

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

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DAN A. NICOLAU,

*Plaintiff,*

v.

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

*Defendants.*

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Case No.: 19-CV-0139

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**DEFENDANT CITIZENS COMMISSION ON HUMAN RIGHTS OF  
NASHVILLE'S TENN. CODE ANN. § 20-17-104(a) PETITION TO DISMISS  
PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO THE TENNESSEE  
PUBLIC PARTICIPATION ACT**

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**I. Introduction**

This is a defamation action filed by the Plaintiff against two mental health watchdog organizations that published news articles about the Plaintiff's high-profile misconduct regarding his romantic relationship with a woman to whom he admittedly prescribed medication and then stalked. *See Exhibit #1; Exhibit #2.* Pursuant to the newly-enacted Tennessee Public Participation Act, codified at Tenn. Code Ann. § 20-17-101, *et seq.*, "[i]f a legal action is filed in response to a party's exercise of the right of free speech, . . . that party may petition the court to dismiss the legal action" subject to the Act's specialized rules of procedure. *See* Tenn. Code Ann. § 20-17-104(a). Here, because the Plaintiff has lodged a defamation claim in response to Defendant Citizens Commission on Human Rights of Nashville's right to free speech, Defendant Citizens Commission on Human Rights of Nashville respectfully petitions this Court to dismiss the Plaintiff's Amended Complaint pursuant to Tenn. Code Ann. § 20-17-104(a).

FILED

AUG 14 2019

at 8:35A

Sarah Lawson, Clerk and Master

## **II. The Tennessee Public Participation Act**

“If a legal action is filed in response to a party’s exercise of the right of free speech, . . . that party may petition the court to dismiss the legal action” subject to the specialized provisions set forth in the Tennessee Public Participation Act. *See* Tenn. Code Ann. § 20-17-104(a). 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 . . . under the Tennessee Rules of Civil Procedure,” *see* Tenn. Code Ann. § 20-17-109, and as such, nothing in the Act “affects, limits, or precludes the right of any party to assert any defense, remedy, immunity, or privilege otherwise authorized by law.” Tenn. Code Ann. § 20-17-108(4). In enacting the Tennessee Public Participation Act, the 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, it is entitled to file a special petition to dismiss the legal action, *see* Tenn. Code Ann. § 20-17-104(a);
- (2) Discovery is automatically stayed by statute pending the entry of an order ruling on the petition, *see* 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. Applicability of The Tennessee Public Participation Act.

Under Tenn. Code Ann. § 20-17-104(a), a litigant may petition the court to dismiss a legal action against it if the action “is filed in response to a party’s exercise of the right of free speech . . . .” *Id.* Pursuant to Tenn. Code Ann. § 20-17-103(3), “[e]xercise of the right of free speech’ means a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution.” *Id.* In turn, Tenn. Code Ann. § 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).

In the instant case, given that news article over which the Plaintiff has sued concerns the Plaintiff’s high-profile misconduct regarding his romantic relationship with a woman to whom he admittedly prescribed medication and stalked—resulting in both

professional suspension and criminal proceedings initiated by the government, *see Exhibit #1; Exhibit #2*—this action qualifies as one filed in response to a party's exercise of the right of free speech regarding a communication made in connection with a matter of public concern in several independent regards. *See* Tenn. Code Ann. § 20-17-104(a); Tenn. Code Ann. § 20-17-103(3); Tenn. Code Ann. § 20-17-103(6).

B. Timing of Petition.

A petition to dismiss an action under the Tennessee Public Participation Act “may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper.” *See* Tenn. Code Ann. § 20-17-104(b). Here, the Plaintiff's legal action was filed and served upon Defendant Citizens Commission on Human Rights of Nashville on July 30, 2019.<sup>1</sup> *See Plaintiff's Amended Complaint*, p. 1; State of Tennessee Civil Summons, *Dan A. Nicolau v. Citizens Commission on Human Rights of Nashville* (“Issued: Tuesday, July 30, 2019 at 3:45 p.m.”). The instant petition has thus been filed within 60 calendar days of the date of filing and service. *See* Tenn. Code Ann. § 20-17-104(b).

