RECEIVED
FEDERAL ELECTION COMMISSION
AUGUST 24, 2022 12:47 PM
OFFICE OF GENERAL COUNSEL

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MUR 7990
SUPPLEMENT

August 24, 2022

VIA EMAIL

Office of General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
EnfComplaint@fec.gov

Trace Keeys
Paralegal
Federal Election Commission
Complaints Examination &
Legal Administration
CELA@fec.gov

Re: SUPPLEMENT RE: MUR 7990

Dear FEC Office of General Counsel:

By email dated May 3, 2022, Acting Assistant General Counsel Roy Q. Luckett acknowledged the FEC's receipt, on April 26, 2022, of my complaint regarding the registered campaign committee "Kim Klacik for Congress" (C00726117). A copy of Mr. Luckett's letter is attached to this correspondence for your Office's convenience and review as **Attachment #1**. This correspondence supplements the complaint at issue, which I understand has been assigned Case No. MUR 7990.

Since the filing of my initial complaint, Ms. Klacik's campaign committee has filed a campaign finance report for a subsequent reporting period. I have had an opportunity to review Ms. Klacik's most recent report, which significantly heightens my concern that Ms. Klacik has been using and is continuing to use funds from her campaign account to finance personal litigation that would have occurred irrespective of Ms. Klacik's campaign in contravention of FECA's personal use ban.

In particular, Ms. Klacik's most recent campaign finance report contains a massively outsized disbursement—$126,806.72—to the law firm Dickinson Wright PLLC. That disbursement—highlighted for your Office's convenience and review in **Attachment #2**—appears to be the largest disbursement on her most recent report by nearly $124,000.00. The disbursement is also described, once again, as a payment for "LEGAL CONSULTING." *Id.* at 2. Based on my personal knowledge of the likely nature of that disbursement, however, I have a reasonable basis for believing that this description was again inaccurate; that it was designed to conceal the personal nature of the expenditure; and that the disbursement was actually payment for Ms. Klacik's own, personal legal representation in active litigation that seeks to benefit her individually, rather than for legal "consulting" on behalf of her long-since-concluded campaign.

In particular, within the time period during which the disbursement at issue was reported, Ms. Klacik—personally, and independent and irrespective of her campaign—employed the law firm Dickinson Wright, PLLC to maintain personal litigation that expressly seeks an order awarding "**Ms. Klacik** compensatory damages in an amount to be determined at trial" as detailed in my previous correspondence. The substantial $126,806.72 disbursement at issue came during a time period of active and substantial appellate and trial court litigation in that personal lawsuit. A non-exhaustive sample of the documents that Dickinson Wright PLLC prepared and filed for Ms. Klacik, personally, during this apparent reporting period across three courts—the Davidson County Circuit Court, the Tennessee Court of Appeals, and the Tennessee Supreme Court—is attached collectively for your Office's convenience and review as **Attachment #3**.

In light of the foregoing, I have a well-founded reason to believe that the reported disbursement to the law firm Dickinson Wright PLLC—paid for by Kim Klacik for Congress during active personal litigation and reported as a "legal consulting" campaign expenditure—was, in fact, yet another payment for litigation maintained by and designed to benefit Ms. Klacik personally and irrespective of her long-since-concluded congressional campaign. As you are aware, however, a campaign contribution "shall not be converted by any person to personal use[,]" *see* 52 U.S.C.A. § 30114(b)(1), and FECA expressly prohibits Ms. Klacik's campaign committee from making expenditures for anything "that would exist irrespective of" her campaign. *See* 52 U.S.C.A. § 30114(b)(2). Thus, Ms. Klacik's campaign funds may not be used to pay for a personal lawsuit that she has maintained "irrespective" of her campaign, and if the expense would exist even in the absence of Ms. Klacik's candidacy, then the personal use ban applies. Once again, my concern that Ms. Klacik may be violating federal campaign finance law by converting campaign contributions for her own personal use is also compounded further by her committee's many previous violations of federal campaign finance law, which resulted in the FEC assessing a substantial monetary fine. *See* Administrative Fine #4220 against KIM KLACIK FOR CONGRESS, ID: C00726117, FED. ELECTION COMM'N, https://www.fec.gov/data/legal/administrative-fine/4220/ (last visited Apr. 24, 2022).

For the foregoing reasons, I respectfully request that the FEC investigate Ms. Klacik's apparent continued conversion of campaign funds for her own personal use; that it take whatever enforcement action it deems appropriate against any individual who is

determined to have violated federal campaign finance law; and that it audit Ms. Klacik's expenditures to determine whether any other personal use violations occurred.

Sincerely,

Daniel A. Horwitz

Enclosures as stated

Attachment #1

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 3, 2022

VIA EMAIL
daniel@horwitz.law

Daniel A. Horwitz
4016 Westlawn Dr.
Nashville, TN 37209

RE: MUR 7990

Dear Mr. Horwitz:

This letter acknowledges receipt of your complaint on April 26, 2022, alleging possible violations of the Federal Election Campaign Act of 1971, as amended. The respondents will be notified of this complaint within five business days.

You will be notified as soon as the Federal Election Commission (FEC) takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be notarized and sworn to in the same manner as the original complaint. We have numbered this matter MUR 7990. Please refer to this number in all future communications. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Please note that you still **must file** the paper copy of the electronic complaint with the Commission, within 15 days of this letter, in order for the matter to be further processed as a proper complaint. Any additional correspondence sent to the Commission must be addressed to one of the following below. As indicated in the FEC's Notice found at https://www.fec.gov/resources/cms-content/documents/status-of-fec-operations.pdf, the office's mailroom is open on a limited basis and, therefore, processing paper correspondence may be delayed. Accordingly, we strongly encourage you to file via email, except amendments to your complaint, which should be filed by paper even if email correspondence is used.

Mail
Federal Election Commission
Office of Complaints Examination
& Legal Administration
Attn: Trace Keeys, Paralegal
1050 First Street, NE
Washington, DC 20463

OR

Email
cela@fec.gov

Sincerely,

Roy Q. Luckett
Acting Assistant General Counsel
Complaints Examination &
Legal Administration

Enclosure:
Procedures

DESCRIPTION OF PRELIMINARY PROCEDURES FOR PROCESSING COMPLAINTS FILED WITH THE FEDERAL ELECTION COMMISSION

1050 First Street, NE
Washington, D.C. 20463
EMAIL cela@fec.gov

Complaints filed with the Federal Election Commission shall be referred to the Enforcement Division of the Office of the General Counsel, where they are assigned a MUR (Matter Under Review) number and forwarded to Complaints Examination & Legal Administration ("CELA") for processing. Within five days of receipt of the complaint, the Commission shall notify all respondents referenced in the complaint, in writing, that the complaint has been filed, and shall include with such notification a copy of the complaint. Simultaneously, the complainant shall be notified that the complaint has been received. The respondents shall then have 15 days to demonstrate, in writing, that no action should be taken against them in response to the complaint. If additional time is needed in which to respond to the complaint, the respondents may request an extension of time. The request must be in writing and demonstrate good cause as to why an extension should be granted. Please be advised that not all requests are granted.

After the response period has elapsed, cases are prioritized and maintained in CELA. Cases warranting the use of Commission resources are assigned as staff becomes available. Cases not warranting the use of Commission resources are dismissed.

If a case is assigned to a staff person, the Office of the General Counsel shall report to the Commission, making recommendations based upon a preliminary legal and factual analysis of the complaint and any submission made by the respondent. The report may recommend that the Commission: (a) find reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act of 1971, as amended, (hereinafter the “Act"); or (b) find no reason to believe that the complaint sets forth a possible violation of the Act and, accordingly, close the file.

If, by an affirmative vote of four Commissioners, the Commission determines that there is reason to believe that a respondent has committed or is about to commit a violation of the Act, the Office of the General Counsel shall open an investigation into the matter. During the investigation, the Commission has the power to subpoena documents, to subpoena individuals to appear for deposition, and to order written answers to interrogatories. A respondent may be contacted more than once by the Commission during this phase.

If during this period of investigation, a respondent indicates a desire to enter into conciliation, the Office of the General Counsel may recommend that the Commission enter into conciliation prior to a finding of probable cause to believe that a violation has been committed. Conciliation is an attempt to correct or prevent a violation of the Act by informal methods of conference and persuasion. Most often, the result of conciliation is an agreement signed by the Commission and the respondent. The Conciliation Agreement must be adopted by four votes of

the Commission in order to become final. After signature by the Commission and the respondent, the Conciliation Agreement is made public within 30 days of closing of the entire file.

If the investigation warrants, and no conciliation agreement has been entered into prior to a probable cause to believe finding, the General Counsel must notify the respondent of his/her intent to recommend that the Commission proceed to a vote on probable cause to believe that a violation of the Act has been committed or is about to be committed. The General Counsel shall send the respondent a brief setting forth his/her position on the legal and factual issues of the case. A response brief stating respondent's position on the issues may be submitted within 15 days of receipt of the General Counsel's Brief. Both briefs are then filed with the Commission Secretary and considered by the Commission. Thereafter, if the Commission determines, by an affirmative vote of four Commissioners, that there is probable cause to believe that a violation of the Act has been committed or is about to be committed, the Commission must conciliate with the respondent for a period of at least 30 days, but not more than 90 days. If the Commission is unable to correct or prevent any violation through conciliation, the Office of the General Counsel may recommend that the Commission file a civil suit to enforce the Act against the respondent. Therefore, the Commission may, upon the affirmative vote of four Commissioners, institute civil action for relief in the United States District Court.

See 52 U.S.C. § 30109 and 11 C.F.R. Part 111**.**

March 2018

Attachment #2

Disbursements

Viewing 129 filtered results for: Clear all filters

Data type: raw | KIM KLACIK FOR CONGRESS (C00726117)

Spender	Recipient	State	Description	Disbursement date	Amount
KIM KLACIK FOR CONGRESS	GODADDY.COM	AZ	WEB HOSTING	06/30/2022	$94.99
KIM KLACIK FOR CONGRESS	CONSTANT CONTACT	MA	SOFTWARE SERVICES	06/28/2022	$132.50
KIM KLACIK FOR CONGRESS	BB&T BANK	NC	BANK FEES	06/21/2022	$15.00
KIM KLACIK FOR CONGRESS	COMCAST	PA	BROADBAND SERVICES	06/17/2022	$332.14
KIM KLACIK FOR CONGRESS	GODADDY.COM	AZ	WEB HOSTING	06/13/2022	$24.99
KIM KLACIK FOR CONGRESS	AMAZON	WA	OFFICE SUPPLIES	06/13/2022	$1.99
KIM KLACIK FOR CONGRESS	INTEGRATED SOLUTIONS: POLITICAL	CA	SOFTWARE SERVICES	06/07/2022	$770.00

Spender	Recipient	State	Description	Disbursement date	Amount
KIM KLACIK FOR CONGRESS	IUBENDA	ZZ	SOFTWARE SERVICES	06/03/2022	$57.00
KIM KLACIK FOR CONGRESS	2205 YORK ROAD LLC	MD	RENT	05/31/2022	$2,964.00
KIM KLACIK FOR CONGRESS	CONSTANT CONTACT	MA	SOFTWARE SERVICES	05/31/2022	$132.50
KIM KLACIK FOR CONGRESS	BB&T BANK	NC	BANK FEES	05/23/2022	$35.00
KIM KLACIK FOR CONGRESS	COMCAST	PA	BROADBAND SERVICES	05/17/2022	$332.14
KIM KLACIK FOR CONGRESS	DICKINSON WRIGHT PLLC	DC	LEGAL CONSULTING	05/13/2022	$126,806.72
KIM KLACIK FOR CONGRESS	AMAZON	WA	OFFICE SUPPLIES	05/12/2022	$1.99
KIM KLACIK FOR CONGRESS	GODADDY.COM	AZ	WEB HOSTING	05/11/2022	$21.99
KIM KLACIK FOR CONGRESS	ANTONIO PITOCCO FOR CONGRESS	MD	FEDERAL CONTRIBUTION	05/06/2022	$2,000.00
KIM KLACIK FOR CONGRESS	ANTONIO PITOCCO FOR CONGRESS	MD	FEDERAL CONTRIBUTION	05/06/2022	$2,000.00
KIM KLACIK FOR CONGRESS	INTEGRATED SOLUTIONS: POLITICAL	CA	SOFTWARE SERVICES	05/03/2022	$770.00
KIM KLACIK FOR CONGRESS	IUBENDA	ZZ	SOFTWARE SERVICES	05/03/2022	$57.00

