FILED
TARRANT COUNTY
8/29/2019 12:03 PM
THOMAS A. WILDER
DISTRICT CLERK

CAUSE NO. 141-307474-19

VICTOR MIGNOGNA,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**141ST JUDICIAL DISTRICT**
FUNIMATION PRODUCTIONS, LLC, MONICA RIAL, RONALD TOYE, and JAMIE MARCHI,	§	
	§	
Defendants.	§	**TARRANT COUNTY, TEXAS**

MONICA RIAL AND RON TOYE'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE OR DISREGARD DEFENDANTS' LATE FILINGS

Defendants Monica Rial ("Ms. Rial"), and Ronald Toye ("Mr. Toye") (collectively, "Defendants") hereby file this Response to Plaintiff's Motion to Strike or Disregard Defendants' Late Filings (the "Motion to Strike"), and state as follows:

I. INTRODUCTION

MS. RIAL AND MR. TOYE TIMELY FILED A TCPA[1] MOTION TO DISMISS ALL CLAIMS BROUGHT AGAINST THEM. ELEVEN DAYS LATER, THEY SUPPLEMENTED WITH ADDITIONAL AFFIDAVITS AND AFFIRMATIVE DEFENSES. RATHER THAN UTILIZE THE MECHANISMS IN THE TCPA TO CONDUCT DISCOVERY, PLAINTIFF FILED A MOTION TO STRIKE THAT FINDS NO SUPPORT IN THE TCPA OR FROM OVER THREE HUNDRED AND SEVENTY (370) OPINIONS ISSUED SINCE THE INCEPTION OF THE TCPA. TO THE CONTRARY, SUPPLEMENTATION IS CONSISTENT WITH THE LIBERAL INTERPRETATION OF THE TCPA WHICH IS DESIGNED TO QUICKLY END FRIVOLOUS LAWSUITS LIKE THIS ONE.[2]

THE COURT SHOULD DENY THE MOTION TO STRIKE.

[1] The TCPA is the Texas Citizens Participation Act, codified at Texas Civil Practice & Remedies Code §27.001 *et seq*.

[2] *See* TCPA §27.011(b) ("This chapter shall be construed liberally to effectuate its purpose and intent fully.").

II. RELEVANT PROCEDURAL BACKGROUND

A. The Litigation Commences with Three Depositions.

1. On April 19, 2019, Plaintiff filed his Original Petition bringing claims of defamation, tortious interference with contract, tortious interference with prospective business relations, and conspiracy against Ms. Rial, Mr. Toye, Funimation Productions, LLC ("Funimation") and Jamie Marchi ("Marchi").

2. Rather than immediately begin briefing concerning the case dismissal, the parties agreed to engage in discovery. Consequently, on June 17, 2019, the Court entered an Agreed Order extending Ms. Rial's and Mr. Toye's deadline to file motions to dismiss pursuant to the Texas Citizens Participation Act ("TCPA") to July 19, 2019.

3. Between June 26 and 28, 2019, Plaintiff, Mr. Toye, and Ms. Rial were deposed over a consecutive three-day period.

B. TCPA Motions to Dismiss are Timely Filed Starting the Maximum 120 Day Clock for a Hearing.

4. On July 1, 2019, Funimation timely filed its TCPA Motion to Dismiss ("Funimation MTD").

5. On July 12, 2019, Plaintiff filed his First Amended Petition, maintaining the same causes of action.

6. On July 19, 2019, Ms. Rial and Mr. Toye timely filed their TCPA Motion to Dismiss ("Rial/Toye MTD").

7. On July 19, 2019, Jamie Marchi timely filed her TCPA Motion to Dismiss (the "Marchi MTD").

8. All three motions to dismiss were initially set for hearing on August 8, 2019.

9. Pursuant to the TCPA, once a TCPA motion is filed, it starts a sixty (60) day clock in which a hearing must occur, but this deadline can be extended up to a maximum of one-hundred twenty (120) days. *See* TCPA §27.004 (a)-(c). The TCPA provides that either the movant or non-movant may seek leave of Court to conduct discovery. *See id*. at §27.006(a)-(b).

10. Accordingly, the **latest** date that the respective TCPA motions could be heard are October 29, 2019 (for the Funimation MTD) and November 18, 2019 (for the Rial/Toye MTD and Marchi MTD).

