APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

STATUTORY PROVISIONS

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 31, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANIE CLIFFORD, AKA STORMY DANIELS,

Plaintiff-Appellant,

v.

DONALD J. TRUMP,

Defendant-Appellee.

No. 18-56351

D.C. No. 2:18-cv-06893-SJO-FFM

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Before: THOMAS, Chief Judge, and WARDLAW and NGUYEN, Circuit Judges.

Stephanie Clifford appeals the district court's dismissal of her defamation action against President

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Donald J. Trump.[1] We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, we affirm.

1. The district court correctly concluded under the *Erie* doctrine that the motion to dismiss procedures of the Texas Citizens Participation Act (TCPA)—Texas's version of an anti-SLAPP law—apply in federal court. We have long held that analogous procedures in California's anti-SLAPP law apply in federal court, *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999), and the TCPA is indistinguishable from California's law in all material respects, *compare S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018) (describing the TCPA analysis), *with Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820 (2011) (describing California's anti-SLAPP analysis).

Though we recognize the Fifth Circuit recently held that the TCPA does not apply in federal court, *Klocke v. Watson*, 936 F.3d 240, 244-47 (5th Cir. 2019), the reasoning of the Fifth Circuit's opinion cannot be reconciled with our circuit's anti-SLAPP precedent, *compare Newsham*, 190 F.3d at 972 ("[T]here is no indication that [Federal Rules of Civil Procedure] 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims."), *with Klocke*, 936 F.3d at 247 ("Rules 8, 12, and 56 provide a comprehensive framework governing pretrial dismissal and judgment." (cleaned up)). We are bound to follow our own precedent, which requires

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[1] Because the operative complaint names President Trump in his personal capacity, the remainder of this disposition refers to the parties as Ms. Clifford and Mr. Trump.

us to apply the TCPA.[2] *Miller v. Gammie*, 335 F.3d 889, 892-93, 900 (9th Cir. 2003) (en banc).

Because the TCPA motion in this case challenged the legal sufficiency of the allegations in the complaint, we "apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

2. The elements of a defamation claim under Texas law are (1) "the publication of a false statement of fact to a third party," (2) "that was defamatory concerning the plaintiff," (3) made with actual malice,[3] and (4) damages, in some cases. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). We conclude, like the district court, that the complaint failed to plausibly allege an actionable false statement of fact, though for slightly different reasons.

As alleged in the complaint, Ms. Clifford began an intimate relationship with Mr. Trump in 2006. Five years later, in 2011, Ms. Clifford agreed to cooperate with a magazine that intended to publish a story about the relationship. Ms. Clifford alleges that a few weeks after she agreed to assist with the magazine story, she was approached by an unknown man in a Las

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[2] We do not consider Ms. Clifford's argument, raised for the first time in her reply brief on appeal, that applying the TCPA would violate the Seventh Amendment. *Brown v. Rawson-Neal Psych. Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016) ("We generally do not consider issues that are not raised in the appellant's opening brief.").

[3] Actual malice is required because Ms. Clifford has not disputed that she is a public figure. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015).

Vegas parking lot who told her "Leave Trump alone. Forget the story," and threatened that harm would come to her if she continued to cooperate with the magazine. Ultimately, the story was not published.

In 2018, after Mr. Trump became President, Ms. Clifford went public with her account of this incident. With the assistance of a sketch artist, she prepared a composite sketch of the man from the parking lot, which was disseminated publicly.

Ms. Clifford's defamation claim is based on a tweet Mr. Trump published about the composite sketch. Shortly after the sketch was released, a Twitter user unrelated to the parties here tweeted the sketch juxtaposed with a photograph of Ms. Clifford's ex-husband, with a mocking message suggesting that the two men resembled one another. Mr. Trump retweeted this tweet, adding his own message: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!"

The two tweets appeared together as depicted below:[4]

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[4] Mr. Trump's unopposed request that we consider the screenshot of the tweet is granted. The screenshot is properly before us because the tweet is described in the complaint and forms the basis of the defamation claim. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018).

Ms. Clifford responded by filing this suit, alleging that Mr. Trump's tweet is defamatory.

Under Texas law, as informed by the Supreme Court's First Amendment jurisprudence, "statements that are not verifiable as false are not defamatory. And even when a statement is verifiable, it cannot give rise to liability if the entire context in which it was made discloses that it was not intended to assert a fact." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018) (cleaned up). Texas law refers to statements that fail either test—"verifiability or context"—as "opinion[s]." *Id.* The determination of whether a statement is "reasonably capable of a defamatory meaning" focuses on how the statement would be interpreted by an "objectively reasonable reader." *Id.* at 624, 631.

Ms. Clifford advances two arguments for why the tweet at issue is defamatory. First, citing the Black's Law Dictionary definition of "confidence man," she argues that the use of the term "con job" implied that

she had literally committed the crime of fraud. But it would be clear to a reasonable reader that the tweet was not accusing Clifford of actually committing criminal activity. *See id.* at 638. Instead, as used in this context, the term "con job" could not be interpreted as anything more than a colorful expression of rhetorical hyperbole. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (description of the plaintiff's negotiating position as "blackmail" could not reasonably be interpreted as having accused him of committing the crime of blackmail); *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 16-17 (1990). Because the tweet could not reasonably be read as asserting that Ms. Clifford committed a crime, this theory of defamation is not viable. *Tatum*, 554 S.W.3d at 638; *see also Bresler*, 398 U.S. at 13-14.

