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CAUSE NO. 26-DCV-344566

Ken Mathews *Plaintiff*, v. Tamara McFarlane, Joseph Menslage, as Publisher of Katy Christian Magazine and Fort Bend Christian Magazine, and UnitedC3 Inc., *Defendants*.	§ § § § § § § § § § §	IN THE DISTRICT COURT OF FORT BEND COUNTY, TEXAS 502nd JUDICIAL DISTRICT

Magazine Defendants' Reply to Plaintiff's Supplemental TCPA Response and Submission of Evidence

Defendants Joseph Menslage, Katy Christian Magazine, and Fort Bend Christian Magazine (hereinafter "the Magazine Defendants") file this Reply to "Plaintiff's Supplemental Response in Opposition to the Magazine Defendants' Motion to Dismiss Under the Texas Citizens Participation Act, and Submission of Evidence" and would respectfully show as follows:

INTRODUCTION

Plaintiff's Supplemental Response is built around a contradiction. Mathews expressly concedes that "[a]ctual malice is measured at the time of publication . . . ." Pl.'s Supp. Resp. at 11. Yet much of his supplemental submission attempts to prove the Magazine Defendants have refused to retract the "Transparency Questions" article despite his demands. See *id.* at 9–11. But the Supreme Court has already rejected a failure-to-retract theory of constitutional actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (holding that actual malice turns on the speaker's state of mind "at the time of the publication" and that a "failure to retract upon [a plaintiff's] demand . . . is . . . not adequate evidence of malice for constitutional purposes"). The Texas Supreme Court concurs, emphasizing that actual malice concerns the publisher's subjective

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state of mind during the editorial process; information acquired after publication has "little, if any, bearing" on that inquiry. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 173–74 (Tex. 2003). Mathews cannot satisfy his "heavy burden" of proving actual malice by showing that an article remained online after publication. *See Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 421 (Tex. 2000).

Nor has Mathews abandoned his reliance on Katy Christian Magazine's endorsement of his opponent. To the contrary, he again places the endorsement prominently among his supposed evidence of actual malice. Pl.'s Supp. Resp. at 11. But actual malice concerns a defendant's attitude toward the truth, not his attitude toward the plaintiff. *Forbes*, 124 S.W.3d at 171. Political disagreement, ill will, and a preference for another candidate do not establish that a publisher knowingly published a falsehood or subjectively entertained serious doubts about its truth. *See Huckabee*, 19 S.W.3d at 425–26; *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002).

Indeed, Mathews' new evidence shows that it was Mathews and his campaign—not Menslage—who treated the Magazine's endorsement as disqualifying. When Menslage asked Mathews detailed factual questions about the claims his campaign was presenting to voters, Mathews' surrogate responded by accusing the Magazine of bias and "pay to play" and declaring that, because of the endorsement, "[t]he window for your publication to cover this race has closed." Pl.'s Ex. R-10. Mathews' evidence may demonstrate Mathews dislikes the Magazine Defendants and distrusts their coverage. It does not establish actual malice.

The remaining supplementation likewise fails to cure the deficiencies identified in the Magazine Defendants' Motion, Reply, and at the October 9th hearing. Mathews has finally produced the anonymous political text message, but still offers no evidence that the Magazine

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Defendants sent it, and his amended petition now abandons those claims. He advances a new theory based on the article's statements that he "did not respond," but that theory is not pleaded and the specific questions identified in the article were, in fact, unanswered. Mathews offers no evidence to the contrary. And his expanded damages declaration relies in material part on hearsay and generalized allegations that do not trace any injury to a particular actionable statement by the Magazine Defendants.

The Court gave Mathews an additional opportunity to supplement his evidence. Even considering that supplementation, he has not established the clear and specific evidence required by Section 27.005(c), and nothing he has submitted defeats the Magazine Defendants' privilege under TEX. CIV. PRAC. & REM. CODE § 73.002.

