

**IN THE FIFTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE**

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BRITTANY S. STEVENS,

*Plaintiff,*

v.

TONY SEES,

and

JOHN DOES,

*Defendants.*

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Case No.: 19C2096

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

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**I. INTRODUCTION**

This is a defamation and “civil conspiracy” action filed by Plaintiff Brittany S. Stevens—the elected Smyrna Court Clerk—against a citizen watchdog in retaliation for exercising his constitutionally protected right to file a good-faith ethics complaint regarding her with the Tennessee Ethics Commission. On its face, Clerk Stevens’s Complaint is a “threat of a civil action for damages in the form of a ‘strategic lawsuit against political participation”” (a SLAPP-suit), *see* TENN. CODE ANN. § 4-21-1002(b), which the State of Tennessee appropriately regards as being “evil[.]” *See Residents Against Indus. Landfill Expansion, Inc. v. Diversified Sys., Inc.*, No. 03A01-9703-CV-00102, 1998 WL 18201, at \*3 (Tenn. Ct. App. Jan. 21, 1998) (“Their lawsuit fits all of the characteristics of a lawsuit filed to intimidate a citizen into silence regarding an

issue of public concern.”); *see id.* at \*8 n.6 (“The legislature has recently recognized the evils of this type of lawsuit.”). Of note, Mr. Sees’s good-faith ethics complaint was also effectively withdrawn and clarified in a subsequent letter that was hand-delivered to the Tennessee Bureau of Ethics and Campaign Finance after he received new information regarding it from the Plaintiff’s brother, *see Exhibit A* (Tony Sees’s Withdrawal Letter)—a material fact that Clerk Stevens’s Complaint curiously omits.

Critically, the statements over which the Plaintiff has sued are not capable of a defamatory meaning as a matter of law, and her Complaint should be dismissed with prejudice on that basis. Further, even accepting the allegations in Clerk Stevens’s Complaint as true—and they are not—the Plaintiff also cannot establish actual malice as a matter of law. Further still, Clerk Stevens did not and could not have suffered the damages that she has alleged—a defect that independently compels dismissal as well.

Separately, Clerk Stevens’s Complaint falls squarely within the protections of the newly enacted Tennessee Public Participation Act. *See* TENN. CODE ANN. § 20-17-101, *et seq.* Invoking the Public Participation Act’s substantive protections, the Defendant has submitted sworn, admissible evidence setting forth several available and outcome-determinative defenses to this action. *See Exhibit B* (Affidavit of Tony Sees). Among them, the Defendant is categorically immune from this SLAPP-suit pursuant to both Tennessee Code Annotated § 3-6-208(b) (“any person who in good faith files a verified complaint . . . is immune from any civil liability that otherwise might result by reason of such actions.”) and § 4-21-1003(a) (“Any person who in furtherance of such person’s right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of

concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.”). In furtherance of the Tennessee Public Participation Act’s substantive protections, Mr. Sees additionally demands that the Plaintiff establish a prima facie case for each essential element of her claims in order to avoid dismissal.

## **II. NOTICE TO TENNESSEE ETHICS COMMISSION AND THE OFFICE OF THE ATTORNEY GENERAL AND REPORTER**

Tennessee Code Annotated § 4-21-1004(a) provides that:

(a) In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under § 4-21-1003 may intervene and defend against any suit precipitated by the communication to the agency. In the event that a local government agency does not intervene in and defend against a suit arising from any communication protected under this part, the office of the attorney general and reporter may intervene in and defend against the suit.

Because this action arises out of a good-faith ethics complaint filed with the Tennessee Ethics Commission that qualifies as a “communication” within the meaning of Tennessee Code Annotated § 4-21-1003(a), and because this SLAPP-suit seeks to chill the free flow of information from citizens to their government, notice of this matter is being served upon both the Tennessee Ethics Commission and the Office of the Attorney General and Reporter in order to enable them to intervene in this lawsuit and defend against it.

## **III. LEGAL STANDARD**

### **A. DEFENDANT’S MOTION TO DISMISS**

“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). 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) (citing *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994), *abrogated in part on other grounds by Oneok, Inc. v. Learjet, Inc.*, 191 L.Ed.2d 511, 521 (2015)), 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. Brukaradt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at \*8 (Tenn. Ct. App. Feb.19, 2009), *perm. to app. denied* (Aug. 24, 2009) (in turn quoting WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1357, at 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).

