

SMILEDIRECTCLUB, INC.,
SDC FINANCIAL, LLC, and
SMILEDIRECTCLUB, LLC,

V.

Defendants.

ORDER GRANTING PETITION TO DISMISS COMPLAINT UNDER THE TENNESSEE PUBLIC PARTICIPATION ACT

This matter came before the Court on November 17, 2021, pursuant to Defendants' Petition to dismiss the complaint under the Tennessee Public Participation Act (TPPA). The Court thanks the parties for their hard work on this case. Upon consideration of the Parties' briefs and arguments, the Court finds that Defendants' Petition should be granted for the reasons stated on the record at the Court's November 17 hearing. ^{corrected} A transcript of the Court's ruling is attached hereto and incorporated by reference.

IT IS SO ORDERED this the _____ day of November 2021.


The Honorable Thomas W. Brothers

Respectfully submitted and approved for entry,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via e-mail and U.S. Mail to the following on the 24th day of November 2021.

/s/ James F. Sanders

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1 IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

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4 SMILEDIRECTCLUB, INC.,
5 SDC FINANCIAL, LLC, AND
6 SMILEDIRECTCLUB, LLC,

7 Plaintiffs,

8 vs.

Case No. 20-C-1054

9 NBCUNIVERSAL MEDIA, LLC,
10 and VICKY NGUYEN,

11 Defendants.

12
13 RULING OF THE COURT

14
15 BE IT REMEMBERED that the above-captioned
16 cause came on for hearing, on this, the 17th day of
17 November, 2021 beginning at 1:00 p.m., before the
18 Honorable THOMAS BROTHERS, when and where the
19 following proceedings were had, to wit:

20
21
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1 free speech, right to petition, or right of
2 association, and that's what the claim is based
3 upon, then the burden shifts to the complainant, in
4 this case SDC. I'm going to try to use
5 abbreviations for both of you. I'll use NBC and
6 SDC.

7 The legislature has defined, "...the
8 Court shall dismiss the legal action unless the
9 responding party establishes a prima facie case for
10 each essential element of the claim in the legal
11 action."

12 I think it's clear that the intent of
13 our legislature and the legislature in other states
14 is to set forth a procedure to winnow down baseless
15 claims or unnecessary claims to -- because of the
16 abuse of the legal system by some large corporations
17 or large well-financed individuals, even, who try to
18 exercise their power of saying we don't mind
19 spending a few hundred thousand dollars in
20 attorney's fees. We're going to make them spend all
21 of this and it's going to destroy most of these
22 people and they can't do it.

23 So they've set forth this mechanism to
24 try and eliminate these cases which will ultimately
25 fail if they were tested at an early stage and try

1 to do it as efficiently and economically as
2 possible. The Tennessee legislature, of course, has
3 noted, they want to protect the meritorious claims
4 to go forward. That is just as important in this
5 matter.

6 I can't help but note that I don't
7 believe the legislature envisioned the parties
8 involved in one of these petitions to be what I have
9 before me today. We have two very well-funded,
10 large organizations that are fighting about this.
11 This is not what I think they thought about. But
12 nonetheless it applies to them.

13 The parties have agreed that the
14 statement was in the course of exercise of free
15 speech, First Amendment rights, and, therefore, the
16 burden has shifted to SDC.

17 And the case deals with two
18 communications, a broadcast on television and an
19 internet posting. Clearly, both of these
20 communications portrayed SDC in a negative light.
21 SDC claims it goes further and was actually
22 defamatory, as well as being violative of the
23 Consumer Protection Act.

24 The TPPA is designed to provide an
25 expedited initial examination of a specific class of

1 cases involving public expression, to weed out
2 baseless lawsuits commonly referred to as SLAPP
3 lawsuits, strategic litigation against public
4 participation, while protecting the right to bring a
5 meritorious claim.

6 In order to establish a prima facia case
7 for each essential element, SDC is required to
8 submit factual assertions, not mere conclusory
9 allegations, sufficient to cause reasonable minds to
10 conclude that there is a likelihood that SDC will be
11 able to introduce admissible evidence at trial to
12 support each element, unless they are going to be
13 disproved or rebutted at trial. SDC could
14 essentially set forth a strawman case that would be
15 effective.

16 The Court is required at this stage to
17 draw every inference in favor of the respondent,
18 SDC, and the Court is not permitted to ^{weigh}waive
19 countervailing evidence at this stage.