ARGUMENT

I. THE SUPPLEMENTAL EVIDENCE STILL DOES NOT ESTABLISH ACTUAL MALICE.

A. Mathews concedes that actual malice is measured at publication, but relies heavily on a failure-to-retract theory.

A public-figure plaintiff must establish that the defendant published with actual knowledge of falsity or while subjectively entertaining serious doubts about the publication's truth. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Forbes*, 124 S.W.3d at 171. Negligence, failure to investigate, ill will, and injurious motive are insufficient. *Forbes*, 124 S.W.3d at 171; *Bentley*, 94 S.W.3d at 591.

Mathews now expressly acknowledges the temporal limitation built into that standard: "Actual malice is measured at the time of publication . . . ." Pl.'s Supp. Resp. at 11. That concession disposes of much of his supplemental evidence.

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The article was published on May 15, 2026. Yet Mathews relies on Menslage's communications on May 16th; counsel's demand for correction dated May 21st; Mathews' transmission of that demand on May 22nd; certified-mail delivery on May 26th; the later dismissal of the Ethics Commission complaint on May 19th; the article's continued availability in October; and the Magazine Defendants' failure to retract or modify the publication in the intervening months. *See* Pl.'s Supp. Resp. at 9–11; Pl.'s Exs. K-1, K-4 ¶ 9, K-6.

Those later events do not establish Menslage's subjective state of mind on May 15th. In *Sullivan* itself, the Supreme Court held that a publisher's failure to retract after receiving a demand was "not adequate evidence of malice for constitutional purposes." 376 U.S. at 286. The Texas Supreme Court likewise holds that actual malice focuses on the defendant's state of mind "during the editorial process" and that evidence concerning matters occurring after publication has "little, if any, bearing" on whether the defendant acted with actual malice when the challenged statement was made. *Forbes*, 124 S.W.3d at 173–74.

Mathews cites *DR Partners v. Floyd* for the general proposition that a defendant's later conduct may sometimes constitute circumstantial evidence. 228 S.W.3d 493, 507 (Tex. App.—Texarkana 2007, pet. denied). But circumstantial evidence remains relevant only insofar as it supports the constitutionally required inference that the publisher actually knew of probable falsity or seriously doubted the truth when he published. It cannot retroactively manufacture that state of mind. And *DR Partners* itself recognizes that the ultimate inquiry is whether the defendant subjectively possessed significant doubt when the challenged publication was made. *Id.* at 498–99.

Nor does the mere continued accessibility of an unchanged internet article transform each day into a new publication. *See Glassdoor, Inc. v. Andra Grp., LP*, 575 S.W.3d 523, 529-530 (Tex.

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2019) (adopting the "single publication rule" regarding internet publications). Mathews' October screenshots establish that the article remained online. They do not establish actual malice on May 15th.

B. Even assuming Mathews' May 14th email reached Menslage, its contents do not establish actual malice.

Mathews' principal new prepublication evidence fares no better. He testifies that, at 3:56 p.m. on May 14, he emailed Menslage in response to Menslage's questions and attached two documents: his Appointment of Campaign Treasurer and the Ethics Commission's April 27 Notice of Noncompliance. Pl.'s Ex. K-4 ¶ 11; Pl.'s Ex. R-8. Plaintiff argues that these documents "disproved the article's central premises." Pl.'s Supp. Resp. at 10. They did not.

As an initial matter, Plaintiff's evidence establishes that the email was sent; it does not establish that Menslage actually received and reviewed the attachments before publication. The contemporaneous exchange submitted by Plaintiff records Menslage stating that he "didn't receive anything" and later explaining that he was "not receiving [his] other emails right now." Pl.'s Ex. R-7, DOC-000001, DOC-000006. The point at which Plaintiff's own record indisputably establishes that Menslage actually had these materials is the morning of May 16, when Mathews resent them to Menslage's personal email address at Menslage's request. *See* Pl.'s Ex. K-4 ¶ 11; Pl.'s Supp. Resp. at 6 ("In any event, by the morning of May 16 Menslage had the documents in hand.").

But the Court need not resolve any dispute about whether the May 14 email was received. Even assuming it was, its two attachments do not establish that Menslage knowingly or recklessly published a falsehood.

