CAUSE NO. D-1-GN-23-006883

BENJAMIN BRODY, *Plaintiff,*	§ §	IN THE DISTRICT COURT OF
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
ELON MUSK, *Defendant.*	§ §	459th DISTRICT COURT

DEFENDANT ELON MUSK'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY

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Plaintiff Benjamin Brody has sued Defendant Elon Musk, demanding more than one million dollars in damages for a single Twitter post that did not mention Brody. Now, seeking to displace the Texas Citizens Participation Act's ("TCPA") general prohibition on discovery, Brody asks the Court for permission to serve facially overbroad written discovery—even though there is no dispute about the operative facts—and conduct an open-ended deposition of Musk, a public figure who runs multiple large companies. The Court should see through this transparent effort to harass Musk and unnecessarily increase litigation costs. It should deny the Motion for Discovery ("Motion") for three independent reasons.

First, Brody has not established good cause, which is a threshold requirement under the TCPA that he must satisfy before seeking discovery. He makes no effort to explain how his proposed requests are targeted at outcome-determinative issues or why discovery is necessary to meet his burden under the TCPA. Brody simply claims that the information he seeks would be helpful to carry his burden, which falls far short of the applicable standard. The failure to establish good cause is a fatal defect that cannot be cured.

Second, Brody does not need discovery to address the gating questions of law raised in Musk's Motion to Dismiss. For example, determining whether a statement is defamatory—one of Brody's reasons for seeking discovery—does not require document production or a deposition of Musk because the governing standard is objective, not subjective. Similarly, facts bearing on Musk's state of mind are available at this preliminary stage from publicly available information, including information that Brody already possesses. Given the applicable standard under the TCPA, the Court is already equipped to determine whether a prima facie defamation claim against Musk has been sufficiently stated without the discovery that Brody seeks.

Third, the proposed discovery is neither limited nor specific, the lodestar for discovery under the TCPA. Brody, for instance, asks Musk to collect data from *every* device that can connect to the internet, an effort-intensive collection that is not reasonably calculated to yield relevant information. Brody also seeks information that is outside of Musk's possession, such as a copy of every single Tweet displayed on his feed—information that is held by Twitter (which is not a party to this action), not Musk. Worse yet, Brody asks to depose Musk on broad-sweeping topics, without explaining what information Brody expects to elicit, how it is relevant to the TCPA motion, or why this information cannot be obtained through less intrusive means. These requests are as unnecessary as they are overbroad.

The Texas Legislature, through passing the TCPA, has foreclosed this type of kitchen-sink approach to discovery, recognizing the oppressive chilling effect it has on an individual's ability to exercise his or her constitutional rights. And given that Brody has not offered any case-specific reasons why he needs discovery, he effectively asks the Court to hold that all defamation plaintiffs are entitled to a deposition, notwithstanding the filing of a TCPA motion to dismiss, any time the actual malice standard is implicated. Such a rule would flout the spirit and text of the TCPA and unwind the constitutional logic of the actual malice standard—"our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'"[1] The Court should not sanction Brody's effort to weaponize the judicial system to punish Musk for sharing his opinion on a matter of public concern by requiring him to expend time, effort, and

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[1] *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 171 (Tex. 2003) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

resources responding to overbroad discovery that is neither necessary nor appropriate under the TCPA. Accordingly, the Motion should be denied.

BACKGROUND

A. Brody's Petition

Brody filed his Original Petition (the "Petition") on October 2, 2023. Brody's action centers on a single statement posted by Musk to the social media service X[2] on June 27, 2023. Pet. ¶¶ 120-22.

The allegedly defamatory post was made in response to a public debate surrounding the identities of the participants of a "street brawl" between "two rightwing extremist groups" in the midst of an LGBT pride event in Portland, Oregon on June 24, 2023, during which two of the brawlers' masks were removed. *Id.* ¶¶ 48, 52, 59. After video of the altercation "went viral" the following day, there was widespread discussion on (and beyond) Twitter as to whether the unmasked participants in the brawl were "genuine neo-Nazis" or, in fact, "federal agents or leftwing provocateurs" posing as neo-Nazis. *Id.* ¶¶ 60-63.

Within hours, multiple individuals identified Brody as one of the unmasked participants, supporting these allegations with screenshots from social media accounts belonging to Brody and his fraternity that included Brody's name, his photograph, that he was a "PolySci major," and that he planned to work for the government after graduation. *Id.* ¶¶ 66, 68, 69, 79. These materials were re-distributed by other Twitter users (but not Musk). *Id.* The next day, June 26, 2023, Brody publicly distributed a video on multiple social media platforms where he personally appeared and denied participating in the street brawl. *Id.* ¶¶ 81-82.

