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**DIB WALDRIP**
PRESIDING JUDGE

433RD JUDICIAL DISTRICT COURT
COMAL COUNTY



**CAUSE NO. C2013-1082B**

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| **MONIQUE RATHBUN,** | § | **IN THE DISTRICT COURT** |
| | § | |
| **PLAINTIFF** | § | |
| **V.** | § | **207TH JUDICIAL DISTRICT** |
| | § | |
| **DAVID MISCAVIGE, RELIGIOUS TECHNOLOGY CENTER, CHURCH OF SCIENTOLOGY INTERNATIONAL, STEVEN GREGORY SLOAT, MONTY DRAKE, DAVE LUBOW A/K/A DAVID J. LABOW, AND ED BRYAN,** | § | |
| | § | |
| **DEFENDANTS** | § | **COMAL COUNTY, TEXAS** |

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**ANTI-SLAPP MOTIONS OF ALL DEFENDANTS FINDINGS OF FACT AND CONCLUSIONS OF LAW & RULING DENYING ALL ANTI-SLAPP MOTIONS TO DISMISS**

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**FINDINGS OF FACT**

1. Defendant Church of Scientology International ("CSI"), by and through its agents or contractors, including Defendants David Lubow, Monty Drake and Greg Sloat, undertook extensive surveillance of Plaintiff and her husband over a collective period of more than four years—possibly six. Monty Drake actually began the investigation of Mark Rathbun in 2007. *See* Deposition of Monty Drake at 52:16-19. He started

investigating Mark Rathbun for potential Scientology trademark violations. *See* Affidavit of Monty Drake ¶ 7. [1] Scientologist David Lubow has likewise stated that he is a private investigator and filmmaker and was hired by CSI's attorney Elliot Abelson prior to 2009 to investigate Mr. Rathbun in support of prospective litigation regarding alleged violations by Mr. Rathbun of intellectual property rights owned by CSI. *See* Affidavit of David Lubow ¶¶ 3-4.

2. Certain of the activities about which Plaintiff complains were conducted by persons calling themselves the "Squirrel Busters" beginning in April 2011. Defendant CSI admits that it prompted and sponsored the Squirrel Busters. *See* Affidavit of Allan Cartwright @ ¶ 23. "Squirrel Buster" Richard Hirst indicates that his first involvement came after he was notified of the proposed activities when he "received a call from a staff member of the Church of Scientology International" (Defendant CSI). *See* Affidavit of Richard Hirst @ ¶ 5. Wanting to assist Scientologists to document Mark Rathbun's "provision of 'squirrel' Scientology," CSI's Legal Director Cartwright acknowledges that CSI provided financial and legal support. *See* Affidavit of Allan Cartwright @ ¶ 23.

3. In his declaration filed by Defendant CSI, Hirst admits the Squirrel Busters instigated the first Ingleside on the Bay confrontation on "the very first day" at the Rathbuns' front door purportedly to conduct a "technical inspection" of Mark Rathbun's procedure as a Scientology minister/auditor. *See* Affidavit of Richard Hirst @ ¶ 10. This initial Squirrel Buster event was video-taped and shown in court displaying numerous Squirrel Busters at the Rathbuns' door wearing distinctive provocative t-shirts portraying Mark Rathbun as a squirrel with a red-slashed circle over the depiction and

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[1] Defendants CSI, Monty Drake, and David Lubow use the same affidavits and declarations in their Anti-SLAPP motions. Each motion will be referred to as "Defendants' Anti-SLAPP Motions," collectively.

several Squirrel Busters had video cameras and microphones of their own, including some with head-mounted cameras, lights, etc. From this point forward, it is clear, and the Court so finds, that few if any "confrontations" were civil with both sides either initiating or reciprocating. *See* various declarations filed either in support of or in response to the Anti-SLAPP motion to dismiss.

4. Defendant Ed Bryan was sent from California by the Office of Special Affairs ("OSA"), a division of CSI, to join the Squirrel Busters in Texas. On July 13, 2011, Bryan wrote:

> . . . . *This is in co-ordination with OSA Int. They are calling the shots* and quite frankly I don't think it is very effective. The reporters came to our house the other day and we didn't tell them very much. Our main guy went back to discuss with them a different strategy. The rat is getting more brazen and yesterday I actually had a 1 minute comm cycle with him *while he was on a walk.* The guy is nuttier than a fruitcake. He's gone off the deep end. *Taking him down will be no easy task.* . . . . *See* Exh. E to Plaintiff's 2nd Amended Response to Anti-SLAPP Motions to Dismiss [*emphasis added*].

"[I]n the vicinity of the Rathbun home/office," Joanne Wheaton "regularly participated" in the Squirrel Buster activities "[o]ver a period of several months." *See* Declaration of Joanne Wheaton @ ¶¶ 3 & 6. While doing so, a house was rented by Lubow two blocks from the Rathbuns' "home/office" for Wheaton and other Squirrel Busters to stage their activities from which a golf cart was also utilized to travel back and forth. *Id.* @ ¶ 4. The participating individual "Squirrel Busters" varied from time to time as they left and returned at different times for different reasons. *Id.* @ 14. *See also* Affidavit of Richard Hirst @ ¶ 7.

A videographer, Bart Parr, was hired by private investigator Dave, a.k.a. David, Lubow to film the project "at or near Rathbun's office." *See* Declaration

of Bart Parr @ ¶¶ 4 & 6. The project occurred "over a period of approximately 6 months." *Id.* @ 6. Evidence identifies, and the Court so finds, the period of time of the Squirrel Buster activities as having started and ended, respectively, in April 2011 and in September 2011. *See* Affidavit of Richard Hirst @ ¶ 10 and Declaration of Joanne Wheaton @ ¶ 14.