C. Plaintiff Tips His Hand with a Premature Evidence Challenge and Obtains a Continuance of the TCPA Hearing to September 6, 2019.

11. On July 24, 2019, Plaintiff filed Objections to Motion to Strike Evidence Offered in Support of Defendant Funimation's MTD ("Plaintiff's Evidentiary Challenges").

12. On July 29, 2019, Plaintiff filed a Motion to Continue Hearing on TCPA Motions to Dismiss, seeking an extension of the August 8, 2019 hearing to August 29, 2019.

13. On July 30, 2019, Ms. Rial and Mr. Toye filed their Supplement to Motion to Dismiss ("Rial/Toye Supplement"), providing two affidavits confirming Plaintiff's acts of sexual predatory behavior, two affidavits confirming Ms. Rial and Mr. Toye did not interfere with Plaintiff's alleged contracts, and pleading affirmative defenses of consent/invitation and §230 of the Communications Decency Act (the "CDA").

14. On July 31, 2019, Plaintiff filed a First Amended Motion to Continue.

15. On August 1, 2019, the Court heard argument and reset the TCPA hearing to September 6, 2019.

16. Plaintiff's response deadline is set for August 30, 2019.[3]

[3] The Parties also executed a Rule 11 Agreement outlining the Court's August 1, 2019 ruling.

D. Funimation Files Supplemental Affidavits, and Plaintiff Files the Motion to Strike.

17. On August 6, 2019, Funimation filed its Supplemental Evidence in Support of its TCPA Motion to Dismiss ("Funimation Supplement") seeking to cure any affidavit defects raised by Plaintiff's Evidentiary Challenges.

18. On August 7, 2019, Plaintiff filed the Motion to Strike the Rial/Toye Supplement and Funimation Supplement (collectively, the "Supplements").

E. Plaintiff Does Not Seek Additional Discovery or More Time.

19. Representing that he has all the evidence needed to support four (4) causes of action against four (4) separate Defendants, Plaintiff has not invoked the discovery or continuance provisions of the TCPA.

20. All motions to dismiss will be heard on September 6, 2019, starting the Court's thirty (30) day clock to rule. *See* TCPA §27.005(a).33

III. ARGUMENT AND AUTHORITIES

Plaintiff's Motion to Strike finds no support in the TCPA's statutory language, or any cases cited in the Motion to Strike. In the legion of decisions (over 370) issued by the Texas Supreme Court and the thirteen Courts of Appeals concerning the TCPA, **not one** has ever determined that a movant cannot amend or supplement a timely filed motion to dismiss. The liberal construction of the statute, which allows for limited discovery, invites supplementation or amendment during the (up to) one-hundred twenty (120) day window for the dismissal hearing to occur.

In other words, why allow discovery and four (4) months for a hearing if the movant cannot supplement or amend?

Plaintiff's argument as to prejudice is non-existent considering he has had thirty (30) days to respond to the Rial/Toye Supplement, which is more time than required under the new standard

implemented pursuant to HB 2730.[4] Plaintiff cannot complain about prejudice after having failed to take advantage of the discovery procedure of the TCPA. Finally, to the extent the Court believes the Rial/Toye Supplement was untimely, good cause exists for the supplementation.

A. Plaintiff's Statutory Interpretation Invites Judicial Error Through Exclusion that Will Lead to Unnecessary and Multiple Appeals.

Plaintiff is a public figure, due in no small part to his own bragging about his extensive career and income signing autographs for adoring fans.[5] Notwithstanding this, given his aggressive involvement in the public controversy concerning this dispute, it strains belief that Plaintiff is not, at a minimum, a limited-purpose public figure. *See Lane v. Phares*, 544 S.W.3d 881, 890–91 (Tex. App.—Fort Worth 2018, no pet.).[6] On at least three separate occasions, Plaintiff has addressed his over 113,000 Twitter followers and uncountable international fans concerning the growing online firestorm caused by his inappropriate behavior. Whether he is a public or limited-purpose public figure, Plaintiff must establish that any alleged defamatory statements were committed with actual malice:

> **"Actual malice" in the defamation context does not mean injurious motive or ill will toward the plaintiff, but rather means that the defendant had knowledge of the falsity of the statement or reckless disregard for the truth**. The focus therefore "is on the defendant's attitude toward the truth, not [her] attitude toward the plaintiff." *Id*; . . ." Reckless disregard is a subjective standard, focusing on the defendant's state of mind." To establish reckless disregard, the plaintiff "must establish that the defendant in fact entertained serious doubts as to

[4] On June 2, 2019, Governor Abbott signed into law HB2730 into which incorporate a twenty-one (21) day notice for the hearing and seven (7) day deadline to file a response before the hearing.

