10/24/2022 9:43 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 69523919
By: Keeley Hodgins
Filed: 10/24/2022 9:43 PM

No. 2022-44525

DR. MARY TALLEY BOWDEN, Plaintiff, v. THE METHODIST HOSPITAL, d/b/a Houston Methodist Hospital, and MARC L. BOOM, Defendants.	§ § § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 151ST JUDICIAL DISTRICT

DEFENDANTS' MOTION TO DISMISS
UNDER TEX. CIV. PRAC. & REM. CODE CHAP. 27

Pursuant to Chapter 27 of the Tex. Civ. Prac. & Rem. Code ("TCPA"), defendants The Methodist Hospital ("Houston Methodist") and Dr. Marc L. Boom respectfully move to dismiss plaintiff's causes of action.

INTRODUCTION

Houston Methodist and its CEO, Dr. Boom, have been at the forefront of the fight against COVID-19 in our community. Plaintiff is a physician who once had privileges to admit patients to Houston Methodist. She used the internet to broadcast untrue statements about COVID-19 and Houston Methodist, which defendants were forced to correct.

Plaintiff now brings claims against defendants for defamation. Her claims have no merit, and they are the sort of claims that may be summarily dismissed pursuant to the TCPA. The Act is designed to achieve a speedy resolution when unmerited claims are based on communications in connection with a matter of public concern. Because the TCPA applies, and plaintiff cannot establish her claims by clear and specific evidence, the Court should dismiss them.

STATEMENT OF FACTS

In 2019, plaintiff opened her "BreatheMD" clinic, *see* Ex. 1 ("Our Team"), and became a member of the Provisional Medical Staff at Houston Methodist. *See* Ex. 2 (Nov. 11, 2021 letter).

In early 2020, the novel coronavirus COVID-19 began wreaking havoc across the country. On January 31, 2020, the U.S. Secretary of Health and Human Services declared that a public health emergency existed, pursuant to the Public Health Service Act. *See* Ex. 3 (Jan. 31, 2020 determination). Texas followed suit on March 13, 2020, when the Governor declared that "COVID-19 poses an imminent threat of disaster" and "authorize[d] the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster." Ex. 4 (Mar. 13, 2020 proclamation).

I. The COVID-19 Pandemic Caused a Public Health Emergency.

Since then, the Texas Department of State Health Services reports that COVID-19 has caused over 6 million confirmed infections and over 89,000 fatalities in the state. *See* Ex. 5 (COVID-19 Dashboard). Of those fatalities, more than 11,000 were in this County. *Id*. Across the country, the National Center for Health Statistics has reported that over one million deaths have been attributed to the virus. *See* Ex. 6 (NCHS Executive Summary).

Beginning in late 2020, the Food and Drug Administration ("FDA") issued Emergency Use Authorizations for three COVID-19 vaccines. *See* Auth. of Emergency Use of Certain Biological Products During the COVID-19 Pandemic, 86 Fed. Reg. 28,608 (May 27, 2021) (Janssen); Auth. of Emergency Use of Two Biological Products During the COVID19 Pandemic, 86 Fed. Reg. 5200 (Jan. 19, 2021) (Pfizer and Moderna). The FDA authorizations were based on a review process into the vaccines' safety and effectiveness and a finding that the vaccine benefits clearly outweigh their risks. *Id*.; *see also*, *e.g*., Ex. 7 (Dec. 11, 2020 FDA news release). The Centers for Disease Control and Prevention ("CDC") likewise has stated that the vaccines are safe and

effective, and the "benefits of COVID-19 vaccination outweigh the known and potential risks." Ex. 8 (CDC, Safety of COVID-19 Vaccines)**.** Over 600 million doses of COVID-19 vaccines have been administered in the U.S to date. Ex. 9 (CDC COVID Data Tracker).

The Texas Department of State Health Services called vaccines a "precious resource in the fight against COVID-19." Ex. 10 (Dec. 24, 2020 Guidance). As the initial supply of vaccines was limited, the state "encourage[d] vaccine providers to continue to prioritize limited supplies of vaccine for . . . front-line health care workers and residents of long-term care facilities." *Id*. In "the interest of public health and providing maximum protection in Texas communities," the state told providers to seek opportunities to use "any remaining doses to vaccinate other at-risk populations in their area." *Id*. Hospitals were "encourage[d]" to "serv[e] as community vaccinators for health care workers" and prioritize "those age 65 or older or with high-risk medical conditions." *Id*.

Houston Methodist followed this guidance of the FDA, CDC, Texas Department of State Health Services, and other reputable sources. It announced it would begin providing vaccines to its health care workers and elderly members of the public in late 2020. *See* Ex. 11 (Dec. 24, 2020, "Houston Methodist to begin scheduling COVID-19 vaccinations of patients"). In April 2021, Houston Methodist became the first hospital in the nation to require all members of its medical staff to be vaccinated against COVID-19, including physicians, nurse practitioners, and physician assistants with clinical privileges at the hospital. *See* Ex. 12 (June 8, 2021 Houston Methodist press release). This requirement was based on the staff's "duty as health care professionals" to "protect our patients and our community." *Id*. Over 99% of its employees and physicians had received the vaccine by June 1, 2021. *Id*. In fact, plaintiff attested to Houston Methodist that she got or planned to get the COVID-19 vaccine no later than June 7, 2021. *See* Ex. 13 (COVID-19 survey response).

