THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Case No. 4:12-cv-00083-BR

ASCEND HEALTH CORPORATION, *et al.*,

Plaintiffs,

v.

BRENDA WELLS, *et al.*,

Defendants.

DEFENDANT BRENDA WELLS' CONSOLIDATED BRIEF IN SUPPORT OF SPECIAL MOTION TO DISMISS AND MOTION TO DISMISS

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TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT 3

I. Texas Law Governs The Parties' Dispute 3

II. Plaintiffs' State-Law Claims Are Subject To Dismissal Under The Texas Anti-SLAPP Statute 5

A. The Texas Anti-SLAPP Statute Applies to this Case 5

B. This Legal Action Relates to Wells' Exercise of Her Right of Free Speech 7

C. Plaintiffs Cannot Meet Their Burden of Proof on the Essential Elements of Their Claims 8

i. Plaintiffs' "Texas Libel" Claim Should be Dismissed 9

a. The statements are not set out with sufficient particularity 11

b. The statements are non-actionable expressions of opinion and/or rhetorical hyperbole 11

c. The statements are non-defamatory 14

d. Section 230 immunizes Wells from liability for third-party content 15

e. The statements are true or substantially true 17

f. Plaintiffs cannot prove Wells acted with the requisite level of fault 18

g. The statements are privileged commentary on an issue of public concern 19

h. The statute of limitations bars claims arising from many of the statements 21

ii. Plaintiffs' "Business Disparagement" Claim Should be Dismissed 21

iii. Plaintiffs' Civil Conspiracy Claim Should be Dismissed.....22

iv. Wells Should be Awarded Her Attorneys' Fees.....23

III. Plaintiffs' State-Law Claims Should Be Dismissed Pursuant To Rule 12(b)(6).....24

A. Legal Standard.....24

B. Plaintiffs' State-Law Claims Fail As A Matter Of Law.....24

IV. Plaintiffs' Copyright Infringement Claim Should Be Dismissed Pursuant To Rule 12(b)(6).....25

CONCLUSION.....30

With the filing of their Complaint in this matter, Plaintiffs seek to silence the speech of Defendant Brenda Wells—a former patient and critic of the healthcare services they provide in Denton, Texas. Rather than attempt to rebut the opinions and commentary Wells has authored, or the third-party accounts she has collected and passed on to the public, Plaintiffs resort to legal action. However, as demonstrated below, their Complaint fails as a matter of law. It is replete with conclusory allegations, and it suffers from substantial legal deficiencies. Given these deficiencies, dismissal is warranted not only for failure to state a claim, but also under a Texas statute designed to safeguard the right to engage in free speech on matters of public concern by weeding out at the initial pleadings stage just the sort of action Plaintiffs have brought here. *See* TEX. CIV. PRAC. & REM. CODE § 27.001, *et seq*.

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs, a major healthcare corporation, its CEO, an affiliate hospital located in Denton, Texas, and the medical director of that hospital instituted this action on May 3, 2012. Plaintiffs assert six claims in their Complaint against Wells, (1) defamation under North Carolina common law; (2) violation of N.C. Gen. Stat. § 75-1.1 ("NCUDTPA"); (3) libel under Texas law, which is codified at Section 73.001 of the Texas Civil Practice and Remedies Code; (4) business disparagement under Texas common law; (5) copyright infringement; and (6) civil conspiracy. In response, Wells filed a timely Special Motion to Dismiss under the Texas anti-SLAPP statute and a timely Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Because of the overlapping nature of her dismissal arguments, Wells respectfully submits this single, consolidated brief in support of both Motions to Dismiss.

STATEMENT OF FACTS[1]

The allegations of the Complaint conclusively establish that this legal action relates and was instituted in response to Wells' commentary and criticism of the healthcare services offered to the public by Plaintiffs. All the Plaintiffs in this legal action are engaged in the healthcare industry. Plaintiff Ascend is engaged in the business of operating "psychiatric hospitals and residential treatment centers," and Plaintiff Kresch is its CEO. (Compl. ¶¶ 5, 8). Plaintiff UBH is a "private freestanding psychiatric hospital" located in Denton, Texas. (*Id*., ¶ 6). Plaintiff Khan is a psychiatrist in Texas and medical director of UBH. (*Id*., ¶ 7). Wells is a resident of Greenville, North Carolina and a professor of finance at East Carolina University. (*Id*., ¶ 9).

This legal action arises from matters Wells has published on the Internet, with the allegations of the Complaint focusing on statements she allegedly made about the healthcare services and business practices of Plaintiffs in Denton, Texas. (*Id*., ¶ 1). According to the Complaint, some of these statements were authored by Wells herself based on her own experience at UBH (*Id*., ¶¶ 9, 29), whereas others represent accounts by third parties of their own experiences there that Wells published on the Internet. (*Id*., ¶ 59) The statements set out in the Complaint relate, among other things, to the condition of the patient rooms at UBH (*Id*., Ex. A), the quality of food at UBH (*Id*., Exs. A, D), and the quality of medical care provided at UBH (*Id*., ¶ 29, Ex. B). With few exceptions, Plaintiffs do not allege when the statements they claim Wells made were published. In addition to challenging statements, Plaintiffs also allege that Wells posted images "taken from UBH's and Ascend's websites," for which Plaintiffs have

[1] This statement is drawn only from the allegations of Plaintiffs' Complaint, which are assumed to be true for purposes of Wells' Rule 12(b)(6) Motion to Dismiss. As explained below, facts set out in the Declaration of Brenda Wells may be considered by the Court with respect to the Special Motion to Dismiss and are therefore discussed only in the sections of this brief addressing that motion. They are not offered in support of her Rule 12(b)(6) motion.

apparently sought, but not yet obtained, copyright registration. (*Id*., ¶¶ 54-56, 98). Plaintiffs do not allege that Wells received any economic benefit from or had any economic purpose in making the alleged statements or in posting the material and images she is alleged to have posted.