Spender	Recipient	State	Description	Disbursement date	Amount
KIM KLACIK FOR CONGRESS	CONSTANT CONTACT	MA	SOFTWARE SERVICES	04/28/2022	$132.50
KIM KLACIK FOR CONGRESS	BB&T BANK	NC	BANK FEES	04/21/2022	$50.00
KIM KLACIK FOR CONGRESS	COMCAST	PA	BROADBAND SERVICES	04/18/2022	$332.27
KIM KLACIK FOR CONGRESS	REGINA MAURO FOR CONGRESS	PA	FEDERAL CONTRIBUTION	04/14/2022	$2,000.00
KIM KLACIK FOR CONGRESS	REGINA MAURO FOR CONGRESS	PA	FEDERAL CONTRIBUTION	04/14/2022	$2,000.00
KIM KLACIK FOR CONGRESS	JAROME BELL FOR CONGRESS	VA	FEDERAL CONTRIBUTION	04/14/2022	$2,000.00
KIM KLACIK FOR CONGRESS	GODADDY.COM	AZ	WEB HOSTING	04/11/2022	$21.99
KIM KLACIK FOR CONGRESS	IUBENDA	ZZ	SOFTWARE SERVICES	04/04/2022	$57.00
KIM KLACIK FOR CONGRESS	INTEGRATED SOLUTIONS: POLITICAL	CA	SOFTWARE SERVICES	04/04/2022	$770.00
KIM KLACIK FOR CONGRESS	CONSTANT CONTACT	MA	SOFTWARE SERVICES	03/28/2022	$132.50
KIM KLACIK FOR CONGRESS	BB&T BANK	NC	BANK FEES	03/21/2022	$15.00

Results per page: 30

Showing 1 to 30 of 129 entries

Attachment #3

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

KIMBERLY KLACIK	)	
	)	
Plaintiff.	)	
v.	)	**Case No. 21C1607**
	)	**JURY DEMANDED**
CANDACE OWENS	)	
	)	
Defendant.	)	

OPPOSITION TO DEFENDANT CANDACE OWENS'S APPLICATION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDERS AND TO STAY DISCOVERY PENDING APPEAL

I. INTRODUCTION

Defendant's Application for Permission to Appeal Interlocutory Orders and to Stay Discovery Pending Appeal ("Application") seeks interlocutory review of two discrete issues. First, Defendant seeks review of what constitutes a "prima facie case" as that term is used pursuant to the Tennessee Public Participation Act ("TPPA"). Second, Defendant seeks review of what factors are to be considered to establish "good cause" to permit limited discovery in the context of a pending motion to dismiss pursuant to the TPPA.

Defendant also moves this court for a stay of limited discovery, despite this Court's ruling that a is not warranted under the circumstances. Plaintiff has not make the requisite showing under Tenn. R. App. P. 9(a) as to the questions upon which she seeks interlocutory review, and similarly has not established that a total stay of discovery is warranted. Defendant's Application should thus be denied.

II. ARGUMENT

A. Legal Standard

Under Tennessee Rule of Appellate Procedure 9(a), "[i]n determining whether to grant permission to appeal," the trial court considers: (1) "the need to prevent irreparable injury;" (2) "the need to prevent needless, expensive, and protracted litigation;" and (3) "the need to develop a uniform body of law." Tenn. R. App. P. 9(a). These factors are "neither controlling nor fully measuring the courts' discretion," *id*, and "[a] trial court's discretionary decision must take into account applicable law and be consistent with the facts before the court," *Bailey v. Champion Window Co. Tri-Cities, LLC*, 236 S.W.3d 168, 172 (Tenn. Ct. App. 2007) (citing *Overstreet v. Shoney's, Inc*., 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)). Finally, an interlocutory appeal is an exception to the general rule which requires a final judgment before a party may appeal as of right. Accordingly, "[i]nterlocutory appeals to review pretrial orders or rulings are generally disfavored." *State v. McKim*, 215 S.W.3d 781, 190 (Tenn. 2007) (citing *Reid v. State*, 197 S.W.3d 694, 699 (Tenn. 2006)).

B. Plaintiff, not Defendant, will Continue to Suffer Irreparable Injury if Immediate Review is Allowed

In considering the first factor under Rule 9(a), courts give "consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective." Tenn. R. App. P. (9)(a). Here, Defendant alleges that, if interlocutory review is not allowed, she will suffer "an irreparable injury that can never be reviewed in the normal course." (Appl. at 9). However, Defendant concedes that the "the severity of that injury (discovery expense) is admittedly minor." (*Id*.) Thus, Defendant admits that she will not suffer irreparable injury if interlocutory review is not permitted. Indeed, it is well settled that monetary harm, standing alone, does not constitute irreparable injury. *Interox Am. v. PPG*

Indus., Inc., 736 F.2d 194, 202 (5th Cir.1984) ("An injury is irreparable if it cannot be undone through monetary remedies.")[1].

Plaintiff, by contrast, has and will continue to suffer irreparable harm if interlocutory review is granted and all discovery is stayed. The entirety of Plaintiff's action is based on the false, damaging statements Defendant broadcast to her millions of followers. (*See generally* Compl.) And, since Defendant published the defamatory statements described in the Complaint, Plaintiff continues to suffer harassment from Defendant's fans and supporters, and has lost speaking engagements and business opportunities. (Opp. to Pet. to Dismiss, Klacik Aff. ¶¶ 13-16). If interlocutory review is granted, and discovery is stayed, Plaintiff's injuries will only compound, and the reputational harm Defendant has caused is indisputably irreparable in both legal and practical terms. *See NuLife Ventures, LLC. v. AVACEN, Inc*., No. E202001157COAR3CV, 2021 WL 1421201, at *7 (Tenn. Ct. App. Apr. 15, 2021) (reversing denial of injunctive relief on the basis that there was no irreparable harm because "the damage to [plaintiff's] credibility and reputation cannot be easily quantified in terms of money." (citing *Reitz v. City of Mt. Juliet*, No. M2016-02048-COA-R3-CV, 2017 WL 3879201, at *3 (Tenn. Ct. App. Aug. 31, 2017) (explaining that damages for loss of reputation are disfavored in breach of contract actions as nonquantifiable and speculative).

Because Defendant has not, and cannot, establish irreparable harm, and Plaintiff will continue to suffer irreparable harm if review is allowed, this factor militates against granting Defendant's Application.

[1] All out-of-state and unpublished cases have been attached as collective Exhibit C.

C. Immediate Appellate Review will Cause a More Protracted Litigation

In considering the second factor under Rule 9(a), courts give "consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed." Tenn. R. App. P. (9)(a).

Defendant argues that interlocutory review is warranted because (1) "if appellate review concludes that actual malice has been negated on the present record, then this litigation will end entirely," (Appl. at 7), and (2) "[i]f the Defendant's position that the relevant [good cause] standard [under the TPPA] has not been satisfied prevails, then review of this Court's order authorizing discovery will be ineffective upon entry of final judgment," (Appl. at 9). Defendant's position is flawed for several reasons.

First, Defendant is not seeking interlocutory review on whether "actual malice has been negated on the present record." Rather, Defendant is seeking review "regarding the following question: When a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what quantum of evidence must a litigant introduce to satisfy or negate the [TPPA's] 'prima facie' standard?" (Appl. at 7). Based on the question Defendant seeks to ask the appellate courts, this litigation will not "end entirely," no matter what decision is rendered. Instead, any appellate decision answering Defendant's question will necessarily require ***this Court*** to review the evidence obtained through limited discovery, and this Court will, in any event, be required to make a determination as to whether Plaintiff has carried her prima facie burden in response to Defendant's Petition to Dismiss.

Second, and similarly, Defendant is requesting to seek review regarding "[w]hat factors govern a trial court's determination to 'allow specified and limited discovery relevant to the

petition upon a showing of good cause' under [the TPPA], and has the Plaintiff made that showing here?" As with the request for review regarding the prima facie standard, Plaintiff's proposed to question to the Appellate Court may require this Court to make a determination in the first instance whether the "good cause" standard was met. Although Defendant does plan to request that the Appellate Court make a finding that Plaintiff did not carry her burden, the TPPA provides that the decision whether to allow limited discovery is discretionary, and an Appellate Court would therefore be in an inferior to make such a determination when compared to this Court. *See* Tenn. Code Ann. § 20-17-104(d) ("The court ***may*** allow specified and limited discovery relevant to the petition upon a showing of good cause.") (emphasis added).

Finally, this Court's determination that Plaintiff showed good cause to conduct limited discovery is unlikely to be overturned. Like the TPPA, the California anti-SLAPP statute contemplates that "for good cause shown, [the court] may order that specified discovery be conducted" notwithstanding the general stay of discovery upon the filing of a special motion to strike. *See* Cal. Civ. Code § 425.16(g). The opportunity to conduct limited discovery in response to an anti-SLAPP motion "is of prime import in a libel suit against a media defendant who will generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to learn whether the matter published was false and defamatory." *Lafayette Morehouse, Inc. v. Chron. Publ'g Co*., 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (1995).

If a plaintiff establishes in response to an anti-SLAPP motion "that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff ***must be given*** the reasonable opportunity to obtain that evidence through discovery before the motion to strike

is adjudicated." *Id*. (emphasis added). "The trial court, therefore, ***must liberally exercise its discretion by authorizing reasonable and specified discovery*** timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees." *Id*. (emphasis added).

Here, this Court determined that "the Plaintiff needs fact discovery on the issue of actual malice in order to get into the details that are required for the plaintiff to make a prima facie case for actual malice." (**Exhibit B**, 59:10-14). This Court thus recognized that Plaintiff's need for expedited discovery constituted a good cause because, without early discovery, this Court is unable to render a decision as to whether Plaintiff can meet her prima facie burden to show that Defendant acted with actual malice. The standard for what constitutes good cause should not reasonably be in dispute, this Court correctly exercised its discretion in allowing limited discovery, and interlocutory review is thus unwarranted.

If, by contrast, interlocutory review is permitted, the timeline for a resolution of Plaintiff's claim will be thrust into uncertainty, and will almost certainly lead to piecemeal appellate review of this action. Moreover, even if the Appellate Court renders a decision favorable to Defendant, the parties will, in all likelihood, be right back before this Court as if they never left. Judicial economy therefore weighs against granting Plaintiff's Application.

D. There is Not a Need to Develop a Uniform Body of Law, Because a Uniform Body of Law already Exists

In considering the final factor under Rule 9(a), courts give "consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment." Tenn. R. App. P. (9)(a). Defendant asserts that it seeks "review regarding the following question: When a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what

quantum of evidence must a litigant introduce to satisfy or negate [the TPPA's] 'prima facie' standard?" (Appl. at 7). Interlocutory review of this question is not warranted. [2]

The first part of Defendant's question is already explicitly addressed in the TPPA. Indeed, the TPPA provides that "[i]f the petitioning party meets this burden, the court shall dismiss the legal action unless the responding party establishes a ***prima facie case for each essential element of the claim in the legal action***." Tenn. Code Ann. § 20-17-104(d). The entire first half of Defendant's proposed question is already answered by statute and, as contemplated by this Court, the actual question is: "[W]hat quantum of evidence must a litigant introduce to satisfy or negate [the TPPA's] 'prima facie' standard?"[3] In that regard, a well-established body of law exists, and interlocutory review is unwarranted.

Defendant suggests that the application of "prima facie," as that term is used in the TPPA is elevated in this action to the burden of proof Plaintiff must carry at trial. (*See* Appl. at 2-7). Specifically, Defendant cites to a judicial decision that "adjudicated a TPPA petition in an actual malice case . . .by referencing a 'clear and convincing standard." (*Id.* at 6 (citing *Lee v. Mitchell et al.*, Case No. 2020-CV-50 (Overton Cty, Tenn. Cir. Ct. Dec. 10, 2021)). Certainly, this cannot be the standard, as forcing the plaintiff in an "actual malice" case to prove her cause of action by

[2] Plaintiff recognizes that this Court has already indicated that it believes guidance from Tennessee Appellate Courts with respect to the "prima facie" standard under the TPPA is necessary. However, Plaintiff includes the following section in the interest of completeness and to preserve the record in this action.