See https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB02730S.pdf#navpanes=0

[5] *See* Petition, ¶ 15 ("In addition to his voice work, Vic attends fan conventions, approximately 35-40 per year. He earns a sizeable income from appearance fees guaranteed by contract with the convention producers and from signing autographs, taking photos with fans, and appearing on guest panels."); Rial/Toye MTD, ¶¶ 34, 42, and 45.

[6] ("Oddly, Lane then argues that it was the trial court's fault for making her a public figure by 'inappropriately punish[ing] Professor Lane for promoting her career,' 'as revealed by the [trial court's] repeated references to Professor Lane's professional websites.' This argument is without merit. As Abraham Lincoln observed, '[w]hat kills a skunk is the publicity it gives itself.' Great Quotes from Great Leaders 21 (compiled by Peggy Anderson, 1990). Lane's career is what it is without any assistance from the trial court. Lane simply cannot sing her national and international renown on her website and the UNT faculty page, stand by those statements in her affidavit, and then claim she has no public presence.").

> the truth of [her] publication, or had a high degree of awareness of ... (the) probable falsity of the published information."

Lane, 544 S.W.3d at 891 (citations omitted) (emphasis added). One of the allegations of defamation concerns Funimation's investigation and undoubtedly appropriate termination of Plaintiff which he incorrectly contends is defamatory:[7]

(30) On February 11, 2019, Funimation made its "investigation" public via Twitter, declaring it determined Vic had engaged in "harassment or threatening behavior"; Monica responded there were "multiple investigations with testimony, proof, evidence." (*Figure 3*).

. . .

[7] Petition, ¶ 30.

The Rial/Toye Supplement pertains directly to the Court's determination of actual malice as Funimation (through its parent Sony) conducted an investigation into Plaintiff, severing its independent contractor relationship with him as a result.[8] In addition to Ms. Rial, Funimation interviewed two twin sisters who have provided sworn statements describing Plaintiff's invitation to his hotel room at an anime convention, (not as they thought to visit with a friend), but for his own deluded purpose of having sex with the twenty-two (22) year old siblings:

> We reminded Mignogna that we were only 22 years old, and that he was over 50, so how could he even think of having sex with us or that we would want to have sex with him.
> …
>
> . . . he came up to my sister, cupped his hands on either side of her face, and forcibly kissed her. I froze in fear, and then Mignogna walked over to me, cupped his hands on either side of my face, and forcibly kissed me.
>
> I was so terrified and frozen, and I did not know what to do.
> I asked what his intentions were in telling us about these feelings, and he said it was his hope and intention to have sexual relations with both of us . . .
> …
>
> Without giving him any explicit permission to do so, he came up to me, cupped his hands on either side of my face, and forcibly kissed me on the lips. [9]

This behavior is consistent with what Plaintiff's ex-fiancé, Michelle Specht, accused him of in March 2019, and **he failed to deny**:

> You systematically targeted dozens upon dozens of fangirls (most at least half your age) . . . And since the few who came forward openly, so very many more have reached out privately - to me, and others close to us - all of them in tears, pain, and

[8] Funimation detailed its investigation in the Funimation MTD. *See* Rial/Toye, ¶ 36; *see also* Funimation Supplement, Exs. 1-2.

[9] Rial/Toye Supplement, Ex. U, ¶¶ 9, 11; Ex. T, ¶¶ 10, 13. .

