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

DS ONE, LLC, d/b/a THE DOG SPOT EAST NASHVILLE,	§	
Plaintiff,	§	Case No. 18C362
v.	§	JURY DEMAND
JAMIE BYER [SIC] and BARI HARDIN,	§	Judge Joseph P. Binkley
Defendants.	§	

DEFENDANT HARDIN'S MEMORANDUM IN SUPPORT OF HER MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

I. Introduction

This is a Strategic Lawsuit Against Public Participation ("SLAPP-suit") filed by The Dog Spot, a public figure, against two dog lovers who posted Facebook comments expressing their good-faith concerns about the number of dogs that have died in the Plaintiff's care. The Defendants' Facebook posts were not illegal, and they fall safely within the protection guaranteed by the First Amendment. For a wealth of additional reasons, the Plaintiff's Complaint also fails to state a cognizable claim under any pleaded theory of relief. Further, because the Plaintiff has sued the Defendants over statements made to a group known to include police officers, animal control officers, and other local agency officials, the Defendants are immune from this lawsuit, and they are entitled to recover the "costs and reasonable attorneys' fees incurred in establishing [their] defense" pursuant to the Tennessee Anti-SLAPP Act of 1997. *See* Tenn. Code Ann. § 4-21-1003(c).

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II. Summary of Argument

On February 14, 2018, the Plaintiff—a public figure and "doggy daycare" doing business as "The Dog Spot"—filed a $2 million lawsuit against the Defendants[1] over a handful of purportedly illegal Facebook comments. The Dog Spot's Complaint attempts to spin the Facebook comments at issue into seven distinct claims for: (1) Libel; (2) Misrepresentation by Concealment; (3) Fraud; (4) Negligent Misrepresentation; (5) False Light Invasion of Privacy; (6) Intentional Interference of [sic] a Business Relationship; and (7) Civil Conspiracy.[2] However, longstanding U.S. Supreme Court precedent dictates that regardless of the Plaintiff's attempt to reframe its claims under separate theories of relief, each claim is subject to the heightened constitutional protection guaranteed by the First Amendment.[3] Further, because multiple fatal defects in The Dog Spot's Complaint prevent it from overcoming the heightened constitutional standards that govern defamation claims, and because The Dog Spot's Complaint also fails to comply with the mandatory requirements of Tenn. R. Civ. P. 10.03, the Plaintiff's Complaint must be dismissed outright for failure to state a claim upon which relief can be granted.

Critically, in addition to failing to pass muster under the heightened constitutional

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[1] Defendant Hardin refers to the claims filed against both her and Defendant Bayer, because the Plaintiff alleges an undefined "civil conspiracy" between them in which they are supposedly liable for one another's torts. *See* Doc. #1, p. 13.

[2] *See* Doc. #1, pp. 7-13.

[3] *See, e.g., Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir. 2005) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) ("A party may not skirt the requirements of defamation law by pleading another, related cause of action.")); *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) ("stricter scrutiny may be warranted where a plaintiff attempts to use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim.'")). *See also Moldea v. New York Times Co.*, 22 F.3d 310, 319–20 (D.C. Cir. 1994) ("a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim."); *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001) ("A plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion.") (cleaned up).

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standards that govern defamation claims, The Dog Spot's Complaint independently fails to establish threshold elements of each of the six additional torts pleaded as well. For example, Claims #2-#4 allege various forms of misrepresentation and fraud against The Dog Spot regarding comments that its own Complaint acknowledges were not made to The Dog Spot—even though such claims cannot be premised upon statements made to third parties.[4] Similarly, Claim #5 alleges false light invasion of privacy against The Dog Spot, even though applicable precedent unmistakably provides that corporations cannot assert false light claims.[5] Further, Claim #6, alleging unlawful interference, fails to allege, *inter alia*, the threshold requirement that the Defendants' predominant purpose was to injure The Dog Spot—rather than having been made for their expressly stated purpose of protecting more dogs from dying in The Dog Spot's care.[6] Finally, Claim #7 merely copies and pastes an identical Vicarious Liability/Civil Conspiracy claim from The Dog Spot's parallel lawsuit in Davidson County Case: 17C1425, which claim was dismissed *ab initio* because it enjoys absolutely no basis in law.[7]

Separately, The Dog Spot has sued the Defendants over comments made "in furtherance of [their] right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue." *See* Tenn. Code Ann. § 4-21-1003(a). Defendants' comments were also made to a group known to include police officers, animal control officers, and other local agency officials and regarded matters of concern to their respective agencies. *Id.* Accordingly, the Defendants are immune from

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[4] *See infra* Section VII.