5. The investigators, videographers and Squirrel Busters "interacted with the Rathbuns many [possibly "hundreds" of] times over a period of these several months, usually when the golf cart was parked near their office [on a dead-end street when] filming was ongoing, or [when] traveling about the little town." *See* Declaration of Joanne Wheaton @ ¶ 6. In addition, private investigator Monty Drake utilized "surveillance, photographing, videotaping and static cameras" to film areas "outside the Rathbuns' office/home" in part from inside a second house rented by Drake across the street from the Rathbuns. *See* Affidavit of Monte Drake @ ¶ 9. Without any time limitation, Drake acknowledges that he was able "to observe persons coming and going from the Rathbuns' office/home." *See Id.* For several months, when the Rathbuns left their home, the Squirrel Busters group appeared in a golf cart to confront the Rathbuns with video cameras and taunts. *See* Mark Rathbun Declaration in Support of Plaintiff's Second Amended Response to Defendants' Motion to Dismiss[2] ¶ 27. Due to both this constant surveillance and the Squirrel Buster activity cited above, Defendants knew when Plaintiff left home and when she was home alone due to her husband having left their residence. *See* First Amended Declaration of Monique Rathbun in Support of Plaintiff's

[2] Hereinafter referred to as "Mark Rathbun Declaration."

Second Amended Response to Defendants' Motion to Dismiss[3] ¶¶ 11, 11a, 11b, 11c, 13a, 13c, 15, 15a and 15b. When her husband was out of town, Plaintiff was visited at home on several occasions by unknown individuals who refused to give their names. *Id.* @ ¶ 5.

6. Bert Leahy was also hired as a videographer for the Squirrel Busters group. He was told by Defendant Lubow that Lubow had two private investigators who were engaged in surveillance of Plaintiff and her husband and were able to keep track of the Plaintiff's movements on a 24/7 basis. *See* Declaration of Bernard "Bert" Leahy ¶ 6. Leahy was directed by Lubow to film the Squirrel Busters taunting and harassing the Rathbuns. *Id.* Although denied by Lubow (*see* Declaration of David Lubow ¶ 4), Leahy declared to have been told that the purpose of the Squirrel Busters' mission was "to make the Rathbuns life a living hell" and "to turn their neighbors against them" so that Plaintiff and her husband would be forced from their residence. *Id.* Leahy's declaration is corroborated by Lubow's stated desire to, in-part, "create a documentary showing [Rathbun's] true nature as a violent, foolish `squirrel'." Declaration of David Lubow @ ¶ 12. Assisting in this process, CSI hired Ralph Gomez as "muscle." See Declaration of Bert Leahy @ ¶ 6.

7. No evidence demonstrates that any of the complained-of Squirrel Buster or investigative activities occurred at an actual church, at a mission, at a place of worship or during any other type of religious service or ceremony; rather, most of the activities, including those cited by declarants for Defendant CSI, occurred at locations described by the declarants as the Rathbuns' "home," "house," "business/residence," "business," "office," "home/office," or "office/home." *See* various declarations filed either in support of or in response to the Anti-SLAPP motion to dismiss.

[3] Hereinafter referred to as "First Amended Declaration of Monique Rathbun."

8. Defendants published information from their Squirrel Buster activity and continuous surveillance of the Rathbuns on the internet, a dedicated YouTube channel, and on a website, which included a section called "Spy Corner" that discussed information obtained by the surveillance of the Rathbuns. *See* Declaration of Bart Parr @ ¶ 15. *See also* Declaration of Mark Rathbun @ ¶ 28. Also published was information about visitors to and from the Rathbun home creating a chilling effect upon Mark Rathbun and possibly others. *Id.*

9. At unspecified times subsequent to 2009, Plaintiff also received anonymous and threatening phone calls, and she was followed to and from work. *See* First Amended Declaration of Monique Rathbun ¶ 6. Squirrel Busters and Scientology investigators or operatives followed Plaintiff to and from restaurants. *Id.* ¶ 7g. *See also* Declaration of Monte Drake @ ¶ 11 (Drake and others followed "Rathbun's car"). *See also e.g.*, Declaration of Joanne Wheaton @ ¶ 7 (Mark a.k.a. Marty Rathbun drove a "large pick-up truck."). Plaintiff was similarly followed to and from shopping. *See* First Amended Declaration of Monique Rathbun @ ¶ 15a. She was similarly followed while walking her dog. *Id.* @ ¶ 8. The Rathbuns were followed even when they took measures to avoid being seen leaving their house. *See* Declaration of Mark Rathbun @ ¶ 29.

10. Between September 2010 and December 2012, Lubow, a.k.a. David Statter, interviewed and confronted Plaintiff's family, friends, and co-workers disparaging Plaintiff, her husband, and his family. *See* Declaration of Franklyn R. Carle @ ¶ 4; Declaration of Tonya Torrez @ ¶ 3; Declaration of Doncine Kelly @ ¶ 3.

11. Seeking to avoid the harassment, embarrassment, disruption and extreme distress imposed on her in the workplace while living in Ingleside on the Bay by

Defendant Lubow and the other Defendants, Plaintiff gave notice on April 1, 2011, to her then-employer that she would leave her job at the end of that month. *See* First Amended Declaration of Monique Rathbun @ ¶¶ 11a, 11b, 11c and 11d; Mark Rathbun Declaration @ ¶ 23.

