CAUSE NO. 15-2186-CV

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

DEFENDANTS HEARST COMMUNICATIONS, INC. AND DYLAN BADDOUR'S MOTION TO DISMISS PURSUANT TO THE TEXAS CITIZENS PARTICIPATION ACT

Jonathan R. Donnellan (State Bar No. 24063660)
Kristina E. Findikyan
Jennifer D. Bishop
THE HEARST CORPORATION
Office of General Counsel
300 W. 57th Street, 40th Floor
New York, NY 10019
(212) 841-7000
(212) 554-7000 (fax)
jdonnellan@hearst.com

Attorneys for Defendants Hearst Communications, Inc. and Dylan Baddour

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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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") hereby move the Court to dismiss Plaintiff's Original Petition pursuant to the Texas Citizens Participation Act ("TCPA"), Tex. Civ. Prac. & Rem. Code § 27.001, *et seq*. In support of its motion to dismiss, the Chronicle respectfully shows the Court as follows:

INTRODUCTION

At the heart of this action are two Houston Chronicle articles published in print and online that lie at the very core of the First Amendment.[1] In the highest journalistic tradition of reporting on matters of public concern, the Houston Chronicle fairly and accurately detailed the views of a Texas political organization called the Republic of Texas (or "Texians"), a nonviolent body engaged in political discourse that believes Texas is not legally part of the United States

[1] Copies of the articles (the "Articles") are annexed as Exhibits A and B to the December 23, 2015 Declaration of Jennifer D. Bishop ("Bishop Decl."). The articles are substantially identical, with one published in print (the "Print Article," Bishop Decl. Ex. A) and the other on the newspaper's website (the "Web Article," Bishop Decl. Ex. B).

and seeks recognition of Texas' independence through "legalistic" means.

Pro se plaintiff Ronald F. Avery was a speaker at one of the Texians' meetings described in the Chronicle's Articles and now claims that those articles—which mention him only in photo captions—defamed him. His remarkable theory is that he is a "dissolutionist" (believing that the United States and Texas were "dissolved" and no longer exist as a result of various unlawful actions by the federal government tracing back to the 1800s) and not, as he claims the articles imply, a Texian "secessionist" (believing that Texas was never made part of the United States in the first place). Plaintiff's claim is based on a distinction without a difference. Both groups believe that Texas is not part of the United States.

Plaintiff's frivolous effort to punish the Chronicle for its fair and accurate reporting can go no further. Because the Articles concerned the Texians' views about the government, among other legitimate matters of public concern, this case is subject to early dismissal under the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.* ("TCPA"), unless Plaintiff presents "clear and specific evidence" of each of the essential elements of his defamation claim. *Id.* § 27.005(c). Plaintiff cannot meet his high burden because the statements on which his claim is based are not actionable as a matter of law.

First, the Articles are not capable of a defamatory meaning. On their face, the Articles imply at most that Plaintiff was advocating a dissenting political opinion in favor of secession and associating with a group of like-minded dissenters. It is not defamatory as a matter of law for Defendants to describe Plaintiff as engaged in constitutionally-protected association and expression. Moreover, the dissenting expression described in the Articles does not carry the element of disgrace necessary for defamation. There is nothing more American than political dissent: this country was founded upon it, dating back to the colonization of America and the

American Revolution, and the right to dissent is enshrined in the First Amendment as a value above all others. This includes the right to advocate political change in the form of State's rights, independence, and secession. No less than Founding Father and later President Thomas Jefferson expressed the idea that every generation needs a new revolution, the most radical form of political change.[2] Indeed, the Supreme Court has made clear that advocacy of political change—even violent overthrow of the government—is valuable speech fully protected by the First Amendment, just as burning the American flag is fully protected.[3] And while Plaintiff claims that extrinsic material hyperlinked in the Web Article creates the impression that he is an extremist and/or terrorist, those materials do not mention or relate to Plaintiff at all, and no reasonable reader could take that meaning from the hyperlinks in the context of the Web Article as a whole, which describes the Texians as nonviolent advocates seeking legalistic means of achieving independence.

Second, even if the Articles could be said to carry a defamatory meaning, they are substantially true and therefore non-actionable because Plaintiff admittedly believes that the United States government has been dissolved and that Texas is thus independent from the federal government. To the average reader, this belief is not materially different than those held by Texians, who also believe that Texas is independent from the federal government. The fact that they attribute Texas independence to different root causes—Plaintiff basing it on the "dissolution" of the United States and the Texians basing it on the failure to properly annex

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[2] In a letter to William Stephens Smith dated November 13, 1787, Jefferson wrote that the American Revolution was "honourably conducted" and expressed his view that "God forbid we should ever be 20 years without such a rebellion." Continuing his thought, he said: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure."

[3] *Brandenberg v. Ohio*, 395 U.S. 444 (1969) (advocacy of violent overthrow of government protected by First Amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag protected by First Amendment).

Texas in the first place—does not alter the common fundamental tenet of both belief systems. Being associated with Texians is certainly no more damaging (and likely less damaging) to Plaintiff's reputation than reporting that he is a dissolutionist, for both believe that Texas is not legitimately part of the United States.[4]

At bottom, Plaintiff's defamation claim is divorced from any reasonable reading of the Articles and based entirely on his own strained interpretation and quibbles about the difference between "secession" and "dissolution." His subjective reading is not enough to support a defamation claim, and the Original Petition must be dismissed pursuant to the TCPA.

FACTUAL BACKGROUND[5]

This case arises out of the Chronicle's reporting on the Texians and their April 2015 meeting, which mentioned Plaintiff Ronald F. Avery in a total of three photo captions but not at all in the body of the Articles.