ARGUMENT

I. Texas Law Governs The Parties' Dispute

A federal court hearing state-law claims pursuant to its diversity jurisdiction "must apply the choice of law rules of the state in which it sits." *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir. 2005) (quoting *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 (1941)). Plaintiffs here assert jurisdiction under 28 U.S.C. § 1332. (Compl. ¶ 13). Accordingly, this Court must apply North Carolina choice-of-law rules to determine which state's law governs Plaintiffs' claims.[2]

North Carolina's courts have not specifically addressed a choice-of-law question in a case such as this one. In multistate defamation cases—where the defendant resides in one state and the plaintiffs in another—most courts now apply what is known as the "most significant relationship" or "center of gravity" test given the difficulty in applying traditional choice-of-law rules in such a setting. *See Kamelgard v. Macura*, 585 F.3d 334, 341-342 (7th Cir. 2009) (observing that "most states . . . nowadays apply the law of the state that has the 'most significant relationship' to the claim"). The test has been adopted in the Restatement and applied in this Circuit. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 150; *Wells v. Liddy*, 186 F.3d

[2] Plaintiffs do not assert supplemental jurisdiction over their state-law claims under 28 U.S.C. § 1367. In any event, doing so would not alter the analysis, as North Carolina's choice-of-law rules still would dictate the law applicable to Plaintiffs' state-law claims. *See, e.g.*, *Totalplan Corp. of Am. v. Colborne*, 14 F.3d 824, 832 (2d Cir.1994); *Stud v. Trans Int'l Airlines*, 727 F.2d 880, 881 (9th Cir.1984).

505, 528 (4th Cir. 1999). As the Restatement expressly provides and a leading commentator has recognized, the state of "most significant relationship" is usually the state in which an individual plaintiff resides or a corporate plaintiff has its principal place of business. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 150(2)-(3); 2 ROBERT D. SACK, SACK ON DEFAMATION ("SACK") § 15:3.2, at 15-51 (4th ed. 2011) ("Accordingly, the place of the plaintiff's domicile typically has the 'most significant relationship' to the occurrence and the parties.").

It is clear that under the "most significant relationship" test, the law of Texas controls in this action. The statements and images at issue here all relate to the healthcare services and business practices of a hospital located in Denton, Texas, and Wells' commentary is directed to an audience in that community and the surrounding areas. Thus, both the substance of the statements and any purported injury they might have caused are centered squarely in Texas. Moreover, Plaintiff Khan admits to being a resident of Texas, and Plaintiff UBH admits that its principal place of business is in Texas. (Compl. ¶¶ 6-7). Plaintiffs Ascend and Kresch are referenced in the statements at issue only in their capacity as UBH's corporate owner and that company's CEO, respectively, and Plaintiff Ascend, through UBH at the very least, has a significant business presence in Texas. Thus, any impact to Plaintiffs Ascend and Kresch from statements and commentary about the experiences of Wells and others at UBH was likewise felt in Texas. For these reasons, the law of Texas applies to this case.

The outcome is no different under the traditional choice-of-law rule applied in North Carolina, known as *lex loci delicti*, or "the place of the wrong." *See Eagle Nation, Inc. v. Market Force, Inc.*, 180 F. Supp. 2d 752, 755 (E.D.N.C. 2001) ("North Carolina courts adhere to the rule of lex loci and apply the substantive laws of the state in which the injuries were sustained.") (citing *Charnock v. Taylor*, 223 N.C. 360, 361, 26 S.E.2d 911, 913 (1943)); *see also United Va.*

Bank v. Air-Lift Assoc., Inc., 79 N.C. App. 315, 321, 339 S.E.2d 90, 93 (1986) ("[T]he law of the state where the injuries are sustained should govern."). Under the *lex loci* rule, the place of injury is the state of the plaintiff's residence because that is where any injury to reputation or standing the community will be felt. *See* SACK, § 15:3.1, at 15-48 ("In defamation cases, 'the place of the wrong' was the jurisdiction where the defamatory matter was heard, read, or seen by a third person, regardless of the place of broadcasting or writing.").[3] While Wells concedes no wrong, for the reasons stated above, "the place of the wrong" in this matter, if any wrong occurred, was Texas.

In sum, because the substance of the statements and images at issue related to the quality of patient care at a hospital in Texas, the statements were intended for an audience in Texas, and Plaintiffs either reside, are based and do business in, and/or felt any impact from those statements in Texas, under either choice-of-law approach, Texas law governs this action.

II. Plaintiffs' State-Law Claims Are Subject To Dismissal Under The Texas Anti-SLAPP Statute

A. The Texas Anti-SLAPP Statute Applies to this Case

The Texas legislature recently enacted the "Citizens Participation Act" (the "CPA"), which is codified in Chapter 27 of the Texas Civil Practice and Remedies Code. The CPA is an example of what is known as an "anti-SLAPP" statute, a form of statutory protection against lawsuits intended to chill or curtail the exercise of constitutional rights (a "strategic lawsuit

[3] *See also Kamelgard*, 585 F.3d at 341-42 ("When the defamatory statement is communicated in many different states, it makes sense to apply the law of the plaintiff's domicile, and that is the usual result . . . . That is where the principal injury from a defamation will occur because it is where the victim works and lives and where . . . most of the people . . . are found with whom he has personal or commercial transactions, which might be impaired by defamation.") (citations omitted); *Fuqua Homes, Inc. v. Beattie*, 388 F.3d 618, 622 (8th Cir. 2004) (stating that "the state where the defamed party has its principal place of business will usually be the state in which its reputation is most grievously affected").

against public participation"). Anti-SLAPP statutes have generally been a legislative response to attempts by large corporate interests to silence opposition to or commentary on their businesses. *See, e.g.*, *Durocraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998) ("SLAPP suits have been characterized as 'generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.'") (citation omitted). These statutes generally provide for early dismissal of such lawsuits, along with the possibility that a defendant will also recover his or her attorneys' fees, and have been enacted in a number of states, including California, Massachusetts, New York, Georgia, Louisiana, Indiana, Oregon, and Utah.

Although the CPA has not yet been interpreted by any Texas appellate court or federal court, the Ninth Circuit has definitively held that California's anti-SLAPP statute, on which the CPA is modeled, must be applied by federal courts applying California's substantive law. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 n.2 (9th Cir. 2010); *see also Godin v. Schencks*, 629 F.3d 79, 87 (1st Cir. 2010) (anti-SLAPP statute applies in federal court); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009) (same). This rule prevents a plaintiff from engaging in forum shopping and avoids an "inequitable administration of the law." *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)). As explained above, Texas law governs this action, which means that Plaintiffs' state claims are subject to the CPA.

The text of the CPA is unambiguous, and the test it requires is straightforward. According to Section 27.003(a): "If a legal action is based on, relates to, or is in response to a party's exercise of the right to free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." TEX. CIV. PRAC. & REM. CODE § 27.003(a). That

motion "shall" be granted "if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of," in relevant part, "the right of free speech." *Id.* § 27.005(b) (emphasis added). Further, the statute defines the "[e]xercise of the right of free speech" as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). Most importantly, a "[m]atter of public concern" is defined to include "an issue related to: (A) health or safety; (B) environmental, economic, or community well-being . . .; or (E) a good, product, or service in the marketplace." *Id.* § 27.001(7).

