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No. 2016-79698

LANDRY'S, INC., and HOUSTON AQUARIUM, INC., Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
ANIMAL LEGAL DEFENSE FUND, CARNEY ANNE NASSER, and CHERYL CONLEY, Defendants.	§	334th JUDICIAL DISTRICT

ANIMAL LEGAL DEFENSE FUND AND CARNEY ANNE NASSER'S JOINT ANTI-SLAPP MOTION TO DISMISS

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(Still image from 2016 KPRC video)

INTRODUCTION

For twelve years, Landry's, Inc. and Houston Aquarium, Inc. ("Landry's) have confined four adult tigers in indoor, concrete pens beneath a seafood restaurant. Landry's does not allow the tigers outdoors; they live behind bars and glass and have never experienced nature. Because there is a resin-covered skylight nearby and the tigers sometimes get "sod and wood chips," Landry's calls this treatment humane. Pet. ¶ 44. Others disagree. Since 2004, political leaders, Landry's customers, reviewers on sites such as Yelp, and much of the media have questioned the wisdom of impounding endangered tigers in an all-indoor structure just feet away from Interstate 45 in Downtown Houston. To Landry's, those who criticize this arrangement are, at best, adherents of a "fringe social agenda" and, at worst, criminals. *Id*., ¶¶ 2, 119 (asserting theft under Penal Code).

In September 2016, the Animal Legal Defense Fund ("ALDF") entered the fray. ALDF is an animal law charity whose mission includes providing legal services to advance animal welfare. After learning of the tigers' fate, ALDF and one of its staff attorneys, Carney Anne Nasser, agreed to represent radio journalist and animal volunteer Cheryl Conley in an Endangered Species Act suit that Ms. Conley plans to file against Landry's to improve the tigers' living conditions.

As Ms. Conley's lawyer, ALDF sent Landry's a demand letter giving 60 days' notice of suit as required by the Endangered Species Act. ALDF then noted in a press release and on social media that it had sent the letter and planned to sue Landry's in federal court. Just before the 60-day waiting period expired, Landry's jumped in line and filed this case. Landry's claims that ALDF committed defamation, disparagement, tortious interference, abuse of process, conspiracy, and even theft by making comments to the effect that "Landry's should stick to the restaurant business and leave the housing of tigers to those who are able to provide big cats with proper care." *Id*. at ¶ 81.

Landry's claims are of just the sort the Legislature intended to weed out by mandating early dismissal of strategic lawsuits against public participation ("SLAPPs"). Animal advocates merely publicized their views that Landry's should not deprive tigers of life in the outdoors and—perhaps more gallingly to Landry's powerbrokers—dared to challenge the company in federal court. Rather than simply defending its conduct under the Endangered Species Act if it had any basis for doing so, Landry's retaliated with its own 30-page, seven-count suit.

As in any SLAPP, Landry's is not out to win damages, it is out to force a so-called "fringe social" movement to either stop criticizing Landry's or pay through the nose in defense costs. As a billion-dollar company, Landry's cannot expect the Court to believe it hired one of the state's most elite law firms to chase the profits from one "lost booking of a private event," which is the only money Landry's even alludes to in its petition. Pet. ¶ 106. Tilman Fertitta, a reality-TV celebrity hailed as "Houston's most famous billionaire," is Landry's CEO and sole owner. Mr. Fertitta has sense enough to know that paying Norton Rose Fulbright to chase the income from one private birthday party would be a foolish economic plan. Consequently, this suit makes no sense except as a sledgehammer to pummel animal-welfare advocates who dare to carry on a public dialogue about whether Landry's should force tigers to waste away their lives inside a seafood restaurant.

Fortunately, Texas law offers a remedy for SLAPP victims like ALDF. Immediate dismissal and a fee award are mandatory if either (a) ALDF proves any valid defense by a preponderance of the evidence or (b) Landry's fails to supply "clear and specific" proof for every element of every claim. Both grounds require dismissal in this case. Landry's certainly lacks "clear and specific" evidence to back up its claims, but perhaps more importantly, ALDF's defenses would defeat every claim even if Landry's had a prima face case. Because Landry's is suing over acts ALDF took in its role as Ms. Conley's lawyer, ALDF enjoys attorney immunity. The judicial-proceeding privilege also applies because ALDF made all the statements in furtherance of the Endangered Species Act citizen suit.

Beyond ALDF's all-encompassing immunity and privilege defenses, Landry's suffers from claim-specific problems. It cannot salvage its defamation claim because all of ALDF's statements are either true or were mere opinions. Additionally, it cannot prove that ALDF's comments caused any harm because—for more than a decade before ALDF ever said a word—Landry's customers have been lambasting it with negative, public reviews for mistreating the tigers. ALDF's recent remarks are not even a drop in the causation bucket. With no defamation predicate, all of Landry's tag-along claims necessarily fail too. As such, this suit warrants immediate dismissal.[1]

[1] For ease of reference throughout this motion, "ALDF" collectively refers to both ALDF and its former employee Ms. Nasser unless an express distinction is made. Both ALDF and Ms. Nasser join in and assert the benefit of all arguments and evidence submitted in this motion.

FACTUAL BACKGROUND

A. Tilman Fertitta provokes a political firestorm by seeking special rights to keep tigers.

Nero, Marina, Coral, and Reef are four white tigers who have lived at the Downtown Aquarium in Houston for the last twelve years. Pet. ¶ 14. During that time, the four tigers have lived entirely indoors, without any access to the outside. Ex. 1, Conley Dec., ¶ 11–12. They have had no meaningful access to natural light, natural surfaces, or sufficient species-appropriate environmental enrichment. *Id*. According to an Aquarium employee interviewed on KPRC-TV, the tigers spend as much as 20 hours per day in 10'x10' metal cells. The rest of the time, the tigers are on public display in a small, indoor room.

These conditions have caused controversy for more than a decade. The Downtown Aquarium, owned by Landry's, opened in 2003 on city-owned land near Interstate 45. Pet. ¶ 13. After extracting agreements from the city for a giant Ferris wheel and oversized signs, Landry's owner Tilman Fertitta asked the city for special rights to keep tigers at the aquarium. Ex. 3 (Landry's Web Site "Meet the CEO"). On its website, Landry's admits that Fertitta's 2004 proposal "sparked a backlash among the animal rights community and drew heat from city councilmembers including Pam Holm, who said, 'I have a hard time justifying this type of entitlement. In this instance, the city is acting too hastily, and we really need to be more responsible.'" *Id*.

Then-Controller Annise Parker, who helped draft the city's exotic animal ban, warned that Fertitta's tiger plan "appears to be in direct violation of the law." Ex. 4 (*Houston Chronicle* Feb. 17, 2004). Ultimately, city council overruled Holm and Parker, and Fertitta won permission to, as his website puts it, "put [a] tiger in an aquarium's tank." Ex. 3. Fertitta then bought four tiger cubs and moved them to the Aquarium. As Landry's website describes the outcome, "Fertitta gets what Fertitta wants. He has the tigers – four of them." *Id*.

B. Landry's locks the tigers in 10' x 10' cages for up to 20 hours per day and puts them on display in an all-concrete room for the rest of the day.

The tigers have not had access to the outdoors since 2004. *See* Pet. ¶ 14. After their arrival at the Aquarium, the tigers have spent all their time in one of two indoor enclosures: a concrete exhibit (the public "Tiger Exhibit"), or one of several metal holding cages out of public view (the "Holding Area"). In their entirely indoor living conditions, the tigers have no access to actual, direct sunlight. Ex. 1, ¶ 12. Instead, the Tiger Exhibit and Holding Area offer only limited access to filtered light through tinted windows and resin-covered skylights. *Id.*

The Tiger Exhibit is made entirely of concrete or similar hard, artificial material. It has a small pool at its center but contains no naturalistic elements such as trees or dirt substrates:

Sometimes, Landry's even forces tigers into the Tiger Exhibit overnight. For the low-low price of $65, you too can "stay up late, learn all about tigers, go on a scavenger hunt, sleep within inches of these awesome animals, plus so much more!" Ex. 5 (Aquarium Website). Those who pay to sleep alongside the tigers even get a snack and t-shirt as part of the bargain. *Id.*

The non-public Holding Area is even worse. It contains four cages that are 10'x10' in size. Ex. 1, ¶ 11. The cages are made of metal and other hard materials and have a small bench inside:

Skylights, tinted over, provide the only source of non-electric light while the tigers are in the Holding Area. *Id.* ¶ 12. Not only do the tigers not have access to the outdoors or naturalistic elements while in these cages, they do not have sufficient room to spread out, jump, or play, and lack any opportunities to hide or climb. *Id.* ¶ 15. The Aquarium claims to provide the tigers with enrichment by exposing them to scented perfumes and feeding them meat from a stick. *Id.* ¶ 13. According to an Aquarium representative, the tigers spend anywhere from 10 to 20 hours per day locked in their cages. Ex. 2.

C. The conditions at the Aquarium are in no way appropriate for tigers.

Tigers are the largest existing cat species and the largest living carnivorous land mammals. *See* Ex. 6, AZA Tiger Species Survival Plan (2016) ("Tiger Care Manual") at 6. Historically, they were found throughout much of Asia. *Id.* Three subspecies of tiger went extinct in the 1900s; only six subspecies remain. *Id.* In the wild, tigers live exclusively outdoors "in surprisingly varied habitats, including dry thorn forests, mangrove swamps, tropical rain forests, and seasonally snow-

covered woodlands." *Id.* Tigers are highly territorial and mostly solitary. *Id*. Male tigers may cover a range of forty square miles; female tigers maintain a smaller range. *Id*.

Tigers' behavior in the wild informs their needs in captivity. In its Tiger Care Manual, issued in 2016, the Association of Zoos and Aquariums ("AZA") instructs that: "Careful consideration should be given to exhibit design so that all areas meet the physical, social, behavioral, and psychological needs of the species." *Id*. at 11.[2] When tigers are deprived of certain basic conditions found in the wild, they may suffer physical injury and are likelier to exhibit signs of stress, including what is called "stereotypic behavior." Ex. 7, Leigh Elizabeth Pitsko, *Wild Tigers in Captivity: A Study of the Effects of the Captive Environment on Tiger Behavior*, at ii (2003) (M.S. thesis, Virginia Polytechnic Institute and State University) ("Pitsko Study"). Stereotypic behavior includes "a pattern of movement such as pacing and head bobbing that is performed repeatedly, is relatively invariant in form, and has no apparent function or goal." Behavior like pacing is rarely seen in wild animals; therefore it is considered an indication of physiological stresses "such as boredom, physical restraint, fear, or frustration." *Id*. at 12–13.

To reduce the potential for these problems, the AZA's Tiger Care Manual instructs that, at a minimum, tigers "should be maintained in outdoor enclosures with access to natural light." Ex. 6 at 9. The Tiger Care Manual further recommends that all tiger exhibits include:

[2] The Association of Zoos and Aquariums ("AZA") sets the most basic requirements for tiger care in facilities like the Downtown Aquarium and has made clear that tigers, due to "their large size and activity patterns,… should be maintained in outdoor enclosures with access to natural light." AZA Tiger Species Survival Plan (2016), Tiger Care Manual ("Tiger Care Manual") at ¶ 1.2. The AZA's recommendations are "a compilation of animal care and management knowledge that has been gained from recognized species experts," "based on the most current science, practices, and technologies used in animal care and management," and "valuable resources that enhance animal welfare by providing information about the basic requirements needed and best practices known for caring for ex situ tiger populations." Tiger Care Manual at 5. The Downtown Aquarium is subject to the AZA's requirements.

- Relatively large, complex outdoor space;
- Water pools, moats, and/or running streams;
- Natural vegetation;
- Trees or other natural substrate objects to allow nail grooming;
- Reduced exposure of bars or concrete from the public viewing side.

Id. at 11. For the floors of tiger enclosures, the AZA cautions against the use of concrete because of the physical and behavioral injuries they may cause:

> In general, ***natural outdoor dirt substrates are recommended*** for tiger exhibits…. For indoor enclosure areas that have non-dirt substrates, the choices of flooring are extensive. ***The most common material is concrete, which by itself is not recommended*** due to its porosity, abrasiveness, and hardness…. Any surface used should provide good traction for tigers, especially when wet, but should not be abrasive so as to cause footpad trauma during normal movement or exaggerated pacing. ***If the surface is too hard (e.g., concrete), trauma to bony prominences in normal resting or sleeping positions can result***….