**III. 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.” *See* Tenn. Code Ann. § 20-17-105(a). As noted above, this action is a response to Defendant Citizens Commission on Human Rights of Nashville's exercise of free speech, as defined by Tenn.

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<sup>1</sup> “[A]n ‘amended complaint’, complete in itself without adoption or reference to the original, supersedes and destroys the original as a pleading.” *See McBurney v. Aldrich*, 816 S.W.2d 30, 33 (Tenn. Ct. App. 1991).

Code Ann. § 20-17-103(3), having been initiated as a result of a communication made in connection with “a matter of public concern” as defined by Tenn. Code Ann. § 20-17-103(6)(A), (B), (C), (D), (E), and (G). Thus, Defendant Citizens Commission on Human Rights of Nashville having met its 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). The Plaintiff’s “response to the petition, including any opposing affidavits, may be served and filed by the opposing party no less than five (5) days before the hearing or, in the court’s discretion, at any earlier time that the court deems proper.” Tenn. Code Ann. § 20-17-104(c).

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 Citizens Commission on Human Rights of Nashville expressly incorporates into this Petition each defense set forth in its contemporaneously filed Motion to Dismiss. In further support of its defenses to this action, Defendant Citizens Commission on Human Rights of Nashville has additionally appended an affidavit from Brian Fesler to this Petition as **Exhibit #3** to establish the following:

- (1) The news article over which Defendant Citizens Commission on Human Rights of Nashville was sued was published on October 20, 2017;
- (2) The news article over which Defendant Citizens Commission on Human Rights of Nashville was sued was based on disclosed, non-defamatory facts;
- (3) No statement in the news article over which over which Defendant Citizens Commission on Human Rights of Nashville was sued was made with actual malice.

See **Exhibit #3**. See also Tenn. Code Ann. § 20-17-105(d) (“The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.”).

#### **IV. Costs, Attorney’s Fees, and Sanctions**

Pursuant to Tenn. Code Ann. § 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.

Tenn. Code Ann. § 20-17-107(a).

In the instant case, sanctions are especially warranted given that the Plaintiff was expressly informed that this action was both time-barred and frivolous and was given an opportunity to withdraw it without penalty, but persisted in prosecuting it anyway. See **Exhibit #4**. This also is not the Plaintiff’s first baseless legal action or attempted abuse of the legal process. See **Exhibit #5** (Motion to Set Aside Default Judgment), *Dan A. Nicolau v. Kenneth Kramer*, Civil Action No: 18-CV-0628. Both mandatory costs and attorney’s fees and discretionary sanctions should be awarded accordingly.

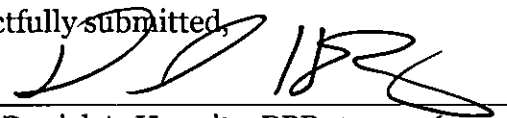
#### **V. Conclusion**

For the foregoing reasons, the Defendant Citizens Commission on Human Rights of Nashville’s petition to dismiss this action pursuant to Tenn. Code Ann. § 20-17-104(a) should be **GRANTED**; and the Plaintiff should be ordered to pay the Defendant court

costs, reasonable attorney's fees, and discretionary costs, pursuant to Tenn. Code Ann. § 20-17-107(a)(1); and this Court should assess sanctions against the Plaintiff as necessary to deter repetition of its conduct pursuant to Tenn. Code Ann. § 20-17-107(a)(2).

Respectfully submitted,

By:

  
Daniel A. Horwitz, BPR #032176  
1803 Broadway, Suite #531  
Nashville, TN 37203  
daniel.a.horwitz@gmail.com  
(615) 739-2888

*Counsel for Defendants*

### **NOTICE OF HEARING**

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

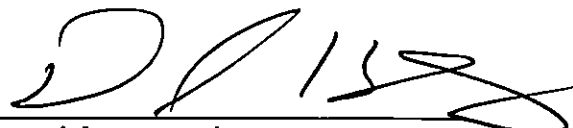
### **CERTIFICATE OF SERVICE**

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

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

*Counsel for Plaintiff*

By:

  
Daniel A. Horwitz, Esq.

