

D-1-GN-22-002727

CAUSE NO. _____

**ALEXANDER JESSE MCDUFFIE and
JOSEPH MUSSO,**

Plaintiffs,

v.

**TEXAS MONTHLY LLC, PENGUIN
RANDOM HOUSE LLC, BRYAN
BURROUGH, CHRIS TOMLINSON and
JASON STANFORD**

Defendants.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 53RD, DISTRICT COURT
§
§ ____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION AND REQUEST FOR DISCLOSURE

COME NOW Plaintiffs Alexander McDuffie and Joseph Musso, by and through their undersigned attorney, and bring this action for defamation against Defendants Texas Monthly LLC, Penguin Random House LLC, Bryan Burrough, Chris Tomlinson, and Jason Stanford. Plaintiffs allege as follows:

INTRODUCTION

The Plaintiffs in this case made one mistake: they trusted a reporter who came to them asking about a subject on which they have a good deal of passion and expertise: authenticating artifacts that might have a connection to the Texas Revolution and the Battle of the Alamo. Although that reporter promised that he would quit the project before he would allow his co-authors to say anything negative about the Plaintiffs or their work, the book that was ultimately published, *Forget the Alamo: The Rise and Fall of an American Myth* (the "Book") contained false statements, mischaracterizations, and significant omissions. It strongly implied that Plaintiffs were careless about their work and perhaps even fraudulent. Worst of all, it implied that the Plaintiffs

had faked inscriptions and inflated the price of three significant artifacts that were sold to collector Phil Collins: a knife with the initials J.B. which might have belonged to Jim Bowie, a sword with the inscription “J. Bowie” that likewise might have belonged to Bowie, and a possible bag with the initials “E.S.” which might have belonged to Erastus “Deaf” Smith, and which contained a knife with the initials WBT that might have belonged to William Barrett Travis. Now, a year later, both Plaintiffs find that their reputation as honest appraisers and dealers of antiquities has been damaged. In a business in which reputation is everything, Plaintiffs have experienced a dramatic loss of career opportunities and sales from which they may never recover. In this case, Plaintiffs are seeking compensation for the loss of their businesses, as well as damage to their reputations and significant emotional distress.

THE PARTIES

1. Plaintiff Alexander McDuffie (“McDuffie”) is a successful antiquities appraiser and dealer who resides in Austin, Texas. He is one of the founders of the Authentication and Preservation Group and was the Founding Curator and Historian for “The Battle for Texas – The Experience.” He is the owner of Alex McDuffie Antiques and lives in Austin, Texas.

2. Plaintiff Joseph Musso (“Musso”) is a biographer, historian and artist and one of the leading experts on the life of James Bowie. Musso is acclaimed for having discovered the site of James Bowie’s birth, for which he was granted the honorary title of Colonel by the State of Kentucky. Musso also restored the famous George Peter Alexander Healy portrait of James Bowie for the Bowie family, which was purchased by the State of Texas in 2001. He was awarded a Lifetime Achievement Award by the Art Directors’ Guild in 2017 for his extensive film work. He resides in Sylmar, California.

3. Defendant Texas Monthly LLC (“Texas Monthly”) is Texas limited liability company. Its principal place of business is in Austin, Texas, and its registered agent for service of process is CT Corporation System, located at 1999 Bryan Street Ste. 900, Dallas, Texas 75201-3140.

4. Defendant Penguin Random House LLC (“PRH”) is a foreign limited liability company with its principal place of business in New York, New York. Its registered agent for service of process is Corporation Service Company dba CSC – Lawyers Incorporating Service Co., located at 211 E. 7th St., Ste. 620, Austin, TX 78701-3218.

5. Defendant Bryan Burrough is a correspondent for *Vanity Fair* and the author of six books. He is a resident of Texas and New Jersey and can be served with process at 2101 Kenwood Ave, Austin, TX, 78704.

6. Defendant Chris Tomlinson is a columnist for the *Houston Chronicle* and *San Antonio Express News* and the author of two New York Times Bestsellers. He can be served at 1605 Newning Ave, Austin, Texas, 78704.

7. Defendant Jason Stanford is the Chief of Communications and Communications for the Austin Independent School District. He is also the founder of Stanford Caskey, a political research and crisis firm. He can be served at 9304 San Lucas Rd., Austin, Texas 78737.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this court under Article V, Section 8 of the Texas Constitution, because it is a civil matter in which the amount in controversy is over \$500. The Court has personal jurisdiction over Texas Monthly and the individual defendants because they reside or have their

principal place of business in Travis County, Texas, and over PRH because it does business in this state.