Id. at 12 (emphasis added).

The Tiger Care Manual further instructs that "Opportunities should be provided for natural behaviors such as scratching, running, jumping, climbing, scent marking, swimming, and resting." *Id*. at 11. Insufficient enrichment can cause stereotypic behavior. For example, "[i]n sterile environments, captive animals often appear to be 'bored' or lethargic due to a lack of stimulation." Ex. 7 at 13.

As a general matter, the AZA has observed that unlike the tiger exhibit at the Aquarium, "[n]ewer exhibits in AZA-accredited zoos have progressed toward the use of open-air enclosures with live vegetation and natural soil substrates." *See* Ex. 6 at 11. To illustrate, the Houston Zoo, an AZA-accredited facility located less than five miles from the Aquarium, features a naturalistic outdoor tiger habitat with a natural dirt and grass and access to both natural light and shade. In contrast—of the more than 100 AZA-accredited facilities housing tigers in the United States that were surveyed—**only two** reported that they do not have outdoor exhibits for the tigers: the

Downtown Aquarium in Houston and the Downtown Aquarium in Denver. Both are owned and operated by Landry's.

D. Landry's customers flood the media with criticism about the tigers' conditions, and groups unrelated to ALDF keep protests alive for years.

Since its inception, the Aquarium has been receiving flak from political leaders, the media, activists, and its own customers angry about the tigers' plight. The negative publicity began in 2004 as soon as Fertitta announced his plans to buy the tigers. Ex. 4. In the years since, visitors to the Aquarium have flocked to social media to report their distaste for how Landry's treats the tigers. Two customer reviews that represent hundreds of others include:

From Trip Advisor user Giulia V (a year before ALDF's statements):

> ***The aquarium is average, definitely have seen better ones. The biggest disappointment was seeing the white tiger at the end of the exhibition in a small cement cage...it just ruined it for me and my fiance and our guests that where visiting. We felt like the tiger had nothing to do with the aquarium and definetly could be moved in a larger more open space.*** (Ex. 8)

From Yelp user Beverly J (a year before ALDF's statements):

> ***I went to the Aquarium a few weeks ago with Big Brothers Big Sisters and I thought some of it was okay, but the saddest thing I have ever seen, is that beautiful white tiger trapped on such a small space. I don't know how the company could do that, I guess they are making a lot of money and I am all for capitalism, but seriously, can't you provide a bigger space, perhaps, some indoor and some outdoor. It is so sad and I can't believe that there isn't an outcry. I went to a mayoral forum last night and one of the candidates brought it up, not as a platform, but when BARC came up, she brought it up as cruelty to animals, which it is and I think that The Aquarium should really re-think on how they house this beautiful animal.*** (Ex. 9)

Years before ALDF entered the debate, other animal advocates began calling public awareness to the tigers' conditions. The independent website "Free Houston Tigers" urges patrons to boycott Landry's. Ex. 10. The Texas Humane Legislation Network publicly removing the tigers from their current situation in Houston. Ex. 11. Two twelve-year-olds in Colorado gathered more than 110,000 signatures on a petition asking Landry's to relinquish the tigers at its aquarium in

Denver. Ex. 12. In December 2015—nine months before ALDF said a word—volunteers from the Florida-based Big Cat Sanctuary staged a protest outside the Downtown Aquarium. Ex. 11. Many of these protests, which have nothing to do with ALDF, covered by the media. *See id.*

E. Conley obtains Landry's permission to tour the tigers' private holding area.

Cheryl Conley lives in Montgomery, Texas. Conley, who is committed to the welfare of local wildlife, has served on the boards of wildlife organizations for more than ten years and cares for injured animals at her house as a licensed rehabilitator for the State of Texas. Ex. 1, ¶ 2. As the owner of Backyard Radio, a small not-for-profit radio station in Magnolia, Texas, Conley decided to combine her interests by starting a program which periodically would profile wildlife, or venues housing wildlife, in the Houston area. *Id.* ¶ 3.

As part of her background research to identify possible topics for her show, Conley scheduled a private tour with the Aquarium through its public relations firm, which allowed her to take a 10-15 minute guided tour of the enclosures where the tigers spend the majority of their time outside of public view. *Id.* ¶¶ 4–8. In her email requesting a tour, Conley wrote that "I am passionate about animals and wildlife." Ex. 13. The signature block of the email disclosed Conley's sympathies: It quotes Gandhi as saying "[t]he greatness of a nation and its moral progress can be judged by the way its animals are treated." *Id.* Conley told the Aquarium that her radio station was a start-up and that her plans for the show were amorphous: "Since we're a new station, we're really still in the planning stages on how we will use the information in a wildlife segment." *Id.* Knowing all this, the Aquarium approved Conley's request for a behind-the-scenes tour. *Id.*

During Conley's March 26, 2015 tour, she saw a small, metal cage with concrete floors and an elevated bench, as shown in this photograph that the Aquarium allowed Conley to take:

Conley asked one of the caretakers whether the tigers receive fresh air. The caretaker said that fresh air was only "piped in." Ex. 1, ¶ 12. Conley also asked how the tigers were kept from becoming bored. *Id.* The caretaker did not answer verbally, instead putting meat on the end of a stick and holding it out for the tigers to retrieve. *Id.* Conley then viewed the tigers on display in the Tiger Exhibit, where she witnessed the conditions in that area as described above. *Id.* ¶¶ 14–15.

F. Conley engages ALDF to represent her in an Endangered Species Act lawsuit that will aim to secure better living conditions for the tigers.

Disgusted by what she saw at the Aquarium, Conley later reached out to ALDF. Ex. 14, Nasser Dec., ¶ 6. Founded in 1979 by attorneys active in shaping the field of animal law, ALDF is a section 501(c)(3) non-profit organization. *Id.* ¶ 3. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. *Id.* ALDF accomplishes this mission by, among other ways, serving as legal counsel in lawsuits to protect animals from harm, lobbying

state legislators to strengthen anti-cruelty statutes, and encouraging regulators to enforce existing animal protection laws. *Id.*[3]

Once in touch with ALDF, Conley connected with staff attorney Carney Anne Nasser. *Id.* ¶ 6. Conley discussed the possibility of pursuing a lawsuit against Landry's and the Aquarium to obtain better conditions for the tigers. *Id.* ¶ 7. ALDF agreed to represent Conley in connection with that planned lawsuit, and Nasser became the primary ALDF attorney responsible for representing Conley. *Id.* ¶ 8. As a result, both ALDF and Nasser formed an attorney-client relationship with Conley and began to represent her in the preparation of a citizen lawsuit under the Endangered Species Act. *Id.* ¶ 7–8; *see also* Ex. 1, Conley Dec., ¶¶ 19–20.[4]

After discussing the tigers' condition with Conley, Nasser paid for admission to the Downtown Aquarium and saw the tigers' public area. Ex. 14, ¶ 10. Nasser witnessed the tigers pacing and saw at least one tiger slip on the concrete floor, which appeared to be very wet. *Id.* ¶ 11. After consulting a veterinarian and expert literature, Nasser wrote a letter to Landry's informing it that Conley was planning to sue Landry's for Endangered Species Act violations. *Id.* ¶ 12. This notice letter is a prerequisite to suing under the Endangered Species Act. 16 U.S.C. § 1540(g)(2)(A). To further Conley's interests and litigation strategy in the planned lawsuit, Nasser and ALDF also publicized the notice letter and the forthcoming lawsuit. Ex. 14, ¶¶ 15–18.

[3] ALDF's Litigation Program functions on a daily basis in essentially the same way as a private law firm, save for the fact that as a non-profit and pro-bono provider, its case generation procedures of course differ from those of a for-profit firm. On a general day, the ordinary tasks of ALDF staff attorneys are to prepare and revise pleadings, interview witnesses, interact with clients, attend depositions, argue hearings, draft and respond to discovery requests, and handle all the other tasks typically associated with litigation. Ex. 14, ¶¶ 4–5.

[4] In addition to being represented by California-based ALDF attorneys, Conley's Houston counsel in the Endangered Species Act lawsuit will be Irvine & Conner, PLLC. *See* Pet., Ex. B.

Just before the expiration of the 60-day waiting period for Conley to sue Landry's, Landry's filed this case and accused ALDF, Nasser, and Conley of everything from defamation to theft. Pet. ¶¶ 108–119. Because ALDF is a non-profit organization and can only afford to fight on so many fronts at one time, Landry's has at least temporarily succeeded in stifling Conley's right to petition the federal courts. Nonetheless, ALDF continues to represent Conley in preparations for the Endangered Species Act lawsuit and—as soon as Landry's SLAPP suit is addressed—intends to proceed with Conley's claims against Landry's. Ex. 1, ¶ 19.

ARGUMENT AND AUTHORITIES

All of Landry's claims are subject to the anti-SLAPP dismissal procedure because they are based on ALDF's rights of free speech, petitioning, and free association. Because ALDF is shielded by attorney immunity and the judicial-proceeding privilege, those defenses require all claims to be dismissed under the TCPA. Alternatively, dismissal is due because Landry's has no "clear and specific" evidence to support all elements of all claims, most of which are also barred by other valid defenses. For these reasons, ALDF asks the Court to dismiss the suit, award ALDF its fees and expenses, and impose the TCPA-mandated fine on Landry's.

A. Standard of Review

This motion arises under the Texas Citizens Participation Act ("TCPA"), which exists to "encourage and safeguard the constitutional rights of persons to petition, speak freely, and associate freely." TEX. CIV. PRAC. & REM. CODE § 27.002. To prevent "Strategic Lawsuits Against Public Participation" from achieving their intended purpose of stifling constitutional rights, the TCPA permits early dismissal after no discovery. TEX. CIV. PRAC. & REM. CODE §§ 27.003, 27.006; *see also Rehak Creative Servs. Inc. v. Witt*, 404 S.W.3d 716, 719 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (defining "SLAPPs").

Motions to dismiss under the TCPA involve two steps. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). First, ALDF must show "by a preponderance of the evidence that the lawsuit is based on, relates to, or is in response to the party's exercise of its right to free speech, the right to petition or the right of association." TEX. CIV. PRAC. & REM. CODE § 27.005(b). A cause of action "relates to" these rights so long as it has any "connection with" a protected statement. *Rehak*, 404 S.W.3d at 733–34 (trademark misappropriation claim "related to" free speech because trademark appeared on political web site). For this first step, all doubts must be resolved in favor of the statute's application because the TCPA is "construed liberally to effectuate its purpose and intent fully." *See* TEX. CIV. PRAC. & REM. CODE § 27.011(b).

Once ALDF shows that the claims relate to free speech, petitioning, or association, the burden shifts to Landry's to thwart dismissal by producing "clear and specific evidence [of] a prima facie case for each essential element" of each claim. TEX. CIV. PRAC. & REM. CODE § 27.005(c). If Landry's cannot carry that burden, the case must be dismissed. *Id*. Even if Landry's does submit clear evidence of a prima facie case, dismissal is still required if ALDF "establishes by a preponderance of the evidence each essential element of a valid defense to the [plaintiffs'] claim." *Id*., § 27.005(d).

B. Landry's claims are subject to anti-SLAPP dismissal because they relate to ALDF's rights of free speech, petitioning, and association.

In this case, step one of the anti-SLAPP analysis need not take long. Landry's admits that all of its claims are based on ALDF's statements in a press release, in newspapers, on social media, and in an attorney demand letter. Pet. ¶¶ 38–100. All the statements relate to (a) Landry's treatment of "the world's favorite animal" at one of Houston's top tourist spots and (b) Conley's plans to sue for Endangered Species Act violations. These are quintessential exercises of free speech, petitioning, and association. *See Backes v. Misko*, 486 S.W.3d 7, 20–21 (Tex. App.—

Dallas 2015, pet. denied) (applying TCPA because claims were based on internet discussion of horse breeding); *see also* Ex. 8 (top tourist spot); Ex. 15 ("favorite animal"). The Court need not decide whether all three rights are implicated; any one suffices to trigger the TCPA. *Deaver v. Desai*, 483 S.W.3d 668, 672 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Retaliatory lawsuits against environmental and animal activists were among the top factors leading to anti-SLAPP laws in the first place. The professor who coined the term "SLAPP" reports that suits targeting environmentalists are the third-most-common type of SLAPP.[5] One of the original SLAPPs involved a Boston aquarium's claims that an animal rights group had defamed it by criticizing the aquarium's treatment of dolphins.[6] And in Texas, the Legislature enacted the TCPA after hearing testimony from, among other witnesses, a citizen facing a $20 million RICO suit for her protests against a homebuilder's environmental practices.[7] In light of this historical record and the TCPA's text, the statute's application to Landry's claims could not be clearer.

