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REPORTER'S RECORD

VOLUME 1 OF 1 VOLUME

CAUSE NO. 141-307474-19

VICTOR MIGNOGNA,	X	IN THE DISTRICT COURT
	X	
Plaintiff,	X	
	X	
VS.	X	141ST JUDICIAL DISTRICT
	X	
MONICA RIAL, RONALD	X	
TOYE and FUNIMATION	X	
PRODUCTIONS, LLC	X	
	X	
Defendants.	X	TARRANT COUNTY, TEXAS

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HEARING

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BE IT REMEMBERED that on the 8th day of November, 2019, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable John P. Chupp, judge presiding, held in Fort Worth, Tarrant County, Texas.

The proceedings were reported by machine shorthand.

#byebyebankruptcy

#brokeeverafter

Tina Fett, CSR
Official Court Reporter 141st District Court

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P R O C E E D I N G S

(Friday, November 8, 2019, 1:30 p.m.)

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THE COURT: All right. Who's on the phone?

MR. VOLNEY: Your Honor, yes, John Volney for Funimation along with Christian Orozco and Scott Smoot, who is our paralegal, who asked to listen in today.

THE COURT: Okay.

MR. JOHNSON: And also, Your Honor, this is Sam Johnson for defendant, Jamie Marchi.

THE COURT: Okay. Well, everybody is here, I think.

And who wants to do the deposition?

MR. MARTIN: Good afternoon, Your Honor, Brant Martin with Wick, Phillips, Gould & Martin.

Just as a housekeeping matter, Mr. Lemoine was going to argue the motion to quash and the motion to compel. It was he that noticed up the deposition.

I'm here because they filed a motion for sanctions against one of my lawyers, and so I was going to conduct that piece of it, if it's -- you

1 know, with the Court's permission, we would like to
2 split it up that way.

3 THE COURT: That's fine.

4 MR. MARTIN: Okay. So I'll let
5 Mr. Lemoine answer the questions about the deposition.

6 THE COURT: Okay. So you want to
7 depose Slatosch.

8 MR. LEMOINE: Slatosch, yes, sir.

9 THE COURT: And you sent him a
10 deposition notice out in the Odessa Midland area, and
11 he is not represented by counsel, I assume?

12 MR. LEMOINE: He has counsel. I think
13 his name is Brian McKay. I've been in touch with him,
14 but he is waiting to see what this Court does.

15 THE COURT: Okay. But he hasn't filed
16 a motion to quash, y'all have, right?

17 MR. MARTINEZ: That's correct, Your
18 Honor.

19 THE COURT: They did bring up the fact
20 that you did not ask for leave of court to conduct
21 discovery, I think.

22 MR. LEMOINE: That's correct, Judge.

23 THE COURT: So do you think you need
24 to?

25 MR. LEMOINE: No, Your Honor.

1 THE COURT: What rule do you get to
2 follow?

3 MR. LEMOINE: So I'm following this
4 Court's order and TCPA 27.003(c), which says if you
5 have -- I don't know if you have our reply brief.

6 THE COURT: Yes, I have it

7 MR. LEMOINE: If you look at the second
8 page, it puts your order side by side with the rule --
9 or with the statute. The statute doesn't say final
10 judgment. The statute says ruling, until the Court
11 has ruled on the motion to dismiss.

12 You entered an order that said that you
13 have ruled on the motion to dismiss. That means the
14 suspension goes away.

15 Now, typically what you would have in a
16 normal case is if you have denied the motion, there
17 would be an appeal, and that would freeze all of the
18 discovery. But if you have bifurcated and you granted
19 some and -- if you dismissed some and kept some,
20 obviously, the suspension would go away.

21 So the plain language of the rule
22 doesn't say final judgment.

23 THE COURT: You don't think the
24 attorney's fees and sanctions are part of the ruling,
25 so I'm done ruling.

#sweatingtheappeal

#spinnin4ever

1 MR. LEMOINE: No. You have ruled on
2 the motion to dismiss.

3 THE COURT: But I haven't ruled on the
4 entire motion to dismiss, because the sanctions are
5 part of it, right?

6 MR. LEMOINE: Well, the sanctions under
7 the code is 29 -- it's Section 29, that's correct.

8 THE COURT: So I haven't completely
9 ruled on the motion to dismiss, because it's not
10 final.

11 MR. LEMOINE: I agree with that, Judge.

12 THE COURT: So I don't think that you
13 get to just start doing -- can they start doing a
14 bunch of discovery now, too?

15 MR. LEMOINE: Well, they could, but
16 what would they serve discovery for? Their claims are
17 all dismissed.

18 THE COURT: I think you probably need
19 to have the complete ruling before --

20 MR. LEMOINE: And, Judge, as a --
21 obviously, I do not believe that based on my research
22 of the case law, but --

23 THE COURT: Do you have a case that
24 actually says that during the pendency of the
25 sanctions hearing that you can serve discovery?