9. Venue is proper under Tex. Civ. Prac. & Rem. Code §15.002 because one plaintiff and three of the individual defendants live in Travis County, Texas, and one of the corporate defendants has its principal place of business in Travis County.

FACTUAL ALLEGATIONS

10. The Battle of the Alamo was a turning point in the Texas Revolution and an important part of the state's founding myth. From February 23 to March 6, 1836, a heroic band of between 100-200 Texians at the Alamo Mission held off the Mexican army under the command of President General Antonio Lopez de Santa Anna. Almost all of the Texians were killed in the attack, but their resistance enabled General Sam Houston to regroup and attack the Mexican troops at the Battle of San Jacinto. Although the Texian troops were still vastly outnumbered, Texian soldiers were so inspired by the sacrifice of the Texians at the Alamo that they won the Battle of San Jacinto in just 18 minutes. Their battle cry was "Remember the Alamo!" – or so the story goes.

11. Since then, the story of the Alamo has lived on in popular culture. Fighters Davy Crockett, Jim Bowie and William B. Travis became folk heroes. Walt Disney developed a 1955 television series *Davy Crockett: King of the Wild Frontier*. John Wayne starred as Davy Crockett in the 1960 film *The Alamo*. Marty Robbins recorded a version of the song "The Ballad of the Alamo" in 1960. The church of the Alamo mission remains standing in San Antonio as a shrine to the fallen heroes, and is one of the state's most visited tourist attractions.

12. In the last years of the 2010's, authors Bryan Burroughs, Chris Tomlinson and Jason Stanford decided to write a popular book that would go beyond what they called the "Heroic Anglo Narrative" and bring the history of the Alamo into the 21st century. The book would address not only the historical context behind the battle of the Alamo, but also the mythmaking that rendered the Alamo so powerful. One of their chapters set out to address a proposed redevelopment of the Alamo site which would make the Alamo more attractive to tourists. Plans included a visitor center which would house a collection of artifacts assembled by musician Phil Collins, who had become an avid collector of Alamo memorabilia and even financed a dig for historical artifacts under a building around the corner from the Alamo. A private company, Base Entertainment, also planned a new museum, "The Battle For Texas: The Experience" for the site. Research for that chapter was shouldered by Chris Tomlinson.

13. Around Memorial Day 2020, Tomlinson contacted McDuffie and asked if he could speak with him about the Alamo site redevelopment, the Battle for Texas museum, and the trade in artifacts, documents and memorabilia. McDuffie warmed at the opportunity to talk to a reporter about his favorite subject: the authentication of Alamo artifacts and their display at a reimagined Alamo site. In the following months McDuffie and Tomlinson spoke and corresponded about how antiquities were authenticated and about specific artifacts that McDuffie was familiar with. McDuffie gave Tomlinson several documents and reports to supplement his research. At the time McDuffie believed he and Tomlinson had a friendly and productive working relationship. Tomlinson even promised McDuffie that if his co-authors said anything negative about McDuffie, Tomlinson would quit the project.

14. As the publication date for the book drew closer, McDuffie was informed that *Texas Monthly* planned to publish the chapter of the book that concerned the Alamo redevelopment as a

stand-alone article (the “Article”). McDuffie coordinated with the article’s fact checkers and even opened his home for a photo shoot.

15. When the first excerpt from the book was published on the *Texas Monthly* website on May 21, 2021, McDuffie’s illusions about the reporters’ intentions disappeared. The article was littered with false statements, half-truths, and negative implications about McDuffie and his colleague Joe Musso – many of them errors that McDuffie had addressed with Tomlinson during the interview process and given him the information he needed to correct. Devastated by what he considered a betrayal and an attack on his reputation, McDuffie contacted *Texas Monthly* editor Dan Goodgame about the many misrepresentations and misquotes in the article and asked for correction, clarification or retraction. McDuffie’s despair on May 23, 2021, when he learned that the piece would be the cover article for the magazine’s June issue, with a canon on the magazine’s cover and the title “Come and Fake It.” The title emphasized the worst of the bad implications stemming from the Article: that the artifacts that McDuffie and Musso helped assemble for the museum were not authentic Alamo artifacts, and that McDuffie and Musso had fraudulently authenticated and sold them to Phil Collins for his collection. Musso and McDuffie continued to correspond with Goodgame, pressing their case that the article misrepresented and defamed them.

