CAUSE NO. CV21-0575-173

MONTGOMERY J. BENNETT and DALLAS EXPRESS MEDIA, INC. D/B/A THE DALLAS EXPRESS,	§	**IN THE DISTRICT COURT**
	§	
	§	
	§	
***Plaintiffs*,**	§	
	§	
	§	
v.	§	**173RD JUDICIAL DISTRICT**
	§	
STEVEN MONACELLI and THE DALLAS WEEKLY, INC.,	§	
	§	
	§	
	§	
***Defendants*.**	§	**HENDERSON COUNTY, TEXAS**

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS UNDER THE TEXAS CITIZENS PARTICIPATION ACT

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Plaintiffs Montgomery J. Bennett and Dallas Express Media, Inc. d/b/a *The Dallas Express* (collectively, "Plaintiffs") file this response and opposition to the motion to dismiss under the Texas Citizens Participation Act ("TCPA") filed by Defendants Steven Monacelli and The Dallas Weekly, Inc. (collectively, "Defendants"). As set out below, the Court should deny Defendants' motion to dismiss in its entirety.

I. SUMMARY OF RESPONSE

The Dallas Express is a non-profit, non-partisan, general-interest daily news source covering events, activities, and citizens of the City of Dallas and Dallas County. Mr. Bennett—who is *The Dallas Express*'s founder and publisher—outlined his motivations for founding *The Dallas Express* in a Letter from the Editor:

> Truth has become a casualty in today's media world. News has become a vessel to promote favored world views, and objectivity has been sacrificed. There are many publications in our wonderful city, but none we can count on daily to present just the facts. Readers can't pick up a local publication without seeing bias in one direction or the other. I can't take it anymore—and I know many of you can't either. *The Dallas Express* was created for one purpose; to help make our city a better place. That's it. It's a non-profit operation and there's no other agenda. *The Dallas Express* will be a daily news source that serves every member of our community. It will be a place to learn about what's happening in Dallas, without a political agenda. It will not be left-leaning or right-leaning; it will present news about our city straight down the center.

Defs.' App'x at Ex. 8. *The Dallas Express* publishes factual content that, outside of pieces published in its opinion section, endeavors to be transparent and viewpoint neutral. *See* Pls.' App'x at Ex. 1, ¶ 3 (Affidavit of Montgomery J. Bennett).

On February 12, 2021, *The Dallas Weekly* published an article authored by Steven Monacelli titled "Formerly Black Owned Dallas Express Resurrected As Right Wing Propaganda Site." *See* Pls.' Am. Pet. ¶ 14; Defs.' App'x in Supp. of Mot. to Dismiss at Ex. 1. In the article, Monacelli maligns *The Dallas Express* as "fake news" and a "right wing propaganda site" and makes other false statements about *The Dallas Express*. Monacelli is a self-described publisher

and editor of a "nonprofit leftist media collective" and is a "regular contributor" to *The Dallas Weekly*. *See* Pls.' App'x at Ex. 2, ¶¶ 5–6 & Exs. B, C (Affidavit of Martin Bennett). Monacelli holds (in his own words) "leftist" views. *See id.* He is a member of a group called "Liberal Warriors Free for All" and has attacked an organization defending Christian values as a "Christian hate group." *See* Pls.' App'x at Ex. 3 (printout from https://hi-in.facebook.com/liberalwarriors/posts/steven-monacellistevanzettithere-is-currently-a-large-crowd-of-what-appears-to-b/4589109387836688/); Ex. 4 (printout from https://twitter.com/stevanzetti/status/1434659589337796611).

Defendants have attacked and smeared both *The Dallas Express* and Mr. Bennett, as its publisher, because of Mr. Bennett's perceived political views and support for former President Donald Trump. Without regard for the truth and with no factual support, Defendants have called Plaintiffs' publication "fake news," "right wing propaganda," and a "pay-to-play 'news' site" that, at one time, was "run by a Chicago-based operation called Metric Media" that "owns hundreds of . . . bogus news sites all across the country." *See* App'x in Supp. of Defs.' Mot. at Ex. 1. As described below, each such statement is false and defamatory. The Court should not permit Defendants to hide behind the First Amendment—with pro bono legal assistance from a high-priced, large Dallas law firm, *see* Pls.' App'x at Ex. 5 (printout from https://twitter.com/stevanzetti/status/1450871014540390405), that supports far-left causes—while making unlawful, defamatory statements about Plaintiffs because Defendants harbor animus toward what they perceive as Mr. Bennett's political viewpoint. Defendants' smear campaign is both intentional and malicious. Mr. Bennett believes he is also being targeted by Defendants as well as Defendants' lawyer, Mr. Tom Leatherbury, because of his marriage to a Hispanic woman. It is Mr. Bennett's belief and experience that far-left ideologues are discriminatory and

outright racist to (usually conservative) white males that intermarry with Black or Hispanic women.