Once the moving party establishes that the legal action relates to a "communication, made in connection with a matter of public concern," the plaintiff avoids dismissal only by "establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c) (emphasis added). In deciding a motion under the CPA, the Court may consider the pleadings and "supporting or opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a). If the plaintiff cannot meet that burden of proof and, as a result, dismissal is granted, "the court shall award to the moving party . . . court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." *Id.* § 27.009(a) (emphasis added).

B. This Legal Action Relates to Wells' Exercise of Her Right of Free Speech

There is no question that this legal action was filed in response to Wells' exercise of her free speech rights—Plaintiffs admit as much in their Complaint. They affirmatively allege that their Complaint arises out of commentary they contend Wells and others published over the Internet about the quality of the healthcare services they provide. (*See, e.g.*, Compl. ¶¶ 1, 29 & Ex. A, B, D). According to the plain text of the CPA, speech about "health or safety,"

"community well-being," or a "service in the marketplace" is, by definition, speech about a "[m]atter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(7). Moreover, speech about a matter of public concern constitutes, by definition, the "[e]xercise of the right of free speech." *Id*. § 27.001(3). The allegations of the Complaint as to the nature of this legal action and Wells' exercise of her free speech rights—while clear on their face—are also confirmed by the Declaration of Brenda Wells, filed contemporaneously herewith. (Wells Decl. ¶¶ 8-10). In particular, she states that she is "concerned about the quality of healthcare provided at UBH Denton," and that "it is important not only to share my experience there with others who might consider receiving care at UBH Denton, but also to provide a forum for others to communicate their own experiences at UBH Denton." (*Id.*, ¶ 8). Wells further states that "[t]he quality of healthcare in the Denton, Texas, area is a matter of significant public importance." (*Id.*, ¶ 9).

Having established by a preponderance of the evidence (indeed, on the undisputed evidence) that this legal action arises from Wells' exercise of her free speech rights, dismissal of the state-law claims is mandated by the CPA unless Plaintiffs can establish by "clear and specific evidence" that they have a prima facie case for "each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE § 27.005(c). As set out below, Plaintiffs can make no such showing. Accordingly, this action ought properly be dismissed.

C. Plaintiffs Cannot Meet Their Burden of Proof on the Essential Elements of Their Claims

Plaintiffs' state-law claims are legally deficient on their face, which precludes Plaintiffs from satisfying the burden they must carry under the CPA to show "clear and specific evidence" on "each essential element" of their claims.[4] These deficiencies alone warrant dismissal under

[4] Indeed, it is apparent from the face of the Complaint that Plaintiffs have simply scoured the Internet to compile any statement Wells might have ever made relating to Plaintiffs,

the CPA (and well as under Rule 12(b)(6)). Moreover, taking into consideration the Wells Declaration, as the Court may do in considering Well's Special Motion to Dismiss under the CPA, Plaintiffs' state-law claims fail as a factual matter as well and therefore are subject to dismissal on this additional basis.

As a threshold matter, because Texas law governs all matters of state law in this case, Plaintiffs' claim for defamation under North Carolina common law and their NCUDTPA claim are inapplicable and should be dismissed on their face.[5] Further, even if North Carolina law did apply, the NCUDTPA claim should be dismissed because none of the Plaintiffs is a North Carolina resident. *See The In Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 502 (M.D.N.C. 1987) ("For these reasons, limiting [Chapter 75's] reach to cases involving a substantial effect on plaintiff's operations in North Carolina comports with the notion of fairness under the due process clause.").

i. Plaintiffs' "Texas Libel" Claim Should be Dismissed

Plaintiffs' defamation claim, purportedly brought pursuant to Section 73.001 of the Texas Civil Practice and Remedies Code, has fatal deficiencies as a matter of law and of fact. As detailed below, each statement in the Complaint that Plaintiffs allege is defamatory suffers from one or more of the following flaws: (a) the statements are not alleged *in haec verba*, or with sufficient particularity; (b) the statements are—on their face—expressions of opinion and/or hyperbole, not statements of fact; (c) the statements are not defamatory; (d) the statements were published by third parties on a website operated by Wells, and are therefore privileged pursuant

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irrespective of whether any such statement meets the elements of their claims. Plaintiffs allege that Wells' website was started in January 2010 (Compl. ¶ 2), and yet they never sent Wells a demand letter and waited nearly two-and-a-half years before filing this Complaint, which they now claim is a matter of urgent importance. (Pl. Opp. to Motion to Extend, DE 13, at 4).

[5] Of course, the converse would be true were the Court to hold that North Carolina law applied—the Texas causes of action would be subject to dismissal.

to 47 U.S.C. § 230; (e) the statements are true or substantially true; (f) Plaintiffs cannot prove the requisite level of fault; (g) the statements are privileged as "reasonable and fair comment" on a "matter of public concern" pursuant to Section § 73.002 of the Texas Civil Practice and Remedies Code; and (h) the statements were published prior to May 3, 2011 (one year from the filing of this Complaint), and are therefore barred by the statute of limitations under Texas law.[6]

The elements of defamation are: "(1) the defendant published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with malice, if the plaintiff was a public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement." *Udoewa v. Plus4 Credit Union*, 754 F. Supp. 2d 850, 866-867 (S.D. Tex. 2010) (citing *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)).[7] It is well settled that "[t]he truth of a statement is a defense to a claim for defamation," and that the statement need not be literally true in every detail; substantial truth is sufficient." *Id.* (citing *Gustafson v. City of Austin*, 110 S.W.3d 652, 656 (Tex. Ct. App.—Austin 2003)); *see also* TEX. CIV. PRAC. & REM. CODE § 73.005.

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[6] The first four grounds detailed above—(a) through (d)—apply both to Wells' Special Motion to Dismiss under the CPA and to her Motion to Dismiss under Rule 12(b)(6) because they can be analyzed solely by looking at the allegations of the Complaint. The last four are supported by the Wells Declaration and are applicable only to the Special Motion to Dismiss.