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[2] X was formerly known as Twitter and was rebranded in July 2023. As the Petition refers to the social media platform as "Twitter" and each post as a "Tweet," for convenience the same nomenclature will be used herein.

On June 27, 2023, a Twitter user named @zerohedge published a post to its Twitter account containing a photo from the video of the street brawl that included an individual who is not Brody. Musk replied to the post, as shown below. This is the publication that Brody claims is defamatory.

Id. ¶¶ 120-122.

B. Procedural History

On November 16, 2023, the parties filed a Rule 11 Agreement with the Court, reciting the parties' agreement that Musk had accepted service of the Petition through his attorneys and that Musk's deadline to respond would be January 5, 2024. Brody never indicated an intent to seek discovery.

On January 5, 2024, Musk filed a motion to dismiss the Petition (the "Motion to Dismiss" or "MTD") under the Texas Citizens Participation Act. A hearing on the Motion to Dismiss is

scheduled for March 25, 2024, in the 459th District Court.[3] The Motion to Dismiss seeks dismissal of the Petition for the following reasons[4]:

- Musk's statement was not "of and concerning" Brody (*see* MTD 10-13);
- Musk's post was not a verifiable statement of fact but rather one of nonactionable opinion (*see id.* at 13-18);
- Musk's statement was not false, even assuming it was factual (*see id.* at 18-19);
- A reasonable, hypothetical reader would not understand Musk's statement as communicating a defamatory assertion (*see id.* at 19-24); and
- Musk's statement was not made with the requisite state of mind (*see id.* at 25-32).

On January 10, 2024, Brody filed his Motion, asking to serve written discovery on Musk and for permission to conduct a full deposition of Musk before the hearing. *See generally* Mot.; *see also id.*, Ex. 1. Brody claims this discovery is relevant to "whether the statement was defamatory and whether Musk acted with negligence and/or malice." Mot. 5.

LEGAL STANDARD

The TCPA "is a bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern." *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019). The Act's "plain language provides that [] the court may allow specified and limited discovery relevant to the TCPA motion to dismiss on a showing of good cause, otherwise 'all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.'" *In re Elliott*, 504 S.W.3d 455, 465 (Tex. App.—Austin 2016, no pet.) (emphasis omitted) (quoting

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[3] On January 25, 2024, the parties filed a Rule 11 agreement pursuant to TCPA 27.004(a), stipulating that "[t]he time for a hearing on Musk's Motion to Dismiss is extended by thirty days."

[4] This list is a summary of issues raised in the Motion to Dismiss that are relevant to Brody's Motion; it does not purport to be an exhaustive summary of the Motion to Dismiss. For the avoidance of doubt, the discussion of certain arguments in the Motion to Dismiss should not be construed as a waiver of any arguments and issues not discussed herein.

TCPA § 27.003(c)); *see also* TCPA § 27.006(b) (restricting discovery to that "*specified and limited* discovery relevant to the motion" only after a showing of good cause) (emphasis added).

As the Austin Court of Appeals has explained, the court may allow discovery only to the extent that is "*relevant to the TCPA motion to dismiss* on a showing of good cause." *Elliott*, 504 S.W.3d at 465 (emphasis in original). Under this standard, the information sought must be directly "related to the allegations raised in the dismissal motion." *In re Quality Cleaning Plus, Inc.*, No. 05-22-01053-CV, 2022 WL 16549069, at *3 (Tex. App.—Dallas Oct. 31, 2022, no pet.); *see also In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) ("This Court has repeatedly emphasized that discovery may not be used as a fishing expedition."). "In a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015).

These additional restrictions under the TCPA sit atop the limitations on discovery already built into the Texas Rules of Civil Procedure, including restrictions against "overly broad requests, harassment, or disclosure of privileged information." *In re SSCP Mgmt., Inc.*, 573 S.W.3d 464, 469 (Tex. App.—Fort Worth 2019, no pet.). The TCPA thus supplements the Texas Rules of Civil Procedure's prohibition against requests for discovery that are disproportionate to the needs of the case or that seek information that is "obtainable from some other source that is more convenient, less burdensome, or less expensive." *In re LCS SP, LLC*, 640 S.W.3d 848, 852 (Tex. 2022) (quoting TEX. R. CIV. P. 192.4(a)); *see also* TEX. R. CIV. P. 192.4(b).