Even if the TCPA applies to Plaintiffs' claims, under the law the Court must deny the motion to dismiss because Plaintiffs have established, by clear and specific evidence, a prima facie case for each element of their libel claims. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c). Further, Defendants have not established any affirmative defenses as a matter of law. *See id.* § 27.005(d). Defendants are not entitled a defense for accurate reporting of allegations made by a third party regarding a matter of public concern because they adopt *D Magazine*'s factually erroneous and defamatory statements, many of which were subsequently withdrawn by *D Magazine*, as their own and convey those statements as though they are truthful. Nor are Defendants entitled to a defense that the challenged statements are protected under the fair-comment privilege because that privilege does not apply to statements that have been shown to be untrue. In sum, dismissal is improper because Plaintiffs can establish each element of their claims by clear and specific evidence, and Defendants have not established that they are entitled to any defense as a matter of law.

II. BACKGROUND

Pursuant to Texas Rule of Civil Procedure 58, Plaintiffs expressly incorporate the facts as set forth in their First Amended Petition.[1] Briefly, the relevant facts as set out in their First Amended Petition and the accompanying affidavits supporting this response are as follows:

Dallas Express Media, Inc., a nonprofit corporation, founded *The Dallas Express* in 2021 as a non-partisan, non-profit general-interest daily news source covering events, activities, and

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[1] These facts are also set forth in the affidavits attached to this motion, which are fully incorporated herein by this reference. *See generally* Pls.' App'x.

citizens of the City of Dallas and Dallas County. *See* Pls.' Am. Pet. ¶ 11; Pls.' App'x at Ex. 1, ¶ 2 (Affidavit of Montgomery J. Bennett). Mr. Bennett publishes *The Dallas Express* and was, until the end of 2021, *The Dallas Express*'s only financial contributor. *See* Pls.' Am. Pet. ¶ 12; Pls.' App'x at Ex. 1, ¶ 4 (Affidavit of Montgomery J. Bennett). *The Dallas Express* is non-profit news organization that publishes content without a viewpoint bias, with the exception of pieces published in its opinion and sports sections. *See* Pls.' Am. Pet. ¶ 13; Pls.' App'x at Ex. 1, ¶ 3 (Affidavit of Montgomery J. Bennett). Mr. Bennett's goal in founding *The Dallas Express* was to provide a transparent, factual, neutral news source to the citizens of Dallas County. *See id. Dallas Express*, unlike most publications, accepts no anonymous sources and has a policy requiring that articles are vetted to achieve consensus that they are fair and neutral.

On or about February 12, 2021, *The Dallas Weekly* published an article titled "Formerly Black Owned Dallas Express Resurrected As Right Wing Propaganda Site." *See* Pls.' Am. Pet. ¶ 14; Defs.' App'x in Supp. of Mot. to Dismiss at Ex. 1. Monacelli authored the article, which represents that *The Dallas Express* is a "right wing propaganda site" and is "being used to publish right-wing propaganda." *See* Pls.' Am. Pet. ¶¶ 14–15; Defs.' App'x in Supp. of Mot. to Dismiss at Ex. 1. The article further refers to *The Dallas Express* as "fake news" and a "pay-to-play 'news' site" that, at one time, was "run by a Chicago-based operation called Metric Media" that "owns hundreds of . . . bogus news sites all across the country." *See* Pls.' Am. Pet. ¶¶ 15–16; Defs.' App'x in Supp. of Mot. to Dismiss at Ex. 1. Contrary to Defendants' allegations, however, *The Dallas Express* is a 501(c)(3) non-profit organization that has never accepted money in return for the publication of content and has never been owned or run by Metric Media. *See* Pls.' Am. Pet. ¶ 17; Pls.' App'x at Ex. 1, ¶¶ 2, 4–5 (Affidavit of Montgomery J. Bennett). In addition, the article's title states that *The Dallas Express* is "formerly Black owned," but that, too is erroneous. The

formerly Black-owned Dallas Express ceased publication over fifty years ago. Dallas Express Media, Inc., d/b/a *The Dallas Express* is an entirely new entity formed as a non-profit in late 2020. .' App'x at Ex. 1, ¶ 2 (Affidavit of Montgomery J. Bennett). Although it operates under the same name as the formerly Black-owned publication, it is not the same entity, and the title of Defendants' article therefore contains false information. *See id.*