The Texians. According to their website, the Texians are a group that maintains that the national sovereignty of Texas was never signed over to the United States. Their "Proclamation" explains that "[a] fraudulent color-of-law annexation agreement was foisted on elected officials in Texas, but no lawful treaty was ever ratified to allow the United States to take over our nation [of Texas], which had already been established forever by international treaties." Bishop Decl. Ex. G at 6. The group holds regular meetings of its congress. *See* Bishop Decl. Ex. I (minutes of

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[4] Association with the Texians is likely less damaging because of that group's commitment to legalistic, non-violent change, as reported in the Chronicle. *See* Bishop Decl. Exs. A-B. Plaintiff, on the other hand, has advocated in favor of an armed and organized militia, including military style weapons, to "defend" against the federal government. *See* Bishop Decl. Exs. L-M (advocating a "need" and a "right" to retain "military style" weapons and organize into militias to "defend" against the federal government "with force if necessary").

[5] The facts herein are derived from Plaintiff's Original Petition, the accompanying Bishop Declaration and exhibits thereto, and the accompanying December 22, 2015 Declaration of Dylan Baddour ("Baddour Decl.") and exhibits thereto. *See* Tex. Civ. Prac. & Rem. Code § 27.006(a); *In re Lipsky*, 460 S.W.3d 579, 590-91 (Tex. 2015).

an August meeting of the Texian "house" and "senate" referencing upcoming meetings in September and October); *see also* Baddour Decl. ¶¶ 2, 4.

Consistent with their understanding that Texas never became part of the United States as a matter of law, the Texians work to have Texas' independence recognized by legal means under international law. *See* Bishop Decl. Exs. H (letter from the Texians to the United Nations), I (minutes of an August 8, 2015 meeting of the Texian congress referencing letters to the UN, and remedies through "humanitarian conventions and treaties" and the Hague's direction "to the rest of the nations to leave Texas alone"). For instance, after the government raided one of their meetings on February 14, 2015, they responded by asking the United Nations to recognize that the raid was a violation of international law. *See* Bishop Decl. Ex. H.

Plaintiff Ronald F. Avery. Plaintiff is a licensed architect, a self-proclaimed "political philosopher," and the operator of multiple websites including www.lawfulgovernment.com (on which he discusses his theories about government). Pet. ¶¶ 11, 92; *see* Bishop Decl. Exs. J-N (registration information for and excerpts from www.lawfulgovernment.com). He has also litigated multiple prior lawsuits that served as platforms for his political beliefs, most notably *Avery v. Guadalupe Blanco River Authority*, No. 04-0499-cv (25th Judicial Dist. July 27, 2004), *aff'd*, No. 04-04-00582-CV, 2005 WL 900155 (Tex. App.—San Antonio April 20, 2005, pet. denied), in which he unsuccessfully argued that sovereign immunity does not exist. *Id.* at *1.

Plaintiff does not consider himself a member of the Texians. *See, e.g.*, Pet. ¶ 17. However, he does maintain that the United States and the State of Texas have been ***dissolved*** through the alteration of the country's constitutional form "without the required amendments." Pet. ¶¶ 72, 73, 91-92, 105; Bishop Decl. Ex. K at 2 (claiming that the constitution and the authority of the government of the State of Texas has been dissolved). On

www.lawfulgovernment.com, Plaintiff explains that, according to John Locke's *Second Treatise of Government*, "violations that change the constitutional form without permission of the people by amendment dissolve the state or federation or union . . . ." Bishop Decl. Ex. L. As a result, according to Plaintiff, "no dissolved court has lawful authority to adjudicate anything" and "all those sitting in the seats of a dissolved government have no authority and henceforth everything they do is tyranny." *Id.* Plaintiff argues that this has happened to the United States by, among other things, the use of paper currency since 1862; the creation of a central bank in 1913; the maintenance of a federal standing army; federal gun regulation; federal regulation of education; and membership in the United Nations. *Id.* (listing alterations that "dissolve[d] the federal union"); Bishop Decl. Ex. N (similar). Thus, Plaintiff admittedly does not recognize the legitimacy of the United States government. Pet. ¶ 98.

The April 2015 Texian Meeting. On or about April 11, 2015, Houston Chronicle reporter Defendant Dylan Baddour attended a meeting of the Texian congress and interviewed several attendees. Baddour Decl. ¶ 2. Among other things, the speakers discussed means for achieving recognition of Texas' independence, including filing a memorial to the International Court at the Hague. *Id.*

Plaintiff was also present at the April meeting and gave a speech, which he alleges concerned the doctrine of dissolution and its "impact . . . on the [Texians] and contemporary society." Pet. ¶ 18. In that speech, he discussed "evidence showing the present dissolution of the United States," Pet. ¶ 90, which he has elsewhere explained include the 2008 bailout, the passage of the Patriot Act, and gun control laws. *See* Bishop Decl. Ex. N.

The Articles. Defendant Baddour attended a second Texian meeting in August of 2015. Baddour Decl. ¶ 4. Following that meeting, the Chronicle published the Web and Print Articles

about the Texians on September 13 and 14, respectively. *Id.* ¶ 5; *see* Bishop Decl. Exs. A-B.

The Articles, which are substantially identical, focus on a Texian official named Joe Fallin and his experience with the group, which he says has given him "hope of a better future for himself and his children." Bishop Decl. Ex. A at A6, Ex. B at 6. Although the word "secessionists" appears in the headlines, both Articles explain up front that the Texians "believe Texas never legally became part of the United States and, therefore, remains a sovereign nation" and that they seek "a legalistic escape from Uncle Sam." *Id.* Ex. A at A1, Ex. B at 2. The Articles also detail the government raid on the Texians' February meeting, the increase in media attention that resulted from the raid, and discussions at the April and August meetings, including the possibility of filing a memorial with the International Court. *Id.* Exs. A-B. They make clear that the group "foreswears violence" and has no immediate plans to actually separate from the United States. *Id.* Ex. A at A6, Ex. B at 4.