[3] Plaintiff notes that Defendant is seeking appellate review of a substantive provision of the TPPA that, in Plaintiff's estimation, does not apply. As this Court is aware, Plaintiff argued in opposition to Defendant's Petition to Dismiss that Maryland, not Tennessee, substantive law applies under the circumstances of this action, and Plaintiff maintains that position now. Although the procedural portions of the TPPA may govern, it is not uncommon for federal courts to apply the Federal Rules of Civil Procedure and the ***substantive*** portions of a state's anti-SLAPP statute when sitting in diversity. *See, e.g. Containment Techs. Grp., Inc. v. Am. Soc. of Health Sys. Pharmacists*, No. 1:07-CV-0997DFHTAB, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26, 2009) ("The [Indiana] anti-SLAPP statute provides a complete defense to defamation and also provides the remedy of attorney fees to a victorious defendant. These are substantive provisions of Indiana law that govern in this diversity jurisdiction case. The court [thus] applies both Rule 56 of the Federal Rules of Civil Procedure and the substantive portions of the Indiana Anti–SLAPP statute, including the substance of the defense and the attorney fee remedy.").

clear and convincing evidence at such an early stage in the proceedings, and without the limited discovery on the issue of actual malice that this Court permitted and which is contemplated by the TPPA itself, would be unworkable. Indeed, while Plaintiff recognizes that the question of whether a defendant acted with actual malice is a question of law, the answer to that question is extraordinarily fact-dependent. *See Trigg v. Lakeway Publishers, Inc*., 720 S.W.2d 69, 74 (Tenn.Ct.App.1986) (Where the actual malice standard applies, the "burden is upon plaintiff to show with convincing clarity ***the facts which make up the actual malice***." (internal quotation marks omitted); *Piper v. Mize*, No. M2002–00626–COA–R3–CV, 2003 WL 21338696, at *7 (Tenn.Ct.App. June 10, 2003) (When reviewing a grant of summary judgment to a defendant in an actual malice case, the court must "determine, not whether there is material evidence in the record supporting [the plaintiff], but ***whether or not the record discloses clear and convincing evidence upon which a trier of fact could find actual malice***.").

Here, while Plaintiff presented evidence on the elements of actual malice, this Court ruled that limited discovery on this issue was appropriate before fully adjudicating the TPPA petition. In such circumstances, courts have determined that holding a plaintiff to a "clear and convincing" standard in connection with an anti-SLAPP motion is constitutionally prohibited. For example, the Supreme Court of Minnesota recognized that its anti-SLAPP statute required "the responding party to "produce[ ] ... evidence" (the burden of production) that persuades the district court by a "clear and convincing" standard (the burden of persuasion) that the moving party's acts are not immune under the anti-SLAPP law." *Leiendecker v. Asian Women United of Minnesota*, A16-0360, 2017 WL 2267289 (Minn. 2017) (alterations in original). There, the court determined that "[t]he law provides the district court with two options to resolve a motion to dismiss. The district court could decide that the responding party failed to show by clear and

convincing evidence that the moving party engaged in tortious conduct. This determination would require dismissal of the suit under the anti-SLAPP law, thus precluding a jury trial. Alternatively, the district court could decide that the responding party *did* show by clear and convincing evidence that the moving party engaged in tortious conduct. This conclusion would also arguably preclude a jury trial." *Id*.

In a similar case, the Washington Supreme Court agreed. That court determined that Washington's anti-SLAPP law violated Washington's constitutional jury-trial guarantee. *Davis v. Cox*, 183 Wash.2d 269, 351 P.3d 862, 871, 874 (2015). Like Minnesota's anti-SLAPP law, the Washington law's requirement that the responding party "establish by clear and convincing evidence a probability of prevailing on the claim," Wash. Rev. Code § 4.24.525 (2014), "invades the jury's essential role of deciding debatable questions of fact," *Davis*, 351 P.3d at 874.

Here, the "prima facie" burden, as used under the TPPA, necessarily cannot mean "clear and convincing," as Defendant suggests. While not necessarily well-established in Tennessee, courts in other jurisdictions with similar anti-SLAPP statutes have had little difficulty applying the "prima facie" burden of proof. For example, under Nevada law, like the TPPA, a special motion to dismiss under Nevada's anti-SLAPP statute should be granted where the defendant shows that the claim is based upon a good-faith communication in furtherance of the right to petition or the right to free speech regarding a matter of public concern, NRS 41.600(3)(a), and the plaintiff cannot show with "prima facie evidence a probability of prevailing on the claim," NRS 41.660(3)(b). In applying the plaintiff's burden under the "prima facie" standard, the Nevada Supreme Court has held that a court must determine "whether her claims had minimal merit." *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020). The Nevada Supreme Court has further held that the "minimal merit" standard "serves to ensure that the anti-SLAPP

statutes protect against frivolous lawsuits designed to impede protected public activities without striking legally sufficient claims." *Id*.

Similarly, under the California anti-SLAPP law, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733 (2002). The California Supreme Court, in applying the prima facie standard, concluded that "[o]nly a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and ***lacks even minimal merit***—is a SLAPP, subject to being stricken under the statute." *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) (emphasis added); *see also Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 306 Ga. 252, 263 (2019) (applying the "minimal merit" standard articulated in *Navellier* to Georgia's anti-SLAPP law, and stating that "[o]nly a claim that satisfies both prongs of the anti-SLAPP statute — i.e., that arises from protected [activity] and lacks even minimal merit — is a SLAPP that is subject to being stricken.") (internal quotation marks omitted) (alteration in original).

While other jurisdictions have not expressly held that "prima facie" equates to "minimal merit," several courts have determined that, in the context of anti-SLAPP litigation, "prima facie" is a considerably low burden. *See, Camden Nat. Bank v. Weintraub*, 2016 ME 101, ¶ 11, 143 A.3d 788, 793 (2016) ("The showing required by the [anti-SLAPP] statute is a prima facie case, and production of some evidence is enough to satisfy this burden. Prima facie evidence requires only some evidence on every element of proof necessary to obtain the desired remedy. Thus, prima facie proof is a low standard that does not depend on the reliability or the credibility of evidence, all of which may be considered at some later time in the process."); *Zweizig v. Nw.*

Direct Teleservices, Inc., No. 3:15-CV-02401-HZ, 2016 WL 5402935, at *6 (D. Or. Sept. 24, 2016), aff'd sub nom. *Zweizig v. Rote*, 818 F. App'x 645 (9th Cir. 2020) "Only claims that entirely lack merit under that forgiving [prima facie] standard [under Oregon's anti-SLAPP statute] are to be stricken at the second step of the two-step process.").

The other jurisdictions that have considered the "prima facie" showing a plaintiff must make under their respective anti-SLAPP statutes have had little difficulty articulating the governing evidentiary standard. As such, interlocutory review of what constitutes a "prima facie case" pursuant to the TPPA is unwarranted.

E. The Limited Discovery Already Permitted Should Not be Stayed

This Court ordered "that specified and limited discovery regarding the issue of actual malice is warranted under Tenn. Code Ann. § 20-17-104(d)." (**Exhibit A**, ¶ 8). "Accordingly, the Court **DISSOLVE[D]** Tenn. Code Ann. § 20-17-104(d)'s stay of discovery regarding the limited issue of actual malice, and a ruling on whether the Plaintiff has met her prima facie burden under Tenn. Code Ann. During the hearing on Defendant's Petition, the parties addressed at length whether § 20-17-105(b) [was] **DEFERRED** pending specified and limited discovery on the issue of actual malice." (*Id*.)

During the hearing on Defendant's Petition, the parties argued at length whether the limited discovery ordered by this Court should be stayed pending appeal to the Tennessee Court of Appeals. (*See generally*, **Exhibit B**, at 68-83). The arguments Defendant makes in connection with its request for a stay of discovery in her Application were also addressed at the hearing on Defendant's Petition. (*Compare id*. *with* Appl. at 10-11). Ultimately, this Court disagreed that a stay of discovery was warranted, and determined that "taking limited discovery can go along

with taking at Rule 9 application" and this Court permitted "the limited discovery" regarding actual malice, including "tak[ing] depositions." (*Id*. at 81:25-82:1-3).

Moreover, at the hearing on Defendant's Petition, Defendant's counsel stated that Defendant would "probably within [the instant] motion ask to stay discovery" in order to "allow [Defendant] to ask the Court of Appeals" to impose the requested stay. (*Id*. at 83:9-14). This Court recognized that the Court of Appeals, in its discretion, could impose the requested stay. (*Id*. at 83:15-16). However, as Defendant recognizes, "questions of stay or continuance are matters entrusted to the sound discretion of the trial judge." (Appl. at 10 (quoting *Sanjines v. Ortwein & Assocs., P.C.*, 984 S.W.2d 907, 909 (Tenn. 1998)). This Court should not alter its existing ruling that limited discovery in this case may proceed during the pendency of an appeal, as Defendant has not presented this Court with any additional reasons to stay discovery that were not already presented at the hearing.

III. CONCLUSION

For the foregoing reasons, Defendant's Application should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent via the court's efiling system to:

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Dated: March 14, 2022

s/Daniel D. Choe
Daniel D. Choe

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

KIMBERLY KLACIK	)	
	)	
Plaintiff.	)	
v.	)	**Case No. M2022-00398-COA-R9-CV**
	)	**Trial Court Case No. 21C1607**
	)	
CANDACE OWENS	)	
	)	
Defendant.	)	

ANSWER IN OPPOSITION TO DEFENDANT CANDACE OWENS'S APPLICATION TO APPEAL BY PERMISSION OF THE TRIAL COURT

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Date: April 7, 2022

I. INTRODUCTION

Defendant's Application to Appeal by Permission of the Trial Court ("Application") seeks interlocutory review of two discrete issues. First, Defendant seeks review of what constitutes a "prima facie case" as that term is used pursuant to the Tennessee Public Participation Act ("TPPA"). Second, Defendant seeks review of what factors are to be considered to establish "good cause" to permit limited discovery in the context of a pending motion to dismiss pursuant to the TPPA.

Despite the fact that the Circuit Court granted Defendant's request for interlocutory review, this Court should deny the Application. At the outset, Defendant does not expressly address the factors that this Court considers in assessing a Rule 9 Application. However, notwithstanding Defendant's failure to address the relevant factors, each weighs against interlocutory review. First, Defendant has not, and cannot, establish that she will suffer irreparable injury if interlocutory review is denied. By contrast, given the nature of Plaintiff's underlying claims, ***Plaintiff*** will suffer irreparable harm if litigation is delayed pending this Court's review.

Second, resolution of the questions presented for review will not aid in preventing needless, protracted litigation. Instead, interlocutory review of the questions presented will only lead to piecemeal appellate review of the issues presented in this action, and will only serve to delay Plaintiff's opportunity to have her case decided on the merits. Finally, while Plaintiff concedes that the issues presented for review have not been affirmatively decided by this Court, courts in other jurisdictions with anti-SLAPP statutes similar to the TPPA have developed a uniform body of law regarding the issues Defendant presents in her Application.

For the foregoing reasons, and as fully explained herein, Defendant's Application should be denied.

II. STATEMENT OF ADDITIONAL FACTS

Plaintiff respectfully submits that Defendant's Statement of Facts omits material information relevant to this Court's consideration of Defendant's Application. Plaintiff thus submits the following background to supplement the Statement of Facts contained in Defendant's Application.

1. Plaintiff's Complaint

Defendant's recitation of the allegations in Plaintiff's Complaint is presented to this Court not as "a statement of the facts necessary to an understanding of why an appeal by permission lies," *see* Tenn. R. App. P. 9(d), but rather is framed based on Defendant's skewed interpretation of Plaintiff's allegations. As such, Plaintiff provides this Court with a more accurate description of her Complaint to aid this Court in determining whether interlocutory review is warranted.

Plaintiff filed her Complaint asserting a single claim for defamation against Defendant on September 17, 2021. (*See generally*, **Exhibit 1**, Compl.) Plaintiff alleged that, on June 18, 2021, Defendant launched a series of posts from her personal twitter account assailing President Biden for declaring Juneteenth a federal holiday. (*Id*. ¶ 18). Plaintiff replied on her personal Twitter account to Defendant's post, stating: "Believe it or not, many in 'Black America' are very aware the fight is about classism rather [than] racism. Unfortunately, the loudest mouths with the largest platforms represent the majority. This might come to a shock to you because of your lack of engagement with black people." (*Id*. ¶ 19). Following several posts social media posts

regarding Plaintiff, on June 22, 2021, Defendant published a live video (the "Video") on Defendant's Instagram and Facebook accounts. (*Id*. ¶ 24).

In the Video, the Defendant affirmatively accuses Ms. Klacik of engaging in criminal activity. Specifically, Plaintiff alleged that Defendant made bald untrue allegations that include Ms. Klacik "used campaign money to do cocaine," participated in "money laundering, tax fraud, and campaign fraud," paid vendors in order to "move money off the books," "was the person who helped bring a lot of strippers" into a strip club that Defendant alleges was owned by Ms. Klacik's estranged husband, was a "madame of that strip club," and "has been scamming people for millions." ("Criminal Allegations"). (*Id*. ¶ 25). Plaintiff further alleged that Defendant, when making the Criminal Allegations, acknowledged the accusations were regarding "federal crimes," would "paint [Ms. Klacik] in the wrong light," and Defendant's investigation into Ms. Klacik was motivated by a "petty Twitter feud" between Defendant and Plaintiff. (*Id*. ¶ 26).