Aside from having reviewed an article published by *D Magazine*—which notably was later corrected (an acknowledgement of the falsehoods) by that publication—and a bare, unsupported statement that an unspecified voicemail message was left by an unspecified person at *Dallas Weekly*, Plaintiffs are unaware of Defendants performing any additional investigation into the veracity of their allegations. *See* Pls.' App'x at Ex. 1, ¶ 7 (Affidavit of Montgomery J. Bennett). In addition, Defendants never contacted Mr. Bennett to verify the veracity of their claims before publishing the article. *See id.*

After Plaintiffs demanded a retraction or correction of the false and defamatory statements and received no response aside from a purported "correction" and editor's note, Plaintiffs filed this lawsuit. *See id.* at ¶ 9 & Ex. A; Pls.' App'x at Ex. 2 at ¶ 4 & Ex. A (Affidavit of Martin Bennett). Defendants have moved to dismiss under the Texas Citizens Participation Act, TEX. CIV. PRAC. & REM. CODE §§ 27.001 *et seq.* (the "TCPA"). A hearing on Defendants' motion to dismiss is scheduled for February 9, 2022.

III. ARGUMENTS AND AUTHORITIES

A. Applicable Legal Standard

The TCPA is commonly referred to as the "anti-SLAPP statute." The acronym "SLAPP" stands for "strategic lawsuit against public participation." *Serafine v. Blunt*, 466 S.W.3d 352, 356 (Tex. App.—Austin 2015, no pet.) (citation omitted). This statute was enacted "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and

otherwise participate in government to the maximum extent permitted by law and, at the same time, *protect the rights of a person to file meritorious lawsuits for demonstrable injury*." TEX. CIV. PRAC. & REM. CODE § 27.002 (emphasis added).

The TCPA is intended to "identify and summarily dispose of lawsuits designed *only* to chill First Amendment rights, *not to dismiss meritorious lawsuits*." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (emphasis added); *see also* TEX. CIV. PRAC & REM. CODE § 27.002. Under this statute, a party may move to dismiss a claim that is "based on, relates to, or is in response to" their exercise of the right to petition, right of free speech, or right of association. TEX. CIV. PRAC & REM. CODE § 27.005(b)(1)–(3).

There are three steps to analyzing a motion to dismiss under the TCPA. First, the movant must make a preliminary showing that the TCPA applies. *In re Lipsky*, 460 S.W.3d at 586. To carry this burden, the movant must show by a preponderance of the evidence that the challenged action is "based on, relate[d] to, or [was] in response to [the movant's] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." TEX. CIV. PRAC. & REM. CODE § 27.005(b).

Second, even if the movants establish that the TCPA applies (and no exception to the TCPA applies), the court must nonetheless deny the motion to dismiss if Plaintiffs can 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). "Though the TCPA initially demands more information about the underlying claim, [it] does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial." *In re Lipsky*, 460 S.W.3d at 591. In ruling on an anti-SLAPP motion, courts must consider both pleadings and any supporting affidavits. TEX. CIV. PRAC. &

REM. CODE § 27.006(a); *see Serafine*, 466 S.W.3d at 360 ("Under Section 27.006 of the [TCPA], the trial court may consider the pleadings as evidence."); *see also In re Lipsky*, 460 S.W.3d at 590 (explaining that the reference to "clear and specific evidence" includes sufficiently specific pleadings).[2] As set forth below, Plaintiffs have met their burden.

Third, if, as here, the non-movants successfully establish each element of their prima facie case by clear and specific evidence, the Court must nonetheless dismiss an action if the movants establish that they are entitled to judgment as a matter of law on a valid defense. TEX. CIV. PRAC. & REM. CODE § 27.005(d). As fully described below, Defendants have not established any affirmative defense as a matter of law. Thus, because Plaintiffs have established each element of their prima facie case by clear and specific evidence, and Defendants have not established any affirmative defense as a matter of law, the Court should deny Defendants' motion in its entirety.

B. Plaintiffs have established a prima facie case for each element of their claims.

The Court should deny Defendants' motion to dismiss because Plaintiffs have established a prima facie case for each essential element of their claims by clear and specific evidence. TEX. CIV. PRAC. & REM. CODE § 27.005(c). Plaintiffs assert claims for libel and libel *per se*. The "clear and specific evidence" standard is a "minimal" factual burden. *Warner Bros. Entm't, Inc.*, 538 S.W.3d at 799. "'[C]lear and specific evidence' refers to the quality of evidence required to establish a prima facie case, while the term 'prima facie case' refers to the amount of evidence required to satisfy the nonmovant's minimal factual burden." *Id*. (internal citation omitted). "'Clear' means 'free from doubt,' 'sure,' or 'unambiguous,' while 'specific' means 'explicit' or 'relating to a particular named thing.'" *Id*. (quoting *In re Lipsky*, 460 S.W.3d at 590). A prima