Next, Ms. Clifford argues that the tweet is defamatory because it accused her of lying about having been threatened because of her participation in a magazine story about her relationship with Mr. Trump. We agree that this is a reasonable interpretation of the tweet, but conclude that it is not actionable.

Under Texas law, a statement that merely interprets disclosed facts is an opinion, and, as noted, statements of opinion cannot form the basis of a defamation claim. *Tatum*, 554 S.W.3d at 639-40. Viewed through the eyes of an objectively reasonable reader, the tweet here reflects Mr. Trump's opinion about the implications of the allegedly similar appearances of Ms. Clifford's ex-husband and the man in the sketch. Mr. Trump's reference to a "sketch years later of a nonexistent man" signals that the allegedly defamatory conclusion that followed-that Ms. Clifford was pulling a "con job" and "playing the Fake News

Media for Fools"—plainly concerns the similarities between the sketch and the photograph of Ms. Clifford's ex-husband. Because the tweet juxtaposing the two images was displayed immediately below Mr. Trump's tweet, the reader was provided with the information underlying the allegedly defamatory statement and was free to draw his or her own conclusions. Moreover, the tweet does not imply any undisclosed facts. Accordingly, the tweet, read in context, was a non-actionable statement of opinion. *Id.*; *Fox Ent. Grp., Inc. v. Abdel-Hafiz*, 240 S.W.3d 524, 560 (Tex. App. 2007) ("[T]here is no defamation liability for a statement of opinion when a report sets out the underlying facts in the publication itself, thereby allowing the listener to evaluate the facts and either accept or reject the opinion." (citing *Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636, 643 (Tex. App. 1998)).

Resisting this conclusion, Ms. Clifford argues that the tweet is reasonably construed as disputing not only her account of having been threatened over her cooperation with the magazine but also her broader allegation that she had an intimate relationship with Mr. Trump. Construed this way, Ms. Clifford contends that the tweet is actionable because a reasonable reader would appreciate that Mr. Trump had personal knowledge about whether there had in fact been a relationship, such that the tweet would be understood as a statement, based on undisclosed facts, that Ms. Clifford had fabricated her account of the relationship. We find this argument unpersuasive.

As an initial matter, in evaluating whether Ms. Clifford adequately pleaded a defamation claim, we are limited to the allegations in the complaint. *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019). The opera-

tive complaint specifically alleges that Mr. Trump's tweet was defamatory because it "falsely attack[ed] the veracity of Ms. Clifford's account of the threatening incident that took place in 2011." Nowhere does the complaint allege that the tweet was instead addressing Ms. Clifford's allegations about her relationship with Mr. Trump. This theory is therefore not before us.

More importantly, even if this theory had been properly presented, we do not believe the tweet could be reasonably read as addressing Ms. Clifford's account of her relationship with Mr. Trump. The tweet did not reference the alleged relationship and instead focused on the sketch of the ostensibly "nonexistent man." This was plainly a reference to Ms. Clifford's account of having been threatened by a man in a Las Vegas parking lot. It follows that the statement in the following sentence that Ms. Clifford was pulling a "con job" and "playing the Fake News Media for Fools" was referring to her account of that same incident, not more broadly to other, unreferenced, statements by Ms. Clifford about the alleged relationship.

Because the complaint failed to plead an actionable false statement, the district court correctly granted the motion to dismiss.[5]

3. The district court did not abuse its discretion by denying leave to amend the complaint. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1221 (9th Cir. 2020). Amendment would have been futile because

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[5] In light of our conclusion, we do not address whether the complaint adequately pleaded actual malice. We also need not, and do not, address the district court's conclusion that Ms. Clifford presented herself as a "political adversary" of Mr. Trump.

the tweet is not defamatory as a matter of law. *See id.* at 1239.

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (OCTOBER 15, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES-GENERAL

STEPHANIE CLIFFORD

v.

DONALD J. TRUMP

Case No.: CV 18-06893 SJO (FFMx)

Before: The Honorable S. James OTERO, United States District Judge.

Proceedings (in chambers): Order Granting Defendant Donald J. Trump's Special Motion to Dismiss/Strike Complaint [Docket No. 28]; **Order Denying as Moot Defendant Donald J. Trump's Alternative Motion to Dismiss Complaint** [Docket No. 28]

This matter is before the Court on Defendant Donald J. Trump's Special Motion To Dismiss/Strike Plaintiff Stephanie Clifford's Complaint Pursuant To Anti-SLAPP Statute ("Special Motion") Or Alternatively Defendant's Motion To Dismiss Complaint Pursuant To FRCP 12(b)(6) ("Motion"), filed August 27, 2018. Plaintiff opposed the Special Motion and the Motion ("Opposition") on September 3, 2018. Plaintiff replied

("Reply") on September 10, 2018. The Court held argument on the Special Motion and the Motion on September 24, 2018. (*See* Transcript of Proceedings, ECF No. 34.) For the following reasons, the Court **GRANTS** Defendant's Special Motion To Dismiss/ Strike. The Court **DENIES AS MOOT** Defendant's alternative Motion To Dismiss.

I. Factual and Procedural Background

A. Plaintiff's Allegations in the Operative Complaint

Plaintiff Stephanie Clifford filed the operative Complaint against Defendant Donald J. Trump on April 30, 2018 in the Southern District of New York. In the Complaint, Ms. Clifford alleges as follows.