As originally published, the Print Article mentions Plaintiff exactly once and the Web Article twice, all in captions to photographs accompanying the Articles. *Id.* Exs. A-B; Baddour Decl. ¶¶ 6-7 & Exs. A-B. The photograph in the Print Article shows the back of a man's jacket with the words "Republic of Texas Texian National." The caption reads:

> All Texians have informally renounced their U.S. citizenship, as shown on Ronald Avery's jacket.

Bishop Decl. Ex. A at A1. The same photograph was included in the Web Article, originally with a longer caption:

> All Texians have informally renounced their U.S. citizenship, as evident from Ronald Avery's jacket. Many members have formally renounced citizenship by filing Republic documents to Texas courts, which has no real effect. Most carry official Texian identification. Some have landed briefly in jail for explaining to law enforcement officers that they don't have a Texas drivers' license because they are citizens of the Republic.

Baddour Decl. ¶ 6 & Ex. A. The Web Article also includes a photograph of Plaintiff speaking at the April meeting. Its caption originally read:

> In April, the Texian congress assembled beneath the blue-and-yellow flag of the old Republic, on the dance floor of the shuttered Silver Eagle Taphouse near the banks of the Guadalupe River in McQueeny. They follow a speaker list, and members take turns at the microphone. In this photo, Ronald Avery lists grievances with the U.S., including the 2008 bank bailout, NSA surveillance, the "police state" and "immoral wars."

Id. ¶ 7 & Ex. B.

Shortly after the Articles were published, Plaintiff left a comment on the Web Article that stated, among other things, that "1) The man in the jacket in [sic] not me; 2) I am not a member of any group called 'the Republic of Texas;' 3) I am not anti-government, in fact, I seek lawful government; 4) I do not want, nor do I advocate secession from the so-called 'United States of America,' as it is in fact dissolved." Bishop Decl. Ex. C at 2-3. The Houston Chronicle communicated with Plaintiff about his complaints and promptly ran a correction on September 16, 2015, which stated

> In a photo caption accompany a Sept. 14 article about the Republic of Texas, a secessionist organization, the Chronicle incorrectly identified a man wearing a Republic of Texas jacket as Ronald Avery. Avery is not a member of the organization and was not in the photograph.

Baddour Decl. ¶ 8. Plaintiff's name was later removed from the photo captions accompanying the Web Article. *See id.* ¶¶ 6-7.

Plaintiff's Original Petition. Unsatisfied with the correction, Plaintiff continued communicating with the Chronicle, ultimately demanding that the paper publish an almost three-page retraction statement. Pet. Ex. A. The Chronicle declined to do so, and Plaintiff filed this lawsuit.

In his Original Petition, Plaintiff alleges that the Articles include several false statements and implications about him, specifically that he is a member of the Texians and therefore a secessionist who has renounced his U.S. citizenship, that he was listing "grievances with the U.S. government" and advocating secession at the April meeting, that he is "anti-government," and that he has landed in jail for refusing to carry a Texas driver's license. *See* Pet. ¶¶ 17, 35, 36, 45, 46, 66, 67, 68, 88, 89, 98. He claims these statements and implications are defamatory without reference to extrinsic material because secession is illegal and the statements "aroused public hatred, contempt and ridicule . . . ." Pet. ¶¶ 80, 86.

Plaintiff further alleges that because the Web Article includes links to a *Politico* article entitled "Putin's Plot to Get Texas to Secede," a *New York Times* article entitled "The Growing Right-Wing Terror Threat," and a Department of Homeland Security report, the Web Article defames him by implying that he, as a secessionist, is a "right-wing extremist," "working to 'breakup the United States' even with Russia," "part of the growing right wing terror threat, "worse than Muslim terrorists," will violate federal law, will "use violence on any traffic stop," and "should be dealt with by state and federal authorities." Pet. ¶¶ 62, 63, 64, 69, 75, 76, 77, 78, 79, 87, 91; *see also* Bishop Decl. Exs. D-F (copies of materials linked in the Web Article). Plaintiff also points to an anonymous online comment in response to the Web Article and his own resulting "fear [of] law enforcement agencies" to support his claim that the Articles defamed him. Pet. ¶¶ 81, 95.[6]

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[6] Plaintiff also alleges that the Articles incorrectly described the Silver Eagle Taphouse as "shuttered," Pet. ¶ 40, but does not appear to claim that this statement is defamatory. The official website of the Silver Eagle Taphouse, which is registered by Plaintiff, *see* Bishop Decl. Ex. O, states that the facility has been "closed since 2009," Bishop Decl. Ex. P. One definition of "shutter" is "to close (a business, store, etc.) for a period of time or forever." Bishop Decl. Ex. Q at 3. This statement accordingly is true and cannot form the basis of a defamation claim. *See infra* Part III.B (discussing the requirement that a defamation claim be based on a

This motion to dismiss follows.

ARGUMENT

I. LEGAL STANDARD UNDER THE TCPA.

The TCPA is an anti-SLAPP (strategic lawsuits against public participation) law that "safeguard[s] the constitutional rights of persons . . . to speak freely," Tex. Civ. Prac. & Rem. Code § 27.002, by protecting them "from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern," *In re Lipsky*, 460 S.W.3d at 586. It provides for expedited dismissal of such suits through a two-step process initiated by the filing of a motion to dismiss. *Id.* Under the first step, the defendant must show that the plaintiff's claim "is based on, relates to, or is in response to" the defendant's exercise of the right of free speech, right to petition, or right of association. Tex. Civ. Prac. & Rem. Code § 27.005(b). If the defendant makes this showing, "the second step ***shifts the burden*** to the 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 at 587 (quoting Tex. Civ. Prac. & Rem. Code. § 27.005(c)) (emphasis added). Even if the plaintiff can meet this high burden, the court must still dismiss the claim if the defendant establishes by a preponderance of the evidence each essential element of a valid defense. Tex. Civ. Prac. & Rem. Code § 27.005(d). Thus, dismissal under the TCPA cannot be avoided merely by ***pleading*** facts. A plaintiff must instead submit "clear and specific" ***evidence*** to support their claims, and movants can submit their own evidence. *See id.* § 27.006(a). A dismissal under the TCPA comes with a mandatory attorneys' fees award and possible additional sanctions. *Id.* § 27.009(a).[7]

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substantially false statement).