[5] *See infra* Section VIII.

[6] *See infra* Section IX.

[7] *See infra* Section IX. *See also* Davidson Cty. Case 17C1425, Doc. #18.

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this lawsuit pursuant to Tenn. Code Ann. § 4-21-1003(a), and they are entitled to recover their costs and reasonable attorney's fees pursuant to Tenn. Code Ann. § 4-21-1003(c). *See id.* Finally, following the dismissal of The Dog Spot's claims, the Defendants are also independently entitled to recover an award of $10,000.00 against The Dog Spot pursuant to Tenn. Code Ann. § 20-12-119(c).

In sum: The Dog Spot's Complaint fails to state any claim upon which relief can be granted. It should be dismissed outright as a result. Defendant Hardin should also be awarded her full costs and reasonable attorney's fees pursuant to Tenn. Code Ann. § 4-21-1003(a), and she should additionally be awarded a $10,000.00 fee-shifting award pursuant to Tenn. Code Ann. § 20-12-119(c).

III. The Dog Spot's Status as a Public Figure

"Determining whether a person is a public figure is a question of law." *Tomlinson v. Kelley*, 969 S.W.2d 402, 405, n. 2 (Tenn. Ct. App. 1997). In the instant case, however, The Dog Spot's status as a public figure both is not and cannot seriously be contested.

Notably, this is not the first time that The Dog Spot has been involved in litigation over the death of dogs in its care. *See* Davidson Cty. Case 18GC1623 (Jan. 26, 2018 lawsuit filed against Plaintiff after a Chihuahua was mauled to death at The Dog Spot after The Dog Spot misrepresented its safety practices). Further, the death of dogs in The Dog Spot's care has been covered extensively by local media. *See* Doc. #5 (Defendant Hardin's Motion to Transfer), Exhibit A, Liz Lohuis, *Chihuahua dies at East Nashville dog day care,* WSMV Channel 4 News (May 10, 2017), http://www.wsmv.com/story/35260500/chihuahua-dies-at-east-nashville-dog-day-care. *See also* Brandon Marshall, *Family Pet Killed In Doggy Daycare Attack*, WTVF NewsChannel 5 (Apr. 29, 2017), https://www.newschannel5.com/news/family-pet-

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killed-in-doggy-daycare-attack. The Dog Spot has also "injected [itself] into the public controversy voluntarily" by (questionably) proclaiming to local media that "[a]nimal safety is our number one concern and we take every possible precaution to keep the dogs in our care safe." Doc. #5, Exhibit A; *Hibdon v. Grabowski*, 195 S.W.3d 48, 62 (Tenn. Ct. App. 2005).

Further still, as evidenced by: (1) the dozens of reported injuries to dogs in The Dog Spot's care; (2) the Plaintiff's alleged mistreatment of dogs in its care; (3) the Plaintiff's reported gross negligence in caring for dogs in its care; and (4) the Plaintiff's unusually vindictive approach to online criticism about its business practices; multiple facets of this lawsuit are matters of public concern that have previously generated substantial public commentary.[8] *See, e.g.*, Doc. #5, Exhibit B (Online Reviews of The Dog Spot).[9]

Consequently, as the Plaintiff's own Complaint intimates,[10] The Dog Spot is a public figure, and the subject matter of this lawsuit involves matters of public concern. As such, to state a claim for relief, The Dog Spot's Complaint is subject to the heightened actual malice standard that governs defamation claims. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978) ("the Supreme Court of the United States has constitutionalized the law of libel").

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[8] The Dog Spot has also injected itself into public controversy surrounding its generally outrageous behavior by initiating other frivolous litigation aimed at stifling public criticism about its business practices. *See, e.g.*, Davidson Cty. Case 17C1425 (September 7, 2017 Order Dismissing The Dog Spot's Claims for Vicarious Liability, Civil Conspiracy, and Outrageous Conduct in Plaintiff's $2,000,000.00 lawsuit over a negative Yelp! Review).

[9] "[T]he determination concerning whether the plaintiff is a public figure is a question of law," rendering consideration of external sources appropriate. *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 283 (Tenn. Ct. App. 2007). "In addition to the allegations in the complaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice." *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005).

[10] *See* Doc. #1, ¶¶ 37-46 (pleading that the actual malice standard applies).