Ms. Clifford began an intimate relationship with Mr. Trump in the summer of 2006. (Compl. ¶ 5, ECF No. 1.) In May of 2011, she agreed to cooperate with *In Touch Magazine* in connection with an article about her relationship with Mr. Trump. (Compl. ¶ 6.) She agreed to speak to the magazine after her ex-husband approached the magazine without her approval. (Compl. ¶ 6.) A few weeks after agreeing to speak to the magazine, a man approached and threatened Ms. Clifford in Las Vegas, Nevada. (Compl. ¶ 7.) The man purportedly approached Ms. Clifford, threatened Ms. Clifford's daughter, and told her to "Leave Trump alone. Forget the story." (Compl. ¶¶ 8-9.)

After Mr. Trump was elected President of the United States on November 8, 2016, Ms. Clifford worked with a sketch artist to render a sketch of the person who had purportedly threatened her in 2011.

(Compl. ¶ 14.) Ms. Clifford released the sketch publicly on April 17, 2018. (Compl. ¶ 14.)

The next day, on April 18, 2018, Mr. Trump, from his personal Twitter account (@RealDonaldTrump), posted a purportedly false statement regarding Ms. Clifford, the sketch, and Ms. Clifford's account of the threatening incident that took place in 2011. (Compl. ¶ 15.) Mr. Trump's tweet read as follows: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" (Compl. ¶ 15.) Mr. Trump posted this tweet in response to another tweet posted by an account named DeplorablyScottish (@ShennaFoxMusic), which showed side-by-side images of the sketch released by Ms. Clifford and a picture of Ms. Clifford and her husband. (Compl. ¶ 16.)

Based on this tweet, Ms. Clifford brings the instant lawsuit against Mr. Trump for defamation. (*See* Compl. ¶¶ 21-38.) She argues that Mr. Trump's tweet attacks the veracity of her account of the threatening incident that took place in 2011. (Compl. ¶ 17.) She also contends that Mr. Trump's tweet suggests that she is falsely accusing an individual of committing a crime against her. (Compl. ¶ 17.) According to Plaintiff, "Mr. Trump meant to convey that Ms. Clifford is a liar, someone who should not be trusted, that her claims about the threatening encounter are false, and that she was falsely accusing the individual depicted in the sketch of committing a crime, where no crime had been committed." (Compl. ¶ 28.) As a result, she contends that Mr. Trump's tweet was false and defamatory, and that the tweet was defamation *per se* because it charged her with committing a serious crime. (Compl. ¶¶ 17, 19.)

Ms. Clifford goes on to claim that Mr. Trump acted with actual malice in issuing the tweet because he knew the falsity of his tweet. This is because, according to Ms. Clifford, the person who threatened her in 2011 acted at the direction of Mr. Trump or Mr. Trump's attorney, Michael Cohen. (Compl. ¶ 31.) In the alternative, she contends that Mr. Trump acted with reckless disregard for the truth or falsity of his tweet because he had no way of knowing whether the 2011 incident had occurred. (Compl. ¶ 32.)

Finally, Ms. Clifford contends that she suffered damages as a result of the tweet because Mr. Trump's statement exposed her to "hatred, contempt, ridicule, and shame, and discouraged others from associating or dealing with her." (Compl. ¶ 33.) Therefore, she "has suffered damages in an amount to be proven at trial, including but not limited to, harm to her reputation, emotional harm, exposure to contempt, ridicule, and shame, and physical threats of violence to her person and life." (Compl. ¶ 34.) Mr Clifford claims that she has retained the services of professional bodyguards and other protective services because of the threats that she has received. (Compl. ¶ 36.)

B. Procedural History

Ms. Clifford first brought this lawsuit in the United States District Court for the Southern District of New York. She initially contended that venue was appropriate in the Southern District of New York because it is the district in which Mr. Trump resides. (Compl. ¶ 4.)

On July 23, 2018, Mr. Trump filed a motion to transfer the case from the Southern District of New York to this Court pursuant to 28 U.S.C. § 1404(a).

(*See* Motion To Transfer, ECF No. 11.) Defendant argued in part that this lawsuit relates to other litigation before this Court involving Plaintiff and Defendant concerning the enforceability of a non-disclosure agreement. (*See* Memorandum In Support of Motion To Transfer at 1, ECF No. 11-1.)

Plaintiff initially opposed the transfer, arguing in part that the instant action was not closely related to the other litigation before this Court. (*See* Response In Opposition To Motion To Transfer, ECF No. 13 at 1.) After a meet and confer process, Plaintiff and Defendant jointly agreed to transfer Plaintiff's defamation case to this Court. On August 8, 2018, the district court in the Southern District of New York granted Plaintiff and Defendant's joint stipulation to transfer. (*See* ECF No. 17, ECF No. 18.)

On August 27, 2018, Defendant brought the instant Special Motion To Dismiss/Strike Plaintiff's Complaint. In the Special Motion, Defendant contends that Ms. Clifford's Complaint fails to state a cause of action for defamation because (1) Mr. Trump's tweet is a protected opinion, (2) Ms. Clifford did not suffer damages as a result of the tweet, and (3) Mr. Trump did not act with malice or reckless disregard for the truth when he issued the tweet. (*See* Special Motion at 1.) Defendant argues that Ms. Clifford's lawsuit is a Strategic Lawsuit Against Public Participation ("SLAPP"). (*See id.*)

The Court held argument on September 24, 2018 and subsequently submitted this matter.

II. Analysis

A. Choice of Law

Before addressing the substance of Defendant's Special Motion To Dismiss/Strike, this Court must decide which state's substantive law governs its analysis. Applying New York choice-of-law principles, Defendant argues that the Texas Citizens Participation Act ("TCPA" or "Texas Anti-SLAPP statute") governs this case. (*See* Special Motion at 7-9.) Plaintiff disagrees, arguing that New York's anti-SLAPP law governs this dispute because Mr. Trump is a citizen of the state of New York. (*See* Opposition at 8.)