### **1. Threshold Questions of Law Governing Defamation Claims**

The Plaintiff’s Complaint asserts a single cause of action for written defamation against Defendant Tony Sees and an additional cause of action for “civil conspiracy” against Tony Sees and alleged John Does (who are fictional). To establish a prima facie case of defamation under Tennessee law, a plaintiff must plead and 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. Tennessean*, 83 S.W.3d 125,

128 (Tenn. Ct. App. 2001).

Further, public figures like Clerk Stevens must plead and prove actual malice in order to recover for defamation. *See Tomlinson v. Kelley*, 969 S.W.2d 402, 405 (Tenn. Ct. App. 1997) (“Public figures who desire to pursue defamation actions bear a heavy burden of proof because of our society’s commitment to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L.Ed.2d 686 (1964). In order to recover damages, they must prove with convincing clarity that the defendant acted with actual malice.” (citing *Press, Inc. v. Verran*, 569 S.W.2d 435, 441 (Tenn. 1978); *Moore v. Bailey*, 628 S.W.2d 431, 433 (Tenn. Ct. App. 1981))). Here, the Plaintiff herself pleads that she “serves the Town of Smyrna as the Smyrna Court Clerk” and that she “served as the interim Court Clerk from February 23, 2016, through August 2016, at which [sic] she was duly elected by the citizens of Smyrna and transitioned from interim to the official, elected, Smyrna Court Clerk.” Complaint, p. 2, ¶ 3.1. Consequently, Clerk Stevens is a public figure as a matter of law, *see Tomlinson*, 969 S.W.2d at 405 n.2 (“Any governmental official whose duties affect the lives or peace and tranquility of citizens or their families is a public figure.” (citing *Press, Inc.*, 569 S.W.2d at 441)), and as such, actual malice is an essential element of her defamation claim. *See id.* at 405.

Notably, “the Supreme Court of the United States has constitutionalized the law of libel[.]” *Press, Inc.*, 569 S.W.2d at 440. *See also Sullivan*, 376 U.S. at 269. 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 she has sued over. *See, e.g., Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210 at \*3 (Tenn. Ct. App. Apr. 10, 1997) (“If the [allegedly defamatory] words are

not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation.”). *See also Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012); *McWhorter v. Barre*, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003). 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) (“[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. *Id.*

Critically, 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 in the instant case:

First, merely unpleasant or embarrassing statements are not capable of conveying a defamatory meaning. Instead,

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

*Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at \*3 (Sept. 30, 2015), *appeal denied* (Feb. 18, 2016) (emphases added) (quoting *Brown*, 393 S.W.3d at 708).

Second, 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)).

Third, an allegedly defamatory statement “must be factually false in order to be actionable.”<sup>1</sup> See *Moman*, 1997 WL 167210, at \*4. Thus, any statement that is not capable of being proven false as a matter of fact cannot form the basis for a defamation claim.

Fourth, “comments upon true and nondefamatory published facts are not actionable, ‘even though [the comments] are stated in strong or abusive terms.’” *Covenant Presbyterian Church of Nashville*, 2015 WL 5766685, at \*3 (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,

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<sup>1</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 Complaint exclusively alleges defamation and conspiracy claims. See *Complaint*. Accordingly, any claim that the Plaintiff premises upon an asserted implication is not cognizable.

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); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974)).

Fifth, 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.*

## **2. Threshold Questions of Law Governing Civil Conspiracy Claims**

Under Tennessee law, there is no freestanding tort for “civil conspiracy”; instead, to be actionable, a civil conspiracy requires an underlying predicate tort committed pursuant to the conspiracy. See *Watson’s Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007) (“Civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy.”) (citations omitted). See also *id.* (“Since liability for civil conspiracy depends on the performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort” (quoting *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983))). As a consequence, the absence of an underlying predicate tort is fatal to a civil conspiracy claim, meaning that the inactionable nature of the Plaintiff’s defamation claim forecloses her claim for civil conspiracy as well. See *id.* Separately, given their highly fact-dependent nature, civil conspiracy claims are



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

#### **B. THE TENNESSEE PUBLIC PARTICIPATION ACT**

Since the newly enacted Tennessee Public Participation Act took effect on July 1, 2019, “[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[.]” TENN. CODE ANN. § 20-17-104(a), subject to the specialized provisions set forth in the Tennessee Public Participation Act. *Id.* The special petition to dismiss available under 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), and the Defendant’s special petition to dismiss has been presented in conjunction with his Motion to Dismiss under Tennessee Rule of Civil Procedure 12.02(6) as a result.

