

**IN THE CHANCERY COURT OF WASHINGTON COUNTY, TENNESSEE  
AT JONESBOROUGH**

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DAN A. NICOLAU,

*Plaintiff,*

*v.*

CITIZENS COMMISSION ON HUMAN  
RIGHTS OF NASHVILLE, *et al.*,

*Defendants.*

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Case No.: 19-CV-0139

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**DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF THEIR  
MOTION TO DISMISS**

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**I. Introduction**

This is a defamation action filed by the Plaintiff against two mental health watchdog organizations. Specifically, the Plaintiff has sued the Defendants for publishing news articles about the Plaintiff's high-profile misconduct regarding his romantic relationship with a woman to whom he admittedly prescribed medication and stalked.

Critically, the Plaintiff has already stipulated to extensive facts surrounding his misconduct in a Consent Order with the Tennessee Department of Health, resulting in severe professional discipline. See **Exhibit #1** (Tennessee Department of Health Certified Consent Order). The Plaintiff's egregious misconduct further resulted in him being indicted criminally and pleading guilty to both Stalking and Aggravated Criminal Trespass. See **Exhibit #2** (Order Accepting Plea of Guilt).<sup>1</sup> This action followed.

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<sup>1</sup> Because they are both orders and public records, the Plaintiff's Consent Order and Order Accepting Plea of Guilt may each be considered by this court without converting the instant motion into a motion for summary judgment. See, e.g., *W. Exp., Inc. v. Brentwood Servs., Inc.*, No. M200802227COAR3CV, 2009 WL 3448747, at \*3 (Tenn. Ct. App. Oct. 26, 2009) (citing *Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at \*8 (Tenn. Ct. App. Feb.19, 2009)).

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Independent of its absent merit, the Plaintiff's defamation claim against each Defendant is time-barred by the one-year statute of limitations that governs libel actions. *See* Tenn. Code Ann. § 28-3-104(a)(1)(A). This action was commenced well over one year after publication of the October 2017 articles at issue. Accordingly, dismissal of the Plaintiff's Amended Complaint is warranted.

The Plaintiff's Amended Complaint additionally fails to state a cognizable claim for relief and should be dismissed with prejudice for each of the following reasons:

First, the News Articles at issue constitute true and fair reports of the Plaintiff's Consent Order with the Tennessee Department of Health. *See Exhibit #1*.

Second, the News Articles represent Defendants' commentary upon true and nondefamatory published facts, which renders them categorically inactionable.

Third, the News Articles represent constitutionally protected opinions.

Fourth, the News Articles are inactionable under the substantial truth doctrine.

Fifth, in the context in which the News Articles were published, the Plaintiff is libel-proof.

Last, the Plaintiff's claims against Defendant Citizens Commission On Human Rights—an entity that is based in California, does not target Tennessee, and maintains no physical presence in Tennessee—should be dismissed for want of personal jurisdiction.

For all of these reasons, as to both Defendants, the Plaintiff's Amended Complaint should be **DISMISSED**.

## **II. Legal Standard**

“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).<sup>2</sup> Generally, a motion to dismiss is resolved by examining the pleadings alone, see *Legett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn. 2010), but this Court may also consider “items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned . . . without converting the motion into one for summary judgment.” *W. Exp., Inc. v. Brentwood Servs., Inc.*, No. M200802227COAR3CV, 2009 WL 3448747, at \*3 (Tenn. Ct. App. Oct. 26, 2009) (quoting *Ind. State Dist. Council of Laborers v. Brukart*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at \*8 (Tenn. Ct. App. Feb.19, 2009) (perm. app. denied Aug. 24, 2009) (in turn quoting Wright and Miller, *Federal Practice and Procedure*, Civil § 1357, p. 376 (3d ed.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. See *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

#### **A. APPLICABLE STATUTE OF LIMITATIONS**

“Where the relevant dates are reflected on the face of the complaint, as they are in this case, a statute of limitations defense is appropriately asserted by way of a Rule 12.02(6) motion to dismiss.” *Warnick v. Carter Cty.*, No. E2002-00833-COA-R3CV, 2003 WL 174754, at \*1, n. 2 (Tenn. Ct. App. Jan. 27, 2003) (citing *Anthony v. Tidwell*, 560 S.W.2d 908, 909 (Tenn. 1977) (“A complaint is subject to dismissal under Rule 12.02(6) for failure to state a claim if an affirmative defense clearly and unequivocally

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<sup>2</sup> The Plaintiff insists that Tennessee law governs its Amended Complaint. *Plaintiff’s Amended Complaint*, pp. 3-4, ¶9. Defendants dispute that Tennessee substantive law governs the claim that Plaintiff has asserted against Defendant Citizens Commission on Human Rights, but for purposes of the instant motion, the Plaintiff’s claims cannot survive under Tennessee law, either, and they should be dismissed as a result.

appears on the face of the complaint.”)).

With respect to the Plaintiff’s libel claim—the only cause of action that the Plaintiff has asserted—Tennessee law imposes “a one-year statute of limitations for libelous defamation[.]” *See Vaughn v. Methodist Hosp. Staff & Admin.*, No. W2016-00422-COA-R3-CV, 2017 WL 1861783, at \*2 (Tenn. Ct. App. May 8, 2017), *appeal denied* (Sept. 22, 2017). *See also* Tenn. Code Ann. § 28-3-104(a)(1)(A) (“the following actions shall be commenced within one (1) year after the cause of action accrued: (A) Actions for libel”). Additionally, “[u]nder the single publication rule, any mass communication that is made at approximately one time . . . is construed as a single publication of the statements it contains, thereby giving rise to only one cause of action as of the moment of initial publication, no matter how many copies are later distributed.” *Clark v. Viacom*, 617 Fed.Appx. 495, 502–03 (Tenn. Ct. App. 2015) (citing *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 193–94 (Tenn. 1973), and Restatement (Second) of Torts § 577A, cmt. c (1977)). Thus, a cause of action governed by the single publication rule “accrues at the time of the original publication, and [] the statute of limitations runs from that date.” *Applewhite*, 495 S.W.2d at 193.

Further, absent secrecy or the “inherently undiscoverable nature” of a publication, *see Ali v. Moore*, 984 S.W.2d 224, 228 (Tenn. Ct. App. 1998), **the discovery rule does not apply in defamation cases.** *See Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 821 (Tenn. 1994) (“We conclude that the rationale for declining to apply the discovery rule to defamation statutes of limitations is persuasive.”). *See also Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.*, 566 S.W.3d 671, 710 (Tenn. 2019) (“This Court has declined to apply the discovery rule to actions for defamation”). Consequently, the statute of limitations to assert a written

defamation claim expires one year after the date of an allegedly offending statement's publication. *Id.*

### **B. THRESHOLD QUESTIONS OF LAW GOVERNING DEFAMATION CLAIMS**

The Plaintiff's Amended Complaint asserts a single cause of action for written defamation against each Defendant. *See Plaintiff's Amended Complaint*, pp. 3-4, ¶ 9. To establish a prima facie case of defamation under Tennessee law, a plaintiff must prove that: "(1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Davis v. The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001). Thus, an allegedly defamatory statement "must be factually false in order to be actionable."<sup>3</sup> *See Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at \*4 (Tenn. Ct. App. Apr. 10, 1997).

Notably, "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 Co. 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 he has sued over. *See, e.g., Moman*, No. 02A01-9608-CV00182, 1997 WL 167210 at \*3 ("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

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<sup>3</sup> In Tennessee, implications regarding an allegedly tortious publication are governed by distinct and independent torts. *See generally Loftis v. Rayburn*, No. M201701502COAR3CV, 2018 WL 1895842, at \*5-6 (Tenn. Ct. App. Apr. 20, 2018) (describing Tennessee's independent recognition of the torts of "defamation by implication or innuendo" and "false light invasion of privacy."). In this case, the Plaintiff's Amended Complaint exclusively alleges a defamation claim. *See Plaintiff's Amended Complaint*, pp. 3-4, ¶ 9. Accordingly, any claim that the Plaintiff premises upon an asserted implication is not cognizable under the Plaintiff's asserted claim.

S.W.3d 696, 708 (Tenn. Ct. App. 2012); *McWhorter v. Barre*, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003). As a consequence, “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) (quoting *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000) (“[T]he preliminary question of whether a statement ‘is capable of conveying a defamatory meaning’ presents a question of law.”); *McWhorter*, 132 S.W.3d at 364 (quoting *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978)) (“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.’”). 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. *Id.*

Critically, Tennessee courts have also adopted several categorical bars that prevent claimed defamations from being actionable, several of which are outcome-determinative in the instant case:

First, in order to provide a means of “keeping the public informed” about official

proceedings, *see Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 284 (Tenn. Ct. App. 2007), Tennessee recognizes a fair report privilege that applies to “fair and accurate report[s] of official actions or proceedings” as long as a report is based on disclosed source material. *See Funk v. Scripps Media, Inc.*, 570 S.W.3d 205, 222 (Tenn. 2019). Significantly, “[t]he report need not be a verbatim, technically accurate account in every detail, as long as it conveys a correct and just impression of what took place.” *Lewis*, 238 S.W.3d at 284.

Second, our courts have held that “comments upon true and nondefamatory published facts are not actionable, ‘even though [the comments] are stated in strong or abusive terms.’” *Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at \*3 (Tenn. Ct. App. Sept. 30, 2015), *appeal denied* (Feb. 18, 2016) (quoting *Stones River Motors, Inc. v. Mid-South Publ'g Co., Inc.*, 651 S.W.2d 713, 720 (Tenn. Ct. App. 1983)). *See also 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). Our Court of Appeals has also recognized that this prohibition against liability has “been given constitutional protection under the First Amendment by the United States Supreme Court.” *Moman*, 1997 WL 167210, at \*4 (citing *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6 (1970)).

