Opinion issued August 31, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00877-CV

THERASOURCE, LLC, TYSON LIN, AND CHRISTINE L. LIN, Appellants

V.

HOUSTON OCCUPATIONAL THERAPY, PLLC, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2019-30261

MEMORANDUM OPINION

Appellee Houston Occupational Therapy, PLLC ("Houston OT") sued appellants, TheraSource, LLC ("TheraSource"), Tyson Lin ("Tyson"), and Christine L. Lin ("Christine") (collectively, the "TheraSource Parties"), for conduct related to

an alleged scheme to establish a competing business by misappropriating trade secrets and conspiring to commit related torts. After the trial court denied their motion to dismiss Houston OT's claims under the Texas Citizens Participation Act ("TCPA"),[1] the TheraSource Parties filed this interlocutory appeal. Because we conclude that either the TCPA does not apply to Houston OT's claims or the claims involve exempt commercial speech, we affirm the trial court's order denying the motion to dismiss.

Background

In December 2011, Christine and Tyson Lin formed Ascension Rehab Services LLC, d/b/a Ascension Physical Therapy, a home-health therapy company. They later changed the company's name to TheraSource.[2] TheraSource's primary business is providing staffing for in-home therapy services—including physical therapy, occupational therapy, speech therapy, and social work services—to patients referred by home health agencies ("HHAs").[3] Houston OT, which is owned by

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1 *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011. The pre-September 1, 2019 version of the TCPA applies in this case. Accordingly, the statutory references in this memorandum opinion are to the TCPA as it existed before September 1, 2019.

2 We refer to the company hereinafter as TheraSource, even though the company was doing business at relevant times as Ascension Physical Therapy.

3 Physicians refer patients needing home therapy to HHAs. The HHAs, in turn, refer the patients to home-therapy providers, such as TheraSource and Houston OT.

Michel Monique Burrage, also provides staffing for in-home therapy services through referrals from HHAs.

Houston OT is a founding member of the Texas Therapy Network (the "Network"), a collaboration of several companies providing home therapy services. The Network brings together multiple companies, each with its own expertise in the field of therapy, for the purpose of maximizing the cost-effective delivery of therapy services to mutual clients in the Houston area. The Network members initially included providers of occupational therapy services, speech therapy services, and medical social work services. When the Lins learned about the Network from Burrage in the fall of 2013, however, they became interested in joining as a physical therapy provider.

According to Houston OT, the parties' intended that each Network member would provide services only in its respective therapy field and would refer requests for other therapy services to the other Network members. The members agreed that Houston OT would provide occupational therapy services and that TheraSource would provide physical therapy services. According to Houston OT, the Lins further "agreed not to provide occupational therapy services in Houston [OT's] coverage area, in exchange for access to Houston [OT's] confidential and proprietary information."

When Network clients began to complain about TheraSource's performance, the Lins reached out to Burrage for information to improve their business. The Lins allegedly asked Burrage to share Houston OT's confidential and proprietary information "regarding its process for providing services, performing collections, marketing strategies and ensuring regulatory compliance," as well as provide access to "proprietary materials used by Houston [OT], including contract templates for use with third parties and employees," among other things. Houston OT alleges that the Lins represented that the information would not be used to compete against Houston OT. Based on these representations, Houston OT shared information about its processes for client referrals, patient intake, therapist recruitment and staffing, and bookkeeping with the TheraSource Parties. In addition, Houston OT shared its client referral sources and allowed TheraSource to market directly to those sources in an effort to increase its physical therapy business.

Houston OT alleges that once TheraSource's business improved, TheraSource left the Network and began to compete with Houston OT by offering occupational therapy services. TheraSource "actively pursued competition with Houston [OT] by reaching out to Houston [OT's] referral sources[,] . . . interfering with [its] contractual relationships," poaching therapists, disparaging Houston OT's reputation, and sharing Houston OT's confidential and proprietary information with "third parties in a position to compete with Houston [OT]."