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First, Mathews did not send Menslage the campaign-finance reports on which his Supplemental Response now relies. He sent only his Appointment of Campaign Treasurer. *See* Pl.'s Ex. K-4 ¶ 11; Pl.'s Ex. R-8. The Magazine's article did not assert that Mathews had never appointed a treasurer. It reported that its review "did not clearly identify commonly expected filings under Ken Mathews' name, including campaign finance reports and campaign treasurer filings," in the course of attempting to verify Mathews' public claim concerning more than 4,000 individual "donations." Pl.'s Ex. K-1. Nothing Mathews sent on May 14 established the existence of the February and May finance reports, much less demonstrated that those reports substantiated the 4,000-donation representation that was addressed in the article.

Second, the April 27th Ethics Commission letter likewise did not establish that the article's reporting was false. The letter stated that McFarlane's complaint was presently noncompliant because she had failed to submit acceptable proof of residency, but expressly afforded her twenty-one days to correct the deficiency and resubmit the complaint. Pl.'s Ex. K-3. That cure period remained open when the article was published on May 15th. The article accurately told readers that the Commission had received a sworn complaint, that no findings had been issued, and that "the existence of a complaint alone does not establish wrongdoing." Pl.'s Ex. K-1. The later May 19th dismissal did not yet exist when Menslage published the article on May 15th.

Third, the May 14th communication still did not answer the Magazine's questions concerning the principal professional claims addressed by the article. Menslage had asked Mathews to identify the law-enforcement agencies for which he worked, the nature and dates of that work, relevant licenses or certifications, the company allegedly acquired by IBM, the IBM division involved, and the German technology company referenced by his campaign. Pl.'s Ex. R-8.

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Mathews' response expressly stated that he would not be able to answer that many questions in the time provided. *Id.* Even now, his supplemental affidavit supplies no evidence identifying those agencies, licenses, certifications, IBM entity, or German company.

Thus, even treating Mathews' May 14th transmission exactly as he asks the Court to treat it, it does not establish that Menslage knew the article was false or subjectively entertained serious doubts about its truth.

C. The Magazine's endorsement of Mathews' opponent remains evidence of political preference—not actual malice.

Mathews again emphasizes that Katy Christian Magazine endorsed Adam Schoof in his runoff election. Pl.'s Supp. Resp. at 11. That fact may demonstrate that the Magazine preferred Schoof. It does not demonstrate that Menslage doubted the truth of the challenged article.

Actual malice "is not ill will, spite, or evil motive." *Forbes*, 124 S.W.3d at 171. Nor is "an injurious motive" sufficient. *Bentley*, 94 S.W.3d at 591. The Texas Supreme Court has therefore rejected the proposition that evidence a publisher wished to portray a public figure unfavorably satisfies the constitutional standard absent evidence that the publisher actually doubted the publication's truth. *Huckabee*, 19 S.W.3d at 425–26. *See also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665–68 (1989).

The new evidence makes Mathews' continued reliance on the endorsement particularly misplaced. It shows that Mathews' own campaign treated the Magazine's decision to endorse Schoof as proof that further reporting was illegitimate. His surrogate told Menslage that the Magazine's endorsement "speaks for itself," accused the Magazine of being "pay to play," and declared that "[t]he window for your publication to cover this race has closed." Pl.'s Ex. R-10.

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That may explain Mathews' hostility to the article. It does not establish Menslage's subjective doubts about its truth. Mathews' own evidence shows Menslage doing the opposite of deliberately avoiding clarification: after receiving materials on May 16th, he told Mathews that he was trying to determine "what to update if anything," wanted to "make everything right," and would "make updates accordingly," while also explaining that Mathews still had not addressed the law-enforcement and IBM issues constituting much of the article's subject matter. Pl.'s Ex. R-7, DOC-000006.

Mathews cannot convert a political endorsement—and his own resulting distrust of the publisher—into clear and specific evidence of constitutional actual malice.