ARGUMENT

I. BRODY HAS FAILED TO MAKE A THRESHOLD SHOWING OF GOOD CAUSE

The TCPA provides, "on a showing of good cause, the court may allow specified and limited discovery relevant to the motion." TCPA § 27.006(b). While the Texas Supreme Court

has not construed what is required to demonstrate good cause, appellate courts have found that good cause is not established when a plaintiff does not demonstrate "how the requested discovery [is] 'outcome determinative,' or how it would assist him to meet his prima facie burden." *E.g.*, *Bauta v. Mulvey*, 646 S.W.3d 347, 358 (Tex. App.—Corpus Christi 2022, pet. denied) (quoted by Mot. 5). Even upon a showing of good cause, discovery "must still be specified and limited because a prima facie standard generally requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re SPEX Group US LLC*, No. 05-18-00208-CV, 2018 WL 1312407, at *4 (Tex. App.—Dallas Mar. 14, 2018, no pet.) (internal quotation marks omitted).

Brody asks to serve written discovery and to depose Musk "to address two elements: whether the statement was defamatory and whether Musk acted with negligence and/or malice."[5] Mot. 5. But Brody has not made a threshold showing of "good cause," which the TCPA requires for Brody to avoid the Act's default prohibition on discovery.

A. Brody Cannot Show Good Cause Because The Motion To Dismiss Turns On Questions Of Law That Do Not Require Or Warrant Discovery

Brody has failed to explain why there is "good cause" for the parties to undertake *any* of his proposed discovery to resolve a motion that consists almost entirely of legal, not factual disputes, and where effectively **all of the material facts are undisputed**.

In his Motion to Dismiss, Musk presents several independent, sufficient reasons why Brody's defamation claim fails as a matter of law based on undisputed facts. These include, among

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[5] These are the only two justifications that Brody has offered in support of the requested discovery. It is well-settled that new arguments cannot be raised for the first time in a reply brief. *E.g.*, *In re Arabzadegan*, No. 03-20-00292-CR, 2021 WL 5499087, at *2 n.3 (Tex. App.—Austin Nov. 23, 2021, no pet.); *Hampton v. Equity Tr. Co.*, 607 S.W.3d 1, 6 (Tex. App.—Austin 2020, pet. denied). Accordingly, to the extent Brody attempts to raise any additional justifications for the first time in his reply or during oral argument, the Court should not consider them.

other things, Musk's demonstration (1) that the statement was not "of and concerning" Brody (*see* MTD 10-13); (2) that the post was not a verifiable statement of fact, but rather one of nonactionable opinion (*see id.* at 13-18); (3) that even if the statement was factual in nature, it was not false (*see id.* at 18-19); and (4) that Musk's statement did not communicate a defamatory assertion (*see id.* at 19-24).

Notably, *all* of those issues—each of which is independently sufficient to defeat Brody's defamation claim—turn on questions of law and are based on undisputed questions of fact. Unlike in many defamation cases, there is no dispute here as to what was said, to whom it was said, when and where it was said, how it was said, or the surrounding context in which it was said. Rather, the parties dispute what the statement *meant*, including whether it was "of and concerning" Brody, whether it consisted of a false assertion of fact or a nonactionable assertion of opinion, and whether it conveyed a defamatory message. Each of those inquiries presents a legal question based on how a **hypothetical, objective, reasonable reader** would interpret the statement at issue. *See Lilith Fund for Reprod. Equity v. Dickson*, 662 S.W.3d 355, 363 (Tex. 2023) ("Whether an alleged defamatory statement constitutes an opinion rather than a verifiable falsity is a question of law" that is based on "the perspective of a reasonable person's perception."); *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 631 (Tex. 2018) (explaining the "judicial task" of determining whether a defamatory meaning "arises from an objectively reasonable reading" of a statement).

Given that the Motion to Dismiss raises solely questions of law that turn on undisputed allegations in the Petition, Brody has failed to identify any reason why the court should order any discovery at all at this time instead of resolving the legal disputes based on the pleadings and affidavits submitted with the parties' filings, as it is permitted to do under the Act. *See* TCPA § 27.006(a); *Lipsky*, 460 S.W.3d at 591 ("In a defamation case that implicates the TCPA, pleadings

and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss."); *MacGeorge v. Lalezari*, No. 07-23-00024-CV, 2023 WL 4346717, at *1 n.2 (Tex. App.—Amarillo June 29, 2023, no pet.) (resolving TCPA motion based on pleadings alone, notwithstanding ongoing factual disputes); *cf. Sipes v. Gen. Motors Corp.*, 946 S.W.2d 143, 161 (Tex. App.—Texarkana 1997, writ denied) ("If the facts necessary to support summary judgment are developed enough, no further discovery is needed, even if it might raise a fact issue.") (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 522 (Tex. 1995) (no need for discovery where motion could be decided without resolving issues of fact)).