12. In October 2012, the Rathbuns discovered Drake's surveillance cameras aimed at their residence from a house across the street on the same cul-de-sac. *See* Mark Rathbun Declaration @ ¶ 28; First Amended Declaration of Monique Rathbun @ ¶ 13 and 13a. Drake attested thoroughly that his surveillance and investigative efforts sought:

> information concerning (a) crimes or wrongs done or threatened against CSI or other churches of Scientology, (b) the identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of Rathbun and those associated with him, (c) the location, disposition and recovery of misappropriated or stolen property, or (d) securing evidence to be used before a court or for complaints to appropriate law enforcement. *See* Affidavit of Monte Drake @ ¶ 10. See also substantially similar affidavit of David Lubow @ ¶ 7.

13. The Rathbuns left the constant harassment and electronic surveillance in Ingleside on the Bay by moving to a secluded homesite in Bulverde, Texas. *See* First Amended Declaration of Monique Rathbun @ ¶¶ 11, 11a, 11c and 14.

14. The move caused the Rathbuns to lose $36,000 in lease/purchase equity in their Ingleside on the Bay home. *See* First Amended Declaration of Monique Rathbun @ ¶¶ 11, 11a, 11c and 14.

15. In spite of efforts to find a secluded new homesite, Scientology agents resumed tailing the Rathbuns in Bulverde and San Antonio, Texas, while Mark Rathbun continued to "counsel" Scientologists. *See* First Amended Declaration of Monique Rathbun @ ¶ 15a; Declaration of Mark Rathbun @ ¶ 32. The Rathbuns also discovered

custom-adapted surveillance cameras in the woods behind their home in Bulverde. *See* First Amended Declaration of Monique Rathbun @ ¶ 15, 15a; Declaration of Mark Rathbun @ ¶ 33. Defendant Sloat answered a phone call from Mark Rathbun using a number found near the cameras. *See* Declaration of Mark Rathbun @ ¶ 33. Sloat acknowledges that he was hired to see who Mark Rathbun "was seeing [as] *clients*" and that "the object of [the investigation] was Mark Rathbun's associations and *business dealings*." *See* Affidavit of Steven Gregory Sloat @ ¶¶ 5 & 11 [*emphasis added*].

16. After Plaintiff moved to Bulverde, Defendants' agents or contractors also appeared at Plaintiff's new place of work and followed Plaintiff to the ladies room, and the same individual also followed Plaintiff to the grocery store. *See* First Amended Declaration of Monique Rathbun @ ¶ 15a.

17. Plaintiff has demonstrated that she has been personally harmed and injured as a result of these activities in both Ingleside on the Bay and Bulverde. *See* First Amended Declaration of Monique Rathbun @ ¶¶ 5, 7d, 7h, 11b, 11c, 15a, 16, & 16a.

18. On August 16, 2013, the Court issued a Temporary Restraining Order against the harassment.

19. Plaintiff received counseling and auditing services from Mark Rathbun. *See* Affidavit of Allan Cartwright @ ¶ 7 (quoting Mark Rathbun as justification to apply term of "squirrel"). Further, Plaintiff and her husband, Mark Rathbun, offered similar services as a business for which they received monetary compensation, including auditing services that are purportedly based on the same "tech" ("correctly applying Scientology procedure") and services offered by the Church of Scientology. *See* Affidavit of John Allender @ ¶ 9 in support of Defendants' Anti-SLAPP Motion. *See* Affidavit of David

Lubow @ ¶¶ 9 and 10. *See* Affidavit of Allan Cartwright @ ¶¶ 5 to 8, 10, 13, 15, 17, 23, & 27, in support of Defendant CSI's Anti-SLAPP Motion. These business services were offered in competition to similar goods or services offered by Defendant CSI's and/or its missions or other affiliates in the Church Scientology. *See* Defendant CSI's Motion to Dismiss @ ¶ 9, *citing* Affidavit of Allan Cartwright @ ¶¶ 5 to 8. *See* Affidavit of Defendant David Lubow @ ¶10.

20. Both orally and in writing, Defendants have admitted, asserted and argued that their activities, directed at and having an effect upon Plaintiff, were connected with, or in relation to, Mark Rathbun's alleged involvement in offering unauthorized Scientology services including auditing, using protected Scientology "technology" in a manner not approved by Defendant CSI, and profiting from a business using such services offered from and provided at, his and Plaintiff's residence in Ingleside on the Bay and Bulverde, Texas. *See* citations in ¶¶ 17 & 19 above. *See also* Affidavit of Monte Drake @ ¶ 12. On February 4, 2014, counsel for Defendant CSI argued that the Rathbun home was a place of business using Scientology practices for a fee that were allegedly advertised on Craig's List. *See* Reporter's Transcript 146:22; 147:9; 151:23; and 158:6-159:8. Defendant CSI's Counsel implicitly agreed, and the Court so finds, that investigating and protecting the value of the trademarks is a primary function and responsibility of Defendant CSI as the exclusive licensee of Defendant RTC's trademarks. *See Id.* @ 157:14-158:24 & Page 2 of Defendant CSI's Power Point court presentation (copy attached).

21. As Defendant CSI asserts and argues, Mark Rathbun's activity of offering Scientology services is a business. If so, the Church's own activity of offering Scientology services is also a business.