16. On June 8, 2021, Goodgame wrote McDuffie to inform him that the magazine had assembled a list of corrections and planned to publish them. McDuffie looked at the list and informed Goodgame that the corrections he proposed did not even come close to erasing the impressions the article had created, nor did they correct all of the factual errors. McDuffie and Musso continued to ask for a correction, clarification or retraction of those falsehoods and false implications through July and August, until finally, on August 10, 2021, Goodgame informed them that the magazine had done all that it intended to do.

17. By coincidence, June 8, 2021 was also the date that defendant PRH published the book from which the article was taken, *Forget the Alamo: The Rise and Fall of An American Myth*. This time McDuffie and Musso were ready, and sent a rebuttal to PRH which detailed, in 36 dense, historically researched pages, the false statements and misleading implications in the book. McDuffie and Musso asked for the book to be withdrawn or else categorized as fiction. PRH never published any correction or clarification, and, far from withdrawing the book, gave the book privileged promotion, leading to reviews in major newspapers and magazines. A paperback edition was issued the day before this lawsuit was filed, on June 7, 2022.

DAMAGES

18. The business of authenticating antiques requires the authenticator to have a good reputation. Often establishing the provenance of an article involves a knowledge of historical manufacturing techniques and modern scientific technologies for ascertaining the approximate age of materials – as well as a detailed and exacting grasp of the historical period in question and the biographies of its major figures. Few clients can follow the authenticator’s journey through birth and death records, land deeds, sales and manufacturing diagrams, metallurgical reports, ballistics, and all the other sciences that go into discovering what has befallen a likely-looking object in the last century of its existence. At some point, most clients just need to take the authenticator’s word for it.

19. Before the article came out, McDuffie had built a thriving business in antiquities under the name Alex McDuffie Antiques. The business averaged around \$150,000 in annual sales. By contrast, in the year after the book and its excerpts came out, McDuffie’s sales dropped to \$9800,

and he was forced to drop his prices to the extent that he was making no profit on the sales he was able to close.

20. McDuffie also earned money at various jobs related to his skills as an authenticator. His dream job was his position as Founding Historian and Curator of the Battle for Texas museum. His first year salary at Battle for Texas was \$150,000. Now the Battle for Texas museum has closed and plans for the Alamo site redevelopment have gone back to the drawing board. McDuffie has not only lost his dream job, but he is concerned that because of the damage to his reputation, he will have a difficult time getting another job that uses his expertise. He seeks compensation for

21. Finally, the false statements and misrepresentations in the article have caused McDuffie many sleepless nights and much emotional distress.

22. Meanwhile, Musso is an honored member of both the historical community and the film community. He received a Lifetime Award from the Art Directors Association in 2017 for his work on iconic films such as *The Towering Inferno* and *Star Trek: First Contact*. The State of Kentucky granted the honorary title of Coronel for his work in locating James Bowie's birthplace. Since he is not a dealer, Musso has not traced any pecuniary losses to the false and misleading statements about him in the Book and the Article. However, those false statements and misrepresentations have damaged his standing in the film and historical communities, and he has been forced to defend himself before his peers through lengthy and detailed rebuttals of the article's false statements and false implications. He has also suffered emotional distress from those false statements and misrepresentations.

23. To the extent that defendants acted maliciously, McDuffie and Musso also claim the right to exemplary damages.

COUNT 1: DEFAMATION

24. Plaintiffs re-allege each of the allegations in Paragraphs 1-24 as if fully set forth verbatim herein.

25. The false statements and false implications in the Book and the Article defamed plaintiffs McDuffie and Musso in violation of Texas Civil Practice and Remedies Code Chapter 73. Specifically:

This Suit Was Timely Filed

26. Texas Civil Practice and Remedies Code §16.002 provides that a person must bring a suit for libel or slander not less than a year after the cause of action accrues. A defamatory statement is considered to be "published" when a final version is available to the public. *Holloway v. Butler*, 662 S.W. 2d 688 (Tex.App. -- Houston 1983, write ref'd n.r.e). And when the publication is online, the statute of limitations begins to run from the date the article is first posted and made available to the public on the internet. *Hamad v. Center for the Study of Popular Culture*, No. A-06-CA-285-SS (W.D. Tex. June 26, 2006). Thus the statute of limitations began to run when the Article was first published online on May 21, 2021. Texas follows the "single publication" rule, so all claims for defamation are deemed to have accrued at that time. *Holloway*, 662 S.W. 2d at 692.

