

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA

AT GREENVILLE

No. 4:12-cv-00083-BR

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<p>ASCEND HEALTH CORPORATION, <i>et al.</i>,</p> <p style="text-align:center"><i>Plaintiffs,</i></p> <p style="text-align:center">v.</p> <p>BRENDA WELLS, <i>et al.</i>,</p> <p style="text-align:center"><i>Defendants.</i></p>	<p style="text-align:center"><b>PLAINTIFFS’ BRIEF IN OPPOSITION TO DEFENDANT BRENDA WELLS’ SPECIAL MOTION TO DISMISS AND MOTION TO DISMISS</b></p>
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**PLAINTIFFS’ BRIEF IN OPPOSITION TO DEFENDANT BRENDA WELLS’  
SPECIAL MOTION TO DISMISS AND MOTION TO DISMISS**

**STATEMENT OF THE NATURE OF THE CASE**

This matter comes before the Court upon Motions to Dismiss filed by Defendant Brenda Wells (“Wells”). Specifically, Wells responded to Plaintiffs’ Complaint for Damages and Injunctive Relief with Jury Demand (Dkt. No. 1) (“Compl.”) by filing Defendant Brenda Wells’ Special Motion to Dismiss Pursuant to Texas Anti-SLAPP Statute (Dkt. No. 17) (“Spec. Mtn.”) and Defendant Brenda Wells’ Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. No. 16) (“MTD”), arguing both Motions in Defendant Brenda Wells’ Consolidated Brief in Support of Special Motion to Dismiss and Motion to Dismiss (Dkt. 19) (“Con. Br.”).

In this matter Plaintiffs include UHP, LP., a Delaware limited partnership doing business as University Behavioral Health of Denton (“UBH”), a hospital providing mental health care services; Ascend Health Corporation (“Ascend”), the Corporate parent company of UBH; Dr. Richard Kresch, the President and CEO of Ascend; and Dr. Atique

Khan, a board-certified psychiatrist practicing at UBH. Plaintiffs allege that Wells, who has stated that she is a former patient of UBH and of Dr. Khan (*see* Declaration of Brenda Wells (Dkt. No. 18) (“Wells Dec.”) ¶5), in concert with a number of unknown “John and Jane Doe” Defendants, has made false, malicious, harmful, and generally defamatory statements against them. Plaintiffs have raised claims against the Defendants for defamation under North Carolina common law and libel under §73.001 of the Texas Civil Practice and Remedies Code, unfair or deceptive business practices under §75-1.1 *et. seq.* of the North Carolina General Statutes and business disparagement under Texas common law, copyright infringement, and conspiracy.

### **STATEMENT OF FACTS**

Plaintiffs’ Complaint alleges that Defendants have engaged in tortious acts including, but not limited to defamation, deceptive trade practices, business disparagement and copyright infringement. UBH is a private psychiatric hospital (Compl. ¶ 6) and Ascend is UBH’s parent company (Compl. ¶ 5), while Dr. Khan is the medical director of Plaintiff UBH (Compl. ¶ 7) and Dr. Kresch is the President and CEO of Ascend (Compl. ¶ 8). The Plaintiffs are duly-qualified and well respected within their professions. *See* Declaration of Susan Young In Opposition to Defendant Brenda Wells’ Special Motion to Dismiss Pursuant to Texas Anti-SLAPP Statute and Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (“Young Dec.”) ¶¶ 3, 7(j). These Plaintiffs depend on their reputations with the public to practice their businesses and professions (Compl. ¶ 23, *See* Young Dec. ¶ 3.)

Wells is the owner of the Internet domain ubhdentonsucks.com, which routes readers to the URL <http://ubhdenton.wordpress.com/>, a web log entitled “WORST

HOSPITALS IN AMERICA: UBH/MAYHILL” (“the Blog”). *See* Compl. ¶¶ 24, 25.

Wells has posted to the Blog both statements that are defamatory *per quod* as well as statements that are clearly defamatory *per se*, that is, statements which, considered alone, charge that Plaintiffs have committed infamous crimes, tend to impeach plaintiffs in their trade or profession, or otherwise subject plaintiffs to ridicule, contempt, or disgrace including, but not limited to:

1. Challenging Dr. Khan’s medical board certification. Compl. ¶ 29(a), Young Dec., Exhibit A.
2. Referring to Dr. Khan in his capacity as a physician as an “arrogant little virus.” Compl. ¶ 29(g), Young Dec., Exhibit D.
3. Referring to UBH as a “quack shack.” Compl. ¶ 29(b), Young Dec., Exhibit B.
4. Repeatedly accusing UBH, Dr. Khan, and Dr. Kresch of “insurance fraud” and being an “insurance milking machine.” Compl. ¶¶ 29(b), 29(f), 29(i), and 29(j), *See e.g.* Young Dec., Exhibit B, E, and F.
5. Referring to UBH as a “shitty rat-filled” hospital. Compl. ¶¶ 29(d), Young Dec., Exhibit C.
6. Referring to UBH staff as “harmful,” “incompetent,” and “grossly neglectful.” Compl. ¶¶ 29(d), 29(n), Young Dec., Exhibit C.