Based on these factual allegations, Houston OT sued the TheraSource Parties for misappropriation of trade secrets, common-law fraud, tortious interference with prospective contractual relations, and business disparagement.[4] Houston OT claimed that, while consulting with Houston OT to become a Network member, the TheraSource Parties acquired Houston OT's confidential and proprietary information. This included proprietary information on patient lists, records, referral sources, therapists, contract templates, and processes for providing therapy services, performing collections, marketing, and ensuring regulatory compliance, as well as other proprietary information related to how Houston OT handled intake, input referrals, staffed patients, informed referral agencies that patients needed additional therapy, and used software.

Houston OT asserted that it shared this confidential and proprietary information with the TheraSource Parties in reliance on false representations that the TheraSource Parties would not use the information to compete with Houston OT by providing occupational therapy services in the same area or otherwise disrupting Houston OT's business relationships. But after leaving the Network, the TheraSource Parties used Houston OT's confidential and proprietary information to contact Houston OT's client referral sources and therapist contractors; disparage

[4] Houston OT pleaded that the TheraSource Parties were liable collectively under theories of conspiracy, joint enterprise, and vicarious liability.

Houston OT to those parties; provide occupational therapy services with Houston OT's business and record-keeping practices; and wrongfully divert business to TheraSource, thereby disrupting Houston OT's ability to attract business.

The TheraSource Parties answered the suit and later moved to dismiss the suit under the TCPA, asserting that Houston OT's claims targeted their protected rights of association and free speech. The TheraSource Parties argued that Houston OT's claims lacked merit because there "was no written contract between the parties for joining the [Network], including no confidentiality agreements, no non-compete agreements, and no agreement restricting the parties' ability to leave the [Network] at any time." Further, they asserted the information received from Houston OT and Burrage "was readily available and known to persons involved in the home health industry."

In support of their dismissal motion, the TheraSource Parties relied on Houston OT's pleading and Christine's affidavit. In her affidavit, Christine stated that although TheraSource initially provided staffing for home-health physical therapy services throughout Houston, it began providing staffing for occupational therapy services in 2013. Because the certified occupational therapist working with TheraSource at that time was not getting as many referrals as he desired outside of the Houston area where TheraSource directed most of its marketing and soliciting, Christine reached out to Burrage about whether Houston OT needed an additional

occupational therapist for other areas of town. Christine recalled that Burrage was "shocked" to receive the call and indicated "she had been looking for a good physical therapy company she could network with for a very long time." After meeting with Christine, Burrage proposed the Network. According to Christine, none of the TheraSource Parties signed any agreement with Houston OT to not compete or prohibiting the use of Houston OT's information. She stated that members were free to leave the Network at any time, "without reason or cause," and that TheraSource decided to do so because of "multiple recurring issues" arising from its affiliation with Burrage and Houston OT.

Houston OT responded to the motion to dismiss, arguing that even though it had sufficient evidence to survive the motion, the TCPA did not apply because the claims against the TheraSource Parties were not based on, related to, or in response to any exercise of protected rights and instead concerned only unprotected commercial speech.

Houston OT's evidence included a Letter of Intent signed by Tyson and addressed to Burrage.[5] The Letter of Intent stated TheraSource's intention to be

[5] Although the TheraSource Parties filed written objections to some of the evidence attached Houston OT's response, the record does not indicate any ruling was made on those objections.

included in the Network and, regarding the services to be provided by the Network members, stated as follows:

> As per conversations at previously established meetings and phone conversations, [TheraSource] will provide physical therapy services for the [N]etwork. Houston [OT] will provide occupational therapy services for the [N]etwork. Speech Therapy Unlimited will provide speech therapy services for the Network. Senior Care Solutions will provide MSW services for the Network and Houston Pediatric Therapy will provide pediatric occupational therapy services for the Network. All non[-]physical therapy referrals will be referred to the prospective provider in the [N]etwork.

In addition, Houston OT presented email correspondence purporting to memorialize TheraSource's intention to stop providing occupational therapy services, a sample TheraSource contract for physical therapy services which indicated that any requests for occupational therapy services would be referred to Houston OT, and affidavits.