[7] Section 73.001 reads:

> A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Though there is no common-law cause of action for libel in Texas, Section 73.001 has been interpreted to simply codify the pre-existing common law. *See Renfro Drug Co. v. Lawson*, 144 S.W.2d 417, 418-19 (Tex. Ct. App. 1940).

a. The statements are not set out with sufficient particularity

Under Texas law, allegations of defamation must be set out *in haec verba* (i.e., "in these words"). *See Perkins v. Welch*, 57 S.W.2d 914, 915 (Tex. Ct. App.—San Antonio 1933). As a result, the complaint must quote the statement itself "or at least the particular portion or portions thereof charged to be libelous," in order to avoid dismissal. *Id.* A summary of the statement is insufficient because that would "amount only to conclusions of the pleader." *Id.*

In this case, many allegations are little more than purported summaries or descriptions of the alleged statements, devoid of any detail or context. (*See, e.g.*, Compl. ¶¶ 29(b), 29(e), 29(f), 29(g), 29(k), 29(l), 59(g)). For example, in paragraph 59(g), Plaintiffs do not quote Wells, but simply characterize her as stating "essentially, that UBH improperly or fraudulently bills insurance companies." Such an allegation is, on its face, wholly inadequate under *Perkins*. The actual text of the alleged statement is not included, and Plaintiffs admit that the allegation is only "essentially" what was published. It is, in fact, Plaintiffs' bare conclusion about the statement, not the statement itself. Each of the foregoing statements suffers from this same deficiency and is subject to dismissal on this ground.

b. The statements are non-actionable expressions of opinion and/or rhetorical hyperbole

Under Texas law, statements of opinion and expressions of rhetorical hyperbole are not actionable. According to the Texas Court of Appeals, in order to give rise to a defamation claim, an alleged statement must "be a statement of fact rather than opinion." *Shaw v. Palmer*, 197 S.W.3d 854, 857 (Tex. Ct. App.—Dallas 2006) (citations omitted). While "expressions of opinion may be derogatory and disparaging; nevertheless they are protected by the First Amendment of the United States Constitution and by article I, section 8 of the Texas Constitution." *Id*. A statement may be "hyperbolic, but exaggeration does not equal

defamation." *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562 (5th Cir. 1997). "In a case of parody or satire, courts must analyze the words at issue with detachment and dispassion, considering them in context and as a whole, as the reasonable reader would consider them." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 158 (Tex. 2004). The question of whether a statement is an assertion of fact or opinion is a question of law. *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex.1989).

Many of the statements set out in the Complaint are clear expressions of opinion and/or hyperbole and are therefore subject to dismissal. (*See* Compl. ¶¶ 29(a), 29(c)-(g), 29(k)-(l), 33(c), 37(b), 39(c), 42(e), 46, 48, and 50). For example, paragraph 29(a) concerns the following alleged statement about Plaintiff Khan, allegedly called "Dr. Con" in the post: "'Board Certified?' Give me a break." That allegation does not contain a single statement of fact about any of the Plaintiffs, and therefore cannot be false, as a matter of law. Similarly, Plaintiffs allege that Wells called Khan an "arrogant little virus." (Compl. ¶ 29(g)). It is clear that Wells is not claiming Khan is, in fact, a virus, and whether she finds him to be arrogant is merely her opinion, and not actionable as defamation, because it is not a matter that can be proved true or false. The same conclusion follows with respect to Wells' alleged commentary that, in her view, Plaintiffs serve "shitty food every day," (Compl. ¶ 39(c)); "[she] would not trust UBH Denton for anything," (*Id.*, ¶ 46); Khan merits a rating of 1/10 on a healthcare review website (*Id.*, ¶ 48); and she would not go to UBH "if [she] actually cared about [her] health." (*Id.*, ¶ 50). Plaintiffs also complain of statements they claim Wells made about her being "held against her will." (*Id.*, ¶ 29(e)). Such a statement is, by its very nature, a statement of opinion, not fact. Wells is the only person who can know what her will was at the time.

Texas courts have made clear that the First Amendment gives speakers wide berth to express their opinions without fear of reprisal in civil litigation. In *Yiamouyiannis v. Thompson*, 764 S.W.2d 338 (Tex. Ct. App.—San Antonio 1988), for example, the court held:

> When the topic is a public issue such as the fluoridation of drinking water, speakers may express their opinions about their opponents' views and qualifications without having to prove the substantial "truth" of those opinions to a jury in a defamation case. Our holding also recognizes the limitations of the legal process, which is ill-suited to determine what is and is not quackery, hokum, and mumbo jumbo, even with such tools as broad discovery, expert testimony, and finely-crafted jury questions and definitions.

Id. at 341 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). In that case, the Texas court held the following statements to be non-actionable opinion: calling the plaintiff a "quack" and "an outrageous hoke artist and imported fearmonger," implying that he lacked "solid credentials," and characterizing his views as "incomprehensible mumbo jumbo." *Id.* at 341. The court noted that these statements were simply "the speaker's shorthand way of opining that Yiamouyiannis is not worthy of belief, his views are confused nonsense, and he is not qualified to instruct the public about fluoridation." *Id.* at 341.

Another Texas case, *Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636 (Tex. Ct. App.—Fort Worth 1998), is also illustrative. *Brewer* involved a report about the care being given at nursing homes owned by the plaintiffs, in which the defendants allegedly made statements indicating, in relevant part, that "appellants engaged in 'profiteering.'" *Id.* at 642. The court held that this statement was non-actionable opinion because the report, viewed in context, made clear that profiteering was simply the "most likely reason" for patient neglect at the facilities in question. *Id.* at 643. *See also Am. Broad. Co., Inc. v. Gill*, 6 S.W.3d 19, 29 (Tex. Ct. App.—San Antonio 1999) (holding statement that "I figure I got screwed" was non-

actionable opinion because "rhetorical hyperbole is not subject to objective verification"), *rev'd on other grounds, Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000).

Similarly, in this case, many statements at issue (including one allegedly entitled "Dr. Richard Kresch: the Mastermind of this Quack Shack") are pure expressions of Wells' opinion that (1) Plaintiffs gave her poor medical treatment; (2) one explanation for her poor treatment was Plaintiffs' focus on treating patients with good insurance coverage; and (3) Wells would not recommend their services to others. That Wells allegedly used colorful or harsh language in expressing her opinions does not make those opinions actionable as libel. *See Peter Scalamandre & Sons, Inc.*, 113 F.3d at 564 ("Defamation law should not be used as a threat to force individuals to muzzle their truthful, reasonable opinions and beliefs.").

c. The statements are non-defamatory

Under Texas law, whether a statement is defamatory is a question of law. *See Carr*, 776 S.W.2d at 569. In making this analysis, "allegedly libelous statements must be construed as a whole, in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Id.* at 570. Texas courts "view the alleged defamatory statements in their context; they may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances." *Columbia Valley Reg'l Med. Ctr. v. Bannert*, 112 S.W.3d 193, 198 (Tex. Ct. App.—Corpus Christi-Edinburg 2003). "A communication that is merely unflattering, abusive, annoying, irksome, or embarrassing, or that hurts only the plaintiff's feelings, however, is not actionable." *Means v. ABCABCO, Inc.*, 315 S.W.3d 209, 214 (Tex. Ct. App.—Austin 2010).