Wells has also made numerous other posts to various Internet sites under various pseudonyms which are also clearly defamatory, including, but not limited to:

1. Again accusing UBH of fraud and abusing insurance. Compl. ¶¶ 33, 35(a), 44(b), 44(c).

2. Claiming there is an “ongoing investigation.” Compl. ¶ 33(a).
3. Accusing UBH of offering “no real treatment... and no beneficial therapies.” Compl. ¶ 33(c).
4. Referring to Dr. Khan as a “poor excuse for a doctor.” Compl. ¶ 48.

In addition to these and other defamatory statements, Wells has also misappropriated and posted images and video taken from Plaintiffs’ websites without license to use those images. (Compl. ¶¶ 54-58.) A number of Wells’ Internet posts claim to be based upon information received by Wells from others, by email or other means. (Compl. ¶59.) These individuals have been named in the Complaint as John and Jane Doe defendants, as the individuals who have provided these false statements are unknown to Plaintiffs. (See Compl. ¶¶ 10,11.)

Wells has expressed great pride in the success of her blog. (Compl. ¶ 31, *passim*.) She also expressed awareness that the blog is objectionable, stating “... most any day now I’m going to get a letter from either Dr. Khan’s lawyer, or the hospital’s, telling me I have to take this site down.” (Compl. ¶ 31(e).)

Wells was served with the Complaint on May 7, 2012. See Proof of Service dated May 7, 2012 (Dkt. No. 9) (“Proof of Service”). Since that date, including two posts on that date itself, Wells has continued to post to the blog, adding no fewer than 6 posts. See *e.g.*, Young Dec., Exhibits I through N. Many of these are tagged under the heading “Lawsuit” and one entitled “The Games Begin” attacks Plaintiff’s counsel personally. *Id.* at Exhibit K. Even in the face of a lawsuit demanding “a bunch of money [she doesn’t] have” (*id.*) Wells’ attack continues.

Defendants' attacks on Plaintiffs have caused considerable harm, including damage to their reputations and standing in the community. These attacks have also caused monetary damages as a result of loss of business and potential patients. *See* Young Dec. ¶ 8.

In Wells Dec. Wells admits to being employed in North Carolina (¶ 3), having left Texas in 2009 (¶ 4). The statements alleged in the Complaint date from after Wells left Texas. *See* Complaint, *passim*, Young Dec. Exhibits A through N. Wells does not claim to be a reporter, and there is no evidence to indicate that Wells or any other Defendant is a reporter or media professional in any other capacity. *See* Young Dec. ¶ 23.

### **ARGUMENT**

Defendant Wells' Motions to Dismiss are without merit. Plaintiffs have stated their causes of action with sufficient particularity. Especially with respect to Wells' "Special Motion to Dismiss," Wells is arguing that a North Carolina Federal Court should apply Texas substantive and procedural law in reference to a complaint filed against a North Carolina Defendant filed in North Carolina as a result of actions by that Defendant in North Carolina.

a. Federal Procedural Law Governs this Dispute

**i. Choice of Law Rules Preclude the Application of the Texas Anti-SLAPP Statute Because it is Procedural**

A federal court applies either federal procedural law or the procedural law of the state in which it sits. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941); *Fedder v. McClennen*, 1994 U.S. Dist. LEXIS 14680 (D. Mass. Sept. 28, 1994) (applying Massachusetts procedural law to determine statute of limitations, despite a contractual

clause requiring suits to be bound by Florida law). “The line between procedural and substantive law is hazy but no one doubts federal power over procedure.” *Erie R.R. v. Tompkins*, 304 U.S. 64, 92 (U.S. 1938).

To determine whether a state law is “substantive” or “procedural,” the Court must consider whether the statute is determinative of the suit’s outcome as a whole (substantive), or whether the statute is determinative of the timing of that outcome (procedural). *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (“What matters is what the rule itself regulates: If it governs only ‘the manner and the means’ by which the litigants’ rights are “enforced,” it is valid [as substantive]; if it alters “the rules of decision by which [the] court will adjudicate [those] rights,’ it is not” (*internal citations omitted*)).

The Texas Anti-SLAPP statute’s provisions (Chapter 27 of the Texas Civil Practice and Remedies Code) are clearly procedural in nature and effect. Wells entitled her motion under Texas Civil Practice and Remedies Code § 27.003 intending to invoke the procedural aspects of those provisions (“Defendant Brenda Wells’ Special Motion to Dismiss Pursuant to Texas Anti-SLAPP Statute”). The heightened pleading requirements of the Texas Anti-SLAPP statute conflict with Federal Rules of Civil Procedure 12(b)(6) and 9(b). *See Kapetanovic v. Stephen J. Cannell Prods., Inc.*, 1998 U.S. Dist. LEXIS 22215, 10-11 (N.D. Ill. Aug. 4, 1998) (refusing in a libel case to apply state law requiring heightened pleading standard for malice over FRCP 9(b) allowing that “Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”)