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2 As set forth herein, Plaintiffs have shown the necessary prima facie case. But the TCPA also allows for specific and limited discovery relevant to responding to a TCPA motion. TEX. CIV. PRAC. & REM. CODE § 27.006(b). Thus, if the Court is inclined to grant Defendants' motion in full or in part, Plaintiffs request, and should be entitled, to limited discovery, as referenced *infra* Part III.D.

facie case is simply the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id*. The Court may consider the pleadings as well as other evidence. *Serafine*, 466 S.W.3d at 360 (citation omitted); TEX. CIV. PRAC. & REM. CODE § 27.006(a). The Court is to view all of the evidence, including the pleadings, in the light most favorable to the non-movants, here Plaintiffs. *See Warner Bros. Entm't, Inc.*, 538 S.W.3d at 800–01.

Importantly, the TCPA "does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial." *In re Lipsky*, 460 S.W.3d at 591; *accord Deaver v. Desai*, 483 S.W.3d 668, 675 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("These terms do not impose an elevated evidentiary standard, nor do they categorically reject the consideration of circumstantial evidence." (internal citation omitted)). Accordingly, the Texas Supreme Court has rejected the notion that the TCPA requires "direct evidence of each essential element of the underlying claim to avoid dismissal." *In re Lipsky*, 460 S.W.3d at 591.

Defendants' motion to dismiss fails because Plaintiffs have established each essential element of their claims with at least a minimum quantum of unambiguous evidence to support a rational inference that their allegations are true.

1. Libel

To establish a libel claim against a media defendant in Texas, a plaintiff must prove that the defendant "(1) published a statement; (2) that defamed the plaintiff; (3) while either acting with actual malice (if the plaintiff was a public official or public figure) or negligence (if the plaintiff was a private individual) regarding the truth of the statement." *Neely v. Wilson*, 418

S.W.3d 52, 61 (Tex. 2013); *see also Dall. Morning News v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). As set forth below, Plaintiffs have established each element of their claims.

a. Defendants published objectively false and defamatory statements about Plaintiffs.

Defendants published several objectively false and defamatory statements regarding *The Dallas Express* that also harmed Mr. Bennett, as its publisher. A statement is defamatory if, when considered in the appropriate context, "a person of ordinary intelligence would interpret it in a way that tends to injure the subject's reputation and thereby expose the subject to public hatred, contempt, or ridicule, or financial injury, or to impeach the subject's honesty, integrity, virtue, or reputation." *Neyland v. Thompson*, 2015 WL 1612155 (Tex. App.—Austin 2015). Persons of ordinary intelligence would interpret the gist of the article, which accused Defendants of publishing "fake news," being part of a "pay-to-play 'news' site," being run by an organization that owns "hundreds of such bogus news sites," and hawking "right-wing propaganda" as tending to injure that news organization's reputation and as impugning Defendants' honesty and integrity. *Cf., e.g., Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114–16 (Tex. 2000) (persons of ordinary intelligence would interpret broadcast as a whole as defamatory when it falsely conveyed an impression that a candidate played a role in an attempted multi-million dollar life insurance scam). Such statements also injure Mr. Bennett's reputation as the publisher of *The Dallas Express* because they imply that he publishes false, misleading, and bogus news that is paid for by interested parties. *See id.*

(i) The statements at issue are objectively false.

In addition, the statements are objectively false. First, Defendants erroneously refer to *The Dallas Express* as a "pay-to-play 'news' site run by a Chicago-based operation called Metric Media News that owns hundreds of such bogus news sites all across the country . . . ." Defs.'

App'x at Ex. 1. As an initial matter, *The Dallas Express* is not, and has never been, owned or run by an organization known as Metric Media. *See* Pls.' Am. Pet. ¶ 17; Pls.' App'x at Ex. 1, ¶ 5 (Affidavit of Montgomery J. Bennett). *The Dallas Express* is a 501(c)(3) organization owned entirely by Dallas Express Media, Inc., and until late this year, Mr. Bennett—*The Dallas Express*'s publisher—has been that organization's sole financial contributor. *See* Pls.' Am. Pet. ¶ 17; Pls.' App'x at Ex. 1, ¶ 4 (Affidavit of Montgomery J. Bennett). Further, any allegation that *The Dallas Express* is a "pay-to-play" news site is false. Neither *The Dallas Express* nor Mr. Bennett, its publisher, have accepted money in return for publication of any content. *See* Pls.' Am. Pet. ¶ 17; Pls.' App'x at Ex. 1, ¶ 4 (Affidavit of Montgomery J. Bennett).