[7] The filing of a motion to dismiss under the TCPA has additional procedural consequences. It stays discovery unless the plaintiff shows "good cause" to continue. Tex. Civ. Prac. & Rem. Code § 27.003(c). It also requires the court to promptly rule on the motion and

II. THE TCPA APPLIES TO PLAINTIFF'S DEFAMATION CLAIM.

Plaintiff's Original Petition falls squarely within the TCPA's cross-hairs. His suit is based solely on the Chronicle's Articles about a voluntary association and its political beliefs and plans, the publication of which are textbook examples of the exercise of the right of free speech within the meaning of the TCPA.

The TCPA defines the "[e]xercise of the right of free speech" as "a communication made in connection with a matter of public concern." Tex. Civ. Prac. & Rem. Code § 27.001(3). In turn, the law defines "matters of public concern" as including (but not limited to) issues relating to "the government," "health or safety," and "economic[] or community well-being." *Id.* § 27.001(7)(A)-(C). These terms must be "construed liberally." *Id.* § 27.011(b).

As detailed above, the Articles reported on the Texians and their political belief that the United States does not legitimately include Texas, their nonviolent plans for securing Texas' independence from the federal government, the hope their cause has given one of their members, and a government raid on the Texians' winter meeting. Bishop Decl. Exs. A-B. These subjects self-evidently "relate[] to . . . the government," as well as community well-being and safety, and the Articles therefore fall within the TCPA's broad definition of "free expression." *See, e.g., In re Lipsky*, 411 S.W.3d 530, 542-43 (Tex. App.—Fort Worth 2013), *reconsideration overruled* (Oct. 10, 2013), *reh'g overruled* (Oct. 10, 2013) (statements about company's alleged political power and corruption of government agencies were matters of public concern under TCPA); *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 733-34 (Tex. App.—Houston [14th Dist.] 2013), *review denied* (Sept. 6, 2013), *disapproved of on other grounds by In re Lipsky*, 460 S.W.3d 579 (communications on a political campaign website were made in connection with a

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dismiss plaintiff's claim if the defendant's constitutional rights are implicated and the plaintiff has not met the required showing of a prima facie case, ordinarily within 90 days of service of the motion. *See id.* §§ 27.004(a), 27.005(a).

matter of public concern under TCPA). Indeed, the Articles' coverage of the Texians' political views lies at the very heart of the First Amendment's protection of free expression about matters of public concern, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (citation omitted).[8] The TCPA accordingly applies and governs this motion.

III. THE TCPA REQUIRES DISMISSAL OF PLAINTIFF'S DEFAMATION CLAIM.

Because the Chronicle has shown that Plaintiff's claim is subject to the TCPA, the burden shifts to Plaintiff to establish "by clear and specific evidence a prima facie case for each essential element" of his claim. Tex. Civ. Prac. & Rem. Code § 27.005(c). The essential elements of defamation under Texas law are "(1) the defendant published a statement of fact, (2) the statement was defamatory[,] (3) the statement was false, (4) the defendant acted negligently in publishing the false and defamatory statement[,] and (5) the plaintiff suffered damages as a result." *Brown v. Swett & Crawford of Texas, Inc.*, 178 S.W.3d 373, 382 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)); *see also* 50 Tex. Jur. 3d Libel & Slander § 6.[9]

Plaintiff cannot carry his burden with respect to each of these elements because the Chronicle's reporting on the Texians' and Plaintiff's political speech and viewpoints is not

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[8] *Cf. Meyer v. Grant*, 486 U.S. 414, 421 (1988) (seeking "by petition to achieve political change" is a matter of public concern protected by the First Amendment); *Voyvodich v. Lopez*, 48 F.3d 879, 885 (5th Cir. 1995) ("there can be no question that . . . associating with political organizations ... related to a matter of public concern"); *Ricci v. Cleveland Indep. Sch. Dist.*, No. 11-CV-02957, 2012 WL 2935200, at *7 (S.D. Tex. July 17, 2012) ("[E]ven a single, off-hand comment of a political nature is sufficient to constitute a matter of public concern . . . .").

[9] To recover exemplary damages, Plaintiff would be required to prove by clear and convincing evidence that the Chronicle made false and defamatory statements with actual malice. *See Outlet Co. v. Int'l Sec. Grp.*, 693 S.W.2d 621, 627 (Tex. App.—San Antonio 1985), *writ refused NRE* (Dec. 4, 1985). Because his Original Petition may be disposed of on grounds that the Articles lack defamatory meaning and are substantially true, issues of fault are not raised by this motion but are expressly reserved.

reasonably capable of a defamatory meaning and is substantially true as a matter of law. The TCPA therefore requires that this case be dismissed.

A. The Articles Are Not Reasonably Capable Of A Defamatory Meaning.

Plaintiff's defamation claim fails at the most basic level: the Articles—which describe the Texians and Plaintiff engaged in the exercise of their own First Amendment rights—do not carry a libelous meaning as a matter of law.