22. The complained-of activity, which Defendants claim was in-part documentary making, reporting, and protesting at Mark Rathbun's "office," was intended to and/or did have an effect (be it positive or negative—depending upon perspective) on a specific audience of consumers—principally those interested in Scientology "technology," including Scientology members, former members such as Mark Rathbun, and non-member users of the technology such as Plaintiff. *See e.g.,* Affidavit of Allan Cartwright @ ¶¶ 23-24 (Although Cartwright also claims pamphlets were distributed to citizens of Ingleside, the evidence lacks weight and credibility due to his lack of personal knowledge coupled with the fact that no Squirrel Buster attested to such activity.); Affidavit of David Lubow @ ¶¶ 11-12; Affidavit of John Allender @ ¶¶ 6-9; Declaration of Bart Parr @ ¶¶ 5, 6, 8, & 15; Declaration of Joanne Wheaton @ ¶¶ 2-4, 6 & 10; First Amended Declaration of Monique Rathbun @ ¶¶ 7, 7a, 7b, 7c, 9, 10, 11d, 13, 13a & 14; Declaration of Mark Rathbun @ ¶¶ 28-30. Further, no credible evidence from an un-interested witness indicates an intent by any of the CSI defendants, collectively, to genuinely inform the general public as their audience. While Scientologist Lubow does aver that the purpose of the documentary and protest was to educate the general public, he did so only after stating that the purpose was primarily to educate other Scientologists. *See* Affidavit of David Lubow @ ¶ 11. *See also* the substantially similar sentence in Declaration of John Allender @ ¶ 6. As to his self-serving statements, Allender's credibility is suspect in that he admits filing a fictitious public document with the City of

Campbell, California to create a business name for "Squirrel Buster Productions." *Id.* @ ¶ 7.

23. The primary reason CSI initiated the complained-of activity was to investigate alleged infringement of its intellectual property rights by both Mark and Monique Rathbun allegedly occurring as early as January 29, 2009, if not before. *See* Affiddavit of Allan Cartwright @ ¶¶ 6, 8, 17 and 27. *See* Affidavit of Defendant David Lubow @ ¶ 6. *See also* Deposition of Monty Drake 52:16-19 (investigation began in 2007).

24. No evidence indicates that either Defendants CSI or the Religious Technology Center has ever sent Mark Rathbun a cease and desist letter or sued Mark or Monique Rathbun for infringement of intellectual property rights or any other cause of action. See Declaration of Mark Rathbun @ ¶¶ 8 & 10. Although ¶ 21 of Cartwright's Affidavit lists legal cases Mark Rathbun has been allegedly involved in regarding Scientology in general (not admitted for the truth of the matters asserted), Cartwright does not, in any of his testimony, point to any litigation wherein CSI has sued Mark Rathbun for any cause of action.

## CONCLUSIONS OF LAW

1. Any of the foregoing findings of fact that may be deemed to constitute conclusions of law shall be so considered and any finding of fact that also constitutes a conclusion of law is adopted as a conclusion of law. Any conclusions of law below that may be deemed to constitute findings of fact shall be so considered and any conclusion of law that also constitutes a finding of fact is adopted as a finding of fact.

2. Defendants seek dismissal under the Texas Citizen's Participation Act, Tex. Civ. Prac. & Rem. Code §§ 27.001, *et al.* (West Supp. 2013) (hereinafter, the "Act"). Under the Act, the Court has an equal duty to safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury. *See* Tex.Civ.Prac. & Rem. Code § 27.002 (West Supp. 2013); *Whisenhunt v. Lippincott,* No. 06-13-00051-CV, 2013 Tex.App. LEXIS 12489, Slip op. @ 6 & n.11 (Tex.App.—Texarkana Oct. 9, 2013, *pet. filed*) (acknowledging that the Act has a stated dual purpose and that courts must give "effect to all words so that none of the statute's language is treated as surplusage"). Further, the Court is required to liberally construe the entirety of the Act. *See* Tex.Civ.Prac. & Rem. Code § 27.011 (b) (West Supp. 2013).

3. The most efficient and judicious hierarchy of the mandatory decisions to be made by a court in application of the Act is:

a) Does an exemption, with the burden of proof resting on the nonmovant, preclude further application of Chapter 27 pursuant to Tex.Civ.Prac. & Rem. Code § 27.010 (West Supp. 2013)?;[4]

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[4] Although the Act does not expressly assign the burden of proof on the nonmovant, Texas law generally requires the party seeking benefit of a statutory exemption to prove the matter. *See generally, McIntyre v. Ramirez,* 109 S.W.3d 741, 745 (Tex. 2003) (doctor's burden to prove exemption from emergency care statute). Several Texas Courts of Appeals around the state have recently applied this concept to exemptions in the Act. *See Pena v. Perel,* 417 S.W.3d 552, 555 (El Paso 2013, *no. pet.*); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88-89 (Tex.App.—Houston [1st] 2013, *writ filed Mar. 5, 2014*) (*on rehearing*); *Better Business Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 309 (Tex.App.—Dallas 2013, *no pet.*).

More problematic, however, is determining the applicable yet legislatively-unspecified standard of proof required to be shown by the nonmovant while shouldering that burden. In cases of exemptions that are disfavored under the law (such as tax exemptions), the party seeking the exemption must, at trial, clearly show its entitlement thereto. *See generally, First Baptist/Amarillo Foundation v. Potter Co. Appraisal District,* 813 S.W.2d 192, 195 (Tex.App.—Amarillo 1991, *no writ*) (Chief Justice Reynolds noting standard for fact question of entitlement to tax emption must be *clearly* proven.); *Hammerman & Gaines, Inc. v. Bullock,* 791 S.W.2d 330, n.2 (Tex.App.—Austin 1990, *no writ*) (*superseded by statute*) (now-Chief Justice Jones citing 1979 Texas Supreme Court rationale for strict construction of tax exemptions that must be *clearly shown with all doubts resolved against claimant.*). Alternatively, other

b) If not,[5] is the legal action "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association," with the burden of proof resting on the movant, pursuant to Tex.Civ.Prac. & Rem. Code § 27.003 (a) (West Supp. 2013) and applicable definitions in Tex.Civ.Prac. & Rem. Code § 27.001 (West Supp. 2013)?;

c) If so, can "the party bringing the legal action [establish] by clear and specific evidence a prima facie case for each essential element of the claim in question" pursuant to Tex.Civ.Prac. & Rem. Code § 27.005 (c) (West Supp. 2013)?; and

d) If so, can "the moving party [establish] by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim" pursuant to Tex.Civ.Prac. & Rem. Code § 27.005 (d) (West Supp. 2013)?[6]