On August 23, 2021, the Pfizer vaccine became the first fully approved vaccine. The FDA found that the vaccine "meets the high standards for safety, effectiveness, and manufacturing quality the FDA requires of an approved product." Ex. 14 (Aug. 23, 2021 FDA news release). On September 17, 2021, the CDC released a report monitoring the incidence of COVID-19 cases, hospitalizations, and deaths by vaccination status. *See* Ex. 15 (CDC Morbidity/Mortality Weekly Report). The report concluded that during a prior three-month time period the vast majority of COVID-19 cases, hospitalizations, and deaths were reported among individuals who were not fully vaccinated. *Id*. "Getting vaccinated protects against severe illness from COVID-19 . . . ." *Id*.

II. The Use of Ivermectin to Treat COVID-19 Is Not Supported by Medical Evidence.

As vaccines rolled out, a certain segment of the population began promoting a drug called ivermectin to treat or prevent the virus. For example, the group Front Line COVID-19 Critical Care Alliance (FLCCC), of which plaintiff is a "clinical advisor," Pet. ¶8, lauded the drug. It posted on its website that "it's been known for MONTHS that ivermectin could bring an end to this pandemic but media, Big Tech, Big Pharma and your government tried as hard as they could to keep it quiet," in what FLCCC called "The BIGGE$T Lie" on the public. Ex. 16 at p. 1, 8(July 26, 2021).

The use of ivermectin to treat COVID-19 is not supported by medical evidence. "Overall, the reliable evidence available does not support the use of ivermectin for treatment or prevention of COVID-19 outside of well-designed randomized trials." Ex. 17 at p. 2 (*Cochrane Database of Sys. Rev.*, July 28, 2021) (review of studies). Ivermectin has never been approved by the FDA to treat the virus. Ex. 18 at p. 2 (FDA consumer update). In fact, "Currently available data do not show ivermectin is effective against COVID-19," and, "Taking large doses of ivermectin is dangerous." *Id*.

In August 2021, the CDC reported, "Adverse effects associated with ivermectin misuse and overdose are increasing." Ex. 19 at p. 1 (CDC health advisory). This included a "five-fold increase" in calls to poison control centers across the country compared to pre-pandemic baseline levels. *Id*. at p. 2. An overdose of ivermectin could lead to serious gastrointestinal symptoms, hypotension, seizures, coma, and even death. *Id*. In addition, as the CDC warned, "Clinical trials and observational studies to evaluate the use of ivermectin to prevent and treat COVID-19 in humas have yielded insufficient evidence," and, "Data from adequately sized, well-designed, and well-conducted clinical trials are needed to provide more specific, evidence-based guidance on the role of ivermectin in the treatment of COVID-19." *Id*. at p. 1.

Later in 2021, a "legion of plaintiffs" tried to use court systems in many states to "compel hospitals to treat COVID-19 patients with ivermectin." *DeMarco v. Christiana Care Health Servs., Inc*., 263 A.3d 423, 426 (Del. Ch. 2021).

Court after court, based on evidentiary hearings, denied these efforts. "Treating COVID-19 with ivermectin is undisputedly contrary to generally accepted health care standards"; "the weight of authority shows it is not an effective treatment"; and data to the contrary is "inconsistent with the great weight of medical authority and are based on dubious methodologies." *Id*. at 435, 438. "[T]here has been no admissible evidence submitted that Ivermectin is an effective or an approved treatment for COVID-19." *D.J.C. v. Staten Island Univ. Hosp.-Northwell Health*, 73 Misc.3d 840, 842 (N.Y. Sup. 2021). There is "no doubt that the medical and scientific communities do not support the use of ivermectin as a treatment for COVID-19." *Smith v. West Chester Hosp., LLC*, 2021 WL 4129083, *3 (Ohio C.P. Sept. 6, 2021).

III. The Plaintiff Spread Inaccurate and Harmful Public Statements.

Nevertheless, plaintiff began sharing social media statements critical of vaccines, rejecting medical treatment of vaccinated patients, and promoting ivermectin to prevent/treat the virus. *See*

Pet. ¶5 (she "became an opponent of vaccine mandates, and over time, the vaccines themselves. Dr. Bowden began sharing her opinions on Twitter"). For example, she made these Twitter posts:

- Nov. 5, 2021: "I've had it. Going forward, I will not accept any patients who have been vaccinated. I will continue to see established patients how [sic] have had the vaccine, but all new patients have to be unvaccinated." Ex. 20.

- Nov. 8, 2021: "Given the current climate and the writing on the wall, I am shifting my practice focus to treating the unvaccinated." Ex. 21.

- Nov. 8, 2021: "Vaccine mandates are wrong." Ex. 22.

Similarly, she posted an open letter on her practice's website: "the vaccine is not working." Ex. 23 at p. 2 (Nov. 6, 2021 post). She would be "taking a stand" by refusing to accept vaccinated patients. *Id*.