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Under this standard, the Plaintiff must plead and prove "by clear and convincing evidence that the Defendants' published statements were made with knowledge of the statement's falsity or with reckless disregard of its truth or falsity." *Hibdon v. Grabowski*, 195 S.W.3d 48, 62 (Tenn. Ct. App. 2005).

IV. All of The Dog Spot's Claims Are Subject to the Heightened Constitutional Standards Governing Defamation Claims

The Dog Spot's Complaint alleges seven distinct claims for: (1) Libel; (2) Misrepresentation by Concealment; (3) Fraud; (4) Negligent Misrepresentation; (5) False Light Invasion of Privacy; (6) Intentional Interference of [sic] a Business Relationship; and (7) Civil Conspiracy.[11] However, notwithstanding its attempt to restate its claims under separate theories of relief, all of The Dog Spot's claims are subject to the same heightened pleading standards that govern defamation claims filed by public figures. *See, e.g., Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir. 2005) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) ("**A party may not skirt the requirements of defamation law by pleading another, related cause of action.**")); *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) ("**stricter scrutiny may be warranted where a plaintiff attempts to use a state-law claim 'to avoid the strict requirements for establishing a libel or defamation claim.'**")). *See also Moldea v. New York Times Co.*, 22 F.3d 310, 319–20 (D.C. Cir. 1994) ("**a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim.**"); *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001) ("**A plaintiff**

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[11] *See* Doc. #1, pp. 7-13.

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may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion.") (cleaned up).

In the instant case, The Dog Spot's Complaint fails to satisfy multiple threshold requirements of defamation claims that must be established in order to survive a motion to dismiss. Accordingly, all of the Plaintiff's causes of action fail to state a cognizable claim for relief, and the Plaintiff's Complaint must be dismissed in its entirety as a result.

V. Standards that Apply to Defamation Claims on a 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). Such a motion is generally resolved by examining the pleadings alone. *See Legett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn. 2010). However, "[t]here are exceptions to the above rule," which "numerous court decisions [have] well recognized." *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). Thus, "'[i]n addition to the allegations in the complaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.'" *Id.* (quoting *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005)). After considering these materials, where—as here—it "appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief," a defendant's motion to dismiss must be granted. *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

With respect to defamation claims specifically, the Tennessee Supreme Court has recognized that "the Supreme Court of the United States has constitutionalized the law of

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libel and [defamation]." *Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). As a consequence, defamation claims are subject to heightened pleading standards, and they present several threshold and outcome-determinative questions of law that do not require any deference to a plaintiff's own characterizations in his Complaint. *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). Accordingly, "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, *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 v. Mapco Exp., Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012) (emphasis added). *See also Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000) ("Whether a communication is capable of conveying a defamatory meaning is a question of law."); *McWhorter v. Barre*, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003) (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

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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. See also Riley v. Reagan*, Davidson Cty. Cir. Ct. Case No. 2016-CV-479 (2016) (granting defendant's motion to dismiss defamation claim that could not be considered defamatory as a matter of law); *Loftis v. Rayburn*, Davidson Cty. Cir. Ct. Case 17C295 (same).

Further still, Tennessee courts have adopted several categorical bars that prevent claimed defamations from being actionable, at least four of which independently control this case:

First, to provide substantial breathing room to promote free speech, unfettered communication, and commentary on issues of public importance, statements that are merely "annoying, offensive or embarrassing" are not actionable. *Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at *3 (Tenn. Ct. App. Sept. 30, 2015) (quotation omitted), *appeal denied* (Feb. 18, 2016). Instead, "[f]or a communication to be libelous [or defamatory], it must constitute a serious threat to the plaintiff's reputation. A libel [or defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element 'of disgrace.'" *Id.* (quoting *Davis v. The Tennessean*, 83 S.W.3d 125 (Tenn. Ct. App. 2001)).

Second, if a speaker's "words are true, ***or essentially true***, they are not actionable even though the statement contains other inaccuracies which are not damaging." *Revis*, 31 S.W.3d at 253 (emphasis added) (quoting *Stones River Motors, Inc. v. Mid–South Publishing Co., Inc.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983)).

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Third, "'comments upon or characterizations of published facts are not in themselves actionable.'" *Weidlich v. Rung*, No. M2017-00045-COA-R3-CV, 2017 WL 4862068, at *6 (Tenn. Ct. App. Oct. 26, 2017) (quoting *Stones River Motors, Inc.*, 651 S.W.2d at 720)).

