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

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| NANDIGAM NEUROLOGY, PLC,<br><br>*Plaintiff,*<br><br>*v.*<br><br>KELLY BEAVERS<br><br>and<br><br>DEVIN YOUNT,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No.: 2019-cv-663<br><br>JURY DEMANDED |



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

## I. INTRODUCTION

This is a Strategic Lawsuit Against Public Participation (a "SLAPP-suit") over a truthful Yelp! review that is masquerading as a false light, defamation, and civil conspiracy action. Upset about Dr. Kaveer Nandigam's extraordinarily disturbing behavior coming to light, the Plaintiff—Nandigam Neurology, PLC—has sued Kelly 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 Plaintiff's Complaint also fails to state a cognizable claim under any pleaded theory of relief. Because the Plaintiff has sued Ms. Beavers for exercising her right to free speech, Ms. Beavers further petitions this Court to dismiss the Plaintiff's Complaint and to sanction the Plaintiff under the newly enacted Tennessee Public

Participation Act. *See* TENN. CODE ANN. § 20-17-104(a).

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

*First*, longstanding, unambiguous, and controlling authority establishes that corporations cannot sue for false light invasion of privacy. *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) ("the right to privacy is a personal right. As such, the right cannot attach to corporations or other business entities . . . ."). The Plaintiff has inexplicably maintained a false light claim regardless.

*Second*, the Plaintiff's Complaint does not comport with threshold pleading requirements and fails to set forth the substance of any of the statements that it alleges are defamatory.

*Third*, Dr. Kaveer Nandigam—the human being about whom Ms. Beavers posted her Yelp! review—is not a party to this action. The actual Plaintiff in this action may not sue over statements that concern a non-party, however, and Dr. Nandigam may not maintain his defamation action through a PLC.

*Fourth*, for multiple independent 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.

*Fifth*, the Plaintiff's civil conspiracy claim fails as a matter of law because: (1) it is not premised upon any tortious act; (2) it is not premised upon any unlawful purpose or unlawful means; and, in any event, (3) it is not pleaded with the requisite degree of specificity.

Separately, the Plaintiff's Complaint 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**, Beavers Affidavit. In furtherance of the Tennessee Public Participation Act's substantive protections, Ms. Beavers additionally demands that the Plaintiff establish a prima facie case for each essential element of its claims in order to avoid dismissal.

## II. LEGAL STANDARDS

### A. MS. BEAVERS'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

"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 must be granted. *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."[1] *Davis v.*

[1] Where—as here—the alleged defamatory statement involves a matter of public interest, a plaintiff is required to prove actual malice. *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 647 (Tenn. 2001) ("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."). 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, e.g., Neumann v. Liles*, 369 P.3d 1117, 1126 (Or. 2016) (finding

*The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001). Critically, however, "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 Plaintiff's 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-

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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 Court*, 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).

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.

Of note, 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."[2] *See Moman*, 1997 WL 167210, at *4. Thus, any statement that is not capable

[2] 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 Plaintiff's Complaint exclusively alleges defamation, false light, and conspiracy claims. *See* Complaint.

of being proven false as a matter of fact or that constitutes mere rhetorical hyperbole cannot form the basis for 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 plaintiff's 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)).

### 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's special petition to dismiss "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[,]" *see* TENN. CODE ANN. § 20-17-108(4), and Ms. Beavers's special petition to dismiss has been presented in conjunction with her Motion to Dismiss under Tennessee Rule of Civil Procedure 12.02(6) as a result.

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 as of right, 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

"In early November 2019, Defendant Beavers accompanied her father to a medical consultation at the office of Plaintiff Nandigam." *See* Complaint, p. 1, ¶ 6. "On November 7, 2019, Defendant Beavers posted a negative Yelp review on the internet[.]" *Id.* at ¶ 7. The Plaintiff's Complaint does not include any mention of what the Yelp! review at issue says. *See generally* Complaint. It also does not append the review as an exhibit. *See id.* Nonetheless, the Plaintiff asserts, without explanation, that it "contained false, disparaging, and misleading statements." *Id.* at ¶ 7. The Plaintiff has additionally sued Defendant Devin Yount over "a negative Google" [sic] that similarly is not described, quoted, or appended to the Plaintiff's Complaint as an exhibit. *Id.* at p. 2, ¶ 8.