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situations merit characterization of an exemption (or an exception) as an affirmative defense wherein the lesser standard of proof of a preponderance of evidence is utilized. *See Pedigo v. Austin Rumba, Inc.*, 722 F.Supp.2d 714, 722-24 (W.D.Tex. 2010) (Noting, as in the instant statute, the absence of legislative intent to divert from the general rule, Justice Nowlin cites 1974 U.S. Supreme Court authority generally holding that exemption under Fair Labor and Standards Act is an *affirmative defense* and cites 1995 Northern District of Texas authority requiring similar exemptions to be proven, at trial, by a *preponderance of the evidence*.).

Since the legislature did not evidence an intent to divert from the U.S. Supreme Court's general rule and the stated purpose of the Act requires a balancing of interests rather than favoring one over the other, the Court concludes that the instant exemption is more akin to the latter situation. *See* Tex.Civ.Prac. & Rem. Code § 27.002 (West Supp. 2013) (balance safeguarding freedom of expression versus protecting rights in meritorious litigation). *See also generally, Better Business Bureau, supra* @ hdn.8 (Although this standard of proof is used editorially in the case headnotes on this point and is used within the actual opinion relative to other issues, the Court's opinion does not utilize the preponderance standard for this specific issue.). Moreover, a motion under the Act must be filed, if at all, within 60 days of service of the litigation, absent a showing of good cause. *Id.* @ § 27.003 (b). With limited opportunity for discovery prior to a trial on the merits, it would be unreasonable to require a litigant, at such an early stage, to prove the case to a standard higher than would be required at the end of the litigation post-full discovery. As a counterpoint, one could rationally argue that a standard less than a preponderance, such as a prima facie standard, should be used due to the extreme early staging of such motions. Nonetheless, the Court will adhere to the preponderance standard to determine application of any statutory exemption based upon the constraints of the appropriate authorities cited above.

[5] On the day ending the Court's hearings on the anti-SLAPP motion (Feb. 14, 2014), Defendant CSI filed a "Supplementary Memorandum" supporting its motion arguing for the first time that no exemption should be considered on the basis that Plaintiff failed to explicitly plead such matters. Even if true, much of the evidence, the questions from and answers to the Court, and the arguments of counsel from all sides reflect that the issue of exemptions were actively being tried; thus, the Court concludes the exemption issues were tried by consent. To the extent one may argue to the contrary, the Court would grant a trial amendment necessary to satisfy any explicit pleading requirement.

[6] Depending upon the flow of the resolution of these issues, other tangential decisions are to be explored regarding recovery of costs, fees, and expenses as well as application of potential sanctions. *See* Tex.Civ.Prac. & Rem. Code § 27.009 (West. Supp. 2013).

4. Based upon the findings of fact,[7] the Court concludes that a preponderance of the evidence demonstrates that CSI and its agents are "primarily engaged in the business of selling or leasing goods or services" consistent with the intent and meaning of Tex.Civ.Prac. & Rem. Code § 27.010 (b) (West Supp. 2013). Other courts have made similar findings and the resulting conclusions. *See e.g., Hernandez v. Comm'r*, 490 U.S. 680, 681, 685 (1989) (On findings that: "The Church charges a 'fixed donation,' also known as a 'price' or a 'fixed contribution,' for participants to gain access to auditing and training sessions. These charges are set forth in schedules, and prices vary with a session's length and level of sophistication.", the Supreme Court upheld the conclusion that payments, which are the *primary* source of income to missions, branches and franchises of the mother church, by Scientology patrons were not deductible contributions due to receipt of consideration and benefits.); *id.* at 692 (concluding that the church "categorically barred provision of auditing or training sessions for free"); *The Founding Church of Scientology of Washington, D.C. v. United States*, 409 F.2d 1146, 1159 (D.C. Cir. 1969) ("Within this literature is to be found only the most occasional passing reference to the E meter; more often than not, the meter is not even mentioned in these general works. Among these are the introductory works describing Scientology, and it is presumably these works, if any, which are pressed upon curious members of the public in any effort which might be made to promote the sale of Scientology services."). Accordingly, the evidence sufficiently establishes Scientology is primarily in business to sell a good or service—be it religious or otherwise.

[7] For the purpose of evaluating the evidence in support of an exemption, § 27.010 of the Tex.Civ.Prac. & Rem. Code (West Supp. 2013) does not require that the evidence considered be "clear and specific" as the Act does in § 27.005 (c) for the purpose establishing "a prima facie case for each essential element of the claim in question." Thus, the Act does not preclude the Court, as to the exemption issues, from making reasonable inferences and deductions from the evidence admitted.