II. THE SUPPLEMENT STILL DOES NOT CURE MATHEWS' OTHER STEP TWO FAILURES.

A. Plaintiff has finally produced the anonymous political text, but still has no evidence connecting it to the Magazine Defendants.

Mathews' supplementation cures one deficiency concerning the anonymous political text: the Court can now see what the message said. It cures nothing concerning the essential element of publication by the Magazine Defendants.

The text was sent from telephone number (832) 974-2815. Pl.'s Ex. K-2; Pl.'s Ex. R-9. Plaintiff offers no testimony, document, communication, vendor record, payment record, telephone record, or other evidence showing that Menslage or either Magazine Defendant created the text, commissioned it, paid for it, supplied a voter list, coordinated its distribution, or even knew who sent it.

Indeed, Plaintiff expressly acknowledges that "who sent it, who supplied the voter list, and whether the sender coordinated with the Magazine Defendants" remain unknown. Pl.'s Supp.

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Resp. at 9. That is not clear and specific evidence; it is an admission that the evidence required to attribute the communication to these Defendants remains absent.

Plaintiff again invokes limited discovery to fill that gap. *Id.* But the Court already denied Plaintiff's request for TCPA discovery at the October 9th hearing. And Plaintiff's continued pursuit of this theory is particularly incongruous because his First Amended Petition—filed overnight before the hearing—does not plead a text-message claim against the Magazine Defendants at all. *See* Pl.'s First Am. Pet. ¶¶ 22–30. Plaintiff thus supplements evidence and renews a discovery request concerning a theory his operative pleading no longer asserts.

Whether evaluated under the allegations that existed when the TCPA Motion was filed or Plaintiff's current pleading, the evidentiary result is the same: there is no evidence that the Magazine Defendants published the anonymous political text.

B. Plaintiff's newly asserted "did not respond" theory is neither pleaded nor false when the article is read in context.

Plaintiff also uses his Supplemental Response to promote a new supposed defamatory publication that his First Amended Petition does not plead: the article's statements that Mathews "did not respond" and that certain questions "remain unanswered." Pl.'s Supp. Resp. at 7–8; compare Pl.'s First Am. Pet. ¶¶ 22–30.

The new theory fails on the evidence as well. The article did not broadly assert that Mathews had never communicated with Menslage. Its references to nonresponse followed several specific groups of unanswered questions. The article reported that Mathews had been asked to identify his law-enforcement agencies, years of service, role, and licenses or certifications; he did not answer those questions. It reported that he had been asked to identify the software company allegedly acquired by IBM, the relevant IBM division, and the German technology company; he

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did not answer those questions. And it reported that he had been asked to explain whether the claimed 4,000 "donations" were monetary contributions or something else; those questions likewise remained unanswered when Menslage published.

Mathews' own May 14th email confirms the point. Rather than answering the questions, he told Menslage that the deadline was "unrealistic" and that he would not be able to provide that many answers in the available time. Pl.'s Ex. R-8. The May 15th communication by Mathews surrogate Rick Garcia did not answer them either. It instead accused the Magazine of bias and announced that, because of its endorsement, "[t]he window for your publication to cover this race has closed." Pl.'s Ex. R-10.

Providing two documents while expressly declining to answer the larger set of questions does not make it false to report that those questions remained unanswered. And an evidentiary supplement filed after the hearing cannot transform an unpleaded sentence into a new actionable defamation theory.

C. Plaintiff's supplemental damages allegations remain inadmissible in part and insufficiently tied to any actionable publication by the Magazine Defendants.

Plaintiff's supplemental affidavit adds detail to his prior generalized damages allegations, but it still does not establish clear and specific evidence tracing the claimed injuries to an actionable statement by the Magazine Defendants.

As a threshold matter, **the Magazine Defendants expressly object to paragraph 3 of Plaintiff's Exhibit K-4** to the extent Mathews recounts statements allegedly made by Craig Lewis, Larry Francezware, Todd Hansen, Brian Covault, John Plauchette, Larry McDougal, and Donnie Boesch and offers those out-of-court statements to prove that the article caused those persons to change their opinions of him or question his honesty. **The Magazine Defendants likewise object**

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to any portions of paragraphs 4 and 5 that depend upon out-of-court statements by third parties offered to establish the reasons for those persons' conduct.