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—who is not a party to this action—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 B**, Yelp! Review.

Devin Yount—Ms. Beavers's co-defendant—is the son of Ms. Beavers's friend. **Exhibit A**, p. 3, ¶ 22. After hearing a conversation between his mother and Ms. Beavers about the visit, Mr. Yount posted a truthful review on Google regarding it. *Id.* at ¶ 23.

This action for false light, defamation, and civil conspiracy against both Ms. Beavers and Mr. Yount followed. *See generally* Complaint.

## IV. ARGUMENT

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

#### 1. Plaintiff's false light claim is inactionable as a matter of law because corporations cannot sue for false light.

A claim for false light invasion of privacy concerns a "personal right" that is premised upon a natural person's right to privacy. *See West*, 53 S.W.3d at 648. Accordingly, the Tennessee Supreme Court has clearly established that:

> the right cannot attach to corporations or other business entities, may not be assigned to another, nor may it be asserted by a member of the individual's family, even if brought after the death of the individual. Therefore, only those persons who have been placed in a false light may recover for invasion of their privacy.

*Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652I cmt. a-c (1977)) (emphases added).

Thus, as a categorical matter, corporations may never maintain false light claims. *Id. See also Seaton v. TripAdvisor LLC*, 728 F.3d 592, 601 (6th Cir. 2013) ("Seaton cannot recover on behalf of Grand Resort because it is a business and as such does not have the right under Tennessee law to recover for a violation of its privacy.").

Here, the Plaintiff's Complaint reflects that the Plaintiff—Nandigam Neurology, PLC—is "a Tennessee professional limited liability company." Complaint, p. 1, ¶ 1. As such, the Plaintiff is categorically prohibited from maintaining a false light invasion of privacy claim under any circumstances against any party. *West*, 53 S.W.3d at 648; *Seaton*, 728 F.3d at 601. The Plaintiff's claims for false light invasion of privacy must be dismissed with prejudice for failure to state a claim as a consequence.

**2. <u>The Plaintiff has failed to plead the substance of any of the statements over which it is suing.</u>**

Plaintiffs who sue for defamation 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 Plaintiff has not bothered to set forth the substance of any of the statements over which it has sued as to either defendant. *See* Complaint, pp. 1–2, ¶¶ 7–13. 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.

Nor has the Plaintiff appended the written publications over which it has sued as

exhibits. *But see* Tenn. R. Civ. P. 10.03 ("Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit" absent exceptions not present here). A Plaintiff's failure to comply with Rule 10.03 can similarly warrant 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)).

Here, the Plaintiff has failed to plead the substance of any of the allegedly defamatory statements at issue or to attach the statements as exhibits to its Complaint. These omissions serve to deprive both the Court and the Defendants themselves—who are being sued for not only their own statements, but also for *one another's* allegedly defamatory statements—of any opportunity to determine what, specifically, the Plaintiff alleges is defamatory. Given this context, the Plaintiff's failure to plead the substance of its defamation claims as required compels dismissal as a matter of law. *See Markowitz*, 2013 WL 4782143, at *4. Accordingly, as to both defendants, the Plaintiff's defamation claims should be dismissed.