> shame. Colleagues, cosplayers, fans (one of whom was underage at the time of her 'experience' with you) . .[10]
>
> I [Plaintiff] am only now beginning to understand the depth of the pain I caused you, and the weight of it is nearly unbearable. I'm so ashamed and so deeply sorry.[11]

The sisters shared this humiliating experience with Sony, Ms. Rial, and Mr. Toye.[12] Plaintiff may well attempt to deny the sisters were ever in his hotel room, and risk perjury by doing so. But **absent evidence the twins recanted** to Funimation/Sony, Ms. Rial, and Mr. Toye, Plaintiff cannot establish negligence, much less actual malice or reckless disregard for the truth in relation to Defendants' allegedly defamatory comments about the investigation. *See Lane,* 544 S.W.3d at 891.[13]

In addition, the Rial/Toye Supplement contains statements from convention officials unequivocally refuting Plaintiff's assertions that Ms. Rial's or Mr. Toye's actions caused the termination of Plaintiff's (alleged) contracts.[14] *See Van Der Linden v. Khan*, 535 S.W.3d 179, 195 (Tex. App.—Fort Worth 2017, pet. denied) ("Khan did not offer affidavit testimony from Sheldon, the one person who personally knew why he refused to go forward with the alleged contract. So, once the impermissibly speculative evidence from Khan's affidavits is disregarded, there is simply no evidence, let alone clear and specific evidence, that *but for* the Message, any contract between Khan and Sheldon would have gone forward.").

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[10] *See* Rial/Toye MTD, at Ex. L, Ex. A thereto.

[11] *See* Rial/Toye MTD, at Ex. L, Ex. B thereto.

[12] *See* Rial/Toye Supplement, Ex. U, ¶ 15 ("In January 2019, my sister and I shared our story with Tammi Denbow when Sony conducted the investigation into the allegations of Mignogna's sexual harassment and assault. We also told Monica Rial and Ronald Toye in January 2019 about the events with Mignogna in connection with Sony's investigation.").

[13] *See* Rial/Toye MTD, at ¶¶ 20-22 and Toye Depo. at pp. 41-42, 57-63, 71-72, 74, 119-120 (Ex. O).

[14] *See* Rial/Toye Supp. at Ex. V (Affidavit of Amanda McManus stating Anime Milwaukee's cancellation of Plaintiff's appearance had nothing to do with Mr. Rial or Mr. Toye); Ex. W (Affidavit of Raymond Lenzer stating that Kami-Con's cancellation of Plaintiff's appearance had nothing to do with Ms. Rial or Mr. Toye).

Further, while it is apparent why Plaintiff would choose to file the Motion to Strike rather than exercise his statutory rights to depose the twins or other affiants, he offers no legal authority or analysis why he cannot defend against the affirmative defenses of consent/invitation or application of the Communications Decency Act, neither of which depend on supplemental evidence.[15]

The information contained in the Rial/Toye Supplement are necessary for a full understanding of Plaintiff's allegations, credibility, and the elements of his claims. If the supplemental evidence and affirmative defenses are excluded, and Plaintiff's unsupported statutory interpretation is rejected on appeal, the result is an expensive and prejudicial remand to reconsider such evidence/affirmative defenses. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 898 (Tex. 2018).[16]

B. The TCPA Does Not Bar Supplementation of Timely Filed Motions.

Plaintiff has not cited any statutory provision within the TCPA that bars supplementation and none of his cases support the assertion that **after a timely filed TCPA motion to dismiss**, the movant can neither amend nor supplement.[17] The reason Plaintiff cannot find cases to support his

[15] *See* Rial/Toye Supplement, § II A-B.

[16] "Because the court of appeals concluded that Adams did not satisfy his initial burden to establish the applicability of the TCPA under section 27.005(b), it did not proceed to decide whether Starside established a *prima facie* case for each essential element of its defamation claim under section 27.005(c) or whether Adams established a valid defense under section 27.005(d). We therefore remand the case to the court of appeals to make these determinations in the first instance. *See* Tex. R. App. P. 60.2(d). The judgment of the court of appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion."

[17] None of the cases cited by Plaintiff stand for the proposition that supplementation or amendment of a timely filed TCPA motion is improper or should be stricken. *See Braun v. Gordon*, 05-17-00176-CV, 2017 WL 4250235, at *3 (Tex. App.—Dallas Sept. 26, 2017, no pet.) (movant must timely file the motion and seek a hearing, i.e., failure to timely seek the hearing); *Jordan v. Hall*, 510 S.W.3d 194, 198 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (movant must timely file the motion, i.e., failure to timely file the motion); and *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, 511 S.W.3d 181, 193–94 (Tex. App.—El Paso 2014, no pet.) (movant must timely file the motion, i.e., failure to timely file the motion).

theory is that it is at odds with the purpose of the TCPA and its discovery and timing components.[18] In contrast, the El Paso Court of Appeals rejected a similar attempt to artificially create a TCPA response deadline by judicial fiat. *See MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, 545 S.W.3d 180, 190–91 (Tex. App.—El Paso 2017, no pet.). In *MVS*, the non-movant filed a response to a TCPA motion to dismiss on the very day of the hearing. The El Paso Court of Appeals rejected the movants' timeliness objection because it would force the courts to create new procedures outside of the procedures created by the Texas legislature.[19] This Court should adopt that reasoning and deny the Motion to Strike.