# Exhibit #1

FILED

AUG 14 2019  
8:35 A

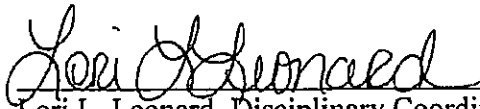
Sarah Lawson, Clerk and Master



**CERTIFICATION**

July 2, 2019

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



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



FILED

AUG 14 2019

at 8:35A .M.

Sarah Lawson, Clerk and Master

**STATE OF TENNESSEE  
DEPARTMENT OF HEALTH**

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

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**CONSENT ORDER**

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

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

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

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

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

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## **I. STIPULATIONS OF FACT**

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

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

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

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## II. GROUNDS FOR DISCIPLINE

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

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

214(b)(12):

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

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

ANN. § 63-6-214(b)(1):

Unprofessional, dishonorable or unethical conduct

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

6-214(b)(2):

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

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### III. POLICY STATEMENT

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

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### IV. ORDER

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

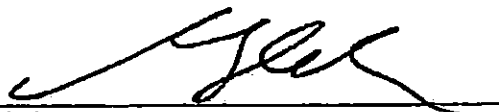
18. The Tennessee medical license of Dan Nicolau, M.D., license number 49214, is hereby placed on **PROBATION** for two (2) years effective the date of entry of this Order.
19. Respondent shall comply with all recommendations of the Acumen assessment. IN addition to the Acumen assessment recommendations,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

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

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


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

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

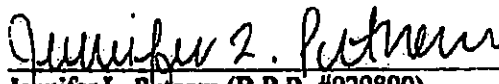
  
Chairperson  
Tennessee Board of Medical Examiners



**APPROVED FOR ENTRY:**

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

9-27-17  
DATE


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

9-27-17  
DATE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of this document has been served upon Respondent, Dan Nicolau, M.D., by and through counsel, Tom Jessee, Esq., Jessee & Jessee, 412 East Unaka Avenue, Johnson City, Tennessee 37605, by delivering same in the United States Mail, Certified Number 7016 1976 0061 1321 9528, return receipt requested, and United States First Class Postage Pre-Paid Mail, with sufficient postage thereon to reach its destination and via email at [jjlaw@jesseeandjessee.com](mailto:jjlaw@jesseeandjessee.com).

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

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

# Exhibit #2

FILED

AUG 14 2019

at § 35A .w.

Sarah Lawson, Clerk and Master

IN THE CRIMINAL COURT FOR WASHINGTON COUNTY  
TENNESSEE AT JONESBOROUGH

STATE OF TENNESSEE

vs.

Docket No. 42345

DAN A Nicolau  
DEFENDANT

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

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

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

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

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

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

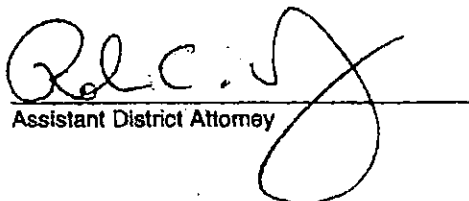
1. The nature of the charge(s) against him/her.
2. The minimum punishment for said charge(s).
3. The maximum punishment for said charge(s).
4. That prior convictions or other factors may be considered in determining his/her sentence.
5. That no trial will follow this plea but only sentencing.
6. That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

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

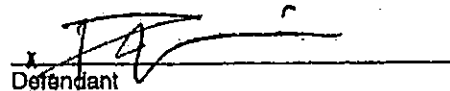
Further, the Defendant states that he/she is pleading guilty freely and voluntarily and not as the result of force of threats or of promises apart from a plea agreement, wherein his/her willingness to plead guilty results from discussions between the District Attorney's Office and the Defendant or his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

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

SUBMITTED, APPROVED AND CONCURRED IN:

  
Assistant District Attorney

  
Attorney for Defendant

  
Defendant

ENTERED  
MINUTEBOOK 728C PAGE 211  
CIR. CL. CLK

FILED

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

## ORDER ACCEPTING PLEA OF GUILTY

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

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

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

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

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

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

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

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

ENTER, this the 23 day of August, 2017.