20 The gravamen of SDC's Complaint is
21 defamation. Defamation is a statement about a
22 person or entity that exposes that person or entity
23 to wrath, public hatred, contempt, or ridicule, or
24 deprives that person of the benefits of public
25 confidence or social interaction.

1 To recover damages for defamation, a
2 plaintiff must prove the following:

3 First, that the defendant communicated a
4 statement that referred to the plaintiff;

5 And second, that the statement was made
6 to persons other than the plaintiff by television,
7 broadcast, and/or the internet;

8 And third, that the statement was read
9 or heard by persons other than the plaintiff, namely
10 members of the general public who understood its
11 defamatory meaning and that it referred to
12 plaintiff;

13 And fourth, that the statement referring
14 to the plaintiff was false or would lead a
15 reasonable person to conclude that the statement
16 implied facts which were not true;

17 And fifth, that the statement was
18 defamatory;

19 And sixth, that the defendant knew that
20 the statement was false or acted with reckless
21 disregard of whether it was false or not;

22 And seventh, finally, that the plaintiff
23 was injured by the communication of the statement.

24 The Court finds, as the parties have
25 agreed, essentially, that the statements were

1 published. So that issue is not before me.

2 The Court finds that SDC has established
3 a prima facie showing that it suffered actual
4 damages following the publication of the broadcast
5 and the internet posting.

6 The next determination is whether SDC
7 has established a prima facie case supporting the
8 requirement that the statements were false and
9 defamatory.

10 Whether a communication is capable of
11 conveying a defamatory meaning is a question of law.
12 That's *Revis versus McClean*, 31 S.W.3d 250.

13 SDC has identified 40 statements
14 contained within the broadcast and internet posting
15 that it alleges overlap each other and support
16 13 counts of defamation within this Complaint.

17 Considering the assertions by SDC in the
18 light most favorable to it, considering all factual
19 allegations as being true and drawing every
20 inference in favor of it, the Court finds that at
21 this stage, and subject to subsequent rebuttal by
22 contrary proof, SDC has established sufficient
23 factual assertions concerning six of those
24 statements to allow reasonable minds to conclude
25 that the contents of the report was defamatory and

1 caused actual damages.

2 These six statements broadly address
3 11 counts of the Complaint. And I'm going to go
4 through these by statement on it. First one -- I'm
5 using the numbering that SDC utilized in their
6 chart.

7 Number 4, the defamatory statements
8 alleged as by Ms. Nguyen. "After a year, Anna was
9 in pain and she says she tried but couldn't speak to
10 her assigned dentist, so she found an orthodontist
11 who diagnosed her with a crossbite, possibly caused
12 by the aligners, straining her neck and jaw muscle,
13 sparking migraines."

14 Ms. Rosemond notes, stating, "I really
15 noticed that things, like, didn't feel right with
16 the bite. My head was hurting frequently."

17 They have submitted evidence of falsity
18 of that, that Ms. Rosemond's orthodontist did not
19 indicate that her issues were caused by the
20 treatment through SDC's platform. And that's in the
21 Statement of Facts, Paragraph 112, Part g,
22 Exhibit 23, and -- excuse me, and in the Dunn
23 deposition, Pages 76, Line 10 through 80, Line 13.
24 These all apply to multiple counts. This one
25 addresses more than any of them:

1 Count I, the defamation claim that it
2 caused health and physical problems;

3 Count III, that there was defamatory
4 statements concerning the extensiveness and
5 thoroughness of the treatment using the platform;

6 Count IV, defamation for false
7 statements and treatment using the platform injured
8 the female patient;

9 Count VIII, defamation against NBC and
10 Nguyen for false and misleading statements of the
11 treatment using SDC's platform is a do-it-yourself
12 dentistry;

13 Count IX, defamation against NBC and
14 Nguyen for false and misleading statements that
15 SDC-affiliated doctors are not involved in treating
16 patients;

17 Count X, defamation claims against NBC
18 and Nguyen for falsely implying that treatment using
19 SDC's platform is not safe for patients;

20 And XI, Count XI, defamation against NBC
21 and Nguyen for falsely implying that treatment using
22 their platform is a do-it-yourself dentistry.

23 Statement Number 14, a statement by
24 Ms. Nguyen that, "Well, Lester, California just
25 enacted the first law that would require a dentist

1 to look at an x-ray before anyone can start this
2 kind of treatment. That law in California also bans
3 those confidentiality agreements."