Additionally, and importantly, Plaintiff alleged that Defendant publicized the Criminal Allegations without factual support. Defendant's main evidence for the Criminal Allegations purportedly came from "a stripper who used to work with [Ms. Klacik]" and who supposedly told Defendant that *some* of the Criminal Allegations were true. (*Id*. ¶ 27). Plaintiff also alleged that Defendant admitted that she "had no proof," "cannot possibly verify" and "could not confirm" the Criminal Allegations, but that "[n]evertheless Defendant continued to publish and republish as fact that Ms. Klacik engaged in criminal activity and that Defendant's 'investigation' supported these claims." (*Id*. ¶ 28). Defendant thus alleged that Plaintiff's claims were false and defamatory because" (1) Plaintiff was never a "madame;" (2) Plaintiff never used campaign funds for any illegal activity, including drug use; (3) Plaintiff never committed campaign fraud, tax fraud, or money laundering; and (4) Plaintiff did not make any payments on

behalf of her political campaign to any individual or business entity for improper or illegal reasons. (*Id*. ¶ 29).

Based on the publication of the Criminal Allegations, Plaintiff alleged that she had, and has, suffered continuous harassment, reputational damage, and lost business opportunities. (*Id*. ¶¶ 35-40). Thus, Plaintiff filed a single cause of action against Defendant for defamation based on Defendant publishing the Criminal Allegations, with knowledge of their falsity or with reckless disregard for their truth, and the resulting harm that Plaintiff suffered. (*See generally, id*.)

2. Defendant's Tennessee Public Participation Act Petition and Plaintiff's Opposition Thereto

Defendant filed her Petition pursuant to the TPPA arguing, in part, that Plaintiff's Complaint should be dismissed because Defendant produced sufficient evidence to establish that she did not publish the Criminal Allegations with actual malice. (Appl. Ex. 3 at 40-09). As articulated by Defendant in her Application, the "evidence" precluding a finding of actual malice falls into a few main categories. First, Defendant alleges that she introduced "uncontested and admissible evidence" that she had reached out to Plaintiff for comment before reporting at the allegations at issue, but in that response, the Plaintiff refused to answer questions or to be interviewed regarding them. (Appl. at 5-6). Second, Defendant alleges that she introduced "uncontested and admissible evidence" that the Criminal Allegations were "recounted . . . from a source who represented that she had personal knowledge of them." (*Id*. at 7). Third, Defendant alleges that Plaintiff later "admitted that . . . [she] had worked as a stripper" and this alleged admission "confirm[ed] the reliability of [Defendant's] source . . ." (*Id*. at 7-8). Fourth, Defendant alleges that, following the publication of the Criminal Allegations, "several of the allegations that [Defendant] had recounted were confirmed as true by independent reporting."

(*Id*. at 8). Finally, Defendant alleges that, following the publication of the Criminal Allegations, the Federal Election Commission "determined that the Plaintiff had committed extensive federal campaign finance violations . . ." (*Id*.)

Defendant fails to inform this Court that, in support of her Petition, Defendant attached an exhibit which she only describes as "Source Correspondence." (*See* Appl., Ex. 3 at 11, n. 12 (citing Petition, Ex. J)). Although Defendant did not submit Exhibit J to her Petition in support of her Application, Exhibit J is a copy of an incomplete, heavily-redacted text message conversation that lacks any context, but makes several damning accusations against Plaintiff, including that Plaintiff had been "misleading millions with lies since the start of her campaign." (*See* **Exhibit 2**, Pet., Ex. J). Notwithstanding that Defendant attached a redacted message ostensibly from her "anonymous source" to her Petition to the Circuit Court, Defendant posted the same message from the same individual on Defendant's social media account but without any redaction of that particular message. In that message, the individual claims Plaintiff "knows exactly who I am, but I'd prefer you kept my name out of it." (*See* **Exhibit 3**, Plaintiff's Opposition to Defendant's Pet., Ex. B). In that same message, the individual states that Plaintiff's "campaign funds . . . went up her nose" and that the individual has "a lot, but nothing comes for free." (*Id*.) Defendant did not inform the Circuit Court, or this Court, that her "anonymous source" offered Defendant "a lot" regarding Plaintiff that was expressly conditioned on Defendant providing compensation for the alleged information in the "anonymous source's" possession. To make matters worse, what Defendant told her viewers was not even what the "anonymous source" told *her*. Defendant stated in her video that her "anonymous source" told her that Plaintiff "and her husband had been scamming people for millions…" (Compl., Ex. 1, 14:2), but the so-called source said no such thing. (*See* **Exhibit** 2, Pet., Ex. J).

Similarly, in an attempt to "prove" that Plaintiff was formerly a stripper, Defendant posted images of Plaintiff (not stripping or purporting to do so) along with an image of an African American woman (who happens to be on reality TV) who was dancing on a pole. Ms. Klacik testified in her affidavit:

> As part "evidence" against me, Ms. Owens posted some photos on Instagram Story. Two of those photos were photos I posted on my Instagram account. Neither of those photos depicted me stripping. In the same post, however, she included a photo of one of the stars of Real Housewives of Atlanta dancing on a pole when she was apparently stripping. That woman is not me. A simple Google search demonstrates that the photo is not me. "Instagram Stories" disappear from public view after a certain amount of time; to my understanding, Ms. Owens is the only person who can access that post at this time. (Appl., Ex. 6 ¶ 12).

Moreover, although Defendant accuses Plaintiff of taking her "reporting" out of context, Defendant is the one who cherry-picked and submitted incomplete information in support of her Petition. For example, Defendant asserted that "Plaintiff admitted that it was, indeed 'true' that she had worked as a stripper . . ." (**Exhibit 2**, Pet. at 46). However, Defendant misrepresented a portion of a transcript from an interview that is taken completely out of context. Plaintiff's statement was in response to a question asking about the "***allegations*** about [Plaintiff] being a former stripper . . ." (Compl., Ex. 4, 5:23-25, 6:1-16). Plaintiff never "admitted" that she worked as a stripper. Rather, she "admitted" that those allegations had been made.

Defendant also brushes aside the Affidavit submitted in support of Plaintiff's Opposition to Defendant's Petition. Although Defendant argues that it "contained no admissible evidence of actual malice," (Appl. at 8), Plaintiff's Affidavit affirmatively rebuffed each of Defendant's arguments regarding her alleged "evidence" negating actual malice. For example, Plaintiff declared, under penalty of perjury, that she "was never a 'Madame' of any strip club," and that she "never lured or recruited women to work at any strip club. (Appl., Ex. 6 ¶ 7). Plaintiff also

declared that she "never used campaign funds for any illegal activity, including drug use," "did not 'scam' anyone for money," and "never committed campaign fraud, tax fraud, or money laundering." (*Id*. ¶¶ 8-11).

Importantly, Plaintiff also declared that Defendant's "allegation that [Plaintiff] laundered campaign money through a strip club during [her] campaign . . . could not have been true because nightclubs and bars, including but not limited to strip clubs, were closed during [her] campaign because of Governmental orders related to COVID-19." (*Id*. ¶ 10). Plaintiff also declared that Defendant published the Criminal Allegations "with a reckless disregard for their truth" because, *inter alia*, the Criminal Allegations were based "on an 'anonymous source' who demanded money from [Defendant] for his or her 'information.'" (*Id*. ¶ 17).

In short, Plaintiff submitted evidence in response to Defendant's Petition showing that (1) the Criminal Allegations were false, and (2) Defendant published the Criminal Allegations with reckless disregard for the truth of the same. Additionally, with respect to the "evidence" Defendant posits negates Plaintiff's claim that the Criminal Allegations were published with actual malice, Plaintiff pointed out that Defendant had submitted over one-hundred pages worth of exhibits to her Petition, yet did the absolute bare minimum to authenticate the same. (**Exhibit 3**, Plaintiff's Opposition to Defendant's Pet. at 22). Plaintiff alerted the court to the fact that, Defendant submitted a scant affidavit that merely asserted that the exhibits appended to her Petition are "authentic," they "helped inform [her] reporting regarding" Plaintiff, and "helped inform her belief that Plaintiff Kimberly Klacik is not credible." (*Id*.) However, Defendant did not describe the substance of source of any of the exhibits, and did not substantiate any of the arguments in her Petition. (*Id*.)

3. Plaintiff's Request for Permission to Take Limited Discovery

In her Opposition to Defendant's Petition, Plaintiff requested that the Court permit limited discovery pursuant to Tenn. Code Ann. § 20-17-104(d), which provides that, when a party files a Petition to Dismiss pursuant to the TPPA, "[t]he court may allow specified and limited discovery relevant to the petition upon a showing of good cause." (Appl., Ex. 5 at 21). Plaintiff asserted that good cause existed to conduct limited discovery to explore the veracity of the allegations in Defendant's Petition, including to explore the factual allegations surrounding Defendant's "anonymous" source. (*Id*. at 22). Plaintiff also renewed her request during the hearing on Defendant's Petition. (*See* Appl. at 10 (quoting, Ex. 4 at Attach. 1, 39:9-40:3)).

The Court granted Plaintiff's request, determining that the hearing on Defendant's Petition qualified as a trial within the meaning of Tenn R. Civ. P. 7.02(1), and that good cause existed to allow limited discovery regarding the issue of actual malice. (*See* Appl. at 10-11).

Defendant takes issue with Plaintiff's allegedly "broad" Requests for Production of Documents and Interrogatories, yet Defendant does not explain how Plaintiff's discovery requests are impermissibly overbroad. (Appl. at 23). To the contrary, Plaintiff's discovery requests are all related to the issue of actual malice, and are directly related to the "evidence" Defendant submitted in connection with her Petition. (*See generally,* Appl., Ex. 8). For example, Plaintiff requested: "All Communications between [Defendant] and Liz Matory regarding [Plaintiff]." (*Id*., Request for Production No. 19). In support of her Petition, Defendant alleged that her statements in the Video "cannot be defamatory" because similar allegations "have been widely reported and made by any number of people, including one of the Plaintiff's primary opponents." (**Exhibit 2**, Pet. at 31). In support of Defendant's allegation, Defendant attached to her petition a host of social media posts made by Liz Matory. (*Id*., Ex. K). Certainly, any

communications between Defendant and Ms. Matory are relevant to whether Defendant made the statements in the Video with actual malice.

In reality, it appears that Defendant requested a stay of discovery, and has challenged Plaintiff's discovery requests as overbroad to prevent Plaintiff from having her claim heard on its merits. As Defendant admits, testing the veracity of Defendant's assertion that she published the statements without actual malice is precisely why the Circuit Court determined it was appropriate for the parties to "take 'depositions' regarding the limited issue of actual malice in order to enable the Court to make a credibility determination." (Appl. at 10-11). Notwithstanding the determination and direction from the Circuit Court, sitting for a deposition does not appear to be something that Defendant is inclined or willing to do.

III. ARGUMENT

1. Legal Standard

Under Tennessee Rule of Appellate Procedure 9(a), "[i]n determining whether to grant permission to appeal," the court considers: (1) "the need to prevent irreparable injury;" (2) "the need to prevent needless, expensive, and protracted litigation;" and (3) "the need to develop a uniform body of law." Tenn. R. App. P. 9(a). These factors are "neither controlling nor fully measuring the courts' discretion," *id*, and "[a] trial court's discretionary decision must take into account applicable law and be consistent with the facts before the court," *Bailey v. Champion Window Co. Tri-Cities, LLC*, 236 S.W.3d 168, 172 (Tenn. Ct. App. 2007) (citing *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)). Finally, an interlocutory appeal is an exception to the general rule which requires a final judgment before a party may appeal as of right. Accordingly, "[i]nterlocutory appeals to review pretrial orders or rulings are generally

disfavored." *State v. McKim*, 215 S.W.3d 781, 190 (Tenn. 2007) (citing *Reid v. State*, 197 S.W.3d 694, 699 (Tenn. 2006)).