5. Based upon the findings of fact supported in-part by the Defendants' and movants' testimony by Allender, Lubow, Cartwright and others, the Court concludes that a preponderance of the evidence demonstrates that the litigated "conduct [arose] out of the sale . . . of goods, services, . . . or a commercial transaction" consistent with the intent and meaning of Tex.Civ.Prac. & Rem. Code § 27.010 (b) (West Supp. 2013). As investigator and avowed Scientologist David Lubow put it, "Rathbun was engaged in delivering Scientology services and counseling at his office/home, for compensation, even though he had been expelled from the religion and possessed no religious authority to provide Scientology services to anyone." Affidavit of David Lubow @ ¶ 9. *See also* Affidavit of Monty Drake @ ¶ 12. The Legal Director for CSI's Office of Special Affairs Allan Cartwright testified that:

> The Rathbuns' [Mark's and Monique's] unauthorized counseling practice . . . [for his "Independent Scientology" services . . . which is how he earns his living] was an immediate cause for concern [for those] charged with the protection of the Scientology religion, all churches of Scientology as well as these [*sic*] intellectual properties and the enforcement of CSI's rights. This was a primary reason for CSI's decision to have counsel retain an investigator to help determine the nature and extent of any possible infringements. Affidavit of Allan Cartwright @ ¶¶ 15 & 17.

But for the preponderate evidence of Defendant CSI's apprehension of intellectual property rights violations by former 20-plus year Scientology employee and now-competitor Mark Rathbun and his alleged sale of unauthorized Scientology services, the extensive-type of commercial piracy investigation such as that declared by Drake and/or Lubow, instigated as early as 2007, to protect CSI's primary business interests would clearly not have occurred. *See generally, Kinney, supra* Slip op. @ 2 (*Memorandum opinion*) (general recitation of reasoning of California court, in prior related litigation,

regarding former employer as a current competitor of former employee "and was therefore exempt from [California] anti-SLAPP statute.").

6. Based upon the findings of fact, the Court concludes that a preponderance of the evidence demonstrates that the majority of the conduct and statements about which Plaintiff complains was, by Defendants' own admissions (in-part, testimony of David Lubow, John Allender, and Richard Hirst), intended to "communicate" to and to affect an audience of actual or interested potential (current or former) customers of the Church's own sale of services the Church's displeasure with the competitive commercial activities of Plaintiff and her husband. The evidence also preponderates in favor of the conclusion that the "Squirrel Buster" activity was primarily designed to convey the message to other Scientologist that the Rathbuns should stop being "squirrels"—one who alters standard Scientology practice and delivers altered Scientology counseling. *See* Affidavit of David Lubow @ ¶¶ 9 & 11. The record is replete with evidence showing it was CSI who designed, initiated and funded both the investigations and the Squirrel Busters to communicate chiefly to Scientology buyers and customers that the Rathbuns were:

> offering a basterdized version of Scientology to former members, and seeking to entice parishioners to leave the faith with false assertions that his brand of so-called Scientology was more correct than standard Scientology delivered in churches. Affidavit of David Lubow @ ¶ 10.

CSI's message to its consumers, by and through its conduct and statements, being, "Pay us for delivering the good or service—not Rathbun." Further, the evidence also sufficiently establishes that the "communication"—the extensive investigations coupled with the confrontational Squirrel Buster tactics, in fact, did reach and did affect some individuals within its intended audience in one way or another, including but not limited to Plaintiff, Mark Rathbun, Mike Rinder, John Brousseau, Michael Fairman, Stephen

Hall, David Lingenfelter, Mercy Lingenfelter, Mark a.k.a. Mat Pesch, Amy Scobee, and Debbie Jean Cook as well as Allan Cartwright, Joanne Wheaton, Richard Hirst, David Lubow, John Allender, and Ed Bryan.

7. As such, Defendants' motions are precluded by the provision of the Texas Citizen's Participation Act exempting from reach of the statute legal actions brought against persons "primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the[8] sale or lease of goods, services, . . . or a commercial transaction in which the intended audience is an actual or potential buyer or customer." Tex. Civ. Prac. & Rem. Code § 27.010(b) (West Supp. 2013).

8. Additionally or alternatively, the Court concludes that a preponderance of the evidence demonstrates that the complained-of actions caused Plaintiff bodily injury as defined by Texas law. "Bodily injury" includes "physical pain, illness, or any impairment of physical condition." Tex. Penal Code § 1.07(8) (West Supp. 2013). In *Zurich American Ins. Co. v. Nokia, Incorp.*, 268 S.W.3d 487, 492 (Tex. 2008), then-Chief Justice Wallace Jefferson wrote for the Court and held, without regard to the merits, that "biological injuries or effects [qualified] as bodily injury," from a pleading construct in an insurance duty-to-defend case. While the Court noted that the "bodily injury" definition "unambiguously requires an injury to the physical structure of the human body," *id. citing Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997), it likened and found sufficient allegations that "radio frequency radiation . . . causes an

[8] Defendant CSI argues this provision requires that it, CSI, must have been the person (or entity) to have sold or leased "the" good or service from which the litigated statement or conduct flowed. To apply such a construct would necessarily limit application of the Act to being a one-way street. Applying the Act in such a fashion inherently gives a preference to the one party over another which would be contrary to the stated purpose of the Act that a court balance the respective rights of the litigants and would be contrary to the premises of standard statutory construction as stated by the Third Court of Appeals in its recent consideration of the Act. *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-0579-CV, *Slip op.* @ 3 (Tex.App.—Austin, Aug. 21, 2013, *pet.*) (*Memorandum Op.*) (citations omitted).

adverse cellular reaction and/or cellular dysfunction ('biological injury')" to allegations of "subclinical tissue damage that results on inhalation of a toxic substance such as asbestos." *Zurich, supra* @ 492-93 (*quoting Guar. Nat'l Ins. Co. v. Azrock Indus., Inc.*, 211 F.3d 239, 245, 250 (5th Cir. 2000)).