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

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to

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

TENN. CODE ANN. § 20-17-102. Substantively, the Tennessee Public Participation Act provides, *inter alia*, 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,<sup>2</sup> TENN. CODE ANN. § 20-17-104(d); and

(3) In the event that the petition is denied, the petitioning party is entitled to an immediate interlocutory appeal as of right. *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.” 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,

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<sup>2</sup> The Plaintiff propounded discovery with her Complaint, which is now stayed by operation of statute.

“[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).

#### IV. FACTS

Clerk Stevens’s Complaint asserts a single claim for written defamation against Defendant Tony Sees and an additional claim for civil conspiracy against Defendant Sees and unnamed John Does. *See* Complaint, pp. 7–9. Clerk Stevens’s defamation claim is premised upon allegedly defamatory statements that Mr. Sees made in an ethics complaint regarding her (“the Ethics Complaint”), which Clerk Stevens has attached as Exhibit B to her Complaint. The allegedly defamatory statements are described at paragraphs 3.7 through 3.10 of Clerk Stevens’s Complaint, which contain significant qualifications (bolded below for emphasis) and read as follows:

¶ 3.7 The Complaints allege ‘Brittany Stevens did not disclose her source of income at Stevens & Stevens PLLC on her 2019 Statement of Disclosure Interests (SS-8005). Her brother, Robert Stevens certified this filing as true.’ This is a false statement.

¶ 3.8 The Complaints allege that the following law or rules were violated: “T.C.A. § 23-3-102; T.C.A. § 8-50-501 – 502(1), **Potentially** R[ules] [of] P[rofessional] C[onduct] 1.11; **Potentially** § 2-10-124(a).” These are false accusations.

¶ 3.9 The Complaints allege that Plaintiff Stevens “**may have** substantially or materially been involved in cases in which she represented private clients within her own jurisdiction, and in any case, it is **reasonable to presume** that a clerk of the courts is privy to confidential governmental information, while representing private clients in that jurisdiction.” This is a false statement.

¶ 3.10 The Complaints allege “**[i]f ‘Consulting Services’ means services performed as a professional whose expert opinions might be relied upon, and would include attorney consultations,** then both Robert and Brittany Stevens have violated TCA § 2-10-124(a) each time they provided legal advice to a private client without disclosing it to the commission.” This is a false accusation.

Complaint, pp. 3–4 (emphases added).

Critically, Clerk Stevens candidly concedes that her LinkedIn profile—which listed her as a lawyer while she held the position of Smyrna Court Clerk—was “not maintained nor current.” *See* Complaint, p. 5, ¶ 3.20. Further, Clerk Stevens’s own Complaint in this case expressly reflects that Mr. Sees cited her apparently “not maintained nor current[,]” *see id.*, LinkedIn profile in support of his Ethics Complaint that she had concurrent employment. *See* Exhibit B to Complaint, p. 3, § 1 (referencing Clerk Stevens’s “LinkedIn listing her concurrent positions”). Nonetheless, Clerk Stevens somewhat inexplicably insists that her own admittedly inaccurate LinkedIn profile was “not proof that she has operated a law office or engaged in the practice of law,” Complaint, p. 5, ¶ 3.20, and she asserts that despite what she now admits was an inaccurate LinkedIn profile that she had failed to maintain with accurate, current information, “[t]he statements written in the Complaint[] were made with actual malice[,]” *id.* at p. 7, ¶ 4.6.

As to Clerk Stevens’s conspiracy claim: It is premised upon Mr. Sees’s alleged conspiracy to defame her in conjunction with unnamed, imagined John Does. Of note, Clerk Stevens’s Complaint also styles Mr. Sees as a patsy—specifically asserting that he is neither the person who was responsible for circulating the Ethics Complaint, *see id.* at p. 2, ¶¶ 3.2–3.3, nor even its original author, *see id.* at p. 8, ¶ 5.2 (“The Defendants acted in concert to have Defendant Sees sign the Complaint, under oath, that he did not originally draft to create the appearance that he acted alone.”).