1. Landry's claims are based on, relate to, and are in response to ALDF's exercise of its right of free speech on matters of public concern.

Landry's bases each cause of action on ALDF's statements to the press, online, and in a demand letter about Landry's treatment of the tigers. Pet. ¶¶ 38–101. Landry's cannot conceal that it sued ALDF in response to free speech. Under the TCPA, "the right of free speech" includes any "communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). "Matter[s] of public concern" are any issues related to "(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." *Id*., § 27.001(7). ALDF's statements are "free speech" because they relate to at least four public concerns:

[5] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9 (1989).
[6] *See* Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359, 362 (1994).
[7] Laura Lee Prather & Justice Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH L. REV. 725, 734 (2015).

Health or safety. ALDF's statements address the tigers' "health or safety." *See, e.g.*, Pet. ¶ 21 (suing over statements that tigers are kept in "deplorable" conditions, that Landry's has "harm[ed the tigers'] physical health and physiological well-being" and "caused the tigers serious mental and physical harm," that tigers are "at risk of serious, long term debilitating injuries," and that tigers are in "species-inappropriate living conditions").[8] Had the Legislature meant to restrict the definition of "public concern" to ***human*** health, it would have said so. Because no such limitation appears in the statute, none can be imposed. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) ("A court may not judicially amend [the TCPA] by adding words that are not contained in the language of the statute."). Indeed, the Texas Supreme Court has found a "health" concern under the TCPA in circumstances involving far less public outcry. *Compare id.* (finding "public concern" based on internal emails to the effect that one nurse "violated the company's sterile protocol policy") *with* Pet. ¶ 2 (noting that "thousands of customers" care about the tigers). Under any reading of the TCPA, the tigers' health is a matter of public concern.

Environmental and community well-being. Some of ALDF's statements refer to, and all are intended to prove, Landry's violations of the Endangered Species Act,[9] which scholars call "the 'pit bull' of all environmental laws, passed with the groundbreaking goal of actively conserving biological diversity." *See* Stephanie Brauer, *Arizona Cattle Growers' Pyrrhic Victory for Critical Habitat*, 38 ECOLOGY L.Q. 369, 371 (2011). Consequently, the statements involve the public concern of "environmental . . . well-being." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(7)(B).

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[8] *See also id.*, ¶ 43 ("Landry's has deprived these tigers of access to sunlight, fresh air, natural surfaces, and special appropriate environmental enrichment"); *id.*, ¶ 49 ("living on unnatural, unyielding concrete also increases the cats' risk of painful foot, joint, muscle, and circulatory problems and ulcerated or cracked footpads"); *id.*, ¶ 51 ("the tigers have been observed pacing and lunging at the glass wall").

[9] *See, e.g.*, Pet. ¶ 67 ("In this press release, ALDF falsely stated that Plaintiffs have committed 'Endangered Species Act violations'….").

Additionally, ALDF's statements relate to Landry's treatment of tigers at a "high-profile" theme park frequented by "thousands" of customers. Pet. ¶¶ 2, 13. Animal welfare—and the tigers' fates specifically—are matters of "community well-being." *See* TEX. PENAL CODE § 42.09 (making cruelty to livestock an offense); *id.*, § 42.092 (cruelty to domestic animals); Houston, Tex., Rev. Ordinances ch. 6, art. I, § 6.7 (regulating animal care); *id.*, ch. 6, art. III, §§ 6.51–6.52 (banning most possession of tigers). Courts have found "community well-being" at stake under the TCPA in matters far more humdrum than the confinement of endangered tigers at a "high-profile" theme park. *See Deaver*, 483 S.W.3d at 673 (accusing man of identity theft); *Neyland v. Thompson*, No. 03–13–00643–CV, 2015 WL 1612155, at *5 (Tex. App.—Austin Apr. 7, 2015, no pet.) (mem. op.) (feud within homeowner's association); *Bilbrey v. Williams*, No. 02–13–00332–CV, 2015 WL 1120921, at *11 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (mem. op.) (statements about coach's angry behavior during children's baseball game).

***Service in the marketplace*.** The tiger exhibit is part of a "service in the marketplace"—entertainment—and is thus a public concern. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(7)(E). Landry's markets itself as an entertainment destination and operates an "amusement park" that "involves the sale of ticket, food and beverages, and special event access." Pet. ¶ 13. As part of its services, Landry's "exhibit[s] four (4) captive-bred white Bengal tigers." *Id.* ¶ 2. Landry's charges $11.99 for tickets that include an opportunity to see the tigers. Ex. 16. Because ALDF's comments relate to these services, they involve a "matter of public concern" under the TCPA. *See, e.g.*, *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, no pet.) (online review of pool builder was "public concern" under TCPA); *Avila v. Larrea*, 394 S.W.3d 646, 655 (Tex. App.—Dallas 2012, pet. denied) (attorney's legal services involve "public concern" under TCPA).

Public figure. As a final consideration, many of ALDF's statements—or at least the articles containing them—pertain to Mr. Fertitta. *See, e.g.*, Pet. Ex. D, (*Houston Chronicle* article) ("the group is alleging the company, owned by Houston billionaire Tilman Fertitta, is violating the new AZA standards and the federal Endangered Species Act"). The media describes Mr. Fertitta as "Houston's most famous billionaire," Ex. 17, making him a "public figure." *See Haynes v. Crenshaw*, 166 F. Supp. 3d 764, 769 (E.D. Tex. 2016) (concluding that school district communications director was a "public figure" under TCPA). Fertitta's public-figure status has only increased with his new role hosting a CNBC reality show. For instance, visitors to the Landry's and Aquarium web sites are greeted with this pop-up ad featuring Mr. Fertitta:

Ex. 18. Moreover, Landry's itself is a "public figure" as that term applies to corporations. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980) (even a local Pittsburgh steak chain was a "public figure" based on its $16,000 advertising campaign). Because ALDF's statements relate to Mr. Fertitta and Landry's, the TCPA clearly applies.

In sum, Landry's based each cause of action on ALDF's statements about the tigers, which implicate at least four of the "public concerns" required to qualify as "free speech." As a result, the TCPA's dismissal procedure is available for each of Landry's claims.

2. Landry's claims are based on, relate to, and are in response to ALDF's exercise of its right to petition courts on behalf of Conley.

Landry's petition leaves no doubt that its claims are "based on" and were filed "in response" to ALDF's letter notifying Landry's of the planned Endangered Species Act lawsuit. *See*, *e.g.*, Pet. ¶ 42 ("Defendants' 11-page, single-spaced letter, couched as notice of their claims under the Endangered Species Act, is rife with defamatory and disparaging statements. . . ."). As one example, Landry's abuse of process claim relates *only* to the notice letter that ALDF mailed to federal regulators; the letter is the "process" that was supposedly abused. *Id*. at ¶ 115. Additionally, ALDF's comments to the media appear in articles that describe the notice letter and the Endangered Species Act lawsuit. *Id.* at ¶¶ 92–96. Likewise, nearly of all of ALDF's social media postings describe the "notice of intent to sue" letter. *Id*. at ¶¶ 78–88.

ALDF's notice letter and the associated statements are an archetypal "exercise of the right to petition." The TCPA defines that right to encompass all communications "***pertaining to*** a judicial proceeding." TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A) (emphasis added). ALDF's allegedly defamatory statements clearly "pertain to" Conley's planned citizen suit. *See*, *e.g.*, Pet. ¶ 74 ("The press release threatened that unless Plaintiffs give up their tigers to a location of ALDF's choosing, ALDF will bring a lawsuit against Plaintiffs in federal court."). It makes no difference that the Endangered Species Act suit was not yet pending. *Cuba v. Pylant*, 814 F.3d 701, 712 (5th Cir. 2016) (applying TCPA, holding that letter about a lawsuit "plainly 'pertains to' the proceeding,

which is all that is needed under the statute," and rejecting argument that letter was "unprotected because there was no live proceeding when the letter was sent").[10]

Moreover, ALDF's notice letter involves the right to petition because it is "a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, **executive**, **judicial**, or other **governmental body**," i.e., a federal court, the U.S. Department of Justice, the U.S. Department of the Interior, and the U.S. Fish and Wildlife Service. TEX. CIV. PRAC. & REM. CODE § 27.001(4)(C) (emphasis added); Pet. ¶ 38 (admitting ALDF sent the letter to federal regulators); Pet. Ex. B.[11] Not only is the letter "likely to encourage" judicial and agency review, the letter is a legal prerequisite to obtaining relief under the Endangered Species Act. 16 U.S.C. § 1540(g)(2)(A) ("No action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator . . . .").

As Landry's notes, some of the statements on ALDF's web site include a link that requests sympathetic members of the public to "donate" toward the costs that ALDF will incur in prosecuting the Endangered Species Act lawsuit for Conley. Pet. ¶¶ 65–66. Moreover, ALDF sent

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[10] In an opinion that has yet to be followed by any other Texas court, the Dallas Court of Appeals disagreed with the Fifth Circuit, holding that "judicial proceeding" can only mean a "pending" case. *Levatino v. Apple Tree Cafe Touring, Inc.*, 486 S.W.3d 724, 729 (Tex. App.—Dallas 2016, pet. denied). For that reason, the Dallas court found that a pre-suit demand letter was not related to the right to petition. But the court's reasoning was limited to a letter that was only distributed to the demandee's lawyer, not to the government. *Id.* In this case, ALDF was required to—and did—send the letter to federal regulators; doing so was a jurisdictional prerequisite to filing the ESA lawsuit. 16 U.S.C. § 1540(g)(2)(A)(i). Additionally, the defendant in *Levantino* did not assert that the *contents* of the letter were an exercise of his right to free speech. 486 S.W.3d at 729. Instead, he only claimed that the *form* of the demand was an exercise of the right to petition because it related to a proposed lawsuit. *Id.* In contrast, ALDF has shown that the contents of the letter relate to free speech independently of whether the letter also invokes the right to petition. *See supra*. Finally, by reading the non-existent word "pending" into the TCPA's definition of "right to petition," the *Levantino* opinion defies the statute's text and the Texas Supreme Court's rules of construction. *Lippincott*, 462 S.W.3d at 508 ("A court may not judicially amend [the TCPA] by adding words that are not contained in the language of the statute."); TEX. CIV. PRAC. & REM. CODE § 27.011(b) (requiring that the TCPA be "construed liberally to effectuate its purpose and intent fully").

[11] ALDF forwarded the letter to Mayor Turner. Although Mayor Turner's office does not enforce the Endangered Species Act, the Aquarium is located on land owned by the City of Houston and leased from the City. Moreover, the City regulates the keeping of tigers, and changes in city law could also advance animal advocates' interests in freeing the tigers from their present conditions. *See* Houston, Tex., Rev. Ordinances ch. 6, art. I, § 6.7 (regulating care); *id.*, ch. 6, art. III, §§ 6.51–6.52 (banning most possession of tigers).

copies of the demand letter to the media, hoping to elicit public awareness of and support for the planned lawsuit. *See id*., ¶ 64. ALDF's attempts to elicit public support present still further reasons why the statements equate to petitioning. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(4)(D) (defining the right to include "a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a . . . judicial. . . body"). Because all of Landry's claims are a direct response to the notice letter and ALDF's communications about the planned citizen suit, the claims implicate the right to petition and are subject to dismissal under the TCPA.

3. Landry's claims are based on, relate to, and are in response to ALDF's exercise of its right to freedom of association.

Landry's claims also relate to ALDF's exercise of its "right of association," which protects communications "between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(3). The "common interests" need not involve any public, let alone salutary, concerns. *See Fawcett v. Rogers*, 492 S.W.3d 18, 24 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding that "right of association" encompasses private emails about mismanagement of Mason lodge).