  
CRIMINAL COURT JUDGE

Richard Phillips  
June 17, 2019  
Page 5

defeated by showing that a report about an official action or proceeding was unfair or inaccurate.”

### **The Court Does Not Have Jurisdiction Over CCHR**

Citizens Commission on Human Rights (“CCHR”) is a California non-profit corporation. The organization has no contacts with Tennessee other than its website postings about psychiatric abuses throughout the world which is available to everyone on the internet. No effort was made to reach out to Tennessee residents in particular. The court in *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790 (W.D. Tenn. 2000), found that it did not have personal jurisdiction over a Florida individual who posted allegedly defamatory statements about a competing Tennessee company and businessman on the Florida company’s Web site. The court held that a general posting on the Internet is not sufficient to establish minimum contacts. The *Bailey* court noted that the evidence revealed that the allegedly defamatory statements were merely posted on the Web site to be viewed by whomever cared to do so. Accordingly, the court concluded that the plaintiff Tennessee businessman failed to demonstrate that the defendant Florida company president had availed himself of the benefits of the state of Tennessee. As the court concluded that it lacked personal jurisdiction over the Florida company president, it granted his motion to dismiss.

More recently, the Tennessee Supreme Court held that Moody’s, a global ratings agency doing millions of dollars of business with Tennessee customers, was not subject to general or specific personal jurisdiction in Tennessee. “[T]he appropriate determination of whether a nonresident corporation may be subject to general personal jurisdiction in Tennessee is whether the corporation has continuous and systematic contacts with Tennessee so substantial as to render the corporation “*essentially at home*” here in such a way which does not offend traditional notions of fair play and substantial justice. *Id.* The determination of whether a nonresident defendant’s contacts are substantial enough to give rise to general jurisdiction is “extremely fact dependent” and “entails a careful, non-mechanical evaluation of the facts with particular focus on the nonresident defendant’s contacts with the forum state.” *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 648 (Tenn. 2009) (citing *Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 385 (Tenn. 2015)

With regard to specific personal jurisdiction, the court reasoned that “[t]here is nothing in the record to establish that the Ratings Agencies’ conduct in rating the investment products for sale to the Plaintiff was purposefully directed toward or substantially connected to Tennessee. The Plaintiff failed to allege facts to show that the Ratings Agencies’ conduct giving rise to the controversy underlying the instant case

Richard Phillips  
June 17, 2019  
Page 6

was purposefully directed toward Tennessee or established sufficient minimum contacts with Tennessee necessary to justify specific personal jurisdiction. Accordingly, we conclude that the Plaintiff has failed to demonstrate contacts between the Ratings Agencies and the State of Tennessee with reasonable particularity sufficient to establish a prima facie case of specific jurisdiction in Tennessee.”

Thus, a huge international ratings agency which derived substantial income from Tennessee citizens was not subject to personal jurisdiction in the State of Tennessee. Under the holdings in *Bailey* and *First Cmty. Bank*, CCHR, which has no offices, employees, business or other contacts with Tennessee and derives no income from the state, is not subject to general or specific personal jurisdiction in Tennessee.

#### **Anti-SLAPP defense**

California Civ. Proc. Code § 425.16(a) allows the Defendant to file a special motion to strike at the commencement of any Complaint that arises out of free speech on matters of public interest. In those cases, it is the Plaintiff’s burden to prove with admissible evidence a probability of prevailing at the time of trial, a burden that Dr. Nicolau could not possibly sustain. “[A]ny SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorneys fees.” *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131, 17 P.3d 735, 741 (2001). We have reasonable grounds to assert that the Tennessee Chancery Court should apply California’s anti-SLAPP law to Dr. Nicolau’s Complaint against CCHR, a California Defendant, because California has the most significant relationship to the speech at issue and California law is entirely consistent with Tennessee public policy as set forth in its newly revised Public Participation Act effective July 1, 2019.