Recognizing that his inability to show good cause is an impediment to his fishing expedition, Brody invents a new standard to avoid the TCPA prohibition on discovery: "good cause is shown," Brody claims, "when a plaintiff articulates 'how [the discovery] would assist him to meet him prima facie burden.'" Mot. 5 (quoting *Bauta*, 646 S.W.3d at 358). But this is not the standard Brody must meet to show good cause.

Brody's misstatement of the standard flows from his misreading of *Bauta* and its holding. In *Bauta*, the Corpus Christi Court of Appeals held the trial court did not abuse its discretion under the TCPA by denying the plaintiff leave to serve written discovery and depose the defendant. 646 S.W.3d at 358. The *Bauta* court first held that the denial of discovery was appropriate because the plaintiff failed to "articulate how he met the requirement of 'good cause'" by failing to adequately brief the issue. *Id.* at 358 (citing *Cruz v. Van Sickle*, 452 S.W.3d 503, 512 (Tex. App.—Dallas 2014, pet. denied)). The court separately affirmed the denial of discovery on an independent basis: that denial was appropriate because the plaintiff did not explain "how the requested discovery was 'outcome determinative,' or how it would assist him to meet his prima facie burden." *Id.* The

court did not hold, let alone suggest, that good cause is affirmatively established whenever a plaintiff can explain how the information is relevant to meet his TCPA burden, Brody's selective quotation notwithstanding. *See* Mot. 5. If mere relevance were the standard for good cause, every plaintiff would be able to seek discovery in the mine run TCPA action, frustrating the Legislature's goal of curbing meritless actions brought to chill the exercise of free speech. The *Bauta* court did not say anything of the sort. On the contrary, it held that good cause is **not established** when the plaintiff does not show how the requested discovery is necessary. 646 S.W.3d at 358. Brody's mistake is confusing a necessary condition for a sufficient one.

Properly understood, *Bauta* undercuts Brody's request because he has not made a showing of good cause. Brody mentions good cause just two times[6] in the entire Motion, without any attempt to explain how that standard is satisfied here. That alone warrants dismissal of the Motion. *Bauta*, 646 S.W.3d at 358 (affirming denial of discovery where plaintiff "did not articulate how he met the requirement of 'good cause'"); *Cruz*, 452 S.W.3d at 512 (holding that three sentences devoid of discussion or analysis was not sufficient to establish good cause to conduct to discovery into malice). Separately, the Motion should be denied because Brody makes no attempt to explain why the proposed discovery is outcome determinative or necessary. *See, e.g.*, *Bauta*, 646 S.W.3d at 358; *SPS Austin, Inc. v. Wilbourn*, No. 03-20-00054-CV, 2021 WL 5456659, at *14 (Tex. App.—Austin Nov. 19, 2021, no pet.) (affirming denial of discovery where plaintiff "did not present an argument as to why it needed an exception to the standard prohibition of discovery to obtain evidence on that subject matter").

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[6] Mot. ¶ 16 ("Under the TCPA, 'on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.'") (quoting TCPA 27.006(b)); *id.* at 5 ("Thus, good cause is shown when a plaintiff articulates 'how [the discovery] would assist him to meet his prima facie burden.'") (quoting *Bauta*, 646 S.W.3d at 358).

Having failed to offer reasons why discovery is necessary in this case, Brody effectively asks the Court to announce a new rule of law: that a defamation plaintiff is entitled to a deposition whenever the actual malice standard is implicated, regardless of the TCPA. Such a request not only frustrates the Legislature's stated goals in passing the TCPA; it also violates the constitutional recognition that "debate on public issues should be uninhibited, robust, and wide-open" and that even erroneous statements "must be protected if the freedoms of expression are to have the breathing space that they need to survive." *Forbes Inc. v. Granada Biosciences, Inc*., 124 S.W.3d 167, 171 (Tex. 2003) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (internal quotation marks and alterations omitted)).

B. Brody Does Not Require Discovery To Show The Statement Is Defamatory

Nor indeed is *any* discovery necessary in this case. Brody's first claim—that discovery is necessary to address "whether the statement was defamatory" (Mot. 5)—misinterprets the applicable law.

