HEARST *corporation*

Jennifer D Bishop
Counsel

March 4, 2016

VIA FEDERAL EXPRESS

Ronald F. Avery
1933 Montclair Drive
Seguin, Texas 78155

Re: ***Ronald Avery v. Dylan Baddour & Hearst Communications, Inc.,***
Cause No. 15-2186-CV

Dear Mr. Avery:

Enclosed for service under Texas Rule of Civil Procedure 21a(a) please find a copy of the following document from Defendants Hearst Communications, Inc. and Dylan Baddour in the above-referenced matter, which was filed with the clerk today:

- Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Pursuant to the Texas Citizens Participation Act

Thank you for your attention to this matter. Please call me at (212) 649-2030, if you have any questions regarding the above.

Yours truly,

Jennifer D. Bishop

Enclosure

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CAUSE NO. 15-2186-CV

RONALD F. AVERY,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**GUADALUPE COUNTY, TEXAS**
	§	
DYLAN BADDOUR;	§	
HEARST COMMUNICATIONS, INC.,	§	
	§	**2ND 25TH JUDICIAL DISTRICT**
Defendants.	§	

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO THE TEXAS CITIZENS PARTICIPATION ACT

TO THE HONORABLE COURT:

Defendants Hearst Communications, Inc., publisher of the Houston Chronicle, and Dylan Baddour, a reporter for the Chronicle (collectively "the Chronicle" or "Defendants") respectfully submit this reply memorandum in further support of their Motion to Dismiss Pursuant to the TCPA, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.* (the "Motion" or "MTD").[1]

INTRODUCTION

Virtually all of the nearly forty pages of Plaintiff's Verified Response ("Resp.") and accompanying argumentative affidavit and addendum (together, the "Avery Aff.") consist of serial rehashings of the allegations in his Original Petition. Plaintiff cites to no relevant law, points to no relevant evidence, and fails to address the longstanding legal principles that establish that his defamation claim is fatally flawed and must be dismissed.

First, Plaintiff misunderstands the scope of the TCPA, which applies to ***all*** claims based on ***all*** communications relating to matters of public concern, including factual news reports that

[1] Capitalized terms and abbreviations not defined herein have the meaning given to them in Defendants' Motion to Dismiss Pursuant to the TCPA.

relate to the government like the Articles. Because the TCPA applies to this case, Plaintiff bears the burden of providing evidence that establishes a prima facie case of defamation.

Second, Plaintiff misconstrues his burden to establish that the Articles were defamatory and substantially false. Both of these essential elements of defamation must be analyzed from the perspective of an ordinary, reasonable reader, and thus Plaintiff's many repetitions of his own strained interpretations of the Articles and highly technical distinctions between secession and his belief in "dissolution" are irrelevant. Plaintiff's Response does nothing to refute the clear law cited in the Chronicle's moving papers that establishes that the Articles—which describe the Texians engaged in peaceful political discourse and mention Plaintiff only briefly in photo captions—are incapable of defaming Plaintiff and are substantially true as a matter of law. Plaintiff accordingly has failed to meet his burden of establishing a prima facie case of defamation as a matter of law, and this case must be dismissed.

ARGUMENT

I. PLAINTIFF'S CLAIM IS SUBJECT TO THE TCPA BECAUSE IT IS BASED ON THE CHRONICLE'S EXERCISE OF ITS RIGHT OF FREE SPEECH

Plaintiff does not (because he cannot) dispute that the Articles at issue fall squarely within the TCPA's broad statutory definition of "the right to free speech" since they relate to the government and other matters of public concern. *See* MTD at 11-12; Resp. at 4-5. Plaintiff nevertheless contends, without support, that the Chronicle has not met its burden of showing that the TCPA applies to his defamation claim because the Articles do not express the Chronicle's "opinions" or "views regarding secession and or dissolution or any other matter." Resp. at 5. This argument misunderstands the law. The TCPA's protection of free speech is not limited to expressions of opinion, but rather expressly applies to ***all*** "communication[s] made in connection with a matter of public concern," as those terms are statutorily defined. *See* Tex. Civ. Prac. &

Rem. Code § 27.001. It includes news reporting on factual events, like the Articles. *See, e.g., Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 76-78, 81 (Tex. App.—Houston [1st Dist.] 2013) (series of newspaper articles reporting on regulatory problems at and investigations of assisted living facility were protected by TCPA); *AOL, Inc. v. Malouf*, No. 05-13-0167-CV, 2015 WL 1535669, at *1-3 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (online article reporting facts surrounding fraud charges against dentist was an exercise of free speech covered by the TCPA).