Second, Defendants described *The Dallas Express* as a "fake news site." Defs.' App'x at Ex. 1. The phrase "fake news" implies that the stories published on *The Dallas Express*'s website are shams or otherwise false. *See Merriam-Webster's* Online Dictionary, available at https://www.merriam-webster.com/dictionary/fake (last visited Jan. 22, 2022). *The Dallas Express* publishes factual content with opinion allowed only in its opinion and sports section. *See* Pls.' Am. Pet. ¶¶ 13, 16; Pls.' App'x at Ex. 1, ¶ 6 (Affidavit of Montgomery J. Bennett). Examples of content from *The Dallas Express*, which report facts about current events like those that appear in other news sources, are appended to this the appendix in support of this response. *See* Pls.' App'x at Ex. 2, ¶¶ 8–13 & Exs. E–J (Affidavit of Martin Bennett).

Third, Defendants describe *The Dallas Express* as a "right wing propaganda site." Defs.' App'x at Ex. 1. *Merriam-Webster*'s online dictionary identifies the "essential meaning" of the word "propaganda" as "ideas or statements that are often false or exaggerated and that are spread in order to help a cause, a political leader, a government, etc." *See Merriam-Webster*'s Online Dictionary, available at https://www.merriam-webster.com/dictionary/propaganda (last visited

Jan. 19, 2022). Adding the phrase "right-wing" to the word "propaganda" implies that *The Dallas Express* publishes false content that favors only a certain political perspective. As described above, however, *The Dallas Express* is non-profit, non-partisan, only publishes factual content, and the subjects on which it reports, and the content it offers, are often the same as, or similar to, that published by other news organizations that are considered mainstream. *See* Pls.' Am. Pet. ¶¶ 13, 16; Pls.' App'x at Ex. 1, ¶ 3 (Affidavit of Montgomery J. Bennett); Pls.' App'x at Ex. 2, ¶¶ 8–13 & Exs. E–J (Affidavit of Martin Bennett).

(ii) The statements at issue are not constitutionally protected opinions.

Defendants incorrectly argue that the statements regarding *The Dallas Express* being a "fake news site" and a "right wing propaganda site" are expressions of opinion and not verifiably false statements of fact. *See* Defs.' Mot. at 10-12. The Texas Supreme Court makes clear, however, that "a reasonable person's perception of the entirety of a publication and not merely individual statements" determines "whether a publication is an actionable statement of fact or a constitutionally protected expression of opinion." *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002). Thus, the Court must focus "on a statement's verifiability and *the entire context* in which it was made." *Id.* at 581 (emphasis added). In *Bentley*, for example, the Texas Supreme Court concluded that calling a judge "corrupt" was *not* a constitutionally protected statement of opinion because the underlying facts supporting the allegations of alleged corruption were verifiably false. *See id.* at 581–83. As the court observed,

> If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of fact which leads to the conclusion that Jones told an untruth. *Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact*.

Id. at 583 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990) (emphasis added).

In a recent federal district court opinion applying Texas law, the court held that statements that a Fox News story was "baseless" and "fake news" were "objective facts" and not subjective opinion in the context of the entire publication. *See Butowsky v. Folkenflik*, No. 4:18-cv-442, 2019 WL 3712026, at *16–17 (E.D. Tex. Aug. 7, 2019). In that opinion, the court stressed that "even opinions are actionable under a defamation claim where the statement implies an assertion of fact." *Id.* at *17 (citing *Milkovich*). The court relied on the Texas Supreme Court's holding that "publishers 'cannot avoid liability for defamatory statements simply by couching their implications within a subjective opinion'" in concluding that the statements at issue were actionable. *Id.* (quoting *Dallas Morning News v. Tatum*, 554 S.W.3d 614, 634 (Tex. 2018)).

Although Defendants state that "[c]ourts regularly hold that hard-to-pinpoint concepts (such as 'propaganda' and 'fake news') are not actionable in libel," Defs.' Mot. at 10, none of the Texas cases they cite address either concept. *See id.* at 10–11. The *only* case they cite that addresses either term is from the Ninth Circuit and applies California law, rendering it inapposite. *See Herring Networks, Inc. v. Maddow*, 8 F.4th 1148 (9th Cir. 2021).

