings. Defendant Yount has never been to the offices of Nandigam Neurology, and has never met Dr. Nandigam. In fact, Plaintiff had no idea who Defendant Yount was. Unfortunately, since further discovery is stayed pending consideration of Defendant's TPPA Petition to Dismiss, further discovery as to the exact role of Defendant Yount and circumstances in the coordination of the two internet postings cannot be conducted, temporarily.

However, the thrust of Defendant's arguments that the claim of civil conspiracy must be dismissed are all based upon Defendant's premature assumptions that the court will rule that the underlying claim of defamation is invalid. For this reason, Defendant's argument fails.

## **V. DEFENDANT’S PETITION TO DISMISS UNDER T.C.A. 20-17-104(A).**

The previous sections I though IV dealt with Defendant’s Motion to Dismiss under Rule 12. This section V shall address the specific arguments made under the additional Petition to Dismiss of TPPA, and specifically T.C.A. 20-17-104.

### **The TPPA Framework**

The TPPA is a newly enacted statute designed to “encourage and safeguard the constitutional rights of persons to . . . speak freely. . . and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury.” Tenn. Code Ann. § 20-17-102 (emphasis added). The TPPA “does not insulate defendants from any liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity.” *Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430, 442 (Ct. App. 2017).<sup>1</sup>

The TPPA provides that if a lawsuit “is filed in response to a party’s exercise of the right of free speech,” then that party may petition the court to dismiss the legal action. Tenn. Code Ann. §20-17-104 (a). The TPPA defines the “[e]xercise of the right of free speech” as communication made in connection with “a matter of public concern.” Tenn. Code Ann. § 20-17-103 (3). The Act further defines “matter of public concern” as including “[a] good, product, or service in the marketplace.” Tenn. Code Ann. § 20-17-103 (6) (E). Because defendant Beavers’ review on Yelp addresses services in the marketplace, defendant’s right to petition for dismissal was validly triggered.

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<sup>1</sup> Because the TPPA is a new statute which only became effective July 1, 2019 and there is no Tennessee case precedent to cite, Plaintiff must cite to outside jurisdictions (such as California and Texas) that have adopted participation legislation that tracks similarly to the TPPA.

For the next step, the responding party has to establish “a prima facie case for each essential element of the claim in the legal action.” Tenn. Code Ann. § 20-17-105 (d). Here, Plaintiff’s Complaint, Defendant Beavers’ Yelp review, and the affidavits accompanying this response demonstrate a prima facie claim for defamation. Plaintiff was materially and economically harmed by Defendant’s libelous and false remarks and its suit has merit.

**A. PLAINTIFF HAS ESTABLISHED A PRIMA FACIE CLAIM FOR DEFAMATION.**

In Tennessee, an actionable claim for defamation includes the following elements: acting with the (1) requisite level of fault, a defendant (2) publishes a (3) false and (4) defamatory statement that causes (5) damage. See *Sullivan v. Baptist Mem’l Hosp.*, 995 S.W.2d 569, 571–72 (Tenn. 1999). For a private entity such as Plaintiff, the requisite level of fault is negligence. See *Pate v. Serv. Merch. Co.*, 959 S.W.2d 569, 574–75 (Tenn. Ct. App. 1996) (holding that private figures make their defamation case by proving the defendant was negligent in making the communication); see also, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-49 (1974) (holding that a negligence standard of fault is constitutionally acceptable when the plaintiff is a private figure (here, the plaintiff was an attorney), even when the matter at issue is a matter of public concern). As for the element of publication, defendant Beavers published her review on Yelp, a public website. This satisfies the defamation element of publication. See *Sullivan*, 995 S.W.2d at 571–72 (“Publication is a term of art meaning the communication of defamatory matter to a third person.”). In applying these elements to the facts (the complaint and affidavits), the analysis below details Plaintiff’s prima facie case for defamation.