Fourth, opinions enjoy constitutional protection under the First Amendment. *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.*

Based on these threshold questions of law that apply to defamation claims and the above categorical proscriptions against defamation liability, none of the statements underlying Plaintiff's defamation claim is capable of sustaining a cognizable claim for relief as a matter of law. Accordingly, the Plaintiff's Complaint must be dismissed with prejudice in its entirety.

VI. Fatal Defects in the Plaintiff's Defamation Claim

1. The Plaintiff's allegation that it has had only "one" major incident at its facilities rather than "seven" cannot be construed as a "serious threat to the plaintiff's reputation."

There is no dispute in this case that in 2017, a dog was mauled to death while in The Dog Spot's care. The Dog Spot has publicly admitted as much in widely reported local media. *See* Doc. #5, Exhibit A (noting "the tragedy that occurred at one of our facilities"). The Dog Spot was also sued over the matter just weeks before initiating this lawsuit. *See* Davidson Cty. Case 18GC1623. In reviewing the sufficiency of The Dog Spot's Complaint, this Court is empowered to take notice of these materials. *Ind. State Dist. Council of Laborers*, 2009 WL 426237, at *8.

Accordingly, this lawsuit does not involve a dispute over *whether* dogs have died in The Dog Spot's care. Instead, it turns on a dispute over whether The Dog Spot lied to

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the public when it claimed that it has never had "any major incident" other than one Chihuahua being mauled to death at its facilities in 2017.[12] *See* Doc. #5, Exhibit A.

It is the Defendants' understanding that, contrary to the Plaintiff's public claims, The Dog Spot has had at least "seven" such "major incident[s]" at its facilities since it opened its doors. *See* Doc. #1, pp. 3-5. Disputing that allegation, the Plaintiff continues to insist that there has only been one. Significantly, though, the Dog Spot has also publicly proclaimed that "we've literally had hundreds of thousands of dogs through our doors. . . ." *See* Doc. #5, Exhibit A. Thus, even taking the Plaintiff's allegations as true, and assuming—most conservatively—that "hundreds of thousands of dogs" means "two hundred thousand dogs," this lawsuit turns upon whether the Plaintiff has been disgraced by an allegation that 0.0035% of dogs in The Dog Spot's care have died versus 0.0005%.

Regardless of which number is accurate, however, the difference between the two death rates does not rise to the level of a "serious threat to the plaintiff's reputation"—an indisputable prerequisite to surviving a motion to dismiss. *Davis*, 2015 WL 5766685, at *3. Thus, the mathematically negligible difference between what The Dog Spot claims and what the Defendants said they heard is plainly insufficient to constitute a serious threat to the plaintiff's reputation, to "hold[] the plaintiff up to public hatred, contempt or ridicule," or to carry "an element of disgrace." *Id.* Instead, at best, it represents a difference that The Dog Spot finds "annoying, offensive or embarrassing"—a deficiency that compels the outright dismissal of the Plaintiff's Complaint *ab initio*. *Id.*

Applicable precedent in comparable cases overwhelmingly supports this view. In

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[12] The balance of the Plaintiff's claims—such as those involving questions or recommendations—concern statements that do not contain factual allegations; are facially incapable of being proven false; or are such clearly protected opinions that further analysis of them is unnecessary. *See Stones River Motors*, 651 S.W.2d at 722 ("an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts.").

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Ali v. Moore, 984 S.W.2d 224, 230 (Tenn. Ct. App. 1998), for example, our Court of Appeals held that an inaccurate report stating that a plaintiff had bribed two people instead of one failed to establish the requisite "disgrace" to sustain a claim for defamation. *See id.* ("Whether Ali, in fact, only attempted to bribe one of these persons is immaterial in light of these circumstances. Since Ali was convicted of one count of attempted bribery, his reputation was already tarnished. We do not believe that Ali's reputation suffered further disgrace for being accused of twice committing attempted bribery in light of the fact that he was convicted of rape and one act of attempted bribery.").

Similarly, in *Isbell v. Travis Elec. Co.*, No. M1999-00052-COA-R3-CV, 2000 WL 1817252, at *7 (Tenn. Ct. App. Dec. 13, 2000), our Court of Appeals rejected another defamation claim based on a similarly acknowledged misstatement. *See id.* (holding that "we decline to find that Mr. Travis's false statement that Mr. Isbell refused to take a drug test constituted 'a serious threat' to Mr. Isbell's reputation," when the truth was that the plaintiff had failed an initial drug test but offered to take another).