#tweetinginprivate

#blockchainlawyer

1 MR. LEMOINE: No. No, the Court --

2 THE COURT: Hold on. Hold on. You
3 said you did a review of case law.

4 MR. LEMOINE: That's right.

5 THE COURT: Okay. But you didn't find
6 anything in your review?

7 MR. LEMOINE: There's only one case,
8 and it didn't reach the issue.

9 THE COURT: Okay.

10 MR. LEMOINE: And, Judge, but to
11 backstop it, to make sure that we don't waste our
12 time, we ask as alternative relief permission to take
13 the discovery.

14 THE COURT: Okay. And I'll take that
15 into consideration, then, because I can do it on my
16 own if I want to, it says here. On the Court's own
17 motion, so I can do it anyway, so --

18 Okay. So why do you need this guy?

19 MR. LEMOINE: Mr. Slatosch is one of
20 three people that submitted affidavits on behalf of
21 the plaintiff. There is conflict between what he said
22 in his affidavit and what my client said.

23 We also think that he was pressured
24 into signing this affidavit, and it's what is absent
25 from his affidavit that I think is most important for

#desperatetobeclever

#dreamingoflemons

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1 the Court's determination for sanctions.

2 Mr. Slatosch's affidavit says his
3 company breached the contract with Mr. Mignogna, and
4 that was the entirety of their argument to try and get
5 around the TCPA.

6 The reason why we didn't ask the Court
7 to continue the hearing to go take Mr. Slatosch's
8 deposition at the time, was just -- and it doesn't get
9 them there for the purpose of the Court of Appeals.

10 But the fact that he did not say that
11 Ms. Rial and Mr. Toye said something to me, did
12 something to me, I breached the contract. We think
13 that is because he told the plaintiff that he didn't
14 terminate the contract based on something that they
15 did or said.

16 And so we want to take his deposition,
17 and I think it's a fairly short deposition, maybe two
18 hours, to find out in part why he breached the
19 contract and in part to find out how this affidavit
20 that he allegedly signed in Ector County, but was
21 notarized in Smith County came into being.

22 THE COURT: Okay. But I don't think I
23 can sanction somebody for filing after the petition,
24 necessarily. I mean, my sanction is to try to prevent
25 people from filing these type of lawsuits, not

#dammitshane

#notkiwifarmsagain!

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1 necessarily their response to the motion, right?

2 And so it seems to me that the evidence
3 that you're trying to seek from this guy, I have
4 already ruled on it, in that I dismissed the case.

5 MR. LEMOINE: I would disagree, Judge,
6 in that there's only a couple of cases that address
7 what the Court should look at in TCPA sanctions, as
8 the Court points out, it's a deterrence argument.

9 THE COURT: Deterrence of filing a
10 lawsuit.

11 MR. LEMOINE: That's correct.

12 THE COURT: Right.

13 MR. LEMOINE: But one of the things
14 that goes into that analysis because the one court,
15 it's the Landry case out of the Houston Court of
16 Appeals, said because deterrence is a component of the
17 TCPA, we look at Chapter 10 and we look to Rule 13.

18 What did they look at? What does the
19 Supreme Court tell us to look at? One of the elements
20 is frivolousness, the other one is vindictiveness of
21 the complaint.

22 So I think under those two arguments,
23 we get to go take his deposition, because if he comes
24 back and says there was an affidavit that had me
25 blaming Ms. Rial and Mr. Toye, and I said, I won't

1 sign that, and then you have this very odd plaintiff,
2 I breached the contract admission, it's a liability,
3 you know, just kind of where you would say I breached
4 because of what they did. I think we should be able
5 to depose him and find out the information around
6 that.

7 THE COURT: But why should -- you
8 should have deposed him before the hearing, then.

9 MR. LEMOINE: Judge -- well, I would
10 disagree, and here's the reason why.

11 THE COURT: Well, you filed the motion.
12 I mean, you said that they didn't have a case, so you
13 filed the motion, you thought you had enough to get
14 there, and you did.

15 I mean, I ruled your way, and now you
16 want more evidence to show that you should have won.

17 MR. LEMOINE: No, Judge. I want
18 evidence to show that they knew it was frivolous when
19 they filed it, which is different.

20 THE COURT: I don't think they knew --
21 I don't know that they necessarily did, but I mean, I
22 think they got caught when they got here, and if what
23 you are saying is true, they tried to fix it, but I --

24 MR. LEMOINE: But Judge --

25 THE COURT: But you're going to ask him

#sometimesilayawakeinmycardboardboxatnightandithinktomyself #whydontpeoplelikeme?

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1 questions, then, prior to filing the lawsuit, not
2 after the filing of the lawsuit?

3 MR. LEMOINE: The --

4 THE COURT: Because that's the evidence
5 that's relevant is at the time of the lawsuit, was it
6 frivolous.

7 MR. LEMOINE: I'm not sure that I
8 believe that, but I don't know what communications he
9 had with them. I do know that text messages between
10 Mr. Slatosch and Mr. Toye found themselves into the
11 public media arena before the lawsuit, I believe,
12 before the lawsuit was filed, which means -- and I
13 believe that either Mr. Beard or somebody with
14 Mr. Mignogna's legal team had already talked to
15 Mr. Slatosh.