The Court applies the Texas anti-SLAPP statute because Ms. Clifford brought this diversity action in the Southern District of New York, and a state court in New York would apply the TCPA to this case.

1. New York Choice-of-Law Provisions Govern This Court's Analysis of Defendant's Special Motion

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). In *Van Dusen v. Barrack*, the United States Supreme Court held that where a defendant seeks to transfer an action to another district court in the country, "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." 376 U.S. 612, 639 (1964). In *Ferens v. John Deere Company*, the Supreme Court extended this rule to those cases

where a plaintiff initiates a transfer. 494 U.S. 516, 525 (1990).

Ms. Clifford, a citizen of the state of Texas, brings this defamation action against Mr. Trump, a citizen of the state of New York.[1] This Court has diversity jurisdiction under 28 U.S.C. Section 1332. The instant case is a diversity action transferred to this Court from the Southern District of New York with the consent of both parties. Therefore, the Court applies New York choice-of-law principles to determine which forum's substantive law governs the Court's analysis of the Special Motion To Dismiss/Strike.

2. Under New York Choice of Law Principles, Texas Law Applies to Plaintiff's Allegations of Defamation and the Special Motion to Dismiss/Strike

Under New York's choice-of-law principles, the law of the situs of the injury generally applies to a tort lawsuit involving diverse parties. *See Stoyanovskiy v. Amerada Hess Corp.*, 286 A.D.2d 727, 728 (2001). However, in this day and age, with the publication of statements in online fora, the tort of defamation often involves a plaintiff injured in several jurisdictions. For multistate defamation actions, where the situs of the injury may be in multiple jurisdictions, "New York applies the law of the state with the most significant interest in litigation," which generally is the state where a plaintiff is domiciled. *See Lee v.*

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[1] Defendant Mr. Trump argues that he is a citizen of Washington D.C. because he resides at the White House, not in New York city. For purposes of the Court's choice-of-law analysis here, the Court is required to apply Texas law to Ms. Clifford's defamation action, whether Mr. Trump is a citizen of New York or Washington D.C.

Bankers Trust Co., 166 F.3d 540, 545 (2d. Cir. 1999). Plaintiff alleges in the Complaint that Ms. Clifford is a "resident of the State of Texas," (Compl. ¶ 1), and conceded during argument on September 24, 2018 that Ms. Clifford is domiciled in Texas. (*See* Transcript of Proceedings at 11: 7.) Therefore, this Court applies Texas law to Plaintiff's allegations of defamation and Defendant's Special Motion To Dismiss/Strike.[2]

The Restatement (Second) Conflicts of Law supports this Court's holding that Texas law applies. In defamation lawsuits involving "multistate communication," a court must apply "the local law of the state where the plaintiff has suffered the greatest injury by reason of [her] loss of reputation," which "will usually be the state of the plaintiff's domicile if the matter complained of has there been published." Restatement (Second) of Conflict of Laws § 150 (1971).

B. Defendant's Special Motion to Strike/Dismiss Is Analogous to a Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

Having concluded that the TCPA applies to the Complaint and the Special Motion, the Court next determines if it is appropriate to adjudicate the Special Motion at the present stage of litigation before any discovery has taken place. Plaintiff argues

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[2] In analyzing Defendant's Special Motion To Dismiss/Strike under the TCPA, the Court borrows from courts' analysis of California's anti-SLAPP statute. "The California statute—section 425.16 of the California Code of Civil Procedure—was one of the earliest 'anti-SLAPP' laws and has been a primary model or influence on similar laws subsequently enacted in other states, including, directly or indirectly, the TCPA." *Serafine v. Blunt*, 466 S.W.3d 352, 386 (Tex. App. 2015).

that Mr. Trump's Special Motion should be adjudicated as a motion for summary judgment. (*See* Opposition at 5-6; Transcript of Proceedings at 15:3-16:6, 17:5-24.) If this were the case, the parties would be permitted to pursue discovery prior to a ruling on the Special Motion. Plaintiff's argument, however, has no merit.

For purposes of the Federal Rules of Civil Procedure, a motion brought on anti-SLAPP grounds can either be analogous to a motion to dismiss or a motion for summary judgment. If a defendant moves to strike/dismiss based on purely legal arguments and the fact that a complaint does not allege sufficient facts to support its stated causes of action, this Court analyzes the motion under the standards set out in Federal Rule of Civil Procedure 8 and 12(b)(6). *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018). If a defendant makes a factual challenge to a complaint, including by providing alternate facts to challenge the allegations in a complaint, this Court treats the motion to strike/dismiss as a motion for summary judgment. *See id.*

Here, Mr. Trump's Special Motion is analogous to a motion to dismiss because it makes three main arguments, all of which assume the truth of the allegations in the Complaint and ask this Court to dismiss Plaintiff's action because these facts do not sustain a cause of action for defamation. First, Defendant argues that although Plaintiff alleges that the President made a defamatory statement in a tweet,[3] the statement, as alleged in the Complaint, is

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[3] For purposes of arguing the Motion To Strike/Dismiss, Defendant accepts that Mr. Trump sent the tweet stating "A sketch years later about a nonexistent man. A total con job, playing the Fake

a constitutionally-protected opinion. (*See* Special Motion at 9-10.) Second, Defendant argues that Plaintiff has not sufficiently alleged damages as a result of Mr. Trump's purported defamation because the damages that she suffered could have arisen from an alternate cause. (*See* Special Motion at 11-14.) Third, Defendant argues that Plaintiff has not alleged sufficient facts to show that Mr. Trump acted with actual malice or reckless disregard for the truth, aside from Plaintiff's conclusory statements that Mr. Trump had knowledge of the threat that Plaintiff received in 2011. (*See* Special Motion at 14-16.) Each of these arguments largely assume the truth of the Complaint, but nevertheless make the point that the Complaint does not allege sufficient facts to meet each prong of the defamation standard.