In *Columbia Valley*, the Texas Court of Appeals held that it was not defamatory to accuse a hospital manager of an "apparent lack of discipline in her department," nor was it defamatory

to accuse the manager of "un-professionalism." 112 S.W.3d at 199-200. Rather, the court held, those statements merely consisted of her "supervisor's opinion regarding her shortcomings that are not libelous." *Id.* at 200.

Applying these principles, a number of the statements cited in the Complaint are not defamatory because a "person of ordinary intelligence" would not perceive them to "expose the [Plaintiffs] to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury." TEX. CIV. PRAC. & REM. CODE § 73.001. (*See, e.g.*, Compl. ¶¶ 29(c), 29(e), 29(i), 29(k), 29(o), 33(b), 33(d), 35(b), 42(c), 42(e), 42(d), 44(b), 59(a)-(e), 59(h), 59(n), 59(o), 59(r)).

For example, in paragraph 59(c) of the Complaint Plaintiffs claim that the following statement is defamatory: "Wells alleges that a 'former nurse from their facility has told me that when they hold daily staff meetings, the discussion emphasizes the patient's insurance benefits." That statement is simply not defamatory, as a matter of law. It does not accuse Plaintiffs of committing a crime or ethical violation. (*See also* Compl. ¶ 29(i)). Similarly, in paragraph 35(b), Plaintiffs complain about a purported post in which "Wells alleges 'they told my boyfriend I had an addition [*sic*] to illegal drugs, which I most certainly did not, and the lab work I had done proves that no such substances were in my system." Again, no reasonable person of ordinary intelligence would interpret this statement to be defamatory.

d. Section 230 immunizes Wells from liability for third-party content

Plaintiffs admit in their Complaint that some of the statements at issue were authored by third parties and sent to Wells for publication on her website. (*See, e.g.*, Compl. ¶¶ 59(g), 59(r)).

These allegations run headlong into the immunity provisions of Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230, and therefore should be dismissed.

Under Section 230(c)(1): "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230 forecloses any attempt to impose tort liability on Wells for content provided by a third party. "Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (citing *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003)); *Batzel v. Smith*, 333 F.3d 1018, 1030-31 & n.19 (9th Cir. 2003); *Zeran v. Am. Online, Inc*., 129 F.3d 327, 330-31 (4th Cir. 1997).

Batzel is particularly relevant here. In that case, the court held that the publisher of an Internet newsletter enjoyed Section 230 immunity for content he posted that had been provided to him in an email from a third party. *See Batzel*, 333 F.3d at 1031-32. The court applied Section 230, and the fact that the publisher had edited portions of the email before publishing it did not affect the defendant's eligibility for Section 230's protections. *Id.* at 1031 ("The 'development of information' therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication. Because Cremers did no more than select and make minor alterations to Smith's e-mail, Cremers cannot be considered the content provider of Smith's e-mail for purposes of § 230.")

According to the allegations of the Complaint, some of the statements at issue were simply Wells' re-posting content provided by a third party. Paragraph 59(g) of the Complaint alleges that Wells simply "removed the name from a comment made on the blog," which clearly fits under *Batzel*. Similarly, paragraph 59(r) of the Complaint alleges that one blog post was

"from the mother of a former UBH patient." Re-posting third-party content, even with some edits, is not actionable under Section 230, and dismissal as to those allegations is appropriate.

e. The statements are true or substantially true

The CPA makes it clear that Plaintiffs bear the burden of proving—by "clear and specific evidence"—that the statements at issue are false. TEX. CIV. PRAC. & REM. CODE § 27.0005(c). Faced with a Special Motion to Dismiss under the CPA, the bare and conclusory allegations of falsity contained in the Complaint will not suffice. Though "clear and specific" has not been defined by Texas courts, in other contexts they have defined "clear and convincing" as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *State v. Addington*, 588 S.W.2d 569 (Tex. 1979). Plaintiffs here cannot meet that burden.

As detailed in the Wells Declaration, Wells is not aware of a single statement attributed to her in the Complaint that is incorrect. (Wells Decl. ¶ 13). In each instance, she was either accurately describing her own experiences with Plaintiffs (*Id.*, ¶ 14), or she was accurately reporting information that had been given to her by third parties about their own experiences with Plaintiffs. (*Id.*, ¶ 15).

With respect to Wells' reporting of third-party statements, Texas courts recognize the principle of "neutral reportage," which holds that a defendant's "reporting that a third party has made allegations is 'substantially true' if, in fact, those allegations have been made and their content is accurately reported." *Neely v. Wilson*, 331 S.W.3d 900, 922 (Tex. Ct. App.—Austin 2011) (citing *McIlvain v. Jacobs*, 794 S.W.2d 14 Tex. 1990)). Thus, the truth of the underlying allegations is not at issue, so long as the evidence shows that the defendant accurately reported that allegations had been made and accurately detailed them. *Id.* ("[T]he focus of the substantial-

truth inquiry is on whether the allegations were in fact made and accurately reported, regardless of the truth of the allegations themselves."). *See also Dolcefino v. Turner*, 987 S.W.2d 100, 109 (Tex. Ct. App.—Houston (14th Dist.) 1999) (same).

Given these facts, Plaintiffs cannot carry their burden of proving falsity by "clear and specific" evidence that each of the complained-of statements is false. Accordingly, Plaintiffs' claims must be dismissed pursuant to the CPA.

f. Plaintiffs cannot prove Wells acted with the requisite level of fault

To establish their prima facie case for libel, Plaintiffs bear the burden of proving that Wells acted with the requisite degree of fault—actual malice for public-figure plaintiffs or negligence for private-figure plaintiffs. *See Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 771-72 (Tex. 1994); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976). This is a question of law. *See Freedom Newspapers of Tex. v. Cantu*, 168 S.W.3d 847 (Tex. 2005).