Here, applying Texas law, taking the entire context of the article into account, and noting that the article did, in fact, rely on incorrect facts—i.e., that *The Dallas Express* was a "pay-to-play 'news' site run by a Chicago-based operation called Metric Media News that owns hundreds of such bogus news sites all across the country"—the accusation that *The Dallas Express* was "fake news" and a "right wing propaganda site" is not a constitutionally protected statement of opinion but is, in fact, verifiably false. Further, as described above, *The Dallas Express* publishes factual content that overlaps, in large part, with content published by mainstream news outlets. As in *Bentley*, the "clear implication" of Defendants' words was that Plaintiffs were responsible for publishing factually untrue content, for which they were paid, and that the false, paid content was

published to advance a "right-wing" political agenda. Like the Texas Supreme Court in *Bentley*, this Court should reject the argument that such statements constituted constitutionally protected statements of opinion.

(iii) The article was not "substantially true."

Further, the article was not "substantially true," as Defendants argue. *See* Defs.' Mot. at 13–17. As the Texas Supreme Court has outlined, "if a broadcast taken as a whole is more damaging to the plaintiff's reputation than a truthful broadcast would have been, the broadcast is not substantially true and is actionable." *Neely*, 418 S.W.3d at 63. The analysis begins by analyzing the article's gist. *Id.* at 63–64.

The gist of the article is as follows: (1) *The Dallas Express* was a part of a network of illegitimate, pay-to-play news sites; (2) Mr. Bennett later took over publication of *The Dallas Express*; and (3) *The Dallas Express* now publishes false information with a political motive to further a right-wing agenda. The truth is that *The Dallas Express* never has been owned or run by Metric Media, which Defendants claim (without any proof) is a network of illegitimate pay-to-play websites. *See* Pls.' Am. Pet. ¶ 17; Pls.' App'x at Ex. 1, ¶ 5 (Affidavit of Montgomery J. Bennett). Further, articles published outside of *The Dallas Express*'s opinion page and sports section are factual—not "fake news" or "propaganda." *See* Pls.' Am. Pet. ¶¶ 13, 16; Pls.' App'x at Ex. 1, ¶ 6 (Affidavit of Montgomery J. Bennett); Pls.' App'x at Ex. 2, ¶¶ 7–13 & Exs. D–J (Affidavit of Martin Bennett). Even the articles to which Defendants refer on page 16 of their motion contain factual content and are not false or misleading (nor do Defendants contend that they are false or misleading). *See* Defs.' App'x at Exs. 12–15, 21. Notably, several of the articles cited by Defendants were not even published by *The Dallas Express* but were, instead, published by *The Dallas Morning News*—a notably non-conservative publication. *See* Defs.' App'x at Exs. 40, 41.

In other words, the content that Defendants claim is so damning is the *same* type of content that appears in an ordinary, mainstream publication like *The Dallas Morning News*. Defendants should not be permitted to make up lies in an attempt to discredit Plaintiffs and their publication merely because Defendants disagree with the content—which, notably, also appears in other organizations that no one would call "right wing propaganda" or "fake news"—published in *The Dallas Express.* In short, there simply is no evidence that the truth is more damaging than the false, misleading content for which Defendants are responsible, and they therefore cannot argue that the article was substantially true.

b. Defendants acted with actual malice.

Plaintiffs have offered evidence that Defendants acted with actual malice in publishing false, defamatory statements about Plaintiffs. To establish malice, the plaintiff must show that the defamatory statement was published with knowledge of its falsity or a reckless disregard for its truth. *See Lipsky*, 460 S.W.3d at 593. Reckless disregard focuses "on the defendant's state of mind," and that state of mind "can—indeed must usually—be proved by circumstantial evidence." *MediaOne, L.L.C. v. Henderson*, 592 S.W.3d 933, 942 (Tex. App.—Tyler 2019, pet. denied) (citation and internal quotation marks omitted). Both "care" and "motive" are factors in determining whether a defendant acted with actual malice, and although "[a] failure to investigate fully is not evidence of actual malice[,] a purposeful avoidance of the truth is." *Id.* (internal citation and quotation marks omitted).

The falsity of Defendants' statements is evident by readily available public information. Specifically, Defendants contend that *The Dallas Express* was "run by a Chicago-based operation called Metric Media news that owns hundreds of such bogus news sites all across the country . . . ." Defs.' App'x at Ex. 1. But Metric Media's website—which is readily accessible by anyone—does not list *The Dallas Express* as one of its publications, despite listing hundreds of others. *See*