In addition to these three arguments, Defendant's Special Motion sets forth some facts beyond those alleged in the Complaint.[4] For example, Defendant argues that Ms. Clifford did not sufficiently allege that she suffered damages because, in fact, she benefitted economically from Mr. Trump's defamatory statement. To prove this, Defendant points to evidence outside

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News Media for Fools (but they know it)!" Defendant assumes that Mr. Trump issued this tweet and argues that Plaintiff cannot sue Defendant for defamation based on the content of the tweet.

[4] Plaintiff and Defendant have filed evidentiary objections to several of the factual submissions. In doing so, both parties correctly point out that this Court should not take into account facts outside the Complaint in deciding this Special Motion. Aside from otherwise judicially-noticeable facts, the Court does not take into account facts outside the Complaint in reaching its final holding that Mr. Trump's tweet is a non-actionable opinion that cannot be the subject of a defamation claim.

the Complaint of Ms. Clifford's economic well-being. (*See* Special Motion at 13-14.) In making its ruling, the Court takes no position as to any argument concerning the purported benefit that Ms. Clifford received as a result of the tweet in question. The remainder of Defendant's arguments are properly brought at the present stage of litigation.

C. Defendant's Special Motion to Dismiss/Strike Is Timely

The next threshold inquiry is whether the Special Motion is timely. Plaintiff contends that it is not, because Mr. Trump should have brought the Special Motion within 60 days of May 23, 2018, as required by the TCPA. This is the date on which Mr. Trump waived service of Ms. Clifford's defamation action. (*See* Opposition at 7.)

The Court holds that although Mr. Trump may not have complied with the filing deadline, there is good cause to permit the Special Motion to proceed given the procedural history of this case, which includes a transfer to this Court from a district court in the Southern District of New York.

Plaintiff's argument concerning the applicability of the 60-day deadline in federal court raises an unresolved issue of law. Like the TCPA, California's anti-SLAPP statute contains a 60-day requirement. No court in this Circuit, or the Fifth Circuit, has ruled on whether an anti-SLAPP motion, brought as a motion to dismiss as opposed to a motion for summary judgment, is subject to the 60-day deadline. To be sure, federal courts have held that the 60-day deadline in California's anti-SLAPP statute does not apply to anti-SLAPP motions that are analogous to motions

for summary judgment. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (citing *Rogers*, 57 F. Supp. 2d at 982). The 60-day deadline is a procedural rule under the *Erie* doctrine that conflicts with Federal Rule of Civil Procedure 56. *See Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016). This is because the 60-day deadline seeks to limit discovery and allow for anti-SLAPP motions at an early stage of litigation, while Rule 56 seeks to promote discovery, requiring motions for summary judgment after litigation has proceeded for some time. *See id.* As analyzed above, however, Mr. Trump's anti-SLAPP motion is analogous to a motion to dismiss, not a motion for summary judgment. The discovery rationale that underpins a case like *Metabolife International* does not exist here.

Nevertheless, the Court does not need to address the applicability of the 60-day deadline to the Special Motion because there is "good cause" to permit it to proceed. *See Schimmel v. McGregor*, 438 S.W.3d 847, 856 (Tex. App. 2014) (holding that the TCPA allows a court to waive the motion filing deadline where "good cause" exists). Ms. Clifford initially filed her defamation action in the Southern District of New York, and there was some dispute as to whether that district was the appropriate venue for this case. After briefing on the matter, Ms. Clifford's defamation action was transferred to this Court on August 8, 2018. After the transfer, Defendant did not delay bringing this Special Motion, filing it on August 27, 2018, nineteen days after the transfer and well-within the 21-day deadline in which a defendant must normally file a responsive pleading after a plaintiff files a complaint. *See* Fed. Rule Civ. P. Rule 12(a). Importantly, the instant case

did not proceed in any material respect after Plaintiff's initial filing of the Complaint in April 2018. This limits the prejudice that Plaintiff may face from an untimely anti-SLAPP motion. *See New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1100 (C.D. Cal. 2004). Defendant's filing of this Special Motion after the 60-day deadline also does not frustrate the TCPA's purpose of dismissing improper lawsuits at an early stage of litigation. *See id.* (holding that one purpose of California's 60-day deadline for anti-SLAPP motions was to dismiss lawsuits early in litigation). Accordingly, "good cause" exists to allow Defendant to proceed with this Special Motion, even if the filing did not comply with the TCPA's 60-day deadline.

D. Standard Under the TCPA

Having determined (1) that the TCPA applies to the Special Motion and Ms. Clifford's defamation action, (2) that this Court treats the Special Motion as analogous to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and (3) that there is "good cause" to permit the Special Motion after the expiration of 60 days from the initial filing of the Complaint, the Court next applies the substantive requirements of the TCPA to the Special Motion and the allegations in the Complaint.

Texas offers robust protection for the freedom of speech. The TCPA, like analogous anti-SLAPP statutes in other jurisdictions including California, seeks 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.