Several provisions of the Texas Anti-SLAPP statute reiterate the requirement either that a hearing or a ruling on a motion to dismiss pursuant to § 27.003 must be

within 30 days of filing. *See* Tex. Civ. Prac. & Rem. Code § 27.004, Tex. Civ. Prac. & Rem. Code §§ 27.005, 27.007. Within § 27.003, there are other clearly procedural provisions, including a requirement that a motion to dismiss under that section “be filed not later than the 60<sup>th</sup> day after the date of service” and a provision that allows for a court to extend this time upon a “showing of good cause.” Tex. Civ. Prac. & Rem. Code § 27.003; *See McRay v. Peachey*, 2009 U.S. Dist. LEXIS 10401 (E.D. La. Feb. 2, 2009) (timeliness of a motion filed in the federal court is governed by Federal Rules not state procedural rules). Texas Civil Practice and Remedies Code § 27.003 conflicts with Federal Rules of Civil Procedure Rules 26, 33, 34 and 37, by requiring that “all discovery in the legal action is suspended” as a result of a motion to dismiss filed thereunder. Application of the Texas Anti-SLAPP statute also conflicts with Federal Rule of Civil Procedure 15(a)(2) with respect to leave to amend, which leave “[t]he court should freely give...”

Neither North Carolina nor Federal law includes an Anti-SLAPP statute. Because this Court is bound to apply federal procedural law (or in limited circumstances, North Carolina Procedural law), the Texas Anti-SLAPP statute is inapplicable.

**ii. North Carolina’s Choice of Law Rules Apply and North Carolina’s Substantive Law Governs This Dispute Because Under North Carolina law the *Lex Loci Delicti* in This Case is North Carolina**

The parties agree that a federal court must apply the choice of law rules of the state in which that court sits (Con. Br. at 3, *Klaxon, supra*). Because the Court sits in diversity in this case, it must apply the substantive law of the forum state including its

choice of law rules. *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007) (*citations omitted*). Wells inaccurately states, however, that North Carolina has “not addressed” choice of law in a similar circumstance, and that Texas Law would apply under North Carolina choice of law.

Wells also incorrectly defines *Lex Loci Delicti*. “*Lex Loci Delicti*,” as defined in the First Restatement of Conflict of Laws, is “the state where the last event necessary to make an actor liable for an alleged tort takes place.” Restatement (First) of Conflict of Laws § 377 (1934), *See Wells v. Liddy*, 186 F.3d 505, 521 (4th Cir. Md. 1999). The U.S. District Court for the Eastern District noted in a recent case “North Carolina follows the *lex loci delicti* rule (law of the situs of the claim) in resolving choice of law for tort claims.... In North Carolina, ‘[t]he plaintiff’s injury is considered to be sustained in the state ‘where the last act occurred giving rise to [the] injury’ ... the general rule for defamation claims is the place of harm is the place of publication.” *Verona v. U.S. Bancorp*, 2011 U.S. Dist. LEXIS 33160, at \*31-32 n.6 (E.D.N.C. Mar. 29, 2011) (*internal citations omitted*).

The Complaint alleges that the claims therein arose in North Carolina. Compl. at ¶ 17. Wells is alleged to be a resident of, domiciled in, and employed in North Carolina, and was served in North Carolina (Compl. at ¶¶ 9, 14, 15, *See* Proof of Service dated May 7, 2012 (Dkt. No. 9)). By her own admission, Wells left Texas in 2009 (Wells Dec. ¶ 4), and now lives and works in North Carolina (Wells Dec. ¶ 3). During her residence in North Carolina, Wells posted defamatory statements against Plaintiffs (*See* Complaint, *passim*, Young Dec. Exhibits A through N), and has continued to post such defamation after service of the Complaint (Young Dec. Exhibits I through N). Clearly, the last act



giving rise to injury to the Plaintiffs in this matter took place not in Texas, but in North Carolina. Under North Carolina choice of law rules, North Carolina law applies in this matter.

**iii. Though Wells’ Incorrectly Applies the Restatement  
(Second) of Conflict of Laws “Most Significant  
Relationship” Test, Even Under This Test, North Carolina  
Law Applies**

In her eagerness to argue that Texas law applies in this matter and her somewhat tortured legal analysis, Wells notes, and then frankly ignores, that North Carolina “traditionally” applies *Lex Loci Delicti* as set forth above (Con. Br. at 4). Instead, Wells applies the Restatement (Second) of Conflict of Laws § 150 used in Texas, called the “most significant relationship” test. Wells mis-states this standard as well. “The rights and liabilities that arise from defamatory matter... are determined by the local law of the state which, *with respect to the particular issue*, has the most significant relationship *to the occurrence* and the parties.” *Id.* § 150(1) (*emphasis added*). The point of focus for the “most significant relationship” test is the location of the *tort* alleged, not the location of the *parties*. The Restatement goes on to express this:

When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, *if the matter complained of was published in that state.*” *Id.* § 150(3) (*emphasis added*). Moreover, the *preceding section* of the Second Restatement states “In an action for defamation, *the local law of the state where the*

*publication occurs determines the rights and liabilities of the parties, except as stated in § 150...*” (*emphasis added*) *Id.* § 149.