Plaintiff also incorrectly suggests that the TCPA does not apply to his claim because he alleges the subject Articles are false and defamatory. *See* Resp. at 5-6, 8-9. This is circular reasoning that Texas courts have repeatedly rejected. *See AOL, Inc.*, 2015 WL 1535669, at *3 ("in determining whether [a] lawsuit relates to [the] exercise of free speech, we are not called on to determine the truth or falsity of the allegedly defamatory statement; that is a subject for the second part of the analysis under section 27.005(c)" (citation and quotation marks omitted)); *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *5 (Tex. App.—Austin Apr. 11, 2014), *review denied* (Jan. 30, 2015) (similar); *Cruz v. Van Sickle*, 452 S.W.3d 503, 515 (Tex. App.—Dallas 2014), *reh'g overruled* (Dec. 29, 2014), *reconsideration en banc denied* (Jan. 9, 2015), *review denied* (Sept. 11, 2015).

In short, Plaintiff's arguments do not undermine the Chronicle's showing that the TCPA applies to Plaintiff's defamation suit. The Chronicle has met its initial burden under the TCPA.

II. PLAINTIFF HAS NOT ESTABLISHED BY CLEAR AND SPECIFIC EVIDENCE A PRIMA FACIE CASE FOR EACH ELEMENT OF HIS CLAIM, AS REQUIRED BY THE TCPA

Because the Chronicle has shown that the TCPA applies to this lawsuit, the burden shifts to Plaintiff to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015) (quoting Tex.

Civ. Prac. & Rem. Code. § 27.005(c)). Plaintiff has not done so, and this case must be dismissed.

A. Plaintiff Cannot Show That The Articles Carry A Defamatory Meaning.

As detailed in the Chronicle's moving papers, Plaintiff's claim fails as a matter of law because the Articles are not capable of a defamatory meaning. MTD at 12-20. In response, Plaintiff offers no evidence of this essential element beyond repeating his own interpretation that the Articles are defamatory because, by associating him with the Texians, they (a) imply that he has renounced his citizenship; (b) call him a "secessionist[] while in the same article secession is being shown to be a federal crime," and (c) by linking to other online articles, they imply that he is a "[t]errorist," an "[e]xtremist," and "seeking the break-up of the U.S. in concert with fascists, neo-Nazis and . . . Russia."[2] Resp. at 11; *see also* Resp. at 18-21.

But ***Plaintiff's*** personal interpretation of the Articles is irrelevant. *San Antonio Express News v. Dracos*, 922 S.W.2d 242, 248 (Tex. App.—San Antonio 1996, no writ) (the court's task "is not to determine what the statement meant to the plaintiff, but whether it would be considered defamatory to the average reader."). The appropriate inquiry is "objective, not subjective" and focuses on "what a [hypothetical] reasonable reader would believe . . . ." *Harvest House Publishers v. Local Church*, 190 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2006) (citing *New Times v. Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004)). Unless the ***Court*** finds that the Articles are capable of carrying a defamatory meaning, "construe[d] . . . as a whole in light of surrounding circumstances based upon how ***a person of ordinary intelligence*** would perceive

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[2] Plaintiff incorrectly characterizes his claims based on the hyperlinks as defamation *per se*. Resp. at 11. Because these claims are based on facts extrinsic to the Articles themselves—specifically, the content of the other, hyperlinked articles—they are not *per se* claims. *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 691 (Tex. App.—Houston [1st Dist.] 2013) (defamation *per se* requires that "the defamatory nature of the challenged statement [be] apparent on its face without reference to extrinsic facts or 'innuendo'").

the entire [Article]," Plaintiff cannot establish a prima facie case of defamatory meaning as a matter of law. *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987) (emphases added).[3]