All of Landry's claims are based on statements ALDF posted on social media feeds such as Facebook, Twitter, and ALDF's web site. Pet. ¶¶ 64, 78–88, 98. For instance, ALDF says on Facebook that Landry's "should stick to the restaurant business and leave the housing of tigers to those who are able to provide big cats with proper care." *Id*. at ¶ 81. Such statements involve ALDF's right of association with like-minded advocates. Like anyone else, ALDF uses social media in the hopes that supporters will "express, promote, pursue, or defend" the common interest they share with ALDF—improving the treatment of animals. Applying that rationale, a Texas court has expressly held that Facebook posts about common interests in animals are a form of protected "association" under the TCPA. *Backes*, 486 S.W.3d at 20–21 (applying TCPA because people

"have the right to associate with each other on social media, particularly when it involves a common interest such as horse breeding").

Additionally, the conspiracy claim directly targets the right of association. A conspiracy can only exist if the defendants knew about and agreed on it. *See Transport Ins. v. Faircloth*, 898 S.W.2d 269, 278 (Tex. 1995). Had any such planning occurred, those conversations between ALDF and Conley would fall within the TCPA's broad "right of association." *See Backes*, 486 S.W.3d at 20–21 (applying TCPA to conspiracy claim); *Combined Law Enforcement Ass'n of Texas v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *5 (Tex. App.—Austin Jan. 31, 2014, no. pet. h.) ("right of association" covers internal emails about firing an employee). With the rights of free speech, petitioning, and free association all at stake, ALDF has more than satisfied its burden of showing by a preponderance of the evidence that the anti-SLAPP dismissal procedure applies.

C. Even if Landry's could establish a prima facie case, all of Landry's claims are barred by attorney immunity and the judicial-proceeding privilege.

Because the anti-SLAPP law applies, the Court moves to step two: deciding if dismissal is warranted. Later in this motion, ALDF explains on a claim-by-claim basis why Landry's has no case and why ALDF has valid defenses. But the Court need not undertake a claim-specific study to dispose of this case. Independent of their other flaws, all claims against ALDF are barred by attorney immunity and judicial privilege. Consequently, dismissal is due. TEX. CIV. PRAC. & REM. CODE § 27.005(d) ("[T]he court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."); *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 285 (Tex. App.—Dallas 2015, pet. denied) (dismissing case under TCPA because defendant established that judicial-proceeding privilege applied).

1. ALDF enjoys attorney immunity with respect to all the challenged conduct.

In the planned Endangered Species lawsuit that gave rise to this case, ALDF, through Nasser, is providing legal services to the would-be plaintiff, Cheryl Conley. Ex. 14 ¶ 7–8. As its name suggests, ALDF is a legal organization whose lawyers represent animal advocates. *Id*. ¶ 3. Consistent with that mission, ALDF staff are the attorneys in Conley's planned federal lawsuit, and Conley is their client. Ex. 1, ¶¶ 19–20. In making the statements that underlie Landry's claims, ALDF acted in the scope of representing Conley in the Endangered Species Act dispute. Ex. 14, ¶¶ 15–18. For that reason, ALDF is entitled to attorney immunity even if, contrary to the facts here, its acts on behalf of Conley were just as tortious as Landry's alleges. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 485 (Tex. 2015).

As the Texas Supreme Court recently explained in *Cantey Hanger*, attorney immunity is a "comprehensive affirmative defense protecting attorneys from liability to non-clients, stemming from the broad declaration over a century ago that 'attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.'" *Id.* at 481 (internal citation omitted). Under this defense, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Id.* Even if the lawyer actually committed a tort, the wrongful conduct "is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id*. It makes no difference what legal label Landry's applies to the claims. Attorney immunity "applies to *all* causes of action" based on a lawyer's acts while representing a client. *Bradt v. West*, 892 S.W.2d 56, 76 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

In *Cantey Hanger*, for instance, the plaintiff accused a lawyer of making fraudulent statements in a court-ordered bill of sale. 467 S.W.3d at 485. The Supreme Court decided that, even

if the statements truly were fraudulent, the lawyer was immune because preparing a bill of sale "is the kind of conduct in which an attorney engages when discharging his duties to his client." *Id*. at 482, 485. This does not mean that attorneys face no consequences for bad acts committed while representing a client. Although civil liability is off limits because it would chill zealous advocacy, "other mechanisms are in place to discourage and remedy such conduct, such as sanctions, contempt, and attorney disciplinary proceedings." *Id*. at 482.

To prevail on its immunity defense, ALDF needs to prove nothing except that "its alleged conduct was within the scope of its legal representation of" Conley. *Id.* at 484. If the "type of conduct" is that "which an attorney engages to discharge his duties to his client," the attorney is immune even if she undertook the conduct in a tortious manner. *Id.* at 482, 485. "[I]t is the kind of conduct that is controlling, and not whether that conduct is meritorious or sanctionable." *Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 442 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). For example, punching an opponent "is not part of the discharge of an attorney's duties in representing a party" and could lead to an assault claim because boxing is not among the tasks that lawyers generally perform for clients. *Bradt*, 892 S.W.2d at 72. For any type of activity not "foreign to the duties of an attorney," however, immunity protects even the lawyer who conducts that activity in way that injures, or even defrauds, a non-client. *Cantey Hanger*, 467 S.W.3d at 481–82.

Two types of activity form the basis for all of Landry's claims. First, ALDF sent a demand letter. Pet. ¶ 38. Second, ALDF publicized the federal lawsuit in traditional and social media, including with a press release. *Id*., ¶¶ 41, 64. Neither of these actions is "foreign to the duties of an attorney." *See Cantey Hanger*, 467 S.W.3d at 481–82. To the contrary, "***making demands*** on the client's behalf, . . . ***speaking about an opposing party in a negative light***, . . . and even threatening particular consequences . . . if demands are not met—are the kinds of actions that are part of the

discharge of an attorney's duties in representing a party." *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (emphasis added) (attorney immunity barred tortious interference claim that was based in part on lawyer's alleged role in leaks to *Wall Street Journal*).

The First Court of Appeals has repeatedly held that sending demand or notice letters is a typical attorney activity, making attorneys immune from defamation or other liability for statements in such letters. *Bosch v. Armstrong*, No. 01-08-00847-CV, 2009 WL 1635318, at *4 (Tex. App.—Houston [1st Dist.] June 11, 2009, pet. denied) (mem. op.); *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405–06 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Watson v. Kaminski*, 51 S.W.3d 825, 828 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Likewise, advocating for clients in the court of public opinion is not "foreign to the duties of an attorney." *See Cantey Hanger*, 467 S.W.3d at 481–82. As the Court knows, "[s]eldom a day elapses when the legal affairs writers for the major and smaller newspapers in Texas do not receive a telephone call, fax, or email from a law firm or a public relations company representing lawyers pitching an article featuring the firm."[12] Legal scholars agree that using media to promote client interests "is not optional or exceptional behavior; it is baseline, ordinary behavior."[13]

Even Texas disciplinary rules reflect that, in a lawyer's role as "advocate," she may properly issue public statements that describe "the general nature of the claim" and the existence and "general scope" of an investigation. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.07(c). Attorneys' media advocacy, whether through traditional means like the newspaper or modern ones like Twitter, is important because "the subject matter of legal proceedings is often of direct

[12] Mark Curriden & Paula Hinton, *Using the Media to Promote Your Law Practice and Your Client's Interests*, 67 Tex. B.J. 740 (2004).

[13] Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to Be Competent in Public Advocacy*, 30 Hamline L. Rev. 567, 585 (2007).

significance in debate and deliberation over questions of public policy." *See id.*, cmt. 1. As further proof that issuing press releases and posting case descriptions online is "the kind of conduct in which an attorney engages when discharging his duties to his client," *Cantey Hanger*, 467 S.W.3d at 482, 485, it bears noting that Landry's own attorneys routinely do so in representing their clients. *See, e.g.*, Ex. 19, Press Release, "*Norton Rose Fulbright obtains landmark $15.75 million settlement for Feld Entertainment*" (May 15, 2014).

Because educating the public about clients' cases is such a staple of zealous advocacy in high-profile disputes, attorneys are immune from civil liability for this type of speech. *Cf. Highland Capital Mgmt.*, 2016 WL 164528, at *6 (immunity barred claims based on lawyer's alleged role in leaks to the *Wall Street Journal*). Applying immunity to attorneys' media activity is fully consistent with the doctrine's purpose. By design, immunity is "broad" and "comprehensive" to assure "loyal, faithful, and aggressive representation by attorneys employed as advocates." *Cantey Hanger*, 467 S.W.3d at 481 (internal citation omitted). Immunity is so broad, for example, that it even protects a lawyer for advising his client, before any lawsuit is filed, to tear down a billboard on the client's property. *Reagan Nat'l Advert. of Austin, Inc. v. Hazen*, No. 03-05-00699-CV, 2008 WL 2938823, at *8 (Tex. App.—Austin July 29, 2008, no pet.).

In sum, sending demand letters and publicizing lawsuits are routine acts that lawyers undertake in representing their clients. Consequently, Landry's contention that ALDF's notice letter and media statements were false is immaterial to immunity. *See Porter & Hedges*, 32 S.W.3d at 442 ("[I]t is the kind of conduct that is controlling, and not whether that conduct is meritorious or sanctionable."). Because ALDF made these statements within the scope of its role as Conley's attorney, ALDF is immune from suit. *Cantey Hanger*, 467 S.W.3d at 485 ("[A]n attorney's conduct may be wrongful but still fall within the scope of client representation.").

2. The judicial-proceeding privilege bars all of Landry's claims because ALDF's statements all "bear some relationship to" a planned lawsuit.

The judicial-proceeding privilege provides an extra layer of protection. Attorney immunity and judicial privilege are related but "independent" defenses, and one may apply even where the other does not. *Cantey Hanger*, 467 S.W.3d at 485 n.12. Consequently, even if ALDF and Nasser were not immune, their statements remain privileged because they arose in connection with the planned Endangered Species Act citizen suit.

Thanks to the judicial-proceeding privilege, most speech attendant to litigation cannot give rise to civil liability. *See James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982). The privilege "not only extends to statements made during litigation, but also to statements made ***in contemplation of and preliminary to*** judicial proceedings." *Daystar Residential, Inc. v. Collmer*, 176 S.W.3d 24, 27–28 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (emphasis added). To invoke the privilege, ALDF need only show that its statements "bear some relationship to," and were made to further, "pending or proposed litigation." *Id.* Whether ALDF meets that standard is a question of law. *Id*. In deciding the issue, "the court must consider the entire communication in its context," and "[a]ll doubt should be resolved in favor of" applying the privilege. *Id*. (citing *Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.)).

Under this standard, ALDF's statements are all privileged. As to statements contained in ALDF's 60-Day Notice Letter, Texas law "clearly" specifies that "demand letters" and "documents constituting notice as required by law" are protected by the judicial-proceeding privilege. *Daystar Residential*, 176 S.W.3d at 28; *see, e.g., Thomas v. Bracey*, 940 S.W.2d 340, 344 (Tex. App.—San Antonio 1997, no writ) (applying privilege to demand letter); *Russell*, 620 S.W.2d at 870 (same); *see also Crain v. Smith*, 22 S.W.3d 58, 62 (Tex. App.—Corpus Christi 2000, no pet.) ("The rationale is largely that of the absolute privilege that attaches to allegations in a petition filed in

court, in that the demand letter is an attempt to alert the potential defendant of the grievance before suit is filed."). Consequently, all claims based on ALDF's "60-Day Notice Letter" are barred by the judicial-proceeding privilege.

Texas law is just as clear that ALDF's public statements related to the Endangered Species Act case are privileged. Not only do ALDF's comments "bear some relationship to" proposed litigation, they expressly discuss the planned suit. *See, e.g.*, Pet. ¶¶ 67-75 (ALDF's press release says that "ALDF will bring a lawsuit"); ¶¶ 78–88 (discussing ALDF's statements in social media that ALDF "sent a notice of intent to sue"). In the context of describing the suit, ALDF's statements also summarize allegations that Conley will bring in federal court. The judicial-proceeding privilege protects all such comments. *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 239 (Tex. App.—Dallas 2000, pet. denied) (applying privilege to press release that described lawsuit allegations); *Hill v. Herald-Post Pub. Co., Inc.*, 877 S.W.2d 774, 783–84 (Tex. App.—El Paso 1994) (applying privilege to comments in a newspaper about lawyer's "belief that he could prove" lawsuit allegations), *rev'd in part on other grounds*, 891 S.W.2d 638 (Tex. 1994).