#### **Settlement Offer**

The prosecution of this case is without probable cause and malicious. The Defendants intend to pursue all appropriate legal remedies. Dr. Nicolau is mistaken if he believes that he will receive money or better his reputation in the community by prosecuting this case. I respectfully suggest that he read QB VII by Leon Uris or check out the Streisand effect on the internet.

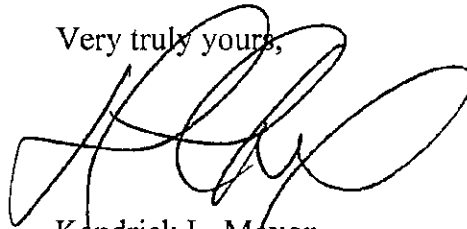
The Defendants have already incurred attorneys’ fees and costs. CCHR has retained attorney Daniel Horwitz of Nashville, a Constitutional law expert. Mr. Horwitz has been quite successful in obtaining court orders requiring the other side to pay his client’s attorneys’ fees. CCHR of Nashville has retained the services of Michael Trantum of Kingsport who has already informed you verbally that Dr. Nicolau’s claims lack merit. If forced to appear in the litigation, the Defendants will handle this case appropriately as another incident of psychiatric abuse by Dr. Nicolau, this time of the legal system. However, if Dr. Nicolau voluntarily agrees to dismiss his

Richard Phillips  
June 17, 2019  
Page 7

Complaint with prejudice on or before June 20, 2019, the Defendants will agree to waive costs and attorney's fees, waive their rights under Rule 11, waive their rights under California's anti-SLAPP law, and waive their rights to commence a lawsuit for abuse of process and malicious prosecution against Dr. Nicolau and his counsel. We do not expect to renew the offer. If you wish to discuss any aspect of this case, please do not hesitate to call or write.

Please respond no later than June 19, 2019, as responsive pleadings are due on June 25th. If you need further time to speak with your client, we can stipulate to further time to Answer or move to dismiss.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Moxon', written in a cursive style.

Kendrick L. Moxon

cc: Michael Trantum, Esq.  
Daniel Horwitz, Esq.

# Exhibit #5

FILED

AUG 14 2019

at 8:35 A .m.

Sarah Lawson, Clerk and Master



IN THE CHANCERY COURT OF WASHINGTON COUNTY,  
TENNESSEE AT JONESBOROUGH

DAN A. NICOLAU, )  
Plaintiff, )  
 ) Civil Action No: 18-CV-0628  
v. )  
 )  
KENNETH KRAMER, )  
Defendant )

---

Defendant Kenneth Kramer, in propria persona, hereby moves pursuant to Tennessee Rule of Civil Procedure 12.02(2),(4) and (5) to set aside the default judgment against him and for an order dismissing Plaintiff's Complaint because he was never served with the Complaint and the Court does not have personal jurisdiction over him since he does not have minimum contacts with the State of Tennessee.

**I. INTRODUCTION**

Defendant operates a website from Florida that publishes findings of psychiatric abuse. The website is accessible to anyone on the world-wide Internet. He did not reach out specifically to the state of Tennessee, nor does he conduct any business with persons in the State of Tennessee. (See Declaration of Kenneth Kramer) Kramer is a full time resident of Florida. He has no contacts with the State of Tennessee. (*Id.*) Plaintiff did not make any reasonable effort to provide Kramer with actual notice of the lawsuit. (*Id.*) He can be easily contacted through the website Psychsearch.net which has a contact link but no effort was made to contact him through the website. (*Id.*) He did not receive notice of the lawsuit in the mails and Plaintiff did not make reasonable efforts to provide Kramer

with actual notice of the lawsuit. (*Id.*) By serendipity, he discovered on June 18th that this court authorized service by publication in Florida newspapers and that this court entered judgment against him before the response deadline set forth in the newspaper notice. He discovered that the last publication was dated May 24 with a notice that a responsive pleading was due 30 days later. But, Plaintiff applied for and was granted a default and default judgment before the 30 day response period expired.