### 3. The Plaintiff may not sue over statements that concern a non-party to this litigation, 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 B.** Critically, however, *Dr. Nandigam is not a party to this litigation, and he is not the Plaintiff. See* Complaint. That fact is necessarily fatal to the Plaintiff'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: Dr. Nandigam cannot prosecute—through the veil of a PLC—defamation claims over statements that concern him. *See id.* Nothing, of course, prevents the Plaintiff from substituting Dr. Nandigam as the plaintiff in this action, which would subject Dr. Nandigam personally to the inevitable sanctions associated with this bad-faith and facially frivolous lawsuit. Unless and until that happens, however, Dr. Nandigam cannot hide behind his PLC and prosecute his defamation claims through the corporate plaintiff that is actually maintaining this lawsuit. *See id.* Accordingly, the Plaintiff'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. **The statements contained in Ms. Beavers's Yelp! review are inactionable as defamation as a matter of law.**

To state a claim for defamation, it goes without saying that a statement must 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 Plaintiff's 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 manner in which the Plaintiff characterizes them. *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 plaintiff's 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 Plaintiff's Complaint comes anywhere close to clearing these hurdles. As such, the Plaintiff has 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.

Overlooking the fact that the Plaintiff's Complaint does not set forth the substance of the statements over which it is suing, the statements in Ms. Beavers's Yelp! review are not capable of conveying a defamatory meaning as a matter of law. With respect to Ms. Beavers, the Plaintiff's lawsuit is premised entirely upon her online 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 B.**

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 Plaintiff has not specified which statements within Ms. Beavers's

review it contends are tortious, it is not clear whether the Plaintiff is 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. 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 plaintiff's 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 Plaintiff's 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 plaintiff's 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 Plaintiff has not sued over implications. Even if it had, however, the only statements underlying the Plaintiff's Complaint that could even plausibly imply any 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 B**—cannot be considered defamatory as a matter of law. Considered in the most generous fashion possible, the Yelp! review at issue, and each of its component parts, 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 plaintiff's reputation.'" *See Davis*, 83 S.W.3d at 128 (quoting *Stones River Motors*, 651 S.W.2d at 719). Consequently, notwithstanding the Plaintiff's 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. <u>The statements in Ms. Beavers's Yelp! review are mere rhetorical hyperbole that cannot reasonably be read as objective assertions of false fact.</u>

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 necessary 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." 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, "'Dirtiest' is a loose, hyperbolic term because it is the superlative of an adjective that conveys an inherently subjective concept," and thus, "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 also has 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 v. UMG Recordings, Inc.*, 123 F. App'x 165, 170 (6th Cir. 2005) (unpublished).

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. 19–21. *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 Plaintiff's defamation claim should be dismissed as a result.

**5. <u>The Plaintiff's civil conspiracy claim fails as a matter of law for multiple independent reasons.</u>**

Tennessee law does not recognize any freestanding tort for civil conspiracy. Instead, to be actionable, a civil conspiracy requires an underlying predicate tort committed pursuant to the conspiracy. *See Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007) (citations omitted). *See also id.* ("Since liability for civil conspiracy depends on the performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort" (quoting *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983))).

Additionally, "[a]n essential element of a conspiracy claim is that the conspiring parties intend to accomplish an unlawful purpose, or a lawful purpose by unlawful

means." *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 39 (Tenn. Ct. App. 2006) (citing *Morgan v. Brush Wellman, Inc.*, 165 F. Supp.2d 704, 720 (E.D. Tenn. 2001)). As such, the absence of any unlawful purpose or means is fatal to a civil conspiracy claim.

Separately, given their highly fact-dependent nature, civil conspiracy claims are subject to heightened pleading standards and must be pleaded with some degree of specificity. *See McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002) ("As to civil conspiracy, this Court has stated that '[i]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim[.]'" (quoting *Haynes v. Harris*, No. 01A01–9810–CV–00518, 1999 WL 317946, at *2 (Tenn. Ct. App. 1999))).

For the reasons that follow, none of these requirements is satisfied. Accordingly, the Plaintiff's civil conspiracy claim must be dismissed as a matter of law.

i. Because there was no underlying tortious act, the Plaintiff's civil conspiracy claim fails as a matter of law.