One of the affiants was Sandra Gallegos, a long-term Houston OT employee. Gallegos stated that Burrage and Tyson "shook hands" and agreed that if Burrage allowed TheraSource to join the Network, the TheraSource Parties would not compete with Houston OT. After making her own promise not to compete with Houston OT, Christine visited Houston OT's office and was "allowed access to [Houston OT's] contracts and company information." Christine gathered information on how Houston OT managed the office, handled referrals, staffed patients, and communicated with HHAs. When Houston OT began to receive

complaints from HHAs after TheraSource left the Network, it appeared to Gallegos that TheraSource was sending its staff to Houston OT under the guise of interviewing to "gather information and hurt [Houston OT's] business." One client referral source reported that Christine said she wanted Houston OT's occupational therapy business. In addition, Houston OT lost therapists to TheraSource.

Hannah Marie Patricia Kara-an Sale, a former employee of an HHA called Sigmah Home Health ("Sigmah"), also gave a sworn statement. She stated that she came to know Burrage and Houston OT through her work with Sigmah. Although Sigmah had worked with Houston OT to service many patients, it ceased doing so after its owner met privately with Christine and declared there were "too many complaints" about Houston OT. Kara-an Sale recalled a "significant" complaint made in March 2018, when TheraSource informed Sigmah that a Houston OT occupational therapist, referred to as "Jessica," had "abandoned" and angered a mutual patient who no longer wanted her services. Kara-an Sale reported the complaint to Burrage, who stated that she had spoken to the patient, that "there was no problem," and that the patient was happy with Houston OT's service.

In another affidavit, Jessica Scott, the occupational therapist associated with Houston OT whom TheraSource accused of patient abandonment, averred that the patient at issue was told by a TheraSource therapist that Scott had abandoned her "without discussion of discharge." According to Scott, these were "false words" that

put her and Houston OT in the "uncomfortable position" of defending her work. Scott continued to provide the patient with occupational therapy services, but the patient eventually was referred by Sigmah to a different therapist associated with TheraSource despite the patient's desire to continue working with Scott.

A second occupational therapist associated with Houston OT, Bryan Wilkerson, stated in his affidavit that he witnessed Christine announce at Houston OT's holiday party in December 2013 that TheraSource "was a single discipline [p]hysical [t]herapy company" with "no intention to compete with Houston [OT] or its associates." However, in 2016 and then again in 2018 or 2019, Wilkerson overheard TheraSource representatives make "defamatory statements" to Houston-area HHAs about himself and other Houston OT therapists in an effort to "poach Houston [OT] employees," "promote negative publicity" about Houston OT, and establish TheraSource "as a competitive provider of occupational therapy, speech therapy, and social worker services."

Without stating its reasons, the trial court denied the TheraSource Parties' motion. The TheraSource Parties now challenge that ruling in this interlocutory appeal.

The TCPA

The TheraSource Parties argue that the trial court erred by denying their TCPA motion to dismiss because they established that Houston OT's claims are

based on, related to, or in response to the exercise of the right of free speech and the right of association. In addition, they assert that Houston OT did not establish that the complained-of communications fall within the TCPA's exemption for commercial speech.

A. Legal standard for dismissal

The TCPA "protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002. A party may move to dismiss a legal action that "is based on, relates to, or is in response to [that] party's exercise of" any of three enumerated rights: the right of free speech, the right to petition, or the right of association. *Id.* § 27.003(a).

The TheraSource Parties' TCPA motion raised two of these rights—the right of association and the right of free speech. First, the TCPA defines "exercise of the right of association" as a "communication between individuals who join together to collectively express, promote, pursue, or defend common interests." *Id.* § 27.001(2). "Communication" is statutorily defined to include "the making or submitting of a

statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1); *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018). Second, the TCPA defines "exercise of the right of free speech" as a "communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). A "matter of public concern" includes, among other things, an issue related to "health or safety" or "a good, product, or service in the marketplace." *Id.* § 27.001(7)(A), (E).

The TCPA movant bears the initial burden of showing by a preponderance of evidence that the legal action is based on, relates to, or is in response to the movant's exercise of one of the three rights listed in the TCPA statute. *Id.* § 27.005(b). If the TCPA movant meets this burden, then the burden shifts to the nonmovant to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). To make a showing of a prima facie case, the nonmovant must provide "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *Lipsky*, 460 S.W.3d at 590 (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam)). "Prima facie proof is not subject to rebuttal, cross-examination, impeachment[,] or even disproof." *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993).