To make a prima facie showing that Musk's post "was defamatory concerning the plaintiff," Brody must only present "the minimum quantum of evidence" (*In re DuPont de Nemours & Co*., 136 S.W.3d 218, 223 (Tex. 2004) (internal quotation marks omitted)) necessary to show that a reasonable reader would interpret the tweet as implying an assertion of fact. *Lilith Fund*, 662 S.W.3d at 363. When determining whether a statement is defamatory, courts look at how the hypothetical "objectively reasonable reader" would interpret the statement at issue. *Dallas Morning News,* 554 S.W.3d at 631. Consequently, as the Supreme Court of Texas recently explained, the speaker's own "subjective belief, even when sincerely held," is not the standard for determining defamatory meaning; rather, "[t]he touchstone is the reasonable reader's reception." *Lilith Fund*, 662 S.W.3d at 369. This is an objective standard that does not turn on the speaker's subjective state of mind.

Crucially, Brody has not identified, and cannot identify, any way in which the written discovery he seeks to propound is relevant to the understanding of a **hypothetical, objective, reasonable third-party reader.** The written discovery is aimed at Musk's internet activity and Twitter history. *See* Mot., Ex. 1. These requests are in no way related to the "relevant contemporary events" surrounding the tweet or the understanding of "a hypothetical reasonable reader" (*id.* at 5-6), and Brody does not suggest otherwise. Indeed, the relevant context—the who, what, when, and where (*see Lipsky*, 460 S.W.3d at 591)—is undisputed, obviating the need for written discovery.

Brody's request to depose Musk fares no better. To start, Brody fails to identify any information to be elicited through a deposition regarding "relevant contemporary events" or "the speaker's method and style" (Mot. 6) that would be outcome determinative. To the contrary, Musk's testimony is not remotely relevant—let alone outcome determinative—to how a reasonable person would interpret his tweet under the proper objective inquiry. *Lilith Fund*, 662 S.W.3d at 369. Brody claims that "a deposition of Musk will provide an opportunity to explore" three amorphous topics (Mot. 6), but under the TCPA, Brody is not entitled to "an opportunity to explore" (*id.*) for facts that might buttress his fatally defective claim. *Rockman v. Ob Hospitalist Grp., Inc.*, No. 01-21-00383-CV, 2023 WL 3311548, at *9 (Tex. App.—Houston [1st Dist.] May 9, 2023, no pet.) (affirming denial of discovery under the TCPA because plaintiffs desire to explore "the underlying factual situation" in a defamation action was not "specified and limited") (internal quotation marks omitted). What Brody seeks, in effect, is a fishing expedition that is anathema to the TCPA's directive that discovery, to the extent it occurs at all, be "specified and limited." TCPA § 27.006(b). And, in any event, Musk's testimony on each of those points remains wholly immaterial because Musk's "subjective belief" is not the standard for determining defamatory

meaning; rather, "[t]he touchstone is the reasonable reader's reception." *Lilith Fund*, 662 S.W.3d at 369. In other words, what matters under Texas law is:

(1) The surrounding "contexts and circumstances" *as perceived by hypothetical, objectively reasonable readers*;

(2) How Musk's post would have been "received by" *third-party, hypothetical, objectively reasonable readers.*

(3) Musk's "style and method of dissemination" *as perceived by hypothetical, objectively reasonable readers*.

Mot. 6.

Thus, by seeking Musk's testimony as to the defamatory meaning of his own statements, Brody is seeking precisely the sorts of "statements of [the speaker's] intent or interpretation" of his own statements that the Supreme Court expressly held, just last year, are irrelevant when considering defamatory meaning. *Lilith Fund*, 662 S.W.3d at 369. Courts in Texas routinely deny TCPA discovery motions (including deposition requests) where the information sought is irrelevant to the motion. *See, e.g.*, *SPEX Group*, 2018 WL 1312407, at *5 (holding that the trial court abused its discretion by ordering deposition seeking information not relevant to the TCPA motion); *Bauta*, 646 S.W.3d at 358 (discovery request was properly denied where the movant failed to show that the requested discovery was "outcome determinative, or how it would assist him to meet his prima facie burden") (internal quotation marks omitted); *Quality Cleaning*, 2022 WL 16549069, at *3 (overturning discovery orders where the "discovery ordered was not limited to that which was relevant to the motion to dismiss") (internal quotation marks omitted).

The Court should adhere to the default rule that discovery is inappropriate under the TCPA until the plaintiff makes a showing of good cause. Here, Brody has made no such showing. Because the discovery is irrelevant and unnecessary to Brody's prima facie burden to establish that the statements are defamatory, the Motion should be denied.