9. The definition of bodily injury is broad enough to cover "[a]ny physical pain, however minor." *Garcia v. State*, 367 S.W.3d 683, 688 (Tex.Crim.App. 2012) *citing Laster v. State*, 275 S.W.3d 512, 524 (Tex.Crim.App. 2009). In *Garcia, supra*, the Court noted as to the merits that a "fact finder may infer that a victim actually felt or suffered physical pain because people of common intelligence understand pain and some of the natural causes of it." *Id.* Taking instruction from both the Supreme Court's and Court of Criminal Appeals' respective pleading and merits decisions on what qualifies as "bodily injury," the exception embodied in § 27.010 (c) is not, as suggested in CSI's "Supplemental Memorandum in Support of Anti-SLAPP Motion" at ¶ 10, restricted to claims arising directly from a traumatic event. Rather, the definition is broad enough to include claims supported by sufficient evidence demonstrating physical manifestations of pain, anxiety, emotional distress, stress, illness or other impairment of condition regardless of the mechanism of injury.

10. Plaintiff sufficiently established by a preponderance of the evidence that she suffered stress, anxiety and fear that resulted in severe headaches, including migraines with debilitating pain due to the surveillance of investigators and Squirrel Busters—she further attested that as a result of these activities she suffered an extreme gagging nausea, and Plaintiff averred she developed a hyper-sensitivity to light and was unable to eat or concentrate due to the headaches. *See e.g.*, Declaration of Monique

Rathbun @ ¶¶ 7d, 11c, 11d, 15a & 16a. Accordingly, Defendants' motions are precluded by the provision of the Texas Citizen's Participation Act exempting from the reach of the statute "legal action[s] seeking recovery for bodily injury." Tex.Civ.Prac. & Rem. Code § 27.010 (c) (West Supp. 2013).

11. Assuming solely for the sake of argument that neither the commercial exemption nor the bodily injury exemption preclude application of the Act, the Court will address as succinctly as possible the pertinence of whether Plaintiff's legal action is based on, relate to, or are in response to Defendants' exercise of the right of free speech, right to petition, or right of association. *See* Tex.Civ.Prac. & Rem. Code § 27.003 (a) (West. Supp. 2013). Following the grammatical syntax and structure of this statute, no party to this litigation disputes that the current dispute is a "legal action." Next, the focus is whether that action "is based on, relates to, or is in response to" Defendants' freedoms of expression. If so, did the Defendants meet their burden of proof regarding the "exercise of the right of free speech, right to petition, or right of association" as defined by § 27.001, Tex.Civ.Prac. & Rem. Code (West. Supp. 2013)? Then and only then would a court need to go further in the analysis regarding the adequacy of the nonmovants' proof on the essential elements, etc. *See generally*, Conclusion of Law @ ¶ 3.

12. Regardless of the merits of her claims seeking damages in tort for personal injury, Plaintiff's pleadings sufficiently and legally allege common law tort causes of action, in-part, for bodily injury. It has been said that one person's rights end where another's nose begins—meaning, in the converse, that the farther and farther one intrudes into the space of another, the more diminished are the rights of the intruder. So too is it

with the balance of the rights at issue here. In *Zurich, supra*, the Supreme Court concluded, regardless of the merits, that a petition alleging that "radio frequency radiation . . . causes an adverse cellular reaction and/or cellular dysfunction ('biological injury')" was a legally sufficient pleading for bodily injury such that it triggered a contractual duty to defend under certain insurance policies in question. The converse of a duty to defend is a right to prosecute.

13. Plaintiff's "legal action" seeking redress for personal injury is sufficiently pleaded in a manner clearly distinguishable from any cause of action that would, as a matter of law, be "based on, related to, or in response to" a freedom of expression under the Act triggering her right to prosecute her claims even if the assertions are eventually proven to be false, groundless, or fraudulent—subject to possible sanctions if appropriate. *See generally, Zurich, supra* @ 490-91 (adequacy of pleadings triggers procedure thereafter). Ergo, the need to balance Plaintiff's rights to prosecute her common law claims for personal injury versus the Defendants' rights of freedom of expression arises.

14. Regarding the proper legal and constitutional balance of the respective rights of the litigants in this case, all of the parties have argued and relied upon the United States Supreme Court's opinion in *Snyder v. Phelps*, ___ U.S. ___, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). In *Snyder, supra* 131 S.Ct. @ 1215-18, protestors picketed matters, which the Court found related to broad issues of societal interest, shortly before and within the proximity of the funeral a United States Marine killed in the line of duty. As a result of the Court's finding that the picketed issues were of public concern, Chief Justice Roberts wrote and the Court narrowly concluded, limited by the facts presented and absent any controlling exceptions, that the *First Amendment* shielded the picketers from

tort liability and precluded recovery of the jury verdict on such common law torts by the fallen marine's family. *Snyder, supra* @ 1220.

15. Several salient points arise from *Snyder*: a) the necessary balance of the rights in question was determined post-discovery, post-trial and post-verdict; b) Chief Justice Roberts explicitly expressed the narrowness of the Court's ruling noting certain inapplicable exceptions due to the instant facts; and c) Justice Breyer wrote separately, concurring, to emphasize that the effect of the majority opinion was to be restricted to the matter before the Court—the picketing at-hand. *See generally, Snyder, supra* @ 1217-21.