2. Plaintiff, not Defendant, will Continue to Suffer Irreparable Injury if Immediate Review is Allowed

In considering the first factor under Rule 9(a), courts give "consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective." Tenn. R. App. P. (9)(a). Here, Defendant only alleges that, if interlocutory review is not allowed, she will suffer "an irreparable injury that can never be reviewed in the normal course." (Appl. at 21). However, Defendant does not expand on what irreparable injury she will suffer if interlocutory review is not granted. To the extent Defendant asserts that she will suffer monetary injury if review is not granted, it is well settled that monetary harm, standing alone, does not constitute irreparable injury. *Interox Am. v. PPG Indus., Inc.*, 736 F.2d 194, 202 (5th Cir.1984) ("An injury is irreparable if it cannot be undone through monetary remedies.")[1].

Plaintiff, by contrast, has and will continue to suffer irreparable harm if interlocutory review is granted and all discovery is stayed. The entirety of Plaintiff's action is based on the false, damaging statements Defendant broadcast to her millions of followers. (*See generally* Compl.) And, since Defendant published the defamatory statements described in the Complaint, Plaintiff continues to suffer harassment from Defendant's fans and supporters, and has lost speaking engagements and business opportunities. (**Exhibit 3,** Plaintiff's Opposition to Defendant's Pet., Klacik Aff. ¶¶ 13-16). If interlocutory review is granted, and discovery is stayed, Plaintiff's injuries will only compound, and the reputational harm Defendant has caused is indisputably irreparable in both legal and practical terms. *See NuLife Ventures, LLC. v.*

[1] All out-of-state and unpublished cases have been attached as collective **Exhibit 4**.

AVACEN, Inc., No. E202001157COAR3CV, 2021 WL 1421201, at *7 (Tenn. Ct. App. Apr. 15, 2021) (reversing denial of injunctive relief on the basis that there was no irreparable harm because "the damage to [plaintiff's] credibility and reputation cannot be easily quantified in terms of money." (citing *Reitz v. City of Mt. Juliet*, No. M2016-02048-COA-R3-CV, 2017 WL 3879201, at *3 (Tenn. Ct. App. Aug. 31, 2017) (explaining that damages for loss of reputation are disfavored in breach of contract actions as nonquantifiable and speculative).

Because Defendant has not, and cannot, establish irreparable harm, and Plaintiff will continue to suffer irreparable harm if review is allowed, this factor militates against granting Defendant's Application.

3. Immediate Appellate Review will Cause a More Protracted Litigation

In considering the second factor under Rule 9(a), courts give "consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed." Tenn. R. App. P. (9)(a).

Defendant argues that interlocutory review is warranted because (1) "if this Court concludes that actual malice has been negated on the present record, then this litigation will end entirely," (Appl. at 18), and (2) "[i]f the Defendant's position that the relevant [good cause] standard [under the TPPA] was not satisfied is correct, then review of the Circuit Court's order authorizing discovery will be ineffective upon entry of final judgment," (Appl. at 21). Defendant's position is flawed for several reasons.

First, Defendant is seeking "permission to appeal the following question: When a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what quantum of evidence must a litigant introduce to satisfy or negate [the TPPA's] 'prima

facie' standard?" (Appl. at 19). Based on the question Defendant requests this Court to review, this litigation will not "end entirely," no matter what decision is rendered. Instead, any appellate decision answering Defendant's question will necessarily require ***the Circuit Court*** to review the evidence obtained through limited discovery, and the Circuit Court will, in any event, be required to make a determination as to whether Plaintiff carried her prima facie burden in response to Defendant's Petition to Dismiss.

Second, and similarly, Defendant is requesting to seek review regarding "[w]hat factors govern a trial court's determination to 'allow specified and limited discovery relevant to the petition upon a showing of good cause' under [the TPPA], and has the Plaintiff made that showing here?" (Appl. at 23). As with the request for review regarding the prima facie standard, Plaintiff's proposed to question to this Court may require the Circuit Court to make a determination in the first instance whether the "good cause" standard was met. Although Defendant does plan to request that this Court make a finding that Plaintiff did not carry her burden, the TPPA provides that the decision whether to allow limited discovery is discretionary, and the Circuit Court was, respectfully, in a better position to make that determination. *See* Tenn. Code Ann. § 20-17-104(d) ("The court ***may*** allow specified and limited discovery relevant to the petition upon a showing of good cause.") (emphasis added).

Finally, this Court's determination that Plaintiff showed good cause to conduct limited discovery should not be overturned. Like the TPPA, the California anti-SLAPP statute contemplates that "for good cause shown, [the court] may order that specified discovery be conducted" notwithstanding the general stay of discovery upon the filing of a special motion to strike. *See* Cal. Civ. Code § 425.16(g). The opportunity to conduct limited discovery in response to an anti-SLAPP motion "is of prime import in a libel suit against a media defendant who will

generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to learn whether the matter published was false and defamatory." *Lafayette Morehouse, Inc. v. Chron. Publ'g Co*., 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (1995).

If a plaintiff establishes in response to an anti-SLAPP motion "that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff ***must be given*** the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated." *Id*. (emphasis added). "The trial court, therefore, ***must liberally exercise its discretion by authorizing reasonable and specified discovery*** timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees." *Id*. (emphasis added).

Here, the Circuit Court determined that "the Plaintiff needs fact discovery on the issue of actual malice in order to get into the details that are required for the plaintiff to make a prima facie case for actual malice." (Appl., n. 45). The Circuit Court thus recognized that Plaintiff's need for expedited discovery constituted good cause because, without early discovery, the Circuit Court was unable to render a decision as to whether Plaintiff could meet her prima facie burden to show that Defendant acted with actual malice. The standard for what constitutes good cause should not reasonably be in dispute, the Circuit Court correctly exercised its discretion in allowing limited discovery, and interlocutory review is thus unwarranted.

If, by contrast, interlocutory review is permitted, the timeline for a resolution of Plaintiff's claim will be thrust into uncertainty, and will almost certainly lead to piecemeal appellate review of this action. Moreover, even if this Court renders a decision favorable to

Defendant, the parties will, in all likelihood, be right back before the Circuit Court as if they never left. Judicial economy therefore weighs against granting Plaintiff's Application.

4. <u>There is Not a Need to Develop a Uniform Body of Law, Because a Uniform Body of Law already Exists</u>

In considering the final factor under Rule 9(a), courts give "consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment." Tenn. R. App. P. (9)(a). Defendant asserts that it seeks "permission to appeal the following question: When a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what quantum of evidence must a litigant introduce to satisfy or negate [the TPPA's] 'prima facie' standard?" (Appl. at 19). Interlocutory review of this question is not warranted.

The first part of Defendant's question is already explicitly addressed in the TPPA. Indeed, the TPPA provides that "[i]f the petitioning party meets this burden, the court shall dismiss the legal action unless the responding party establishes a ***prima facie case for each essential element of the claim in the legal action***." Tenn. Code Ann. § 20-17-104(d). The entire first half of Defendant's proposed question is already answered by statute, and the relevant question is: "[W]hat quantum of evidence must a litigant introduce to satisfy or negate [the TPPA's] 'prima facie' standard?"[2] In that regard, a well-established body of law exists to guide the Circuit Court, and interlocutory review is unwarranted.

[2] Plaintiff notes that Defendant is seeking appellate review of a substantive provision of the TPPA that, in Plaintiff's estimation, does not apply. Plaintiff argued in opposition to Defendant's Petition to Dismiss that Maryland, not Tennessee, substantive law applies under the circumstances of this action, and Plaintiff maintains that position now. Although the procedural portions of the TPPA may govern, it is not uncommon for federal courts to apply the Federal Rules of Civil Procedure and the ***substantive*** portions of a state's anti-SLAPP statute when sitting in diversity. *See, e.g. Containment Techs. Grp., Inc. v. Am. Soc. of Health Sys. Pharmacists*, No. 1:07-CV-0997DFHTAB, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26, 2009) ("The [Indiana] anti-SLAPP statute provides a complete defense to defamation and also provides the remedy of attorney fees to a victorious defendant. These are substantive provisions of Indiana law that govern in this diversity jurisdiction case. The court [thus] applies both

Defendant suggests that the application of "prima facie," as that term is used in the TPPA is elevated in this action to the burden of proof Plaintiff must carry at trial. (*See* Appl. 14-18). Specifically, Defendant cites to a judicial decision that "adjudicated a TPPA petition in an actual malice case . . .by reference to a 'clear and convincing standard." (*Id*. at 17 (citing *Lee v. Mitchell et al.*, Case No. 2020-CV-50 (Overton Cty, Tenn. Cir. Ct. Dec. 10, 2021)). Certainly, this cannot be the standard, as forcing the plaintiff in an "actual malice" case to prove her cause of action by clear and convincing evidence at such an early stage in the proceedings, and without the limited discovery on the issue of actual malice that this Court permitted and which is contemplated by the TPPA itself, would be unworkable. Indeed, while Plaintiff recognizes that the question of whether a defendant acted with actual malice is a question of law, the answer to that question is extraordinarily fact-dependent. *See Trigg v. Lakeway Publishers, Inc*., 720 S.W.2d 69, 74 (Tenn.Ct.App.1986) (Where the actual malice standard applies, the "burden is upon plaintiff to show with convincing clarity ***the facts which make up the actual malice***." (internal quotation marks omitted); *Piper v. Mize*, No. M2002–00626–COA–R3–CV, 2003 WL 21338696, at *7 (Tenn.Ct.App. June 10, 2003) (When reviewing a grant of summary judgment to a defendant in an actual malice case, the court must "determine, not whether there is material evidence in the record supporting [the plaintiff], but ***whether or not the record discloses clear and convincing evidence upon which a trier of fact could find actual malice***.").

Here, while Plaintiff presented evidence on the elements of actual malice, the Circuit Court ruled that limited discovery on this issue was appropriate before fully adjudicating the TPPA petition. In such circumstances, courts have determined that holding a plaintiff to a "clear

Rule 56 of the Federal Rules of Civil Procedure and the substantive portions of the Indiana Anti–SLAPP statute, including the substance of the defense and the attorney fee remedy.").

and convincing" standard in connection with an anti-SLAPP motion is constitutionally prohibited. For example, the Supreme Court of Minnesota recognized that its anti-SLAPP statute required "the responding party to "produce[ ] ... evidence" (the burden of production) that persuades the district court by a "clear and convincing" standard (the burden of persuasion) that the moving party's acts are not immune under the anti-SLAPP law." *Leiendecker v. Asian Women United of Minnesota*, A16-0360, 2017 WL 2267289 (Minn. 2017) (alterations in original). There, the court determined that "[t]he law provides the district court with two options to resolve a motion to dismiss. The district court could decide that the responding party failed to show by clear and convincing evidence that the moving party engaged in tortious conduct. This determination would require dismissal of the suit under the anti-SLAPP law, thus precluding a jury trial. Alternatively, the district court could decide that the responding party *did* show by clear and convincing evidence that the moving party engaged in tortious conduct. This conclusion would also arguably preclude a jury trial." *Id.*

In a similar case, the Washington Supreme Court agreed. That court determined that Washington's anti-SLAPP law violated Washington's constitutional jury-trial guarantee. *Davis v. Cox*, 183 Wash.2d 269, 351 P.3d 862, 871, 874 (2015). Like Minnesota's anti-SLAPP law, the Washington law's requirement that the responding party "establish by clear and convincing evidence a probability of prevailing on the claim," Wash. Rev. Code § 4.24.525 (2014), "invades the jury's essential role of deciding debatable questions of fact," *Davis*, 351 P.3d at 874.

Here, the "prima facie" burden, as used under the TPPA, necessarily cannot mean "clear and convincing," as Defendant suggests. While not necessarily well-established in Tennessee, courts in other jurisdictions with similar anti-SLAPP statutes have had little difficulty applying the "prima facie" burden of proof. For example, under Nevada law, like the TPPA, a special

motion to dismiss under Nevada's anti-SLAPP statute should be granted where the defendant shows that the claim is based upon a good-faith communication in furtherance of the right to petition or the right to free speech regarding a matter of public concern, NRS 41.600(3)(a), and the plaintiff cannot show with "prima facie evidence a probability of prevailing on the claim," NRS 41.660(3)(b). In applying the plaintiff's burden under the "prima facie" standard, the Nevada Supreme Court has held that a court must determine "whether her claims had minimal merit." *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020). The Nevada Supreme Court has further held that the "minimal merit" standard "serves to ensure that the anti-SLAPP statutes protect against frivolous lawsuits designed to impede protected public activities without striking legally sufficient claims." *Id*.