Third, our courts have held that opinions enjoy robust constitutional protection under the First Amendment. *See Stones River Motors*, 651 S.W.2d at 722. As a result, “an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts.” *Id.*

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). Under that doctrine, defamation claims that are premised upon minor inaccuracies regarding a plaintiff's reputation-tarnishing incidents—rather than whether any such incidents occurred at all—are not actionable. See *id.* See also *Spicer v. Thompson*, No. M200203110COAR3CV, 2004 WL 1531431, at \*7 (Tenn. Ct. App. July 7, 2004) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (“In determining the truth or falsity of a statement in the law of defamation the Supreme Court of the United States has held . . . [that the law] ‘overlooks minor inaccuracies and concentrates upon substantial truth.’”)).

Fifth, a libel-proof Plaintiff cannot assert a defamation claim. See *Looper v. News Channel 5 Network*, No. CIV.A.6197C, 2002 WL 32163526, at \*1 (Tenn. Cir. Ct. May 7, 2002) (citing *Davis v. The Tennessean*, No. M1999-01602-COA-R3-CV, 2001 WL 950108 (Tenn. Ct. App. Oct. 29, 2001); *Coker v. Sundquist*, No. 01A01-9806-BC-00318, 1998 WL 736655 (Tenn. Ct. App. Oct. 23, 1998)).

### **C. Personal Jurisdiction**

Due process recognizes a “distinction between general and specific personal jurisdiction.” *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 744 (Tenn. 2013). Explaining that distinction, our Supreme Court has noted that:

Specific jurisdiction exists when a defendant has minimum contacts with the forum state and the cause of action arises out of those contacts. General jurisdiction, on the other hand, may be proper even when the cause of action does not arise out of the defendant's activities in the forum state. A state's courts may assert general jurisdiction when the defendant is “essentially at home” in the state. . *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ----, ----, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011). Being essentially at home means that a nonresident defendant's contacts with the forum state are “sufficiently continuous and systematic” such that it would be fair to subject the defendant to suit in the forum state, even when the



cause of action arises elsewhere. *Goodyear v. Brown*, 131 S.Ct. at 2854; see also *Helicopteros Nacionales*, 466 U.S. at 414–16, 104 S.Ct. 1868; *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 648–49.

*Id.*

In specific personal jurisdiction cases, “[t]o establish minimum contacts, there must be a ‘substantial connection’ between the defendant and the forum state. And this connection ‘must come about by an action of the defendant purposefully directed toward the forum state.’” *Id.* at 746 (quoting *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112 (1987) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76, 105 (1985))). Additionally, when assessing a defendant’s alleged contacts with a jurisdiction, “a trial court is not obligated to accept as true factual allegations . . . that are controverted by more reliable evidence and plainly lack credibility.” *See id.* at 735.

### **III. Facts**

The Plaintiff’s Amended Complaint asserts a single claim for defamation against each Defendant. *See Plaintiff’s Amended Complaint*, pp. 3-4, ¶ 9. Plaintiff’s defamation claim is premised upon separate, written news articles published by each Defendant (collectively, the “News Articles”), which have been appended to the Plaintiff’s Amended Complaint and which the Plaintiff collectively designates as “Exhibit A.”

The First News Article over which the Plaintiff has sued was published by Defendant Citizens Commission on Human Rights. *See Plaintiff’s Amended Complaint, Exhibit A* (First News Article), pp. 1-8. The article is entitled: “Betrayal Under the Guise of Help—Sexual Predators Pervasive in Mental Health Industry,” and it reflects a publication date of “October 31, 2017.” *Id.* at p. 3.

The First News Article makes just a single, passing reference to the Plaintiff on its

seventh page, stating: “The Tennessee Board of Medical Examiners placed psychiatrist Dan Nicolau on indefinite probation for charges including having been convicted of aggravated burglary and stalking of a female patient with whom he’d ‘entered into a romantic relationship.’” *Id.* at p. 7. This statement admittedly contains a minor inaccuracy; although the Plaintiff was indicted for Aggravated Burglary and Stalking, he ended up pleading to Aggravated Criminal Trespass and Stalking. See **Exhibit #2**, pp. 3-4. The First News Article also footnotes its source material and provides readers with a link to a Knox News Sentinel article describing the Plaintiff’s misconduct. *Id.* at p. 8 (citing Kristi L. Nelson, *3 ET doctors have licenses placed on probation, state says*, KNOX NEWS SENTINEL (Oct. 23, 2017) <http://www.knoxnews.com/story/news/health/2017/10/23/sexual-misconduct-patients-overprescribing-drugs-3-east-tennessee-doctors-probation/791709001/>).

The Second News Article appended to the Plaintiff’s Amended Complaint—which the Plaintiff also designates as “Exhibit A”—was published by Defendant Citizens Commission on Human Rights of Nashville, which “investigates abuse in the field of mental health.” See *Plaintiff’s Amended Complaint, Exhibit A* (Second News Article), pp. 9-10. The article is entitled: “Johnson City Psychiatrist Dan Nicolau Disciplined by State,” and it concerns a story published by “The Johnson City Press reported on Oct. 16, 2017.” *Id.* at p. 9.

The Second News Article provides a near-verbatim recitation of the stipulations of fact and discipline set forth in the Plaintiff’s Consent Order with the Tennessee Department of Health. See *id.* at pp. 9-10. One of the Consent Order’s provisions also indicates that the Plaintiff had undergone an assessment that recommended that he “utilize a chaperon when seeing females in an addiction/Suboxone treatment context[.]”

See **Exhibit #1**, p. 5, ¶ 13(e). Based on that published and stipulated fact, the Second News Article states: “Who’s that with Johnson City Psychiatrist *Dan Nicolau*? It might be his chaperone...” See *Plaintiff’s Amended Complaint, Exhibit A* (Second News Article), p. 9. Of note, the Second News Article, too, provides citations and links to its source material, including directing readers to the linked “State Board of Medical Examiners Order” and to other news articles about the Plaintiff’s misconduct published by the Johnson City Press and the Knoxville News Sentinel. *Id.* at p. 10.

Critically, the Plaintiff’s Complaint does not allege that the October 2017 publication dates noted on the face of the News Articles at issue are inaccurate. Instead, despite insisting that the News Articles were specifically targeted to reach the Plaintiff’s patients and caused the Plaintiff to suffer massive damages, see *Plaintiff’s Amended Complaint*, p. 1, ¶ 1; p. 4, ¶ 1, the Plaintiff alleges that he did not “discover[.]” them until January 2019—some fifteen months after their publication. See *id.* at p. 2, ¶ 4 (“On or about the 21<sup>st</sup> day of January, 2019, the plaintiff discovered that defendants . . . did defame, malign, and vilify the plaintiff by making false statements about the plaintiff which statements were publicized and spread in multiple publications and on the internet as follows . . .”). This action followed.

#### **IV. Argument**

A. **The Plaintiff’s claims are time-barred, having been filed more than one year after the News Articles’ publication in October 2017.**

Tennessee law imposes “a one-year statute of limitations for libelous defamation[.]” See *Vaughn*, No. W2016-00422-COA-R3-CV, 2017 WL 1861783, at \*2. See also Tenn. Code Ann. § 28-3-104(a)(1)(A) (“the following actions shall be commenced within one (1) year after the cause of action accrued: (A) Actions for libel”). Here, the

Plaintiff's Amended Complaint reflects that the First News Article over which it has sued was published on "October 31, 2017," see *Exhibit A to Plaintiff's Amended Complaint* (First News Article), p. 3, and that the Second News Article at issue concerns a publication "reported on Oct 16, 2017." *Id.* at p. 9. Accordingly, the statute of limitations for the Plaintiff's defamation claims expired in October 2018. See Tenn. Code Ann. § 28-3-104(a)(1)(A). This action, however, was not commenced by the Plaintiff until after that statute of limitations expired.

Notably, the Plaintiff does not claim otherwise. Instead, the Plaintiff seeks to circumvent the applicable statute of limitations by asserting that he did not "discover" the articles at issue until January 2019—some fifteen months after their publication. See *id.* at p. 2, ¶ 4 ("On or about the 21<sup>st</sup> day of January, 2019, the plaintiff discovered that defendants . . . did defame, malign, and vilify the plaintiff by making false statements about the plaintiff which statements were publicized and spready in multiple publications and on the internet as follows . . ."). Critically, though, absent secrecy or the "inherently undiscoverable nature" of a publication, see *Ali*, 984 S.W.2d at 228, **the discovery rule does not apply in defamation cases.** See *Quality Auto Parts Co.*, 876 S.W.2d at 821 ("We conclude that the rationale for declining to apply the discovery rule to defamation statutes of limitations is persuasive."). See also *Individual Healthcare Specialists, Inc.*, 566 S.W.3d at 710 ("This Court has declined to apply the discovery rule to actions for defamation"). Nor could the discovery rule apply in a case like this one, given the Plaintiff's own unqualified assertion that the articles at issue were public, visible, and specifically targeted at both this jurisdiction and his patients, all of which allegedly resulted in him experiencing significant professional harm. See *Plaintiff's Amended Complaint*, p. 1, ¶ 1 (alleging that "Defendant [sic] disseminated the defamatory language

online with heavy use of location-specific language,” and that “Defendant [sic] knew the effect of its actions and intended to reach Plaintiff’s patients and potential patients and thereby cause harm to the Plaintiff.”).