C. Brody Does Not Need Discovery To Make A Prima Facie Showing Of Negligence Or Malice

Brody next claims discovery is necessary to show "whether Musk acted with negligence and/or malice." Mot. 5. But, again, Brody has not met the standard for showing why—in this case and based on the allegations in this Complaint—Brody needs discovery (and certainly not such extensive discovery) to meet his burden under the TCPA.

First, Brody has failed to adequately brief the issue of malice. Brody devotes to the issue of malice four sentences, none of which identifies how the deposition is necessary to elicit outcome-determinative information. The Court may deny the Motion on this ground alone. *See Bauta*, 646 S.W.3d at 358; *cf. In re Lester*, 254 S.W.3d 663, 668 n.3 (Tex. App.—Beaumont 2008, no pet.); *see supra*, at Section I.A (describing requirements for meeting standard to obtain discovery).

Rather, Brody briefly suggests, in two conclusory sentences and without any elaboration, that a deposition of Musk would allow Brody to "explore concepts of negligence and malice." Mot. 6. But after failing to present any non-conclusory allegations of malice in his Petition (*see* MTD 29-32), Brody now fails to explain why—other than, presumably, to harass and inconvenience his adversary—he seeks such a cumbersome form of discovery to muster even the "minimum quantum of evidence" necessary to establish a prima facie case for malice. *SPEX Group*, 2018 WL 1312407, at *4 (internal quotation marks omitted) (explaining that the rationale underlying the significantly "limited" discovery permissible under the TCPA is that "a prima facie standard generally 'requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true'") (quoting *DuPont*, 136 S.W.3d at 223). Under the TCPA, the desire for "an opportunity to explore" (Mot. 6) an area of inquiry does not meet the "specified and limited" standard. *Rockman*, No. 01-21-00383-CV, 2023 WL 3311548, at *9

(internal quotation marks omitted) (affirming denial of discovery under the TCPA because plaintiff's desire to explore "the underlying factual situation" in a defamation action was not "specified and limited").

Second, the discovery Brody seeks is unnecessary to oppose Musk's TCPA motion, which argues only that the ***allegations in the petition*** are insufficient for actual malice. Musk does not rely on evidence outside the petition's four corners to argue that the petition should be dismissed for failing to plead actual malice. As a result, Musk's TCPA motion does not provide a basis for Brody to obtain discovery into this area. Rather, a deposition is unnecessary to respond to the TCPA motion's assertion that Brody's own allegations fail to meet the pleading requirements for malice. Further, the TCPA motion does not assert that the petition fails to allege negligence—indeed, the TCPA motion argues that the negligence standard is inapplicable because the petition shows Brody is a limited purpose public figure, triggering the requirement of actual malice. Thus, a deposition is unnecessary to oppose the TCPA motion on this ground, too.

Third, Brody offers no reason why he cannot seek—as he does in the Petition—to carry his burden on Musk's mindset through publicly available information, thus undermining any claim that he needs burdensome discovery from Musk. The Petition devotes 141 paragraphs to exploring the circumstances under which the Tweet was published (Pet. ¶¶ 48-188) and 39 paragraphs—that have nothing to do with this case—exploring Musk's style of communication (*see* Pet. ¶¶ 9-47). Musk denies that these circumstances create a reasonable inference of negligence and/or malice, but in any case, this information provides Brody with an adequate opportunity to make a prima facie showing of negligence and/or malice at this preliminary stage. *Lipsky*, 460 S.W.3d at 591 ("In a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they

damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss."); *see also Warner Bros. Entm't, Inc. v. Jones,* 538 S.W.3d 781, 805 (Tex. App.—Austin 2017), *aff'd*, 611 S.W.3d 1 (Tex. 2020) ("Actual malice may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the defendant's words or acts before, at, or after the time of the communication.") (cleaned up). Brody seeks to place the cart ahead of the horse by conducting broad discovery that is inappropriate under the TCPA.

Finally, Brody's failure to articulate his proposed line of inquiry spotlights his true (and improper) motivation for seeking discovery at this stage. Unlike the written discovery requests, Brody has not given any indication of what topics will be subject to inquiry in his proposed deposition of Musk, what the expected testimony will reveal, or how it relates to his specific burdens on the TCPA. Rather, Brody has identified ambiguous, amorphous topics—such as posting history—that would allow Brody to question Musk on every internet interaction, regardless of time or topic. The only logical inference is not that Brody seeks good-faith discovery to satisfy his TCPA burden but rather that he hopes to abuse the discovery process to harass Musk and increase his litigation costs unnecessarily.