16 In fact, I believe that there is a
17 nondisclosure agreement between Mr. Mignogna and
18 Mr. Slatosch that was designed to prevent him from
19 talking to people.

20 And so to that extent, if the Court is
21 focused on the temporal, kind of what did they know
22 before they filed the lawsuit. My guess is they knew,
23 and they had already had this conversation with
24 Mr. Slatosch.

25 The fact that the affidavit was signed

#everybodylikesnickandhesnotevenfunnyhesjustadrunklawyer #imafunnylawyertho

1 after the lawsuit was filed, I can ask him that. Who
2 did you talk to? What did you tell them? What did
3 they ask of you? I mean, Mr. Slatosch's affidavit
4 even says I was pressured into letting Mr. Mignogna
5 come back under threat of a lawsuit.

6 THE COURT: I mean, it seems like you
7 are not real confident of what the appellate court is
8 going to do.

9 MR. LEMOINE: I actually -- I am
10 confident of what the appellate court is going to do
11 regarding the dismissal.

12 THE COURT: Yes.

13 MR. LEMOINE: What I am not confident
14 on is the sanction, because the Texas Supreme Court
15 has not ruled on what elements you're supposed to look
16 at, and neither has the Fort Worth Court of Appeals.

17 THE COURT: You've already filed your
18 attorney's fees motion, right?

19 MR. LEMOINE: That's correct.

20 THE COURT: I didn't look at it, but
21 how much are you asking for?

22 MR. LEMOINE: I believe we are asking
23 for \$259,000.

24 THE COURT: And you want sanctions on
25 top of that?

#icrackalottagreatjokesonmypodcastandonmytwitterallthetime #butnobodyvotedforme

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1 MR. LEMOINE: Yes.

2 THE COURT: Okay. I mean, that seems
3 like a lot of money.

4 MR. LEMOINE: It is.

5 THE COURT: I mean, that seems like
6 that might deter somebody.

7 MR. LEMOINE: Well, just paying my
8 client back is not much of a deterrence for an
9 individual who crowd-funded his own litigation fees
10 and didn't occur any economic pain to bring this
11 lawsuit.

12 THE COURT: Well, see, that may be more
13 relevant than what he and Slatosch did.

14 MR. LEMOINE: Well, it's certainly
15 relevant to the economic component, which was part of
16 the ability to pay the fees and things like that.

17 But I think from the standpoint of the
18 Court of Appeals looking and saying whatever sanction
19 you impose, there's no doubt they're going to
20 challenge it, the dollar amount.

21 If the Court of Appeals is going to do
22 the analysis, the very first thing under Chapter 10 is
23 whether or not the motion was frivolous. The fact
24 that we won doesn't automatically mean the motion was
25 frivolous -- or that their lawsuit was frivolous, it

#someonevotedforlegaleaglebutnotformeonMYelectionbidwtfwwhy #whycantibelikenick?

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1 means they didn't meet their evidentiary burdens.

2 I'm not asking for -- you know, three
3 people submitted affidavits from their side. I'm only
4 asking for this gentleman, because he was the -- he
5 was kind of the centerpiece of their argument.

6 And, Judge, their argument basically is
7 cost, right. If we get past the -- should I ask for
8 leave, we're really talking about whether or not the
9 deposition is appropriate.

10 They have four attorneys here trying to
11 tell you that it is costly to allow this deposition,
12 and it shouldn't go forward. I think the fact that
13 four --

14 MR. MARTINEZ: Objection, Your Honor.

15 MR. LEMOINE: -- attorneys are here --

16 THE COURT: Hold on.

17 MR. MARTINEZ: The number of attorneys
18 here is irrelevant to his argument as it relates to
19 that.

20 THE COURT: Well, I mean, overruled. I
21 mean, I've already -- I'm not necessarily considering
22 that, so that's okay.

23 Keep going.

24 MR. LEMOINE: I think that that's one
25 of the pieces of evidence that you need to take a look

#illgetdrunktooifihavetoilleevenjokeaboutthesoniabandoned #ijustwanttobeloved

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1 at in terms of whether or not their lawsuit at the
2 inception was frivolous.

3 And it's irrelevant, and they don't --
4 they're all blocked in over what Mr. Slatosch is going
5 to say. They should welcome the deposition. They
6 shouldn't be opposed to it, and they shouldn't have
7 four attorneys here telling you that I ought to be
8 sanctioned, and we don't need to hear any of this
9 evidence, because it means nothing.

10 THE COURT: So you are, I guess, what
11 you are trying to tell me is that 27,009 with regards
12 to the damages and cost contemplates additional
13 discovery after a ruling. Because I guess there could
14 have been a situation where I did it all at once,
15 right?

16 MR. LEMOINE: That's correct, Your
17 Honor.

18 THE COURT: And then what would you
19 have done, we would have been stuck with what you had,
20 right? So how come you get to have additional
21 evidence after we have the hearing, but they don't?

22 MR. LEMOINE: So two answers. First, I
23 would have -- in order to be able to have any defense
24 at the Court of Appeals about attorney's fees or
25 sanctions, we have to have an evidentiary hearing.