## **V. ARGUMENT**

### **A. THE PLAINTIFF’S DEFAMATION CLAIM IS INACTIONABLE AS A MATTER OF LAW.**

The Plaintiff’s Complaint fails to state a cognizable claim for relief for each of the

following reasons:

- (1) The statements were, at most, annoying, offensive, or embarrassing;
- (2) Clerk Stevens did not suffer actual damages as a result of the statements at issue, and the Plaintiff's Complaint reflects that any damages that she claims cannot be attributed to Mr. Sees;
- (3) Three of the four statements over which Clerk Stevens has sued are not factually false;
- (4) The Plaintiff's own Complaint reflects that the fourth statement over which Clerk Stevens has sued was not made with actual malice;
- (5) Comments upon true and nondefamatory published facts are not actionable; and
- (6) Opinions are not actionable.

Each independent basis for dismissal is detailed below.

**1. The statements were, at most, annoying, offensive, or embarrassing.**

In its entirety, the Plaintiff's lawsuit is premised upon a scrawled, handwritten, and largely withdrawn Ethics Complaint that—on its face—refers to mere “alleged” violations and expressly references claims so trivial that they are described as “alleged[] . . . *potential*[]” violations. *See* Exhibit B to Complaint, p. 1–2 (emphasis added). Further, the allegations and “alleged[] . . . *potential*[]” violations set forth in the Ethics Complaint, *see id.*—which were submitted on the basis of “belief,” *see id.* at p. 3—are not even especially serious. Further still, no mental state suggesting or even intimating any deliberate misconduct by Clerk Stevens is asserted in the Ethics Complaint. *See id.* The Ethics Complaint also forthrightly discloses that critical documents that would be

relevant to the ethics violations that Mr. Sees believed Clerk Stevens may have committed were not available to Mr. Sees, *id.* at p. 3, further evidencing the Ethics Complaint's good-faith but facially unserious nature.

Further still, to clarify any lingering doubt, Mr. Sees also withdrew substantial portions of his Ethics Complaint and conditionally withdrew his Ethics Complaint *in its entirety* after receiving new information regarding it from the Plaintiff's brother. See **Exhibit A**. Mr. Sees' withdrawal letter explained, *inter alia*, that:

Upon further information and being given a better understanding of the law, I would like to withdraw violation #5 of my complaint which I filed against Robert and Brittany Stevens.

...

**Mr. Stevens has contacted me stating that his sister has never represented anyone while serving as a clerk. If this turns out to be true, then I would also like to withdraw the remainder of my complaint.**

...

If more evidence will be expected of me in order for my complaint to move forward, then I must regretfully withdraw it in its entirety as well.

*Id.* (emphasis added). Mr. Sees's Withdrawal Letter additionally made clear that: "All of the evidence I have is what I have already provided." *Id.*

Put simply: The Ethics Complaint was a trivial matter that was—at most—"annoying, offensive or embarrassing," it was promptly withdrawn by Mr. Sees after he received new information about it, and it did not and could not have seriously threatened the Plaintiff's reputation. *But see Covenant Presbyterian Church of Nashville*, 2015 WL 5766685, at \*3 ("For a communication to be [defamatory], it must constitute a serious threat to the plaintiff's reputation. A [defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The

words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element ‘of disgrace.’”) (quotation omitted). The Plaintiff’s defamation claim is inactionable and should be dismissed with prejudice as a consequence. *See id.*

**2. Clerk Stevens did not suffer actual damages as a result of the statements at issue, and the Plaintiff’s Complaint reflects that any damages she claims cannot be attributed to Mr. Sees.**

Clerk Stevens also did not suffer any damages as a result of the Ethics Complaint at issue. Typically, the proper course of action to address a trivial inconvenience like an unfounded ethics complaint would be for the Plaintiff—an elected official who should be accustomed to such annoyances—to deny the allegations at issue and secure the dismissal of the Ethics Complaint in the normal course, as countless other government officials have done before her and will do after her. Instead, Clerk Stevens has filed a nakedly retaliatory lawsuit and sued Mr. Sees for a whopping \$150,000.00, insisting that she suffered “actual damages”—including economic damages—as a consequence of the handwritten and effectively withdrawn Ethics Complaint at issue. *See* Complaint, pp. 9–10.