II. BRODY'S DISCOVERY IS NOT SPECIFIED AND LIMITED AS REQUIRED BY THE TCPA

To the extent it determines that any discovery is proper, the Court still should not sanction the particular discovery Brody proposes because it is both facially overbroad and disproportionate to the needs of the case. Upon a showing of good cause, the Court "may allow *specified* and *limited* discovery *relevant* to the motion [to dismiss]." *Bauta*, 646 S.W.3d at 357 (quoting TCPA § 27.006(b)) (alternation in original; emphases added). Discovery "must still be 'specified and limited' because a prima facie standard generally 'requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *Id.* (quoting *DuPont*,

136 S.W.3d at 223). Even if Brody had demonstrated good cause (he has not), the proposed discovery would nevertheless be inappropriate because it is neither specified nor limited.

First, Brody's request that Musk produce his entire internet browsing history, search history, and Twitter viewing history across several days and across "any web-connected devices" —business or personal—is plainly overbroad and intended to harass Musk. *See* Mot., Ex. 1. Brody's request would extend to devices that have no possible nexus to this case, including home appliances and personal devices that are connected to the internet but cannot be used to search or post to social media. There is no discernible justification for asking Musk to expend resources responding to this facially overbroad request.

Certainly, nothing about this sweeping request aligns with the Court's mandate to order, at most, "limited" discovery as part of a TCPA motion. TCPA § 27.006(b). Indeed, even outside of the TCPA context, Texas courts look skeptically upon sweeping requests for electronic discovery that encompass all of a party's electronic devices (*i.e.*, business and personal) and where the requests seek "invasive" disclosure. *E.g.*, *In re Shipman*, 540 S.W.3d 562, 565, 569 (Tex. 2018); *cf. In re Weekley Homes, L.P.*, 295 S.W.3d 309, 323 (Tex. 2009) ("[T]he harm that might result from revealing private conversations, trade secrets, and privileged or otherwise confidential communications, cannot be remedied on appeal."). Such overbroad discovery triggers the judicial obligation "to impose reasonable discovery limits, particularly when the burden or expense of the proposed discovery outweighs its likely benefit." *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 248 (Tex. 2021) (cleaned up).

Unsurprisingly, under the TCPA's more restrictive discovery parameters, courts are even more skeptical of requests that, like this one, are overbroad and calibrated to capture large swaths of irrelevant information. *See, e.g.*, *SPEX Group*, 2018 WL 1312407, at *5 (overturning discovery

order “not properly limited to discovery of information necessary to meet the minimum burden of establishing a prima facie case for each element of [plaintiff's] causes of action”); *SSCP Mgmt.*, 573 S.W.3d at 473-74 (similar).

Second, several of Brody's other requests for written discovery improperly seek to impose upon Musk the burden of producing materials that are readily available to the public and that Brody already has. For example—as Brody's Petition illustrates in referencing Musk's Twitter likes, replies, and other engagements with posts (*see, e.g.*, Pet. ¶ 35)—a list of Twitter posts “engaged by” Musk in this manner is publicly available on Twitter and, for that matter, was included in the Petition. *See* Mot., Ex. 1; Pet. ¶¶ 69-80, 83-113, 121. There is no reason for Musk to reproduce materials in Brody's possession or incur the costs of searching for information that is publicly available to Brody. *See In re Kuraray Am., Inc.,* 656 S.W.3d 137, 142 (Tex. 2022) (“[A] discovery order [that] compels production of ‘. . . duplicative documents . . . imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party.”) (quoting *In re CSX Corp*., 124 S.W.3d 149, 153 (Tex. 2003)).

Similarly, to the extent Brody is suggesting that some of the posts engaged by Brody no longer “remain publicly viewable” (Mot., Ex. 1), Brody, like any other member of the public, can view those posts with ease using publicly available internet archive services—again, as Brody's use of such internet archive service links in his own Petition demonstrates. *See, e.g.*, Pet. ¶ 115, fn. 117. Even outside the “limited” discovery provisions under the TCPA, Texas courts traditionally frown upon requests that impose upon another party the burden to produce something that is publicly available to the moving party. *See LCS*, 640 S.W.3d at 852 (stating that courts “‘should’ limit discovery if what is sought is ‘obtainable from some other source that is more convenient, less burdensome, or less expensive’” and affirming trial court's “refusal to compel

production of publicly available documents") (quoting TEX. R. CIV. P. 192.4(a)); *K & L*, 627 S.W.3d at 262) (Huddle, J., concurring) (instructing that the need for discovery "is at its lowest when the . . . data is publicly available"); *see also* TEX. R. CIV. P. 192.6 (authorizing the court to protect parties from "undue burden, unnecessary expense, harassment, [and] annoyance"). The Court should likewise decline Brody's invitation to order such unnecessary discovery here.