Dismissal of the legal action is required if the nonmovant fails to meet its burden or if the movant "establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." TEX. CIV. PRAC. & REM. CODE § 27.005(d). When determining whether to dismiss the legal action, the trial court considers "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a). "The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations" and "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the [TCPA], the defendant need show no more." *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

B. Standard of review

We review de novo the trial court's determination of whether the parties met or failed to meet their respective burdens of proof under the TCPA. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). Similarly, whether the TCPA applies to a particular claim is an issue of statutory interpretation that is reviewed de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). In making that determination, we must enforce the plain meaning of the TCPA text "'unless a different meaning is supplied by a statutory definition, is apparent from the context, or the plain meaning would lead to an absurd or nonsensical result.'" *Creative Oil*

& Gas, LLC v. Lona Hills Ranch, LLC, 591 S.W.3d 127, 133 (Tex. 2019) (quoting *Beeman v. Livingston*, 468 S.W.3d 534, 538 (Tex. 2015)).

C. Does the TCPA apply?

The TheraSource Parties assert they met their initial burden as TCPA movants to show by a preponderance of the evidence that Houston OT's claims are based on, related to, or in response to their exercise of the right of association and the right of free speech. Each of those protected rights requires a "communication," which "includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(1)–(3); *see also Rouzier v. Biote Medical, LLC*, No. 05-19-00277-CV, 2019 WL 6242305, at *3 (Tex. App.—Dallas Nov. 22, 2019, no pet.) (mem. op.) ("The protections of the TCPA are specifically directed at communications."). We thus evaluate the rights of association and free speech as bases for the TCPA's application in this case.

1. Exercise of the right of association

We first consider the right of association. Houston OT's pleading reveals that its claims rest on alleged oral and written statements between either (1) the TheraSource Parties themselves, (2) the TheraSource Parties and Houston OT, or (3) the TheraSource Parties and third parties, including Houston OT's referral sources and therapists and "third parties in a position to compete with Houston OT."

These alleged oral and written statements are "communications," as defined by the TCPA. TEX. CIV. PRAC. & REM. CODE § 27.001(1). Under the version of the TCPA applicable here, Houston OT's claims are based on, related to, or in response to the exercise of the right of association if these alleged communications are "between individuals who join together to collectively express, promote, pursue, or defend common interests." *Id.* § 27.001(2) (emphasis added).

In considering the statutory meaning of the word "common" in the phrase "common interests," this Court sitting en banc has concluded it means "of or relating to a community at large: public." *Gaskamp v. WSP USA, Inc.* 596 S.W.3d 457, 476 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd w.o.m.) (op. on reh'g en banc). There, a company alleged that its former employees had joined together to form a new business venture, misappropriated trade secrets, and conspired to commit related torts to enrich themselves. *Id.* at 462. The Court explained that because allegations involving misappropriation of trade secrets and conspiring to commit related torts "benefit[ ] only the . . . tortfeasors" and the company's pleadings did not allege any "public or community interest," the former employees did not satisfy their initial burden to show by a preponderance of the evidence that the company's suit was based on, related to, or was in response to their exercise of the right of association. *Id.* at 476.

The same is true here. Houston OT's claims are based on alleged breaches of promises made in connection with the TheraSource Parties first joining the Network and then competing with Houston OT in staffing occupational therapy services after leaving the Network. More specifically, Houston OT alleged the following communications and conduct as a basis for its claims that the TheraSource Parties misappropriated its trade secrets and conspired to commit the related torts of fraud, tortious interference, and business disparagement:

- Houston OT gave the TheraSource Parties allegedly confidential and proprietary information pursuant to either a promise or agreement or both that the TheraSource Parties would not use that information to compete with Houston OT;

- The TheraSource Parties breached their promise or agreement and used the alleged confidential and proprietary information to compete with Houston OT; and

- The TheraSource Parties interfered with and made disparaging statements about Houston OT to client referral sources and therapists in order to acquire referrals that might otherwise have gone to Houston OT.

As pleaded by Houston OT, the TheraSource Parties' communications and conduct upon which its claims are based benefitted only the TheraSource Parties in their development of a competing business enterprise. No "public or community interest" is alleged.