Analysis of an anti-SLAPP motion under the TCPA proceeds in three steps. First, a defendant must show, by a preponderance of the evidence, that a plaintiff's complaint is based on, relates to, or is in response to the defendant's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b); *In re Lipsky*, 460 S.W.3d 579, 586 (Texas 2015). The TCPA defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." Tex. Civ. Prac. & Rem. Code § 27.001(3). A communication includes "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). A "matter of public concern" includes an issue related to: "(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." *Id.* § 27.001(7). Second, the burden then shifts to the plaintiff to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). Third, the defendant can still prevail under the TCPA if he/she "establishes by a preponderance of the evidence each essential element of a valid defense" to the plaintiff's claim. *Id.* § 27.005(d). *See also ExxonMobil Pipeline Company v. Coleman*, 512 S.W.3d 895, 898-99 (summarizing the standard under the TCPA).

Here, Defendant's Special Motion does not allege any defenses to plaintiff's defamation claim. The Court

addresses the other two steps of the TCPA analysis in turn.

1. Plaintiff's Defamation Lawsuit Relates to Defendant's Right of Free Speech

There is little dispute that Ms. Clifford's Complaint relates to Mr. Trump's exercise of his right of free speech on an issue of public concern. In reaching this conclusion, the Court is mindful of the fact that Texas "look[s] to the entire communication as well as the context of the communication in which the allegedly defamatory statement is made." *Cruz v. Van Sickle*, 452 S.W.3d 503, 514 (Tex. App. 2014). Here, the statement at issue is Mr. Trump's reaction to Plaintiff's release of the sketch of a person who threatened Plaintiff in connection with a purported affair that she had with Mr. Trump. Although Mr. Trump was not the President at the time of the purported affair or the purported threat that Plaintiff received, Mr. Trump is now the President and was the President at the time of the tweet. Moreover, Mr. Trump issued the tweet in the context of Plaintiff publicly styling herself as an adversary to the President, including in filings before this Court. (*See, e.g.*, First Amended Complaint in *Stephanie Clifford v. Donald Trump et al.* at ¶ 17, No. 2:18-cv-02217-SJO-FFM (arguing that "Mr. Trump, with the assistance of his attorney Mr. Cohen, aggressively sought to silence Ms. Clifford as part of an effort to avoid her telling the truth, thus helping to ensure he won the Presidential Election").) The tweet in question, therefore, relates to an issue involving a public official on a matter of public concern. *See id.* (holding that the TCPA applies to a defamation claim involving "a public official or public figure," including a candidate for judicial office). Accordingly,

the TCPA applies to the Special Motion To Dismiss/ Strike.

2. Plaintiff Fails to Establish a Prima Facie Case for Defamation

The Court next analyzes whether Plaintiff has established a prima facie case for defamation. To prevail on a cause of action for defamation under Texas law, Plaintiff must allege that: (1) Mr. Trump published a false statement; (2) that defamed Ms. Clifford; (3) with the requisite degree of fault regarding the truth of the statement (negligence if Ms. Clifford is a private individual or malice if Ms. Clifford is a public individual); and (4) damages (unless the statement constitutes defamation per se). *See D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017).

a. False Statement

In the Special Motion, Mr. Trump argues that the tweet at issue is a non-actionable opinion, not a statement of fact about Ms. Clifford. (Special Motion at 9.) "Expressions of opinion may be derogatory and disparaging; nevertheless they are protected by the First Amendment of the United States Constitution and by article I, section 8 of the Texas Constitution." *Shaw v. Palmer*, 197 S.W.3d 854, 857 (Tex. App. 2006).

The Court agrees with Mr. Trump's argument because the tweet in question constitutes "rhetorical hyperbole" normally associated with politics and public discourse in the United States. The First Amendment protects this type of rhetorical statement.

"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." *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) (quoting *Turner v. KTROK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)). To assess whether a statement is "rhetorical hyperbole," this Court looks to the statement "as a whole in light of the surrounding circumstances and based upon how a person of ordinary intelligence would perceive it." *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App. 2015). Because Mr. Trump's tweet involves a matter of public concern, including purported acts committed by the now President of the United States, the Court applies the following three principles to determine if the tweet is actionable for defamation (the "*Bentley/ Milkovich*" analysis). *See Bentley*, 94 S.W.3d at 580. *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (setting out the standard summarized below).

1. A statement on matters of public concern must be provable as false before there can be liability for defamation.

2. The United States Constitution protects statements that cannot reasonably be interpreted as stating actual facts about an individual made in debate over public matters in order to provide assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of the United States.

3. Where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that

> such statements were made with knowledge of their false implications or with reckless disregard of their truth, and where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault.

Mr. Trump's tweet stated as follows: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" When the first step in the *Bentley/Milkovich* analysis is applied to this tweet, Plaintiff correctly points out that Mr. Trump's tweet contains two verifiably true/false statements: (1) that the man who threatened Ms. Clifford in 2011 does not exist and therefore, that Plaintiff is lying about her encounter with him; and (2) that Ms. Clifford is engaging in a "con job" or is lying to Mr. Trump, the public, and the media about the threat (and by implication her affair with Mr. Trump). If the man who threatened Ms. Clifford in 2011 does exist, or if Ms. Clifford is not lying to Mr. Trump, the public, and the media about the threats that she received or her affair with Mr. Trump, Mr. Trump's tweet would be verifiable as false.