In sum: The Plaintiff’s claims against each Defendant were filed more than one year after publication of the News Articles at issue, and as such, this action was commenced after the statute of limitations to initiate a libel action expired. *See* Tenn. Code Ann. § 28-3-104(a)(1)(A). Thus, the Plaintiff’s Amended Complaint is time-barred, and it must be dismissed with prejudice as a consequence. *See Warnick*, No. E2002-00833-COA-R3CV, 2003 WL 174754, at \*1, n. 2 (“Where the relevant dates are reflected on the face of the complaint, as they are in this case, a statute of limitations defense is appropriately asserted by way of a Rule 12.02(6) motion to dismiss.”) (citing *Anthony v. Tidwell*, 560 S.W.2d 908, 909 (Tenn. 1977)).

B. The Plaintiff’s Amended Complaint fails to state a cognizable claim for relief.

The Plaintiff’s Amended Complaint should additionally be dismissed on the basis that it fails to state a cognizable claim for relief for each of the following reasons:

First, the News Articles are protected by the fair report privilege.

Second, the News Articles represent Defendants’ comments upon true and nondefamatory published facts, which renders them categorically inactionable.

Third, the News Articles represent constitutionally protected opinions.

Fourth, the News Articles are inactionable under the substantial truth doctrine.

Fifth, in the context in which the News Articles were published, the Plaintiff is libel-proof.

Each independent basis for dismissal is detailed below.

1. **THE NEWS ARTICLES ARE PROTECTED BY THE FAIR REPORT PRIVILEGE.**

Provided that a news report is based on disclosed and official source material, Tennessee recognizes a fair report privilege that applies to “fair and accurate report[s] of official actions or proceedings.” *See Funk*, 570 S.W.3d at 222. “[N]either actual nor express malice defeats the privilege; the only limitations on the fair report privilege are that a report of an official action or proceeding must be fair and accurate.” *Id.* at 207. A report also “need not be a verbatim, technically accurate account in every detail, as long as it conveys a correct and just impression of what took place.” *Lewis*, 238 S.W.3d at 284 (citing *American Publ'g Co. v. Gamble*, 115 Tenn. at 677, 90 S.W. 1005, 1008 (Tenn. 1906); *Smith v. Reed*, 944 S.W.2d at 625; *Langford v. Vanderbilt Univ.*, 318 S.W.2d 568, 574–75 (Tenn. Ct. App. 1958)). “[T]he foundation of the privilege was the importance attached to keeping the public informed of the proceedings in court . . . and of the contents of papers filed in court.” *Id.* (citations omitted).

Here, the First News Article over which the Plaintiff has sued makes only the following passing reference to the Plaintiff: “The Tennessee Board of Medical Examiners placed psychiatrist Dan Nicolau on indefinite probation for charges including having been convicted of aggravated burglary and stalking of a female patient with whom he’d ‘entered into a romantic relationship.’” *Plaintiff's Amended Complaint, Exhibit A*, p. 7. There is also no doubt that the Tennessee Department of Health—following a proceeding held “before the Tennessee Board of Medical Examiners”—did, in fact, place the Plaintiff on probation, as demonstrated by the Plaintiff’s Consent Order with the Tennessee Department of Health. *See generally Exhibit #1*. The Consent Order provided for an initial probationary period of two years, *see id.* at ¶ 18 (“The Tennessee medical license of Dan Nicolau, M.D., license number 49214, is hereby placed on **PROBATION** for two (2)

years effective the date of entry of this Order”), and it additionally provided that although the Plaintiff could “request” an order lifting his probation after two years, lifting the Plaintiff’s probation was not automatic, and the Plaintiff’s probation would remain in effect if essential preconditions were not met. *See id.* at ¶ 23 (“Upon expiration of the two (2) year probationary period, and continued compliance with all recommendations of the TMF, Respondent may request an Order of Compliance to have the probation of Respondent’s license to practice medicine lifted. Respondent must personally appear before the board to have the probation lifted.”).

The Consent Order additionally details the Plaintiff’s criminal proceedings—attached hereto as **Exhibit #2**—that arose out of his relationship with a female individual to whom the Plaintiff had prescribed Percocet and Oxycodone. *See Exhibit #1*, ¶¶ 2-11.

In particular, the Consent Order details the following stipulated findings of fact:

2. On or about September 2015, [Plaintiff] wrote one (1) prescription for Percocet 10/325 mg for acquaintance C.B. that was not pursuant to a doctor-patient relationship. On or about November 2015, [Plaintiff] wrote C.B. one (1) prescription for Oxycodone 30mg that was not pursuant to a doctor-patient relationship.
3. On or around June 2016, Respondent and C.B. entered into a romantic relationship that ended in August 2016.
4. On or about August 27, 2016, C.B. received text messages from another user’s Facebook account after C.B. had blocked the [Plaintiff] from her Facebook.
5. Later that same evening, C.B. was awakened by the [Plaintiff] in her bedroom.
6. C.B. had recently been out of town and had left a key under the mat for her neighbor to have access to her home in to feed her dog. The [Plaintiff] was aware that C.B. would leave a key under the mat for the neighbor to feed the dog.
7. [Plaintiff] used the key and entered C.B.’s home. He approached C.B. and began to grab her and attempt to hug and kiss her.

8. C.B. screamed for the [Plaintiff] to leave, called 911 and ran outside of her home to meet Johnson City police officers who responded to the call.

9. The Johnson City police officers moved the [Plaintiff] to another area so they could speak with each person individually. During this time, the [Plaintiff] used his cell phone to call and text C.B. as she spoke with officers.

10. On or about August 23, 2017, [Plaintiff] appeared before the Criminal Court for Washington County, Tennessee and was placed on judicial diversion for 11 months and 29 days for one (1) count of aggravated criminal trespassing and one (1) count of stalking.

11. The judicial diversion ordered by the Court also required the [Plaintiff] to pay costs, complete a treatment plan established by the Tennessee Board of Medical Examiner[s] and have no contact with C.B.

*Id.*

Given this context, the First News Article's statement that the Plaintiff had "been convicted of aggravated burglary and stalking of a female patient with whom he'd 'entered into a romantic relationship,'" see *Plaintiff's Amended Complaint, Exhibit A*—though perhaps not "a verbatim, technically accurate account in every detail"—nonetheless "conveys a correct and just impression of what took place," which places it squarely within the protection of the fair report privilege. *Lewis*, 238 S.W.3d at 284. The gist of the report is that the Plaintiff: (1) entered into a romantic relationship with a female individual to whom he had prescribed medication; (2) stalked her; (3) entered her home without her consent; and (4) ended up pleading to serious criminal charges related to the incident—all of which resulted in severe professional discipline. *Plaintiff's Amended Complaint, Exhibit A*, p. 7. Despite a minor technical inaccuracy between one of the offenses for which the Plaintiff was indicted (Aggravated Burglary) and his resulting plea (Aggravated Criminal Trespass), the First News Article also fairly conveys this impression. See *Plaintiff's Amended Complaint, Exhibit A* (First News Article). The article is protected by



the fair report privilege as a consequence. *Lewis*, 238 S.W.3d at 284.

The Second News Article, too, is squarely protected by the fair report privilege. Indeed, it is a near-verbatim recitation of the facts to which the Plaintiff stipulated in his Consent Order. *See Plaintiff's Amended Complaint, Exhibit A* (News Article #2). Based expressly on one of those facts—that the Plaintiff had undergone an assessment that recommended that he “utilize a chaperon when seeing females in an addiction/Suboxone treatment context,” *see Exhibit #1*, p. 5, ¶ 13(e)—the Second News Article states: “Who’s that with Johnson City Psychiatrist *Dan Nicolau*? It might be his chaperone...” *See Plaintiff's Amended Complaint, Exhibit A* (Second News Article), p. 9.

Simply put: The News Articles are fair reports of the Plaintiff's severe and egregious misconduct, which resulted in both criminal and professional discipline as described. Consequently, to the extent that the Plaintiff experienced any professional consequences from their publication, that fact is not plausibly attributable to the News Articles themselves, but to the Plaintiff's own contemptible—and criminal—misbehavior, for which he was justly sanctioned. *See Exhibit #1; Exhibit #2*. The News Articles themselves constitute fair reports of that behavior based on disclosed and cited source material. As such, the News Articles are fair reports that are privileged from suit, and as to both Defendants, the instant action should be dismissed.

**2. THE NEWS ARTICLES ARE COMMENTS UPON TRUE AND NONDEFAMATORY PUBLISHED FACTS.**

To encourage the free exchange of information and ideas and to avoid chilling public commentary on issues of public importance, our courts have held that “comments upon true and nondefamatory published facts are not actionable, ‘even though [the comments] are stated in strong or abusive terms.’” *Davis v. Covenant Presbyterian*

*Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at \*3 (quoting *Stones River Motors, Inc.*, 651 S.W.2d at 720). As such, “[a] writer’s comments upon true and nondefamatory published facts are not actionable” as a matter of law. *See Weidlich*, No. M2017-00045-COA-R3-CV, 2017 WL 4862068, at \*6. Of note, this categorical prohibition against liability has also “been given constitutional protection under the First Amendment by the United States Supreme Court,” *see Moman*, 1997 WL 167210, at \*4 (citing *Greenbelt Coop. Publ’g Ass’n.*, 398 U.S. at 6), and based on that authority, the News Articles over which the Plaintiff has sued are inactionable. *Id.*

The Plaintiff specifically complains that the News Articles portray him “as though he had committed or had been accused of committing sexual misconduct, sexual assault, and/or sexual abuse or other abuse.” *See Plaintiff’s Amended Complaint*, p. 2, ¶ 4(a)(ii) (emphasis added). Critically, though, the Plaintiff has asserted only a defamation claim, regarding which implications are inactionable. *See, e.g., Moman*, 1997 WL 167210 at \*4 (holding a statement “must be factually false in order to be actionable.”). Even if the Defendants had specifically accused the Plaintiff “of committing sexual misconduct, sexual assault, and/or sexual abuse or other abuse,” however, *see Plaintiff’s Amended Complaint*, p. 2, ¶ 4(a)(ii), such commentary upon true and non-defamatory published facts would still be privileged from suit.