Wells’ statements were published in North Carolina, where she resides, works and has lived since 2009. *See* Wells Dec. ¶¶ 3, 4. Through Wells, the statements of the John and Jane Doe Defendants were republished in North Carolina. Even under Texas law, North Carolina law applies in this matter.

b. The Texas Anti-SLAPP Statute is Contrary to North Carolina Public Policy and Should not be Applied Here

As indicated above, Wells’ analysis of the applicable law is clearly fatally flawed. Still, even if Wells’ errant interpretation of North Carolina’s choice of law rules and the Second Restatement of Conflict of Laws was adopted, North Carolina is not obligated to apply foreign law that is contrary to its public policy. *Davis v. Davis*, 269 N.C. 120, 125 (N.C. 1967) (“It is thoroughly established as a broad general rule that foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum.”) (*citations omitted*). “Comity, unlike full faith and credit, is voluntary...” *Quets v. Needham*, 198 N.C. App. 241, 253 (N.C. Ct. App. 2009).

This is not a situation where the Texas Anti-SLAPP statute merely differs from North Carolina law, *see Davis, supra; Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (N.C. 1988), but a situation where Texas legislators have issued a statute based upon Texas public policy. *See* Tex. Civ. Prac. & Rem. Code §27.002 (Entitled “purpose” states that the Texas Anti-SLAPP statute is intended to “encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government...”). While Texas law establishes an entire statutory scheme

intended to favor early assessment and dismissal of cases impacting speech, North Carolina relies on the common law in evaluating defamation claims, and applies N.C. Gen. Stat. §75-1 *et. seq.*

Wells' Brief recognizes that "Anti-SLAPP statutes have generally been a legislative response..." Con. Br. at 6. North Carolina has no Anti-SLAPP statute, and Texas' Anti-SLAPP statute (barely a year old and with no citation history, *see e.g.* Con. Br. at 6) is based upon the findings of a Texas legislature, and not a North Carolina legislature. Not one of the cases cited by Wells involved a *foreign* federal court applying the Anti-SLAPP statute of a state outside of that in which it sat. Con. Br. at 6; *see Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (Federal Court in California applying California Anti-SLAPP statute); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) (Federal Court in Maine applying Maine Anti-SLAPP statute); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009) (Federal Court in Louisiana applying Louisiana Anti-SLAPP statute).

In the absence of an Anti-SLAPP statute, and in the face of not only North Carolina common law but also North Carolina General Statutes § 75-1.1 *et. seq.* preventing deceptive business practices, application of Texas' Anti-SLAPP statute here would be contrary to the public policy of North Carolina.

Furthermore the Texas Anti-SLAPP statute does not apply because, for the reasons stated below, Plaintiffs have met the requirement to state their causes of action "with clear and specific evidence." Tex. Civ. Prac. & Rem. Code § 27.005(c)

c. Wells is not entitled to 47 U.S.C. §230 Immunity

Wells claims immunity under the Communications Decency Act, 47 U.S.C. §230. Though she correctly quotes § 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,” she fails to use the definitions of those terms found in the Act:

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server...

Wells is not an “information service, system, or access software provider,” nor does she “provide[] or enable[] computer access by multiple users to a computer server.” Instead, she seeks immunity as a “user” who has published “information provided by another information content provider.” *See Id.*

Significantly, Wells recognizes that this immunity applies only to “re-posting” and not to editors who “develop[] information” (Con. Br. at 16). At this stage, prior to the conduct of discovery, it is inappropriate to determine that Wells is entitled to this immunity because it is not yet clear to what extent Wells has edited the posts sent to her by third parties. Furthermore, the editing done by Wells is substantive, to the extent that she removed information regarding the origin of the statements – were it not for these changes, John and Jane Doe Defendants would be unnecessary. In a number of the posts attributed to third-parties, Wells admits that she has removed names, or obviously removed the headers, including name and email address, from an email she claims to have received. *See e.g.*, Young Dec. Exs. E, J.

Furthermore, accepting the allegations in the Complaint as true, Wells may, in fact, have drafted these statements attributed to others. It is clear both from the posts on various websites themselves and the allegations made in the Complaint that Wells posted using a number of identities (Compl. at ¶¶ 29, 33, 35, 39, 41, 42, 44, 46, 47, 48, 50, 52, 53), in some cases quoting herself (*Id.* at ¶¶ 42(c)-(e)). In the face of these allegations, which the Court must accept as true, it would be premature to extend 47 U.S.C. §230 immunity to Wells.