The Chronicle has already explained why the Articles, as a whole, do not carry the defamatory meanings Plaintiff ascribes to them. ***First***, even assuming the Articles imply that Plaintiff is a member of the Texians, who are "secessionists" that have informally renounced their U.S. citizenship, the Articles describe the Texians as engaged only in non-criminal, non-violent, and First Amendment-protected advocacy of the dissenting viewpoint that Texas is not part of the United States. *See* Bishop Decl. Exs. A-B; MTD at 14-16. As a matter of law, it is not defamatory to describe Plaintiff as part of this group, particularly given the valued American tradition of dissenting advocacy, including advocacy of secession, and the fact that a significant portion of the population supports secession today. MTD at 15-16 (citing, *inter alia*, *Johnson v. Houston Post Co.*, 807 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1991), *writ denied* (Sept. 5, 1991) (description of appellant as a "militant speaker" was not defamatory as a matter of law); *Associated Press v. Cook*, 17 S.W.3d 447, 456 n.8 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (statement that the plaintiff invoked the Fifth Amendment was not defamatory because "exercising a legal right is not defamatory as a matter of law")).

Plaintiff tries to circumvent this inevitable conclusion by stating, repeatedly, that the Articles' use of the word "secessionist" must be defamatory because "secession is a federal

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[3] Plaintiff incorrectly characterizes the Chronicle's argument that the Articles lack defamatory meaning as a "defense." *See* Resp. at 13, 18-21. To the contrary, defamatory meaning is an essential element of defamation that Plaintiff bears the burden of establishing by "clear and specific" evidence, *see* MTD at 10, 12, and the Chronicle's argument simply shows that Plaintiff could never meet that burden because the Articles are incapable of defaming him as a matter of law.

crime." Resp. at 11, 18.[4] But the Articles are clear that the "secessionists" they describe are engaged ***only*** in belief and advocacy—not illegal or violent steps towards actual secession—and such belief and advocacy is fully protected by the First Amendment and not a crime, *see* *Brandenberg v. Ohio*, 395 U.S. 444 (1969). *See* Bishop Decl. Exs. A-B (describing the Texians as having "foresw[orn] violence" and participating in monthly meetings discussing "legalistic" options for securing Texas' independence). Contrary to Plaintiff's unsupported assertion, Resp. at 21, this description places the word "secessionist" in a context that negates any implication of criminal behavior—the Articles as a whole cannot reasonably be read as implying that Plaintiff is engaged in criminal activity. *See, e.g.*, *Musser*, 723 S.W.2d at 655 (statement that accused plaintiff of taking accounts with him when he left the business was not reasonably capable of defamatory meaning in the context of a letter that praised the plaintiff's qualifications and competence).

Second, as Plaintiff has conceded, the Chronicle is not liable for publishing the content of other articles that are hyperlinked in the Web Article. Resp. at 19 ("[I]t is true that Defendants are not liable for publishing those links[.]"); MTD at 17-18. Moreover, a "person of ordinary intelligence" would not interpret the Web Article's hyperlinks to other articles discussing more radical groups as implying that Plaintiff is a "[t]errorist," an "[e]xtremist," and "seeking the break-up of the U.S. in concert with fascists, neo-Nazis and . . . Russia." Resp. at 11-12, 18-21.

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[4] Plaintiff nowhere explains why it was defamatory for the Articles to imply that he "informally" renounced his United States citizenship—which at most in the context of the Articles merely implies another form of peaceful, lawful protest. To the extent Plaintiff continues to complain about the Web Article's statement that "some" Texians have "formally" renounced their citizenship, Pet. ¶ 67, *see* Resp. at 11, the Chronicle has already explained that this statement cannot provide a basis for Plaintiff's claim because it is not "of and concerning" Plaintiff. *See* MTD at 14 n.10 (citing *Harvest House Publishers*, 190 S.W.3d at 214). The same is true for the statements in the Articles regarding particular Texians' illegal activities. MTD at 16 n.12.

The Chronicle has already explained that no such implication can be found in the plain language of the Article—one link is used to show only that the "Russian media . . . have cheered the independence movement" and the other two are used to note how the government's general concern with anti-government groups may have led to a raid on the Texians ***despite*** the fact that the Texians "foreswear[] violence." MTD at 18-20; Bishop Decl. Ex. B. And although Plaintiff has told this Court that the Articles fail to indicate that the Texians are different from the groups described in the hyperlinked materials, Resp. at 21, the Articles actually do just that by describing the Texians as nonviolent advocates. Bishop Decl. Exs. A-B. Again, this description negates any suggestion of terrorism or violent extremism.[5]