**(1) The allegation that Dr. Nandigam (the owner of Nandigam Neurology) is unethical is defamatory**

Defendant Beavers reported that Dr. Nandigam's behavior was unethical and that she would be reporting him to the Tennessee Medical Review Board. This statement was false, defamatory, and caused Plaintiff palpable damage. And, Defendant Beavers made this statement negligently. As a threshold matter, Dr. Nandigam's affidavit establishes a prima facie case for proving that this statement is a false fact. He has never had any complaints about his ethical standards. He is prepared to bring witnesses to his trial attesting that he adheres to the highest ethical standards as a doctor and in all his dealings with his patients. Further, the statement that Dr. Nandigam is unethical is defamatory because, as Dr. Nandigam has averred, the charge injured the character and reputation of his medical office. See *Brown v. Christian Bros. Univ.*, 428 S.W.3d 38, 50 (Tenn. Ct. App. 2013) (defamatory means that a statement causes injury to a person's reputation).

While there is no published case law on this exact point in Tennessee, in sister jurisdictions, statements impugning a person's business or professional ethics are defamatory per se. See *Carwile v. Richmond Newspapers*, 196 Va. 1, 8, 82 S.E.2d 588, 592 (1954) (words alleging that an attorney was unethical were defamatory per se); *Modern Prod., Inc. v. Schwartz*, 734 F. Supp. 362, 363 (E.D. Wis. 1990) (words alleging business was "dishonorable, unethical or unprofessional conduct in a trade, business or profession" were capable of a defamatory meaning); *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002) (holding that words that impeach the "plaintiff in his trade, business, or profession" are defamatory per se).

Applying the negligence standard, Defendant Beavers did not act in a reasonably prudent way in making the statement that Dr. Nandigam was unethical. In Paragraph 8 of her affidavit,

Defendant Beavers stated that Dr. Nandigam’s behavior was not compatible with the doctor’s ethical responsibility to do no harm. However, this is a false statement. Dr. Nandigam did not do any harm to anyone that day. Further, Defendant Beavers failed to mention that the doctors’ oath is owed to the patient,<sup>2</sup> and Defendant Beavers was fully aware that she was not a patient. If anyone was obstructing Dr. Nandigam from complying with his ethical obligations that day it was Defendant Beavers. Her insistence on recording video in Dr. Nandigam’s office conflicted with the doctor’s ancient ethical obligation to maintain the confidentiality of patient health information. See Jotterand, *supra* n. 4. In charging that Dr. Nandigam was unethical, Defendant Beavers did not make any effort to determine if her false statement had any factual basis. Her affidavit does not include information on any fact-checking efforts as to Dr. Nandigam’s ethics record. With respect to the final defamation element of damage, Dr. Nandigam has attested that his medical office has suffered significant actual financial damage resulting from the false Yelp review left by Defendant.

In conclusion, Plaintiff has brought forth sufficient facts that show that the statements made by Defendant were false, defamatory, and caused damage to Plaintiff. Plaintiff has asserted facts that defendant Beavers was negligent in failing to ascertain the truth of her allegation before she posted the review. For a TPPA, Plaintiff has raised sufficient questions of fact that require his case to be submitted for a trial.

**(2) Defendant’s use of ironic quotes around the abbreviation Dr. is defamatory.**

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<sup>2</sup> See Fabrice Jotterand, *The Hippocratic Oath and Contemporary Medicine: The Dialectic Between Past Ideals and Present Reality?*, 30 J. OF MEDICINE & PHILOSOPHY 107, 123 n.1 (2005).

(“The major attributes of Hippocratic morality can be summarized as follows: the first characteristic is that Hippocratic medicine is individualistic, that is, the physician acts always in the best interest of the patient, which implies the moral obligation of beneficent [doing good] and consequently nonmaleficent [not doing harm]. . . Other characteristics include *confidentiality*.”). (emphasis added)

Defendant Beaver used quotes around the abbreviation “Dr.” in her review. The use of ironic quotes in this manner connotes the view that Plaintiff does not employ a real doctor. Whether a remark is understood in a defamatory sense raises a question of fact for the fact-finder. *Grant v. Commercial Appeal*, No. W201500208COAR3CV, 2015 WL 5772524, at \*9–11 (Tenn. Ct. App. Sept. 18, 2015). “A trial court may determine that a statement is not defamatory as a matter of law only when the statement is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense.” *Id.* (internal citations and quotes omitted). Here, the quotes create a question of fact for the fact-finder.