Pls.' App'x at Ex. 2, ¶ 14 & Ex. K (Affidavit of Martin Bennett). *The Dallas Weekly* plainly knows how to research historical versions of websites, as evidenced by its appendix attached to its motion, and had it done so on Metric Media's website, it would have seen that *The Dallas Express* was *never* listed as a Metric Media news publication (because it was not one). *See id.* In short, Defendants' blind reliance on an article published by another publication, instead of conducting independent research into publicly available information—which would have revealed the falsity of those representations—to verify the veracity of their assertions, constitutes willful blindness to the truth and not just a negligent failure to investigate. *See, e.g.*, *Warner Bros. Entertainment, Inc. v. Jones*, 538 S.W.3d 781, 810 (Tex. App.——Austin 2017) (finding actual malice "where elementary precautions were ignored" in investigation before publishing defamatory article), *aff'd on other grounds*, 611 S.W.3d 1 (Tex. 2020). In fact, Defendants have refused to retract or correct certain of their false statements even after having been notified of the statements' falsity, further evidencing Defendants' willful blindness to the truth.

Moreover, Defendants' statements that *The Dallas Express* publishes "fake news" and "right-wing propaganda" are shown to be false merely by reviewing content published by *The Dallas Express*. As outlined above, *The Dallas Express* publishes factual content about a variety of subjects, the content of which overlaps with content published by well-known, mainstream news outlets. *See* Pls.' Am. Pet. ¶¶ 13, 16; Pls.' App'x at Ex. 1, ¶ 6 (Affidavit of Montgomery J. Bennett); Pls.' App'x at Ex. 2, ¶¶ 8–13 & Exs. E–J (Affidavit of Martin Bennett); Defs.' App'x at Exs. 40, 41. Had Defendants taken a very small amount of time to review even a fraction of the content published by *The Dallas Express*, they would have confirmed that *The Dallas Express* is not a publisher of "fake news" or "right-wing propaganda," nor is it a "bogus" news site. Again, Defendants' statements are easily provable as false merely by reviewing *The Dallas Express*'s

content, and Defendants' false statements thus constitute a "purposeful avoidance of the truth." *See Warner Bros. Entertainment, Inc.*, 538 S.W.3d at 806, 810. The publicly available evidence, including Plaintiffs' own publication that is the subject of the article, establishes clear and specific evidence of Defendants' recklessness, or intentional blindness to the truth, in publishing false and defamatory statements about Plaintiffs. Accordingly, the Court should find that Plaintiffs have established Defendants' actual malice by clear and specific evidence.

Accordingly, Plaintiffs have established, by clear and specific evidence, a prima facie case of their libel claims against Defendants, and the Court must deny Defendants' motion to dismiss as to those claims.

2. Libel Per se

The elements of libel per se are the same as the elements of libel, except that libel per se "occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish." *Dallas Morning News v. Tatum*, 554 S.W.3d 614, 624 (Tex. 2018). A statement "that injure[s] a person in [his] office, profession, or occupation are typically classified as defamatory per se." *Id.* The statements at issue impugn *The Dallas Express*'s and Mr. Bennett's conduct in their trade or business (i.e., that of a news organization and publisher, respectively) by alleging that the Plaintiffs intentionally accepted money from interested persons in exchange for publishing content, operated a "bogus" site, and published false and misleading news. *See* Defs.' App'x at Ex. 1. Such statements constitute libel per se as a matter of law because they impugn Plaintiffs in the operation of their trade or business. *See, e.g.*, *Lipsky*, 460 S.W.3d at 594–95 (false accusation that natural gas company contaminated an aquifer during fracking operations constituted defamation per se); *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 156–62 (Tex. 2014) (false accusation that waste-disposal company evaded environmental rules and ignored

sound environmental practices constituted defamation per se); *Bell Publ'g Co. v. Garrett Eng'g Co.*, 170 S.W.2d 197, 199–201, 207 (1943) (false statement that no one in engineering firm held an engineering degree constituted defamation per se).

Accordingly, Plaintiffs have established, by clear and specific evidence, a prima facie case for each element of their libel per se claim against Defendants, and the Court must deny Defendants' motion to dismiss as to this claim.

C. Defendants have not established any affirmative defense as a matter of law.

Defendants contend that they are entitled to dismissal of Plaintiffs' libel claims because those claims are (1) not actionable because Defendants accurately reported third-party allegations; and (2) privileged as a fair and reasonable comment on matters of public concern.[3] Defendants have the burden to provide evidence to support their affirmative defenses. TEX. CIV. PRAC. & REM. CODE § 27.005(d).