Of course, Clerk Stevens did not suffer such damages. As the Plaintiff herself notes, she is employed exclusively as the Smyrna Town Court Clerk, *see id.* at p. 5, ¶¶ 3.18–3.19; she has not lost her job as the Smyrna Town Court Clerk; and public records demonstrate conclusively that her salary has not changed by even a single penny since the Ethics Complaint at issue was filed, *see Exhibit C* (Clerk Brittany Stevens Payroll Documents, July 28, 2019, through September 8, 2019).<sup>3</sup> The absence of actual damages is also fatal

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<sup>3</sup> Because they are matters of public record, this Court may consider Clerk Stevens’s payroll records without converting Defendant’s Motion to Dismiss into one for summary judgment. *See 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. Brukardt*, No. M2007–02271–COA–R3–CV, 2009 WL 426237, at

to her Complaint, and it compels dismissal. *See Davis*, 83 S.W.3d at 128 (“Damages from false or inaccurate statements cannot be presumed; actual damage must be sustained and proved.”).

Further, Clerk Stevens’s Complaint reflects that Mr. Sees is not even the person she claims is responsible for her alleged damages. Specifically, she attributes the circulation of her Complaint not to Mr. Sees, but to the “John Does.” *See* Complaint, p. 2, ¶¶ 3.2–3.3. Notably, however, to the extent that the Plaintiff alleges others were involved in circulating the Ethics Complaint at issue—which Mr. Sees himself expected to be handled confidentially by the Ethics Commission, *see Exhibit A*—Mr. Sees cannot be held responsible for such third-party publications as a matter of law. *Cf. Sullivan v. Baptist Mem’l Hosp.*, 995 S.W.2d 569, 572 (Tenn. 1999) (rejecting doctrine of self-publication and discussing longstanding precedent that “the plaintiff’s publication of defendant’s defamatory statements would not support a defamation action,” a “defendant is not answerable for anything the plaintiff may choose to do with the letter after it has once safely reached his hands,” and that “[i]f a person receives a letter containing libelous matter, he will not be justified in publishing it.” (quoting *Sylvis v. Miller*, 33 S.W. 921, 922 (Tenn. 1896))).

In sum: In addition to the fact that the statements over which Clerk Stevens has sued Mr. Sees cannot plausibly be considered defamatory as a matter of law, *see Covenant Presbyterian Church of Nashville*, 2015 WL 5766685, at \*3, the statements provably did not cause her to suffer the economic damages that she has alleged, *see Exhibit C*, and any damage arising from publication by third parties cannot be attributed to Mr. Sees, *see*

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\*8 (Tenn. Ct. App. Feb.19, 2009), *perm. to app. denied* (Aug. 24, 2009) (in turn quoting WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1357, at 376 (3d ed. 2004))).



*Sullivan*, 995 S.W.2d at 572. Accordingly, the Plaintiff's defamation claim fails as a matter of law, both because it is not based upon statements that are capable of producing the requisite injury and because the Plaintiff cannot "prove actual damages" as required. *Handley*, 588 S.W.2d at 776.

**3. Three of the four statements over which Clerk Stevens has sued are not factually false.**

An allegedly defamatory statement "must be factually false in order to be actionable." *See Moman*, 1997 WL 167210, at \*4. Thus, any statement that is not capable of being proven false cannot form the basis for a defamation claim.

Here, several of the statements over which Clerk Stevens has sued are expressly qualified and are not capable of being proven false. For example, by definition, the allegation that "Potentially R[ule] [of] P[rofessional] C[onduct] 1.11" and "Potentially § 2-10-124(a)" were violated by the Plaintiff, Complaint, p. 3, ¶ 3.8, are not declarative assertions that are capable of being proven false. *See potentially*, DICTIONARY.COM, <https://www.dictionary.com/browse/potential> (last visited Oct. 3, 2019) (defining "potentially" as "possible, as opposed to actual"). Nor can any defamation claim be premised upon the statement that Clerk Stevens "may have" violated an ethics rule, *see* Complaint, ¶ 3.9, which is not a declarative assertion that can be proven false, either. Additionally, as a matter of law, the assertion that Clerk Stevens violated an ethics rule only "if" consulting services are defined in a certain way similarly is not a statement that is capable of being proven false. *See id.*, pp. 3-4, ¶ 3.10. Accordingly, all of these statements are inactionable.