Similarly, under the California anti-SLAPP law, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733 (2002).[3] The California Supreme Court, in applying the prima facie standard, concluded that "[o]nly a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and ***lacks even minimal merit***—is a SLAPP, subject to being stricken under the statute." *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) (emphasis added); *see also Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 306 Ga. 252, 263 (2019) (applying the "minimal merit" standard articulated in *Navellier* to Georgia's anti-SLAPP law, and stating that "[o]nly a claim that satisfies both prongs of the anti-SLAPP statute — i.e., that arises from

[3] Tennessee courts have recognized that the purpose of the TPPA is similar to that of California's anti-SLAPP statute. *See Dillard v. Richmond*, 549 F. Supp. 3d 753, 763 (E.D. Tenn. 2021).

protected [activity] and lacks even minimal merit — is a SLAPP that is subject to being stricken.") (internal quotation marks omitted) (alteration in original).

While other jurisdictions have not expressly held that "prima facie" equates to "minimal merit," several courts have determined that, in the context of anti-SLAPP litigation, "prima facie" is a considerably low burden. *See, Camden Nat. Bank v. Weintraub*, 2016 ME 101, ¶ 11, 143 A.3d 788, 793 (2016) ("The showing required by the [anti-SLAPP] statute is a prima facie case, and production of some evidence is enough to satisfy this burden. Prima facie evidence requires only some evidence on every element of proof necessary to obtain the desired remedy. Thus, prima facie proof is a low standard that does not depend on the reliability or the credibility of evidence, all of which may be considered at some later time in the process."); *Zweizig v. Nw. Direct Teleservices, Inc.*, No. 3:15-CV-02401-HZ, 2016 WL 5402935, at *6 (D. Or. Sept. 24, 2016), aff'd sub nom. *Zweizig v. Rote*, 818 F. App'x 645 (9th Cir. 2020) "Only claims that entirely lack merit under that forgiving [prima facie] standard [under Oregon's anti-SLAPP statute] are to be stricken at the second step of the two-step process.").

The other jurisdictions that have considered the "prima facie" showing a plaintiff must make under their respective anti-SLAPP statutes have had little difficulty articulating the governing evidentiary standard. As such, interlocutory review of what constitutes a "prima facie case" pursuant to the TPPA is unwarranted.

IV. CONCLUSION

For the foregoing reasons, Defendant's Application should be denied.

V. APPENDIX

1. Complaint [**Exhibit 1**]

2. Defendant Candace Owen's Motion to Dismiss and Tenn. Code Ann. § 20-17-104(a) Petition to Dismiss the Plaintiff's Complaint Pursuant to the Tennessee Public Participation Act [**Exhibit 2**]

3. Opposition to Defendant Candace Owen's Motion to Dismiss and Tenn. Code Ann. § 20-17-104(a) Petition to Dismiss the Plaintiff's Complaint Pursuant to the Tennessee Public Participation Act [**Exhibit 3**]

4. Out-of-State Cases [**Exhibit 4**]

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent via the court's efiling system to:

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EFILED 04/22/22 03:25 PM CASE NO. 21C1607 Richard R. Rooker, Clerk

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

KIMBERLY KLACIK	)	
	)	
Plaintiff.	)	
v.	)	**Case No. 21C1607**
	)	**JURY DEMANDED**
CANDACE OWENS	)	
	)	
Defendant.	)	

MOTION TO LIFT DISCOVERY STAY
AND INCORPORATED MEMORANDUM IN SUPPORT

Comes now the Plaintiff, **KIMBERLY KLACIK** ("Plaintiff"), by and through her counsel respectfully submits this Motion and incorporated Memorandum of law and facts in support thereof. Plaintiff moves this Honorable Court to lift its discovery stay. As grounds for this Motion, Plaintiff would state and show to the Court as follows:

1. On March 22, 2022, the Honorable Joseph P. Binkley, Jr. issued an Order, in which it stated all discovery "shall be STAYED pending appellate review of the Defendant's Rule 9 Application." *See* **Exhibit A**, ¶ 8.

2. Additionally, the Court stated in its Order that it shall "revisit the propriety of its order staying discovery following the conclusion of appellate review." **Exhibit A**, ¶ 8.

3. On April 12, 2022, the Tennessee Court of Appeals entered an Order upon the Defendant's Application for Permission to Appeal under Rule 9 of the Tennessee Rules of Appellate Procedure. *See* **Exhibit B**.

4. In its Order, the Court of Appeals of Tennessee at Nashville denied Defendant's application for permission to appeal. *See* **Exhibit B**.

5. As this Court previously found, good cause exists for discovery on the issue of

actual malice; and, while there is not guidance on this issue from the Tennessee appellate courts because Tennessee's anti-SLAPP statute is relatively new, other courts recognize the importance of permitting discovery to assist in defending an anti-SLAPP motion.

6. The opportunity to conduct limited discovery in response to an anti-SLAPP motion "is of prime import in a libel suit against a media defendant who will generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to learn whether the matter published was false and defamatory." *Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (1995).

7. The California Court of Appeals emphasized that if a plaintiff establishes in response to an anti-SLAPP motion "that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff ***must be given*** the reasonably opportunity to obtain that evidence through discovery before the motion to strike is adjudicated." *Id.* (emphasis added). "The trial court, therefore, ***must liberally exercise its discretion by authorizing reasonable and specified discovery*** timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held or known by defendant or its agents and employees." *Id.* (emphasis added).

8. Here, this Court already previously held that the "Plaintiff needs fact discovery on the issue of actual malice in order to get into the details that are required for the Plaintiff to make a prima facie case for actual malice." *See* **Exhibit C**, ¶ 8. Thus, this Court recognized the Plaintiff's need for expedited discovery constituted good cause.

9. Therefore, since Defendant's application for permission to appeal has been denied, appellate review has concluded and good cause exists to permit limited discovery, the discovery

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stay should be lifted.

WHEREFORE, for the foregoing reasons, Plaintiff moves this Honorable Court to lift its discovery stay that was issued pending the conclusion of appellate review and permit the limited discovery on the question of actual malice as ordered in this Court's original March 22, 2022 Order.

Respectfully submitted,

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NOTICE OF HEARING

THIS MOTION IS SET TO BE HEARD ON THE 13th DAY OF MAY, 2022 AT 9:00A.M. ON THE CIRCUIT COURT MOTION DOCKET. IF NO WRITTEN RESPONSE TO THIS MOTION IS FILED AND SERVED IN THE TIME SET BY THE LOCAL RULES OF PRACTICE, THIS MOTION MAY BE GRANTED WITHOUT A HEARING.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2022, a copy of the foregoing was served via the Court's e-filing system upon:

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Attorneys for Defendant

By: /s/Daniel D. Choe
Daniel D. Choe

IN THE COURT OF SUPREME COURT OF TENNESSEE

KIMBERLY KLACIK	)	
	)	
Plaintiff	)	
	)	
v.	)	No. M2022-00398-SC-R11-CV
	)	Trial Court Case No. 21C1607
CANDACE OWENS,	)	
	)	
Defendant.	)	
	)	

ANSWER IN OPPOSITION TO DEFENDANT CANDACE OWENS' APPLICATION FOR PERMISSION TO APPEAL FROM DENIAL OF RULE 9 APPLICATION

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Date: May 20, 2022

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I. INTRODUCTION

Through her Application for Permission to Appeal from Denial of Rule 9 Application ("Application"), Defendant requests that this Court reverse the Court of Appeals' decision to deny her Application for immediate interlocutory review pursuant to TRAP 9 (the "Rule 9 Application"). In her Rule 9 Application, as she does here, Defendant sought interlocutory review of two discrete issues. First, Defendant sought review of what constitutes a "prima facie case" as that term is used pursuant to the Tennessee Public Participation Act ("TPPA"). Second, Defendant sought review of what factors are to be considered to establish "good cause" to permit limited discovery in the context of a pending motion to dismiss pursuant to the TPPA.

Despite the fact that the Circuit Court granted Defendant's request for interlocutory review, the Court of Appeals denied the Rule 9 Application, and this Court should similarly deny the instant Application. First, while Plaintiff concedes that the issues presented for review have not been affirmatively decided by this Court, courts in other jurisdictions with anti-SLAPP statutes similar to the TPPA have developed a uniform body of law regarding the issues Defendant presents in her Application. Second, while Defendant argues that the purpose of the TPPA would be served if the Application is granted, Defendant has not demonstrated that the purpose of Tenn. R. App. P. 11 militates in favor of granting the Application. Finally, Plaintiff will be severely prejudiced if the proceedings in the Circuit Court are further delayed during the pendency of an unnecessary appeal.

For the foregoing reasons, and as fully explained herein, Defendant's Application should be denied.

II. STATEMENT OF ADDITIONAL FACTS

Plaintiff respectfully submits that Defendant's Statement of Facts omits material information relevant to this Court's consideration of Defendant's Application. Plaintiff thus submits the following background to supplement the Statement of Facts contained in Defendant's Application.

A. Plaintiff's Complaint

Defendant's recitation of the allegations in Plaintiff's Complaint is presented to this Court not as "the facts relevant to the questions presented," *see* Tenn. R. App. P. 11(b), but rather is framed based on Defendant's skewed interpretation of Plaintiff's allegations. As such, Plaintiff provides this Court with a more accurate description of her Complaint to aid this Court in determining whether interlocutory review is warranted.

Plaintiff filed her Complaint asserting a single claim for defamation against Defendant on September 17, 2021. (*See generally*, Appl., Ex. 1, Compl.) Plaintiff alleged that, on June 18, 2021, Defendant launched a series of posts from her personal twitter account assailing President Biden for declaring Juneteenth a federal holiday. (*Id.* ¶ 18). Plaintiff replied on her personal Twitter account to Defendant's post, stating: "Believe it or not, many in 'Black America' are very aware the fight is about classism rather [than] racism. Unfortunately, the loudest mouths with the largest platforms represent the majority. This might

come to a shock to you because of your lack of engagement with black people." (*Id.* ¶ 19). Following several posts social media posts regarding Plaintiff, on June 22, 2021, Defendant published a live video (the "Video") on Defendant's Instagram and Facebook accounts. (*Id.* ¶ 24).

In the Video, the Defendant affirmatively accuses Ms. Klacik of engaging in criminal activity. Specifically, Plaintiff alleged that Defendant made bald untrue allegations that include Ms. Klacik "used campaign money to do cocaine," participated in "money laundering, tax fraud, and campaign fraud," paid vendors in order to "move money off the books," "was the person who helped bring a lot of strippers" into a strip club that Defendant alleges was owned by Ms. Klacik's estranged husband, was a "madame of that strip club," and "has been scamming people for millions." ("Criminal Allegations"). (*Id.* ¶ 25). Plaintiff further alleged that Defendant, when making the Criminal Allegations, acknowledged the accusations were regarding "federal crimes," would "paint [Ms. Klacik] in the wrong light," and Defendant's investigation into Ms. Klacik was motivated by a "petty Twitter feud" between Defendant and Plaintiff. (*Id.* ¶ 26).

Additionally, and importantly, Plaintiff alleged that Defendant publicized the Criminal Allegations without factual support. Defendant's main evidence for the Criminal Allegations purportedly came from "a stripper who used to work with [Ms. Klacik]" and who supposedly told Defendant that *some* of the Criminal Allegations were true. (*Id.* ¶ 27). Plaintiff also alleged that Defendant admitted that she "had no proof," "cannot possibly verify" and "could not confirm" the

Criminal Allegations, but that "[n]evertheless Defendant continued to publish and republish as fact that Ms. Klacik engaged in criminal activity and that Defendant's 'investigation' supported these claims." (*Id.* ¶ 28). Defendant thus alleged that Plaintiff's claims were false and defamatory because" (1) Plaintiff was never a "madame;" (2) Plaintiff never used campaign funds for any illegal activity, including drug use; (3) Plaintiff never committed campaign fraud, tax fraud, or money laundering; and (4) Plaintiff did not make any payments on behalf of her political campaign to any individual or business entity for improper or illegal reasons. (*Id.* ¶ 29).