1 THE COURT: Right.

2 MR. LEMOINE: So if I come to the
3 Court, and I let all the -- and I don't ask for
4 discovery to have the evidentiary hearing, I wouldn't
5 have an argument, which is why I'm here ahead of time,
6 so that I can say to the Court, I'd like to take this
7 guy's deposition.

8 THE COURT: If you could -- if Slatosch
9 was within the subpoena power of this Court, would you
10 actually have him at the hearing to testify at the
11 evidentiary hearing?

12 MR. LEMOINE: Yes.

13 THE COURT: And you are not able to
14 subpoena him because he's outside of the 150 miles to
15 come here?

16 MR. LEMOINE: That's correct.

17 THE COURT: And so you're trying to do
18 this deposition so that you can secure his testimony
19 for that hearing?

20 MR. LEMOINE: That's correct.

21 THE COURT: That's a better argument.

22 Okay. He wants to bring this guy down
23 here to testify, but he's outside of the subpoena
24 range, so why can't he depose him?

25 I don't know which one of y'all is

#ifikeepwatermarkingandhashtaggingthingspeoplewilllikeme #illbefamoussoon!

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1 doing this today, but why should he not be able to
2 bring that evidence in here at the hearing?

3 MR. MARTINEZ: Well, Your Honor, I
4 believe -- Michael Martinez on behalf of Mr. Mignogna.

5 THE COURT: Yes.

6 MR. MARTINEZ: Your Honor, I believe
7 the Court hit the nail on the head here when you said
8 as an initial matter that if he wants discovery, he
9 has to come forward before the Court, before he goes
10 off and files it, and then files a motion to compel
11 causing my client to have to file a motion to quash
12 and then a motion -- a response to that motion to
13 compel as well, from that perspective.

14 Moving beyond that, Your Honor, beyond
15 the procedural aspect of this, my opposing counsel
16 here makes a valid argument from the standpoint where
17 he says he has to have evidence to put forth for the
18 Court of Appeals.

19 However, the evidence that was -- that
20 is necessary -- that is available for him to put forth
21 before the Court of Appeals is the evidence that was
22 presented or offered to the Court at or before the
23 time of the hearing and at or before the time the
24 Court granted the motion itself, the anti-SLAPP
25 motion, and the TCPA motion.

1 Your Honor, he says that he has to have
2 this information. And as Your Honor pointed out a
3 moment ago, this is something that he says had he had
4 the opportunity to do so, because he hasn't been able
5 to bring Mr. Slatosch to Tarrant County to testify,
6 but he's trying to get around that by doing a
7 deposition. He could have done that prior to the
8 hearing.

9 Everything he is doing now, Your Honor,
10 is the exact same thing that he could have and should
11 have done, if he says it is vital to his presentation
12 of evidence. It's something that should have happened
13 prior to the hearing.

14 He is attempting to take, essentially,
15 Your Honor, a closed book, because the Court has
16 already heard all of the evidence that was necessary
17 to make a ruling on the TCPA motion, and reopen it to
18 add additional evidence to try to show additional
19 things that may or may not have even occurred.

20 He has provided no factual basis to --
21 or any type of evidence whatsoever that is admissible
22 to the Court to justify any of the things that he
23 says, other than his conjecture today where he says we
24 believe that Mr. Slatosch may say this, or we believe
25 that Mr. Slatosch may say that. None of those things

1 are supported by any type of evidence whatsoever that
2 have been put before the Court.

3 Additionally, Your Honor, what he is
4 trying to here is, the affidavits weren't even
5 considered by the Court. They were withdrawn in this
6 instance in their entirety prior to the hearing, and
7 the Court stated on the record and within its order
8 granting the TCPA motion, that the affidavits were not
9 considered.

10 So if those affidavits were not
11 considered, then what does it matter that they have to
12 have them suddenly go back and find out other things
13 that may or may not have occurred from that
14 perspective, Your Honor.

15 Additionally, Your Honor, as we're
16 going through this, he says that this isn't about fees
17 or, you know, that this isn't about driving up costs,
18 etcetera, etcetera, etcetera.

19 At the end of the day, Your Honor,
20 unless he is going to come back to the Court and say
21 all of the fees associated with trying to obtain the
22 deposition of Mr. Slatosch are not going to be
23 included in his claim, then it is about fees and it is
24 about costs.

25 Regardless of whether Mr. Mignogna's

1 counsel appear at the deposition, there is still going
2 to be additional costs incurred. There is still going
3 to be additional costs that they've already covered in
4 the requests.

5 So when you look at it from that
6 perspective, Your Honor, any evidence that they wanted
7 to put forward as part of their TCPA motion should
8 have been presented at that TCPA hearing, and that's
9 just -- it's purely -- at that point.

10 THE COURT: Okay. I'm not going to let
11 you do the deposition. I think that it's just going
12 to confuse everything if you do the deposition.

13 I think we're at a point where it's
14 your burden to do attorney's fees and sanctions, and
15 you can do that, and we're having a hearing on that
16 day.