Of course, the privilege is not limited to comments in the media, and the rationale behind the privilege applies just as much to Facebook posts as to faxed press releases. *Cf. Riley v. Ferguson*, No. 01-98-00350-CV, 1999 WL 191654, at *4 (Tex. App.—Houston [1st Dist.] Apr. 8, 1999, pet. denied) (extending the privilege so far as to cover pleadings hand-delivered to a non-party condo manager). Whether in a telegram or a tweet, "[t]o allow a party to convert a privileged communication into an actionable communication simply by repeating it to third persons would clearly frustrate the goal of [the privilege]." *See id.* (internal citation omitted).

The Court is not writing on a blank slate. This case closely tracks the scenario that the First Court of Appeals faced in *Daystar Residential*. In that case, an attorney was investigating a potential

wrongful-death lawsuit against a mental-health center. 176 S.W.3d at 26–27. Before filing suit, he spoke with newspapers about his plans to sue and his allegation that the center killed patients by improperly restraining them. *Id.* The center sued the lawyer for business disparagement, and the court held that his public statements were privileged because they "bore some relationship to proposed litigation and could further his representation of his client." *Id.* at 28–29. "That his statements were made before the actual filing of the suit has no bearing on whether they are protected by judicial privilege." *Id.* at 28. After *Daystar Residential*, Landry's lacks even an arguable basis for evading the judicial-proceeding privilege.[14]

Because all of Landry's claims are based on comments that ALDF made in demand letters or in public statements about the planned lawsuit, the judicial-proceeding privilege bars each cause of action. *Hernandez v. Hayes*, 931 S.W.2d 648, 654 (Tex. App.—San Antonio 1996, writ denied) ("Although the privilege arises as a defense to defamation, it must be applied to all of appellant's causes of action. The privilege would be lost if the appellant could merely drop the defamation causes of action and creatively replead a new cause of action.").

[14] ALDF notes that, nearly 20 years **before** *Daystar Residential*, the Beaumont Court of Appeals issued one opinion contrary to the mainstream position that prevails elsewhere in Texas. In that case, the Beaumont court found that the judicial-proceeding privilege did not protect a **party's** filing of a lawsuit for the purpose of stifling competition. *Levingston Shipbuilding Co. v. Inland W. Corp.*, 688 S.W.2d 192, 196 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.). The defendant was not an attorney; thus, the entirely "independent" question of attorney immunity never arose. *See Cantey Hanger*, 467 S.W.3d at 485 n.12. Moreover, most Texas courts have rejected the narrow holding of *Levingston* even as it applies to non-attorneys, let alone lawyers. *See, e.g.*, *Riley*, 1999 WL 191654, at *4 (chronicling courts' criticism of "*Levingston* as a holding that has no support in the case law and as a deviation from the general rule of absolute privilege" and finding that defendant's mailing of pleadings to a third party ***was*** protected by judicial-proceeding privilege).

D. Even if the claims were not barred by immunity and privilege, this suit must be dismissed because Landry's has no "clear and specific" proof to support the claims, and ALDF has established valid defenses to each claim.

In a case where immunity and privilege did not apply, Landry's could attempt to defeat this motion by offering "clear and specific" evidence of a prima facie case for all elements of all claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c). Landry's burden exceeds the "scintilla" standard that applies to no-evidence motions for summary judgment. *Rehak*, 404 S.W.3d at 726. "The words 'clear' and 'specific' in the context of this statute have been interpreted respectively to mean, for the former, 'unambiguous,' 'sure,' or 'free from doubt' and, for the latter, 'explicit' or 'relating to a particular named thing.'" *Lipsky*, 460 S.W.3d at 590. Landry's has no such evidence.

Although the Texas Supreme Court has clarified that the "clear and specific" standard is looser than some originally understood it,[15] the TCPA remains potent. In *Lipsky* itself, for instance, the Supreme Court found that a business disparagement claim failed because the only proof of damages—an affidavit asserting "direct pecuniary and economic losses . . . and loss of goodwill in the communities in which it operates . . . in excess of three million dollars"—was too "conclusory" to count as "clear and specific" evidence. *Id*. at 592.

Additionally, the TCPA's greatest power after *Lipsky* resides in section 27.005(d), which provides that "[n]otwithstanding the [non-movant's ability to show a prima facie case], the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense." TEX. CIV. PRAC. & REM. CODE § 27.005(d). Because ALDF need only prove its defenses by a "preponderance of the evidence" to win dismissal under the TCPA, its burden is less than required to win traditional

[15] In *Lipsky*, the Supreme Court (1) clarified that courts may consider circumstantial evidence so long as the circumstances are "clear and specific" and (2) specified that both evidence and pleading allegations, when taken together, may suffice to ward off dismissal. 460 S.W.3d at 590–91. For pleadings to count toward a non-movant's TCPA burden, "general allegations that merely recite the elements of a cause of action—will not suffice." *Id.*

summary judgment. *Compare Bradt v. West*, 892 S.W.2d 56, 65 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (requiring summary judgment movant to "conclusively establish" defenses to a point that "ordinary minds cannot differ"). Especially under this "valid defense" rule in section 27.005(d), Landry's claims all fall short.

1. Defamation

To avoid dismissal of its defamation claim, Landry's needs "clear and specific" evidence that ALDF, acting with actual malice, published a false statement of fact that proximately caused actual damage to Landry's. By at least a preponderance of the evidence, ALDF has established three valid defenses: Most of the statements are non-actionable opinion, the rest are true, and alternative causes are the likelier explanation for any reputational harm Landry's has suffered. Additionally, Landry's has no clear and specific evidence to prove any element of defamation, and its proof is particularly lacking with respect to actual malice and damages.

a. For most of the comments, ALDF prevails on its defense that the statements are opinions incapable of defamatory meaning.

For a statement to be defamatory, it "must be sufficiently factual to be susceptible of being proved objectively true or false, as contrasted from a purely subjective assertion." *Thomas-Smith v. Mackin*, 238 S.W.3d 503, 507 (Tex. App.—Houston [14th Dist.] 2007, no pet.). This does not mean that a speaker can escape liability by saying "in my opinion, John Doe has stolen $1,000,000 from at least 20 of his clients." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990). Instead, it means that plaintiffs cannot sue over statements such as "John Doe is the worst lawyer in America." *Id*. The distinction lies in whether "a reasonable factfinder could conclude that the statement implies an actual assertion of the purported fact, as contrasted from loose, figurative, or hyperbolic language." *Thomas-Smith*, 238 S.W.3d at 507. If the statement is, "by its nature, an indefinite or

ambiguous individual judgment," it cannot be defamatory. *Avila*, 394 S.W.3d at 659 (calling lawyer's result a "nightmare" for client was non-actionable opinion).

Most of ALDF's comments are textbook illustrations of " individual judgment." *See Avila*, 394 S.W.3d at 659. The focal point of Landry's case is that ALDF said Landry's keeps tigers in "deplorable," "horrible," "dungeon-like" conditions; holds the tigers "captive," and denies the tigers "so much that is natural and important." Pet. ¶¶ 21, 43, 55, 67, 68, 69, 71, 83, 85, 88. In one of the most opinion-like statements conceivable, ALDF wrote that "Landry's, Inc. should stick to the restaurant business and leave the housing of tigers to those who are able to provide big cats with proper care and naturalistic habitats rather than sacrificing the wellbeing of an endangered species for the sake of tourist dollars." *Id*., ¶ 81.

Not one of those statements is "susceptible of being proved objectively true or false." *Thomas-Smith*, 238 S.W.3d at 507. Courts in Texas and nationwide have dismissed cases involving statements just like, and far worse than, what ALDF said here. *Rehak*, 404 S.W.3d at 729 ("bilking" and "ripping off" are just "rhetorical hyperbole"); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 875 (Tex. App.—Dallas 2014, no pet.) ("Whether someone can 'barely speak English' is a matter of subjective opinion, because what one person may view as non-proficient English may be completely acceptable to another person."); *Falk & Mayfield L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) ("lawsuit abuse" is subjective); *Beverly Hills Foodland, Inc. v. UFCW Local 655*, 39 F.3d 191, 195 (8th Cir. 1994) ("unfair to black employees" is opinion); *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1288–89 (5th Cir. 1981) (reference to church as a "rip-off, money motivated operation" not defamatory). As Justice Frankfurter explains, "to use loose language or undefined slogans that are part of the conventional

give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts." *Cafeteria Employees Union, Local 302, v. Angelos*, 320 U.S. 293, 295 (1943).

ALDF's statements about medical risks to the tigers are just as constitutionally off-limits as ALDF's other opinions. ALDF said that conditions at Landry's "harm[ed the tigers'] physical health and psychological wellbeing," do "not offer the tigers the opportunity to mimic their natural behaviors," can cause "serious mental and physical harm," lead to "pervasive stress" and "overly aggressive behavior," and put the tigers "at risk for serious, long term, debilitating injuries." Pet. ¶¶ 21, 47, 57, 71, 72. Diagnoses and observations about whether behavior puts an animal "at risk" are classic, albeit expert, opinions. For instance, when *Dateline NBC* said that a trucker was "putting people at risk by driving long hours," a federal appeals court ruled that the statement "expresses *Dateline's* protected opinion that [the] behavior was risky." *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 116 (1st Cir. 2000); *see also Yohe v. Nugent*, 321 F.3d 35, 41 (1st Cir. 2003) (statement that arrestee "was suicidal" is "plainly" a protected opinion about mental condition).

Finally, the fact that ALDF punctuated opinions with the comment that Landry's "committed Endangered Species Act violations" (Pet. ¶ 67) changes nothing. That statement cannot be considered in a vacuum. *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987) ("The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement."). Because ALDF "laid out the behavior that [it] considered to be a problem," stated its view of what the rules require, and then stated that Landry's broke those rules, ALDF's "statements regarding [its] opinion about [Landry's] behavior violating [applicable] policies are not actionable as defamation." *See Hadlock v. Texas Christian Univ.*, No. 2-07-290-CV, 2009 WL 485669, at *4 (Tex. App.—Fort Worth Feb. 26, 2009, pet. denied) (mem. op.) (professor's comment that another professor violated school

ethics policy was opinion incapable of defamatory meaning); *see also Horsley v. Rivera*, 292 F.3d 695, 697 (11th Cir. 2002) (calling man "accomplice to murder" was protected opinion); *Secrist v. Harkin*, 874 F.2d 1244, 1247 (8th Cir. 1989) (accusing senator of "a violation of the Hatch Act which could have subjected him to two years imprisonment" was subjective opinion).

b. <u>For the remaining comments, ALDF has proven its defense that all its assertions of fact are true.</u>

Of the dozens of statements that Landry's sued over, only six even arguably come close to assertions of verifiable fact. ALDF does not concede that these statements, viewed in context, are non-opinions, but the statements are not actionable in any event because all are true. Specifically, ALDF stated that the tigers (1) lack "access to sunlight, fresh air, natural surfaces," (2) "cannot run or jump," (3) "live entirely on unnatural and unyielding surfaces," (4) have been "observed pacing and lunging," (5) have "no tree trunks" in their enclosure, and (6) when on display, have "no ability to seek privacy from the viewing public." Pet. ¶¶ 43, 45, 47, 51, 70.[16]

Every one of these statements is true, meaning that ALDF has established a valid defense warranting dismissal of Landry's claims. Photos and videos show the tigers pacing, demonstrate that the public viewing area lacks a place for them to seek privacy, and prove that the tigers have no "tree trunks" in their enclosure, just a concrete sculpture of a tree. *See* Ex. 14, ¶ 10–11. Nasser and Conley saw no place for the tigers to run or jump. *Id*. Landry's also asserts that one skylight and occasional "wood chips" are the equivalent of sunlight and "tree trunks," but the gist of ALDF's comments was clearly that the tigers are never allowed outdoors. Landry's does not

[16] Landry's also complains of statements to the effect that "The Animal Legal Defense Fund sent a notice of intent to sue Landrys, Inc.," "[t]oday @ALDF sent a notice of intent to sue," and "[w]e have secured placement for these cats at reputable sanctuaries where they will feel sunshine on their backs and something other than concrete under their paws." *See* ¶ Orig. Pet. 78, 79, 86. All of these statements simply, and accurately, describe actions that ALDF has taken. They are true in every sense. *See* Pet., Ex. B. And the statement that ALDF "sent a notice letter" is hardly capable of defamatory meaning.

dispute that the tigers live their entire lives inside and thus have no sunlight exposure except through a skylight, which is covered with a plastic-like glaze. Ex. 1, ¶ 12.