Federal courts applying Tennessee law have reached the same essential conclusion in comparable cases as well. *See, e.g., Stilts v. Globe Int'l, Inc.*, 950 F. Supp. 220, 225 (M.D. Tenn. 1995), *aff'd*, 91 F.3d 144 (6th Cir. 1996) (quoting *Masson*, 501 U.S. at 517) ("Although the precise accuracy of several specific details set forth in the article is disputed, the overall effect of the published account would not have 'a different effect on the mind of the reader from that which the pleaded truth would have produced.'")); *Gallagher v. E.W. Scripps Co.*, No. 08-2153-STA, 2009 WL 1505649, at *10 (W.D. Tenn. May 28, 2009) ("Having found that all of the statements pertaining to the Delaware lawsuit were either true, substantially true, or privileged, the Court holds that Plaintiffs' claims as to these statements should be dismissed."). *Cf. Orr v. Argus-Press Co.*, 586

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F.2d 1108, 1112 (6th Cir. 1978) ("most, if not all, of the reporter's story on Orr is substantially truthful and therefore not actionable.").

In sum: the mathematically negligible distinction over which this entire lawsuit is premised is insufficient—as a matter of law—to establish the necessary "disgrace" that is required for the Plaintiff to overcome a motion to dismiss. *Davis*, 2015 WL 5766685, at *3. Accordingly, the Plaintiff's Complaint fails to clear the heightened pleading standards that govern defamation claims, *see id.*, and The Dog Spot's Complaint must be dismissed in its entirety as a result.

<u>2. The Defendants' statements about dog deaths at The Dog Spot are inactionable because they were substantially true.</u>

Dogs, it goes without saying, are beloved family members. Many dog owners—including the undersigned—love their dogs more than people. Thus, as far as the Plaintiff's reputation is concerned, whether The Dog Spot allowed one dog in its care to be mauled to death or seven is of vanishingly little importance. Instead, the fact that the Plaintiff is indisputably incapable of ensuring that a cherished family pet will come back alive after being boarded at The Dog Spot is all that matters.

Critically, 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). Pursuant to 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

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law of defamation the Supreme Court of the United States has held . . . [that the law] 'overlooks minor inaccuracies and concentrates upon substantial truth.'")).

As such, defamation claims premised upon inaccurate but insignificant distinctions like the one presented in this case are uniformly rejected across jurisdictions,[13] in no small part because the United States Supreme Court has compelled as much. Specifically, in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991), 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.* (citing Restatement (Second) of Torts § 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 (5th Cir. 1983); Rodney A. Smolla, Law

[13] *See, e.g.*, *Raczkowski 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.").

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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 Dog Spot allowed a dog in its care to be mauled to death—is established. *Id.*

Accordingly, even assuming the truth of the allegations in The Dog Spot's Complaint, this case is premised upon an alleged inaccuracy that is substantially true and, therefore, is not cognizable as defamation as a matter of law. *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—such as when a defendant misstates a plaintiff's involvement in criminal proceedings—"substantial truth has been successfully asserted as a matter of law" in 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*, 372 N.W.2d at 254-55 (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

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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)).

In the instant case, The Dog Spot alleges misstatements that are nowhere near as serious as those described above. It certainly has not been falsely accused of criminal wrongdoing—the sort of allegation that gave rise to defamation *per se* at common law but still commonly fails even at the motion to dismiss stage, *see id.*—and it has not had any allegation that is nearly so serious published inaccurately. Here, regardless of whether the correct number is one or seven, the "gist" and "sting" of the Defendants' charge is that The Dog Spot cannot prevent dogs in its care from being killed. That charge is indisputably true; it has been widely reported in local media; and The Dog Spot has acknowledged its accuracy. *See* Doc. #5, Exhibit A. As such, The Dog Spot's Complaint is barred by the substantial truth doctrine, and the instant lawsuit must be dismissed.

<u>3. Defendant Hardin's statements reflected non-actionable commentary on facts alleged by others.</u>

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, Inc.*, 651 S.W.2d at 720)). Our Court of Appeals has also recognized that this

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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)).