At the same time, plaintiff published a serious and unfounded accusation that Houston Methodist "was discussing denying care for unvaccinated people." *Id*. Her statements about this supposed denial of care and that "the vaccine is not working" remain on her website today. *Id*. Further, she sent an email to patients stating that a doctor associated with Houston Methodist allegedly refused to treat an unvaccinated patient. *See* Pet. ¶6 n.2. And she posted on Twitter, "Hospitals are prisons." Ex. 24 (Nov. 6, 2022 tweet).

In addition, plaintiff promoted the use of ivermectin to treat the virus. She republished a tweet, "Ivermectin is effective for COVID-19." Ex. 25 (Nov. 10, 2021 tweet). On her practice's website, she said she "believes in aggressive treatment with safe medications such as ivermectin to help patients with COVID19," Ex. 26 at p. 2 (Oct. 2, 2021 post), and she is "one of those doctors who will prescribe ivermectin." Ex. 27 at p. 2 (Oct. 17, 2021 post). She further promoted ivermectin for the "prevention" of the virus. Ex. 28 at p. 2 (Aug. 19, 2021 post).[1]

[1] Plaintiff also used offensive language on Twitter, including "c**t" and "b***h." Ex. 66 (Nov. 7, 2021 tweet). The use of this type of language on social media was an additional basis for suspension of her privileges at Houston Methodist. *See* Ex. 2 (Nov. 11, 2021 letter to plaintiff) ("The public

Her public statements were false. First, Houston Methodist never restricted or denied care to unvaccinated persons, which plaintiff later admitted. *See* Pet. ¶6 n.2. Her statements to the contrary were inaccurate. Moreover, her criticisms of vaccines were contrary to the overwhelming medical evidence demonstrating their safety and effectiveness in preventing illness and death. *See supra*. And her statements promoting ivermectin as safe and effective to treat or prevent COVID-19 were contrary to the science, and her statements risked injury to individuals who took it against reliable medical guidance. *Id*.

IV. Houston Methodist Corrected Plaintiff's Misstatements to Protect the Public.

Plaintiff's statements raised many serious issues. One was whether she got the COVID-19 vaccine as she had attested. *See* Ex. 2 (Nov. 11, 2021 letter to plaintiff). Houston Methodist told her that it required "documentation confirming [her] vaccination status." *Id*. It reminded her to conduct herself on social media with "respect, courtesy, dignity and compassion." *Id*.

In addition, a wider statement was necessary in the interest of public health and safety. The hospital felt dutybound to counteract plaintiff's misstatements about vaccinations, ivermectin, and its patient care. Houston Methodist issued statements that plaintiff's statements were her own "personal and political opinions"; her opinions were "harmful to the community" and "do not reflect reliable medical evidence or the values of Houston Methodist"; "Houston Methodist does not and will never deny care to a patient based on vaccination status"; her statements were "dangerous misinformation which is not based in science"; and "Dr. Bowden has told Houston

---

use of vulgar, offensive and abusive language directed at others, whether occurring within or without the hospital, contradicts the ICARE Values and professional standards expected of members of the medical staff and of our profession.")

Methodist that she is vaccinated, as required of all physicians who practice at Houston Methodist." Ex. 29 (Nov. 12, 2021 tweets).

Dr. Boom said he was "personally offended by her behavior and by her misleading comments about COVID-19 and our hospital system," and he noted she had been suspended for inappropriate behavior including spreading misinformation on vaccines and treatments. Pet. ¶6.

V. Plaintiff Promptly Republished the Allegedly Defamatory Statements.

Defendants made their statements to protect the public, and plaintiff used their statements to promote her business. Within days she started a media blitz, including these appearances:

- Nov. 12, 2021: She appeared on "The Conservative Review" podcast. The episode advertised "a harrowing story of genocide that is being committed in a local hospital, with doctors senselessly denying care to [plaintiff's] patient." Ex. 30 (Conservative Review episode summary); Ex. 31 (Ep. 992 Conservative Review).

- Nov. 15, 2021: She gave an interview on the KTHR radio station, "Cancelled for Covid." Ex. 32 (Nov. 15, 2021 post).

- Nov. 17, 2021: She appeared on the "Larry Elder Show," discussing "Her Suspension from Houston Methodist." Ex. 33 (Nov. 17, 2021 post); Ex. 34 (Excerpt of the Larry Elder Show).

- Nov. 17, 2021: She held a press conference in front of her business, repeating alleged defamatory statements. *See* Ex. 48 (Nov. 17, 2021 press conf.).

- Nov. 20, 2021: She posted on her website that she was suspended by Houston Methodist with links to five of her media appearances. Ex. 36 ("In the Press").

Indeed, plaintiff seemed to celebrate her separation from the hospital. "I have broken free from Methodist and very much appreciate the flood of support I have received!" Ex. 37 (Nov. 15, 2021 tweet). The next month, she tweeted that YouTube "suspended" comments on the video of her press conference "because they were all positive!!" Ex. 38 (Dec. 11, 2021 post).