Plaintiff's argument crumbles when it comes to the second step in the *Bentley/Milkovich* analysis. Mr. Trump's tweet constitutes "rhetorical hyperbole," which is "'extravagant exaggeration [that is] employed for rhetorical effect.'" *Backes v. Misko*, 486 S.W.3d 7, 26 (Tex. App. 2015) (quoting *Am. Broad. Cos. v. Gill*, 6 S.W.3d 19, 30 (Tex. App. 1999)). Specifically, Mr. Trump's tweet displays an incredulous tone, suggesting that the content of his tweet was not meant to be understood as a literal statement about Plaintiff.

Instead, Mr. Trump sought to use language to challenge Plaintiff's account of her affair and the threat that she purportedly received in 2011. As the United States Supreme Court has held, a published statement that is "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage" cannot constitute a defamatory statement. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 32 (1990).

Mr. Trump also issued the tweet in the context of Plaintiff presenting herself as a political adversary to the President. *Rehak Creative Services, Inc. v. Witt* is instructive in this regard. *See* 404 S.W.3d 716 (Tex. App. 2013), *disapproved on other grounds by In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). In *Rehak*, an advertising agency that worked with Jim Murphy, a state representative serving in the Texas House of Representatives, sued Ann Witt, a candidate who ran against Murphy in the Republican primary. *Id.* at 722. The advertising agency sued Witt for defamation on the grounds that Witt's website contained a series of defamatory statements against Murphy, including Witt's accusations that Murphy "sidestepped" the Texas Constitution by serving as a legislator while receiving payment as a consultant. *Id.* at 720. Witt's website also compared Murphy to a character in the book and musical, *How to Succeed in Business Without Really Trying*, accused Murphy of "ripping off taxpayers," and stated that among Jim Murphy's "sleazy steps" to success included "STEP 6: Reward your supporters with government contracts." *Id.* at 721. The Texas Court of Appeals held that none of the statements on Witt's website constituted defamation in large part because Witt's "website's tone" and the "campaign context" of the statements suggested that the statements

constituted "rhetorical hyperbole" that was part of politics. *Id.* at 730. The website "demonstrate[d] an attempt to deliver a political message about the use of public money in an exaggerated, provocative and amusing way," expression that lies at "the heart of the First Amendment." *Id.* at 730. *See also Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App. 2015) (collecting cases on "rhetorical hyperbole" in the political context).

The instant case is similar to *Rehak* in that Mr. Trump, as President, made a hyperbolic statement against a person who has sought to publicly present herself as a political adversary to him. In filings before this Court, Ms. Clifford has challenged the legitimacy of Mr. Trump's victory in the 2016 Presidential election. Mr. Trump's tweet served as a public rejoinder to allegations made by Plaintiff. If this Court were to prevent Mr. Trump from engaging in this type of "rhetorical hyperbole" against a political adversary, it would significantly hamper the office of the President. Any strongly-worded response by a president to another politician or public figure could constitute an action for defamation. This would deprive this country of the "discourse" common to the political process. In short, should Plaintiff publicly voice her opinions about Mr. Trump, Mr. Trump is entitled to publicly voice non-actionable opinions about Plaintiff. To allow Plaintiff to proceed with her defamation action would, in effect, permit Plaintiff to make public allegations against the President without giving him the opportunity to respond. Such a holding would violate the First Amendment.

Mr. Trump also made a one-off rhetorical comment, not a sustained attack on the veracity of Plaintiff's claims. This distinguishes the instant case

from other cases where courts have determined that public statements constituted defamation. In *Bentley*, for example, the host of a call-in talk show on a public-access channel repeatedly accused a judge of being corrupt. *See Bentley*, 94 S.W.3d at 584. When confronted about the veracity of the allegations, the talk show host doubled down, falsely claiming that he had proof of the judge's corruption, including public records and records of conversations with courthouse employees. *See id.* The Texas Supreme Court held that while a "single, excited reference to [the judge's corruption] might be taken to be rhetorical hyperbole . . . [the host's] characterization of [the judge's] conduct as criminal is only part of [the host's] efforts over many months to prove [the judge] corrupt." *Id.* at 581. Here, Mr. Trump's tweet falls far more in line with a "single, excited reference." Unlike the defendant in *Bentley*, Mr. Trump provided no support for his views in the tweet nor did not he repeat the allegations in the tweet.

Accordingly, the Court grants the Special Motion because Mr. Trump's statement constituted "rhetorical hyperbole" that is protected by the First Amendment.

b. Actual Malice or Reckless Disregard for the Truth

Having determined that Mr. Trump's tweet is non-actionable, the Court's analysis of the Special Motion ends. In the interest of completeness, the Court briefly addresses a few of the other arguments made by the parties in the briefing.

The parties spend some time debating whether Mr. Trump acted with "actual malice" or "reckless disregard for the truth" in issuing the tweet in ques-

tion. Assuming that Plaintiff is a "public figure," Plaintiff would have to show that Defendant acted with "actual malice" or "reckless disregard for the truth" to prevail on a cause of action for defamation. *See Bentley*, 94 S.W.3d at 580.

Plaintiff's focus on the actual malice argument comes as no surprise because Plaintiff stands on thin ice in asserting that Mr. Trump's tweet is an actionable statement. Instead, Plaintiff seeks to use her defamation action to engage in a "fishing expedition" concerning the conclusory allegations in the Complaint. The Court will not permit Plaintiff to exploit the legal process in this way.