Even taking the facts alleged in The Dog Spot's Complaint as true, the claims against Defendant Hardin must be dismissed because they represent her commentary upon factual allegations published *by others*. As The Dog Spot itself contends, on January 31, 2018, Defendant Bayer posted that she had "found out" about multiple dog deaths at The Dog Spot and had heard that "seven" dogs had died there. *See* Doc. #1, ¶ 18. Subsequently, and *only after these comments were published*, in the weeks that followed, Defendant Hardin indicated that she had heard that "seven" dogs died in The Dog Spot's care, and she offered her opinions about The Dog Spot based on those previously published allegations. *See id.* at ¶ 19 (referencing commentary from February 7, 2018); ¶ 24 (referencing commentary from February 13, 2018). Defendant Hardin's commentary also expressly stated that it was based on information that she received from other "sources," rather than her own firsthand knowledge. *See id.* at ¶ 20(d).

Given that this timeline of events is presented in The Dog Spot's own Complaint, the fact that Defendant Hardin's commentary post-dated another person's published factual allegations about "seven" dogs dying in The Dog Spot's care is both judicially admitted and conclusively determined against the Plaintiff. *See First Tennessee Bank, N.A. v. Mungan*, 779 S.W.2d 798, 801 (Tenn. Ct. App. 1989) ("factual statements in pleadings are judicial admissions being conclusive against the pleader in the proceedings in which they are filed . . . ."). As a consequence, Defendant Hardin was well within her rights to express her opinions on such published allegations about a public figure—particularly given that she expressly stated that her opinions were based on "sources"

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rather than firsthand knowledge. *See* Doc. #1, ¶ 20(d). The Dog Spot's Complaint against Defendant Hardin must be dismissed as a result. *See Moman*, 1997 WL 167210, at *4.

VII. Misrepresentation and Fraud Claims Cannot be Premised Upon Statements Made to Third Parties.

The Dog Spot's second, third, and fourth causes of action—which allege various versions of misrepresentation and fraud—independently fail to state a claim for another unavoidable reason. Specifically, The Dog Spot's Complaint makes clear that the statements regarding which it has sued were not made to The Dog Spot. It is elementary, however, that by their very nature, misrepresentation and fraud claims cannot be premised upon statements made to third parties.

The elements of Misrepresentation by Concealment, Fraud, and Negligent Misrepresentation each require that the statement at issue have been made **to the Plaintiff.** As the Plaintiff's own Complaint makes clear, though, its claims are premised entirely upon statements made to a third-party Facebook group.

Specifically, "misrepresentation by concealment requires a plaintiff to prove the following elements: . . . (2) the defendant was under a duty to disclose the fact ***to the plaintiff***; (3) the defendant intentionally concealed or suppressed the fact with the intent ***to deceive the plaintiff*** . . . ." *See Body Invest, LLC v. Cone Solvents, Inc.*, No. M2006-01723-COA-R3CV, 2007 WL 2198230, at *6 (Tenn. Ct. App. July 26, 2007) (emphasis added).

Likewise, our Court of Appeals has explained that "[w]hen a party intentionally misrepresents a material fact or produces a false impression in order to mislead another or to obtain an undue advantage ***over him***, there is a positive fraud." *Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 232 (Tenn. Ct. App. 1976) (emphasis added).

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See also id. (noting that "***the plaintiff*** must have reasonably relied upon that representation to his injury" to sustain the tort of fraud) (emphasis added).

"Similarly, to succeed on a claim for negligent misrepresentation, a plaintiff must establish 'that the defendant supplied information ***to the plaintiff***; the information was false; the defendant did not exercise reasonable care in obtaining or communicating the information and the plaintiffs justifiably relied on the information.'" *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008) (emphasis added) (quoting *Williams v. Berube & Assocs.*, 26 S.W.3d 640, 645 (Tenn. Ct. App. 2000)).

In sum: misrepresentation and fraud claims cannot be premised upon statements made to others. *See id.* Critically, however, as The Dog Spot's own Complaint makes clear, not a single statement over which it has sued was made "to the plaintiff." *Id.* Instead, The Dog Spot is suing over comments that it itself pleads were posted on "the East Nashville closed Facebook group." *See* Doc. #1, pp. 3-5. Accordingly, the Plaintiff cannot sustain its claims for Misrepresentation by Concealment, Fraud, or Negligent Misrepresentation, and these claims must be dismissed for failure to state a claim. *Id.*

VIII. Corporations Cannot Assert False Light Claims

The Dog Spot's fifth cause of action—a claim for false light invasion of privacy—fares no better. False light is premised upon a natural person's right to privacy. *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001). Accordingly, it is clearly established that "**the right cannot attach to corporations or other business entities,** may not be assigned to another, nor may it be asserted by a member of the individual's family, even if brought after the death of the individual. Restatement (Second) of Torts § 652I cmt. a-c (1977). Therefore, only those persons who have been placed in a false light may recover for invasion of their privacy." *Id.* (emphasis added).