More media appearances followed in which she repeated the alleged defamation. *See, e.g.*, Ex. 39 (Dec. 6, 2021, "Let's Argue with Prince Carlton"); Ex. 40 (Jan. 17, 2022 tweet); Ex. 41

(Jan. 19, 2022, "Ingraham Angle"); Ex. 42 (Jan. 19, 2022 tweet); Ex. 43 (Feb. 3, 2022 tweet); Ex. 44 (Feb. 22, 2022, "The Defender"); Ex. 45 (Feb. 27, 2022, "Starkman Approved"); Ex. 46 ("Primary Care Cures"); Ex. 47 (June 25, 2022 tweet). In one interview, she corrected the host's description of the alleged defamation, clarifying that she was accused of sharing "*dangerous* misinformation, not just misinformation, *dangerous*." Ex. 41 (Jan. 19, 2022, Fox News, "Ingraham Angle").

In another press conference, plaintiff repeated that Houston Methodist told "the world" she was "supposedly spreading dangerous misinformation about Covid." Ex. 35 (Jan. 17, 2022 press conf.); Ex. 49 (Jan. 17, 2022 press release). Six months later, in filing this case, she repeated the allegedly defamatory statements in another media conference. Ex. 50 (July 25, 2022 press conf.).

Lastly, she maintains a blog on Substack.com. She frequently has republished the allegedly defamatory statements, including screenshots of the very tweets she says are harmful to her reputation. *See* Ex. 51 (Apr. 18, 2022 post); Ex. 52 (July 27, 2022 post).

VI. Plaintiff Has Profited from Her Self-Generated Media Attention.

Contrary to having "lost patients" and "business opportunities," Pet. ¶11, plaintiff publicly touts her busy, growing practice.

Ten days after the alleged defamation, she advertised "for an unvaccinated primary case doctor who believes in early treatment for Covid to join my practice. . . . I have thousands of patients looking for a new PCP – you will be busy!" Ex. 53 (Nov. 22, 2021 post). Two months later, she announced hiring two more nurses. Ex. 35 (Jan. 17, 2022 press conf.). Six months after that, she was seeking a full- or part-time licensed vocational nurse. Ex. 54 (July 21, 2022 post). And she shared the hiring of a "like-minded board certified ENT" to her practice. Ex. 55 (Aug. 13, 2022 post). Two days later, she advertised for a full-time medical assistant or registered nurse –

"Planning on growing the practice with a Primary care Physician in the next few months." Ex. 56 (Aug. 15, 2022 post).

As of last November, plaintiff claimed to have treated 2000 COVID-19 patients over the course of two years. *See* Ex. 48 (Nov. 17, 2021 press conf.). Pet. ¶3. In the next eight months, after the alleged defamation and her media appearances, the number doubled to 4000 patients. Pet. ¶3.

Her patients make appointments and find prices for services on her BreatheMD website. A rapid COVID-19 nasal swab test costs $295. Ex. 57 (https://breathemd.org/covidtesting). An in-person COVID-19 "consultation" costs $200 on a weekday or $400 on a weekend. Ex. 58 (https://breathemd.org/appointments). Monoclonal antibodies cost $2,450. *Id*. She sells services such as "High Dose Vitamin C IV Fluids" ($300), "Review of Hospital Records" ($250), "Patient Advocate Specialist" services ($500), "Medical Exemption Request" ($50), "Group COVID-19 PCR Saliva Test" ($3,000), and a "Sinus Facial" with "steam aromatherapy" and "eucalyptus hot towels" ($140). *Id*. Her website sells products like a device to "eliminate snoring and apneas" for $1,650, a "home sleep test" for $295, and a COVID-19 "Saliva Travel Test Kit" for $190. Ex. 59 (https://breathemd.org/shop); Ex. 60 (https://breathemd.org/covid19-saliva-travel-test-kit). She accepts no insurance for services or treatments. Ex. 61 (https://breathemd.org/clinic-price-list).

When asked how she felt about "the whole incident" with Houston Methodist, plaintiff was pleased. She was "overwhelmed by the support" she had received from "all over the world." Ex. 48 (Nov. 17, 2021 press conf.). She described her experience as "gratifying," as she had "created a lot of enemies but I've made many more friends." *Id*.

GOVERNING LEGAL STANDARDS

A TCPA motion to dismiss initiates a three-step process. First, the movant must show that the nonmovant's legal action falls under the TCPA by showing that the claim "is based on or is in response to" communications or conduct covered by the statute. *See* Tex. Civ. Prac. & Rem. Code

§27.005(b). Courts consider pleadings as the "best and all-sufficient evidence" of the nature of the claims: "When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more." *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

Second, if the movant satisfies the first step, the burden shifts to the nonmovant to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code §27.005(c).

Third, even if the nonmovant meets this burden, the court still must dismiss the claims if the movant "establishes an affirmative defense or other grounds on which the [movant] is entitled to judgment as a matter of law." Tex. Civ. Prac. & Rem. Code §27.005(d).