Finally, Wells' argument ignores not only that the Complaint alleges statements made specifically by her which she has admitted making (Wells Dec. ¶¶ 8, 11) but also that one of the causes of action in the Complaint alleges conspiracy, which involves concerted action between herself and the third-parties whose defamatory statements she admittedly "select[ed]" and to which she made "minor alterations." (Con. Br. 16.) 47 U.S.C. §230 immunity from being "treated as the publisher or speaker" does not make her immune from a claim for conspiracy, or for liability for statements she admits to having made herself.

d. The Statute of Limitations Does Not Bar Plaintiff's Claims

Both Texas and North Carolina use a one year statute of limitations for defamation. Tex. Civ. Prac. & Rem. Code §16.002(a); N.C. Gen. Stat. § 1-54(3). Many of the statements alleged in the Complaint fall within this period, though admittedly, some do not. A defamatory statement, particularly the question of malice, should be considered within the context of a work as a whole – a website found through the URL "www.ubhdentonsucks.com." Furthermore, the statute of limitations for the Texas business disparagement claim in this case should be two years, *see Marquis v.*

*Omniguide, Inc.*, 2011 U.S. Dist. LEXIS 8504, 23 (N.D. Tx. 2011), and the statute of limitations for a North Carolina Deceptive Trade Practices claim is four years. N.C. Gen. Stat. § 75-16.2. None of the statements alleged fall outside of this four year period.

e. Wells is not Entitled to the Privileges Claimed, and Her Statements Were Made with the Requisite Malice

In her efforts to obtain dismissal under Texas law, Wells claims her statements are privileged under Tex. Civ. Prac. & Rem. Code § 73.002, under the “matter of public concern” privilege. To be subject to this privilege, Wells must prove her blog is a “publication by a newspaper or other periodical.” Wells was unable to cite a case to support the applicability of this provision to herself. (Con. Br. at 19.) This Court, sitting in diversity, should decline to extend privileges so broadly as to effectively encompass any publication by any website on the Internet.

Notably, Wells left Texas in 2009, and now lives and works in North Carolina. Wells Dec. ¶ 4. Even assuming her statements are a “matter of concern” for someone, her claims that statements made in 2012 regarding a hospital she hasn’t lived near since 2009 represent a “matter of concern” are patently self-serving. There is no basis for this Court to find Wells’ statements are privileged as addressing a matter of public concern.

The traditional “bad intent” malice inherent in Wells’ statements is readily apparent from their context, ranging from the name of her blog, to its URL, to her active solicitation of and participation in attacks on the Plaintiffs by others. Still Wells argues that the mere fact she swore in a Declaration that she had no knowledge of falsity “negates actual malice as a matter of law.” This is an inaccurate statement of the law.

Plaintiffs argue that Wells is not entitled to claim privilege, and therefore only negligent falsity must be shown. *See* Con. Br. at 18; *WFAA-TV, Inc. v. McLemore*, *supra*. Even were this Court to apply the high “actual malice” standard, Plaintiffs have shown that Wells had the requisite intent to be held liable. Wells admitted to having been a patient with UBH. (Wells Dec. ¶ 5.) In Susan Young’s Declaration, Mrs. Young identified several statements which Wells, as a former patient, knew or should have known to be false, including such things as the fact that Wells was at all times voluntarily admitted (Young Dec. ¶ 7(a)), the fact that Plaintiffs have never been investigated, or specifically accused of fraud (Young Dec. ¶¶ 7(e), (h)), the absence of single-sex living facilities (Young Dec. ¶ 7(k)), the serving of more than one type of food per day (Young Dec. ¶ 7(i)) and, the fact that the military still uses UBH to provide care (Young Dec. ¶ 7(j)).

f. Plaintiffs Have Made Sufficient Allegations to Support Their Claims and for this Matter to Proceed.

Plaintiff does not address each of the allegations made in the Complaint in her Motions. *See* Con. Br. at 11 (“In this case, many allegations are little more than purported summaries or descriptions of the alleged statements...”). As a result, it is impossible for the Plaintiffs or the Court to determine with which allegations, in particular, Wells takes issue. A court considers a motion to dismiss pursuant to FRCP 12(b)(6), accepting as true all facts alleged in the complaint, and drawing all reasonable inferences in favor of the plaintiff. *See Mumford v. GNC Franchising LLC*, 437 F. Supp. 2d 344, 348; *2006 U.S. Dist. LEXIS 45041*, 10 (W.D. Pa. 2006). In considering a motion to dismiss, a court considers only the facts alleged in the pleadings, documents attached

as exhibits or incorporated by reference in the pleadings, and matters of which the court may take judicial notice. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). To survive a 12(b)(6) motion to dismiss a complaint need only “contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Contrary to Wells citation of a 1933 case before the Texas Court of Appeals, *see* Con. Br. at 11, *citing Perkins v. Welch*, 57 S.W.2d 914, 915 (Tex. Ct. App. 1933), the requirement that defamation be pled “*in haec verba*” was replaced by statute. Currently applicable Texas Rules of Civil Procedure Rule 47 requires only “a short statement of the cause of action sufficient to give fair notice of the claim involved.” *See In re Shaw*, 2010 Tex. App. LEXIS 8744 (Tex. App. Corpus Christi Oct. 27, 2010) (Applying Texas Rules of Civil Procedure Rule 47 to defamation claim and holding that “Texas follows the “fair notice” standard for pleadings, which determines whether the opposing party can ascertain from the pleadings the nature and basic issues of the controversy and the type of evidence that might be relevant to the controversy.”) *Accord in North Carolina, Andrews v. Elliot*, 109 N.C. App. 271, 274 (N.C. Ct. App. 1993) (“The alleged defamatory statement or statements made or published by the defendant need not be set out verbatim in plaintiff’s defamation complaint if alleged ‘substantially *in haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory.’”) (*internal citations omitted*).