The use of ironic quotation marks has been held to create an understanding that “an inverted meaning was intended by the writer.” *Wildstein v. New York Post Corp.*, 243 N.Y.S.2d 386, 389 (Sup. Ct. N.Y. 1965). In the *Wildstein* case, the *New York Post* used ironic quotes to refer to plaintiff as being “associated” with a murdered man with a tangled past. The court held that the use of quotes in this fashion created a reasonable construction that the plaintiff was sexually associated with the man, a false statement of fact that was actionable as defamation. *Id.*; see also Megan Garber, *The Scare Quote: 2016 in a Punctuation Mark*, *THE ATLANTIC*, December 26, 2016 (ironic quotation marks “say one thing while meaning another” and “inject doubt into the action of saying itself.”); Jonathan Chait, *Scared Yet*, *THE NEW REPUBLIC*, December 31, 2008 (ironic quotation marks are “the perfect device for making an insinuation without proving it”). Here, the use of ironic quotes most certainly can be understood as questioning the validity of Dr. Nandigam’s credentials. Thus, for purposes of a TPPA petition, the issue of whether or not the ironic quotes are capable of a defamatory meaning should be considered by the fact-finder.

Returning to the other elements of defamation, the use of the quotation marks to insinuate that Dr. Nandigam is not a real doctor is absolutely false; Dr. Nandigam is a real doctor. Moreover, the ironic quotes are defamatory because they questioned his professional reputation. And, as set forth in Dr. Nandigam's affidavit, this spiteful use of irony caused Plaintiff financial harm and suffering. As set forth above, Defendant Beavers did not exercise reasonable care to ensure that her review was truthful and accurate. Rather, upon information and belief, she wrote the review in a state of petulant anger. For these allegations, Dr. Nandigam has established material issues of fact that require a trial on his defamation claim.

**(3) Defendant's allegations that Dr. Nandigam slammed things and threw a temper tantrum are defamatory.**

When defendant accused Plaintiff's doctor of slamming things and throwing a temper tantrum, she lied about concrete, provable facts. Dr. Nandigam attests, under oath, that Defendant Beavers' statements on this point are false. The statements are defamatory because, again, they impugn the character and reputation of Plaintiff. These statements again caused Plaintiff financial harm and suffering. And again, defendant did not employ reasonable care in making these statements. Because these facts simply did not happen, the only inference that can be drawn from them is that Defendant Beavers knew these statements were false when she made them. Plaintiff affidavits establish a prima facie case for defamation based on these false facts.

**(4) Defendant's negative Yelp review is actionable as defamation because it contained purported facts, not hyperbole or opinion.**

The First Amendment provides some protection for statements of opinion, but where an opinion is based on facts that can be proven as true or false, the statement is actionable. *Seaton v.*

*TripAdvisor LLC*, 728 F.3d 592, 597-98 (6th Cir. 2013) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S.1, 20 (1990)). Loose, figurative, or hyperbolic statements are also un-actionable because they cannot reasonably be assumed to constitute a statement of fact. *Id.* at 598.

In the *Seaton* case, the court held that inclusion of plaintiff's hotel on its list of "dirtiest hotels" was not actionable because it was hyperbole and opinion; it was not reasonably understood to state a fact. *Id.* On this issue, part of the inquiry involves asking whether or not the statement can be proven as true or false. *Zius v. Shelton*, NoE199901157COAR9CV, 2000 WL 739466, at \*4 (Tenn. Ct. App. June 6, 2000). In the *Zius* case, defendant's allegation that the plaintiff had taken "hush money" from the mayor was held to be actionable, because plaintiff could prove whether or not she had knowledge of the mayor's nefarious conduct.

When remarks contain a combination of hyperbolic language and more factual phrases, the factual phrases will support a defamation claim. *Ogle v. Hocker*, 279 F. App'x 391, 397-98 (6th Cir. 2008) (The allegation that plaintiff (a Bishop in the Church of God) was a "false prophet" was not actionable, but the allegation that he was inclined to engage in homosexual relations was actionable); *Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at \*6 (Tenn. Ct. App. Apr. 10, 1997) (A newspaper caricature implying that plaintiff took public money and then left the city of Memphis was actionable because it was based on a set of provable facts.).