At the very least, ALDF's comments are substantially true. "A statement need not be perfectly true; as long as it is substantially true, it is not false." *KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710, 714 (Tex. 2016). A report is only false if "taken as a whole [it] is more damaging to the plaintiff's reputation than a truthful [report] would have been." *Id*. Landry's cannot credibly contend that it would have been less harmed if ALDF had said "no access to sunlight except through a plastic-covered skylight" and "no tree trunks except for a concrete one."

Consider this KPRC video of one tiger's cage:

Would Landry's customers be any less dismayed by these conditions if ALDF had mentioned the sorry-looking "sod" scraps in the corner? The tiger seems not to be.

In *KBMT*, for instance, a news story suggested that a doctor was investigated for abusing a child patient. *Id.* But because the doctor actually was investigated for abusing an adult patient, the report was substantially true, and the Supreme Court held that the TCPA required dismissal of the

defamation claim. *Id.*; *see also Avery v. Baddour*, No. 04-16-00184-CV, 2016 WL 4208115, at *6 (Tex. App.—San Antonio Aug. 10, 2016, pet. denied) (affirming anti-SLAPP dismissal because, even if article falsely said plaintiff was a secessionist who had renounced his U.S. citizenship, article was "substantially true" in that plaintiff did belong to "volunteer, non-violent organization premised on the belief that Texas is a sovereign nation").

c. Landry's has no clear and specific evidence of actual malice.

To defeat this motion, Landry's must supply clear and convincing evidence that ALDF published the statements with actual malice. That standard applies because ALDF's comments pertain to matters of public concern[17] and because Landry's is a public figure.[18] *Casso v. Brand*, 776 S.W.2d 551, 554 (Tex. 1989). "Actual malice" means that, before publishing the statement, the defendant knew it was false or subjectively entertained serious doubts about its accuracy. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 171 (Tex. 2003). In effort to carry this heavy burden, Landry's asserts that (1) ALDF "disregarded" USDA inspection reports in which the Downtown Aquarium passed inspection and (2) Conley toured the facility. Pet. ¶¶ 26, 27, 31, 44. Both forms of "proof" miss the mark.

As a matter of law, failing to access favorable inspection reports does not constitute actual malice. *Texas Campaign for the Environment v. Partners Dewatering Int'l, LLC*, 485 S.W.3d 184, 201 (Tex. App.—Corpus Christi 2016, no pet.) (no malice even though defendant did not consult favorable TCEQ compliance report). Even assuming ALDF knew that Landry's had passed USDA

[17] Speech about the treatment of a beloved, endangered species at one of the showiest tourist attractions in the heart of Houston is "fairly considered as relating to any matter of political, social, or other concern to the community." *See Connick v. Myers*, 461 U.S. 138, 146 (1983); *see also Scott v. Godwin*, 147 S.W.3d 609, 618 (Tex. App.—Corpus Christi 2004, no pet.) ("Speech made in the context of ongoing commentary and debate in the press is of public concern to the public.").

[18] *See Steaks Unlimited*, 623 F.2d at 273 (even a local Pittsburgh steak chain was a "public figure" based on its $16,000 advertising campaign). ALDF further adopts and incorporates the arguments and evidence in Defendant Cheryl Conley's Anti-SLAPP Motion to Dismiss that pertain to Landry's status as a public figure.

inspection, the USDA results do not contradict ALDF's statements. Reasonable minds can differ on whether meeting bare-minimum regulations is the same as giving tigers "species-appropriate" conditions. *See Harte-Hanks Comm'cns, Inc. v. Connaughton*, 491 U.S. 657, 681 (1989) ("Difference of opinion as to the truth of a matter—even a difference of 11 to 1—does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity. . . .").

More importantly, the USDA does not regulate whether Landry's provides outdoor access, sunlight, non-concrete surfaces, or the like. 7 U.S.C. § 2134(a); 9 C.F.R. §§ 3.1-3.142. As a result, Landry's purported compliance with USDA rules is a red herring. The USDA enforces the Animal Welfare Act, not the Endangered Species Act—which served as the basis for the claims in the 60 Day-Notice Letter and ALDF's statements to the press. Even if the Aquarium were compliant with the Animal Welfare Act, such compliance is irrelevant to whether it harmed the tigers in violation of the Endangered Species Act. *See* 50 C.F.R. § 17.3 (definition of "harm" includes any "act which actually kills or injures wildlife" and does not include an Animal Welfare Act compliance exception).[19] Moreover, the USDA's enforcement of even the Animal Welfare Act has long been criticized as inadequate to protect animals, including by the agency's own Inspector General. Ex. 20, USDA, OIG Audit Report, APHIS Oversight and Research Facilities (Dec. 2014) (USDA "did not follow its own criteria in closing at least 59 cases that involved grave (e.g., animal deaths) or repeat welfare violations" and issued penalties at an average 86% discount).

[19] The only aspect of the Endangered Species Act for which Animal Welfare Act compliance may be a defense is under the regulatory definition of "harass." "Harass" is defined to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns . . . ." 50 C.F.R. § 17.3. In the context of captive wildlife, this definition of harass does not include "generally accepted . . . [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act . . . when such practices . . . are not likely to result in injury to the wildlife." *Id*. Under this regulatory definition, to be exempt, the facility's husbandry practices must (1) be *generally accepted*, (2) comply with the AWA, and (3) not be likely to injure wildlife. Even if the Aquarium complies with the Animal Welfare Act, however, it still harasses the tigers because its concrete indoor enclosures are not generally accepted (as evidenced by the American Zoological Association's Tiger Care Manual, which requires outdoor access).

Accordingly, the Aquarium's USDA inspection reports have no bearing on the accuracy of ALDF's statements and certainly does not prove actual malice. To the contrary, ALDF knew that even if the USDA had failed to cite the Aquarium, an Endangered Species Act violation still exists, and ALDF's statements about the harm inflicted on the tigers was well within the ongoing debate on this matter of public concern.

Conley's visit to the Aquarium also adds nothing to Landry's actual-malice theory. Even Landry's does not claim that Conley saw any non-concrete surfaces or saw the tigers exposed to the outdoors as would be required for her to doubt ALDF's statements about the tigers' conditions. *Id*. ¶ 31, 44. Likewise, Conley's awareness that a papered-over skylight exists in the tigers' holding room hardly proves that she spoke with actual malice in saying the tigers never experienced sunlight. From the context of the statements, ALDF was clearly complaining that the tigers have no exposure to the outdoors, not that the facility is windowless. Landry's belief that having a skylight is the same as enjoying the outdoors does not make ALDF guilty of malice for believing otherwise. *Harte-Hanks*, 491 U.S. at 681.

Finally, the notice letter itself proves that ALDF did not act with actual malice. The letter reveals a careful investigation of the conditions at Landry's and the applicable law. Before speaking out about the tigers' condition, ALDF consulted a veterinary expert, reviewed academic literature, examined publicly available photos and videos of the tigers' space, and researched the applicable law. *See* Pet., Ex. B. The letter's 27 footnotes document the details of ALDF's investigation. *Id.* Given the undisputed proof of this thorough investigation—and without any evidence suggesting that ALDF doubted the investigation's findings—Landry's cannot establish actual malice. *Dollar v. Georgia-Pac. Corp.*, 59 F.3d 1242 (5th Cir. 1995) (unpublished table opinion) (making "thorough investigation" indicates lack of malice).

d. <u>The statements are not defamatory per se, and Landry's has no proof that ALDF proximately caused any actual damages.</u>

In some defamation cases, general damages are presumed. This is not one of them. Landry's must prove actual damages to avoid dismissal. This is true for two reasons. First, damages can be presumed only if the statement was defamatory per se. ALDF's comments were not.[20] Second, "the Constitution only allows juries to presume the existence of general damages in defamation *per se* cases where: (1) the speech is not public, or (2) the plaintiff proves actual malice." *Hancock v. Variyam*, 400 S.W.3d 59, 65–66 (Tex. 2013). As shown above, ALDF's speech was public, and Landry's failed to prove malice. Consequently, Landry's must prove that each of ALDF's statements caused actual damage. *Id*. The conclusory statements about damages in Landry's petition fall well short of the needed proof. *Lipsky*, 460 S.W.3d at 592.

e. <u>ALDF has proven alternative causes for the purported injuries.</u>

ALDF may also defeat the defamation claim by establishing that Landry's lost business, if at all, due to causes other than ALDF's speech. *See* Orig. Ans. ¶ 14 (asserting this defense); TEX. CIV. PRAC. & REM. CODE 27.005(d) (specifying that anti-SLAPP movant may prevail by proving "valid defense"). ALDF has proven alternative causes of the alleged reputational harm that are at least as probable as those advanced by Landry's, shifting the burden to Landry's to negate the alternative causes. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 218 (Tex. 2010) (applying this rule in personal injury context).

[20] Landry's tries to shoehorn ALDF's statements into two categories of defamation per se: (1) statements imputing a crime and (2) statements that injure a person in his or her profession. First, ALDF has only asserted that Landry's is liable under the "citizen suit" provision of the Act, which provides for purely "civil" relief such as injunctions. *See* 16 U.S.C. § 1540(g); *see Raboya v. Shrybman & Assoc.*, 777 F. Supp. 58, 59 (D.D.C. 1991) (accusing plaintiff of child neglect was not defamation per se because "child neglect constitutes a civil statutory infraction"). Second, just because the statements pertain to Landry's business does not make them defamatory per se. The issue is whether the statement accuses a professional of lacking a peculiar or unique skill necessary for the proper conduct of the profession. *Hancock v. Variyam*, 400 S.W.3d 59, 66–67 (Tex. 2013). For example, accusing a doctor of lying is not defamatory per se because that fault is not special to the medical profession. *Id*. While statements that Landry's keeps tigers in poor conditions may turn away customers, it is does not accuse Landry's of lacking a necessary trait unique to restaurant or amusement park businesses. *Id*.

Long before ALDF made the statements at issue, countless citizens had already criticized Landry's for confining tigers at the Aquarium. Most of the prior public criticism was in forums with a much higher profile than where ALDF published. In assessing proximate cause, the Court should ask: Which is the likelier reason that some eco-friendly parents may have stopped bringing children to the Aquarium? Because they downloaded a 60-day-notice letter from the website of law firm Irvine & Conner? Or because they consulted Reddit, Yelp, or TripAdvisor and read scores of negative reviews from customers appalled by the tigers' poor living conditions? Because the latter inference is, to be charitable, at least as plausible as the first, Landry's causation theories fall to shambles. *See Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991) ("When the circumstances are equally consistent with either of two facts, neither fact may be inferred.").

As one example of negative publicity that far predates ALDF's role, users of Reddit, a popular website with approximately 3.5 million daily views, started a petition in December 2015 urging Landry's to "free the tigers at Houston's Downtown Aquarium." Exs. 20, 21. That petition has generated 116 comments to date. The Reddit petition and comments predate any ALDF speech about the tigers. Nearly a year before ALDF said a word, Reddit user nathan_muses wrote that:

> ***This is the worst restaurant in Houston and it's all just a tourist trap for the uneducated. I went a long time ago and saw the Tigers there... It was wholly depressing and I've never been back.***

robsmashser wrote:

> ***Those tigers are super sad. I hated seeing them the last time I went there in 2010, and have refused to go back since.***

Ex. 21.