Section 27.006(a) directs the Court to consider evidence that could be considered under Texas Rule of Civil Procedure 166a, and Rule 166a requires evidence setting forth facts that would be admissible in evidence. TEX. CIV. PRAC. & REM. CODE § 27.006(a); TEX. R. CIV. P. 166a(f). Hearsay is inadmissible absent an applicable exception. TEX. R. EVID. 802. In considering whether a non-movant has met their TCPA step two burden, a court may not consider inadmissible hearsay. *See Rockman v. OB Hospitalist Grp., Inc.,* No. 01-21-00383-CV, 2023 WL 3311548, at *17 (Tex. App.—Houston [1st Dist.] May 9, 2023, no pet.) (mem. op.) (evidence that does not satisfy the Rule 166a evidentiary standard should not be considered in a TCPA proceeding).

Even apart from that objection, the affidavit does not establish the necessary causal connection.

Paragraph 3 says seven people told Mathews that they read "the article" and that it changed their view of him or caused them to question his honesty. Pl.'s Ex. K-4 ¶ 3. But Mathews does not identify what statement in the article supposedly caused that reaction. That matters in a case where Plaintiff now advances several different theories concerning campaign-finance records, professional credentials, the Ethics Commission complaint, and an alleged nonresponse.

Paragraph 4 is more generalized still. Mathews says his family has been "harassed" and that longtime friends have "distanced themselves." *Id.* ¶ 4. He identifies no harasser, no act of harassment, no friend, no statement by any such person, and no reason why any identified person changed his or her behavior on account of the Transparency Questions article. Temporal sequence is not clear and specific evidence of causation. The problem is particularly apparent here because

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Mathews simultaneously complains of dramatically different alleged statements by McFarlane—including allegations concerning sexual impropriety—as well as an anonymous text campaign accusing him of being a "Fake Republican" and "Democratic plant." Nothing in paragraph 4 identifies which alleged publication caused which supposed injury.

Paragraph 5 suffers from the same defect. Mathews states that approximately thirty people contacted him while texts linking to the article were circulating, that his daughter's friends were no longer permitted to visit his home, that an unidentified customer canceled unidentified pending contracts, and that "several" unidentified campaign endorsements were withdrawn. *Id.* ¶ 5. Thirty people contacting a candidate about a political article is evidence that the article received attention; it is not evidence of compensable injury. Nor does Mathews identify any statement connecting the parents' decisions, the customer's cancellation, or the withdrawn endorsements to a particular statement in the Transparency Questions article—as opposed to McFarlane's separate publications or the anonymous political text that Mathews himself says was circulating at the same time.

The unnamed-customer allegation is particularly inadequate to establish special damages for business disparagement. That tort requires realized pecuniary loss, not generalized reputational injury. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987). Mathews identifies neither the customer, the contracts, their value, nor any statement by the customer connecting cancellation to the Magazine Defendants' publication.

Thus, even if the Court considers all of the supplemental damages testimony over the Magazine Defendants' objection, it does not establish clear and specific evidence that any actionable statement by these Defendants caused the injuries Mathews now claims.

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III. THE SUPPLEMENTAL RECORD REINFORCES, RATHER THAN DEFEATS, THE MAGAZINE DEFENDANTS' SECTION 73.002 PRIVILEGE.

Nothing in Plaintiff's supplementation alters the Magazine Defendants' independent step three ground for dismissal. Section 73.002 protects a newspaper or periodical's "reasonable and fair comment on or criticism of . . . [a] matter of public concern published for general information." TEX. CIV. PRAC. & REM. CODE §§ 73.002(a), (b)(2). A candidate for public office places his qualifications and fitness for that office squarely in the public sphere:

> When a person is a candidate for a public office, and while he holds such an office, he thereby places his character in issue, in so far as his qualifications for the office are concerned. His character and fitness to hold the office are matters of public concern, and are proper subjects for discussion and fair and reasonable comment, which may be published for general information.
>
> *Fitzjarrald v. Panhandle Publ'g Co.*, 228 S.W.2d 499, 503 (Tex. 1950).