In the instant case, none of the following facts is defamatory as a matter of law—and commentary upon them is thus categorically inactionable as a matter of law—because the Plaintiff has stipulated to their truth in a binding, published Consent Order:

2. On or about September 2015, [Plaintiff] wrote one (1) prescription for Percocet 10/325 mg for acquaintance C.B. that was not pursuant to a doctor-patient relationship. On or about November 2015, [Plaintiff] wrote C.B. one (1) prescription for Oxycodone 30mg that was not pursuant to a doctor-patient relationship.

3. On or around June 2016, Respondent and C.B. entered into a romantic relationship that ended in August 2016.
4. On or about August 27, 2016, C.B. received text messages from another user's Facebook account after C.B. had blocked the [Plaintiff] from her Facebook.
5. Later that same evening, C.B. was awakened by the [Plaintiff] in her bedroom.
6. C.B. had recently been out of town and had left a key under the mat for her neighbor to have access to her home in to feed her dog. The [Plaintiff] was aware that C.B. would leave a key under the mat for the neighbor to feed the dog.
7. [Plaintiff] used the key and entered C.B.'s home. He approached C.B. and began to grab her and attempt to hug and kiss her.
8. C.B. screamed for the [Plaintiff] to leave, called 911 and ran outside of her home to meet Johnson City police officers who responded to the call.
9. The Johnson City police officers moved the [Plaintiff] to another area so they could speak with each person individually. During this time, the [Plaintiff] used his cell phone to call and text C.B. as she spoke with officers.
10. On or about August 23, 2017, [Plaintiff] appeared before the Criminal Court for Washington County, Tennessee and was placed on judicial diversion for 11 months and 29 days for one (1) count of aggravated criminal trespassing and one (1) count of stalking.
11. The judicial diversion ordered by the Court also required the [Plaintiff] to pay costs, complete a treatment plan established by the Tennessee Board of Medical Examiner[s] and have no contact with C.B.

**See Exhibit #1, ¶¶ 2-11.**

Further, based on these facts, characterizing the Plaintiff as having committed sexual misconduct is not only reasonable—it is an understatement. The Plaintiff has stipulated to the facts that he prescribed drugs to a female individual who was not his patient; entered into a romantic relationship with her; stalked her and entered her home without permission after their romantic relationship ended; grabbed her and attempted

to hug and kiss her after entering her home unlawfully; and then pleaded guilty to aggravated criminal trespass and stalking after she called the police and had him arrested. *Id.* Given these outrageous and disturbing facts to which the Plaintiff has stipulated, the Defendants' commentary on them—including references to the Plaintiff's misconduct as being "sexual" in nature—is both non-defamatory and perfectly warranted. *Id.* The News Articles at issue are inactionable as a result. *Moman*, 1997 WL 167210, at \*4.

**3. THE NEWS ARTICLES INCLUDE CONSTITUTIONALLY PROTECTED OPINIONS.**

Mere opinions enjoy constitutional protection under the First Amendment. *Weidlich*, No. M201700045COAR3CV, 2017 WL 4862068, at \*6 (holding that a "writer's opinions have constitutional protection under the First Amendment."). As a consequence, the Court of Appeals has held repeatedly "that 'an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts.'" *Id.* (quoting *Stones River Motors, Inc.*, 651 S.W.2d at 722).

Here, the News Articles over which the Plaintiff has sued do not imply the existence of any unstated defamatory facts. To the contrary, they each provide direct links and citations to their source material and set forth the facts upon which they are based directly. *See Plaintiff's Amended Complaint, Exhibit A.* Thus, any reference to the Plaintiff as a "sexual predator" is not only a constitutionally protected opinion, rather than a disprovable factual assertion—it is also an opinion that is overwhelmingly supported by the stipulated facts that the Plaintiff stalked a former romantic partner to whom he had previously prescribed medication and "began to grab her and attempt to hug and kiss her" after breaking into her home. *See Exhibit #1, ¶¶ 2-11.* As a consequence, the statements of opinion over which the Plaintiff has sued are categorically inactionable. *See Weidlich*,

No. M201700045COAR3CV, 2017 WL 4862068, at \*6.

4. THE NEWS ARTICLES ARE INACTIONABLE UNDER THE SUBSTANTIAL TRUTH DOCTRINE.

Tennessee recognizes “the substantial truth doctrine” in defamation cases. See *Isbell*, No. M199900052COAR3CV, 2000 WL 1817252, at \*5. Under the substantial truth doctrine, defamation claims that are premised upon minor inaccuracies regarding a plaintiff’s reputation-tarnishing incidents—rather than whether any such incidents occurred at all—cannot form the basis for a defamation claim. See *id.* See also *Spicer*, No. M200203110COAR3CV, 2004 WL 1531431, at \*7. As such, defamation claims that are premised upon inaccurate but insignificant distinctions like the one presented in the instant case are uniformly rejected across jurisdictions, in no small part because the United States Supreme Court has compelled that result.<sup>4</sup>

Specifically, in *Masson*, 501 U.S. at 516, the U.S. Supreme Court noted that “[t]he common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. **It overlooks minor inaccuracies and concentrates upon substantial truth.**” *Id.* (emphasis added) (citing Restatement (Second) of Torts

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<sup>4</sup> See, e.g., *Rackowski v. Peters*, No. 302606, 2012 WL 5853842, at \*4 (Mich. Ct. App. Nov. 13, 2012) (“When approaching the question of falsity in a defamation case, this Court overlooks minor inaccuracies and concentrates on the substantial truth of the statement. Minor inaccuracies do not amount to falsity as long as the gist or the sting of the communication is true.”) (internal citation omitted); *Jaillett v. Ga. Television Co.*, 520 S.E.2d 721, 724 (Ga. Ct. App. 1999) (“Minor factual errors which do not go to the substance, the gist, the sting of a story do not render a communication false for defamation purposes.”) (cleaned up); *AIDS Counseling & Testing Ctrs. v. Grp. W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (“If the gist or ‘sting’ of a statement is substantially true, minor inaccuracies will not give rise to a defamation claim.”) (quotation omitted); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 601 (D.C. Cir. 1988) (“minor inaccuracies will not give rise to a defamation claim when the ultimate defamatory implications are themselves not actionable. Furthermore, actual malice is not established in cases in which the statement is substantially accurate.”); *G.D. v. Kenny*, 15 A.3d 300, 310 (N.J. 2011) (“The law of defamation overlooks minor inaccuracies, focusing instead on ‘substantial truth.’”); *Mirafuentes v. Estevez*, No. 1:15-CV-610, 2015 WL 8177935, at \*4 (E.D. Va. Nov. 30, 2015) (“The statement at issue here is merely a minor inaccuracy. The “gist,” or substance, of the statement is accurate and the small inaccuracy was easily corrected in the subsequent update. Accordingly, the Court declines to find this statement is actionable.”).

§ 563, Cmt. c (1977); William Lloyd Prosser et al., *Prosser and Keeton on Law of Torts* 776 (5th ed. 1984)). As a result, the *Masson* Court held that a statement “is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’” *Id.* Further, the *Masson* Court explained, “[o]ur definition of actual malice relies upon this historical understanding.” *Id.* (citing Robert D. Sack, *Libel, Slander, and Related Problems* 138 (1980); *Wehling v. Columbia Broadcasting System*, 721 F.2d 506, 509 (5<sup>th</sup> Cir. 1983); Rodney A. Smolla, *Law of Defamation* § 5.08 (1991)). Thus, where—as here—a plaintiff is required to plead and prove actual malice, a plaintiff’s complaint cannot be premised upon “minor inaccuracies” if the “substantial truth” of the allegations at issue—in this case, that the Plaintiff was convicted of serious criminal offenses after stalking and breaking into the home of a woman and former romantic partner to whom he had previously prescribed medication—are true. *Id.* Further, as noted above, the Plaintiff has already stipulated that they are. *See Exhibit #1*, ¶¶ 2-11.

Accordingly, the Plaintiff’s claim that “the [First News] article intentionally mischaracterizes criminal court proceedings” because he was indicted for Aggravated Burglary and Stalking but pleaded to Aggravated Criminal Trespass and Stalking, *see Exhibit #2*, is premised upon a minor inaccuracy that would not have a different effect on the mind of the reader. *See Masson*, 501 U.S. at 516. As a consequence, it is not cognizable as defamation as a matter of law. *See id.* *See also Spicer*, 2004 WL 1531431, at \*7 (“Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.”) (cleaned up). Critically, even in significantly more egregious defamation cases than this one, the defense of substantial truth has also “been successfully asserted as a matter of law by a libel defendant who misstated a

plaintiff's involvement in the criminal justice system" in case after case after case. See *Behr v. Meredith Corp.*, 414 N.W.2d 339, 343 (Iowa 1987) (citing *Fendler v. Phoenix Newspapers Inc.*, 636 P.2d 1257, 1262 (Ariz. Ct. App. 1981) (defendant printed that plaintiff was "doing four-to-five years in prison" when in fact he was free pending appeal); *Sivulich v. Howard Publications, Inc.*, 466 N.E.2d 1218, 1219-20 (Ill. App. Ct. 1984) (defendant printed that plaintiff was "charged" with battery; in truth, plaintiff had been civilly sued for same act); *Hovey v. Iowa State Daily Publication Bd., Inc.*, 372 N.W.2d 253, 254-55 (Iowa, 1984) (defendant printed that plaintiff-victim had been raped and forced into genital sexual intercourse; actually, she had been forced to commit an oral sex act and no genital sexual intercourse had occurred); *Bill Partin Jewelry, Inc. v. Smith*, 467 So. 2d 188, 189 (La. Ct. App. 1985) (defendants broadcast an allegation that plaintiff had participated in burglary; actually, plaintiff had been accused only of receiving burglarized property); *Bosley v. Hebert*, 385 So. 2d 430, 431 (La. Ct. App. 1980) (plaintiff actually arrested for theft of washing machine but reported as having been arrested for theft by issuing worthless checks); *Hamilton v. Lake Charles Am. Press, Inc.*, 372 So. 2d 239, 240-41 (La. Ct. App.), writ denied, 375 So. 2d 943 (La. 1979) (defendant printed that plaintiff was disbarred and convicted for faking automobile accidents to defraud insurance companies; actually, plaintiff's disbarment had been stayed pending appeals, and his conviction had been for conspiracy to commit mail fraud dealing with faked accidents); *Rosen v. Capitol City Press*, 314 So. 2d 511, 512 (La. Ct. App. 1975) (defendant reported plaintiff-doctor was indicted for distributing narcotics; instead, he had been indicted for illegally distributing stimulants)).