Tennessee law does not recognize civil conspiracy as its own freestanding tort. Instead, a civil conspiracy requires an underlying tortious act committed pursuant to the conspiracy. *See Watson's Carpet*, 247 S.W.3d at 180 (citations omitted). As a consequence, the absence of an underlying predicate tort is fatal to a civil conspiracy claim. *Id.*

Here, for the reasons set forth above, *see supra*, pp. 10–21, the Plaintiff has not stated a cognizable claim for either false light or defamation. As such, the Plaintiff's civil conspiracy claim is not premised upon any underlying tort. Thus, the Plaintiff's civil conspiracy claim is necessarily foreclosed—and must be dismissed—as a matter of law.

ii. The Plaintiff's civil conspiracy claim is not premised upon any unlawful purpose or lawful purpose accomplished by unlawful means.

"An essential element of a conspiracy claim is that the conspiring parties intend to accomplish an unlawful purpose, or a lawful purpose by unlawful means." *Kincaid*, 221 S.W.3d at 39. Here, the only supposedly unlawful purpose that the Plaintiff's Complaint alleges is "a civil conspiracy between the two Defendants which resulted in injury to Plaintiff Nadigam's [sic] business" through actions "intentionally coordinated by the Defendants in order to cause damage to Plaintiff's business reputation." Complaint, p. 2, ¶¶ 18–19.

Critically, though, even taking the Plaintiff's allegations as true, a coordinated effort to cause economic damages through criticism of a business *is fully protected First Amendment activity that is not unlawful*. *See, e.g., Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) ("[A]lthough economic damage might be an intended effect of Mishkoff's expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business."). As such, the Plaintiff's Complaint fails to allege "an unlawful purpose, or a lawful purpose by unlawful means" necessary to state a cognizable civil conspiracy claim. *See Kincaid*, 221 S.W.3d 39. The Plaintiff's civil conspiracy claim must be dismissed accordingly.

iii. The Plaintiff's civil conspiracy claim is not pleaded with the requisite specificity.

"As to civil conspiracy, [the Tennessee Court of Appeals] has stated that '[i]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim.'" *McGee*, 106 S.W.3d at 64 (quoting *Harris*, 1999 WL 317946 at *2)). Here,

the Plaintiff's conspiracy claim is based entirely upon conclusory legal allegations—rather than material factual allegations—that are nowhere near sufficient to sustain the cause of action. *See Kincaid*, 221 S.W.3d at 38 ("Conclusory allegations, however, unsupported by material facts will not be sufficient to state such a claim.").

Specifically, the Plaintiff's civil conspiracy claim is premised upon the following bare allegations:

> 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.
>
> . . .
>
> 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.
>
> 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.

Complaint, pp. 2–3.

These allegations are precisely the sort of "vague and conclusory allegations unsupported by material facts" that are manifestly insufficient to state a civil conspiracy claim and require dismissal. *See McGee*, 106 S.W.3d at 64. The Plaintiff's lack of specificity is also particularly prejudicial in the instant case, where the Plaintiff has sued the Defendants not only over their own statements, but also over unspecified statements made by <u>one another</u>. This failure utterly deprives the Defendants of fair notice of what they must defend against. The Plaintiff's civil conspiracy claim fails and compels

dismissal as a matter of law due to this fatal defect as well. *See id.*

## B. THE PLAINTIFF'S 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 Act's specialized provisions. *See* TENN. CODE ANN. § 20-17-104(a).[3] Pursuant to 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**[.]

[3] 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.*

(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* Complaint, p. 1, ¶¶ 1 & 7; **Exhibit B.** Consequently, for purposes of the 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. <u>Grounds for Granting Ms. Beavers' TPPA Petition</u>**

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 defense set forth above in support of her Motion to Dismiss. In further support of her defenses to this action, Ms. Beavers has appended a sworn Affidavit as **Exhibit A** to provide further factual support for the defenses raised in her Motion to Dismiss; to refute the factual allegations underlying the Plaintiff's claims; and to establish the following additional defenses to this action:

(1) The Yelp! review at issue was true or substantially true; and

(2) The Yelp! review at issue was not posted with actual malice or negligence in failing to ascertain the truth.

*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."[4] *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, 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 negligence. *See*

[4] Tennessee law provides that establishing truth is the 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.