Here, the three components of Defendant Beavers' review are actionable because (1) they are not hyperbolic or figurative but instead are factual; and (2) they are based on facts that are verifiable. First, the allegation that Plaintiff's doctor is unethical was not expressed in loose or hyperbolic language. Unlike the "dirtiest hotels" moniker in the *Seaton* case, Defendant Beavers

choose not to use a superlative adjective like “worst” or “most.” Defendant Beavers used the adjective “totally” to refer to her characterization of Dr. Nandigam as unprofessional. While it is unclear if Defendant Beavers meant for the “totally” adjective to modify unethical as well, the word “totally” does not change the conclusion that this was an averment of fact. “Totally” is not the kind of superlative adjective that would place her statement in the category of hyperbole. See *Dion v. Kiev*, 566 F. Supp. 1387, 1389 (E.D. Pa. 1983) (An allegation that a fitness gym was “totally mismanaged” was held to state a claim for defamation); *Estep v. Brewer*, 453 S.E.2d 345, 347 (W. Va. 1994) (An allegation that plaintiff as “being totally without ethics” supported a jury’s verdict for defamation). Further, as set forth above, Dr. Nandigam’s affidavit indicates that he can prove this allegation is false, with his own testimony and through the testimony of others.

Second, the use of ironic quotes to imply that Dr. Nandigam is not a real doctor is also premised on a false factual assertion. The Wildstein case, cited above, supports the conclusion that the use of ironic quotation marks to make a factual point. 243 N.Y.S.2d at 389. And this is a fact that Dr. Nandigam can prove is false; he is a real doctor.

Third, the allegations that Dr. Nandigam slammed something and threw a temper tantrum are factual assertions that are capable of being proven false. The language used was not hyperbolic or figurative. While the review language could be considered colorful (i.e. temper tantrum), colorful language is still actionable if it is based on fact. See *Zius*, 2000 WL 739466, at \*4 (hush money); *Moman*, 1997 WL 167210, at \*6 (a caricature illustration).

## **CONCLUSION**

For the foregoing reasons, Plaintiff moves the Court to make a finding that Plaintiff has complied with the provisions of the TPPA §20-17-104 and related provisions, make a finding that Defendant's Rule 12 Motion to Dismiss be denied as stated above, that Defendant's Petition to Dismiss under T.C.A. 20-17-104(a) be denied in full, and that no attorney's fees, costs or sanctions be awarded to either party at this time.

Plaintiff further moves for discovery to proceed and that the Court set this matter for trial on a date certain.

Respectfully Submitted:

**BENNETT HIRSCHHORN, ESQ (BPR #025937)**

Attorney for Plaintiff  
800 South Gay Street, Suite 700  
Knoxville, TN 37929

**ANGELLO HUONG (BPR #021209)**

Attorney for Plaintiff  
435 Park Avenue, Professional building  
Lebanon, TN 37087

**CERTIFICATE OF SERVICE**

I certify that I hand delivered, emailed, faxed, or mailed by e-mail and by first-class mail, properly addressed, a true and correct copy of this paper to the persons listed below at the address below:

Daniel A. Horwitz  
1803 Broadway, Suite #531  
Nashville, TN 37203

Sarah L. Martin  
1020 Stainback Avenue  
Nashville, TN 32707

*Counsels for Defendant*

This the 20th day of February, 2020.

**BENNETT HIRSCHHORN, ESQ. (BPR #025937)**  
Attorney for Plaintiffs

**ANGELLO HUONG (BPR #021209)**  
Attorney for Plaintiffs

## **EXHIBIT A**

### **AFFIDAVIT**

COMES NOW, Dr. Kaveer Nandigam, M.D., of Murfreesboro, in Rutherford County, Tennessee, and swears under penalty of perjury as follows:

1. I am a licensed, board certified physician, and a practicing neurologist.

#### **MS. BEAVERS' FATHER'S APPOINTMENT**

2. On November 7, 2019, Kelly Beavers accompanied her father and mother to an appointment at my office.

3. Ms. Beavers is not a patient of mine.

4. While in the examination room, I witnessed Kelly Beavers recording video footage in my office, which is against my practice's policies in order to protect the privacy of my patients, staff, and myself. Ms. Beavers did not ask me for permission to record video in my office.