Despite the contorted reading Plaintiff has given them, the Articles—which describe a peaceful group engaged in voluntary association, belief, and advocacy and mention Plaintiff just a few times in photo captions—simply do not accuse Plaintiff of something criminal or unethical or disgraceful or otherwise expose him to "public hatred, contempt or ridicule, or financial injury . . . ." *See* Tex. Civ. Prac. & Rem. Code § 73.001. What they do arguably imply about Plaintiff—that he is engaged in advocacy of dissent—is insufficient as a matter of law to support a defamation claim. *See, e.g.*, *Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex. App.—Houston [1st Dist.] 1992), *writ dismissed w.o.j.* (June 3, 1992) (statement that someone was "attempting to form a union" is not defamatory despite perceived prejudice against unions); *Banfield v. Laidlaw Waste Sys.*, 977 S.W.2d 434, 439 (Tex. App.—Dallas 1998, pet. denied) (similar). Because Plaintiff cannot show that the Articles carry a defamatory meaning, this case must be

[5] Besides his own interpretation of the Articles and hyperlinks, Plaintiff points only to reader comments on the Web Article as support for his claim of defamatory meaning. Resp. at 27-28. The Chronicle has already explained that these comments are irrelevant under the "ordinary reader of reasonable intelligence" standard and in any event are negated by other comments that confirm that readers understand the Articles portray the Texians as peaceful. MTD at 19-20.

dismissed. *See, e.g.*, *Newspaper Holdings*, 416 S.W.3d at 86-87 (dismissing defamation claims under the TCPA where complained-of statement was not defamatory as a matter of law).

B. Plaintiff Cannot Show That The Articles Are False.

Plaintiff concedes that falsity is an essential element of his defamation claim against the Chronicle. Resp. at 9, 11 (arguing that statements were false as part of Plaintiff's "Prima Facie Evidence of Every Element of Plaintiff's Libel Suit"); *see also Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).[6] As the Chronicle has already explained, Plaintiff cannot present a prima facie case of this essential element because, as a matter of law, the Articles are substantially true, or no "more damaging to [Plaintiff's] reputation, ***in the mind of the average [reader]***, than a truthful statement would have been." *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990) (emphasis added). In other words, the Articles are accurate in their "gist" and "sting." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). Plaintiff's attempts to avoid this result by focusing on the highly technical distinctions that he (and only he) draws between his beliefs and secessionism are misplaced.

As an initial matter, Plaintiff appears to argue that the Court cannot determine substantial truth as a matter of law because ***he*** disputes that the "gist" of the Articles is true. *See* Resp. at 29-30. This is not the law. Rather, if the "***underlying facts*** as to the gist of the [statements] are undisputed," the Court can decide for itself as a matter of law whether the gist of the Articles is true. *McIlvain*, 794 S.W.2d at 16. And to be clear, the relevant underlying facts here ***are*** undisputed: for purposes of its Motion, the Chronicle does not dispute Plaintiff's claims that he is not a member of the Texians, that he has not renounced his U.S. citizenship, or that his

[6] Again, although Plaintiff characterizes substantial truth as a "defense," the fact that the Articles are substantially true actually shows that Plaintiff cannot meet his burden of establishing a prima facie case of falsity on this motion.

political beliefs are those he alleges in his Original Petition and Affidavit.[7] And Plaintiff has not disputed that Exhibits A and B to the Bishop Declaration are true and correct copies of the Articles that are the subject of the Complaint. Accordingly, the Court can compare the content of the Articles to Plaintiff's professed beliefs and determine the gist of the Articles and their substantial truth as a matter of law. *McIlvain*, 794 S.W.2d at 16 (comparing contents of broadcast about an investigation to the contents of the subject investigation report).

These undisputed facts show that the gist of the Articles' references to Plaintiff—that Plaintiff, like the Texians, believes that Texas is not part of the United States—is true. *See* Bishop Decl. Exs. A-B; Baddour Decl. ¶¶ 6-7; Pet. ¶¶ 14, 18, 22, 23, 71, 72, 73, 90, 92, 93, 98; Resp. at 12, 15-16, 22; Avery Aff. ¶ 8 & Exs. A, C.[8] The Articles' use of the word "secessionists" to refer to the Texians is immaterial to their gist because the Texians' political beliefs were described in detail using more specific language throughout the Articles. *See* Exs. A-B. Moreover, even if the word "secessionist" was material to the gist of the Articles, and taking as true Plaintiff's claims that there are technical differences between his beliefs and those of a "secessionist," the Articles' use of the word "secessionist" would not affect their substantial truth. Even if the average reader comprehends the difference between Plaintiff's beliefs and those of a "secessionist," he or she would not understand the description of Plaintiff as a

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[7] Should this case survive dismissal, the Chronicle expressly reserves the right to dispute the truth of all of Plaintiff's assertions in his Original Petition and Affidavit.