C. The TCPA Requires Liberal Construction; Amendments or Supplementation are Inherent in the TCPA's Structure.

Multiple cases—including two cited by Plaintiff—stand for the proposition that the TCPA is interpreted liberally and does not abrogate other relevant Texas rules or defenses:[20]

> Because the trial court "allow[ed] discovery," section 27.004(c) allowed the trial court to "extend the hearing date." **Although BioTE contends section 27.004(c) "must be invoked at the time the trial court authorizes limited discovery under Section 27.006(b)**, which the trial court did not do in this instance," **BioTE cites no authority for that position and we have found none**. We decline to impose that requirement on the trial courts. We will construe a deadline statute differently than our default rules prescribe when the legislature clearly tells us to do so, such as by telling us that the default rules do not apply to the particular deadline statute. **Instead of that, though, the TCPA itself tells us it does "not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.**" CIV. PRAC. & REM. § 27.011(a); *see also id.* § 27.011(b) (TCPA **"shall be construed liberally**

[18] Counsel for Ms. Rial and Mr. Toye raised these issues in an email to Plaintiff's counsel, hoping to avoid this mess. *See* Exhibit A. Rather than address the issues substantively, counsel's curt response was "[y]ou can read our motion when we filed [sic] it." *See id*. Remarkably, Plaintiff failed to address any of these issues in the Motion to Strike.

[19] "In any event, **had the Legislature intended a formal response deadline, such as with summary judgments, it could have included such a provision**. **We are not empowered to create such a rule by judicial fiat.** *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001)("[**W]e do not write rules by opinion**."); *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 915 (Tex. 1992)(noting defined process for rule making). **We also note that the trial court allowed Appellants an opportunity to file a written reply addressing the affidavit before it decided the motion**. We therefore consider the affidavit as part of the record." *MVS*, 545 S.W.3d at 190–91 (emphasis added).

[20] *See Hearst Newspapers, LLC v. Status Lounge Inc.*, 541 S.W.3d 881, 887 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (noting liberal construction required under TEX. CIV. PRAC. & REM. CODE § 27.011(b)"); *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 873 (Tex. App.—Austin 2018, pet. filed) (same).

to effectuate its purpose and intent fully").

Forget About It, Inc. v. Biote Medical,LLC, No. 05-18-01290-CV, 2019 WL 3798180 at * (Tex. App.—Dallas, Aug 13, 2019) (no pet. h.) (footnote omitted) (rejecting non-movants' challenge to the timeliness of the TCPA hearing when application of Tex. R. Civ. P. 4 made the hearing timely).

That the TCPA does not abrogate other "rules" such as the Texas Rules of Civil Procedure undermines Plaintiff's assertion that Ms. Rial and Mr. Toye cannot add new affirmative defenses after they filed their TCPA motion. Nor does Plaintiff explain how he suffers any harm by having to respond to their affirmative defense of consent/invitation or the effect of the Communications Decency Act. These "rules" include Texas Rules of Civil Procedure 62-65 (allowing amendments) and Texas Rule of Civil Procedure 69 (allowing supplementation). *See Gibson v. Park Cities Ford, Ltd.*, 174 S.W.3d 930, 932 (Tex. App.—Dallas 2005, no pet.) ("An amended motion for summary judgment supercedes and supplants the previous motion, which may no longer be considered."). Had the Legislature intended to prevent supplements or amendments, it would not have explicitly stated that the TCPA is to be liberally construed. Moreover, the legislature did not include any language barring supplements or amendments in the TCPA. *See generally,* TCPA §§27.001 *et seq*.

It naturally follows that supplements and/or amendments to a timely filed TCPA motion further the explicit purpose of the TCPA, which "is to encourage and safeguard the constitutional rights . . . 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. § 27.002. If Plaintiff has a meritorious lawsuit he in turn has no fear of amendments or supplements, but should a last minute change operate as a surprise he has the protections contained in (1) TRCP 70 (which operates to stop surprise amendments/supplements), (2) TCPA § 27.004 (a-c) (continuances up to 120 days), and (3) TCPA § 27.006(a-b) (allowing any party to take discovery).