A written statement about a living person is defamatory only if the words used tend to injure that person's reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury, or if it tends to impeach that person's honesty, integrity, or virtue. Tex. Civ. Prac. & Rem. Code § 73.001. To be defamatory, a statement "should be derogatory, degrading, and somewhat shocking, and contain 'element[s] of personal disgrace.'" *Means v. ABCABCO, Inc.*, 315 S.W.3d 209, 214 (Tex. App.—Austin 2010, no pet.) (quoting 1 Robert D. Sack, *Sack on Defamation* 2-17 (quoting W. Page Keeton, et al., *Prosser & Keaton on the Law of Torts* § 111 (5th ed. 1984))). A statement can thus be "false, abusive, unpleasant, or objectionable to the plaintiff and without being defamatory." *San Antonio Express News v. Dracos*, 922 S.W.2d 242, 248 (Tex. App.—San Antonio 1996, no writ).

Whether a statement is "reasonably capable of a defamatory meaning" is a "threshold" question of law for the court. *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987). In analyzing this question, the court must "construe[] the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Id.* at 655. A plaintiff's or other person's subjective opinion of the meaning of the statement thus has no bearing on whether the statement has defamatory meaning. *Farias v. Bexar Cty. Bd. of Trs. for Mental Health & Mental Retardation Servs.*, 925

F.2d 866, 878 (5th Cir. 1991); *Dracos*, 922 S.W.2d at 248 (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.").

1. The Articles Are Not Defamatory On Their Face.

On their face, the Articles at most imply that Plaintiff is a member of the Texians, who advocate Texas' independence from the federal government by nonviolent means and have informally renounced their citizenship, and that Plaintiff listed "grievances" with the U.S. government during the Texians' April meeting.[10] *See* Bishop Decl. Exs. A-B; Baddour Decl. ¶¶ 6-7 & Exs. A-B. In other words, the Articles "accuse" Plaintiff of nothing more than exercising his own First Amendment rights to advocate a dissenting political viewpoint and associate with a minority (and perhaps unpopular) group that shares his fundamental belief that Texas is not part of the United States and should separate from it.

Far from disgracing Plaintiff, these implications charge him with the American ***virtue*** of political dissent and cannot be defamatory. This country was founded on dissenters advocating independence from England, and since then, dissenting ideas and actions—including advocacy of illegal and even violent acts—have been used by citizens from Henry David Thoreau to Henry

[10] Plaintiff also claims that the Web Article implies that he has "formally" renounced his citizenship, Pet. ¶ 67, and that Plaintiff has "landed briefly in jail for explaining to law enforcement officers that they don't have a Texas driver's license because they are citizens of the Republic," Pet. ¶ 76. But the Web Article says only that "some" (not all) Texians have taken these actions. Baddour Decl. ¶ 6 & Ex. A. This is insufficient to imply that these statements are about Plaintiff, and they thus cannot form the basis of Plaintiff's defamation claim as a matter of law. *See, e.g.*, *Harvest House Publishers v. Local Church*, 190 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("[I]n order for an alleged defamatory statement that is directed to an unidentified group of individuals to be actionable, it must create the inference that *all members* of the group have participated in the activity that forms the basis of the libel suit. If the statement refers to some, but not all members of the group, and does not identify to which members it refers, it is not a statement of and concerning the plaintiff [and is therefore not actionable].").

Ward Beecher to Harriet Tubman to Eugene Debs to Martin Luther King, Jr. to Supreme Court Justices to push the country closer to their ideals. *See generally* Robert Young, *Dissent: The History of an American Idea* (2015); *see also* n.2, *supra*. Significantly, expression of all these ideas are fully protected by the First Amendment, which enshrines expression of political dissent, association and petition for change as core American values. *See* n.3, *supra*. Indeed, as Justice Holmes explained in his own dissent that has since become the backbone of First Amendment jurisprudence,[11] the very "theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas" including "opinions that we loathe and believe to be fraught with death . . . ." *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). In other words, dissenting ideas are valuable because they may confirm the truth of our already-held beliefs or they may expose flaws in those beliefs—either way, they bring us closer to truth. *See id.*

Advocacy of secession and even revolution is part of this American tradition of speaking one's mind in an effort to win over a majority, or at least a like-minded minority of fellow travelers. Noted secessionists in American history have included elected officials from all over the country, and state secession has wide popular support. Indeed, a recent Reuters survey concluded that 1 in 4 Americans and 34% of those in the Southwest (including Texas) are in favor of state secession, Bishop Decl. Ex. S, and a 2012 whitehouse.gov petition for Texas' peaceful secession garnered 125,746 signatures, *id.* Ex. T. In light of the popularity of secession and the American tradition and value of dissent, the Articles would not lead a reasonable reader to regard Plaintiff with hatred and contempt for his political views, even if they disagreed with

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[11] *See, e.g., Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); *Johnson*, 491 U.S. at 418-19 (paraphrasing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

him. *Cf. 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); *Rawlins v. McKee*, 327 S.W.2d 633, 635 (Tex. App.—Texarkana 1959), *writ refused NRE* (Feb. 3, 1960) (description of a candidate as "radical" and "being backed and financed by the big shot labor bosses" was not defamatory).

Even if dissenting advocacy were not so valued in this country, as a matter of law, it was not defamatory for Defendants to report that Plaintiff was exercising his legal rights. *See, e.g.*, *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"); 50 Tex. Jur. 3d Libel & Slander § 2. That is all the Articles do, notwithstanding Plaintiff's allegation that Defendants' use of the word "secessionist" charges him with "a crime." Pet. ¶ 86. The word "secessionist" does not inherently imply criminal behavior or violence; its definition includes those who merely "***maintain***[] that secession is a right" and "***think*** that that a nation, state, etc., should separate from another and become independent." Bishop Decl. Ex. R. While actually seceding from the United States may be illegal, ***believing in*** or ***advocating*** for secession most definitely is not. *See Brandenberg v. Ohio*, 395 U.S. 444. Read as a whole, the Articles clearly describe Texian "secessionists" who are only engaged in protected thought, advocacy, and voluntary association: it states that they have "foresw[orn] violence" as a means and hold monthly meetings discussing "legalistic" options for independence. Bishop Decl. Exs. A-B.[12] This account of Plaintiff and the Texians exercising their constitutional rights simply "lacks the element of disgrace or