While there is not sufficient evidence at this point to ascertain whether any of the Plaintiffs are, for the purposes of this matter, public figures, Plaintiffs will not be able to meet their burden of establishing with "clear and specific evidence" that Wells acted either with actual malice or negligently. Wells affirms in her declaration that she is not aware of "any statement of fact that [she] made that is incorrect." (Wells Decl. ¶ 13). In fact, a number of the statements at issue reflect her own experience with Plaintiffs. Other statements reflect her accurate reporting of others' experiences with Plaintiffs.

Without "clear and specific" evidence that Wells (1) knew her statements were false or had "in fact entertained serious doubts as to the truth of his publications," *Carr*, 776 S.W.2d at

571; or (2) lacked a reasonable basis in her reporting of her experiences and those of third parties, Plaintiffs cannot satisfy their burden under the CPA.

g. The statements are privileged commentary on an issue of public concern

Under the Texas libel statute, the publication by "a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action." TEX. CIV. PRAC. & REM. CODE § 73.002(a). Among other matters, the privilege extends to "reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information." *Id*. § 73.002(b)(2) (emphasis added). Whether publication is protected by the Texas statutory fair comment privilege is a question of law. *See Denton v Boyd*, 460 S.W.2d 881, 884 (Tex. 1970); *Freedom Commc'ns v. Sotelo*, No. 11-05-00336-CV, 2006 WL 1644602, *3 (Tex. Ct. App.—Eastland June 15, 2006) (Exhibit A hereto). Wells' alleged statements are privileged as fair comment for several reasons.

First, as detailed above, the statements at issue in this case concerned a "matter of public concern" (i.e., speech about "health or safety," "community well-being," or a "service in the marketplace," as defined in Section 27.001(7)). *Second*, as to whether Wells' purported blogs meet the definition of a "periodical," Section 73 does not define "periodical," and it does not appear that any court has done so either. In other related contexts, however, Texas courts and federal courts interpreting Texas law have held that Internet publications enjoy the same statutory protections offered other "traditional" media outlets, such as newspapers and magazines. *See, e.g.*, *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir. 2007) (holding that "single publication rule" with respect to statute of limitations applied to Internet publication in the same way it applied to traditional media); *Kaufman v. Islamic Soc'y of Arlington*, 291 S.W.3d 130 (Tex. Ct. App.—Fort Worth 2009) (holding that website was a

"media defendant" for the purposes of applying statute allowing interlocutory appeals). As the Fifth Circuit held: "A statement electronically located on a server which is called up when a web page is accessed, is no different from a statement on a paper page in a book lying on a shelf which is accessed by the reader when the book is opened." *Nationwide Bi-Weekly*, 512 F.3d at 144 (quotation omitted).

Applying these principles to this case, Section 73.002's privilege for commentary on issues of public concern applies fully to a website such as Wells'. After all, had Wells simply printed out her alleged postings and published them on paper, they would clearly enjoy the privilege. The outcome should be no different simply because she is alleged to have published them online. Moreover, each of the statements alleged to be defamatory in the Complaint constitutes Wells' commentary on an issue of public concern (i.e., healthcare services), and therefore is privileged so long as it is "reasonable and fair." In her Declaration, Wells affirms that the statements at issue are either accurate descriptions of her own experiences with Plaintiffs or reflect her accurate reporting of others' experiences with Plaintiffs. (Wells Decl. ¶ 13). Because Plaintiffs cannot rebut with "clear and specific evidence" the facts set out in the Wells Declaration, which establish that her statements constituted "reasonable and fair" comment on a matter of public concern, their claims must be dismissed.

Finally, the statements at issue are not subject to the exception to the fair comment privilege for statements published with actual malice after they ceased to be of public concern. *See* TEX. CIV. PRAC. & REM. CODE § 73.002(a). The privilege cannot be overcome in this case because Plaintiffs cannot prove that publication was made with the requisite actual malice. *See Sotelo*, 2006 WL 1644602, *5-6; *Langston v Eagle Publ. Co.*, 719 S.W.2d 612, 624 (Tex. Ct. App.—Waco 1986). In her declaration, Wells states that she had no knowledge of any

inaccuracies prior to publication. (Wells Decl. ¶ 13). This testimony negates actual malice as a matter of law, and it precludes the plaintiffs from overcoming the statutory fair comment privilege under Section 73.002. *See Sotelo*, 2006 WL 1644602, *5-6.

h. The statute of limitations bars claims arising from many of the statements

Under TEX. CIV. PRAC. & REM. CODE § 16.002(a), the statute of limitations for libel claims is one year from the date of publication. The Complaint was filed May 3, 2012; thus no statement first published before May 3, 2011, is actionable. As detailed in the Wells Declaration, a substantial number of the statements alleged in the Complaint were indeed published prior to that date. These include the statements referenced in paragraph 29, subparts (a) through (i), and subpart (k); the statements referenced in each subpart of paragraph 35; the statements referenced in paragraph 46, the statements in paragraph 48, the statements referenced in paragraph 50; and the statements referenced in paragraph 59, subparts (a) through (h). (Wells Decl. ¶ 16). Any libel claim based on these statements is time-barred under Texas law and subject to dismissal.

ii. Plaintiffs' "Business Disparagement" Claim Should be Dismissed

To establish a business disparagement claim under Texas law, Plaintiffs must prove: "(1) publication by the defendant of false and disparaging words about the plaintiff; (2) malice; (3) lack of privilege; and (4) special damages to the plaintiff." *Encompass Office Solutions, Inc. v. Ingenix, Inc.*, 775 F. Supp. 2d 938, 959 (E.D. Tex. 2011) (quoting *Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426, 433 (Tex. Ct. App.—Beaumont 2008)).

As detailed above, Plaintiffs cannot meet their burden of showing that any of Wells' alleged statements constitute false statements of fact, they cannot offer any evidence that Wells was motivated by "malice," as opposed to concern about the healthcare she and others have

received and are receiving at Plaintiffs' facility in Denton, Texas, and a number of the statements alleged in the Complaint are subject to the fair comment privilege under Texas law.

Finally, with respect to the fourth element of the business disparagement claim, Plaintiffs have failed to allege that they suffered any "special damages," as required by Texas courts. Under Texas law, to prove special damages, "a plaintiff must provide evidence 'that the disparaging communication played a substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings.'" *Id.* (quoting *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. Ct. App.—Forth Worth 2007)).