Plaintiff's supplemental evidence reinforces why the privilege applies. Menslage sent a candidate for county office a detailed set of questions concerning claims that candidate was making to voters: his law-enforcement experience, licenses and certifications, IBM and technology background, claimed individual donors, campaign-finance disclosures, an Ethics Commission complaint, a public debt suit, and other matters bearing upon his background and qualifications. *See* Pl.'s Exs. R-8, R-10. The article itself acknowledged uncertainty, credited innocent explanations for the absence of independently verifiable records, expressly stated that the Ethics Commission complaint had produced no findings and did not establish wrongdoing, and invited Mathews to supply the information needed to resolve the questions.

The most revealing supplemental evidence is the response Menslage received from Mathews' camp. Rather than answer the substantive questions, Rick Garcia, a Mathews surrogate,

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sent a statement attacking the Magazine's motives and demanding the accusation be printed in the article:

> Katy Christian Magazine chose to endorse my opponent without ever requesting an interview or giving my campaign an opportunity to be heard. That decision speaks for itself.
>
> The window for your publication to cover this race has closed — any attempt to appear unbiased from here on will be seen for exactly what it is, only reinforcing the growing claims by many that your operation is pay to play.
>
> Pl.'s Ex. R-10.

That evidence turns Plaintiff's narrative on its head. Mathews' campaign had decided that because Katy Christian Magazine endorsed Schoof, the Magazine had forfeited the right to ask questions about Mathews' qualifications or report on the race. Its "window" to do so was supposedly "closed."

Menslage's conduct reflects something quite different. He asked detailed factual questions. When Mathews later supplied some information, Menslage told him that he was trying to determine "what to update if anything," that he wanted to "make everything right," and that he would "make updates accordingly." Pl.'s Ex. R-7, DOC-000006. At the same time, he correctly noted that Mathews still had not addressed the law-enforcement and IBM questions that comprised much of the article.

That is not evidence of an unfair or unreasonable publication. It is evidence of precisely the type of inquiry and comment Section 73.002 protects: a periodical examining the representations and qualifications of a candidate for public office, seeking substantiation from the candidate himself, expressly acknowledging uncertainty, and publishing its questions and the lack of substantive response for the information of voters.

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Plaintiff's disagreement with the Magazine's endorsement does not defeat that privilege. Nor does his dissatisfaction with the article transform reasonable and fair scrutiny into actionable defamation. Even if Mathews could satisfy every element of his surviving claims at step two, the Magazine Defendants remain entitled to dismissal under Section 27.005(d) and Section 73.002.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Joseph Menslage, Katy Christian Magazine, and Fort Bend Christian Magazine move the Court to:

(1) sustain their evidentiary objection to paragraph 3 of Plaintiff's Exhibit K-4, and to those portions of paragraphs 4 and 5 that rely upon out-of-court statements offered for their truth or to establish the reasons for third-party conduct, and disregard such testimony in determining whether Plaintiff has satisfied Section 27.005(c);

(2) dismiss Plaintiff Ken Mathews' legal action against them;

(3) issue a final judgment that Mathews take nothing by his claims against them;

(4) award them their reasonable attorneys' fees and costs incurred in defending against Mathews' legal action;

(5) order the parties to provide supplemental briefing and evidence regarding the amount of such attorneys' fees and costs; and

(6) award all other and further relief to which they may show themselves justly entitled.

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Respectfully submitted,

By: */s/ Tony K. McDonald*

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2026, a true and correct copy of the above and foregoing has been e-filed and e-served via Texas e-File to all counsel of record for those parties that have appeared in this action in accordance with the Texas Rules of Civil Procedure.

By: /s/ Tony K. McDonald
Tony K. McDonald

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