IN THE GENERAL SESSIONS COURT OF WILSON COUNTY, TENNESSEE

NANDIGAM NEUROLOGY, PLC, and KAVEER NANDIGAM, M.D.,	§	
Plaintiffs,	§	
v.	§	Case No.: 2020-CV-152
KELLY BEAVERS	§	
Defendant.	§	

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

II. LEGAL STANDARDS

A. HEIGHTENED CONSTITUTIONAL REQUIREMENTS GOVERNING DEFAMATION CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. THE TENNESSEE PUBLIC PARTICIPATION ACT

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

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

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

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

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

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

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

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

III. FACTS

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

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

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

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

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

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

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

i. <u>The statements in Ms. Beavers's Yelp! review are not capable of conveying a defamatory meaning as a matter of law.</u>

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

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

Exhibit C.

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

defamatory meaning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. <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 essential breathing space for expression in a free society. Ms. Beavers's innocuous Yelp! review easily falls within its protection.

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

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

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

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

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

iii. The Plaintiffs have failed to plead actual malice.

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

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

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

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

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

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

(partial emphasis added).

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

4. Plaintiff Nandigam Neurology's claims may not be maintained because its previous dismissal could only be taken with prejudice.[2]

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

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

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

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

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

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

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

[3] A motion to alter or amend the order of dismissal at issue to reflect that mandate is impending.

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

1. Applicability of the Tennessee Public Participation Act

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

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

(emphases added).

Here, Ms. Beavers's statements qualify as "a communication made in connection

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

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

2. <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 argument set forth above in support of her defense

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

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

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

(3) The Plaintiffs—particularly having attributed in excess of $25,000 in damages to a non-party to this action, *see* **Exhibit B** (Complaint)—cannot prove actual damages.

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

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

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

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

V. COSTS, ATTORNEY'S FEES, & SANCTIONS

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

> If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party:
>
> (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition; and
>
> (2) Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.

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

VI. CONCLUSION

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

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

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

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

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Counsel for Plaintiff

By: _____
Daniel A. Horwitz, Esq.

NOTICE OF HEARING

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