Here, Plaintiffs have simply made a boilerplate allegation of "substantial financial losses," (Compl. ¶ 91), which is plainly inadequate to survive a Rule 12(b)(6) motion, much less meet Plaintiffs' burden of proof under the CPA. *See Encompass Office Solutions*, 775 F. Supp. 2d at 959 (dismissing business disparagement claim under Rule 12(b)(6) for failure to plead special damages) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). For that reason, Plaintiffs' business disparagement claim should be dismissed as legally and factually deficient.

iii. Plaintiffs' Civil Conspiracy Claim Should be Dismissed

"The elements of a cause of action for civil conspiracy in Texas are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 623 F. Supp. 2d 798, 809 (S.D. Tex. 2009) (citing *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1990)). "Conspiracy is a derivative tort because recovery is not based on the conspiracy, i.e., the agreement, but on the injury from the underlying tort . . . ." *Id.* at 810.

As detailed above, Plaintiffs' state-law claims are deficient as a legal and factual matter and are therefore properly dismissed. Without any underlying claim, Plaintiffs' conspiracy claim also fails as a matter of law. Moreover, Plaintiffs' conspiracy allegations amount to little more than boilerplate, devoid of any actual facts that, if true, would establish the elements of the claim. Plaintiffs do not allege a "meeting of the minds" between Wells and any of the unnamed defendants, nor do they allege what "object" they sought to accomplish with their alleged conspiracy. Indeed, Plaintiffs do not even specifically allege which defendants were involved in the alleged conspiracy or that Wells herself was part of any such conspiracy.

Under these circumstances, even leaving aside the fundamental problem of having no valid claim to support the conspiracy claim, dismissal is appropriate. "As the Supreme Court has made clear, a plaintiff must plead more than 'labels and conclusions' or offer a 'formulaic recitation of the elements of a cause of action' to defeat a motion to dismiss." *Schroeder v. Wildenthal*, No. 3:11-CV-525-B, 2011 WL 6029727, 7 (N.D. Tex. Nov. 30, 2011) (Exhibit B hereto) (dismissing civil conspiracy claim pursuant to Rule 12(b)(6)) (quoting *Ashcroft*, 556 U.S. at 678).

iv. Wells Should be Awarded Her Attorneys' Fees

Having established that Plaintiffs' state-law causes of action all should be dismissed pursuant to the CPA, Wells is entitled to her "court costs, reasonable attorney's fees, and other expenses incurred in defending against" Plaintiffs' Complaint. TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1).

III. Plaintiffs' State-Law Claims Should Be Dismissed Pursuant To Rule 12(b)(6)

A. Legal Standard

The purpose of a motion to dismiss under Rule 12(b)(6) is "to test the legal sufficiency of the complaint." *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir. 1994). As the Supreme Court recently made clear, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678-79. "Nor does a complaint suffice it if tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (quoting *Twombley*, 550 U.S. at 557). In short, to satisfy the "facial plausibility" standard and survive a Rule 12(b)(6) motion, a plaintiff must do more than simply plead facts that hint at the "sheer possibility that a defendant has acted unlawfully." *Id.* Plaintiffs have fallen far short of meeting that standard.

B. Plaintiffs' State-Law Claims Fail As A Matter Of Law

As detailed above, in Sections II(C)(i)(a) through (d), II(C)(ii), and II(C)(iii), Plaintiffs' state-law claims all fail as a matter of law, a judgment the Court may make without resort to the Special Motion to Dismiss and the evidence Wells offered in support of that Motion.[8] To summarize briefly, Plaintiffs' libel claim fails as a matter of law because, among other reasons, (1) some of the statements are not alleged *in haec verba*; (2) many of the alleged statements are expressions of opinion, not statements of fact; (3) many of the alleged statements are not

[8] As detailed in Section II(C), application of Texas law to the state-law claims mandates dismissal of Plaintiffs' North Carolina causes of action (for libel and NCUDTPA). If the Court were to find that North Carolina law applies to the state-law claims, those claims still fail as a matter of law, and should be dismissed pursuant to Rule 12(b)(6), because the same legal deficiencies outlined above defect those claims under North Carolina law.

defamatory, which is a question of law; and (4) some of the statements are—as alleged in the Complaint—statements authored by third parties and posted on Wells' website, and therefore subject to Section 230 immunity. Plaintiffs' business disparagement claim, for its part, fails as a matter of law because, in addition to the reasons detailed above, Plaintiffs have not alleged special damages as required by Texas law. Finally, Plaintiffs' civil conspiracy claim fails as a matter of law because (1) Plaintiffs have failed to properly allege an underlying tort and (2) their allegations of conspiracy amount to little more than boilerplate legal conclusions. Taken together, these legal deficiencies provide ample grounds for dismissing each of Plaintiffs' state-law claims for failure to state a claim.

IV. Plaintiffs' Copyright Infringement Claim Should Be Dismissed Pursuant To Rule 12(b)(6)

Plaintiffs' copyright claim fails as a matter of law and should be dismissed pursuant to Rule 12(b)(6) because they did not plead in the Complaint that they hold a valid copyright with respect to any of the images at issue. Instead, they allege only that they have "sought" registration from the Copyright Office.[9] (Compl. ¶ 56).

While neither the Fourth Circuit nor this Court have ruled directly on the matter, other federal courts have held that plaintiffs must plead and ultimately prove a valid registration, and not just the filing of an application, at the time a suit for infringement is commenced, otherwise their claims must be dismissed. *See, e.g.*, *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200-01 (10th Cir. 2005) (noting that "the Register of Copyrights must

[9] Although the scope of anti-SLAPP statutes does not typically extend to dismissal of federal claims brought alongside state-law claims, federal courts have consistently made clear that the presence of federal claims in a Complaint does not preclude dismissal of the state-law claims pursuant to the anti-SLAPP statute. *See, e.g.*, *Hilton*, 599 F.3d at 901 (considering application of anti-SLAPP statute to state-law claims despite presence of federal-law claim); *cf. Fabbrini v. City of Dunsmuir*, 631 F.3d 1299, 1302 (9th Cir. 2011).

affirmatively determine copyright protection is warranted . . . before registration occurs under the Act" and that "only upon registration or refusal to register is a copyright holder entitled to sue for copyright infringement under § 411"), *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, --- U.S. ---, 130 S. Ct. 1237 (2010);[10] *Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) ("[A]n application to register must be filed, and either granted or refused, before suit can be brought."); *Levey v. Brownstone Inv. Group, LLC*, No. 11–395 (ES), 2012 WL 295718, *3 n.6 (D.N.J. Feb. 1, 2012) (Exhibit C hereto) (dismissing infringement claims for failure to state a claim because plaintiff did not have a registered copyright at the time he brought suit). The plain language of the Copyright Act, which requires registration, not application, as a prerequisite to a suit for copyright infringement requires dismissal of Plaintiffs' copyright claims for failure to state a claim.