Accordingly, we hold that the TheraSource Parties did not meet their burden of showing, by a preponderance of the evidence, that Houston OT's claims are based

on, related to, or in response to an exercise of their right of association. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b)(3); *see also Gaskamp*, 596 S.W.3d at 476; *Griffith Techs., Inc. v. Packers Plus Energy Servs., (USA), Inc.*, No. 01-18-00674-CV, 2020 WL 4354713, at *5 (Tex. App.—Houston [1st Dist.] July 30, 2020, no pet.) (mem. op.) (holding counterclaims were not related to exercise of right of association because they were based on alleged tortfeasors' joint conduct in developing and promoting a competing business enterprise); *Rouzier*, 2019 WL 6242305, at *3 (holding right of association did not apply to defendants' alleged actions in soliciting physicians to break their licensing and management contracts with company and in using company's confidential and proprietary trade secret information to unfairly compete).

2. Exercise of the right of free speech

We next consider the right of free speech. Under the version of the TCPA applicable here, Houston OT's claims are based on, related to, or in response to the exercise of the right of association if these alleged communications were "made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). The statutory definition of a "matter of public concern" includes, among other things, an issue related to "health or safety" or "a good, product, or service in the marketplace." *Id.* § 27.001(7)(A), (E).

The TheraSource Parties assert that all of their alleged communications are protected speech under the TCPA because they relate to the provision of home-health therapy services, which are both (1) "a good, product, or service in the marketplace" and (2) involve "health or safety," and thus are a "matter of public concern." *Id.* § 27.001(3), (7). In support of this assertion, the TheraSource Parties point to the allegations that they misappropriated Houston OT's proprietary information in order to profit by competing with Houston OT in the marketplace for home-health therapy services. In addition, they argue that because they are in the business of providing staffing for home-health therapy services, they "must necessarily make communications dealing with matters of [patient] 'health or safety' . . . when dealing with customers and other third parties involved in their business." And their alleged disparaging remarks about Houston OT's business, which is also a business in the home-health therapy field, necessarily involved communications related to "health or safety" because the "primary means of disparaging [Houston OT's] business would be to criticize its provision of therapy services."

In considering whether the alleged communications were made in connection with a "matter of public concern," two cases are particularly instructive. First, the Texas Supreme Court's decision in *Creative Oil & Gas* significantly limited the scope of what qualifies as "a matter of public concern." 591 S.W.3d at 137 ("[N]ot every communication related somehow to one of the broad categories set out in

section 27.001(7) always regards a matter of public concern[.]"). The Court considered whether the oil-and-gas-lease lessee's counterclaims against a lessor, which were premised on the allegation that the lessor had "falsely told third-party purchasers of production from the lease that the lease was expired and that payments on the purchases should stop," qualified as "a matter of public concern." *Id.* at 130. Despite these allegations regarding communications to third-party purchasers, the Court found the record "devoid of allegations or evidence that the dispute had any relevance to the broader marketplace or otherwise could reasonably be characterized as involving public concerns." *Id.* at 136. The Court explained that such communications, "with a limited business audience concerning a private contract dispute, do not relate to a matter of public concern under the TCPA." *Id.* The Court further explained that while "private communications are sometimes covered by the TCPA," such particular situations involved "environmental, health, or safety concerns that had public relevance beyond the pecuniary interests of the private parties involved." *Id*.

Second, in accordance with *Creative Oil & Gas*, this Court held in *Gaskamp* that the former employees' communications soliciting and procuring the third party's business did not constitute an exercise of protected free-speech rights because the communications did not have any "relevance to a public audience of

buyers or sellers but instead were limited 'to the pecuniary interests of the private parties involved.'" *Id.* at 479 (quoting *Creative Oil & Gas*, 591 S.W.3d at 136).

Following these two cases, we conclude that most of the communications alleged by Houston OT were not made by the TheraSource Parties in connection with a matter of public concern because they were not relevant to a wider audience of potential buyers or sellers in the marketplace. Specifically, this conclusion concerns the alleged communications by the TheraSource Parties that are the basis for the misappropriation of trade secrets and fraud claims, i.e., the communications made in connection with acquiring Houston OT's allegedly confidential and proprietary information and in breaching an alleged agreement or promise not to use that information to compete with Houston OT. These communications are relevant only to the limited group comprising the TheraSource Parties themselves, Houston OT, potential third-party competitors, and the group of prospective clients whom Houston OT alleged the TheraSource Parties targeted for the purpose of diverting work from Houston OT.