The TCPA § 27.004(a)-(c) and § 27.006(a)-(b) practically guarantee the necessity of amendments or supplements because allowing discovery means additional briefing to condense and articulate that evidence. It is illogical and counter to the liberal interpretation of the TCPA to permit a movant to take discovery, and extend the hearing date, only to then bar her from amending or supplementing with evidence, affirmative defenses, or briefing. *See In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (courts "interpret statutes to avoid an absurd result").

D. Plaintiff Suffered No Harm from the Supplements.

From a timing perspective, the latest date for the hearing on the Funimation MTD is October 29, 2019, and the last date for the hearings on the Rial/Toye MTD and the Marchi MTD is November 18, 2019. Rather than exercise his available TCPA remedies such as seeking discovery or a later hearing date, Plaintiff instead claims prejudice. Waiving those remedies exposes his argument as little more than fear of the evidence and defenses offered, which is not a legal basis to strike the Rial/Toye MTD.

E. Good Cause Exists to Allow the Supplementation.

Although there is no TCPA bar to supplementation, to the extent the Court believes such a provision is implied, the Court should, consistent with TCPA § 27.003(a), allow Ms. Rial and Mr. Toye to supplement for "good cause." The Rial/Toye MTD was timely filed as to all claims. Rather than further delay the hearing by seeking an extension pursuant to §27.006(a)-(b), and because there is no statutory bar to supplementation, the undersigned counsel chose to supplement rather than seek leave to conduct additional discovery, extend the hearing, and then supplement. This decision was not the result of conscious indifference or neglect, but rather to minimize additional costs related to taking several additional depositions/ and other ongoing expenses to Ms. Rial and Mr. Toye. Good cause exists for supplementation given the lack of clarity in the TCPA, and the

dispositive nature of the proffered evidence and defenses is not harmful to Plaintiff given the array of relief available that he chose to reject.

IV. CONCLUSION AND REQUEST FOR RELIEF

For these reasons, Defendants respectfully request the Court deny the Motion to Strike, or, in the alternative, find that good cause exists to allow the Rial/Toye Supplement, and grant such other and further relief to which they may be justly entitled.

Dated: August 29, 2019.

Respectfully submitted,

/s/ J. Sean Lemoine
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ATTORNEYS FOR DEFENDANTS MONICA RIAL AND RONALD TOYE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on counsel of record via electronic service pursuant to the Texas Rules of Civil Procedure on August 29, 2019.

/s/J. Sean Lemoine
J. Sean Lemoine

VERIFICATION

I Sean Lemoine, swear under penalty of perjury that the emails attached hereto as Exhibit A are true and correct, and that the factual statements in §III(E) are within my personal knowledge, true, and correct, by virtue of my involvement in this case as lead counsel for Defendants Monica Rial and Ron Toye.

J. Sean Lemoine

SUBSCRIBED AND SWORN TO before me this 29th day of August, 2019, to certify which witness my hand and seal of office.

My Commission Expires:

November 17, 2021

FATIMAH R. MUHAMMAD
Notary Public, State of Texas
Comm. Expires 11-17-2021
Notary ID 131356460

NOTARY PUBLIC in and for the State of Texas

EXHIBIT A

From: Ty Beard <ty@beardandharris.com>
Sent: Wednesday, August 07, 2019 11:16 AM
To: John Volney <jvolney@lynnllp.com>; Carey Christie <carey@beardandharris.com>; Jim Bullock <jim@beardandharris.com>
Cc: Casey Erick <CErick@kesslercollins.com>; Andrea Perez <APerez@kesslercollins.com>; Christian Orozco <corozco@lynnllp.com>; Sean Lemoine <slemoine@WickPhillips.com>; Ethan Minshull <ethan.minshull@wickphillips.com>; sam@johnsonsparks.com
Subject: RE: Case No. 141-307474-19 8/1/19 Motion to Strike Supplemental Filings

Counsel –

You guys have filed multiple documents purporting to supplement your TDMA Motions to Dismiss. Be advised that we believe that this is improper since you are all well past your TDMA filing deadlines. Therefore, we will be filing a motion to strike and to order no further such filings this week. We will attempt to set hearing as soon as possible. Please advise if you are willing to withdraw all of these post hoc filings or if you will oppose our motion.