Specifically, Plaintiff contends that she needs to conduct discovery to determine if Mr. Trump was involved in the 2011 threat against her or if he purposefully avoided learning about the 2011 threat. *See* Opposition at 11. Plaintiff believes that discovery pertaining to these issues will help her to establish that Mr. Trump acted with actual malice or reckless disregard for the truth (*i.e.* if Ms. Clifford can provide evidence showing that Mr. Trump knew of the 2011 threat, then he tweeted a lie when he challenged Plaintiff's reporting of the 2011 threat). (*See* Transcript of Proceedings at 29:23-30:4.) However, Plaintiff's reasoning is entirely circular. She assumes that Mr. Trump knew of the 2011 threat, argues in her Complaint and her briefing that Mr. Trump knew of the 2011 threat, and then asks this Court for discovery to prove that Mr. Trump knew of the 2011 threat. In doing so, Plaintiff does not allege facts establishing how Mr. Trump knew or did not know about the 2011 threat in the first place. Plaintiff must do this to sustain a cause of action for defamation.

c. Damages

Defendant's Special Motion also alleges that Plaintiff has not adequately pleaded damages. (Special Motion at 11-14.) The Court declines to address this. As with the issue of actual malice, the Court does not need to reach the damages question because it grants the Special Motion on other grounds.

E. Leave to Amend

Having granted the Special Motion, the Court next determines if it should grant Plaintiff leave to amend the Complaint. While recognizing that courts in this Circuit sometimes do grant plaintiffs the opportunity to amend a complaint before granting an anti-SLAPP motion to strike, the Court holds that Ms. Clifford should not have this opportunity because any amendment would be futile. *See Verizon Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1091 (2004) ("[G]ranting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment."); *Gardner v. Martino*, 563 F.3d 981, 992 (9th Cir. 2009) (denying leave to amend on futility grounds).

The Court holds that Mr. Trump's tweet is "rhetorical hyperbole" and is protected by the First Amendment. Plaintiff cannot amend the Complaint in a way that challenges this holding. During argument on this matter, Plaintiff suggested that she could amend her Complaint to "shore up the malice allegations" and to "provide context for the statement to show that, in fact, it was not political nature at the time it was made." (Transcript of Proceedings at 44: 8-13.) The former amendments are futile because this Court rules that

Mr. Trump's tweet is protected by the First Amendment. The issue of malice is irrelevant to this holding. The latter amendments are futile because there is no way for Plaintiff to amend the Complaint to transform the tweet from "rhetorical hyperbole" into an actionable statement. *See Gardner*, 563 F.3d at 992. "A party cannot amend pleadings to 'directly contradic[t] an earlier assertion made in the same proceeding.'" *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir.1990)). Plaintiff cannot change Mr. Trump's tweet or the basic context of the tweet. Nor can Plaintiff withdraw factual allegations that she has made in pleadings before this Court. In the other litigation before this Court, Ms. Clifford argues that Mr. Trump sought to silence her as a strategy to win the Presidential election, a clear argument against the legitimacy of Mr. Trump's Presidency. (*See* First Amended Complaint in *Stephanie Clifford v. Donald Trump et al.* at ¶ 17, No. 2:18-cv-02217-SJO-FFM.) Mr. Trump issued the tweet as a rejoinder against an individual challenging him in the public arena. This is the definition of protected rhetorical hyperbole. The Court denies Plaintiff leave to amend the Complaint.

F. Attorney's Fees

Having granted the Special Motion and denied Plaintiff leave to amend, the Court finally holds that Defendant is entitled to attorney's fees. Texas law is unambiguous that "the TCPA requires an award of 'reasonable attorney's fees' to the successful movant." *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016). "A 'reasonable' attorney's fee 'is one that is not excessive

or extreme, but rather moderate or fair.'" *Id.* (quoting *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex.2010)).

III. Ruling

For the foregoing reasons, the Court GRANTS Defendant's Special Motion To Strike/Dismiss. Defendant is entitled to attorney's fees under the Texas Citizen Participation Act. Should Defendants move for attorneys' fees, the motion must be filed within fourteen (14) days from the date of this order. The Court DENIES AS MOOT Defendant's Motion To Dismiss.

IT IS SO ORDERED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (SEPTEMBER 10, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANIE CLIFFORD, AKA STORMY DANIELS,

Plaintiff-Appellant,

v.

DONALD J. TRUMP,

Defendant-Appellee.

No. 18-56351

D.C. No. 2:18-cv-06893-SJO-FFM
Central District of California, Los Angeles

Before: THOMAS, Chief Judge, and WARDLAW and NGUYEN, Circuit Judges.

Appellant's motion to take judicial notice of 1) a December 11, 2018 district court order regarding attorney fees, costs, and sanctions in case number CV 18-06893-SJO, and 2) submitted printouts of President Trump's official Twitter account is GRANTED.

The panel has unanimously voted to deny appellant's petition for rehearing en banc. The full court has been advised of the petition and no active judge

has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is REJECTED.

TEXAS CIVIL PRACTICE AND REMEDIES CODE, RELEVANT SECTIONS

TEXAS CIVIL PRACTICE AND REMEDIES CODE

Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights

§ 27.001. Definitions

In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4)"Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal

government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to: health or safety; environmental, economic, or community wellbeing; the government; a public official or public figure; or a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has

not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

§ 27.002. Purpose

The purpose of this chapter is 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.

§ 27.003. Motion to Dismiss

(a) If a legal action is based on, relates to, or is in response to a party's exercise of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day

after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

§ 27.004. Hearing

(a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

§ 27.005. Ruling

(a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

§ 27.006. Evidence

(a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

§ 27.007. Additional Findings

(a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

§ 27.008. Appeal

(a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

* * *

§ 27.009. Damages and Costs

(a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

§ 27.010. Exemptions

(a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engage in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

§ 27.011. Construction

(a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.