Citizens acting on their own have also blasted Landry's on sites such as Yelp and TripAdvisor, which potential restaurant patrons are much likelier to consult than sources such as

Ms. Nasser's personal Twitter feed. Over many years—and long before ALDF's first comment in September 2016—Landry's customers on TripAdvisor have been appalled by and vocal about the tigers' condition. *See* Ex. 8 (collecting reviews). As long ago as June 2008, "nem" wrote:

> ***The strangest thing that they had in the last empty fish tank were two white tigers. What do white tigers have to do with marine life and why were these sad looking tigers stuck in an empty fish tank? It seemed so odd and out of place. I guess since they were lacking on marine life the best thing that they could come with were white tigers (who had no space to run or roam)? Talk about mistreating animals. People would not even allow their dogs or cats to be place[d] in an empty fish tank just for display. That was so weird to see that and basically animal cruelty. They need to give those tigers to the zoo and fill that tank up with marine life.***

In June 2012, Candtplus4 wrote:

> ***It gets crowded quick and there really isn't much to see. True they have white tigers, but they live on a tiled floor and the tigers slip and slide while trying to walk. I asked a worker if they have any outdoor time in a grassy cage or anything and the answer was "no, they have a cage in the back when we close" I felt so bad for these tigers to be subjected to that life.***

In April 2015, CityKitty025 reported:

> ***The White Tiger display is very unsettling. Seeing these big beautiful creatures cramped in a tiny enclosure is sickening. They will never see my business again.***

Lottie092013 wrote in May 2015:

> ***There is a white tiger in an enclosure with glass on one side which is continually bashed and banged by children. I find it extremely cruel to have such a large animal inside an enclosure in an aquarium (?) where it spends all day having the glass pounded by visitors. The restaurants are upstairs, over priced and terrible service.***

AnneP0914 said in April 2016:

> ***I was appalled at the white tiger exhibit. The beautiful, majestic animals had very little room to move around, no fresh air, and were just sitting staring into space and seemingly very depressed. How can this inhumane treatment of animals exist? Putting animals on display is another terrible case of animal cruelty. The conditions I saw were unacceptable. This establishment should get out of the captive animal business or at the very least, eliminate the tiger display. I will never return and will encourage friends and colleagues to avoid it as well. Shame on them!!!!***

Many Yelp reviewers of the Aquarium had the same reactions as customers on TripAdvisor. *See* Ex. 9. From the multitude of negative reviews on Yelp, a few samples include:

Melissa M in July 2009:

Cons: You have to pay a bunch to park. The food is awful and expensive! The white tigers are DEPRESSING in a small cement, no natural light, cave!

Jenna W in August 2012:

The white tigers at the end made me sad. Such beautiful, powerful creatures, trapped in a such a tiny enclosure.

Kara K in March 2013:

How could you have two white TIGERS as the finale of an AQUARIUM?! Yes, those tigers were gorgeous. But they were confined to a small, almost hospital-like environment of white cement and a dingy waterfall. The male tiger constantly paced back and forth miserably.

Lauren W in November 2015:

Underwhelming as an aquarium, terrible food but most disappointing of all is the extremely inhumane living conditions of the white tigers. They for some reason have a white tiger display and the tigers are kept in concrete cages all of the time. They never get to go outside. Horribly depressing living conditions for the animals. Don't support this place.

Lisa M in May 2016:

Why in gods name is there two white tigers living in the basement of this aquarium? And all you idiots who said the white tiger was your favorite part? What? How would you like to live in captivity instead of being free? Pathetic. The Houston Aquarium SUCKS! No stars!

Amanda W in July 2016:

And the WORST part is the white tiger who looks so depressed. It HAS to be animal cruelty to keep that poor tiger in an enclosure with NO SUNLIGHT OR NATURAL AIR and NO VEGETATION. He looked so sad and lethargic in his glass box. Coming from the Houston Zoo and seeing how nice that was, this place was just depressing.

Nancy R in July 2016:

> ***Also, I was shocked to learn that they had white tigers. The tiger was confined to an area that was mostly made of stone with no grass, trees, sunlight, etc. It was indoors. The tiger was definitely not having a great time in there. It kept attacking the glass and looked very angry. The aquarium does this weird thing where you can spend a night with the tiger and sleep by it's enclosed space, which is weird and unappealing in my opinion. Overall, it doesn't look like the treatment of the animals here are great and I wouldn't recommend anyone to see.***

Of course, not all the reviews are negative.[21] Some reviewers like the tiger exhibit. But the differing opinions about this topic only further prove that ALDF is merely part of a broader dialogue on a matter of public concern that predates ALDF's involvement. Landry's cannot reach into the years-old cacophony of public criticism, cherry-pick the tiny fraction of comments made by ALDF in late 2016, and claim "clear and specific" evidence that it was ALDF's comments—rather than the thousands made by other speakers since 2004—that hurt Landry's reputation.

Beyond the numerous customers who have been condemning Landry's treatment of the tigers for years, other charities and protestors were criticizing Landry's well before ALDF did. An independent group called "Free Houston Tigers" has a website that urges patrons to boycott Landry's. Ex. 10. Two twelve-year-old girls in Colorado have gathered more than 110,000 signatures on a petition asking Landry's to relinquish the tigers at its aquarium in Denver. Ex. 12. In December 2015—nine months before ALDF said a word—volunteers from the Florida-based Big Cat Sanctuary staged a protest outside the Downtown Aquarium. Ex. 11. Many of these protests, which have nothing to do with ALDF, were the subject of widespread media coverage.

Landry's cannot prove that ALDF's isolated remarks caused Landry's to lose business. It is at least equally plausible that the decade's worth of bad publicity originating with political leaders and Landry's own customers caused the unidentified damages that Landry's seeks in this case. In

[21] And at this stage, ALDF is not offering the above reviews for the truth of what they assert, i.e., that Landry's mistreats the tigers. Instead, the reviews are offered to prove an alternative cause for any reputational harm that Landry's may have suffered related to the tigers. The comments are admissible for that limited purpose.

other words, the customer reviews and non-ALDF protests mean that Landry's inferences about the effects of ALDF's statements are anything but "unambiguous" and "free from doubt" as required to survive an anti-SLAPP motion. *See Lipsky*, 460 S.W.3d at 590.

2. Landry's tag-along claims

All of Landry's claims assume that ALDF's statements were defamatory. Pet. ¶¶ 111, 113, 115, 119, 121. To the extent the Court agrees there was no defamation, then "the tag-along tort claims predicated on the same [statements] also fail." *Rehak*, 404 S.W.3d at 733; *Provencio v. Paradigm Media, Inc.*, 44 S.W.3d 677, 682–83 (Tex. App.—El Paso 2001, no pet.) ("The same protections which the First Amendment affords defendants from libel claims also protect them from non-libel claims [based on the same publication]."); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (same). Even if Landry's had established a defamation predicate, however, all the "tag- along" claims still fail based on the proof deficiencies and valid defenses below.

a. Business Disparagement

To show business disparagement, Landry's needs clear and specific evidence that (1) ALDF published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages. *Lipsky*, 460 S.W.3d at 592. As described above, Landry's cannot prove that ALDF's opinions are false or that ALDF acted with malice, and ALDF has established that the judicial-proceeding privilege applies. The damage component is also missing.

Business disparagement requires proof of special damages. General reputational harm is not enough. *Waste Mgmt. of Texas, Inc. v. Texas Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014). To avoid dismissal, Landry's requires "clear and specific" evidence of particular accounts that it lost as a direct result of ALDF's statements. *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App.—Fort Worth 2007, pet. denied) ("To prove special damages,

the plaintiff must prove that the disparaging communication played a substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings.").

Landry's alleges that "business relationships with patrons and visitors have been damaged," that it "endured negative feedback," and that social-media posts indicate some unknown people will not patronize the Aquarium. Pet. ¶¶ 103–105. But without proof of "particular . . . prospective customer[s]" who heard ALDF's statements, were otherwise planning to eat at the Aquarium, and then did not go, Landry's has no special damages. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987). Mere "negative feedback" is not a "realized or liquidated" harm, and a "general decline in sales" is not special damage. *See Astoria Indus.*, 223 S.W.3d at 628; *Fluor Enterprises, Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426, 440 (Tex. App.—Beaumont 2008, pet. denied).

Landry's also complains that "in at least one instance, Plaintiffs lost a private event due to the false and disparaging statements." Pet. ¶ 106. This incantation is precisely the sort of "conclusory" evidence rejected in *Lipsky*. 460 S.W.3d at 592 (finding no "clear and specific" evidence of special damages despite affidavit claiming "direct pecuniary and economic losses . . . and loss of goodwill in the communities in which it operates . . . in excess of three million dollars"). Even if Landry's had shown that customers stopped eating at the Aquarium in response to negative publicity surrounding the tigers, Landry's offers no "clear and specific" proof that those customers were responding to ALDF comments—as opposed to other, non-ALDF speakers on Yelp, TripAdvisor, or in the media. *See supra*. For these reasons, the disparagement claim fails.

b. Tortious Interference with Prospective Relations

This claim fails because ALDF's interference, if any, was legally justified. Moreover, to prove tortious interference with prospective relations, Landry's must show (1) a reasonable probability that it would have entered into a business relationship with a third party; (2) ALDF desired to prevent the relationship or knew the interference was substantially certain to occur; (3) ALDF's conduct was independently tortious; (4) the interference proximately caused Landry's injury; and (5) Landry's suffered actual damage or loss as a result. *Schimmel v. McGregor*, 438 S.W.3d 847, 860–61 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Landry's only recites these elements; it offers no proof to substantiate them. *See* Pet. ¶ 113.

ALDF's conduct was justified. Justification is an affirmative defense to interference with prospective relations. *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc.*, 356 S.W.3d 54, 77 (Tex. App.—Houston [1st Dist.] 2011, no pet.). If the court finds that ALDF had a legal right to do the "interfering" acts, then Landry's claim fails. *Id*. Federal law expressly authorizes ALDF to send notice letters under the Endangered Species Act. 16 U.S.C. § 1540(g)(2)(A). And Texas law permits ALDF, as Conley's attorney, to issue public statements that describe "the general nature of the claim" and "general scope" of the pending investigation. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.07(c). Of course, ALDF also has constitutional rights to publicly express its opinions about animal welfare. *See also* RESTATEMENT (SECOND) OF TORTS § 772(a) ("One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person … truthful information."). For all these reasons, ALDF's acts were justified and do not support a tortious interference claim. *See Gulf Liquids*, 356 S.W.3d at 77–78.

No intent to interfere. Landry's posits that, from Landry's web site, ALDF was "well aware that Plaintiffs operate a restaurant and amusement park complex." Pet. ¶ 107. To prove intent, however, Landry's must show that ALDF acted "with a conscious desire to prevent the relationship from occurring or . . . knew the interference was certain or substantially certain to occur." *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 860 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Landry's has no evidence that ALDF knew customers were "substantially certain" to avoid Landry's in response to, for instance, a press release on ALDF's website. *See* Pet. ¶¶ 98–101. Even if ALDF suspected that some customers might eat elsewhere, such knowledge does not prove intent to interfere. *Bradford v. Vento*, 48 S.W.3d 749, 758 (Tex. 2001) (interference not intentional if it is "only an incidental result"); *Larson v. Family Violence & Sexual Assault Prevention Ctr. of S. Texas*, 64 S.W.3d 506, 517 (Tex. App.—Corpus Christi 2001, pet. denied) ("If appellees had no desire to interfere with appellant's [customers] but knew that it would be a mere incidental result of conduct for another purpose, this interference may not be improper.").

No damage because customers have a right to eat elsewhere. ALDF cannot be liable for causing Landry's customers to exercise their own legal rights. As the Texas Supreme Court has held, "merely inducing a contract obligor to do what it has a right to do is not actionable interference." *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). In the anti-SLAPP case of *Schimmel v. McGregor*, for example, an attorney persuaded two buyers not to close on a real estate contract. 438 S.W.3d at 861. The court dismissed the claim because there is "no cause of action . . . for inducing [interested buyers] to do that which they had a right to do—not to purchase." *Id*. By the same logic, Landry's customers are free to eat elsewhere, and no tort arises from causing them to exercise their legal right of choosing to patronize another business.

No reasonably certain proof of prospective relations. Landry's vaguely refers to "business relationships with patrons and visitors." Pet. ¶ 103. Landry's further notes that, in unidentified internet posts, unspecified "members of the public" say they will "no longer patronize Plaintiffs' establishments." *Id*. at ¶ 105. Offered for such a purpose, these chat-board comments are complete hearsay, not "clear and specific" evidence. TEX. R. EVID. 802. Moreover, Landry's cannot prove "prospective relations" by pointing to unnamed "members of the public."