27. However, the Defamation Mitigation Act, Tex. Civ. Prac. & Rem. Code Chapter 73, provides that the period of limitations for the commencement of suit is tolled while the plaintiff asks the potential defendant for correction, clarification or retraction of the defamatory matter, and while the potential plaintiff and defendant negotiate over what changes are necessary. Tex. Civ. Prac. & Rem Code §73.055(e). In this case, McDuffie and Musso asked *Texas Monthly* to correct their article the very day after that article was published. Negotiations continued until Dan Goodgame made it clear he would make no further changes on August 10, 2021. Thus the statute

of limitations was tolled from May 22, 2021 to August 10, 2021, extending the limitations date to at least August 9, 2022. This lawsuit is thus timely filed.

**Plaintiffs Requested Correction, Clarification and Retraction as Required by the
Defamation Mitigation Act**

28. Plaintiffs asked Texas Monthly to correct, clarify or retract its Article within 90 days of learning of the publication (indeed, within one day of learning of the publication), as required by Tex. Civ Prac. & Rem. Code §73.055. Texas Monthly never made a timely and sufficient retraction as required by Tex. Civ Prac. & Rem. Code §73.057. Therefore the Defamation Mitigation Act does not bar the Plaintiffs from seeking exemplary damages against Texas Monthly.

29. Plaintiffs asked PRH to correct, clarify or retract its Book within 90 days of learning of the publication (indeed, within one day of learning of the publication), as required by Tex. Civ Prac. & Rem. Code §73.055. Texas Monthly never made a timely and sufficient retraction as required by Tex. Civ Prac. & Rem. Code §73.057. Therefore the Defamation Mitigation Act does not bar the Plaintiffs from seeking exemplary damages against PRH.

Plaintiffs Have Met All the Requirements for a Prima Facie Case of Defamation

30. The elements of a prima facie case for defamation are: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and (4) damages, unless the statement constitutes defamation per se. *D Magazine Partners, L.P. v. Rosenthal*, ___ S.W.3d ___, ___ (Tex. 2017) (citing *Lipsky*, 460 S.W.3d at 593; *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998))

Both the Book and the Article Contained False Statements About the Plaintiffs

31. The Book and the Article both contain false statements about the Plaintiffs, including but not limited to:

32. “In the late nineties, McDuffie was running his own web-development business when a San Antonio dealer named Alfred Van Fossen hired him to build a website. Van Fossen, who died in 2006, was notorious for selling questionable items supposedly associated with the Alamo. McDuffie, still nurturing his boyhood fascination with the battle, quit his website business to work alongside him” (June 2021 Texas Monthly page 91, paragraph 5). In fact, McDuffie never worked *for* Van Fossen. (He was a freelance graphic designer who Van Fossen hired to do his website). McDuffie did not quit his job to work for Van Fossen, and in fact, never worked for Van Fossen.

33. The Article refers to Alfred Van Fossen as McDuffie’s “mentor.” In fact, Van Fossen was never a mentor. McDuffie designed his website as a freelance designer and was never paid for his work. In fact, Van Fossen ended their relationship by stealing a painting from McDuffie and selling it. The article paints a chummy relationship between the two that never existed.

34. The Article emphasizes that McDuffie makes his judgements on historical artifacts from the “gut” – e.g. “When I started listening to my own gut, that’s when I really started finding pieces that were just really great.” In fact, McDuffie was describing a process by which he began to have confidence in his own judgements. He never said that he “trusted his gut” to the exclusion of evidence, or that he found pieces based on his gut. He certainly never sold any pieces based solely on the evidence of his gut. Nonetheless the Book and Article continue to emphasize McDuffie’s acting on his “gut” – “his gut convinced him to buy it;” “his gut

convinced him that this was something special.” This is not only factually false (McDuffie considered the sword in question and bought it the next day), also leaves the false implication that McDuffie is careless and emotional and does not rely on evidence.

35. The Book and Article call McDuffie’s description of the knife belonging to Travis “fanciful,” when in fact there was photographic evidence of the inscription before, during and after cleaning and evidence in the papers of Secretary of War Rusk describing these articles as being in “Deaf” Smith’s possession. Worse, McDuffie actually gave the evidence of authentication to Tomlinson, who ignored it.

36. Texas courts also recognize “defamation by implication,” where a piece might imply a false statement about the Plaintiffs. *Dallas Morning News v. Tatum*, No. 16-0098 (Tex. App. Dallas 2018). The gist of both the Book and the Article is that McDuffie and Musso were at least careless, and at the most fraudulent, in authenticating artifacts relating to the Alamo. Indeed, the strong implication of the headline “Come and Fake It” is that McDuffie, Musso and others mentioned in the article were trading false articles. In fact the hard evidence that McDuffie and Musso provided to the authors, Texas Monthly and PRH shows that Plaintiffs were knowledgeable and careful and acted on physical and historical evidence rather than gut instinct.