**4. The Plaintiff's own Complaint reflects that the fourth statement over which Clerk Stevens has sued was not made with actual malice.**

As to the fourth statement over which Clerk Stevens has sued—that “Brittany Stevens did not disclose her source of income at Stevens & Stevens PLLC on her 2019 Statement of Disclosure Interests (SS-8005),” *id.* at p. 3, ¶ 3.7—the Plaintiff’s own Complaint reflects that it could not have been made with the requisite actual malice. The Ethics Complaint that Defendant Sees filed reflects, on its face, that it was premised upon the Plaintiff’s own LinkedIn profile, which indicated that she had an active law practice. *See* Exhibit B to Complaint, p. 3, § 1 (noting “Brittany Stevens’ LinkedIn listing her concurrent positions.”). Clerk Stevens also judicially admits that her LinkedIn profile—which listed her as a lawyer while she held the position of Smyrna Court Clerk—was “not maintained nor current.” *See* Complaint, p. 5, ¶ 3.20.

Under these circumstances—where an alleged defamation is premised upon *the Plaintiff's own statements about her own employment*—actual malice, a constitutional requisite for Clerk Stevens’s claim, *see Tomlinson*, 969 S.W.2d at 405, is not plausible. Accordingly, any alleged defamation arising from the statement described at paragraph 3.7 of the Plaintiff’s Complaint must be dismissed as well.

**5. Comments upon true and nondefamatory published facts are not actionable.**

To encourage the free exchange of ideas and avoid chilling public commentary, our courts have held that “comments upon or characterizations of published facts are not in themselves actionable.” *Weidlich*, 2017 WL 4862068, at \*6 (quoting *Stones River Motors*, 651 S.W.2d at 720). Thus, as a matter of law, “comments upon true and nondefamatory published facts are not actionable, ‘even though [the comments] are

stated in strong or abusive terms.” *Covenant Presbyterian Church of Nashville*, 2015 WL 5766685, at \*3 (quoting *Stones River Motors*, 651 S.W.2d at 720). *See also Weidlich*, 2017 WL 4862068, at \*6 (holding that “[a] writer’s comments upon true and nondefamatory published facts are not actionable” as a matter of law). This, too, is a categorical bar to defamation liability, having “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.*, 398 U.S. 6).

Here, the Ethics Complaint regarding the Plaintiff includes “a short and plain statement of the nature of the violation(s)” and reads, in full, as follows:

Brittany Stevens is a practicing attorney as well as an elected official serving as the Court Clerk for the City of Smyrna. Robert Stevens is also an elected official serving as both a County Commissioner and an attorney. Brittany Stevens did not disclose her source of income at Stevens & Stevens PLLC on her 2019 statement of disclosure of interests (SS-8005). Her brother, Robert Stevens, certified this filing as true.

Exhibit B to Complaint, p. 1.

Thereafter, Mr. Sees—who is not an attorney—provides commentary regarding the above facts as he understood them, including setting forth “alleged” and “alleged . . . potential[]” ethics violations arising out of what he understood in good faith to be the Plaintiff’s dual employment. *See id.* There is also no serious doubt that the “supporting” documents referenced in his Ethics Complaint—(1) the Plaintiff’s “financial disclosure statement” that did not indicate a second source of income, (2) the Plaintiff’s “professional website which does not list her as a clerk,” and (3) the Plaintiff’s “LinkedIn listing her concurrent positions”—were all accurately described. *See* Exhibit B to Complaint, p. 3.