Third, Brody improperly seeks discovery that is not within Musk's possession, demanding "[a] copy of every tweeted viewed by the @elonmusk account between 8:00pm on June 25, 2023 and 8:22am on June 27, 2023." Mot., Ex. 1. To the extent this information is not publicly available, it is not in the hands of Musk in his capacity as an individual user. Instead, the owner and custodian of this information is, of course, Twitter, which is not a party to this action. Simply put: Brody has no basis to demand that Musk misappropriate **Twitter's** information and data, notwithstanding his position in its corporate hierarchy.

Finally, Brody has not sought less intrusive alternatives to the ill-defined deposition he seeks. Brody could, for example, submit his intended deposition questions and lines of inquiry to the Court for a determination of whether they are directly related to the gating issues raised in the Motion to Dismiss. Alternatively, Brody could seek leave to conduct a written deposition, significantly reducing the cost and burden to Musk. TEX. R. CIV. P. 200.3. Tellingly, Brody has not requested either option. Instead, he insists upon an in-person deposition that will last unknown hours and cover amorphous, overbroad subject matter. The intended result is for Musk to incur unnecessary litigation burdens that are disproportionate to and untethered from the needs of this case.

These reasons further illustrate why the Court should deny the Motion.

III. TO THE EXTENT THE COURT ORDERS ANY DISCOVERY, IT SHOULD ALSO EXTEND THE HEARING DEADLINE

Musk respectfully reiterates that the discovery sought in Brody's Discovery Motion is unnecessary and that the Motion should be denied in its entirety. To the extent that the Court orders any of the requested discovery, it should also extend the deadline to hold a hearing on the Motion to Dismiss.

Under the TCPA, a hearing ordinarily "must be set not later than the 60th day after the date of service of the motion." TCPA § 27.004(a). The parties have jointly agreed to extend the time for a hearing on the Motion to Dismiss by thirty days, and the hearing is scheduled for March 25, 2024. The Act further provides that if the Court does order discovery, it "may extend the hearing date to allow discovery under [§ 27.006(b)], but in no event shall the hearing occur more than 120 days after the service of the motion"—in this case, May 6, 2024. *Id.* § 27.004(c).

Such an extension is appropriate here. Brody's strategic decision to seek overbroad discovery less than a month before the hearing—after making no mention of any intention to seek discovery in the preceding months of correspondence between the parties and in service of a defamation claim founded upon undisputed operative facts—is gamesmanship in its most transparent form. Brody knows perfectly well that Musk helms several large companies and is among the most visible and in-demand executives in the world. He surely, therefore, also understands that given the fatal deficiencies that doom his Petition on the merits, and given the futility of discovery in an action where the facts are substantially undisputed, his last and best chance to manufacture leverage against Musk is to burden his time and to seek to embarrass and harass him.

The requested discovery would certainly accomplish those goals, if nothing else. Not only does Brody seek to force Musk to sit for a deposition to ask questions that are immaterial to his

defamation claim, but he also seeks invasive written discovery that would force Musk to sift through his own internet activity to filter out confidential and sensitive information that is irrelevant to this action, ***and***, presumably, to then litigate the relevance of those materials with an adversary whose true aim is apparently to fish for leverage regardless of relevance. Nothing in the "limited" discovery discretion the TCPA vests in trial courts contemplates such disclosure. *See supra,* Section II.

For the reasons discussed above, the Court should reject Brody's cynical tactic in its entirety. Discovery in this matter is simply unnecessary. But to the extent that the Court does award any discovery, it should extend the hearing deadline to May 6, 2024, to ensure that Musk has a full and fair opportunity to fulfill and respond to Brody's discovery requests.

CONCLUSION

For the foregoing reasons, Musk respectfully requests that the Court deny Brody's Discovery Motion in its entirety. To the extent the Court does order any discovery, Musk respectfully requests that the Court extend the deadline to hold a hearing on Musk's Motion to Dismiss until May 6, 2024.

Dated: February 12, 2024

Respectfully submitted,

By: */s/ John Bash*

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on this date, a true and correct copy of the above and foregoing document has been served upon all counsel of record, in accordance with the Texas Rules of Civil Procedure, via the Court's e-filing system.

DATED: February 12, 2024

/s/ Emiliano D. Delgado
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