--Ty

From: Sean Lemoine <slemoine@WickPhillips.com>
Sent: Wednesday, August 7, 2019 12:14 PM
To: Ty Beard <ty@beardandharris.com>; Carey Christie <carey@beardandharris.com>; Jim Bullock <jim@beardandharris.com>
Cc: Casey Erick <CErick@kesslercollins.com>; Andrea Perez <APerez@kesslercollins.com>; Christian Orozco <corozco@lynnllp.com>; Ethan Minshull <ethan.minshull@wickphillips.com>; sam@johnsonsparks.com; Sean Lemoine <slemoine@WickPhillips.com>; John Volney <jvolney@lynnllp.com>
Subject: RE: Case No. 141-307474-19 8/1/19 Motion to Strike Supplemental Filings

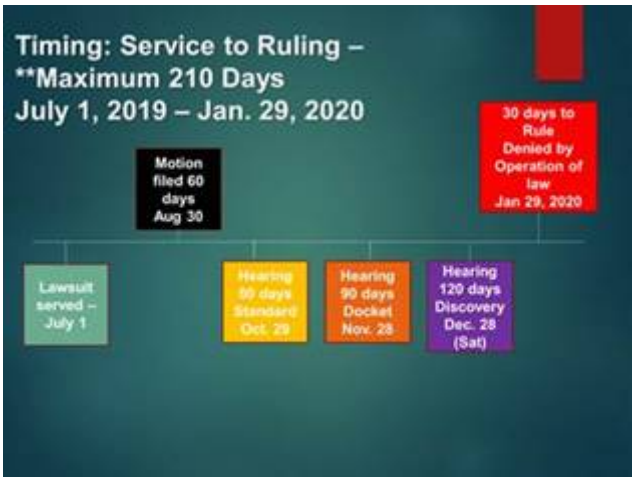
Mr. Beard,

I've actually spent some time considering the issue lately (as someone raised the issue online) and would like to review your motion prior to filing. You may convince me with case law I have not seen.

However, it seems to me that the structure of the TCPA allows for a motion and discovery, which would obviously then require supplementation of the results of the discovery. *See* TCPA 27.006(a-b). There is no mention of "briefing" deadlines in the statute, and the reference to pleadings and affidavits also does not have any corresponding timeline. If you were to look to the new rules, it actually has a new structure akin to a Rule 166a(c) motion, again, without any restriction on supplementation.

Moreover, the statute is dynamic in that (while it has a hard deadline for filing the initial motion) it has flexibility on the hearing, creating a potential 210 day structure from service of the lawsuit to ruling (not counting a preliminary "good cause" extension under 27.003(b)). *See* Agreed Order in this case, dated June 18, 2019. That structure allows for discovery which in turn allows for arguments/defenses to get developed, which by their nature includes supplementation.

EXHIBIT A



Having read quite a few TCPA cases I am not aware of any case law that says supplementation, in particular 30 days before the hearing is improper. Are you aware of any statutory authority or case law that prevents supplementation?

It seems to me that the structure of the TCPA allows for a Motion and discovery, which would obviously then require supplementation of the results of the discovery. *See* TCPA 27.006(a-b). There is no mention of "briefing" deadlines in the statute, and the reference to pleadings and affidavits also does not have any corresponding timeline. If you were to look to the new rules, it actually has a new structure akin to a Rule 166a(c) motion, again, without any restriction on supplementation.

Certainly, there is no basis for Plaintiff to claim "ambush" given you have exactly 30 days from today to research and respond to the TCPA Motions. More than you would get under Rule 166a and under the new revisions to the TCPA.

While it seems that your argument is one that you should advance in your briefing (see Rule 11 Agreement dated Aug 6, 2019), if you feel the need to file a Motion, Monica Rial and Ron Toye are opposed.

Alternatively, I am guessing the Defendants are willing to agree to a drop-dead date for final supplementation.

Ms. Rial and Mr. Toye would agree to twenty-one (21) days prior to Sept. 6, 2019.

Conversely, are you opposed to Ms. Rial and Mr. Toye's Motion for Leave to Supplement pursuant to TCPA 27.003(b)?

If you have a basis to oppose such leave, please advise.