Given this context, the minor inaccuracy over which the Plaintiff has sued is inactionable based on the substantial truth doctrine. See *Isbell*, No.

M199900052COAR3CV, 2000 WL 1817252, at \*5. The Plaintiff's Amended Complaint should be dismissed as a consequence.

5. **THE PLAINTIFF IS LIBEL-PROOF WITH RESPECT TO THE MISCONDUCT SET FORTH IN HIS CONSENT ORDER AND HIS ASSOCIATED CRIMINAL PROCEEDINGS.**

Tennessee recognizes the libel-proof plaintiff doctrine, which provides that a plaintiff with a severely tarnished reputation may not maintain a defamation action. See *Rogers v. Jackson Sun Newspaper*, No. CIV. A. C-94-301, 1995 WL 383000, at \*1 (Tenn. Cir. Ct. Jan. 30, 1995) (“This Court finds and holds, as a matter of law, Plaintiff’s reputation in the community at the time of the article’s publication was so severely tarnished, he is ‘libel-proof’ and may not maintain this defamation action for an allegedly erroneous report of his criminal record.”). The doctrine “essentially holds that ‘a notorious person is without a ‘good name’ and therefore may not recover for injury to it.’” *Davis v. The Tennessean*, 83 S.W.3d at 128 (quoting ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS, 35).

The libel-proof plaintiff doctrine is premised upon the notion that “[t]o suffer injury to one’s standing in the community, or damage to one’s public reputation, one must possess good standing and reputation for good character to begin with.” *Davis v. The Tennessean*, 83 S.W.3d at 130. As a consequence, the doctrine “has often been applied in a situation where”—as here—“the plaintiff’s complaint is that the publication accused him of the wrong crime.” See *id.* at 128. It is also a defense that is cognizable upon a motion to dismiss. *Id.* at 127-18.

In the context in which the News Articles were published, the Plaintiff is patently libel-proof. Here, the Plaintiff’s reputation was severely tarnished not because of the News Articles themselves, but because of the Plaintiff’s own egregious and high-profile



misconduct—misconduct that resulted in both severe professional discipline and criminal sanction as a consequence of extensive, reputation-tarnishing misdeeds to which the Plaintiff himself has stipulated. See **Exhibits ## 1-2**. As evidenced by the Plaintiff's own Amended Complaint in this case, that misconduct was also covered widely and reported in both local and regional newspapers after it occurred. See *Plaintiff's Amended Complaint, Exhibit A* (First News Article), p. 8 (citing Kristi L. Nelson, *3 ET doctors have licenses placed on probation, state says*, KNOX NEWS SENTINEL (Oct. 23, 2017) <http://www.knoxnews.com/story/news/health/2017/10/23/sexual-misconduct-patients-overprescribing-drugs-3-east-tennessee-doctors-probation/791709001/>); *id.* at p. 9 (Second News Article) (citing Johnson City Press report). Further, the Plaintiff's professional disciplinary proceedings and associated criminal proceedings related to his misconduct are all visible public records. See **Exhibits ## 1-2**.

Given this context, the Plaintiff is libel-proof with respect to the subject matter over which he has sued. There is simply no doubt that with respect to his professional disciplinary proceedings and his criminal proceedings, the Plaintiff does not “possess good standing and reputation for good character to begin with,” rendering him libel-proof. *Davis v. The Tennessean*, 83 S.W.3d at 130. As a consequence, the Plaintiff's Amended Complaint should be dismissed under the libel-proof plaintiff doctrine.

C. This Court lacks personal jurisdiction over Defendant Citizens Commission On Human Rights.

Personal jurisdiction can be established by proving either general or specific jurisdiction. *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 744. Defendant Citizens Commission On Human Rights is an entity based in California, and the Plaintiff's Amended Complaint does not assert any facts establishing or even implying that general

jurisdiction exists. *See generally Plaintiff's Amended Complaint*. Accordingly, this is a specific jurisdiction case.

Where, as here, specific jurisdiction is disputed:

Assessing minimum contacts involves a two-part test. The first step is the fact-gathering exercise of identifying the relevant contacts. **The plaintiff is required to establish that minimum contacts exist by a preponderance of the evidence.** The court should consider the quantity of the contacts, their nature and quality, and the source and connection of the cause of action with those contacts. A defendant's contacts are sufficiently meaningful when they demonstrate that the defendant has purposefully targeted Tennessee to the extent that the defendant should reasonably anticipate being haled into court here.

*State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 759–60 (emphasis added).

Here, the Plaintiff's Amended Complaint asserts only the following allegation as a basis for claiming that Defendant Citizens Commission On Human Rights has sufficient minimum contacts to be subject to the jurisdiction of Tennessee courts:

2. Jurisdiction is proper. Defendant [sic] disseminated the defamatory language online with heavy use of location-specific language. Defendant [sic] knew the effect of its actions and intended to reach Plaintiff's patients and potential patients and thereby cause harm to the Plaintiff. Defendant's record of similar acts towards psychiatrists is further evidence of this intent.

*See Plaintiff's Amended Complaint*, p. 2, ¶ 2.

Critically, when assessing a defendant's alleged contacts with a jurisdiction, "a trial court is not obligated to accept as true factual allegations . . . that are controverted by more reliable evidence and plainly lack credibility." *See State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 735. Here, there is also "more reliable evidence" available for the Court's review in the form of the underlying news article itself. *Id.*

Review of the actual news article over which the Plaintiff has sued Defendant Citizens Commission On Human Rights exposes the Plaintiff's allegations of "heavy use of location-specific language" and supposed targeting of the Plaintiff's patients as being

utterly groundless. The Plaintiff is not the focus of the First News Article—indeed, it barely mentions him—and it does not so much as reference him until its seventh page. *See Plaintiff's Amended Complaint, Exhibit A*, p. 7. Even then, the reference to the Plaintiff comes at the end of a long list of recent disciplinary actions taken against psychiatrists around the world, including in California, Florida, Australia, Michigan, the United Kingdom, Pennsylvania, Wyoming, Massachusetts, Mexico, Illinois, France, and Ontario. *See id.* at pp. 6-7. The First News Article also self-evidently is not an effort to target the Plaintiff's patients. *Id.* Instead, it is a canvassing of misconduct regarding fifteen different psychiatrists located around the world between September 2017 and the article's publication on October 31, 2017. *Id.*

As a result, the mere fact that the First News Article references the Plaintiff's professional discipline in an online publication is insufficient to establish personal jurisdiction in Tennessee. *See, e.g., Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790, 794-95 (W.D. Tenn. 2000) (“a general posting on the Internet is not sufficient to establish minimum contacts . . . . Here, there is no indication whatsoever that TDI's website is anything other than wholly passive. The evidence reveals that the allegedly defamatory statements were merely posted on the website to be viewed by whomever cared to do so.”); *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (“As we recognized in *ALS Scan*, ‘a person’s act of placing information on the Internet’ is not sufficient by itself to ‘subject[ ] that person to personal jurisdiction in each State in which the information is accessed.’ Otherwise, a ‘person placing information on the Internet would be subject to personal jurisdiction in every State,’ and the traditional due process principles governing a State's jurisdiction over persons outside of its borders would be subverted.”) (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)). *Cf.*

*Invisible Fence, Inc. v. Fido's Fences, Inc.*, 687 F. Supp. 2d 726, 736 (E.D. Tenn. 2009) (“in the Sixth Circuit, ‘the maintenance of [a] website, in and of itself, does not constitute . . . purposeful availment.’” (quoting *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002))); *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (“the fact that Dotster maintains a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction.”).

Further, because the mere act of publishing the First News Article is the only contact that the Plaintiff alleges Defendant Citizens Commission On Human Rights has with Tennessee, and because the First News Article itself exposes the Plaintiff’s claims of “heavy location-specific language” and patient targeting as being groundless, *See Plaintiff’s Amended Complaint, Exhibit A*, pp. 1-8, Tennessee lacks personal jurisdiction over Defendant Citizens Commission On Human Rights, and the Plaintiff’s Amended Complaint should be dismissed pursuant to Tenn. R. Civ. P. 12.02(2) as a result.