5. I asked Ms. Beavers to stop recording in the same professional demeanor that I always use, and used during our encounter while discussing medical information.

6. When I entered the room, she appeared to be doing something on her phone. As is our policy I asked her to kindly switch off her phone, so that we could continue with the appointment and medical discussion. She appeared to switch off her phone, and kept the phone on her lap, vertically, with the camera facing me.

7. After some time, the phone fell down with the screen facing up, and that's when I noticed that the screen was recording video.

## **EXHIBIT A**

8. When I asked her if she was recording video, Ms. Beavers shook her head from side to side to deny that she was recording. However, she did not acknowledge that she was recording.

9. In the same professional demeanor I had been using, I calmly repeated the question, pointing to the phone screen. I stated, "It appears that the phone may be recording."

10. Ms. Beavers acted surprised and looked at the screen, and then acknowledged that it was recording.

11. In the same professional demeanor I had been using, I reminded her that it is our office policy to not allow video recording to protect our patient and staff privacy. I asked her to please kindly delete the video from your phone.

12. Ms. Beavers appeared baffled, and acted in an unusual manner. Instead of deleting the video on her phone, In an exaggerated manner, she extended her arm as if she was trying to give the phone to me. I did not take the phone, but I calmly asked, "Can you please delete the video?"

13. She used highly exaggerated finger gestures, hitting the screen with her fingers so that it made a noise when she made contact, pretending to delete the video. I could clearly see that she was not touching any icons, and was not deleting video.

14. Noticing that this exaggerated gesture did not delete the video, and in the same professional demeanor I had been using, I calmly stated, "maybe the video was not deleted, could you please check again?"

15. She acted surprised and annoyed, but obliged and checked again. She then appeared to delete the video.

## **EXHIBIT A**

16. I did not know how many videos she recorded or for how long she had recorded.

17. Ms. Beavers appeared to be shaken and angry.

18. I stopped asking questions about the video, and I concluded the appointment using the same professional demeanor I had used the whole time, and then walked her and her parents out to the waiting room.

19. Ms. Beavers walked out angrily, while her mother and father walked slowly and then her mother thanked me.

### **YELP REVIEW**

20. To retaliate, Kelly Beavers published a defamatory review on the website Yelp.

21. I discovered this because Yelp sent an email to my office, notifying that the review had been left.

22. In the review, Ms. Beavers falsely stated that I was unethical. She made this statement negligently, and without any regard for the truth about my character.

23. I have never had any complaints about my ethical standards. In my practice I adhere to the highest ethical standards as a doctor, and with all of my patients.

24. She used ironic quotes around the word “Doctor” to insinuate that I am not a real doctor, and to bring doubt to my reputation.

25. Ms. Beavers also wrote that I threw a “temper tantrum” and “slammed things.” Ms. Beavers knows that this is not true, because it did not happen.

26. This is not true because at no time did my own demeanor deviate from my usual calm professional demeanor. However, Ms. Beavers was making exaggerated physical gestures, and walked out of the examination room angrily.

## **EXHIBIT A**

27. She wrote the review in anger, forming her angle with untrue remarks that she knew did not happen. She targeted my practice and my reputation through her words.

### **FALSE LIGHT**

28. When Ms. Beavers posted her review, she posted it completely out of context. She omitted the fact that she was recording video in my private office, despite signs and my request for her to stop recording the video.

29. Ms. Beavers was aware that she had broken our no-phones and no-recording office policy. She was aware that she had been asked to stop. She was aware that she became angry when she was caught recording video. She intentionally left these details out of the review.

30. Because her false statement was taken out of context, it was highly offensive.

31. In order to receive compensation for the lasting damages the review brought to my business, I have had no choice but to sue Ms. Beavers. I have lost customers, money, and now have a profound dent in my reputation due to her seething anger in the review she posted.

32. She has made two updates to her false review, using the reviews as a way to publish updates about the status of this litigation and, and to recommend her attorneys to the public.

33. It has cost thousands of dollars to try to repair my business' reputation on the internet. I have had to pay for the cleanup of multiple websites that were scattered with reviews that came from the negative press coverage following Ms. Beavers' initial review and statement on the news.

**EXHIBIT A**

**DAMAGES**

34. Since November of 2019, and as the result of Ms. Beavers' false negative Yelp review and resulting internet and news coverage about the review, we have lost more than 100 patients.