Even alone, Mr. Sees’s commentary on these facts—even when stated in strong

terms—would be inactionable as a matter of law. *Covenant Presbyterian Church of Nashville*, 2015 WL 5766685, at \*3 (quoting *Stones River Motors*, 651 S.W.2d at 720). But here, the Plaintiff and her brother are the ones who are responsible for the confusion about the actual nature of their PLLC, having indicated in their annual report to the Secretary of State in 2016, 2017, and 2018—while Clerk Stevens was serving as Court Clerk—that their PLLC still had two members. See **Exhibit D** (Certified Secretary of State Documents) (collective exhibit). Indeed, it was not until sometime between February 3, 2018, and February 1, 2019, that their PLLC’s “Member Count Changed From: 2 To: 1, see **Exhibit E** (Business Entity Detail), even though the Plaintiff herself pleads that she “ceased the practice of law on February 23, 2016, when she was appointed to be the interim Court Clerk for the Town of Smyrna.” See Complaint, p. 5, ¶ 3.18.

Consequently, Mr. Sees’s mistake as to Clerk Stevens’s status as a member of the PLLC that she operated with her brother was not only reasonable; it was supported by the Plaintiff’s own formal filings with the Tennessee Secretary of State. See **Exhibit D**; **Exhibit E**. Under these circumstances, Mr. Sees’s commentary upon nondefamatory published facts that the Plaintiff’s brother and law partner had represented to the Secretary of State were true is patently inactionable. See *Covenant Presbyterian Church of Nashville*, 2015 WL 5766685, at \*3 (quoting *Stones River Motors*, 651 S.W.2d at 720).

#### **6. Opinions are not actionable.**

A similar and related defect additionally compels dismissal of the Plaintiff’s Complaint: “an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts.” *Stones River Motors*, 651 S.W.2d at 722.

Here, no unstated defamatory facts were implied in Mr. Sees's Ethics Complaint. Indeed, to the contrary, Mr. Sees was forthright about the basis for his claims: (1) the Plaintiff's "financial disclosure statement," which did not indicate a second source of income, (2) the Plaintiff's "professional website which does not list her as a clerk," and (3) the Plaintiff's "LinkedIn listing her concurrent positions." *See* Exhibit B to Complaint, p. 3. Further, Mr. Sees emphasized critical additional evidence that would be relevant to his claims that he did not have: (1) "Proof of clients represented by Ms. Stevens that are also within the jurisdiction of her clerkship," and (2) proof of compensation for consulting services obtained by Robert or Brittany Stevens." *See id.* Further still, to the extent that there was any ambiguity on the matter, after receiving new information regarding his Ethics Complaint from the Plaintiff's brother, Mr. Sees promptly clarified that:

All of the evidence I have is what I have already provided. If more evidence will be expected of me in order for my complaint to move forward, then I must regretfully withdraw it in its entirety as well. If, however, the information I have provided is sufficient, then I would like to continue forward with the remainder of my complaint.

*See* **Exhibit A.**

Simply stated: Mr. Sees's Ethics Complaint reflected his own non-expert, lay opinion about potential ethics violations based on the Plaintiff's own published statements. No unstated defamatory facts were implied. Indeed, to the contrary, Mr. Sees expressed his desire to "withdraw [his Ethics Complaint] in its entirety" if what he was relying upon was insufficient and if the new information that he had received from the Plaintiff's brother proved to be accurate. *See id.* Though his opinions about the applicable ethics rules were perhaps legally misguided, Mr. Sees is not a lawyer, and his desire to have his Ethics Complaint "handled by the Ethics Commission"—which was competent to make the relevant determinations even though he was not—was perfectly reasonable. *See*

*id.* Under these circumstances, Mr. Sees’s lay opinions—which implied no unstated defamatory facts—are not actionable as a matter of law. *Stones River Motors*, 651 S.W.2d at 722.

**B. THE PLAINTIFF’S CIVIL CONSPIRACY CLAIM IS INACTIONABLE.**

A civil conspiracy claim requires an actionable predicate tort committed pursuant to the conspiracy. *Watson’s Carpet & Floor Coverings*, 247 S.W.3d at 180 (“Civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy.”) (citations omitted). *See also id.* (quoting *Halberstam*, 705 F.2d at 479 (“Since liability for civil conspiracy depends on the performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort”). Here, because Clerk Stevens’s defamation claim is inactionable, *see supra*, pp. 12–22, her civil conspiracy claim necessarily fails as well. *See Watson’s Carpet & Floor Coverings*, 247 S.W.3d at 180.