g. Under both North Carolina and Texas Law, Plaintiffs have raised a case for Defamation *per se*

Under the well established common law of North Carolina, libel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace. *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 317; 312 S.E.2d 405, 408-409 (N.C. 1984). Texas also recognizes libel *per se*. "Publications are 'libel per se if they include statements that (1) unambiguously charge a crime, dishonesty, fraud, rascality, or general depravity, or (2) are falsehoods that injure one in his office, business, profession, or occupation.'" *Cullum v. White*, 2011 Tex. App. LEXIS 9733, at \*17 (Tex. App. San Antonio Dec. 14, 2011) (Website alleging, *inter alia*, that someone was a "pathological liar" and insinuating criminal activity including "terrorist activity" found to be defamatory per se.)

A number of the statements alleged in the Complaint meet the definition of libel *per se*. Virtually all of them refer to dishonesty, rascality, or depravity and impeach the Plaintiffs in their businesses or professions. For the single clearest example, Plaintiffs refer the Court to Wells' February 8, 2012 statement "...I will stand ready willing and able to be a witness to the pure unadulterated insurance fraud that takes place at your mental so-called "health" facilities." *See Young Dec. Ex. F.*

h. North Carolina Defamation and Texas Libel

Texas Civil Practice and Remedial Code codifies a cause of action for libel at § 73.001:

[L]ibel is a defamation expressed in written or other graphic form...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.

*See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998), *cert. denied*, 526 U.S. 1051, 119 S. Ct. 1358 (1999) (“To maintain a defamation cause of action, the plaintiff must prove that the defendant (1) published a statement, (2) that was defamatory concerning the plaintiff, and (3) while acting with negligence, if the plaintiff was a private individual, regarding the truth of the statement.”).

Wells repeatedly and incorrectly states that under Texas law, defamation is determined as a matter of law. Only the issue of defamation *per se* is a matter of law under Texas law, and even then “although defamation *per se* is generally a legal question, a trial court may pass that inquiry to the jury if ambiguities exist about the meaning and effect of the words. *Waste Mgmt. of Tex., Inc. v. Texas Disposal Systems Landfill*, 2012 Tex. App. LEXIS 4005, at \*14 (Tex. App. Austin May 18, 2012); *See e.g., Cullum v. White*, 2011 Tex. App. LEXIS 9733, at \*14-15 (Tex. App. San Antonio Dec. 14, 2011) (Affirming jury finding of defamation).

Similarly, under North Carolina law, “to make out a prima facie case for defamation, ‘plaintiff must allege and prove that the defendant made false, defamatory

statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation.” *Griffin v. Holden*, 180 N.C. App. 129, 133; 636 S.E.2d 298, 302 (N.C. Ct. App. 2006), quoting *Tyson v. L'Eggs Prods., Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987)). Wells argues that her statements are merely “hyperbole” and opinion, yet Susan Young was able to identify many that were demonstrably false, and which Wells knew or should have known to be false. (Young Dec. ¶ 7.)

i. North Carolina Deceptive Trade Practices and Texas Business Disparagement

A claim of unfair and deceptive trade practices under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant.

*Craven v. SEIU COPE*, 188 N.C. App. 814, 818, 656 S.E.2d 729, 733-34 (2008) (internal citations, quotations marks, ellipses, and brackets omitted). “Unfair or deceptive” practices include a “libel *per se* of a type impeaching a party in its business activities...”

*Id.* Texas’ business disparagement claim is similar, requiring “publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and special damages.” *Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 82 (Tex. 2000). As indicated above, Plaintiffs have met these requirements. Although Wells argues that “special damages” have not been plead, special damages are specifically alleged in the Declaration filed with this Memorandum. *See* Young Dec. ¶ 8.

j. Civil Conspiracy

Under North Carolina law “[t]o create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective.” *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984) (citing *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951)). A “complaint sufficiently state[s] a claim for civil conspiracy when it allege[s] (1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy.” *Muse*, 234 N.C. at 198, 66 S.E.2d at 785. The Texas standard is similar: “To establish a civil conspiracy, one must prove the following: (1) a combination of two or more persons; (2) an object to be accomplished (either an unlawful purpose or a lawful purpose by unlawful means); (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.” *Humble Emergency Physicians, P.A. v. Mem'l Hermann Healthcare Sys.*, 2011 Tex. App. LEXIS 3000, at \*25-26 (Tex. App. Houston 1st Dist. Apr. 21, 2011).