35. Of that amount, the loss was due to loss of approximately 50 new client referrals, 10 cancelled appointments, 15 no shows, and other reasons.

37. My business has lost more than \$20,000 as the result of Ms. Beavers' defamatory review.

38. I have paid over \$5,000 to repair my online reputation, and I now need to pay additional amounts to maintain my online reputation despite trolls and negative comments from non-patients who have seen press coverage and postings by opposing counsel.

FURTHER AFFIANT SAYETH NAUGHT.

I hereby swear under penalty of perjury that the statement above is true and correct.



02/12/2020

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date

EXHIBIT B

AFFIDAVIT

COMES NOW, Bennett Hirschhorn of Knoxville, in Knox County, Tennessee, and swears under penalty of perjury as follows:

1. Attached are true and correct copies of the following internet postings made and published by Defendant and her Attorney.

2. Exhibit A - The Defendant Ms. Beavers' original review post and two update posts.

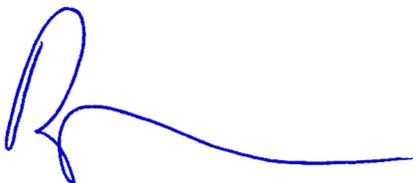
3. Exhibit B - Defendant's attorney Daniel Horwitz's false statement about Dr. Nandigam in a news article.

4. Exhibit C - Defendant's attorney Daniel Horwitz's reposting of the false statement on Twitter, showing 100 reposts at that time.

5. Exhibit D - Defendant's attorney Daniel Horwitz's post that shames Dr. Nandigam by saying "do bad work get a bad review."

FURTHER AFFIANT SAYETH NAUGHT.

I hereby swear under penalty of perjury that the statement above is true and correct.



---

Name

Date 2-12-20

## Exhibit A

### 7 reviews for Nandigam Neurology that are not currently recommended

Note: The reviews below are not factored into the business's overall star rating.



**Kelly B.**  
Mount Juliet, TN  
👥 238 friends  
📝 3 reviews

★ ★ ★ ★ ★ 1/31/2020 · Updated review

Update: January 31, 2020, lawsuit has been refiled against me in General Sessions. Stating that I have abused my First Amendment right. So, again, instead of me focusing on Caring for My Deddie who has once again been hospitalized, I have to worry about fighting ANOTHER lawsuit. Thank goodness I have 2 of the Best Attorney's who are valiantly fighting for me. I don't know what I would do without Daniel Horwitz and Sarah Martin.

★ ★ ★ ★ ★ 1/14/2020 · Previous review

Update: January 14th, 2020. I have posted the dismissal of the lawsuit brought against me by this Doctor. Matthew Torres with NewsChannel 5, brought this story to light. Link to the news story is below. I was sued for posting this review, in the amount of \$25,000.00, plus other damages.., but thankfully I hired the greatest Attorney, Daniel Horwitz, and he got vindication for me! People should not censor themselves when posting a negative review about a business. Especially when it's factual. I appreciate everyone's support in the frivolous lawsuit and if you are ever sued for this same thing, contact Daniel Horwitz, in Nashville, TN... you'll come out a WINNER [https://m.facebook.com/story.php?story\\_fbid=2828986613805727&id=784938171543925](https://m.facebook.com/story.php?story_fbid=2828986613805727&id=784938171543925) [Read less](#)

★ ★ ★ ★ ★ 11/7/2019 · Previous review

This "Dr's" behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all. [Read less](#)

## Exhibit B

Horwitz said, "Nandigam's SLAPP-suit was frivolous and sanctionable the first time it was filed and dismissed, and it is still frivolous and sanctionable now. Dr. Nandigam is about to learn an extremely expensive lesson about the First Amendment, and he is also going to learn very quickly that prospective customers don't want to patronize sue-happy businesses that can't take criticism and are inclined to sue patients and their family members. If you're looking for a doctor who is capable of decent behavior and who won't sue you or your children, cross Nandigam Neurology off your list."

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### Neurologist files lawsuit over social media review

JASON M. REYNOLDS Jan 29, 2020

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Kaveer Nandigam

A Murfreesboro neurologist who is suing a patient's daughter over what he says was a false social media review hopes to have his day in court soon in order to clear his name, his lawyer says.