ARGUMENT AND AUTHORITIES

VII. The TCPA Applies to Plaintiff's Claims Against the Hospital and Dr. Boom.

A. The claims are legal actions.

A TCPA motion must challenge a "legal action." Tex. Civ. Prac. & Rem. Code §27.005(b). The Act defines legal action as a "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." *Id.* §27.001(6). Here, plaintiff brings claims for defamation and defamation by implication. Pet. ¶¶20-31. These are legal actions under the TCPA because, at a minimum, they are "cause[s] of action." *Id.* §27.001(6). They are also part of a "judicial pleading or filing that requests legal … or equitable relief." *Id.*; *see* Pet. at 18.

B. These legal actions are based on and in response to TCPA communications.

The TCPA applies because these legal actions are "based on" and "in response to" conduct and communications covered by the Act. Tex. Civ. Prac. & Rem. Code §27.003(a), §27.005(b). Claims are in response to a protected communication "when they 'react to or are asserted

subsequently' to the communication." *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 880 (Tex. App.—Austin 2018, pet. denied).

The Act defines covered communications. Although it frames the communications and conduct as the "exercise of" certain rights, the Supreme Court has "put to rest any notion that any constitutional connotations of 'right of association,' 'right of free speech,' or 'right to petition' should inform the meaning of the TCPA's corresponding 'exercise of' definitions." *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 196 (Tex. App.—Austin 2017, pet. dism'd). The Act's "scope is dictated by its text, not by [courts'] understanding of the constitution." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 133-34 (Tex. 2019).

Plaintiff's claims are based on or in connection with defendants' "communications" as defined by the statute. Those communications, in turn, were in connection with "matter[s] of public concern" as defined by the statute.

C. Plaintiffs' claims are covered by the Act.

Plaintiff's claims are covered by Tex. Civ. Prac. & Rem. Code §27.005(b)(1)(A), which applies to a legal action that is based on or in response to "a communication made in connection with a matter of public concern," as those terms are defined by the Act. *Id.* §27.001(3).

The statute defines communication to include "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id*. §27.001(1). The TCPA covers "[a]lmost every imaginable form of communication, in any medium." *Adams v. Starside Custom Builders, LLC,* 547 S.W. 3d 890, 894 (Tex. 2018).

Here, the Petition shows that plaintiff's claims are based on or in response to defendants' communications. Indeed, the core of her allegations is that defendants made "statements of and concerning Dr. Bowden," and this is the foundation upon which her causes of action are based. Pet. ¶21, ¶28. These allegations involve communications as defined by the statute: "the making or

submitting of a statement or document in any form or medium." Tex. Civ. Prac. & Rem. Code §27.001(1). By making these statements, plaintiff alleges claims for defamation and defamation by implication which could not arise but for the existence of communications.

D. Defendants' communications were made about matters of public concern.

The TCPA does not require a significant degree of connection between the communication and the matter of public concern. Rather, the Supreme Court gives very broad meaning to the phrase "in connection with":

> Generally, the use of the phrase "in connection with" does not imply a material or significant connection although context may indicate otherwise. One authority has referred to the phrase as "a vague, loose connective." Another has described the phrase as one of "intentional breadth." We have expressed a similar view. See *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (construing "in connection with" and "relates to" as effective synonyms in the context of the Texas Citizens Participation Act). We have also said in one case that it was error to construe the phrase as requiring more than a tangential, tenuous, or remote relationship between the connected items.

Tarrant County v. Bonner, 574 S.W.3d 893, 898 (Tex. 2019) (most cites omitted).

In 2019, the Legislature amended the definition of a "matter of public concern," which now includes "a matter of political, social, or other interest to the community; or . . . a subject of concern to the public." Tex. Civ. Prac. & Rem. Code §27.001(7).

Here, defendants' communications satisfy this standard. Plaintiff alleges communications "in connection with" the global pandemic of COVID-19, a matter of vital concern and interest to the community as reflected in state and federal emergency declarations. *See* Ex. 3 (Jan. 31, 2020 decree); Ex. 4 (Mar. 13, 2020 proclamation); *Immanuel v. Cable News Network, Inc*., 2022 WL 3030290, *4 (S.D. Tex. Aug. 1, 2022) (doctor's statements promoting a certain COVID-19 treatment were "clearly about matters of public concern") (Texas law).

News accounts at the time describe public concern and interest in COVID-19 vaccinations, the safety/efficacy of treatment with ivermectin, and treatment of persons vaccinated or not. A

national article profiled different perspectives regarding the vaccine, describing "a snapshot of a nation at a crossroads." Ex. 62 (July 24, 2021, *New York Times*, "They Waited, They Worried, They Stalled. This Week, They Got the Shot.") Another reported "how heated the debate over ivermectin has come to be in the United States." Ex. 63 (Sept. 19, 2021, NPR, "How Ivermectin Became the New Focus of the Anti-Vaccine Movement"). An article in a prominent medical journal observed, "the epidemiological and social crises brought about by COVID-19 have magnified widely held social anxieties and trust issues that, in the unique circumstances of this global pandemic, have exacerbated skepticism toward vaccines." Ex. 64 (Mar. 10, 2022, *Nature Medicine*, "An epidemic of uncertainty"). One editorial asked, "Should vaccination status be considered in deciding who receives care?" Ex. 65 (Aug. 23, 2021, *Washington Post*, "When Medical Care Must be Rationed, Should Vaccination Status Count?").