4 As pointed out, California law does not
5 require that they get an x-ray before undergoing
6 online aligner treatment, and the California law
7 does not ban the confidentiality agreements used by
8 SDC. I recognize that there is an argument that it
9 was simply loose language, perhaps, on the part of
10 the correspondent. But at this stage, for a
11 prima facie showing, respectfully, I find that they
12 have established that there were false statements
13 and can conceivably support Counts I and VII.

14 Statement Number 21 is where, again, I
15 think Mr. Holt is saying this. So Rosemond
16 consulted an outside -- excuse me. This was
17 Ms. Nguyen, I believe. Said that "...consulted an
18 outside orthodontist who diagnosed her with a
19 crossbite or misalignment, possibly caused by the
20 aligners."

21 And SDC has put forth to contravene this
22 that the orthodontist did not indicate that her
23 issues were caused by treatment through SDC's
24 platform. Again, the citation I've previously given
25 you. And that applies to Counts IV and X.

1 Statement Number 26 is again Ms. Nguyen,
2 I think, making a statement. "And in January, in an
3 effort to protect patients, a law went into effect
4 in California requiring all teledentistry patients
5 to get an x-ray before undergoing online aligner
6 treatment. Virginia is considering similar rules."

7 It's pointed out that the California law
8 does not require all teledentistry patients to get
9 an x-ray before undergoing online aligner treatment.
10 That will apply to Counts VI, VII, and X.

11 Statement Number 30 gives Mr. Harwood --
12 these deal with the internet posting only. This is
13 not the broadcast. It says, "That's what happened
14 to Thomas Harwood, 40, of Winnemucca, Nevada.
15 Harwood told NBC News that his dentist said the
16 SmileDirectClub aligners moved his teeth so fast
17 that it caused them to detach from the bone."

18 First and foremost, the Court notes that
19 these are comments that are attributed to a
20 layperson who does not have the competency to make
21 such a diagnosis or determination of what caused
22 such problems to his teeth. And there's no
23 indication of consultation with an orthodontist to
24 support that.

25 And also, the clear alignment treatments

1 prescribed by the SDC-affiliated doctors is not
2 likely to move teeth so fast they can detach from
3 the bone. That's Statement of Fact, Paragraph 114.
4 This would then apply to Counts V and X.

5 And Statement 31, again, Mr. Harwood,
6 "Now I stand to lose two to three of my bottom teeth
7 and two to three of my front teeth." Again, these
8 are lay comments -- comments by a layperson, not an
9 expert, that were placed in here. And the Statement
10 of Fact 114 also applies to that. That affects,
11 again, Counts V and X.

12 I want to emphasize, this is -- at this
13 early stage, without discovery, without anything
14 else, it doesn't prohibit any other challenge to any
15 of these matters and dispositive motion at some
16 other time, if necessary. It is simply did they
17 establish a prima facie case at this point to allow
18 the Court to let it go forward.

19 Therefore, the Court finds that SDC has
20 established a prima facie showing of those essential
21 elements in those 11 counts.

22 The inquiry doesn't stop there, though.
23 The Court must next address the scienter
24 requirements. The law is different when a public
25 figure is involved. The Court finds that SDC is a

1 public figure as a matter of law. The standard is a
2 subjective one concerning state of mind for this
3 public figure, not an objective reasonable person
4 standard.

5 TPI 7.04 states, the plaintiff must
6 prove by clear and convincing evidence that the
7 defendant communicated the statement, knowing that
8 it was false or with reckless disregard of whether
9 it was false or not. Clear and convincing evidence
10 is a different and higher standard than
11 preponderance of the evidence. It means that the
12 defendant's wrong, if any, must be so clearly shown
13 that there is no serious or substantial doubt about
14 the correctness of the conclusions drawn from the
15 evidence.

16 Malice connotes more than personal ill
17 will, hatred, spite, or desire to injure. It is
18 limited to statements made with knowledge that they
19 are false or with reckless disregard to their truth
20 or falsity.