## II. LACK OF PERSONAL JURISDICTION

KRAMER seeks to dismiss Plaintiff's Amended Complaint because this Court lacks personal jurisdiction over him. Specifically, he was not served with the Complaint, the publication order was improperly obtained through misrepresentations to the court and the posting at issue in the Amended Complaint does not give rise to personal jurisdiction over Defendant, a full time resident of Florida who does not have minimum contacts with the State of Tennessee.

Under the principles of personal jurisdiction adopted in Tennessee, this Court lacks personal jurisdiction over Defendant whose lack of contacts with the State of Tennessee preclude the exercise of either general or specific personal jurisdiction.

Tennessee's Long-Arm Statute has been codified as Tennessee Code Annotated § 20-2-214 ("Tennessee Long-Arm Statute"). See *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (no jurisdiction in Texas over New York defendant that maintained website where purportedly defamatory article was published because there was no evidence that the website targeted Texas internet users); *Barrett v. Catacombs Press*, 44 F.Supp.2d 717, 729 (E.D. Pa. 1999) (no jurisdiction in Pennsylvania over a nonresident defendant

for posting allegedly libelous information on an interactive website message board because plaintiff failed to allege that defendant's comments specifically targeted Pennsylvania users); *Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.*, 989 F. Supp. 265, 272-273 (D. D.C. 1998) (no jurisdiction over nonresident defendant that purportedly posted defamatory material on an AOL bulletin board where the material was not sent to or from the District of Columbia and the subject of the message was unrelated to the District of Columbia).

Kramer has no contacts with Tennessee other than his website postings about psychiatric abuses throughout the world which is available to everyone on the internet. No effort was made to reach out to Tennessee residents in particular. This case is indistinguishable from *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790 (W.D. Tenn. 2000). The Bailey court found that it did not have personal jurisdiction over a Florida individual who posted allegedly defamatory statements about a competing Tennessee company and businessman on the Florida company's Web site. The court held that a general posting on the Internet is not sufficient to establish minimum contacts. The *Bailey* court noted that the evidence revealed that the allegedly defamatory statements were merely posted on the Web site to be viewed by whomever cared to do so. Accordingly, the court concluded that the plaintiff Tennessee businessman failed to demonstrate that the defendant Florida company president had availed himself of the benefits of the state of Tennessee. As the court concluded that it lacked personal jurisdiction over the Florida company president, it granted his motion to dismiss.

More recently, the Tennessee Supreme Court held that Moody's, a global ratings agency doing millions of dollars of business with Tennessee customers, was not subject to general or specific personal jurisdiction in Tennessee. "[T]he appropriate determination of whether a nonresident corporation may be subject to general personal jurisdiction in Tennessee is whether the corporation has continuous and systematic contacts with Tennessee so substantial as to render the corporation "essentially at home" here in such a way which does not offend traditional notions of fair play and substantial justice. *Id.* The determination of whether a nonresident defendant's contacts are substantial enough to give rise to general jurisdiction is "extremely fact dependent" and "entails a careful, non-mechanical evaluation of the facts with particular focus on the nonresident defendant's contacts with the forum state." *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 648 (Tenn. 2009) (citing *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 385 (Tenn. 2015)

With regard to specific personal jurisdiction, the court reasoned that "[t]here is nothing in the record to establish that the Ratings Agencies' conduct in rating the investment products for sale to the Plaintiff was purposefully directed toward or substantially connected to Tennessee. The Plaintiff failed to allege facts to show that the Ratings Agencies' conduct giving rise to the controversy underlying the instant case was purposefully directed toward Tennessee or established sufficient minimum contacts with Tennessee necessary to justify specific personal jurisdiction. Accordingly, we conclude

that the Plaintiff has failed to demonstrate contacts between the Ratings Agencies and the State of Tennessee with reasonable particularity sufficient to establish a prima facie case of specific jurisdiction in Tennessee.”