16. Stifling sufficiently pleaded causes of action alleging tortuous conduct and seeking personal injury damages, prior to discovery—prior to trial—prior to verdict, on the extremely broad or outside chance that the competing interests are "based on, related to, or in response to" some form of freedom of expression would have a chilling effect on potentially meritorious litigation whereby the end might, all too easily, unjustifiably control the means. What then to avoid such an absurd effect upon the balance of the rights of all litigants? Otherwise stated, how might our jurisprudence adequately achieve the proper balance between the rights granted under both the *First* and *Seventh Amendments*? Considering Chief Justice Robert's methodology in *Snyder, supra* and heeding Justice Breyer's admonition on the limited effect of the majority opinion factually, prudence dictates that this Court examines the instant record to ascertain potential applicability of the important exceptions that the Chief Justice noted were not factually in-play in *Snyder*. If the record reveals a *bona fide* situation or circumstance, *i.e., is there a genuine fact question or not*, wherein any of the potential exceptions noted

by the Chief Justice might be in-play here, Plaintiff's *Seventh Amendment* Right to a jury trial, *i.e., the means*, cannot, prior to discovery—prior to trial—prior to verdict, be preemptively overridden by the Defendants' *First Amendment* Rights to freedom of expression, *i.e., the end. See generally, Snyder, supra* @ 1215 ("Free Speech Clause of the *First Amendment* . . . can serve as a *defense* in state tort suits"—it goes without debate that a "defense" is asserted only after a Plaintiff is allowed the opportunity to present her case factually to a jury) [*emphasis added*].

17. For the limited purpose of this inquiry, the Court presumes that the Defendants' expressions of speech, petition and association were, to the extent necessary, public in nature. The first "exclusion" from First Amendment protections noted by Chief Justice Roberts is speech that is either obscene or likely to incite a fight. *Snyder, supra* @ n.3. Plaintiff has alleged and factually asserted publication by Defendants of "bizarre" and "vile" statements about her. First Amended Declaration of Monique Rathbun @ ¶ 12. Both parties have asserted that the other sought to pick fights with one another during the multiple confrontations at issue, and Defendants hired a body guard or "muscle" due to their apprehension of Mark Rathbun's alleged propensities for violence.

18. Another potential exception noted by the Chief Justice is speech, which although given a "public" label at first blush, is determined to be contrived to insulate from liability on a truly private issue. *Snyder, supra* @ 1217. Clearly at issue here and yet to be determined subsequent to discovery, etc. is the extent to which the freedoms of expression espoused by the Defendants were, in fact or not, public in nature—the "content, form and context" of the speech has yet to be fully developed. *Id.* @ 1216. Further, there is ample evidence to indicate that CSI instigated and prompted, *i.e.,*

*contrived*, the Squirrel Buster's purported documentaries as a possible ruse to cloak its efforts with constitutional protection.

19. The majority opinion also noted the possible application of proper restraints, including an injunction. *Snyder, supra* @ 1218. Currently awaiting resolution in this very case is the existing agreed extension of a temporary restraining order so that, in-part, the anti-SLAPP motions could be timely addressed.

20. Lastly, the Supreme Court discussed the limited and sparing applicability of the "captive audience doctrine . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Snyder, supra* @ 1219-20. While it is undisputed that much of the complained-of activity and alleged harassment occurred at or in the vicinity of the Plaintiff's home, the true degree of the alleged invasion, if at all, is yet to be fully developed. This is clearly a fact-driven determination that commands adequate discovery and opportunity to develop that the time constraints of the Act do not countenance.

21. The Court concludes that numerous fact issues are substantiated with enough evidence that if allowed to be fully developed could possibly ripen into one of the exceptions discussed by the Supreme Court in *Snyder, supra.* As a result, preemptively dismissing any such legal action simply because it is somehow "based on, related to, or in response to" the defensive issue of freedom of expression would lead to an absurd result with the end unjustifiably controlling the means. Accordingly, Defendants are not entitled to file a motion to dismiss under the Texas Citizen's Participation Act. *See* §27.003, Tex.Civ.Prac. & Rem. Code (West Supp. 2013). Having reached this result, the Court need not dive headlong into the much lengthier and potentially complex ultimate

issue regarding the constitutionality of the Act from either a Seventh Amendment perspective from the federal side or an open courts perspective from the state constitution.

22. The instant result precludes the necessity of any further review of the parties' respective burdens of proof on the remaining issues, and the Court expressly makes no opinion on any such issue. Defendants' motions are, nonetheless, without merit and are **DENIED**. Tex.Civ.Prac. & Rem. Code § 27.003(c), § 27.005(b) (West Supp. 2013).

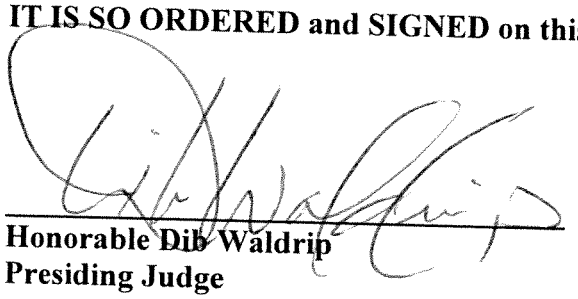
23. The instant record is voluminous, and counsel for all parties have been extremely thorough in their respective arguments and materials provided the Court. Accordingly, the Court has endeavored to be just as thorough not only in reading the evidence, the objections, and the briefs presented but also in conducting independent research on this relatively new aspect of Texas law. As a result, the Court declines to conclude that Defendants' motions, in and of themselves, are frivolous, but the Court does conclude that the method in which the motions were litigated, from the discovery to the objections, etc., resulted in hours upon hours of courtroom time that could have been better spent elsewhere.

**Conclusion**

Rulings on the objections were previously completed, and written orders thereupon will be filed under separate cover with attachments reflecting said rulings as soon as possible. For the foregoing reasons, Defendants' motions under the Act are

**DENIED**. Plaintiff is awarded her court costs and attorneys' fees. Tex.Civ.Prac. & Rem. Code § 27.009(b) (West Supp. 2013).

**IT IS SO ORDERED and SIGNED on this 14th day of March, 2014.**



**Honorable Dib Waldrip**
**Presiding Judge**