17 How much -- I mean, you're talking 250.
18 The other ones are probably the same, aren't they?

19 MR. MARTINEZ: No, Your Honor.

20 THE COURT: How much are the other
21 ones?

22 MR. MARTINEZ: I believe one of the
23 others have attorney's fees, give or take, around
24 \$60,000.

25 THE COURT: Okay. We're still talking

#notakiwi

#only1masshooter

1 about a lot of money.

2 MR. LEMOINE: And Funimation, I think,
3 is 170.

4 MR. MARTIN: 158 for one and 170 for
5 the other.

6 THE COURT: So we're getting to 500,000
7 pretty quick.

8 MR. LEMOINE: Plus we're going to have
9 additional attorney's fees.

10 THE COURT: Yeah, I think it -- I
11 understand the necessity of having him testify, but I
12 don't think it's necessary for this hearing. I think
13 it will be necessary in the future hearings, if there
14 is any, to obviously get him to testify, but I mean,
15 we're just talking about sanctions and attorney's
16 fees, but you already have your attorney's fees. I
17 think the sanctions, you can probably base it on the
18 pleadings pretty easily.

19 MR. LEMOINE: Okay. Judge, we have
20 subpoenaed -- we issued trial subpoenas for
21 Mr. Mignogna and Mr. Beard to testify.

22 THE COURT: Yeah, why do you want
23 Mr. Beard to testify? That's kind of weird.

24 MR. LEMOINE: I think it's the sixth
25 element under Chapter 10 that talks about the

#toocooltobesued

#exceptbycreditors

1 attorneys and their involvement in the sanctionable
2 activity.

3 And I may not be able to -- if the
4 Court ruled against me with regard to Mr. Slatosch, I
5 could ask Mr. Beard the same questions.

6 THE COURT: But you might find
7 Mr. Slatosch at DFW Airport one day, and you can get
8 him.

9 MR. LEMOINE: After the court has
10 already granted the motion?

11 THE COURT: You can subpoena him to
12 come here.

13 MR. LEMOINE: I don't -- he's outside
14 the subpoena power of the Court.

15 THE COURT: Not if he's sitting at DFW
16 Airport, he's not.

17 MR. LEMOINE: Well, that's true, if I
18 could find him there, true, which is why I did the
19 subpoena.

20 THE COURT: No, I understand. Or
21 Abilene or -- I mean, you'll have to get the ruler
22 out, but Abilene is probably about that.

23 MR. LEMOINE: Your Honor, how about if
24 we have an hour limitation on the deposition? We
25 could do it electronically so that everybody could

#outdonebya4thyear

#baldfacelawyer

1 attend.

2 THE COURT: My problem with that is
3 just that I think it's going to confuse everything to
4 a certain extent, and I don't think it's necessary.
5 And, I mean, I think that I have to show that -- I
6 have to have good cause. I don't think there's good
7 cause. I think you have enough -- you already told me
8 you could get Mr. Beard or somebody else to testify,
9 so I don't know that there is good cause.

10 So you're saying -- you want a number
11 six on --

12 MR. LEMOINE: It's not in the actual
13 statute. You would have to go to the Low decision.
14 It's, I think --

15 THE COURT: Oh, okay.

16 MR. LEMOINE: Henry versus Low, Texas
17 Supreme Court 2007. It's cited in the Landry case,
18 which is -- if you had our actual motion to compel, it
19 would be page three, we cite the Landry case in full,
20 and it's G, if you look on page four. It is the
21 relative culpability of the client and counsel and the
22 impact on their privilege relationship.

23 So if Mr. Mignogna wanted to make the
24 argument I didn't know about the evidence, I'm just --
25 you know, I'm relying on my attorney. Because my

1 guess is that Mr. Mignogna didn't actually talk to
2 Mr. Slatosch. It was all done through Mr. Beard.

3 So the Court has to make that
4 determination as well, and the opportunity --

5 THE COURT: Well, I'll tell you what
6 I'll do. When we have that hearing and you put him on
7 the stand, if I think it becomes relevant to have him
8 come here, I'll let you do it then.

9 MR. LEMOINE: Okay.

10 THE COURT: I'll reconsider it, anyway.

11 MR. LEMOINE: I appreciate that, Judge.

12 THE COURT: We'll just see what he
13 says. Is Victor coming?

14 MR. MARTINEZ: I'm sorry.

15 THE COURT: Is Vic coming to our
16 hearing?

17 MR. MARTINEZ: Your Honor, at this
18 point, he has been subpoenaed for the hearing.

19 THE COURT: Okay.

20 MR. MARTINEZ: My expectation is that
21 he is going to be here, Your Honor.

22 THE COURT: Have y'all filed anything
23 on Mr. Beard's subpoena?

24 MR. MARTINEZ: Not yet, Your Honor.
25 That's -- we're within our time limits to do so, but

#gaspingsforrelevance

#sexycpap

1 that --

2 THE COURT: oh, that was just --

3 MR. MARTINEZ: It was just two days
4 ago -- or yesterday, one of the two.

5 We do have some concerns with regard to
6 that, Your Honor, obviously --

7 THE COURT: Yeah, I don't want to have
8 an attorney testify. I mean, I just think it's -- I
9 don't know how you get around attorney client
10 privilege to have them testify to anything.