[8] Plaintiff repeatedly argues that the Texians are also not "secessionists" because they believe Texas was never lawfully annexed, therefore Texas is currently an independent sovereign nation and thus cannot "secede" from the United States. *See* Resp. at 22, 30; Avery Aff. Ex. E. This issue is irrelevant to the questions before this Court, as Plaintiff claims to be neither a Texian nor a secessionist, and the Texians themselves have not brought suit. In any event, the Texians *are* fairly characterized as "secessionists" because the United States currently recognizes Texas as a part of the union, and even though the Texians disagree, their goal of internationally-recognized independence depends on steps being taken to sever the current relationship between Texas and the United States.

"secessionist" as any more damaging than a description of Plaintiff's professed political belief that Texas is not part of the United States because the United States has been dissolved. *See* MTD at 22-23; *McIlvain*, 794 S.W.2d at 16.[9]

Plaintiff's argument largely consists of repeated statements that he believes the "union is dissolved" and conclusory assertions that "[i]t cannot be shown that the secession of states from the union is the same as an observation of dissolution of the entire union or even substantially the same." Resp. at 22, 29. Although that may be Plaintiff's own view based on his uniquely particularized knowledge of his own beliefs, it is the meaning of the Articles "in the mind of the average [reader]" that determines substantial truth. *See McIlvian*, 794 S.W.2d at 16. Plaintiff does not cite any law or evidence, or articulate any reason why a reader "fully informed about . . . the true views of the Plaintiff" would "surely find them less offensive" than the Articles. Resp. at 28. Nor could he—the average reader would find no material distinction between Plaintiff's beliefs and secessionism that would affect the sting of the Articles. Whatever the particular underpinnings, both positions amount to a belief that the United States flag should not fly over Texas, that the U.S. government has no legitimate authority here, and that Texas should no longer be considered a part of the United States.

Indeed, Plaintiff's sole attempt to engage with the Chronicle's arguments only highlights the lack of any material difference between his beliefs and secessionism. In response to the Chronicle's argument that secessionists have historically espoused the same positions as

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[9] Although Plaintiff takes issue with the Chronicle's suggestion that he advocates "confrontational measures," Resp. at 24, he does not dispute that he advocates a "need" and a "right" to retain "military style" weapons and organize in militias to "defend" against the federal government "with force if necessary." Bishop Decl. Exs. L-M; *see also* Resp. at 26 (stating that the Second Amendment authorizes "use of military guns against the federal army if the federal government should abuse their power and become offensive to the unalienable property rights of the people.").

Plaintiff, as reflected in South Carolina's Declaration of Secession, *see* MTD at 23, Plaintiff draws a series of extremely fine distinctions between the statements in that Declaration and his own beliefs. *See* Resp. at 31-34. For instance, Plaintiff notes that South Carolina declared secession before the Civil War due to "a dissolution of . . . the union between S.C. and the union of other states," whereas he observes "the dissolution of the union entirely." *Id.* at 34. Had they done the latter, Plaintiff asserts South Carolina "would be talking about dissolution not secession." *Id.*[10] This distinction is material only to Plaintiff, and is exactly the sort of immaterial difference that Texas courts hold, as a matter of law, cannot support a defamation claim. *See, e.g., Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467, 471-72 (Tex. App.—Dallas 1994), *writ denied* (Mar. 30, 1995) (news reports that charity spent only 10% of its donations on actual charitable service, when it actually spent 43%, were substantially true); MTD at 22 n.15, 23-24 (citing additional cases).[11]

At bottom, just because Plaintiff—a political theorist—understands his belief that "there is no United States" as "a lot different from saying 'Texas should not be part of the United States'" does not mean that the average reader would agree with him. Resp. at 34. Both positions amount to a belief that Texas should no longer be considered a part of the United States, and carry the same reputational impact. The Articles' references to Plaintiff are

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[10] Plaintiff further highlights his tendency to make distinctions that no one else sees by taking issue with the Chronicle's description of him as a "dissolutionist" in its Motion because, Plaintiff claims, "the term by itself implies that the Plaintiff actively seeks a means of dissolution rather than merely passively observes the present dissolution fully accomplished by the tyrranous acts of those in the offices of the dissolved union." Resp. at 23, 35. This makes no sense: the suffixes –ism and –ist are regularly used to describe ***belief systems***, not necessarily actions or desires. Here, Plaintiff ***believes*** the union has been dissolved. He is a dissolutionist.