It is beyond question the virus, vaccination, and treatment were the subject of intense public interest and concern. Defendants' statements relate to that very issue – "the COVID-19 vaccine and treatments" – which plaintiff admits. Pet. ¶6. The statements therefore were "in connection with" matters of public concern. As communications made in connection with "matter[s] of public concern," they are covered by the TCPA. *See* Tex. Civ. Prac. & Rem. Code §27.001(3). Plaintiffs' claims are based on and in response to those communications, so the TCPA applies. *See id.* §27.005(b)(1)(A).

E. Dismissal Is Required Because Plaintiff Cannot Establish a Prima Facie Case.

When a defendant establishes that the TCPA applies to the plaintiff's claims, the burden shifts to her to prove "by clear and specific evidence a prima facie case for each essential element of the claim[s] in question." Tex. Civ. Prac. & Rem Code §27.005(c). To be clear and specific, the evidence must be "unambiguous, sure, or free from doubt" (clear) and "explicit or relating to a

particular named thing" (specific). *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). If she fails to meet her burden, the court "shall dismiss" the claims. *See* Tex. Civ. Prac. & Rem Code §27.005(b).

Here, because her claims are meritless, plaintiff will be unable to meet her burden.

VIII. Plaintiff Cannot Establish a Claim for Defamation.

The elements of defamation are "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *Lipsky*, 460 S.W.3d at 593. The requisite degree of fault means "the defendant acted with actual malice, if the plaintiff is a public figure or a public official, or negligently, if the plaintiff is a private individual." *Rodriguez v. Gonzales*, 566 S.W.3d 844, 851 (Tex. App. – Houston [14th Dist.] 2018, no pet.).

Speech relating to "public issues" is "entitled to special protection" and takes the "highest rung of the hierarchy of First Amendment Values." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Debate regarding public issues must remain "uninhibited, robust, and wide-open," even to the extent it includes "vehemently caustic, sometimes unpleasantly sharp attacks" on a public figure. *Vice v. Kasprzak*, 318 S.W.3d 1, 15 (Tex. App. – Houston [1st Dist.] 2009, pet. denied) (cite omitted). Even if a plaintiff is not an elected public official, she must prove that the defendants acted with "actual malice" in making defamatory statements if the plaintiff is a "limited purpose public figure," that is, someone who has "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id*.

Texas applies a "generally accepted" three-part test as to whether a plaintiff is a limited-purpose public figure:

> (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;

(2) the plaintiff must have more than a trivial or tangential role in the controversy; and

(3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

McLemore, 978 S.W.2d at 571. A finding that a plaintiff is a limited purpose public figure triggers the element of actual malice.

Here, because the TCPA applies to her claims, plaintiff much prove each of the elements of defamation. Tex. Civ. Prac. & Rem Code §27.005(c) Because defendants "established that the TCPA applies to [plaintiff's] defamation claims, the burden shifted" to her to establish "by clear and specific evidence" each element of defamation. *Rodriguez*, 566 S.W.3d at 851.

A. Plaintiff cannot prove falsity.

The first element of defamation requires that the statements at issue be false. *Lipsky*, 460 S.W.3d at 593. Here, plaintiff claims that the following statements made by defendants were false:

a) Her "opinions [about the vaccine and treatments], which are harmful to the community, do not reflect reliable medical evidence."

b) She "is spreading dangerous misinformation which is not based in science."

c) "Houston Methodist's Hospital's medical staff leadership decided to suspend and investigate Dr. Bowden for her inappropriate behavior, including spreading misinformation about COVID-19 vaccines and treatments. As a physician, I am personally offended by her behavior and by her misleading comments about COVID-19 and our hospital system."

Pet. ¶6. The petition further alleges that local news station KHOU tweeted, "CEO Marc Boom said Dr. Mary Talley Bowden was spreading 'dangerous' misinformation about COVID-19 vaccines and treatments," lumping this tweet with other allegedly false statements. *Id*. ¶6, ¶8. It is unclear whether she believes the underlying statement attributed to Dr. Boom is false or whether KHOU's reporting of the statements was in error. In any case, the statements attributed to defendants are true, and it is not possible for her to prove falsity.

"It is well settled that the meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements." *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002). Here, the statements which plaintiff claims are defamatory convey that her opinions regarding vaccines and treatments are not based on "reliable medical evidence," are "not based in science," and are "dangerous misinformation" that is "harmful to the community." Ex. 29 (Nov. 12, 2021 tweets). Defendants' statements regarding these issues were accurate.

Plaintiff expressed opinions regarding COVID-19 that are contrary to medical authority, including statements discouraging vaccination efforts. She said she would "not accept any patients who have been vaccinated," she was "shifting [her] practice focus to treating the unvaccinated," and "Vaccine mandates are wrong." Ex. 20 (Nov. 5, 2021 tweet); Ex. 21 (Nov. 8, 2021 tweet); Ex. 22 (Nov. 8, 2021 tweet). She said on her website, "the vaccine is not working," and she would be "taking a stand" by refusing to accept vaccinated patients. Ex. 23 (Nov. 6, 2021 post). These comments discouraging vaccination were contrary to extensive evidence that vaccines are safe and effective in preventing COVID-19 illness, hospitalizations, and deaths. *See supra*, Sec. I. Because her statements misrepresent established facts regarding vaccination, defendants' statements calling attention to the inaccuracies were not false.