11 MR. LEMOINE: What he says to
12 Mr. Slatosch is not attorney client. If Mr. Beard is
13 talking to him on the phone or sending him an
14 affidavit, that --

15 THE COURT: Is it work product? Does
16 he get into any of that, though?

17 MR. LEMOINE: I don't know how it could
18 be work product. He's not -- Mr. Slatosch is not the
19 agent of Mr. Mignogna. He's an opposing party, if you
20 blast it out on the Internet, here's my --

21 MR. MARTINEZ: If I may, Your Honor.
22 He's not an opposing party.

23 THE COURT: No, he's not an opposing
24 party.

25 MR. LEMOINE: Oh, I'm sorry if I said

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1 opposing party, he's not --

2 THE COURT: That's okay.

3 MR. LEMOINE: -- he's not under -- he's
4 not a joint defendant. He doesn't have a common
5 interest. He's a witness.

6 MR. MARTINEZ: And Your Honor at that
7 point the -- the concern with that, Your Honor, is at
8 that point every time an attorney sends an affidavit
9 off to a nonparty to be signed for any type of
10 pleading in any type of case, does that suddenly
11 subject that attorney to being called to the stand to
12 testify. That doesn't make any sense. That is a
13 routine part of practice.

14 I would -- and assuming is always a
15 dangerous thing, but I would assume that opposing
16 counsel has sent affidavits to nonparties in the past.
17 Does that mean that opposing counsel thinks he should
18 be called to testify?

19 THE COURT: The term work product
20 applies only to materials prepared, mental impressions
21 developed, or communications made in anticipation of
22 litigation or for trial.

23 MR. MARTINEZ: That's firmly within --

24 THE COURT: I mean, that would be a
25 communication, I think, and I assume when you file a

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1 lawsuit they're kind of contemplating a trial.

2 MR. LEMOINE: But that is shared with
3 somebody that's not in privy with them. They didn't
4 brief the issue, Judge. They did not put on evidence
5 that there is an attorney work product. This is just
6 an argument that Mr. Martinez just came up with right
7 now.

8 THE COURT: Well, I'm coming up with
9 it, too, because I think it's weird that you
10 subpoenaed an attorney.

11 MR. LEMOINE: Well, Judge, there is no
12 doubt that if I ask Mr. Slatosch what communications
13 he had with Ty Beard, how is that protectable?

14 THE COURT: I don't think it is from
15 him.

16 MR. LEMOINE: And if you're cutting
17 off -- if the Court prevents me from taking Mr. Beard
18 on live, and I can't take Mr. Slatosch, and then how
19 do I get there because --

20 MR. MARTINEZ: And again, Your Honor --

21 MR. LEMOINE: -- because if
22 Mr. Mignogna never talked to Mr. Slatosch, somebody
23 procured that affidavit. Somebody got him to sign the
24 affidavit.

25 THE COURT: But I've already kicked the

1 affidavit out, what does it matter -- or they withdrew
2 the affidavit.

3 MR. LEMOINE: Judge, that goes to
4 whether or not they met their elements. It does not
5 go to the sanctions. If the Court knew that the
6 affidavit was submitted before where the witness had
7 told the notary, Ms. Rial and Mr. Toye did not have
8 anything to do with me terminating the contract with
9 Mr. Mignogna --

10 THE COURT: Who was the notary?

11 MR. LEMOINE: Mr. Beard.

12 MR. MARTINEZ: And Your Honor, again,
13 that's -- if I may, we're getting back into the weeds
14 here. It goes right back to the issue of everything
15 he is talking about and asking and all of the
16 justification that he's making for wanting to take
17 this deposition was known to him prior to the hearing.

18 If he knew that he needed this
19 information, because I would anticipate that he
20 expected to win, he expected to have to put on
21 evidence as it related to his attorney's fees, because
22 as the Court noted, the Court could have required at
23 that moment when it granted the motion, they could
24 have said, okay, put on your evidence for attorney's
25 fees.

1 THE COURT: But he really didn't get
2 the affidavit until Saturday.

3 MR. MARTINEZ: By that same token, Your
4 Honor, and as Your Honor told him a few minutes ago,
5 he could have shown up at the hearing and said I got
6 an affidavit on Saturday, I would like to request a
7 continuance.

8 THE COURT: No, but we -- I mean, y'all
9 withdrew them, so it really didn't matter.

10 MR. MARTINEZ: Exactly.

11 THE COURT: But what I'm saying is I
12 don't know that he could have done the deposition of
13 Slatosch before that, because I don't know that he
14 necessarily knew that was who was going to testify.

15 MR. MARTINEZ: My point there, Your
16 Honor, is if he believed after receiving the
17 affidavit, and even despite the fact that we withdrew
18 the affidavit, if he believed that Mr. Slatosch was
19 now an integral witness as it related to the
20 sanctions, then he should have requested that
21 information from the Court prior to the Court making
22 its ruling.

23 THE COURT: All right. We'll just have
24 the hearing, and if I feel like we need to do some
25 additional work on it, we still can.