[11] Plaintiff also argues that "it does not matter what history says about dissolution and secession," Resp. at 31. But it does matter, since historical experience informs the average reader's understanding of both the meaning of the word "secessionist" and Plaintiff's beliefs, and thus influences whether the average reader would find the Articles more defamatory than a statement that Plaintiff believes the "union has been dissolved."

substantially true under Texas law, and thus Plaintiff has not and cannot provide evidence of the required element of falsity. This case must be dismissed under the TCPA. *See, e.g.*, *Newspaper Holdings*, 416 S.W.3d at 85-86 (dismissing defamation claims under the TCPA where plaintiff failed to show that statements were less than substantially true).

C. Plaintiff Has Not Provided "Clear And Specific" Evidence Of Damages.

This case must also be dismissed for the separate and independent basis that Plaintiff has failed to carry his burden of providing "clear and specific" evidence of damages. Because the Articles are not defamatory on their face without reference to extrinsic materials (including the hyperlinked articles), *see supra* at 4-6 & n.2; MTD at 14-17, Plaintiff is required to prove that the Articles caused him actual damage as an element of his claim, *id.* at 17 n.13 (citing cases). But the only "evidence" of damages Plaintiff has provided is a single conclusory sentence in his Affidavit: "The Defendant's [sic] articles have harmed me and caused me mental anguish in worrying about what law enforcement is thinking about me and my family." Avery Aff. ¶ 48. This is insufficient to meet Plaintiff's burden on this TCPA motion. *See, e.g.*, *Hicks v. Grp. & Pension Adm'rs, Inc.*, No. 13-14-00607-CV, 2015 WL 5234366, at *10-11 (Tex. App. Sept. 3, 2015) (citing *In re Lipsky*, 460 S.W.3d at 593).[12]

III. PLAINTIFF'S REQUEST FOR COSTS AND FEES MUST BE DENIED.

Plaintiff's request for costs and fees is baseless. The arguments set forth above and in the Chronicle's Motion papers are well-established grounds for dismissal under the TCPA and are

[12] Because Plaintiff's lawsuit must be dismissed on this Motion for the reasons set forth above and in the Chronicle's moving papers, the Chronicle does not respond to many of Plaintiff's statements in his Response—including his 5-page argument against a "fair comment" defense that the Chronicle did not raise in its motion, Resp. at 13-18, and repeated ad hominem attacks on the Chronicle's attorneys. The Chronicle does not concede these points by not responding, and expressly reserves its right to dispute Plaintiff's arguments should this case survive dismissal.

neither "frivolous" nor "solely intended to delay . . . ." Tex. Civ. Prac. & Rem. Code § 27.009(b). It is rather Plaintiff's defamation claim that is frivolous, and the TCPA requires that it be quickly dismissed in order to safeguard the Chronicle's "constitutional right[] . . . to . . . speak freely . . . ." *Id.* § 27.002.

CONCLUSION

This Court should grant the Chronicle's Motion to Dismiss Pursuant to the Citizens Participation Act, Texas Civil Practice & Remedies Code section 27.001, *et seq.*, for the foregoing reasons and those set forth in the Motion. Moreover, based on the merits and the facts that there is nothing frivolous or delay-inducing in any respect regarding the Chronicle's Motion, Plaintiff's request for attorneys' fees under Texas Civil Practice and Remedies Code section 27.009(b) should be summarily denied. The Court should instead grant the Chronicle its court costs, reasonable attorney's fees, and other expenses incurred in defending against this lawsuit, as required by Texas Civil Practice and Remedies Code section 27.009(a). The Chronicle reserves all of its rights to submit information concerning its costs, fees, and expenses pursuant to the Court's instructions.

Dated: March 4, 2016

Respectfully Submitted,

/s/ Jonathan R. Donnellan

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Attorneys for Defendants Hearst Communications, Inc. and Dylan Baddour

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered to the following pursuant to the Texas Rules of Civil Procedure on this 4th day of March, 2016:

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