Plaintiff also promoted ivermectin to treat/prevent the virus, including republishing a tweet stating, "Ivermectin is effective for COVID-19." Ex. 25 (Nov. 10, 2021 tweet). In fact, medical evidence and science did not support the claim that ivermectin was effective at either preventing or treating the virus, and individuals were experiencing harm by ingesting ivermectin. *See supra*, Sec. II. Defendants accurately conveyed that plaintiff's opinions on ivermectin were "dangerous misinformation" which could harm the community and did not reflect reliable science.

Finally, plaintiff said Houston Methodist was rejecting treatment of unvaccinated patients, and "Hospitals are prisons." Ex. 23 (Nov. 6, 2021 post); Ex. 24 (Nov. 6, 2021 tweet). Neither statement is true or had any scientific, medical, or factual basis. *See* Pet. ¶6 n.2.

Defendants' description of her statements as misinformation was accurate. Even if there were debate over the accuracy of the description, any "scientific uncertainty" cannot give rise to a "defamation claim on the basis of [the defendant's] statements of its opinion about [the plaintiff's] public support of a COVID treatment that many scientists had rejected." *Immanuel*, 2022 WL 30302909 at *4.

In addition, at least one statement criticized by plaintiff was mere opinion. Dr. Boom said he was "personally offended" by plaintiff's conduct. Pet. ¶6. A statement that an individual is offended "cannot be verified," not can it "be understood to convey a verifiable fact." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 639 (Tex. 2018). Such an opinion "cannot form the basis of a defamation claim." *Id*.

Based on publicly available information at the time the statements were made, plaintiff cannot show that the statements were false. Her claim for defamation therefore fails.

B. Plaintiff cannot prove defendants acted with actual malice.

In addition, even if she could prove false statements – and she cannot – there is no evidence that defendants made the statements with actual malice.

1. Plaintiff is a limited purpose public figure.

Plaintiff meets all three prongs of a limited-purpose public figure. First, controversies over COVID-19 vaccination, ivermectin treatment, and treating vaccinated or unvaccinated patients were highly public. People were widely discussing these issues, and people across the country would be impacted by any resolution in favor of one side or the other. *See supra*, Sec. VII(D); *see also Immanuel*, 2022 WL 3030290, at *5 (plaintiff "weighed in on controversial issues of public

concern—how to medically treat COVID," and the "ramifications of the debate will be felt by people who are not direct participants.") (cleaned up).

In addition, her role in the debate was neither "trivial" nor "tangential." Rather, she chose to use a public, worldwide, readily accessible platform to share views that were contrary to existing medical guidance. *See supra*, Sec. III. Her statements on Twitter and her website were calculated to reach as many people as possible and to "tak[e] a stand," referencing "the current climate and the writing on the wall." Ex. 23 (Nov. 6, 2021 post); *see also Immanuel*, 2022 WL 3030290, at *5 (considering a plaintiff's "Internet discussions about vaccinations and medicine in general" in finding her to be a limited purpose public figure with "more than a trivial or tangential role in the controversy"). She was aware that her views were, at the least, controversial and would "alienate[] many" of her readers. Ex. 23 (Nov. 6, 2021 post). But rather than share her unfounded views as needed with her individual patients in privacy, she chose to insert herself into the public controversy, rendering herself a limited purpose public figure. Once she "injected herself into the public debate over medical treatments for COVID, her opinions about medical treatment in general became the legitimate subject of news coverage," and "she became a limited purpose public figure . . . ." *Immanuel*, 2022 WL 3030290 at *3.

Finally, the allegedly defamatory statements were "germane to the plaintiff's participation in the controversy." *McLemore*, 978 S.W.2d at 571. Defendants specified that they were making their statements in response to her "personal and political opinions about the COVID-19 vaccine and treatments." Ex. 29 (Nov. 12, 2021 tweets). She concedes this point, framing it as "retaliation" for her decision to "speak out against vaccine mandates" and "share[] her opinions on Twitter." Pet. ¶6. Therefore, she is a limited purpose public figure and must prove actual malice.

2. The allegedly defamatory statements were not made with actual malice.

For a defamation claim, actual malice does not mean "bad motive or ill will" but rather "the knowledge of, or reckless disregard for the falsity of the statement." *Rodriguez*, 566 S.W.3d at 851. In contrast, actual malice "cannot be based on a misinterpretation of ambiguous facts that is not unreasonably erroneous." *Id*. at 851-52. In the context of a TCPA motion, a plaintiff is "required to bring forward the minimum quantum of evidence necessary to support a rational inference that [the defendants] had serious doubts about the truth of [their] statements." *ABD Interest, LLC v. Wallace*, 606 S.W.3d 413, 432 (Tex. App. – Houston [1st Dist.] 2020, pet. denied). In sum, the burden to establish actual malice "by clear and specific evidence" rests on the plaintiff alone. *Rodriguez*, 566 S.W.3d at 855.