#### **V. Additionally Preserved Claims and Tenn. R. App. P. 9(a) Appeal**

In the event that the Plaintiff’s Complaint is not dismissed outright and in its entirety for the reasons set forth above, the Defendants expressly preserve the following additional claims and respectfully seek permission to take an immediate interlocutory appeal pursuant to Tenn. R. App. P. 9(a) on the following issues:

1. Whether Tennessee should adopt the incremental harm doctrine;
2. Whether Tennessee should adopt the subsidiary meaning doctrine; and
3. Whether the Tennessee Supreme Court’s decision in *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 424 (Tenn. 2011), in which the Tennessee Supreme Court “decline[d] to adopt the new *Twombly/Iqbal* ‘plausibility’”


pleading standard, should be reconsidered. *Id.* The Defendants submit that an interlocutory appeal on these issues is appropriate: (1) to prevent irreparable injury; (2) to prevent needless, expensive, and protracted litigation; (3) to enable a net reduction in the duration and expense of the litigation—to wit: dismissal of the Plaintiff's Amended Complaint—if the challenged order is reversed; and (4) to facilitate the development of a uniform body of law. *See* Tenn. R. App. P. 9(a).

## **VI. Conclusion**

For the foregoing reasons, the Defendant's Motion to Dismiss should be **GRANTED**, and the claims set forth in the Plaintiff's Amended Complaint should be **DISMISSED WITH PREJUDICE** pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted. Furthermore, as to Defendant Citizens Commission On Human Rights, the Plaintiff's Amended Complaint should be dismissed pursuant to Tenn. R. Civ. P. 12.02(2). An order dismissing the instant case should issue as a result, and the Defendants should be awarded their reasonable costs and attorney's fees associated with defending this action pursuant to Tenn. Code Ann. § 20-12-119(c).

Respectfully submitted,

By:

  
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Nashville, TN 37203  
daniel.a.horwitz@gmail.com  
(615) 739-2888

*Counsel for Defendants*

### **NOTICE OF HEARING**

This motion is scheduled to be heard in the Chancery Court of Washington County, Tennessee at Jonesborough on September 10, 2019 at 11:00 a.m. Failure to respond to this motion or appear for the scheduled hearing may result in this motion being granted.

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of August, 2019, a copy of the foregoing was served via UPS mail, postage prepaid, and e-mailed to the following parties:

Richard Phillips  
The Law Office of Richard Phillips, PLLC  
104 East Jackson Blvd., Suite #4  
Jonesborough, Tennessee 37659  
rjpmilligan@comcast.net

*Counsel for Plaintiff*

By:

  
Daniel A. Horwitz, Esq.

# Exhibit #1

FILED

AUG 14 2019

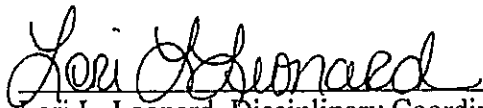
at 8:35A .m.

Sarah Lawson, Clerk and Master

**CERTIFICATION**

July 2, 2019

I, Lori L. Leonard, Disciplinary Coordinator, do hereby certify that the attached Consent Order entered September 27, 2017 for Dan Nicolau, MD, Tennessee license number 49214, is a true and correct copy of the disciplinary order on file in this Office.



\_\_\_\_\_  
Lori L. Leonard, Disciplinary Coordinator  
Tennessee Department of Health  
Investigations Division



FILED

AUG 14 2019

at 8:35A

Sarah Lawson, Clerk and Master



**STATE OF TENNESSEE  
DEPARTMENT OF HEALTH**

<b>IN THE MATTER OF:</b>	)	<b>BEFORE THE TENNESSEE BOARD</b>
	)	<b>OF MEDICAL EXAMINERS</b>
<b>DAN NICOLAU, M.D.</b>	)	
<b>RESPONDENT</b>	)	<b>CASE NO: 201602805</b>
	)	
<b>JOHNSON CITY, TENNESSEE</b>	)	
<b>TENNESSEE LICENSE NO.: 49214</b>	)	

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**CONSENT ORDER**

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Come now the Division of Health Related Boards of the Tennessee Department of Health (hereinafter the "Division"), by and through the Office of General Counsel, and Dan Nicolau, M.D. (hereinafter "Respondent"), who would respectfully move the Tennessee Board of Medical Examiners (hereinafter the "Board") for approval of this Consent Order affecting Respondent's medical license in the State of Tennessee.

The Board is responsible for the regulation and supervision of medical doctors licensed to practice in the State of Tennessee. See Tennessee Medical Practice Act, Tennessee Code Annotated Section (hereinafter "TENN. CODE ANN. §") 63-6-101, *et seq.* It is the policy of the Board to require strict compliance with the laws of this State, and to apply the laws so as to preserve the quality of medical care provided in Tennessee. It is the duty and responsibility of the Board to enforce the Tennessee Medical Practice Act in such a manner as to promote and protect the public health, safety and welfare in every practicable way, including disciplining medical doctors who violate the provisions of TENN. CODE ANN. § 63-6-101, *et seq.* or the Rules and Regulations promulgated by the Board and recorded in the Official Compilation Rules and Regulations of the State of Tennessee (hereinafter "TENN. COMP. R. & REGS.").

Respondent, by his signature to this Consent Order, waives the right to a contested case hearing and any and all rights to judicial review in this matter. Respondent agrees that

presentation to and consideration of this Consent Order by the Board for ratification and all matters divulged during that process shall not constitute unfair disclosure such that the Board or any of its members shall be prejudiced to the extent that requires their disqualification from hearing this matter should this Order not be ratified. Likewise, all matters, admissions and statements disclosed or exchanged during the attempted ratification process shall not be used against Respondent in any subsequent proceeding unless independently entered into evidence or introduced as admissions.

Respondent expressly waives all further procedural steps and expressly waives all rights to seek judicial review of or to challenge or contest the validity of this Consent Order. Respondent understands that by signing this Consent Order, Respondent is allowing the Board to issue its order without further process. Respondent acknowledges that this is a formal disciplinary action and will be reported to the Health Integrity and Protection Data Bank and/ or similar agency. In the event that the Board rejects this Consent Order for any reason, it will be of no force or effect for either party.

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## I. STIPULATIONS OF FACT

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1. Respondent has been at all times pertinent hereto licensed by the Board as a medical doctor in the State of Tennessee, having been granted Tennessee medical license number 49214 by the Board on October 3, 2012, which expires on May 31, 2018.
2. On or about September 2015, Respondent wrote one (1) prescription for Percocet 10/325 mg for acquaintance C.B. that was not pursuant to a doctor-patient relationship. On or about November 2015, Respondent wrote C.B. one (1) prescription for Oxycodone 30 mg that was not pursuant to a doctor-patient relationship.

3. On or around June 2016, Respondent and C.B. entered into a romantic relationship that ended in August 2016.
4. On or about August 27, 2016, C.B. received text messages from another user's Facebook account after C.B. had blocked the Respondent from her Facebook.
5. Later that same evening, C.B. was awakened by the Respondent in her bedroom.
6. C.B. had recently been out of town and had left a key under the mat for her neighbor to have access to her home in to feed her dog. The Respondent was aware that C.B. would leave a key under the mat for the neighbor to feed the dog.
7. Respondent used the key and entered C.B.'s home. He approached C.B. and began to grab her and attempt to hug and kiss her.
8. C.B. screamed for the Respondent to leave, called 911 and ran outside of her home to meet Johnson City police officers who responded to the call.
9. The Johnson City police officers moved the Respondent to another area so they could speak with each person individually. During this time, the Respondent used his cell phone to call and text C.B. as she spoke with officers.
10. On or about August 23, 2017, Respondent appeared before the Criminal Court for Washington County, Tennessee and was placed on judicial diversion for 11 months and 29 days for one (1) count of aggravated criminal trespassing and one (1) count of stalking.
11. The judicial diversion ordered by the Court also required the Respondent to pay costs, complete a treatment plan established by the Tennessee Board of Medical Examiner and have no contact with C.B.
12. Prior to the Court placing the Respondent on judicial diversion, Respondent completed a multidisciplinary assessment with Acumen Assessments on or about June 2017.

13. The assessment stated that the Respondent was fit to practice medicine and recommended the following:
- a. Respondent enter into a monitoring agreement with the Tennessee Medical Foundation for a period of time deemed appropriate by the TMF;
  - b. Respondent refrain from consuming alcohol for one year;
  - c. participate in a TMF approved boundary course within six months;
  - d. participate in a continuing medical education prescription boundaries course within 6 months;
  - e. utilize a chaperon when seeing females in an addiction/Suboxone treatment context;
  - f. engage in weekly, individual psychotherapy with a TMF approved psychologist;
  - g. continue to be under the care of a TMF approved psychiatrist;
  - h. receive hormone replacement treatment from a physician at a medical office where he is being treated and that physician there review the report
14. On or about August 3, 2017 Respondent entered into a two (2) year contract with the Tennessee Medical Foundation.

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## II. GROUNDS FOR DISCIPLINE

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The facts stipulated to in the Stipulations of Fact are sufficient to establish that grounds for discipline of Respondent's medical license exist. Specifically, Respondent has violated the following statutes or rules which are part of the Tennessee Medical Practice Act, (TENN. CODE ANN. § 63-6-101, *et seq.*) for which disciplinary action before and by the Board is authorized:

15. The facts stipulated in paragraph 2 *supra*, constitute a violation of TENN. CODE ANN. § 63-6-

214(b)(12):

Dispensing, prescribing or otherwise distributing any controlled substance or any other drug not in the course of professional practice, or not in good faith to relieve pain and suffering, or not to cure an ailment, physical infirmity or disease, or in amounts and/or for durations not medically necessary, advisable or justifiable for a diagnosed condition

16. The facts stipulated in paragraphs 2 through 10, *supra*, constitute a violation of TENN. CODE

ANN. § 63-6-214(b)(1):

Unprofessional, dishonorable or unethical conduct

17. The facts stipulated in paragraph 10, *supra*, constitute a violation of TENN. CODE ANN. § 63-

6-214(b)(2):

Violation or attempted violation, directly or indirectly, assisting or abetting the violation, or conspiring to violate any provision of this chapter or, any lawful order of the board issued pursuant thereto or any criminal statute of the state of Tennessee

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### III. POLICY STATEMENT

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The Tennessee Board of Medical Examiners takes this action in order to protect the health, safety and welfare of the people of the State of Tennessee and ensure that the public confidence in the integrity of the medical profession is preserved.