Based on the publication of the Criminal Allegations, Plaintiff alleged that she had, and has, suffered continuous harassment, reputational damage, and lost business opportunities. (*Id.* ¶¶ 35-40). Thus, Plaintiff filed a single cause of action against Defendant for defamation based on Defendant publishing the Criminal Allegations, with knowledge of their falsity or with reckless disregard for their truth, and the resulting harm that Plaintiff suffered. (*See generally*, *id.*)

B. Defendant's Tennessee Public Participation Act Petition and Plaintiff's Opposition Thereto

Defendant filed her Petition pursuant to the TPPA arguing, in part, that Plaintiff's Complaint should be dismissed because Defendant produced sufficient evidence to establish that she did not publish the Criminal Allegations with actual malice. (Appl. Ex. 4 at 40-09). As articulated by Defendant in her Application, the "evidence" precluding a finding of actual malice falls into a few main categories. First, Defendant alleges that she introduced "uncontested and admissible

evidence" that she had reached out to Plaintiff for comment before reporting at the allegations at issue, but in that response, the Plaintiff refused to answer questions or to be interviewed regarding them. (Appl. at 7-8). Second, Defendant alleges that she introduced "uncontested and admissible evidence" that the Criminal Allegations were "recounted . . . from a source who indicated that she had personal knowledge of them." (*Id.* at 17). Third, Defendant alleges that Plaintiff later "admitted that . . . [she] had worked as a stripper" and this alleged admission "confirm[ed] the reliability of [Defendant's] source . . ." (*Id.* at 17-18). Fourth, Defendant alleges that, following the publication of the Criminal Allegations, "several of the allegations that [Defendant] had recounted were confirmed as true by independent reporting." (*Id.* at 18). Finally, Defendant alleges that, following the publication of the Criminal Allegations, the Federal Election Commission "determined that the Plaintiff had committed multiple violations of federal campaign finance law. . ." (*Id.*)

Defendant fails to inform this Court that, in support of her Petition, Defendant attached an exhibit which she only describes as "Source Correspondence." (*See* Appl., Ex. 4 at 11, n. 12 (citing Petition, Ex. J)). Although Defendant did not submit Exhibit J to her Petition in support of her Application, Exhibit J is a copy of an incomplete, heavily-redacted text message conversation that lacks any context, but makes several damning accusations against Plaintiff, including that Plaintiff had been "misleading millions with lies since the start of her campaign." (*See* **Exhibit 1**, Pet., Ex. J). Notwithstanding that Defendant

attached a redacted message ostensibly from her "anonymous source" to her Petition to the Circuit Court, Defendant posted the same message from the same individual on Defendant's social media account but without any redaction of that particular message. In that message, the individual claims Plaintiff "knows exactly who I am, but I'd prefer you kept my name out of it." (*See* **Exhibit 2**, Plaintiff's Opposition to Defendant's Pet., Ex. B). In that same message, the individual states that Plaintiff's "campaign funds . . . went up her nose" and that the individual has "a lot, but nothing comes for free." (*Id.*) Defendant did not inform the Circuit Court, or this Court, that her "anonymous source" offered Defendant "a lot" regarding Plaintiff that was expressly conditioned on Defendant providing compensation for the alleged information in the "anonymous source's" possession. To make matters worse, what Defendant told her viewers was not even what the "anonymous source" told *her.* Defendant stated in her video that her "anonymous source" told her that Plaintiff "and her husband had been scamming people for millions…" (Compl., Ex. 1, 14:2), but the so-called source said no such thing. (*See* **Exhibit 1**, Pet., Ex. J).

Similarly, in an attempt to "prove" that Plaintiff was formerly a stripper, Defendant posted images of Plaintiff (not stripping or purporting to do so) along with an image of an African American woman (who happens to be on reality TV) who was dancing on a pole. Ms. Klacik testified in her affidavit:

> As part "evidence" against me, Ms. Owens posted some photos on Instagram Story. Two of those photos were photos I posted on my Instagram account. Neither of those photos

> depicted me stripping. In the same post, however, she included a photo of one of the stars of Real Housewives of Atlanta dancing on a pole when she was apparently stripping. That woman is not me. A simple Google search demonstrates that the photo is not me. "Instagram Stories" disappear from public view after a certain amount of time; to my understanding, Ms. Owens is the only person who can access that post at this time. (Appl., Ex. 3 ¶ 12).

Moreover, although Defendant accuses Plaintiff of taking her "reporting" out of context, Defendant is the one who cherry-picked and submitted incomplete information in support of her Petition. For example, Defendant asserted that "Plaintiff admitted that it was, indeed 'true' that she had worked as a stripper . . ." (Appl., Ex. 4, Pet. at 46). However, Defendant misrepresented a portion of a transcript from an interview that is taken completely out of context. Plaintiff's statement was in response to a question asking about the "***allegations*** about [Plaintiff] being a former stripper . . ." (Compl., Ex. 4, 5:23-25, 6:1-16). Plaintiff never "admitted" that she worked as a stripper. Rather, she "admitted" that those allegations had been made.

Defendant also brushes aside the Affidavit submitted in support of Plaintiff's Opposition to Defendant's Petition. Although Defendant argues that it "contained no admissible evidence of actual malice," (Appl. at 18), Plaintiff's Affidavit affirmatively rebuffed each of Defendant's arguments regarding her alleged "evidence" negating actual malice. For example, Plaintiff declared, under penalty of perjury, that she "was never a 'Madame' of any strip club," and that she "never lured or recruited women to work at any strip club. (Appl., Ex. 3 ¶ 7).

Plaintiff also declared that she "never used campaign funds for any illegal activity, including drug use," "did not 'scam' anyone for money," and "never committed campaign fraud, tax fraud, or money laundering." (*Id.* ¶¶ 8-11).

Importantly, Plaintiff also declared that Defendant's "allegation that [Plaintiff] laundered campaign money through a strip club during [her] campaign . . . could not have been true because nightclubs and bars, including but not limited to strip clubs, were closed during [her] campaign because of Governmental orders related to COVID-19." (*Id.* ¶ 10). Plaintiff also declared that Defendant published the Criminal Allegations "with a reckless disregard for their truth" because, *inter alia*, the Criminal Allegations were based "on an 'anonymous source' who demanded money from [Defendant] for his or her 'information.'" (*Id.* ¶ 17).

In short, Plaintiff submitted evidence in response to Defendant's Petition showing that (1) the Criminal Allegations were false, and (2) Defendant published the Criminal Allegations with reckless disregard for the truth of the same. Additionally, with respect to the "evidence" Defendant posits negates Plaintiff's claim that the Criminal Allegations were published with actual malice, Plaintiff pointed out that Defendant had submitted over one-hundred pages worth of exhibits to her Petition, yet did the absolute bare minimum to authenticate the same. (Appl., Ex. 8, Plaintiff's Opposition to Defendant's Pet. at 22). Plaintiff alerted the court to the fact that, Defendant submitted a scant affidavit that merely asserted that the exhibits appended to her Petition are

"authentic," they "helped inform [her] reporting regarding" Plaintiff, and "helped inform her belief that Plaintiff Kimberly Klacik is not credible." (*Id.*) However, Defendant did not describe the substance of source of any of the exhibits, and did not substantiate any of the arguments in her Petition. (*Id.*)

C. Plaintiff's Request for Permission to Take Limited Discovery

In her Opposition to Defendant's Petition, Plaintiff requested that the Court permit limited discovery pursuant to Tenn. Code Ann. § 20-17-104(d), which provides that, when a party files a Petition to Dismiss pursuant to the TPPA, "[t]he court may allow specified and limited discovery relevant to the petition upon a showing of good cause." (Appl., Ex. 8 at 21). Plaintiff asserted that good cause existed to conduct limited discovery to explore the veracity of the allegations in Defendant's Petition, including to explore the factual allegations surrounding Defendant's "anonymous" source. (*Id.* at 22). Plaintiff also renewed her request during the hearing on Defendant's Petition. (*See* Appl. at 10 (quoting, Ex. 7 at Attach. 1, 39:9-40:3)).

The Court granted Plaintiff's request, determining that the hearing on Defendant's Petition qualified as a trial within the meaning of Tenn R. Civ. P. 7.02(1), and that good cause existed to allow limited discovery regarding the issue of actual malice. (*See* Appl. at 22).

Defendant takes issue with Plaintiff's allegedly "expansive" Requests for Production of Documents and Interrogatories, yet Defendant does not explain how Plaintiff's discovery requests are impermissibly overbroad. (Appl. at 22). To the contrary, Plaintiff's

discovery requests are all related to the issue of actual malice, and are directly related to the "evidence" Defendant submitted in connection with her Petition. (*See generally*, Appl., Ex. 10). For example, Plaintiff requested: "All Communications between [Defendant] and Liz Matory regarding [Plaintiff]." (*Id.*, Request for Production No. 19). In support of her Petition, Defendant alleged that her statements in the Video "cannot be defamatory" because similar allegations "have been widely reported and made by any number of people, including one of the Plaintiff's primary opponents." (**Exhibit 1**, Pet. at 31). In support of Defendant's allegation, Defendant attached to her petition a host of social media posts made by Liz Matory. (*Id.*, Ex. K). Certainly, any communications between Defendant and Ms. Matory are relevant to whether Defendant made the statements in the Video with actual malice.

In reality, it appears that Defendant requested a stay of discovery, and has challenged Plaintiff's discovery requests as overbroad to prevent Plaintiff from having her claim heard on its merits. As Defendant admits, testing the veracity of Defendant's assertion that she published the statements without actual malice is precisely why the Circuit Court determined it was appropriate for the parties to take depositions regarding the limited issue of actual malice in order to enable the Court to make a credibility determination. Notwithstanding the determination and direction from the Circuit Court, sitting for a deposition does not appear to be something that Defendant is inclined or willing to do.

III. ARGUMENT

A. Legal Standard

"An appeal to the supreme court is only by permission, and the court has full discretion whether to review a case from an intermediate appellate court." *Ruby-Ruiz v. State*, No. M201900062CCAR3PC, 2020 WL 7025139, at *3 (Tenn. Crim. App. Nov. 30, 2020) (citing Tenn. R. App. P. 11(a) ("An appeal by permission may be taken ... only on application and in the discretion" of the court.) In determining whether to grant permission to appeal, this Court considers: "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority." Tenn. R. App. P. 11(a)(1)-(4).

While Tenn. R. App. P. 11(a) "provides guidance regarding the reasons the court might grant an application for permission to appeal," this Court "has the authority to grant and to deny an application for permission to appeal for any reason." *Ruby-Ruiz*, 2020 WL 7025139 at *3. This Court has the correlative "authority to deny an application even though the application might raise a relevant reason reflected in Rule 11(a)." *Id.*

B. The Need to Secure Uniformity of Decision is not Present

1. Interlocutory review is *not* warranted to ascertain the quantum of evidence supporting actual malice that a litigant must introduce to satisfy or negate Tennessee Code Annotated § 20-17-105(b)'s "prima facie" standard in public figure defamation cases.

Defendant asserts that she seeks permission to appeal the following question: "When a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim, what quantum of evidence must a litigant introduce to satisfy or negate [the TPPA's] 'prima facie' standard?" (Appl. at 12). Interlocutory review of this question is not warranted.

The first part of Defendant's question is already explicitly addressed in the TPPA. Indeed, the TPPA provides that "[i]f the petitioning party meets this burden, the court shall dismiss the legal action unless the responding party establishes a ***prima facie case for each essential element of the claim in the legal action***." Tenn. Code Ann. § 20-17-104(d). The entire first half of Defendant's proposed question is already answered by statute, and the relevant question is: "[W]hat quantum of evidence must a litigant introduce to satisfy or negate [the TPPA's] 'prima facie' standard?"[1] In that regard, a well-

[1] Plaintiff notes that Defendant is seeking appellate review of a substantive provision of the TPPA that, in Plaintiff's estimation, does not apply. Plaintiff argued in opposition to Defendant's Petition to Dismiss that Maryland, not Tennessee, substantive law applies under the circumstances of this action, and Plaintiff maintains that position now. Although the procedural portions of the TPPA may govern, it is not uncommon for federal courts to apply the Federal Rules of Civil

established body of law exists to guide the Circuit Court, and interlocutory review is unwarranted.

Defendant suggests that the application of "prima facie," as that term is used in the TPPA is elevated in this action to the burden of proof Plaintiff must carry at trial. (*See* Appl. 26-31). Specifically, Defendant cites to a judicial decision that "adjudicated a TPPA petition in an actual malice case . . .based on a 'clear and convincing standard." (*Id.* at 30 (citing *Lee v. Mitchell et al.*, Case No. 2020-CV-50 (Overton Cty, Tenn. Cir. Ct. Dec. 10, 2021)). Certainly, this cannot be the standard, as forcing the plaintiff in an "actual malice" case to prove her cause of action by clear and convincing evidence at such an early stage in the proceedings, and without the limited discovery on the issue of actual malice that this Court permitted and which is contemplated by the TPPA itself, would be unworkable. Indeed, while Plaintiff recognizes that the question of whether a defendant acted with actual malice is a question of law, the answer to that question is

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Procedure and the ***substantive*** portions of a state's anti-SLAPP statute when sitting in diversity. *See, e.g. Containment Techs. Grp., Inc. v. Am. Soc. of Health Sys. Pharmacists*, No. 1:07-CV-0997DFHTAB, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26, 2009) ("The [Indiana] anti-SLAPP statute provides a complete defense to defamation and also provides the remedy of attorney fees to a victorious defendant. These are substantive provisions of Indiana law that govern in this diversity jurisdiction case. The court [thus] applies both Rule 56 of the Federal Rules of Civil Procedure and the substantive portions of the Indiana Anti–SLAPP statute, including the substance of the defense and the attorney fee remedy.").

extraordinarily fact-dependent. *See Trigg v. Lakeway Publishers, Inc.*, 720 S.W.2d 69, 74 (Tenn.Ct.App.1986) (Where the actual malice standard applies, the "burden is upon plaintiff to show with convincing clarity ***the facts which make up the actual malice***." (internal quotation marks omitted); *Piper v. Mize*, No. M2002–00626–COA–R3–CV, 2003 WL 21338696, at *7 (Tenn.Ct.App. June 10, 2003) (When reviewing a grant of summary judgment to a defendant in an actual malice case, the court must "determine, not whether there is material evidence in the record supporting [the plaintiff], but ***whether or not the record discloses clear and convincing evidence upon which a trier of fact could find actual malice***.").