Here, even if the statements were false (and they were not), there is no evidence defendants doubted the truth of their statements or acted with knowledge or reckless disregard of falsity. The vast majority of the medical community, reliable scientific studies, and reputable government entities indicated that vaccines were effective and safe and their benefits outweighed their risks, that ivermectin caused individuals harm, and it was not supported by reliable evidence in treating COVID-19. *Supra* Sec. I-II; *see also Immanuel*, 2022 WL 3030290 at *6 (no actual malice when the defendant relied on "scientific studies and federal government guidance in stating its opinion that" a certain medication "was ineffective as a COVID treatment."). "Treating COVID-19 with ivermectin is undisputedly contrary to generally accepted health care standards," and "the weight of authority shows it is not an effective treatment." *DeMarco*, 263 A.3d at 435.

To the extent plaintiff cites information indicating that vaccines are not 100% effective, that some individuals experience adverse effects from vaccines, or that ivermectin showed potential for treatment in certain studies, this information only would create an ambiguity, which is insufficient to show that defendants acted with actual malice. "Actual malice cannot be based

on a misinterpretation of ambiguous facts that is not unreasonably erroneous." *Rodriguez*, 566 S.W.3d at 851-52. "Statements of different, even conflicting, opinions, about unsettled matters of scientific or medical treatment that are the subject of ongoing public debate and deep public interest, cannot give rise to defamation claims." *Immanuel*, 2022 WL 3030290, at *4.

C. Plaintiff cannot prove defendants acted even with negligence.

In the alternative, even if she were not a public figure (and she is), plaintiff cannot show that defendants acted negligently in making the statements at issue. In making their statements, defendants were relying on the clear weight of existing medical and scientific evidence, which indicated that plaintiff's statements were false and harmful to the public. Reliance on sources such as the FDA, CDC, and published studies shows no negligence but in fact demonstrates diligence in protecting patients and the community.

D. Plaintiff cannot prove the statements were defamatory.

Just as plaintiff cannot prove the statements were false, she cannot prove they were defamatory. If an allegedly defamatory statement "is not verifiable as false, it is not defamatory." *Tatum*, 554 S.W.3d at 624. Therefore, because she cannot "verify" the statements as false for the reasons discussed in Sec. VIII(A), *supra*, she cannot meet her burden on this element of defamation.

In addition, her own actions indicate that she did not find the statements to be defamatory. Rather, she held numerous press conferences, interviews, and media appearances repeating the statements and profiting from the attention. *See supra*, Sec. V-VI.

Plaintiff's claim for defamation fails on at least three elements and should be dismissed.

IX. Plaintiff Cannot Establish a Claim for Defamation by Implication.

Plaintiff has brought a cause of action for defamation by implication. Pet. ¶¶27-31. Texas law distinguishes between "a statement that is defamatory by its text alone and a statement that is

defamatory only by reason of 'extrinsic evidence' and 'explanatory circumstances.'" *Tatum*, 554 S.W.3d at 625. Defamation by implication is simply "a subset of textual defamation," where the "defamatory meaning arises from the statement's text, but it does so implicitly." *Id*. at 627. Because the elements of defamation by implication mirror the elements of defamation, with the clarification that a court may consider extrinsic evidence and circumstances, plaintiff's claim must fail for the same reasons her defamation claim fails. There is no evidence or circumstances that imply a defamatory meaning separate or distinct from the words used in defendants' statements.

CONCLUSION AND PRAYER

For these reasons, defendants respectfully request that the Court dismiss with prejudice all of plaintiff's claims, award them costs, reasonable attorney fees, and other expenses incurred to defend against these claims, impose sanctions, and grant such other relief to which they are entitled.

Dated: October 24, 2022

Respectfully submitted,

/s/ R. Paul Yetter

R. Paul Yetter
State Bar No. 22154200
Tracy N. LeRoy
State Bar No. 24062847
Elizabeth A. Wyman
State Bar No. 24088688
YETTER COLEMAN LLP
811 Main Street, Suite 4100
Houston, Texas 77002
(713) 632-8000
pyetter@yettercoleman.com
tleroy@yettercoleman.com
ewyman@yettercoleman.com

CERTIFICATE OF SERVICE

I certify that on this 24th day of October, 2022, the foregoing was served by email and/or by electronic filing service on all counsel of record.

/s/ Elizabeth A. Wyman
Elizabeth A. Wyman

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Courtney Smith on behalf of R. Yetter
Bar No. 22154200
csmith@yettercoleman.com
Envelope ID: 69523919
Status as of 10/25/2022 8:30 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Madhu Sekharan		MSekharanAttorney@outlook.com	10/24/2022 9:43:10 PM	SENT
Elizabeth Wyman		ewyman@yettercoleman.com	10/24/2022 9:43:10 PM	SENT
R. PaulYetter		pyetter@yettercoleman.com	10/24/2022 9:43:10 PM	SENT
Yetter Coleman		efile@yettercoleman.com	10/24/2022 9:43:10 PM	SENT
Courtney Smith		csmith@yettercoleman.com	10/24/2022 9:43:10 PM	SENT
Tracy LeRoy		tleroy@yettercoleman.com	10/24/2022 9:43:10 PM	SENT