21 Determining whether a defendant acted
22 with reckless disregard requires the finder of fact
23 to determine whether the defendant, in fact,
24 entertained serious doubts as to the truth of his or
25 her publication. That's relying on McWhorter versus

1 Barre, 132 S.W.3d 354.

2 Mere proof of failure to investigate
3 without more cannot establish reckless disregard for
4 the truth. Rather, the publisher must act with a
5 high degree of awareness of probable falsity.
6 That's McCluen versus Roane County Times,
7 936 S.W.2d 936.

8 Therefore, SDC must establish a
9 prima facie case of actual malice or reckless
10 disregard of the truth since it is an essential
11 element. At the summary judgment stage, or at
12 trial, this must not must be shown by clear and
13 convincing admissible evidence.

14 Under the unique procedure established
15 by the TPPA, SDC only needs to establish a
16 prima facie showing of this element. And the Court
17 notes that such showing must be made before any
18 formal discovery is allowed other than the limited
19 discovery dealing with this particular petition.

20 Further, the Court is persuaded by the
21 California cases which have held that there must be
22 a showing of a reasonable probability that SDC will
23 be able to prove malice by clear and convincing
24 proof at the summary judgment stage or at trial.

25 I'm guided by that, because many cases,

1 I know particularly in Texas, they've noted,
2 California started most of this TPPA, and a lot of
3 people look to that state for guidance on it. That
4 was one of the harder things I had to do is how do I
5 take a prima facie case and clear and convincing,
6 which is just one step below reasonable doubt,
7 beyond a reasonable doubt, and how do I equate those
8 together?

9 I think that's a logical and reasonable
10 approach to say, at this stage, show there's a
11 reasonable probability that you're going to be able
12 to produce admissible proof at trial or the summary
13 judgment stage to show it by that high clear and
14 convincing standard.

15 Considering that, and respectfully, the
16 Court finds that SDC has failed to establish the
17 prima facie showing of any of the counts that it
18 would be reasonably able to submit admissible
19 evidence to prove malice by clear and convincing
20 proof at the summary judgment stage or at trial. At
21 best, you've raised some questions possibly touching
22 on being able to present proof to a degree of
23 preponderance of the evidence. But respectfully, I
24 just don't see that going into that high clear and
25 convincing standard, which is required when you've

1 got a public figure.

2 And that higher standard seems to me to
3 be imposed for cases just as this, where a news
4 organization is critical of a public figure or a
5 public corporation and they're held to a requirement
6 not to be actually false or recklessly disregard the
7 truth, but they're allowed to be critical.

8 When you step into the public forum like
9 that, you're required to endure the slings and
10 arrows that are tossed at you by so many people in
11 so many ways. But you should be protected from
12 anything that is ultimately unfair.

13 They've set this clear and convincing
14 standard. That's the guiding light I followed on
15 this one. That unfortunately applies to all of the
16 13 counts that effectively relate to defamation,
17 even the two I didn't find were supported by the
18 statements. I just don't see the actual malice
19 showing that you have a reasonable probability of
20 proving that by clear and convincing evidence at
21 trial.

22 Accordingly, the petition should be
23 granted as to Counts I through XIII.

24 Count XIV is based on the Tennessee
25 Consumer Protection Act. It alleges that the false

1 and misleading statements referred to in the other
2 13 counts constitute a violation of the statute --
3 this statutory protection and amount to unfair and
4 deceptive trade practices.

5 The Court finds that actual malice is
6 not an essential element of a TCPA claim. I don't
7 think that that fits into it. Defamation and TCPA
8 are different. And the TCPA doesn't bring that into
9 play.

10 The only place where willful or wanton
11 conduct comes into play in a Consumer Protection
12 Action is on the treble damages action, and if you
13 can show it was done willfully or wantonly, then you
14 might be entitled to treble damages on it. But I
15 don't think the component of ~~consent of~~ malice is an
16 essential element under TCPA for a deceptive
17 statement that's made.

18 The Court finds that SDC, respectfully,
19 has not established a prima facie case supporting
20 all of the essential elements of a TCPA claim, and
21 therefore, may not avail itself of the TCPA under
22 these circumstances. I'm guided by the plain
23 language of Tennessee Code Annotated 47-18-102,
24 which provides, "...this part shall be liberally
25 construed to promote the following policies:"

1 Subpart (4), "To protect consumers and legitimate
2 business enterprises from those who engage in unfair
3 or deceptive acts or practices in the conduct of any
4 trade or commerce in part or wholly within this
5 state."

6 The issue here is whether the reports
7 which were news stories published on NBC's media
8 platform were made in the conduct of any trade or
9 commerce.