To win the claim, Landry's must (1) identify a "specific contract, prospective contract, or relationship" and (2) show that entering into the specific relationship was "reasonably probable." *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 475–76 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Finlan v. Dallas Indep. Sch. Dist.*, 90 S.W.3d 395, 412 (Tex. App.—Eastland 2002, pet. denied). Landry's identifies no Texas cases, and ALDF has found none, in which an entertainment business such as Landry's was able to prove prospective relations simply by asserting that, as a general-admission business, it expected to attract members of the public. *See also Whisenhunt v. Lippincott*, 474 S.W.3d 30, 45 (Tex. App.—Texarkana 2015, no pet.) (plaintiff's claim that "[t]here was a reasonable probability that these surgeons would have entered into a business relationship with [him]" was not "clear and specific" evidence of damage).

No causation of damages. Landry's must prove that ALDF's conduct proximately caused specific customers to abandon their otherwise likely plans to patronize Landry's. *Schimmel*, 438 S.W.3d at 860–61. Landry's cannot rely on its own surmise to prove why the customers behaved as they did. *Schimmel*, 438 S.W.3d at 860–61 (plaintiff's testimony that "Schimmel's independent misrepresentations and boycott, set out above, prevented our agreements from closing" was not "clear and specific" evidence of proximate cause).

c. Abuse of Process

For the same reasons as Landry's other theories, its abuse of process claim must be dismissed. "The elements of an abuse-of-process claim are (1) the defendant misused a regularly issued process—e.g., 'the issuance of a citation or a writ'—for a purpose not lawfully warranted by that particular process, (2) the defendant had an ulterior motive or purpose for misusing the process, and (3) the plaintiff sustained damage from the irregularity." *Davis v. West*, 433 S.W.3d 101, 110 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Landry's offers no clear and specific evidence to prove any of these three factors.

No "process." ALDF served no "process" within the meaning of the tort. "Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." *In re J.P.L.*, 359 S.W.3d 695, 704 (Tex. App.—San Antonio 2011, pet. denied). ALDF's letter does not refer to a pending action. Even after Conley files the federal citizen suit, Landry's will not have formal notice until Conley serves a summons. *See* FED. R. CIV. P. 4. As is plain from its face, ALDF's letter meets none of the requirements for a federal summons.[22] Moreover, ALDF has located no Texas authority holding that a pre-suit demand letter qualifies as "process," and the Supreme Court of at least one state recently found that it does not. *Weinstein v. Leonard*, 134 A.3d 547, 556 (Vt. 2015) (holding that a demand letter does not "come[ ] close to anything resembling a coherent abuse of process claim").

No "misuse." In order to misuse process, ALDF had to "use" it. Unless the communication actually achieves the process that it invokes—such as arresting someone, seizing his assets, or hauling him into court—there has been no "use" and can be no misuse. *See Futerfas v. Park*

[22] *See* FED. R. CIV. P. 4(a)(1) ("A summons must: (A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal.").

Towers, 707 S.W.2d 149, 160 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) ("If Futerfas has not been arrested, then there has been no 'use' of any process (presumably a warrant for his arrest) issued as the result of the filing of the criminal complaints against him. Thus, the undisputed facts establish that the residents never made an illegal, improper or perverted use of process."). Landry's offers no evidence that, in response to the notice letter, it appeared in federal court or gave up the tigers. Whatever ALDF intended to achieve with the letter, Landry's has not complied with the letter and no government agent has forced Landry's to do so, mooting any possibility of "misuse." *Id.*

No damages. Aside from pleading that it "suffered actual injury," Landry's offers no proof of any damages arising from abuse of process. *See* Pet. ¶ 115. The conclusory reference to "injury" does not even resemble "clear and specific" evidence. *Lipsky*, 460 S.W.3d at 592. Even if Landry's "To recover for abuse of process in Texas, a claimant must demonstrate that he suffered special damages, i.e. some physical interference with the claimant's person or property in the form of an arrest, attachment, injunction, or sequestration." *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 332–33 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Landry's does not allege, let alone prove, that ALDF seized the tigers or otherwise deprived Landry's of physically possessing them.

Landry's argument that ALDF ***tried*** "to compel Plaintiffs to give up possession of its four (4) white tigers against their will" only proves ALDF's point. *See* Pet. ¶ 115. The Fourteenth Court of Appeals has addressed, and rejected, the same argument in a case remarkably similar to this one. In *RRR Farms*, a breeder trained show horses. An animal rights charity complained that the breeder used cruel techniques. The charity sued the U.S. Secretary of Agriculture to impose stricter rules. *RRR Farms, Ltd. v. Am. Horse Prot. Ass'n, Inc.*, 957 S.W.2d 121, 123–25 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). As damages for abuse of process, the breeder claimed that the charity "filed suit . . . not to determine rights and liabilities, but to prevent the appellants from

training horses by a particular method." *Id*. at 134. Although the charity's actions supposedly depressed the value of the horses, the court found no abuse-of-process damages because the breeder still had the horses. *Id*. Because ALDF's letter has not *successfully* compelled Landry's to give up the tigers, there is no damage of the sort needed to establish abuse of process. *Id*.

d. Civil Conspiracy

Unless Landry's proves one of its predicate torts, the conspiracy allegations fail for that reason alone. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 617 (Tex. 1996). Additionally, Texas law recognizes no such thing as a conspiracy between ALDF and its employee, Nasser. *Christopher v. Gen. Computer Sys., Inc.*, 560 S.W.2d 698, 709 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) ("[A] corporation cannot conspire with itself, no matter how many of its agents may participate in the corporate action."). To the extent ALDF can be charged with conspiracy at all, it must be as a result of alleged agreements between ALDF and Conley. *Id*. Because the conspiracy necessarily assumes agreements between ALDF (the attorney) and Conley (the client), attorney immunity clearly precludes liability. *Cantey Hanger*, 467 S.W.3d at 486 (alleged conspiracy between attorney and client was barred by immunity).

Even setting aside immunity, the alleged object of the conspiracy—persuading Landry's to place the tigers in a rescue sanctuary—is far from illegal. Moreover, Landry's does not even plead facts to show a conspiracy between ALDF and Conley. "The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Landry's has no proof of any element.

Landry's identifies these "overt acts" in furtherance of the alleged conspiracy: sending the notice letter to the media and Mayor Turner, publishing the letter online, and thereby "coordinating

a public attack on Plaintiffs' reputations and business practices." Pet. ¶ 119. Distributing statements to the media, elected officials, and the public are not "unlawful acts" of the type needed to prove a conspiracy. *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995) (holding that "letters [that] are a legitimate exercise of the right to influence government action" are not unlawful and "cannot constitute an overt act in furtherance of a conspiracy").

In addition to the underlying torts, Landry's claims a conspiracy to commit criminal theft. Pet. ¶ 119 (citing TEX. PEN. CODE § 31.03(a)). To recover for a conspiracy based on theft, Landry's would need to prove that ALDF accomplished the theft. *See Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos.*, 217 S.W.3d 653, 668 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("There is no independent liability for civil conspiracy . . . . Thus, to prevail on a civil conspiracy claim, the plaintiff must show the defendant was liable for some underlying tort."). But there is no dispute that ALDF has not "unlawfully appropriate[d]" the tigers. *See* TEX. PEN. CODE § 31.03(a). Landry's still has them. Pet. ¶ 14 ("The Downtown Aquarium ***is*** also home to four (4) white Bengal tigers. These tigers came to the Downtown Aquarium when they were cubs, where they have lived their lives ever since."). With no theft, there can be no liability for conspiracy based on theft. *Four Bros. Boat Works*, 217 S.W.3d at 668.

e. <u>Declaratory Judgment</u>

This dispute falls outside the scope of the Declaratory Judgment Act because it involves no "deed, will, written contract, or other writings constituting a contract," and Landry's is not seeking a declaration under any "instrument, statute, ordinance, contract, or franchise." TEX. CIV. PRAC. & REM. CODE § 37.004. Instead, Landry's requests a declaration "that ALDF, Conley, and Nasser's above-referenced actions and statements are false, disparaging, and defamatory; requiring ALDF,

Conley, and Nasser to retract the statements; and enjoining ALDF, Conley, and Nasser from further defaming or disparaging Plaintiffs." Pet. ¶ 122. Texas law forecloses all of that relief.

First, one cannot obtain a declaration that a tort has occurred. *Tucker v. Graham*, 878 S.W.2d 681, 683 (Tex. App.—Eastland 1994, no writ). When a plaintiff sought a declaration that a defendant "made false and defamatory statements," the First Court of Appeals held that such an outcome "is not within the proper scope of an action for declaratory relief" and that the plaintiff's "claim for declaratory relief merely recasts his defamation claims." *De Mino v. Sheridan*, 176 S.W.3d 359, 367–68 (Tex. App.—Houston [1st Dist.] 2004, no pet.). The same is true in this case.

Second, the Declaratory Judgment Act does not authorize forced retractions. In fact, no law does. "At this time there is no statutory authorization for such a remedy in any state," and "[t]he draconian remedy of compulsory retraction or right of reply is probably best kept a theory." Rodney A. Smolla, 2 LAW OF DEFAMATION § 9:92 (2d ed. 2016). Judicial coercion to "correct" one's speech "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

Last, a declaratory judgment can only declare rights, not enjoin activity. TEX. CIV. PRAC. & REM. CODE § 37.004; *Texas Dept. of Pub. Safety v. Alexander*, 300 S.W.3d 62, 78 (Tex. App.—Austin 2009, pet. denied) ("Declaratory judgment is inappropriate if it would add nothing to the injunctive or other relief sought."). Landry's has neither pleaded nor proven a wrongful act, imminent harm, irreparable injury, or the absence of an adequate remedy at law. In any event, "the Texas Constitution does not permit injunctions against future speech following an adjudication of defamation. Trial courts are simply not equipped to comport with the constitutional requirement

not to chill protected speech in an attempt to effectively enjoin defamation." *Kinney v. Barnes*, 443 S.W.3d 87, 99 (Tex. 2014).

E. Because dismissal is proper, Texas law requires awarding ALDF its attorneys' fees and fining Landry's to discourage future SLAPP suits.

If the Court dismisses Landry's claims, then it "shall" award ALDF its "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1). In other words, the TCPA mandates the award of fees and costs if ALDF prevails. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) ("Based on the statute's language and punctuation, we conclude that the TCPA requires an award of 'reasonable attorney's fees' to the successful movant."). At or before the hearing on this motion, ALDF will supply evidence of the fees and expenses it has incurred to that point.

Additionally, the TCPA requires "sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions." TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2). Because the TCPA says "shall," the issuance of some sanction is mandatory. *Kinney v. BCG Attorney Search, Inc.*, 2014 WL 1432012, at *11 (Tex. App.—Austin Apr. 11, 2014, no pet.) In previous cases involving dismissal under the TCPA, courts have determined sanctions by consulting (a) the plaintiff's annual profits, (b) the amount of attorneys' fees incurred, (c) the plaintiff's history of filing similar suits, and (d) any aggravating misconduct, among other factors. *See Kinney* at 2014 WL 1432012, at *12; *Am. Heritage Capital*, 2014 WL 2946005, at *13-14. The overriding question is what sanction will deter the plaintiff from pulling the trigger so quickly on future SLAPPs. *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2).

Given that Landry's is a multi-billion dollar corporation, a large fine is needed to meaningfully deter Landry's and other corporate behemoths from continuing to pursue SLAPPs. Following this principle in one recent case, Judge Sandill fined Schlumberger $250,000 under the TCPA. *See* Order, *Schlumberger Ltd. v. Rutherford*, No. 2014-13621 (127th Dist. Ct. Aug. 27, 2014). Because ALDF's overriding concern is for the tigers to be freed into suitable habitats, however, ALDF requests that the Court's order give Landry's this option: Either pay the Court-ordered fine or, at Landry's election, relinquish the tigers to a reputable, accredited sanctuary within 15 days of the Court's dismissal order.[23]

CONCLUSION

For the reasons above, Landry's claims should be dismissed with prejudice. Additionally, the Court should award ALDF its attorneys' fees, expenses, court costs and a fine against Landry's in accordance with the TCPA.

[23] Landry's has not sued ALDF for trespass; that claim is only against Conley. To the extent that Landry's contends and the Court finds otherwise, however, ALDF adopts and incorporates as if set forth fully herein all arguments and evidence in Conley's Anti-SLAPP motion to dismiss that pertain to the trespass claim, including but not limited to the defense of consent.

Respectfully submitted,

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