The Statements and Implications in the Book and Article Were Defamatory Per Se

37. It is axiomatic that statements which impugn a plaintiff’s reputation for competence in his business are defamatory. Indeed, statements that charge dishonesty, fraud, rascality or general depravity, or falsehoods that injure one in his office, business, profession or occupation are considered defamatory *per se*. *Main v. Royall*, 348 S.W. 3d 318, 390 (Tex App. – Dallas 2001,

no pet.) Because those statements are so injurious, a person claiming defamation per se does not have to prove that they suffered damage to their reputation or any monetary loss. The statement speaks for itself – it is defamatory, and thus the plaintiffs are entitled to damages. *Bentley v. Bunton*, 94 S.W. 3d 561 (Tex. 2002).

The False Statements in the Book and Article Were Made Negligently

38. Both McDuffie and Musso are ordinary citizens. Neither is a public figure as that term is used in defamation law. Thus, all McDuffie and Musso are required to prove is that the Defendants were negligent in making the false statements and implications that defamed them.

39. The defendants' conduct is at the very least negligent, and in some cases rises to the level of actual malice. McDuffie provided Tomlinson with material which, if used, would have shown Tomlinson that the statements he was making and implications he was drawing were false. Tomlinson ignored this material in violation of the standards of ordinary care used in the journalistic profession. Likewise Tomlinson negligently misjudged material that was presented to him, such as the metallurgical report on the sword in question, in violations of the standard of care expected of a historian. Texas Monthly and PRH were also informed of the falsehoods in the article and the book, and likewise made no effort to correct, clarify or retract them.

McDuffie and Musso Suffered both Monetary Damages and Damages to their Reputation

40. As argued in paragraph 37, the defendants' statements constitute defamation *per se*, and therefore no damages can be presumed. Nonetheless, there is plenty of evidence that the defendants' conduct caused actual damage to plaintiffs' reputation and standing in their communities, and actually affected McDuffie's business income and earning potential. Both

plaintiffs suffered significant shame and emotional distress from defendants' defamation. And finally, to the extent defendants acted intentionally or maliciously, plaintiffs are entitled to exemplary damages.

This Lawsuit Is Not Based On Or In Response To Defendants' Exercise of their First Amendment Rights, and Therefore the Texas Citizens Participation Act, TCPA, Does Not Apply.

41. The political and historical claims made in the Book and the Article have generated a good deal of political controversy, including being criticized by Texas Governor Greg Abbott and Texas Lt. Governor Dan Patrick. It is important to note that this lawsuit does not reach the claims that have made the Book politically controversial, and therefore does not fall under the provisions of the Texas Citizens' Participation Act (TCPA), Texas Civ. Prac. & Rem. Code Chapter 27, or the Anti-SLAPP statute. The point that has made the Book and its related materials controversial is the authors' claim that the Texas Revolution arose from economic circumstances, especially a desire to preserve the institution of slavery, and the related claim that the defenders of the Alamo have achieved a mythic status that is not deserved. Nothing in this lawsuit involves or questions that claim. Indeed, the defendants would have been able to make those claims quite capably without demeaning plaintiffs' reputation for honesty and fair business practices. In fact, there are books that advance quite similar visions of history without mentioning Alamo artifacts, such as Annette Gordon Reed's *On Juneteenth* (2021). And defendants would have been quite capable of criticizing the mythology behind collectors' fascination with the Alamo without falsely implying that plaintiffs "faked" anything. The lawsuit therefore is not based on or in response to defendants' exercise of their first amendment rights, and the TCPA does not apply.

REQUEST FOR DISCLOSURE

42. Pursuant to Texas Rule of Civil Procedure 194, plaintiffs request that defendants disclose, within fifty (50) days of the service of this request, the information or material described in Rule 194.2.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that this Court enter judgment as follows:

1. For judgement in favor of McDuffie and Musso finding that defendants published false statements which damaged their reputations,
2. For damages for libel *per se*,
3. For damages to compensate McDuffie for financial losses that stem from defendants' attack on his reputation,
4. For damages to compensate McDuffie and Musso for emotional distress and other reputational damages resulting from defendants attack on their reputations,
5. For exemplary damages for any acts taken with malice, and
6. For all other relief as this court deems fair and equitable under these circumstances.

Respectfully submitted,

/s/ Melynda Nuss

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