1 What else? Do I need to do your motion
2 for sanctions, or would you rather me just deny it?

3 MR. MARTINEZ: It sounds like the Court
4 is --

5 THE COURT: I mean, I think we needed
6 to talk this out and work it out. I don't know that
7 it's sanctionable, anything that anybody did.

8 So are y'all really coming on the 21st
9 or not? You'll probably, to protect yourself, need to
10 file a motion to quash on the subpoena.

11 MR. MARTINEZ: For Mr. Beard?

12 THE COURT: I would think so. I mean,
13 I'm not your appellate lawyer, but I think you
14 probably ought to do that just to protect yourself on
15 that.

16 MR. BEARD: Absolutely, Your Honor.

17 THE COURT: Are you coming on the 21st?

18 MR. LEMOINE: We are.

19 THE COURT: Okay. What's the deal with
20 the appeal, though? I mean, have they kicked it back
21 yet, because they're going to.

22 MR. MARTINEZ: That's the deal at this
23 point, Your Honor, is that they -- we did receive a
24 notice from the Court of Appeals that they wanted some
25 fees paid and things of that nature. We have until

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1 the 14th to determine that.

2 And, in reality, Your Honor, I guess
3 what we were trying to be sure of was that we didn't
4 miss a window.

5 THE COURT: I understand that.

6 MR. MARTINEZ: From that perspective.

7 THE COURT: Right.

8 MR. MARTINEZ: If the Court says on the
9 record that this is not a final order as of this
10 point, and then after the 21st, when the Court renders
11 its ruling at that point, that that would be the time
12 for us to issue an appeal, we are happy to withdraw
13 our appeal.

14 THE COURT: Yeah, that -- I mean, I
15 think that that is my understanding is that that is
16 not a final order at this time until I have issued the
17 final order with regards to the sanctions and
18 attorney's fees.

19 So I mean, I guess we can go ahead and
20 have the hearing. I just don't want them to get mad
21 at me for doing something when they think they have
22 jurisdiction over it.

23 MR. MARTINEZ: And, Your Honor, that's
24 why I say, as long as we have an understanding or
25 something on the record where the Court says this is

#toilettweeting

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1 not a final appealable order, but that should -- back
2 on that, I apologize, I'm not --

3 THE COURT: I mean, I think I reserved
4 in the order that we would have a hearing, I reserved
5 jurisdiction over it.

6 MR. MARTINEZ: Yes, sir. The concern,
7 Your Honor, with it was the wording within the order
8 itself at the very beginning where it states that the
9 Court finds that the three motions should be and are
10 granted in full.

11 So that causes concern that there could
12 be at least an ambiguity whether the Court wanted to
13 bifurcate and -- or what. So if the Court is telling
14 us that the Court does not believe this to be a final
15 and appealable order that was granted and issued by
16 the Court on October 4th of 2019, then we will
17 withdraw our appeal pending the final order of the
18 Court after the November 21st hearing.

19 MR. LEMOINE: We filed a motion to
20 dismiss the appeal. You granted our motion in full.
21 Our motion in full says dismiss claims, and that set a
22 hearing for sanctions and attorney's fees, which is
23 what the Court did.

24 You can't read the top part of the
25 order without reading the last paragraph that says we

1 are going to have a hearing, submit in 30 days.

2 But if they want to dismiss their
3 appeal, that's fine with me. If the Court of Appeals
4 wants to stop this Court from doing anything, they'll
5 let us know pretty quick.

6 THE COURT: They usually do. I mean, I
7 can redo this order and just say --

8 MR. MARTINEZ: I don't know that
9 there's necessarily a need for that, Your Honor.

10 THE COURT: Okay.

11 MR. MARTINEZ: Like I say, as long as
12 the Court -- and we've got a record today. As long as
13 the Court is telling us that this is not a final
14 appealable order that was issued back in October, we
15 will withdraw our appeal and refile the appeal
16 pursuant to the Court's forthcoming order after the
17 November 21st hearing.

18 THE COURT: I'm telling you this is not
19 a -- I did not consider this to be a final order. I
20 still would let the appellate court know this before
21 you dismiss it, to make sure they understand that,
22 because I don't want them to think the clock is
23 ticking.

24 MR MARTINEZ: Okay.

25 THE COURT: And so -- because I don't

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1 want you to get in the position where they think it
2 was final, because it says dismissed in full.

3 So I would like for the appellate court
4 to just send me something saying it wasn't.

5 MR. MARTINEZ: Okay. Then we will go
6 ahead and pay the fees, Your Honor, and move forward
7 with the appeal as set, and the appellate court can
8 make their determination.

9 MR. LEMOINE: And, Judge, we would be
10 estopped from making the counterargument -- from
11 taking the position both in the letter to you and the
12 motion that's set before the Court of Appeals, that we
13 don't think it's a final judgment.

14 THE COURT: But the problem, I think, is
15 that we are 30 days past this now, and so if for some
16 reason the appellate court thinks it was a final
17 order, you'll get zero on attorney's fees, and their
18 case goes away, but they may like that, too. I don't
19 know, because you'd get zero and they're -- everybody
20 walks away.