Here, while Plaintiff presented evidence on the elements of actual malice, the Circuit Court ruled that limited discovery on this issue was appropriate before fully adjudicating the TPPA petition. In such circumstances, courts have determined that holding a plaintiff to a "clear and convincing" standard in connection with an anti-SLAPP motion is constitutionally prohibited. For example, the Supreme Court of Minnesota recognized that its anti-SLAPP statute required "the responding party to "produce[ ] ... evidence" (the burden of production) that persuades the district court by a "clear and convincing" standard (the burden of persuasion) that the moving party's acts are not immune under the anti-SLAPP law." *Leiendecker v. Asian Women United of Minnesota*, A16-0360, 2017 WL 2267289 (Minn. 2017) (alterations in original). There, the court determined that "[t]he law provides the district court with two options to resolve a motion to dismiss. The

district court could decide that the responding party failed to show by clear and convincing evidence that the moving party engaged in tortious conduct. This determination would require dismissal of the suit under the anti-SLAPP law, thus precluding a jury trial. Alternatively, the district court could decide that the responding party *did* show by clear and convincing evidence that the moving party engaged in tortious conduct. This conclusion would also arguably preclude a jury trial." *Id.*

In a similar case, the Washington Supreme Court agreed. That court determined that Washington's anti-SLAPP law violated Washington's constitutional jury-trial guarantee. *Davis v. Cox*, 183 Wash.2d 269, 351 P.3d 862, 871, 874 (2015). Like Minnesota's anti-SLAPP law, the Washington law's requirement that the responding party "establish by clear and convincing evidence a probability of prevailing on the claim," Wash. Rev. Code § 4.24.525 (2014), "invades the jury's essential role of deciding debatable questions of fact," *Davis*, 351 P.3d at 874.

Here, the "prima facie" burden, as used under the TPPA, necessarily cannot mean "clear and convincing," as Defendant suggests. While not necessarily well-established in Tennessee, courts in other jurisdictions with similar anti-SLAPP statutes have had little difficulty applying the "prima facie" burden of proof. For example, under Nevada law, like the TPPA, a special motion to dismiss under Nevada's anti-SLAPP statute should be granted where the defendant shows that the claim is based upon a good-faith communication in furtherance of the right to petition or the right to free speech regarding a matter of public

concern, NRS 41.600(3)(a), and the plaintiff cannot show with "prima facie evidence a probability of prevailing on the claim," NRS 41.660(3)(b). In applying the plaintiff's burden under the "prima facie" standard, the Nevada Supreme Court has held that a court must determine "whether her claims had minimal merit." *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020). The Nevada Supreme Court has further held that the "minimal merit" standard "serves to ensure that the anti-SLAPP statutes protect against frivolous lawsuits designed to impede protected public activities without striking legally sufficient claims." *Id.*

Similarly, under the California anti-SLAPP law, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733 (2002).[2] The California Supreme Court, in applying the prima facie standard, concluded that "[o]nly a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and ***lacks even minimal merit***—is a SLAPP, subject to being stricken under the statute." *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) (emphasis added); *see also Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 306 Ga. 252, 263 (2019) (applying the "minimal merit" standard articulated in *Navellier*

[2] Tennessee courts have recognized that the purpose of the TPPA is similar to that of California's anti-SLAPP statute. *See Dillard v. Richmond*, 549 F. Supp. 3d 753, 763 (E.D. Tenn. 2021).

to Georgia's anti-SLAPP law, and stating that "[o]nly a claim that satisfies both prongs of the anti-SLAPP statute — i.e., that arises from protected [activity] and lacks even minimal merit — is a SLAPP that is subject to being stricken.") (internal quotation marks omitted) (alteration in original).

While other jurisdictions have not expressly held that "prima facie" equates to "minimal merit," several courts have determined that, in the context of anti-SLAPP litigation, "prima facie" is a considerably low burden. *See*, *Camden Nat. Bank v. Weintraub*, 2016 ME 101, ¶ 11, 143 A.3d 788, 793 (2016) ("The showing required by the [anti-SLAPP] statute is a prima facie case, and production of some evidence is enough to satisfy this burden. Prima facie evidence requires only some evidence on every element of proof necessary to obtain the desired remedy. Thus, prima facie proof is a low standard that does not depend on the reliability or the credibility of evidence, all of which may be considered at some later time in the process."); *Zweizig v. Nw. Direct Teleservices, Inc.*, No. 3:15-CV-02401-HZ, 2016 WL 5402935, at *6 (D. Or. Sept. 24, 2016), aff'd sub nom. *Zweizig v. Rote*, 818 F. App'x 645 (9th Cir. 2020) "Only claims that entirely lack merit under that forgiving [prima facie] standard [under Oregon's anti-SLAPP statute] are to be stricken at the second step of the two-step process.").

The other jurisdictions that have considered the "prima facie" showing a plaintiff must make under their respective anti-SLAPP statutes have had little difficulty articulating the governing evidentiary

standard. As such, interlocutory review of what constitutes a "prima facie case" pursuant to the TPPA is unwarranted.

2. Interlocutory review is *not* warranted to ascertain the factors that govern a trial court's determination to "allow specified limited discovery relevant to the petition upon a showing of good cause" under Tennessee Code Annotated § 20-17-104(d).

Defendant also seeks permission to appeal the following question: "What factors govern a trial court's determination to 'allow specified and limited discovery relevant to the petition upon a showing of good cause' under [the TPPA], and has the Plaintiff made that showing here?" (Appl. at 12). Interlocutory review of this question is also unwarranted.

As with the "prima facie" standard under other jurisdictions' anti-SLAPP statutes, courts have addressed what constitutes "good cause" to allow limited discovery. For example, like the TPPA, the California anti-SLAPP statute contemplates that "for good cause shown, [the court] may order that specified discovery be conducted" notwithstanding the general stay of discovery upon the filing of a special motion to strike. *See* Cal. Civ. Code § 425.16(g). The opportunity to conduct limited discovery in response to an anti-SLAPP motion "is of prime import in a libel suit against a media defendant who will generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to learn

whether the matter published was false and defamatory." *Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (1995).

If a plaintiff establishes in response to an anti-SLAPP motion "that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff ***must be given*** the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated." *Id.* (emphasis added). "The trial court, therefore, ***must liberally exercise its discretion by authorizing reasonable and specified discovery*** timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees." *Id.* (emphasis added).

Here, the Circuit Court determined that "the Plaintiff needs fact discovery on the issue of actual malice in order to get into the details that are required for the plaintiff to make a prima facie case for actual malice." (Appl., n. 56). The Circuit Court thus recognized that Plaintiff's need for expedited discovery constituted good cause because, without early discovery, the Circuit Court was unable to render a decision as to whether Plaintiff could meet her prima facie burden to show that Defendant acted with actual malice.

The circumstances of this action are strikingly similar to a defamation action from the United States District Court for the District of Oregon, where the defendants objected to plaintiff's request for discovery under the Oregon anti-SLAPP statute "on the ground plaintiff

failed to demonstrate 'good cause' for the discovery." *A & B Asphalt, Inc. v. Humbert Asphalt, Inc.*, No. 2:13CV-00104-SU, 2013 WL 3245751, at *2 (D. Or. June 26, 2013). Specifically, the defendants argued "that because plaintiff submitted other affidavits purporting to establish its prima facie case, it has no need for . . . depositions." *Id.* The court, unpersuaded by the defendants' argument, determined that "limited discovery" was "necessary regarding the alleged defamatory statements made by defendants." *Id.*

The standard for what constitutes good cause should not reasonably be in dispute, the Circuit Court correctly exercised its discretion in allowing limited discovery, and interlocutory review is thus unwarranted.

C. The Need to Settle Important Questions of Law and Public Interest

In support of her argument that she should be granted permission to appeal, Defendant spends the entirety of her efforts describing the purpose of the TPPA, and baldly posits that "overwhelming and uncontested evidence compels immediate dismissal without the need to burden . . . defendant with the time and expense of discovery." (Appl. at 36). However, Defendant ignores the narrow scope of the questions she seeks to resolve through interlocutory appeal. Defendant seeks clarification from this Court interpreting the "prima facie standard" ***specifically*** "[w]hen a public figure must prove actual malice by clear and convincing evidence to sustain a defamation claim." (Appl. at 12). Similarly, Defendant seeks a determination as to whether Plaintiff

showed good cause at the Circuit Court such that limited discovery should have been permitted. (*Id.*)

The general purpose of the TPPA does not override the "essential purpose" of Tenn. R. App. P. 11, which "is to identify those cases of such extraordinary importance as to justify the burdens of time, expense and effort associated with double appeals." *See* Tenn. R. App. P. 11, Advisory Commission Comments. Moreover, review of whether the Circuit Court properly determined that limited discovery is appropriate in this action does not give rise to an appeal by permission under Tenn. R. App. P. 11, as "discretionary review by the Supreme Court is rarely granted solely for error-correction purposes." *Id.* (citing *State v. West*, 844 S.W.2d 144, 146 (Tenn. 1992) (stating, "[w]ith the passage of the Appellate Courts Improvements Act of 1992, the jurisdiction of this Court has become almost completely discretionary. This means that as to non-capital criminal cases, we function primarily as a law-development court, rather than as an error-correction court.")).

With respect to the public interest, Plaintiff acknowledges that Tennessee courts "recognize[ ] and value[ ] the robust, free exchanges in politics that are so central to democracy and our constitutional republic." *Byrge v. Campfield*, No. E2013-01223-COA-R3CV, 2014 WL 4391117, at *7 (Tenn. Ct. App. Sept. 8, 2014). "However, here we have a case not about differences of ideology or opinion, but rather about factually false allegations made against a candidate for public office." *Id.* "Politics may be a rough and tumble endeavor, but, contrary to the vintage Cole Porter song, 'anything goes' will not suffice when it comes

to publishing factual falsehoods about political rivals." *Id.* "A public figure, even a politician, is neither totally immune from nor totally unprotected by the law of defamation." *Id.*

Finally, Plaintiff has and will continue to suffer irreparable harm if interlocutory review is granted and all discovery is stayed. The entirety of Plaintiff's action is based on the false, damaging statements Defendant broadcast to her millions of followers. (*See generally* Compl.) And, since Defendant published the defamatory statements described in the Complaint, Plaintiff continues to suffer harassment from Defendant's fans and supporters, and has lost speaking engagements and business opportunities. (Appl., Ex. 3, Klacik Aff. ¶¶ 13-16). If interlocutory review is granted, and discovery is stayed indefinitely, Plaintiff's injuries will only compound, and the reputational harm Defendant has caused is indisputably irreparable in both legal and practical terms. *See NuLife Ventures, LLC. v. AVACEN, Inc.*, No. E202001157COAR3CV, 2021 WL 1421201, at *7 (Tenn. Ct. App. Apr. 15, 2021) (reversing denial of injunctive relief on the basis that there was no irreparable harm because "the damage to [plaintiff's] credibility and reputation cannot be easily quantified in terms of money." (citing *Reitz v. City of Mt. Juliet*, No. M2016-02048-COA-R3-CV, 2017 WL 3879201, at *3 (Tenn. Ct. App. Aug. 31, 2017) (explaining that damages for loss of reputation are disfavored in breach of contract actions as nonquantifiable and speculative).

IV. CONCLUSION

For the foregoing reasons, Defendant's Application should be denied.

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CERTIFICATE OF COMPLIANCE PURSUANT TO TENN. R. APP. P. 46 SECTION 3.02

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1. This brief complies with the word limitations of Tenn. S. Ct. Rule 46 Section 3.02(a)(1)(A) because:

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2022, a copy of the foregoing was served via the Court's e-filing system upon:

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