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### IV. ORDER

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**NOW THEREFORE**, Respondent, for the purpose of avoiding further administrative action with respect to this cause, agrees to the following:


18. The Tennessee medical license of Dan Nicolau, M.D., license number 49214, is hereby placed on **PROBATION** for two (2) years effective the date of entry of this Order.
19. Respondent shall comply with all recommendations of the Acumen assessment. IN addition to the Acumen assessment recommendations, Respondent shall comply with all recommendation and requirements of the Tennessee Medical Foundation. Respondent must submit a quarterly report to the Board's Medical Director showing compliance with all recommendations and requirements.
20. Respondent shall pay two (2) 'Type A' civil penalties in the amount of one thousand dollars (\$1,000.00) each; representing each prescription the Respondent wrote not pursuant to a doctor-patient relationship in violation of Section II, Grounds for Discipline; for a total of two thousand dollars (\$2,000.00). Any and all civil penalties shall be paid within thirty (30) days of the effective date of this Consent Order. Any and all civil penalty payments shall be paid by certified check, cashier's check, or money order, payable to the State of Tennessee, which shall be mailed or delivered to: **Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, 2<sup>nd</sup> Floor, Nashville, Tennessee 37243**. A notation shall be placed on said check that it is payable for the civil penalties of **Dan Nicolau, M.D., COMPLAINT NO. 201602805**.
21. Respondent must pay, pursuant to TENN. CODE ANN. §§ 63-6-214 (k) and 63-1-144(a)(4), the actual and reasonable costs of prosecuting this case to the extent allowed by law, including all costs assessed against the Board by the Division's Bureau of Investigations in connection with the prosecution of this matter. These costs will be established by an Assessment of Costs prepared and filed by counsel for the Department. Said costs shall not exceed three thousand dollars (\$3,000.00).

22. Any and all costs shall be paid in full within thirty (30) days after the issuance of the Assessment of Costs unless Respondent makes arrangements for an extended payment plan for the assessed costs through the Disciplinary Coordinator of the Division of Health Related Boards. Payment shall be made by certified check, cashier's check, or money order, payable to the State of Tennessee, Department of Health. Any and all payments shall be forwarded to the Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 665 Mainstream Drive, 2<sup>nd</sup> floor, Nashville, Tennessee 37243. A notation shall be placed on said money order or such check that it is payable for the costs of Dan Nicolău, M.D., COMPLAINT NO. 201602805.


23. Upon expiration of the two (2) year probationary period, and continued compliance with all recommendations of the TMF, Respondent may request an Order of Compliance to have the probation of Respondent's license to practice medicine lifted. Respondent must personally appear before the board to have the probation lifted.

24. Respondent understands that this is a formal disciplinary action and will be reported to the National Practitioner Data Bank (N.P.D.B.) and/or similar agency.

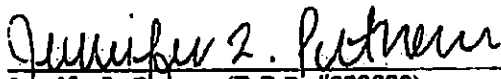
This **CONSENT ORDER** was approved by a majority of a quorum of the Tennessee Board of Medical Examiners at a public meeting of the Board and signed this 27<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
Chairperson  
Tennessee Board of Medical Examiners

**APPROVED FOR ENTRY:**

  
\_\_\_\_\_  
Dan Nicolau, M.D.  
Respondent

9-27-17  
\_\_\_\_\_  
DATE

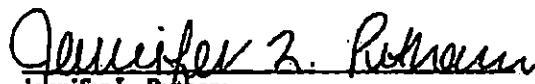
  
\_\_\_\_\_  
Jennifer L. Putham (B.P.R. #029890)  
Assistant General Counsel  
Office of General Counsel  
Tennessee Department of Health  
665 Mainstream Drive, 2<sup>nd</sup> Floor  
Nashville, Tennessee 37243  
(615) 741-1611

9-27-17  
\_\_\_\_\_  
DATE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of this document has been served upon Respondent, Dan Nicolau, M.D., by and through counsel, Tom Jessee, Esq., Jessee & Jessee, 412 East Unaka Avenue, Johnson City, Tennessee 37605, by delivering same in the United States Mail, Certified Number 7016 1976 0001 1321 9528, return receipt requested, and United States First Class Postage Pre-Paid Mail, with sufficient postage thereon to reach its destination and via email at [jjlaw@jesseeandjessee.com](mailto:jjlaw@jesseeandjessee.com).

This 29<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
Jennifer L. Putham  
Assistant General Counsel



# Exhibit #2

FILED

AUG 14 2019

at 9:35A

Sarah Lawson, Clerk and Master

IN THE CRIMINAL COURT FOR WASHINGTON COUNTY  
TENNESSEE AT JONESBOROUGH

STATE OF TENNESSEE

vs.

Docket No. 42345

DAN A Nicolau  
DEFENDANT

Filed 23 day of  
August 2017 at  
10:08 o'clock A M  
Karen Guinn, Clerk TT

PETITION FOR ACCEPTANCE OF  
PLEA OF GUILTY BY DEFENDANT AND WAIVER OF RIGHTS

Comes the Defendant who states that he/she has been advised by the Court of the following rights which the Defendant fully understands that he/she is giving up by this guilty plea.

1. The right to plead not guilty
2. If not represented by an attorney, that he/she has a right to be represented by an attorney at every stage of the proceeding against him/her, and if necessary, one will be appointed to represent him/her.
3. The right to a jury trial
4. The right to confront and cross-examine the witnesses against him/her.
5. The right not to incriminate himself/herself.
6. The right to indictment or presentment by the Grand Jury.
7. The right to compulsory process to secure attendance of witnesses in his/her behalf.
8. The right to appellate review if convicted by trial.

Defendant further states that he/she fully understands and waives each and every one of these rights freely and voluntarily.

Further, Defendant states that he/she has been fully advised by the Court and fully understands:

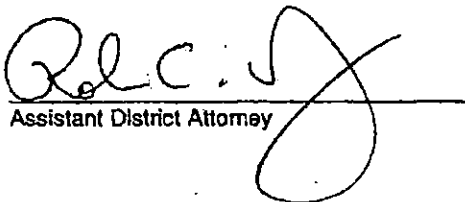
1. The nature of the charge(s) against him/her.
2. The minimum punishment for said charge(s).
3. The maximum punishment for said charge(s).
4. That prior convictions or other factors may be considered in determining his/her sentence.
5. That no trial will follow this plea but only sentencing.
6. That it is perjury to falsely answer questions while under oath.
7. That there must be facts to support the plea.
8. That this conviction may be used in the future to increase the punishment for subsequent offenses.

Further, the Defendant states that he/she is guilty of the charge(s) because the facts which he/she knows to exist equal the elements of the charge(s) as those elements have been explained to him/her by the Court. Defendant therefore states that there is a factual basis for his/her plea.

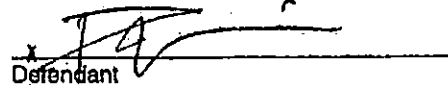
Further, the Defendant states that he/she is pleading guilty freely and voluntarily and not as the result of force of threats or of promises apart from a plea agreement, wherein his/her willingness to plead guilty results from discussions between the District Attorney's Office and the Defendant or his attorney.

Further, Defendant has been advised by the Court that the Judge is required to interrogate the Defendant personally concerning the facts and waivers herein set out and make a verbatim transcript of said interrogation. Defendant having been fully advised of this requirement does now freely and voluntarily waive said interrogation and verbatim recording and petitions the Court to accept his plea of guilty without said interrogation and verbatim recording.

SUBMITTED, APPROVED AND CONCURRED IN:

  
Assistant District Attorney

  
Attorney for Defendant

  
Defendant

ENTERED  
MINUTEBOOK 788 PAGE 211  
CIR. CL. CLK

FILED

AUG 14 2019  
at 8:35A M.  
Sarah Lawson, Clerk and Master

## ORDER ACCEPTING PLEA OF GUILTY

After reviewing the Petition set out herein, the Court did then interrogate the Defendant personally as to the following matters.

1. The nature of the charge(s) against Defendant;
2. The minimum punishment for said charge(s);
3. The maximum punishment for said charge(s);
4. Prior convictions and other factors may be considered in determining his/her sentence;
5. The fact that no trial will follow this plea but only sentencing;
6. The fact that it is perjury for the Defendant while under oath to answer the Court's questions falsely;
7. That there must be facts to support the plea;
8. Any plea negotiations which may have taken place;
9. The fact that this conviction may be used to increase the punishment for any subsequent offenses.

Further, the Court did interrogate the Defendant as to the intelligent and voluntary waiver of the following rights:

1. The right to plead not guilty;
2. The right to assistance of counsel, if the Defendant is unrepresented, including the right to appointment of counsel if indigent;
3. The right to jury trial;
4. The right to confront and cross-examine the witnesses against him/her;
5. The right to compulsory process to secure attendance of witnesses in his/her behalf;
6. The right not to be compelled to incriminate himself/herself;

Based upon this personal interrogation, the Court concludes that the Defendant understands the nature of the charge(s) against him/her and the rights which he/she is giving up by this guilty plea.

The Court concludes that there is a factual basis for the Defendant's plea of guilty and therefore, the Defendant's plea is being entered freely, knowledgeable and voluntarily after freely, knowledgeable and voluntarily waiving the above set-out rights.

Finally, the Court accepts the Defendant's plea of guilty.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED** that the Defendant's plea of guilty, heretofore entered, ought to be and is hereby accepted by the Court. The Defendant is therefore found to be guilty of the offense(s) as set forth in the judgment form(s) attached hereto.