Even though the allegedly confidential and proprietary information the TheraSource Parties misappropriated from Houston OT happened to pertain to the provision of home-health therapy services, that information consisted of Houston OT's internal business practices and client referral sources. The TheraSource Parties' conduct and statements in the course of accessing that information to contact

Houston OT's referral sources and therapists or to emulate Houston OT's procedures for the purpose of competing with Houston OT were not related to the competence of any home-health therapy provider or the quality of any home-health therapy service but were limited only to Houston OT's business relationships. *See Staff Care, Inc. v. Eskridge Enters., LLC*, No. 05-18-00732-CV, 2019 WL 2121116, at *4–5 (Tex. App.—Dallas May 15, 2019, no pet.) (mem. op.) (misappropriation of proprietary information is not related to matter of public concern simply because information being misappropriated belonged to company in healthcare industry); *I-10 Colony, Inc. v. Lee*, No. 01-14-000465-CV, 2015 WL 1869467, at *4–5 (Tex. App.—Houston [1st Dist.] Apr. 23, 2015, no pet.) (mem. op.) (lawyer's allegedly fraudulent statements about whether client would make payment were not about lawyer's services and, thus, not a matter of public concern).

The communications the TheraSource Parties made in the course of wrongfully obtaining or misusing Houston OT's confidential and proprietary information—which form the basis of the misappropriation of trade secrets and fraud claims—had no public relevance beyond the pecuniary interests of the parties involved. *See Creative Oil & Gas*, 591 S.W.3d at 136; *Gaskamp*, 596 S.W.3d at 478–79. And we therefore hold that as to the claims for misappropriation of trade secrets and fraud, the TheraSource Parties did not meet their burden of showing, by a preponderance of the evidence, that the claims are based on, related to, or in

response to an exercise of the right of free speech. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b)(3).

However, we reach a different conclusion as to the communications upon which the claims for tortious interference with prospective contractual relations and business disparagement rest. The record indicates that these claims are based on allegations that, among other things, the TheraSource Parties stated to HHAs, which are the source of the two company's referrals, that a Houston OT therapist had abandoned a patient and that Houston OT had a bad reputation. Thus, the complained-of statements that form the basis of these two claims are not limited to matters of purely private concern, but instead pertain to the competency or quality of Houston OT's staffing of home-health therapy services. *See id.* § 27.001(7); *Avila v. Larrea*, 394 S.W.3d 646, 655 (Tex. App.—Dallas 2012, pet. denied) (communication about lawyer's poor services to clients related to service in marketplace); *see also AOL, Inc. v. Malouf*, No. 05-13-01637-CV, 2015 WL 1535669, at *2 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (mem. op.) (article stating dentist had been charged with "defrauding state taxpayer of tens of millions of dollars in a Medicaid scam" related to provision of services in marketplace and constituted matter of public concern); *cf. Lahijani v. Melifera Partners, LLC*, No. 01-14-01025-CV, 2015 WL 6692197, at *4 (Tex. App.—Houston [1st Dist.] Nov. 3, 2015, no pet.) (mem. op.) (statements making "no mention of a service in the

marketplace" concerned business dispute and not matter of public concern). And we therefore hold that as to the tortious interference and business disparagement claims, the TheraSource Parties satisfied their burden of showing, by a preponderance of the evidence, that the claims are based on, related to, or in response to an exercise of their right of free speech. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b)(3).

D. Does the commercial-speech exemption apply?

Although we have concluded that its claims for tortious interference with prospective contractual relations and business disparagement are based on, related to, or are in response to the exercise of the right of free speech, Houston OT responds that these claims are nevertheless exempt from the TCPA's protections under the commercial-speech exemption. The commercial-speech exemption excludes from the TCPA summary dismissal provisions any "legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, . . . or a commercial transaction in which the intended audience is an actual or potential buyer or customer." *Id.* § 27.010(b); *see Lesley-McNiel v. CP Restoration Inc.*, 584 S.W.3d 579, 583–84 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (commercial-speech exemption applies equally to communications that constitute defendant's right to free speech, right to petition, and right of association).