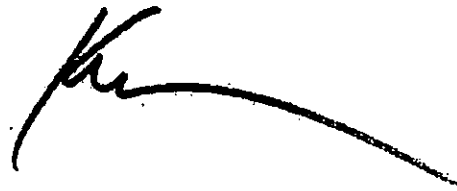
Thus, a huge international ratings agency which derived substantial income from Tennessee citizens was not subject to personal jurisdiction in the State of Tennessee. Under the holdings in *Bailey* and *First Cmty. Bank*, Kramer is not subject to general or specific personal jurisdiction in Tennessee.

### I. CONCLUSION

For the foregoing reasons, Defendant Kramer respectfully moves this Court to dismiss Plaintiff's Amended Complaint in its entirety as to him.

June 24, 2019

Respectfully submitted,



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Kenneth Kramer  
1604 Gentry Street  
Clearwater, Florida, 33755

IN THE CHANCERY COURT FOR WASHINGTON COUNTY  
TENNESSEE AT JONESBOROUGH

DAN NICOLAU,

Plaintiff,

v.

KENNETH KRAMER,

Defendant.

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Civil Action No: 180CV-0628

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DECLARATION OF KENNETH KRAMER

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I, Kenneth Kramer, do hereby state:

1. I am over the age of 21. I make the following statements of my own personal knowledge, and if called to testify thereto, I could and would do so competently.

2. I am the named defendant in the instant lawsuit.

3. My home address is 1604 Gentry Street, Clearwater, Florida, 33755.

4. I am self-employed in Florida and have no business in the State of Tennessee and have never had any business in the State of Tennessee. I believe the only times I was in Tennessee were driving through the state in 1975 or 1976, and another brief trip through Memphis in or about 1990.

5. I am the proprietor of a website, psychsearch.net, which publishes public record information regarding psychiatrists and criminal, ethics and disciplinary actions against them and press accounts regarding psychiatrists. My website does not advertise

FILED

AUG 14 2019

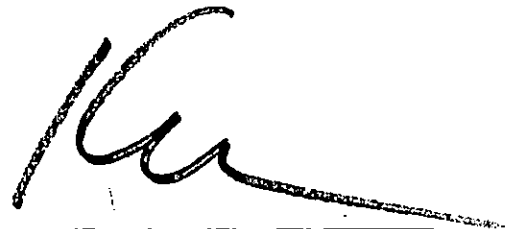
at 8:35A .w.

Sarah Lawson, Clerk and Master

in Tennessee, it has no contacts with the State of Tennessee, and it is not an interactive site.

6. I first heard that a lawsuit had been filed against me on June 18, 2019. I have since reviewed some of the papers filed in this case by the plaintiff, that were emailed to me by the Court clerk. Among them is a sworn statement by the plaintiff's process server, indicating that he had my correct address he acquired from my state driver's license on line, but the Declaration shows no attempt to serve me with any papers, nor did he or plaintiff's counsel mail me the Complaint or any other documents or other notice of the pending lawsuit. I have still not received official notice that this lawsuit was filed against me despite the ease with which I can be contacted through my website. However, I have received information from the Court's clerk or assistant that a default judgment has been entered against me in this case. I received no prior notice that a default was being sought, no notice of any hearing of the matter, and no notice of the judgment – outside of today's email from the Court's office after the default was entered on June 20, 2019.

I declare under penalty of perjury that the foregoing is true and correct. Signed this 24<sup>th</sup> day of June, 2019, in Clearwater, Florida.

A handwritten signature in black ink, appearing to read 'Kramer', written over a horizontal line.

Kenneth Kramer

PROOF OF SERVICE

I HEREBY CERTIFY THAT I SENT THE FOREGOING MOTION TO  
DISMISS, VIA FIRST CLASS MAIL, POSTAGE PREPAID TO:

Richard Phillips  
Law Office of Richard Phillips, PLLC  
104 East Jackson Blvd., Ste 4  
Jonesborough, TN 37659

A handwritten signature in black ink, appearing to be 'Ken Kramer', written over a horizontal line.

Ken Kramer