**C. THE PLAINTIFF’S COMPLAINT SHOULD BE DISMISSED PURSUANT TO THE TENNESSEE PUBLIC PARTICIPATION ACT.**

**1. Applicability of the Tennessee Public Participation Act**

The Tennessee Public Participation Act provides that “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action” subject to the Act’s specialized provisions. *See* TENN. CODE ANN. § 20-17-104(a).<sup>4</sup> Pursuant to Tennessee Code Annotated § 20-17-103(3), “[e]xercise of the right of free speech’ means

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<sup>4</sup> 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, Mr. Sees’s Tennessee Public Participation Act petition to dismiss this action is timely filed. *Id.*

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.” *Id.* 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[.]**

*Id.* (emphases added).

Additionally, pursuant to Tennessee Code Annotated § 20-17-103(4):

“Exercise of the right to petition” means a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and:

- (A) Is intended to encourage consideration or review of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body; or**
- (B) Is intended to enlist public participation in an effort to effect consideration of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body[.]

*Id.* (emphases added).

## **2. Grounds for Granting Petition**

“The 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). Here, given that the Ethics Complaint over which Mr. Sees has been sued: (1) involved the government, (2) involved multiple public officials, (3) involved services in the marketplace, (4) involved governmental ethics—a matter of indisputable public concern—and (5) was additionally intended to encourage consideration or review of an issue by a state governmental body, this action qualifies as one filed in response to a party's "exercise of the right of free speech" and "exercise of the right to petition" within the meaning of the Tennessee Public Participation Act in several independent regards. *See* TENN. CODE ANN. §§ 20-17-104(a); 20-17-103(3); 20-17-103(6)(C), (D), & (G); 20-17-103(4)(A). Thus, Defendant Sees having met his 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, Defendant Sees expressly incorporates into this Petition each defense set forth above in support of his Motion to Dismiss. In further support of his defenses to this action, Defendant Sees has additionally appended a sworn affidavit as **Exhibit B** to establish the following:

- (1) His Ethics Complaint was not filed with actual malice;
- (2) His Ethics Complaint was filed in good faith pursuant to Tennessee Code Annotated § 3-6-208(b);
- (3) His Ethics Complaint was filed in furtherance of his right of free speech or



petition under the Tennessee or United States Constitution in connection with a public or governmental issue, and he communicated information regarding another person or entity to any agency of the state government regarding a matter of concern to that agency without actual malice pursuant to Tennessee Code Annotated § 4-21-1003(a);

(4) He is singularly responsible for drafting and filing his Ethics Complaint, and he did not conspire with anyone to disseminate it; and

(5) The Plaintiff did not suffer actual damages.

#### **VI. 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.

In the instant case, sanctions are especially warranted given that the Plaintiff is both: (1) An elected official seeking to retaliate against a citizen for filing a good-faith ethics complaint, and (2) A member of the Bar who should have been aware of the legally baseless nature of this action at the time of its filing. Both mandatory costs and attorney's fees and discretionary sanctions should be awarded accordingly.

#### **VII. CONCLUSION**

For the foregoing reasons, the Defendant's Motion to Dismiss and Special Motion to Dismiss should be **GRANTED**, and the claims set forth in the Plaintiff's Amended Complaint should be **DISMISSED WITH PREJUDICE** pursuant to Tennessee Rule of

Civil Procedure 12.02(6) and the Tennessee Public Participation Act. An order dismissing the instant case should issue as a result; the Defendant should be awarded his reasonable costs and attorney's fees associated with defending this action pursuant to Tennessee Code Annotated § 20-12-119(c); the Plaintiff should be ordered to pay the Defendant's court costs, reasonable attorney's fees, and discretionary costs pursuant to Tennessee Code Annotated § 20-17-107(a)(1); this Court should assess sanctions against the Plaintiff as necessary to deter repetition of its conduct pursuant to Tennessee Code Annotated § 20-17-107(a)(2); and the Plaintiff should be ordered to pay the Defendant's costs and reasonable attorney's fees pursuant to Tennessee Code Annotated § 4-21-1003(c).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of October, 2019, a copy of the foregoing was served via UPS mail, postage prepaid, and/or e-mailed to the following parties:

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