The Texas Supreme Court has construed the commercial-speech exemption to apply when (1) the defendant was primarily engaged in the business of selling or leasing goods or services, (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant's capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct was the actual or potential customers of the defendant for the kind of goods or services the movant provides. *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018).

Houston OT, as the nonmovant, had to prove these elements by a preponderance of the evidence. *See Schimmel v. McGregor*, 438 S.W.3d 847, 857 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). In deciding whether Houston OT satisfied this burden, we consider the pleadings and any supporting affidavits, both of which are taken as evidence in the TCPA context, in the light most favorable to Houston OT. *See* TEX. CIV. PRAC. & REM. CODE § 27.006; *Hersh*, 526 S.W.3d at 467.

After reviewing the record in accordance with this standard,[6] we conclude Houston OT met its burden to show that the commercial-speech exemption applied

[6] In their argument opposing the commercial-speech exemption's application in this case, the TheraSource Parties renew their objections to Houston OT's evidence and urge this Court not to consider certain of the exhibits and affidavits. They

to its tortious interference and business disparagement claims. Beginning with the first element—whether the defendant was primarily engaged in the business of selling or leasing goods or services—it is undisputed that TheraSource is primarily engaged in the business of providing staffing for home-therapy services. Christine confirmed this in her affidavit stating that "the primary business of TheraSource . . . is to provide home health staffing services including physical therapy, occupational therapy, speech therapy, and social work services to patients referred by home health agencies."

Although there is no dispute that TheraSource is in the business of selling therapy staffing services, the TheraSource Parties assert that the first element of the commercial-speech exemption is negated at least as to the Lins individually because they are "agents and representatives" of TheraSource and "do not engage in any business activities for themselves." This argument fails. More than one court has affirmatively answered a similar question of whether the exemption can apply when the defendant is an employee of a company primarily engaged in the business of

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acknowledge, however, that the trial court did not rule on their objections, meaning this Court would be doing so in the first instance. This, we will not do. To preserve any complaints about Houston OT's evidence, the TheraSource Parties were required to obtain the trial court's ruling. TEX. R. APP. P. 33.1(a); *see Robins v. Clickenbeard*, No. 01-19-00059-CV, 2020 WL 237943, at *10 (Tex. App.—Houston [1st Dist.] Jan. 16, 2020, no pet) (mem. op.) (appellant's objection regarding lack of expert witness testimony in TCPA case was waived because record did not show trial court ruled on objection). Because the trial court did not rule on the TheraSource Parties' objections, the objections are not preserved for appellate review. TEX. R. APP. P. 33.1(a).

selling goods and services. *See, e.g.*, *Hieber v. Percheron Holdings, LLC*, 591 S.W.3d 208, 212 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (exemption applied to employee of selling entity); *Rose v. Sci. Machine & Welding, Inc.*, No. 03-18-00721-CV, 2019 WL 2588512, at *5 (Tex. App.—Austin June 25, 2019, no pet.) (mem. op.) (exemption applied because company's operations manager "tasked with managing commercial sales, servicing accounts[,] . . . and creating manufacturing drawings, was similarly and necessarily 'primarily engaged' in the same 'business' as [company]"). As one of these courts—our sister court in Houston—noted, this rule "stems from the plain text of the statutory exemption, which requires us to consider whether the [defendant] is 'engaged in the business' of selling goods or services, not whether the [defendant] is the actual business itself." *Hieber*, 591 S.W.3d at 212 (considering TEX. CIV. PRAC. & REM. CODE § 27.010(b)).

The same answer is required here, as it is reasonable to conclude that the owners of a company that primarily engages in the business of staffing home-therapy service appointments also is "primarily engaged" in that type of business. *Cf. Rose*, 2019 WL 2588512, at *5 ("It is reasonable to conclude that a high-level executive of a company that primarily designs and sells manufactured items to customers is also 'primarily engaged' in that type of business."). Again, Christine's affidavit informs our analysis. In it, she acknowledges that Tyson "is a licensed physical

therapist." And the evidence submitted by Houston OT supports that Christine had an active role in soliciting TheraSource's business.