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See also Seaton v. TripAdvisor LLC, 728 F.3d 592, 601 (6th Cir. 2013) ("Seaton cannot recover on behalf of Grand Resort because it is a business and as such does not have the right under Tennessee law to recover for a violation of its privacy.").

The Plaintiff's Complaint reflects that The Dog Spot is "a domestic limited liability corporation." *See* Doc. #1, p. 1. As noted above, however, corporations cannot maintain false light claims. *Id.* Accordingly, the Plaintiff's false light claim must be dismissed. *Id.*

IX. The Dog Spot's Complaint Fails to State a Claim for Intentional Interference With a Business Relationship

With respect to The Dog Spot's sixth cause of action—"Intentional Interference of [sic] a Business Relationship"—the Plaintiff's Complaint similarly fails to allege multiple threshold elements of the tort.

For example, The Dog Spot's Complaint fails to allege the Defendants' "intent to cause the breach or termination of the business relationship." *See Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). Instead, it merely alleges that the Defendants "acted" to do so. *See* Doc. #1, p. 12, ¶¶ 73-76. "Intent," of course, is a critical element of a claim for *Intentional* Interference with a Business Relationship. *See Trau-Med of Am.*, 71 S.W. 3d at 699. Accordingly, the Plaintiff's failure to plead intent is immediately fatal and requires dismissal.

The Dog Spot's Complaint also fails to allege that the Defendants' predominant purpose in making the statements at issue was to injure The Dog Spot. "[T]he defendant's *improper motive or improper means*" is the central element of the tort of Intentional Interference with a Business Relationship. *Id.* at 701. Further, as our Court of Appeals has explained: "with regard to improper motive, we require that the plaintiff demonstrate that the defendant's **predominant purpose** was to injure the plaintiff." *Id.* at 701, n. 5

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(emphasis added).

The Dog Spot's Complaint contains no such allegation. *See* Doc. #1. As a result, even assuming the truth of the Plaintiff's allegations, The Dog Spot's Complaint fails to establish threshold elements of the tort of Intentional Interference with a Business Relationship. Accordingly, this claim, too, requires dismissal.

X. The Dog Spot's Complaint Fails to State a Claim for Vicarious Liability/Civil Conspiracy

The Dog Spot's seventh and final claim for "Vicarious Liability and Civil Conspiracy" has no colorable basis in law, either. *See* Doc. #1, p. 13. The Dog Spot should also recognize this, having had an identical claim dismissed in a parallel lawsuit just a few months ago. *See* Davidson Cty. Case 17C1425, Doc. #18 (September 7, 2017 Order Dismissing The Dog Spot's Claims for Vicarious Liability, Civil Conspiracy, and Outrageous Conduct in Plaintiff's $2,000,000.00 lawsuit over a negative Yelp! Review).

In the instant case, The Dog Spot's "Vicarious Liability and Civil Conspiracy" claim is merely a copied-and-pasted version of the same claim that failed the first time it raised it in parallel litigation. *See id.* The substantive law has not changed since then, and as the defendant pointed out in that litigation, there is no freestanding tort for "vicarious liability" or "civil conspiracy" under Tennessee law. *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."). *See also id.* (quoting *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C.Cir.1983) ("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")).

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Further, "[a]n essential element of a conspiracy claim is that the conspiring parties intend to accomplish an unlawful purpose, or a lawful purpose by unlawful means," which the Plaintiff has similarly failed to plead. *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 39 (Tenn. Ct. App. 2006). Further still, The Dog Spot's conspiracy claim is based entirely upon conclusory legal claims—rather than material factual allegations—that are nowhere near sufficient to sustain the cause of action. *See id.* at 38 ("Conclusory allegations, however, unsupported by material facts will not be sufficient to state such a claim."). *See also McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002) ("As to civil conspiracy, this Court has stated that '[i]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim'") (quoting *Haynes v. Harris*, No. 01A01–9810–CV–00518, 1999 WL 317946 at *2 (Tenn.Ct.App.1999)). For all of these reasons, the Plaintiff's civil conspiracy claim must be dismissed as well. *See id.*

XI. The Plaintiff's Complaint Must Be Dismissed Pursuant to Tenn. R. Civ. P. 41.02(1) for Failure to Comply With Tenn. R. Civ. P. 10.03