[12] To the extent the Articles reference illegal actions taken by certain Texians, those statements cannot be "of and concerning" Plaintiff and therefore are not relevant to Plaintiff's defamation claim. *See* n.10, *supra* (citing *Harvest House Publishers*, 190 S.W.3d at 214).

wrongdoing necessary" to sustain Plaintiff's defamation claim on its face. *Means*, 315 S.W.3d at 214-15 (citing cases); *see also, e.g.*, *Dracos*, 922 S.W.2d at 248 (statement that employee "walked off the job . . . without any excuse" is not defamatory because it does not suggest he did anything illegal or unethical).[13]

2. The Articles Are Not Defamatory By Reference To Extrinsic Facts

Perhaps realizing that the Articles are not intrinsically defamatory, Plaintiff alleges at length that three ***other*** unrelated reports hyperlinked in the Web Article give it a defamatory meaning, and that an online commenter's response to the Web Article shows that meaning. *See* Pet. ¶ 91 ("Defendants have falsely labeled Plaintiff . . . a secessionist, who ***by implication of their included inferences in links*** to their article, is taking action to 'breakup the United States' and 'drive violence at home'") (emphasis added); *id.* ¶¶ 80-81 (citing online comment as an "expression of [public] hatred); *see also id.* ¶¶ 62, 63, 64, 69, 75, 76, 77, 78, 79, 87. Neither the

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[13] Because the Articles are not defamatory without reference to extrinsic facts, and because advocacy of secession is not a crime and the Articles cannot be read as charging Plaintiff with illegal conduct, the Articles are not libelous *per se*. *See KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 691 (Tex. App.—Houston [1st Dist.] 2013), *reh'g overruled* (Aug. 21, 2013), *review denied* (Jan. 17, 2014) (defamation *per se* requires "the defamatory nature of the challenged statement [to be] apparent on its face without reference to extrinsic facts or 'innuendo'"); *Sw. Bell Yellow Pages, Inc. v. Thomas*, No. 05-04-01722-CV, 2006 WL 217665, at *2 (Tex. App.—Dallas Jan. 30, 2006, no pet.) (written statements are defamatory *per se* only if it either "(1) . . . ***unambiguously*** charge[s] a crime, dishonesty, fraud, rascality, or general depravity or . . . (2) [includes] falsehoods that injure one in his office, business, profession or occupation."). Accordingly, Plaintiff is required to both plead and prove causation of actual monetary ("special") damages as an essential element of his claim. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 146 n.7 (Tex. 2014), *reh'g denied* (June 27, 2014). Plaintiff has not pled this type of damage (indeed, his only allegation of harm is that he "fear[s] law enforcement agencies" as a result of the Articles), and his claim should be dismissed for this additional reason. *See, e.g.*, *Rawline v. Capital Title of Tex., LLC*, No. Civ. A. H-11-2379, 2012 WL 2194054, at *4-5 (S.D. Tex. June 14, 2012) (defamation *per quod* claim failed as a matter of law because the plaintiff did not allege special damages); *Moore v. Waldrop*, 166 S.W.3d 380, 386-87 (Tex. App.—Waco 2005, no pet.) (similar). Moreover, Plaintiff will not be able to sustain his burden under the TCPA of providing "clear and specific evidence" of monetary damages in response to this motion.

hyperlinked materials nor the comment can be considered part of Defendants' Web Article. *See, e.g., Life Designs Ranch, Inc. v. Sommer*, No. 32922-4-111, 2015 WL 7015867, at *13-14 (Wash. Ct. App. Nov. 12, 2015) (posting a hyperlink to material is not publication or republication of the hyperlinked material)[14]; *KTRK Television*, 409 S.W.3d at 691 (web comments are extrinsic material for purposes of determining defamatory meaning). Accordingly, the only way these extrinsic materials can render the Web Article defamatory is if they cause statements actually in the Web Article to take on a defamatory meaning in the mind of the "average reasonable reader." *See Bingham v. Sw. Bell Yellow Pages, Inc.*, No. 2-06-229-CV, 2008 WL 163551, at *4 (Tex. App.—Fort Worth Jan. 17, 2008, no pet.).

None of the hyperlinked materials imbue the actual Web Article with defamatory meaning. Plaintiff complains about a link to the *Politico* article "Putin's Plot to get Texas to Secede," which he claims implies that Plaintiff "would . . . work with foreign leaders to breakup the United States of America" or "want to violate the federal law . . . ." Pet. ¶¶ 69, 87. But the Web Article references the *Politico* story to show only generally that the "Russian media, at Vladamir Putin's behest, have cheered the independence movement and a rival secessionist group" since the United States imposed sanctions against Russia for its activities in the Ukraine. Bishop Decl. Ex. B at 2-3. Even if one were to review *Politico*'s story, it describes just a few named Texians as having connections to Russia, and the specific portion of the piece that Plaintiff alleges creates defamatory implications is explicitly about a different person, Nathan Smith, and a different group, the Texas Nationalist Movement (which the Web Article clearly states is a "rival" of the Texians). Pet. ¶¶ 30, 69, 87 (quoting *Politico*, "Putin's Plot to Get Texas

[14] *See also, e.g., In re Phila. Newspapers*, 690 F.3d 161, 175 (3d Cir. 2012) (holding "though a link and a reference may bring readers' attention to the existence of an article, they do not republish the article").

to Secede" as stating that "Nathan Smith, who styles himself the 'foreign minister' for the Texas Nationalist Movement" was quoted in a Russian newspaper); *see also* Bishop Decl. Ex. D (*Politico* article). No reasonable reader would understand the Web Article to have the defamatory meaning that Plaintiff ascribes to it as a result of the *Politico* piece, much less understand it to be of and concerning Plaintiff.