In addition, Plaintiffs' claim for copyright infringement is subject to dismissal under Rule 12(b)(6) because it is clear from the face of the Complaint that Wells' alleged actions, even if found to be infringing, are protected as fair use. Fair use is an affirmative defense to copyright infringement. *See* 17 U.S.C. § 107. Typically, "a motion to dismiss filed under Federal Rule of Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). However, the Fourth Circuit has consistently acknowledged that "where facts sufficient to rule

[10] The holding in *Reed Elsevier* addressed whether failure to register a copyright stripped a federal court of subject matter jurisdiction. It did not relate to the pleading standard under Rule 12(b)(6). *Id.* at 1249 ("We also decline to address whether § 411(a)'s registration requirement is a mandatory precondition to suit that . . . district courts may or should enforce sua sponte by dismissing copyright infringement claims involving unregistered works."). Similarly, the Fourth Circuit's dicta in *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978), did not relate to the pleading standard. *Id.* at 296 n.4 (noting, in context of mandamus action, that "[t]he 1976 Amendments eliminate any need to secure registration as a prerequisite to an infringement suit and authorize suit for infringement, despite the Register's denial, so long as the Register is notified of the litigation").

on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Id.*

Federal courts across the country have held that dismissal pursuant to Rule 12(b)(6) is appropriate where a "fair use" defense is established on the face of the complaint. *See, e.g.*, *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009) (affirming dismissal of trademark claim where fair use defense was apparent from the face of the complaint); *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1466-67 (9th Cir. 1993) (same). In a recent copyright case, the Seventh Circuit affirmed dismissal of a copyright claim where examination of the alleged infringement revealed a clear fair use. *See Brownmark Films, LLC v. Comedy Partners*, No. 11–2620, 2012 WL 2044806, at *2 (7th Cir. June 7, 2012) (Exhibit D hereto). In *Brownmark*, the court treated the defendants' motion to dismiss as a summary judgment motion because they had attached the alleged infringement (recordings of television shows) to their motion to dismiss. Here, by contrast, Plaintiffs attached images of the alleged infringement to the Complaint.

The preamble to the fair use factors states that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. Four factors must be weighed when determining whether a use is fair: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.* Several courts have recognized that the first and fourth factors generally are given the greatest weight. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.

569, 579 (1994) (noting in analyzing the first factor that "the more transformative the new work, the less will be the significance of other factors"); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) ("[The fourth] factor is undoubtedly the single most important element of fair use.").

Here, Wells' alleged use of the images that Plaintiffs claim are copyrighted falls into one of the presumptively fair uses listed in the statute because the pictures are clearly used for "criticism" and "comment" rather than for any commercial benefit. In fact, Plaintiffs admit in the Complaint that Wells uses the images for commentary. (Compl. ¶ 39(a)–(c)) (noting multiple times that Wells added captions to the pictures). Furthermore, it is clear from the Exhibits attached to the Complaint that Wells' consistent purpose in using the images was to offer comment about Plaintiffs and their practices, not to profit commercially in any way. (Compl. Ex. A–E) (showing that every use of an image was accompanied by commentary regarding the image and Plaintiffs). Plaintiffs use the images to depict a comfortable, friendly, and welcoming environment at their facilities; Wells took the images and transformed them, through the use of irony and exaggeration, into commentary. Wells' transformative, noncommercial use, for purposes of criticism or commentary, is evident on the face of Plaintiffs' complaint, and therefore the first fair use factor weighs heavily in favor of Wells. *See, e.g.*, *Brownmark Films*, 2012 WL 2044806, at *4 ("The underlying purpose and character [of] SPDS's work was to comment on and critique the social phenomenon that is the 'viral video.'").

Furthermore, the fourth factor—the effect on the potential market for or value of the work—also confirms the alleged use was fair. When, as here, it is obvious that no relevant market exists and that no market impact could result from a defendant's use of copyrighted material, this factor weighs heavily in favor of the defendant, even at the motion to dismiss stage.

See Brownmark Films, 2012 WL 2044806, at *5 (noting that "the plaintiff has failed to give the district court or this court any concrete suggestion about potential evidence indicating that the South Park parody has cut into any real market (with real, non-Internet dollars) for derivative uses of the original [work].").

The images at issue are promotional images used to demonstrate Plaintiffs' facilities. Plaintiffs are engaged in the business of providing healthcare services, not of selling or licensing images. (Compl. ¶¶ 5-8). It is hard to see how such images could have any potential value, let alone any viable commercial market. Even if Plaintiffs could somehow identify a market for the images, or argue that they have made previous licensing attempts, there is not a single fact alleged in the Complaint that suggests Wells' use of the images would affect that market. The images used by Wells, as alleged by Plaintiffs, appear only on her personal blog and a Facebook page. (Compl. ¶¶ 29, 39, 54). It strains credibility to believe that Plaintiffs would be deprived of commercial opportunities to exploit the use of the images by their placement on web pages meant for personal use. Therefore, it is clear from the face of Plaintiffs' Complaint that Wells' alleged use of the images can have no impact on any market for the images, or their value.

With the first and fourth factors in the fair use inquiry weighing decidedly in favor of Wells, the other two fair use factors have lesser significance. *See Campbell*, 510 U.S. at 579. Furthermore, the Supreme Court held that the factors must be balanced "in light of the purposes of copyright." *Id.* at 578. Here, a finding of fair use would comport with those goals. Wells seeks to demonstrate the misleading nature of the images used by Plaintiffs through criticism and comment. Allowing Plaintiffs to stifle such use would enable Plaintiffs to stifle protected free speech simply because it does not comport with the image they project of themselves. Therefore, should this Court find that Plaintiffs have carried their burden of demonstrating

copyright ownership, their claim for copyright infringement should nevertheless be dismissed pursuant to Rule 12(b)(6) because it is clear on the face of the Complaint that Wells' use of the images at issue constitutes a fair use.

CONCLUSION

For the reasons detailed herein, Plaintiffs' claims against Defendant Brenda Wells are legally and factually deficient and should be dismissed with prejudice pursuant to the CPA and pursuant to Rule 12(b)(6). In addition, Wells is entitled to recover her court costs, reasonable attorney's fees, and other expenses incurred in defending against this action.

Respectfully submitted, this the 15th day of June, 2012.

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