Tenn. R. Civ. P. 10.03 provides that: "Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit . . . ." *Id.* The instant action is expressly premised upon Facebook comments described in the Plaintiff's Complaint. *See* Doc. #1, pp. 3-5. Contrary to Tenn. R. Civ. P. 10.03, however, those statements have not been attached to the Plaintiff's pleadings. *See* Doc. #1. Worse, the Plaintiff appears to have had the written statements that underlie this action deleted. *See* Doc. #5, Exhibit C, Cari Wade Gervin, *The Dog Spot Sues Two East Nashville Facebook Group Members for Libel*, THE NASHVILLE SCENE (Feb. 27, 2018),

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https://www.nashvillescene.com/news/pith-in-the-wind/article/20993408/the-dog-spot-sues-two-east-nashville-facebook-group-members-for-libel ("pressure to delete bad reviews isn't new for the Bakers either. In a series of Facebook messages, Chad Baker threatened the administrators of the East Nashville Facebook group with legal action unless they deleted the posts by Hardin and Bayer.").

Tenn. R. Civ. P. 41.02(1) provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." *Id.* Further, the Court of Appeals has held repeatedly that dismissal of a Plaintiff's Complaint is a permissible sanction for failing to comply with Rule 10.03. *See Clear Water Partners, LLC v. Benson*, No. E2016-00442-COA-R3-CV, 2017 WL 376391, at *8 (Tenn. Ct. App. Jan. 26, 2017) ("Rule 10.03 applies to this claim by Clear Water. In response to Clear Water's argument that Rule 10.03 does not contemplate dismissal as a sanction for failing to comply with the rule, we note that Rule 41.02(1) provides that a plaintiff's complaint may be dismissed if the plaintiff fails to comply with the rules set forth in the Tennessee Rules of Civil Procedure.") (citing Tenn. R. Civ. P. 41.02(1)). *See also id.* (citing *Maynard v. Meharry Med. Coll.*, No. 01-A-01-9408-CH-00400, 1995 WL 41598, at *1 (Tenn. Ct. App. Feb. 1, 1995) (granting defendants' motion to dismiss complaint due to failure to attach copy of contract documents to complaint as required by Rule 10.03)).

Here, given that the instant case is premised in its <u>entirety</u> upon supposedly written and apparently spoliated statements that are not attached to the Plaintiff's pleadings as required by Tenn. R. Civ. P. 10.03, *see* Doc. #5, Exhibit C, dismissal of the Plaintiff's Complaint is appropriate. *See Clear Water Partners*, 2017 WL 376391, at *8.

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XII. Immunity

In addition to The Dog Spot's failure to state a claim upon which relief can be granted, the Defendants are independently entitled to immunity pursuant Tenn. Code Ann. § 4-21-1003(a), which categorically bars this lawsuit. *See id.* ("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."). Because the Defendants' eligibility for immunity requires factual determinations that are outside the four corners of the Plaintiff's Complaint, however, the Defendants seek an immediate hearing on their eligibility for immunity pursuant to Tenn. Code Ann. § 4-21-1003(a) without converting the instant Motion to Dismiss into a Motion for Summary judgment.

XIII. Additionally Preserved Claims

In the event that the Plaintiff's Complaint is not dismissed outright and in its entirety for the reasons set forth above, the Defendants preserve the following claims and move this Court for permission to take an immediate interlocutory appeal pursuant to Tenn. R. App. P. 9(a) on the following specific 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'"

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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 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).

XIV. Conclusion

For the foregoing reasons, the Defendant's Motion to Dismiss should be **GRANTED**, and each of the claims presented in the Plaintiff's Amended Complaint should be **DISMISSED** with prejudice for failure to state a claim upon which relief can be granted. An order dismissing the instant case with prejudice should issue as a result. Further, Defendant Hardin should be awarded her reasonable attorney's fees and costs incurred in defending against this action pursuant to Tenn. Code Ann. § 4-21-1003(a) and Tenn. Code Ann. § 20-12-119(c).

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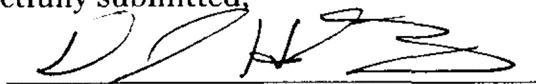
Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2018, a copy of the foregoing was sent via USPS, postage prepaid, and/or by e-mail to the following:

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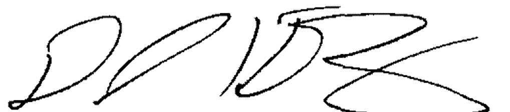
By: 

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