ENTER, this the 23 day of August, 2017.

  
\_\_\_\_\_  
CRIMINAL COURT JUDGE

IN THE CRIMINAL CIRCUIT COURT FOR WASHINGTON COUNTY, TENNESSEE

Case Number: 42345 Count # 1 Counsel for the State: ROBIN BAYERIN MCARDLE  
 Judicial District: 1st Judicial Division: I Counsel for the Defendant: Steve Finney  
 State of Tennessee  Retained  Pub Def Appt  Private Atty Appt  
 vs.  Counsel Waived  Pro Se  
 Defendant: DAN A. NICOLAU Alias: \_\_\_\_\_ Date of Birth: 5-25-80 Sex: M  
 Race: W SSN: \_\_\_\_\_ Relationship to Victim: \_\_\_\_\_ Victim's Age: \_\_\_\_\_  
 State ID #: \_\_\_\_\_ County Offender ID # (if applicable): \_\_\_\_\_ State Control #: \_\_\_\_\_  
 Arrest Date: \_\_\_\_\_ Indictment Filing Date: 3-10-17

ORDER OF DEFERRAL (JUDICIAL DIVERSION)  Original  Amended  Corrected

On the 23 day of August, 20 17, the defendant:

Pled Guilty  Pled Nolo Contendere  
 Was Found Guilty By: Affid  
 Jury Verdict  
 Bench Trial

Indictment: Class (circle one) 1<sup>st</sup> A B C D E  Felony  Misdemeanor  
 Indicted Offense Name AND TCA #: Aggr. Burglary 39-14-403  
 Amended Offense Name AND TCA #: Aggr. Crim. Trespass 39-14-406  
 Offense Date: 8-27-16 County of Offense: WASHINGTON  
 Deferred Offense Name AND TCA #: Aggr. Criminal Trespass 39-14-406  
 Deferred Offense: Class (circle one) A B C D E  Felony  Misdemeanor

Upon review of the case, the court finds the facts stated above as well as the following (For Item 3, Check ONE OF The Two Boxes):

- The defendant is eligible for deferral of the prosecution pursuant to Tennessee Code Annotated section (T.C.A.) 40-35-313;
- The Tennessee Bureau of Investigation has certified (per attached certificate) that the defendant does not have a prior felony or Class A misdemeanor conviction;
- The defendant was not charged with a violation of a criminal statute the elements of which constitute abuse, neglect or misappropriation of the property of a vulnerable person as defined in Title 68, Chapter 11, Part 10: OR  
 The defendant agrees without contest or any further notice or hearing that the defendant's name shall be permanently placed on the registry governed by Title 68, Chapter 11, Part 10, whereupon a copy of this order shall be forwarded by the clerk to the department of health;
- The defendant consents to T.C.A. 40-35-313 deferral, as evidenced by the defendant's signature below; AND
- The defendant should be granted a deferral of charges pursuant to T.C.A. 40-35-313.

It is, therefore, ORDERED that the prosecution in this case is deferred pursuant to T.C.A. 40-35-313, and the defendant is placed on probation. The terms and conditions ordered by this court apply to the defendant's probation and are incorporated herein by reference thereto.

Probation Term: Total Length 11 months 29 days Beginning Date 8/23/17 Ending Date 8/22/18  Supervised  Unsupervised

Supervising Entity (unless otherwise provided to the defendant by the court): Name CCI Filed 23 day of August 20 17 at 10:08 o'clock AM  
 Phone Number \_\_\_\_\_ Address \_\_\_\_\_

Defendant's Contact Information (unless otherwise provided to the probation officer by the court): Phone Number \_\_\_\_\_ Address \_\_\_\_\_

\* must complete treatment plan established by medical Board of Guinn, Clerk  
 \* NO contact w/ victim Cynthia Barker

Costs	Concurrent with:	Restitution	Pretrial Jail Credit Period(s):
\$ _____ Sex Offender Tax (39-13-709)		Victim Name _____	From <u>8-28-16</u> to <u>8-28-16</u>
\$ _____ Sex Offender Fine (40-24-108)		Address _____	From _____ to _____
\$ _____ Drug Testing Fee (39-17-420)	Consecutive to:	Total Amount \$ _____	From _____ to _____
\$ _____ Treatment Expenses (40-35-313)		Per Month \$ _____	From _____ to _____
\$ _____ Supervision Fees (40-35-313)			
\$ <u>25</u> Other: <u>Fine</u>			

IA  
 Defendant  
 Hon. Lisa N. Rice  
 JUDGE'S NAME  
 Counsel for the Defendant

Do pay fees/costs w/in 90 days.  
 ENTERED the 23 day of August, 20 17  
 ENTERED Steve C. Ray  
 MINUTEBOOK 728C PAGE 208  
 CIR. CL. CLK

IN THE CRIMINAL JUDICIAL COURT FOR WASHINGTON COUNTY, TENNESSEE

Case Number: 42345 Court # 2 Counsel for the State: ROBIN RAY/ERIN MCARDLE  
 Judicial District: 1st Judicial Division: I Counsel for the Defendant: Steve Finney  
 State of Tennessee  Retained  Pub Def Appt  Private Atty Appt  
 vs.  Counsel Waived  Pro. Se  
 Defendant: DAN A. NICOLAW Alias: \_\_\_\_\_ Date of Birth: 5-25-80 Sex: M  
 Race: W SSN: \_\_\_\_\_ Relationship to Victim: \_\_\_\_\_ Victim's Age: \_\_\_\_\_  
 State ID #: \_\_\_\_\_ County Offender ID # (if applicable): \_\_\_\_\_ State Control #: \_\_\_\_\_  
 Arrest Date: \_\_\_\_\_ Indictment Filing Date: \_\_\_\_\_

ORDER OF DEFERRAL (JUDICIAL DIVERSION)  Original  Amended  Corrected

On the 23 day of August, 2017, the defendant:

<input type="checkbox"/> Pled Guilty <input checked="" type="checkbox"/> Pled Nolo Contendere Was Found Guilty By: <u>Alford</u> <input type="checkbox"/> Jury Verdict <input type="checkbox"/> Bench Trial	Indictment: Class (circle one) 1 <sup>st</sup> <input checked="" type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input type="radio"/> D <input type="radio"/> E <input type="checkbox"/> Felony <input checked="" type="checkbox"/> Misdemeanor Indicted Offense Name AND TCA §: <u>STALKING</u> Amended Offense Name AND TCA §: _____ Offense Date: _____ County of Offense: <u>WASHINGTON</u> Deferred Offense Name AND TCA §: <u>Stalking</u> Deferred Offense: Class (circle one) <input checked="" type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input type="radio"/> D <input type="radio"/> E <input type="checkbox"/> Felony <input checked="" type="checkbox"/> Misdemeanor
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Upon review of the case, the court finds the facts stated above as well as the following (For Item 3, Check ONE Of The Two Boxes):

- The defendant is eligible for deferral of the prosecution pursuant to Tennessee Code Annotated section (T.C.A.) 40-35-313;
- The Tennessee Bureau of Investigation has certified (per attached certificate) that the defendant does not have a prior felony or Class A misdemeanor conviction;
- The defendant was not charged with a violation of a criminal statute the elements of which constitute abuse, neglect or misappropriation of the property of a vulnerable person as defined in Title 68, Chapter 11, Part 10; OR  
 The defendant agrees without contest or any further notice or hearing that the defendant's name shall be permanently placed on the registry governed by Title 68, Chapter 11, Part 10, whereupon a copy of this order shall be forwarded by the clerk to the department of health;
- The defendant consents to T.C.A. 40-35-313 deferral, as evidenced by the defendant's signature below; AND
- The defendant should be granted a deferral of charges pursuant to T.C.A. 40-35-313.

It is, therefore, ORDERED that the prosecution in this case is deferred pursuant to T.C.A. 40-35-313, and the defendant is placed on probation. The terms and conditions ordered by this court apply to the defendant's probation and are incorporated herein by reference thereto.

Probation Term: Total Length 11 mos. 29 days Beginning Date 8/23/18 Ending Date 8/22/19  Supervised  Unsupervised

Supervising Entity (unless otherwise provided to the defendant by the court): Name \_\_\_\_\_ Filed 23 day of August 2017 at \_\_\_\_\_  
 Phone Number \_\_\_\_\_ Address \_\_\_\_\_

Defendant's Contact Information (unless otherwise provided to the probation officer by the court): Phone Number 10:08 o'clock AM at \_\_\_\_\_  
 Address \_\_\_\_\_  
 Karen Guinn, Clerk

\* Must complete treatment plan established by medical Board, \* NO contact w/

victim Cynthia Baker

Costs	Concurrent with:	Restitution	Pretrial Jail Credit Period(s):
\$ _____ Sex Offender Tax (39-13-709)		Victim Name _____	From <u>8-28-16</u> to <u>8-28-16</u>
\$ _____ Sex Offender Fine (40-24-108)		Address _____	From _____ to _____
\$ _____ Drug Testing Fee (39-17-420)			From _____ to _____
\$ _____ Treatment Expenses (40-35-313)	Consecutive to:	Total Amount \$ _____	From _____ to _____
\$ _____ Supervision Fees (40-35-313)	<u>C1</u>	Per Month \$ _____	
\$ <u>25</u> Other: <u>Fine</u>			

[Signature]  
 Defendant  
Hon. Lisa N. Rice  
 JUDGE'S NAME  
[Signature]  
 Counsel for the Defendant

ENTERED this the 23 day of August, 2017  
[Signature]  
 JUDGE'S SIGNATURE  
[Signature]  
 Counsel for the State of Tennessee

ENTERED  
 MINUTEBOOK 228C PAGE 209  
 CIR. CL. CLK