21 And so that's not a bad deal for them,
22 either, to a certain extent. And so I would just have
23 concerns, without getting something from the appellate
24 court saying that we need to hear it, that it needs to
25 come back here.

1 I think it could hurt both of y'all,
2 you know, to a certain extent so -- because if he
3 withdraws his appeal and they say, well, that
4 wasn't -- the 30-day clock was ticking, and you missed
5 it. Regardless of what I say, they don't care what I
6 say.

7 MR. LEMOINE: Well, if he withdraws the
8 appeal, there is no clock on the attorney's fees.
9 Multiple courts have ruled that the motion to dismiss
10 itself and the ruling on that is what triggers your
11 30-day clock. Once the hearing is heard, you've got
12 30 days. If you do not rule -- the court -- the cases
13 that have been interrupted after that, because
14 people -- the litigants have tried to do kind of what
15 you have described, just we're going to run out and
16 appeal the grant of a dismissal to try to kill the
17 attorney's fees.

18 Every Court of Appeals in the state of
19 Texas that has addressed that issues has said that
20 sanctions and attorney's fees do not have a clock on
21 them. And that's the -- I think it's the --

22 THE COURT: But it would be an unfair
23 situation if they missed their appellate deadline and
24 you still got to get your attorney's fees.

25 MR. LEMOINE: It couldn't happen.

1 THE COURT: Okay.

2 MR. LEMOINE: How could it happen?
3 They would still have a right to challenge, at a
4 minimum, the attorney's fees.

5 THE COURT: But they should be able to
6 challenge the whole thing. That's my only concern.
7 And I haven't read every TCPA case, so I dont know.
8 But I just don't want you to be in a position where it
9 does -- you do lose your appellate right, and you
10 still have to pay attorney's fees, too.

11 MR. MARTINEZ: Well, and I'll be
12 honest, Your Honor, I have to complete my briefing on
13 the case, but if what opposing counsel is saying is
14 correct, which is once the Court issues its ruling as
15 it relates to the motion, then that starts your clock,
16 regardless of the fees, then that means that your
17 order was ripe for appeal and --

18 MR. LEMOINE: No, that's -- no, that's
19 not what I said.

20 THE COURT: I know. See, this is -- I
21 know, it's a little confusing, though, I think.

22 So do whatever you think is right, and
23 I'll see y'all on the 21st.

24 And if you want to take this transcript
25 to the Court of Appeals and say, this is what the

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1 judge said, are y'all okay that he doesn't have --
2 that he still has jurisdiction, if they'll issue that,
3 then I'll be fine, too.

4 MR. MARTIN: Your Honor, if I may.

5 THE COURT: Yes.

6 MR. MARTIN: For point of
7 clarification, can I confirm that the Court --

8 THE COURT: I denied their motion for
9 sanctions.

10 MR. MARTIN: Thank you, Your Honor.

11 THE COURT: Yes. Y'all are on -- is it
12 Thursday or Friday? Thursday the 21st. Okay.

13 MR. MARTINEZ: And for the same sake,
14 Your Honor, just to be absolutely sure, there is a
15 denial of their motion to compel.

16 THE COURT: Yes.

17 MR. MARTINEZ: And sanctions associated
18 with it?

19 THE COURT: I denied their motion to
20 compel, but if they want to reurge it at the hearing,
21 I may still let them depose that guy, if for some
22 reason it comes up.

23 I think you're probably going to need
24 to prepare to find a better way to get the testimony
25 you want, other than from a lawyer that's sitting

1 there, because I'm probably not going to let you do
2 that.

3 MR. LEMOINE: I understand, Judge.

4 THE COURT: Okay. I guess if you send
5 me orders, I'll sign them or -- basically denying the
6 motion to compel and denying the sanctions is what
7 I've ruled on.

8 MR. LEMOINE: Okay. Thank you.

9 MR. MARTINEZ: Thank you, Your Honor.

10 MR. VOLNEY: Thank you, Judge.

11 THE COURT: Oh, thank you. I would
12 have left you there all day. I forgot you were there.
13 Y'all have a good day.

14 (End of proceedings)

15 *--*--*--*--*--*--*

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Tina Fett, CSR
Official Court Reporter 141st District Court

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C E R T I F I C A T E

THE STATE OF TEXAS X

COUNTY OF TARRANT X

I, Christina Fett, Official Court Reporter in and for the 141st District Court, State of Texas, County of Tarrant, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the reporter's record in the aforementioned cause, all of which occurred in open court or in chambers and were reported by me.

I FURTHER CERTIFY that this reporter's record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I FURTHER CERTIFY that I have no financial interest in the matters shown herein, and that I am not related to any of the parties or their counsel.

I FURTHER CERTIFY that the total cost for the preparation of this reporter's record of the proceedings is \$350.00 and was paid by T. Greg Doucette.

WITNESS MY OFFICIAL HAND this the 15th day of November, 2019.

/s/Christina Fett

Christina Fett, Texas CSR 4590

CSR Expires 12-31-19

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#waitwhatsthatbuzzingsound?

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