Plaintiffs have alleged the necessary elements of conspiracy under both Texas and North Carolina law. Specifically, they have alleged joint action by more than one Defendant (Compl. ¶¶ 3, 59, 106-111) in furtherance of the objective of committing the underlying torts alleged (*Id.*), as well as damages (*See Young Dec.* ¶8).

Furthermore, Wells has admitted that “[w]hen content is emailed to [her] [she] first confirm[s] that the sender wishes to make the content publicly available on the website before posting it.” *Wells Dec.* ¶12. Wells and her co-conspiratorial contributors,

by admission, had a meeting of the minds. Plaintiffs have stated valid causes of action for conspiracy under both North Carolina and Texas law.

k. Copyright Claims

Wells' argues that Plaintiffs' copyright claims must be dismissed because an application had been filed but the copyrights were not yet granted. Courts have found that, for the purposes of filing a lawsuit, "registration" is complete upon the filing of an application. *See Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621, 2010 U.S. App. LEXIS 10555, at \*25 (9th Cir. Cal. 2010) ("[R]eceipt by the Copyright Office of a complete application satisfies the registration requirement of § 411(a). This interpretation ensures the broad copyright protection that the 1976 Act provided."). As recently as 2011, the United States District Court for the Middle District of North Carolina has noted that a copyright suit can be instituted as of the filing of a "completed application." *Pan-American Prods. & Holdings, LLC v. R.T.G. Furniture Corp.*, 825 F. Supp. 2d 664, 701, n.19, 2011 U.S. District LEXIS 131325, at \*11, 12, n.19 (M.D.N.C. 2011), *citing Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634, 2004 U.S. Dist. LEXIS 3840, at \*11 (M.D.N.C. 2004) ("[T]he overall statutory scheme governing the institution of infringement actions supports the position that Congress intended for registration to be complete on application" and found that "filing of the completed application is sufficient.") A copyright may also be registered as quickly as the date on which an application is filed. *See, e.g., Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 425; 2010 U.S. App. LEXIS 17421, at \*5 (4th Cir. 2010) (noting registration of a copyright the day applications received by the Copyright office).

On July 5, 2012, the Copyright Office advised Plaintiff's counsel that Copyright Registration Number TX 7-540-310 was issued for the UBHdenton.com Website and Copyright Registration Number TX 7-540-321 was issued for the AscendHealth.net Website, with registration certificates being mailed on that date. This issue is now moot. *See Pure Country Weavers, Inc. v. Bristar, Inc.*, 401 F.Supp.2d 439, 445, n.6 (2006) (citing *Joseph J. Legat Architects, P.C. v. United States Dev. Corp.*, 601 F. Supp. 673, 675 (N.D. Ill. 1985)).

“[T]o establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The first element is proven upon the July 5, 2012 registration of the copyrights. For the second element, Wells does not deny copying of the constituent elements of the work. Instead, she alleges that her use of copyrighted material constitutes “fair use.”

The fair use doctrine is codified in § 107 of the Copyright Act, and “continues to be applied as ‘an equitable rule of reason, for which no generally applicable definition is possible’.” *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 308 (citing *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 202 (4th Cir. 1998)). The fair use doctrine is structured as an affirmative defense to copyright infringement, and Wells here bears the burden of proof at trial as to all issues involved in the fair use analysis. *See Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1994). Courts should usually refrain from granting Rule 12(b)(6) motions on affirmative defenses. *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005).

Though the fair use doctrine “calls for case-by-case analysis,” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561, 105 S.Ct. 2218 (1985); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S.Ct. 1164 (1994), it is appropriate for this Court to use the four statutory factors listed in § 107 of the Copyright Act to guide its determination of whether Wells’ copying of the constituent elements of the works covered by Plaintiffs’ copyrights was fair use. The four statutory factors are: “(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.” 17 U.S.C. § 107.

Under § 107’s first factor, the Court must consider the purpose and character of Wells’ use of Plaintiffs’ copyrighted images, including whether such use is of a commercial nature or is for nonprofit educational purposes. The Court’s inquiry “may be guided” by the examples of fair use provided in the preamble to § 107, which include criticism or comment. *Campbell*, 510 U.S. at 578. However, even if Wells’ use of the copyrighted works falls within one of the purposes listed in the preamble, Wells is not automatically shielded from liability if her use of Plaintiffs’ copyrighted images does not otherwise pass muster under the other fair use statutory factors. *Harper & Row*, 471 U.S. at 561. The main purpose of this inquiry is to determine whether Wells’ use of Plaintiffs’ copyrighted works was “transformative.” *See Bouchat*, 619 F.3d at 308. It was not.