For the second element, Houston OT was required to show that its tortious interference and business disparagement claims were based on statements made by the TheraSource Parties as sellers of home-health therapy services. *Castleman*, 546 S.W.3d at 688; *see Rose*, 2019 WL 2588512, at *5 (second element of commercial-speech exemption involves consideration of context of statement). Houston OT did this through its pleadings and evidence that the TheraSource Parties made disparaging representations of facts about Houston OT's services, including statements to HHAs that a Houston OT therapist had abandoned a client and that Houston OT had a bad reputation, for the purpose of attempting to induce the HHAs to move their referrals from Houston OT to TheraSource.

We similarly conclude that Houston OT's pleadings and evidence establish the closely related third element, which is that the statements at issue arose out of a commercial transaction involving the kind of services that the TheraSource Parties provide. *Castleman*, 546 S.W.3d at 688. A "commercial transaction" need not be consummated and can include conduct or statements that merely "propose[ ] a commercial transaction." *See Castleman*, 546 S.W.3d at 690; *Toth v. Sears Home Improvement Prods., Inc.*, 557 S.W.3d 142, 154 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("*Castleman* aligns with the approach taken by other Texas courts that

have held the challenged statement or conduct must be made for the purpose of securing sales in the goods or services of the person making the statement.") (internal quotation and citation omitted)); *see also Epperson v. Mueller*, No. 01-15-00231-CV, 2016 WL 4253978, at *10–11 (Tex. App.—Houston [1st Dist.] Aug. 11, 2016, no pet.) (mem. op.) (determining that online comments made by defendant-seller of collectible memorabilia about authenticity of competitor's goods were made in course of promoting defendant's authenticity services even though he did not overtly solicit sales of goods or services).

Houston OT alleges that the TheraSource Parties sought to profit by diverting work from Houston OT via the complained-of statements about the abandonment of a patient by a Houston OT therapist and Houston OT's bad reputation. And viewed in the light most favorable to Houston OT, the affidavit from Houston OT therapist Scott indicates that the allegedly abandoned patient was referred to TheraSource for additional therapy services, despite the patient's desire to continue working with Scott. The allegations in Houston OT's pleading and the evidence are sufficient to meet the requirement that the challenged statements "arose out of" a commercial transaction involving the kinds of goods and services they provide. *See Castleman*, 546 S.W.3d at 688–91.

Finally, the pleadings and evidence show that the TheraSource Parties' intended audience was composed of actual or potential customers. The

complained-of statements were made to HHAs. Although the TheraSource Parties assert in their appellate briefing that the HHAs were "referral sources" and not customers, Christine's own affidavit belies that assertion. She described the HHAs as TheraSource's "primary clients."

Accordingly, each of the four elements of the commercial-speech exemption is established by the pleadings and evidence. We therefore hold that Houston OT's tortious interference and business disparagement claims against the TheraSource Parties are exempt from dismissal under the TCPA. TEX. CIV. PRAC. & REM. CODE § 27.010(b); *Castleman*, 546 S.W.3d at 688–91.

Conclusion

In conclusion, because (1) the communications at issue in Houston OT's misappropriation of trade secrets and fraud claims are not based on, related to, or in response to the TheraSource Parties' exercise of their right of association or right of free speech and (2) the communications at issue in the tortious interference with prospective relations and business disparagement claims are exempted from the TCPA as commercial speech, the trial court did not err in denying the TheraSource Parties' motion to dismiss. Because this conclusion fully supports the trial court's

ruling, we need not consider the parties' remaining arguments.[7] *See* TEX. R. APP. P. 47.1. We affirm the trial court's order denying the motion to dismiss.

Amparo Guerra
Justice

Panel consists of Justices Countiss, Rivas-Molloy, and Guerra.

[7] The arguments we do not reach are the TheraSource Parties' arguments that (1) Houston OT did not establish a prima facie case of the essential elements of its claims, (2) the TheraSource Parties established valid defenses, and (3) the trial court should have awarded the TheraSource Parties their attorney's fees upon the dismissal of Houston OT's claims.