10 T.C.A. 47-18-103(19) defines trade or
11 commerce as the advertising, offering for sale,
12 lease or rental, or distribution of any goods,
13 services, or property, tangible or intangible, real,
14 personal, or mixed, and other articles, commodities,
15 or things of value wherever situated.

16 Frankly, it cannot be said that the
17 publishing of news reports satisfies any of the
18 criteria identified above. Accordingly, the Court
19 can reasonably find that NBC did not engage in a
20 trade or commerce, and therefore, SDC does not have
21 a TCPA claim.

22 Furthermore, the Tennessee Court of
23 Appeals recently relied on a 1991 interpretation of
24 the statute, authored by former Justice Koch,
25 limiting the TCPA to, quote, transactions. While

1 this interpretation was made in the context of
2 determining whether a private sale of land falls
3 under the purview of the TCPA, the holding is still
4 applicable to this case and the reasoning is
5 applicable here.

6 The quote from that is relying, in part,
7 on the Act's purpose of maintaining ethical
8 standards of dealing between persons engaged in
9 business and the consuming public,
10 T.C.A. 47-18-102(4).

11 Courts have limited the Act's
12 application to transactions between businesses and
13 consumers and not to casual, noncommercial
14 transactions between two individuals. That's
15 Hall v. Tabb. It's an unreported case, 2021 Westlaw
16 1148539 at 4, and that's quoting Judge Koch's
17 opinion in White versus Eastland, which is 1991
18 Westlaw 149735.

19 Accordingly, the Court finds that the
20 NBC reports are not transactions and therefore were
21 not published in the conduct of any trade or
22 commerce. Therefore, SDC has not made the requisite
23 prima facie showing.

24 And additionally, for purposes of the
25 TCPA and FTC type acts, the essence of deception is

1 misleading consumers by a merchant's statements,
2 silence, or actions. That's Tucker versus Sierra
3 Builders, 180 S.W.3d 109.

4 The Court finds that NBC is not a
5 merchant for purposes of the TCPA. Accordingly, the
6 Court finds that SDC has not established a
7 prima facie case supporting its claims under the
8 TCPA.

9 Having found that SDC has failed to
10 establish a prima facie case as to the entirety of
11 the Complaint, NBC's petition is granted and the
12 case -- this matter is dismissed with prejudice.
13 Costs are taxed to SDC.

14 Under the ambit of the statute, of
15 course, there is an immediate right of appeal that
16 you have. I don't think -- I was trying to figure
17 out procedurally, if I need to take any steps. I
18 don't think I need to. I believe you just simply
19 have that automatic right of appeal to take this up.
20 Either side, frankly, does. If I'm in error on
21 that, I'm glad to remedy it by a subsequent order if
22 necessary.

23 Again, I thank all of you for the hard
24 work you've put into this. You really have labored
25 long and hard on it and made us labor long and hard

1 on it as well. I wish all of you the best.

2 Mr. Petrocelli, will you prepare the
3 order, please, sir?

4 MR. PETROCELLI: Yes, I will.

5 THE COURT: Any questions?

6 MR. CONNOLLY: No, Your Honor.

7 MR. PETROCELLI: Thank you, Your Honor.

8 MR. HARRIS: Thank you, Your Honor.

9 THE COURT: Thank you all very much.
10 Please stay safe. Safe journeys home.

11 (WHEREUPON, the foregoing proceedings
12 were adjourned at 3:30 p.m.)

1 REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE

3 COUNTY OF Davidson

4
5 I, Jerri L. Porter, RPR, CRR, Licensed
6 Court Reporter, with offices in Nashville,
7 Tennessee, hereby certify that I reported the
8 foregoing proceedings by machine shorthand to the
9 best of my skills and abilities, and thereafter the
10 same was reduced to typewritten form by me. I am
11 not related to any of the parties named herein, nor
12 their counsel, and have no interest, financial or
13 otherwise, in the outcome of the proceedings.

14 *I further certify that in order for this*
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20 *violation of Tennessee Code Annotated 39-14-104,*
21 *Theft of Services.*

22 Jerri L. Porter, RPR, CRR, LCR
23 Elite-Brentwood Reporting Services
24 Notary Public State of Tennessee

25 My Notary Public Commission Expires: 2/6/2022
LCR # 335 - Expires: 6/30/2022