Plaintiff also complains about hyperlinks to a government report about "sovereign citizen extremists" and a *New York Times* article entitled "The Growing Right Wing Terror Threat," Pet. ¶¶ 29, 31, but those links are used in the Web Article to ***contrast*** the government's concern about anti-government groups with the Texians' "foreswear[ing] [of] violence." Bishop Decl. ¶¶ 5-6 & Ex. B at 4. In context, the hyperlinks highlight how the government's concern about right-wing extremists led to the February 2015 raid on the Texians despite their nonviolence—and the subtext is that the raid was unfair. Further, the linked materials are clear that their subject is violent extremists and neither list the Texians as such a group. Bishop Decl. Exs. E-F. Indeed, the Web Article's description of the Texians as nonviolent activists working towards a "legalistic" exit from the United States expressly negates and thereby defeats any imagined implication that Plaintiff and the Texians are violent extremists and part of a "right wing terror threat greater than that of radical Muslim terrorists," as Plaintiff alleges. Pet. ¶¶ 75, 77-78.

Finally, Plaintiff cites to an anonymous online comment by "otimo" in response to the Web Article to show that the Articles have a defamatory meaning. This comment is irrelevant under the "ordinary reader of reasonable intelligence" standard because it represents the understanding of just one unidentifiable person. *See supra* at 13. But even if online comments were relevant, the other web comments responding to "otimo" confirm that readers understand that the Articles portray the Texians as "level-headed," "completely peaceful," and engaged only

in "speaking out for what they believe to be true." Bishop Decl. Ex. C at 5-6.

At bottom, the Articles do not accuse Plaintiff directly or through the hyperlinked materials with the commission of a crime or the violation of any law or contract or ethical obligation. It accuses him of "absolutely nothing except what he had a [well-established and celebrated First Amendment] right to do," which is to dissent. *Dracos*, 922 S.W.3d at 248 (quoting *Musser*, 723 S.W.2d at 655). To "suggest such 'accusations' are defamatory requires a strained interpretation" and "'tortures the ordinary meaning.'" *Id.* (quoting *Musser*, 723 S.W.2d at 655). When viewed as a whole and in light of the surrounding circumstances, the Articles do not injure Plaintiff's reputation and expose him to "public hatred, contempt or ridicule, or financial injury," Tex. Civ. Prac. & Rem. Code § 73.001, and thus are not "reasonably capable of a defamatory meaning" as a matter of law. *Musser*, 723 S.W.2d at 654-55; *see also Hearst Newspapers P'ship, L.P. v. Macias*, 283 S.W.3d 8, 11-12 (Tex. App.—San Antonio 2009, no pet.) (statement that employee "resigned" was not defamatory because, inter alia, he had a right to resign); *LaCombe v. San Antonio Express News*, No. 04-99-00426-CV, 2000 WL 84904, at *6-7 (Tex. App.—San Antonio Jan. 26, 2000, pet. denied) (statements were not defamatory as a matter of law because, in context, they did not accuse plaintiff of any illegal or unethical dealings); *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) (statements that plaintiffs were "troublemakers" and "ringleaders" were not defamatory because they related to plaintiffs' exercise of their federally-protected right of union organization). The Original Petition must accordingly be dismissed with prejudice.

B. The Articles Are Substantially True.

Even if the Articles were reasonably capable of defaming Plaintiff, his claim cannot proceed because the challenged statements are substantially true. It is black letter law in Texas that a statement that is true or substantially true cannot support a claim for defamation. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex. 1990); *see also* Tex. Civ. Prac. & Rem. Code § 73.005. Where, as here, a plaintiff has sued a media defendant, the U.S. Constitution further requires that the plaintiff carry the burden of pleading and proving falsity. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *McIlvain*, 794 S.W.2d at 15. Plaintiff cannot meet this constitutional burden if the publication is found to be substantially true. *Id.* at 15-16; *KTRK Television v. Felder*, 950 S.W.2d 100, 105-07 (Tex. App.—Houston [14th Dist.] 1997, no writ).

A statement is substantially true unless the "alleged defamatory statement was more damaging to [the plaintiff's] reputation, in the mind of the average [reader], than a truthful statement would have been." *McIlvain*, 794 S.W.2d at 16; *see also New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004) ("Falsity for constitutional purposes depends upon the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement."). Courts focus on the "gist" or "sting" of the publication in determining whether this burden has been met, not on any minor, inaccurate details. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) ("Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.") (citation and quotation marks omitted); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000) (similar). Thus, Texas courts routinely dismiss libel claims even though the complained-of statements may not be literally true in every respect, as long as the statements have the same

sting or thrust as the literal truth.[15] If the facts underlying the gist of the statement are true or undisputed, courts can "disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law." *McIlvain*, 794 S.W.2d at 16; *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609, 611 (Tex. App.—San Antonio 2002, no pet.); *Basic Capital Mgmt., Inc. v. Dow Jones & Co., Inc.*, 96 S.W.3d 475, 481 (Tex. App.—Austin 2002, no pet.).

To the extent the Articles concern Plaintiff at all, *see* n.10, *supra*, their overall thrust is that Plaintiff is associated with the nonviolent Texians and shares their belief that Texas is not legally a part of the United States. *See* Bishop Decl. Exs. A-B; Baddour Decl. ¶¶ 6-7. This is true—Plaintiff allowed the Texians to hold their April 2015 meeting on his property at the Silver Eagle Taphouse, addressed the April meeting of the Texian congress, and shares the Texians' fundamental belief that Texas is no longer a part of the Union. Pet. ¶¶ 14, 18, 22, 23, 71, 72, 73, 90, 92, 93, 98; *see supra* at 5-6 and material cited therein.