In *Bouchat*, the U.S. Court of Appeals for the 4th Circuit determined that the defendants’ use of the Baltimore Ravens’ Flying B team logo in season highlight films

sold by the NFL did not serve a transformative purpose. Specifically, the U.S. Court of Appeals for the 4th Circuit stated that “[t]he use of the logo in the films serves the same purpose that it did when defendants first infringed [the Flying B logo]: the Flying B logo identifies the football player wearing it with the Baltimore Ravens.” *Bouchat*, 619 F.3d at 309. The act of filming the game in which the copyrighted Flying B logo was displayed did not “add something new” to the logo. *Id.* (quoting *Campbell*, 510 U.S. at 579). Nor did it “alter[] the [logo] with new expression, meaning or message.” *Id.* The films captured the Flying B logo as it had originally appeared, and the logo remained a symbol identifying the Ravens. *Id.*

Here, Plaintiffs’ copyrighted images were taken and used by Wells as symbols identifying Plaintiffs. Wells did not transform the images. In fact, she wanted viewers of the images, which included Plaintiffs’ logo, to be able to readily identify the copyrighted images she displayed as images representing Plaintiffs. Without a clear identification that the copyrighted images represented Plaintiffs, Wells’ statements would not have carried the weight she intended them to carry. Wells’ posting of the copyrighted images with statements next to them did not in any way add new meaning to the images. Nor did Wells’ statements, which were next to but not imposed on the copyrighted images, alter the expression, meaning or message of the copyrighted images: Wells’ use of the copyrighted images captured the images as they originally appeared, and the images remain a symbol identifying Plaintiffs as Wells intended.

Wells’ argument that her use of the copyrighted images was incidental to the purpose of the statements she made about Plaintiffs must fail, because “a taking may not



be excused merely because it is insubstantial with respect to the *infringing* work.”

*Bouchat*, 619 F.3d 310 (quoting *Harper & Row*, 471 U.S. at 565 (emphasis in original)).

Moreover, Wells’ argument that her use of Plaintiffs’ copyrighted images did not allow Wells to profit commercially in any way is moot if Plaintiffs can demonstrate that Wells’ use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted images. *Bouchat*, 619 F.3d at 314 (quoting *Bond v. Blum*, 317 F.3d 385, 395). In addition, a use need not involve direct financial gain to be held commercial. See *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001); see also *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000). Wells here intentionally used the copyrighted images to identify Plaintiffs and make harmful statements intended to keep potential consumers of Plaintiffs’ services from using Plaintiffs for those services. Wells’ use of the copyrighted images costs Plaintiffs money.

In summary, Wells’ use of the copyrighted images was not transformative and was commercial in purpose. Therefore, Wells’ use of the copyrighted images fails to satisfy the first statutory factor for fair use.

Because Wells’ Consolidated Brief does not address the second and third statutory factors of the fair use doctrine, which is an affirmative defense, presumably because those factors would not assist Wells in proving fair use, Plaintiffs do not find it necessary to address those statutory factors.

The single most important element of fair use is the fourth statutory factor, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985), which directs this Court to consider “the effect of the use upon the potential market for or value

of the copyrighted work.” 17 U.S.C. § 107. The Court must “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590 (*internal quotations omitted*).

Wells concedes that the copyrighted images at issue show Plaintiffs’ facilities. These copyrighted images are valuable in that they convey to potential consumers that Plaintiffs are able to provide quality healthcare services. Furthermore, Wells’ use was not intended as commentary on the images, or a critique or interpretation of those images, it was intended to draw attention to her defamation, denigration, and harassment of the Plaintiffs. By attempting to tarnish these photographs through copyright infringement, Wells is depriving Plaintiffs of using these images to promote their healthcare services and attract more consumers. Therefore, Wells’ use of the images does not constitute fair use.

Wells is intentionally using Plaintiffs’ copyrighted images in her scheme to defame and discredit Plaintiffs’ healthcare services and business. Wells is unable to prove any of the four statutory factors of the fair use doctrine. As such, Wells’ motion to dismiss the copyright claim must be denied.

1. Plaintiffs Should be Given Leave to Amend

“The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that [the] plaintiff be given every opportunity to cure a formal defect in his pleading.” *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53; 1999 U.S. App. LEXIS 10033, at\* 19 (4th Cir. 1999) (*citations omitted*). As

discussed above, the underlying facts of this case give merit to the Plaintiffs' allegations and claims. To the extent this Court finds Plaintiffs' Complaint lacking, Plaintiffs should be granted leave to amend. At a minimum, this Court should take this matter under advisement while the parties conduct at least limited discovery on the issues related to the Motions to Dismiss. Tex. Civ. Prac. & Rem. Code § 27.006(b).

m. Wells is not Entitled to her Attorney's Fees

For the reasons set forth above, the Texas Anti-SLAPP statute does not apply in this matter. Alternatively, Plaintiffs should be granted leave to amend. As with choice of law issues addressed elsewhere herein, the provisions of the Texas Anti-SLAPP statute governing sanctions conflict with the procedural elements of Federal Rules of Civil Procedure Rule 11, and therefore do not apply. This Court should deny Wells' request for attorney's fees.

**CONCLUSION**

For the reasons stated herein, Plaintiffs respectfully request that this Court DENY Defendant Brenda Wells' Special Motion to Dismiss Pursuant to Texas Anti-SLAPP Statute and Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, that the Court take this matter under advisement while the parties conduct at least limited discovery, and GRANT Plaintiffs leave to Amend their Complaint.

Dated: July 6, 2012

Respectfully Submitted,

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