1. Defendants cannot escape liability by relying on false statements published by D Magazine.

Defendants first contend that they accurately reported statements made by *D Magazine* about Plaintiffs. *See* Defs.' Mot. at 12–13 (citing TEX. CIV. PRAC. & REM. CODE § 73.005). Section 73.005 provides that truth is a defense to a libel claim and that, "[i]n an action brought against a newspaper or other periodical or broadcaster, the [truth defense] applies to an accurate reporting of allegations made by a third party regarding a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 73.005(a)–(b). But the U.S. Supreme Court and Texas law also recognize that "a person who repeats a defamatory statement made initially by another can be held responsible for republishing the libelous statement." *Hoskins v. Fuchs*, 517 S.W.3d 834, 843 n.6

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[3] Defendants also assert that their statements that *The Dallas Express* is "right wing propaganda," "fake news," and one of "hundreds of . . . bogus news sites all across the country" are protected opinion. *See* Defs.' Mot. at 10-12. Plaintiffs address, and negate, that argument above in Section III.B.1.

(Tex. App.—Fort Worth 2016, pet. denied); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386 (1973) ("The newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own."). As outlined in detail above, the statements made by *D Magazine* were verifiably false and defamatory; in fact, *D Magazine* later corrected such statements. *See* Defs.' App'x at Ex. 3; Pls.' App'x at Ex. 1, ¶ 8 (Affidavit of Montgomery J. Bennett). As such, they are actionable.

Even if the statute applies to republication of defamatory statements that are easily verifiable as false, a media defendant may nonetheless be held liable for accurately reporting statements by a third party if the reporting goes "beyond merely restating the allegations of a third party and instead adopt[s] a gist that the substance of the allegations was itself true." *Scripps NP Operating, LLC v.* Carter, 573 S.W.3d 781, 792 (Tex. 2019).[4] The article at issue here likewise "adopt[s] a gist that the substance [of *D Magazine*'s] allegations was itself true." *Id.* The title of the article portrays *The Dallas Express* as a "right wing propaganda site" and "fake news," which mirrors *D Magazine*'s assertion that *The Dallas Express* is part of a network of "bogus news sites." *See* Defs.' App'x at Ex. 1. In short, instead of merely presenting *D Magazine*'s assertions, Defendants adopt those assertions and build upon them, thus implying that the substance of the allegations were true; therefore, Defendants are not entitled to a defense that they accurately reported a third-party's statements on an issue of public concern.

2. Defendants cannot hide behind the fair-comment privilege to protect them from making false statements about Plaintiffs.

Defendants are not entitled, as a matter of law, to hide behind the fair-comment privilege because that privilege does not apply to "comments that assert or affirm false statements of fact."

[4] Although the statute at issue was not applicable in *Scripps NP Operating* because the lawsuit was filed before the statute was amended to add section 73.005(b), nothing in the Texas Supreme Court's opinion suggests that the statute mandates a different outcome.

Neely, 418 S.W.3d at 70. As described above, Defendants made statements that are objectively, verifiably false. Accordingly, they cannot avail themselves of the fair-comment privilege. *See id.*; *see also, e.g.*, *Rosenthal*, 529 S.W.3d at 441 ("We have said that if a comment is based upon a substantially false statement of fact the defendant asserts or conveys as true, the comment is not protected by the fair comment privilege." (citation and internal quotation marks omitted)). And, because Defendants have not established their entitlement to any affirmative defense as a matter of law, the Court should deny Defendants' motion to dismiss.

D. Alternatively, Plaintiffs request limited discovery before the Court rules.

Under TEX. CIV. PRAC. & REM. CODE § 27.006(b), a party showing good cause may obtain "specified and limited discovery relevant to the motion." If discovery is ordered, the Court may extend the hearing date to accommodate such discovery. *See* TEX. CIV. PRAC. & REM. CODE § 27.004(c).

Plaintiffs have shown the necessary prima facie case. *See supra* Part III.B.1. But if the Court is inclined to grant Defendants' motion in full or in part, Plaintiffs request and should be entitled to discovery regarding Defendants' subjective state of mind when publishing the article. Specifically, Plaintiffs request discovery into the nature and type of investigation Defendants conducted before publishing the article to establish actual malice. Therefore, to the extent necessary to avoid any full or partial grant of the motion to dismiss, Plaintiffs hereby request leave to serve discovery requests and take a deposition of Mr. Monacelli and a corporate representative deposition of *The Dallas Weekly* within the next thirty days, and further requests that the Court extend the date of the hearing for approximately sixty days to allow Plaintiffs sufficient time to conduct this discovery and amend their response to Defendants' motion.

IV. Conclusion

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss in its entirety and award Plaintiffs such other relief to which they are entitled under the TCPA. Alternatively, to the extent necessary to avoid any full or partial grant of the motion to dismiss, order limited, expedited discovery as set forth above.

Dated: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on counsel of record for Defendants via the Court's e-filing system on February 2, 2022:

/s/ Martin R. Bennett
Martin R. Bennett