None of Plaintiff's allegations of falsity detract from the Articles' substantial truth and can support his defamation claim. Plaintiff's primary complaint is that, by associating him with the Texians, the Articles have inaccurately labeled him a "secessionist" who has renounced his U.S. citizenship. *See, e.g.*, Pet. ¶¶ 58, 61, 63, 66-67, 70, 71-74. This is false, Plaintiff claims,

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[15] For example, an article charging that the mayor had wasted $80,000 of taxpayers' money is substantially true, even though only $17,500 had been spent. *Fort Worth Press Co. v. Davis*, 96 S.W.2d 416, 419 (Tex. Civ. App.—Fort Worth 1936, no writ). A statement that a plaintiff failed a drug test was substantially true, even though he then passed a second confirming test. *Washington v. Naylor Indus. Servs., Inc.*, 893 S.W.2d 309, 311 (Tex. App.—Houston [1st Dist.] 1995, no writ). A statement that the plaintiff drank "a toast to the castration [of the district attorney]" was substantially true since the plaintiff attended a party where the toast occurred, although the plaintiff denied participating. *Simmons v. Ware*, 920 S.W.2d 438, 448 (Tex. App.—Amarillo 1996, no writ); *see also Downer v. Amalgamated Meatcutters & Butcher Workmen*, 550 S.W.2d 744, 747 (Tex. Civ. App.—Dallas 1977), *writ refused NRE* (Sept. 27, 1977) (statement that plaintiff misappropriated union funds is substantially true notwithstanding the fact that some of the items were disputed).

because he actually believes the federal government has ***already*** been dissolved as a result of its unlawful actions and thus there is no need for secession (or, presumably, for renouncing citizenship). *See id.* ¶¶ 72, 73. Plaintiff's technical distinction between secession and dissolution is irrelevant under the substantial truth test. Historically, there was no distinction as many secessionists during the Civil War justified secession on the ground that the union had been dissolved as a result of the federal government's tyranny. *See, e.g.*, South Carolina Declaration of Causes of Secession (1860) (arguing that the "constitutional compact" between state and federal government had "been deliberately broken and disregarded" and thus ceased to be binding); *see also, e.g.*, Ralph Young, *Dissent: The History of An American Idea* 191 (2015). But even if it can be plausibly argued that an average reader today imagines there to be some difference between Plaintiff's position and that of a secessionist, both positions amount to a belief that Texas is not or should not be part of the United States and thus carry the same reputational impact. Like other "[t]echnical errors in . . . nomenclature," the Articles' description of Plaintiff as a "secessionist" rather than a "dissolutionist" does not affect the Articles' substantial truth. *Dolcefino v. Turner*, 987 S.W.2d 100, 115 (Tex. App.—Houston [14th Dist.] 1998), *aff'd sub nom. Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000); *see also, e.g., Basic Capital Mgmt.*, 96 S.W.3d at 481-82 (report that company had been charged with "money laundering" was substantially true even though only two of its employees had been charged individually with fraud and conspiracy, "money laundering" was not among the charges, and the company had not been charged with anything); *Schirle v. Sokudo USA, L.L.C.*, 484 F. App'x 893, 900-01 (5th Cir. 2012) ("small mental disease" carried same sting as "mood disorder").

In fact, had the Chronicle detailed the whole of Plaintiff's dissolutionist beliefs in the

Articles, any claimed sting would have been materially ***worse*** than what was reported. While the Articles reported on the Texians' advocacy of only nonviolent, legalistic methods for achieving independence from the United States, Plaintiff in fact advocates more confrontational measures. *See* n.4, *supra*.

Plaintiff's other complaints about the nature of his association with the Texians (whether he was a member or merely hosting and speaking to the group) and his remarks at the April Texian meeting (whether he was "airing grievances" or listing "evidence" of the dissolution of the United States) are the types of minor details that have no effect on the gist of the Articles and cannot support a defamation claim, even if inaccurate. *See AOL, Inc. v. Malouf*, No. 05-13-01637-CV, 2015 WL 1535669, at *5 (Tex. App.—Dallas Apr. 2, 2015, no pet.); *see also 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 services, when it actually spent 43%, were substantially true).

In sum, Plaintiff's admitted political beliefs render the Articles substantially true and non-actionable as to him. Accordingly, even if the Articles were capable of a defamatory meaning, Plaintiff would still be unable to establish the essential elements of his defamation claim as a matter of law.

CONCLUSION

For the reasons set forth above, Defendants respectfully submit that Plaintiff's Original Petition must be dismissed under the TCPA. If the Original Petition is dismissed, the TCPA provides for a mandatory award of "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action." Tex. Civ. Prac. & Rem. Code § 27.009(a)(1). Defendants accordingly reserve all of their rights to submit information concerning their costs,

fees, and expenses pursuant to the Court's instructions.

WHEREFORE, PREMISES CONSIDERED, Defendants Hearst Communications, Inc. and Dylan Baddour pray the Court to enter the attached Order dismissing the Original Petition in this action pursuant to the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.*, and for all other and further relief to which they may show themselves entitled.

Dated: December 23, 2015

Respectfully Submitted,

/s/ Jonathan R. Donnellan

Jonathan R. Donnellan (State Bar No. 24063660)
Kristina E. Findikyan
Jennifer D. Bishop
THE HEARST CORPORATION
Office of General Counsel
300 W. 57th Street, 40th Floor
New York, NY 10019
(212) 841-7000
(212) 554-7000 (fax)
jdonnellan@hearst.com

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 23rd day of December, 2015:

Ronald F. Avery, *pro se* Plaintiff
1933 Montclair Drive
Seguin, Texas 78155
Phone: (830) 372-5534
Email: taphouse@sbcglobal.net

/s/ Jonathan R. Donnellan
Jonathan R. Donnellan

Attorney for Defendants