Dr. Kaveer Nandigam recently refiled a lawsuit against Kelly Beavers of Wilson County. He moved it from Wilson County Circuit Court to the county's General Sessions Court for procedural reasons, his lawyer, Bennett Hirschhorn of Knoxville said. The suit accuses Beavers of defamation of Nandigam Neurology PLC and the doctor, and false light invasion of privacy against the doctor.

The next court hearing is set for Feb. 13. Beavers' lawyer is Daniel A. Horwitz, who specializes in "anti-SLAPP" cases.

Exhibit C

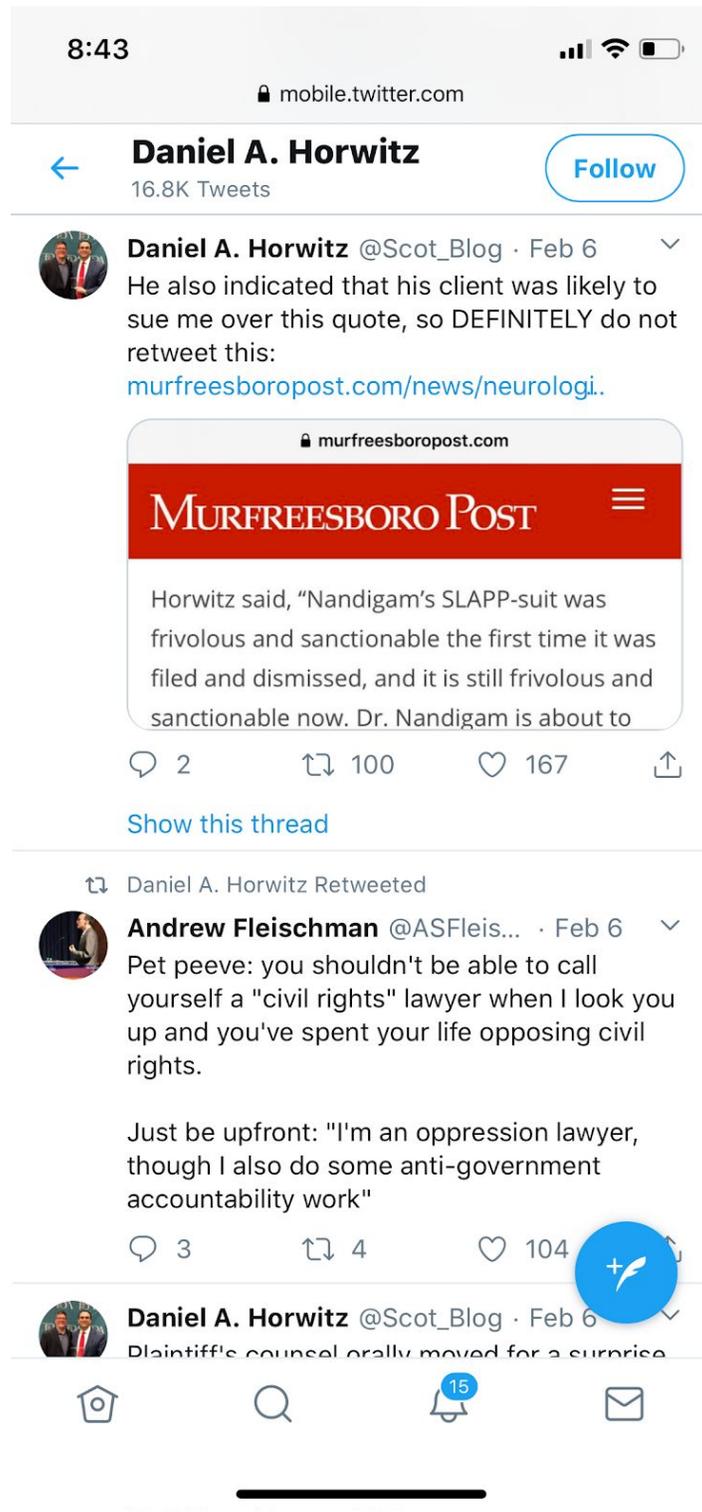


Exhibit D