Unfortunately, if you want to proceed without letting me first review your motion (which I assume you have already drafted), I am not available for telephonic hearings this week. I am available next week and would prefer an in person hearing before the Court on our dueling motions.

Sean Lemoine

EXHIBIT A

Partner | Wick Phillips
Direct: 214.740.4053
Email: sean.lemoine@wickphillips.com

From: Ty Beard <ty@beardandharris.com>
Sent: Wednesday, August 07, 2019 12:27 PM
To: Sean Lemoine <slemoine@WickPhillips.com>; Carey Christie <carey@beardandharris.com>; Jim Bullock <jim@beardandharris.com>
Cc: Casey Erick <CErick@kesslercollins.com>; Andrea Perez <APerez@kesslercollins.com>; Christian Orozco <corozco@lynnllp.com>; Ethan Minshull <ethan.minshull@wickphillips.com>; sam@johnsonsparks.com; John Volney <jvolney@lynnllp.com>
Subject: RE: Case No. 141-307474-19 8/1/19 Motion to Strike Supplemental Filings

Counsel –

I intend to set a face to face hearing – not a telephonic hearing - at the court's earliest convenience. The statute is clear – the TCPA deadline to file has passed. We do not agree to bypass the clear language of the statute.

Also, allowing "supplementation" after the filing deadline would make a mockery of the filing deadline. We're confident that the court will agree with us on this point.

Before I can tell you whether we're opposed to a motion for leave to supplement, please tell me what good cause you allege exists for the court to grant such extraordinary relief.

--Ty

From: Sean Lemoine <slemoine@WickPhillips.com>
Sent: Wednesday, August 7, 2019 12:39 PM
To: Ty Beard <ty@beardandharris.com>; Carey Christie <carey@beardandharris.com>; Jim Bullock <jim@beardandharris.com>
Cc: Casey Erick <CErick@kesslercollins.com>; Andrea Perez <APerez@kesslercollins.com>; Christian Orozco <corozco@lynnllp.com>; Ethan Minshull <ethan.minshull@wickphillips.com>; sam@johnsonsparks.com; John Volney <jvolney@lynnllp.com>; Sean Lemoine <slemoine@WickPhillips.com>
Subject: RE: Case No. 141-307474-19 8/1/19 Motion to Strike Supplemental Filings

Ty,

I need to see your Motion to Strike Supplemental Filing ("MTSF").

I assume it will point out the case law and statutory provisions you are relying on. I tried to be thoughtful below, and expected some reciprocation. This is, for the record, the third time you have

raised an issue ((1) quashing the shock jock's deposition and the (2)continuance/sanctions/strike), and I have responded substantively.

I hope your plan isn't simply too got to the Court without letting me see the MTSF.

All I am asking is a few hours to review the MTSF.

It may turn out that I determine that the MTSF is well founded, I'll disclose my basis for good leave and file my motion, bypassing your need to file the MTSF.

And my apologies for the duplicative paragraph below.

Sean Lemoine
Partner | Wick Phillips
Direct: 214.740.4053
Email: sean.lemoine@wickphillips.com

From: Ty Beard <ty@beardandharris.com>
Sent: Wednesday, August 07, 2019 12:40 PM
To: Sean Lemoine <slemoine@WickPhillips.com>; Carey Christie <carey@beardandharris.com>; Jim Bullock <jim@beardandharris.com>
Cc: Casey Erick <CErick@kesslercollins.com>; Andrea Perez <APerez@kesslercollins.com>; Christian Orozco <corozco@lynnllp.com>; Ethan Minshull <ethan.minshull@wickphillips.com>; sam@johnsonsparks.com; John Volney <jvolney@lynnllp.com>
Subject: RE: Case No. 141-307474-19 8/1/19 Motion to Strike Supplemental Filings

You can read our motion when we filed it.

--Ty

From: Sean Lemoine
Sent: Wednesday, August 07, 2019 12:47 PM
To: Ty Beard <ty@beardandharris.com>; Carey Christie <carey@beardandharris.com>; Jim Bullock <jim@beardandharris.com>
Cc: Casey Erick <CErick@kesslercollins.com>; Andrea Perez <APerez@kesslercollins.com>; Christian Orozco <corozco@lynnllp.com>; Ethan Minshull <ethan.minshull@wickphillips.com>; sam@johnsonsparks.com; John Volney <jvolney@lynnllp.com>; Sean Lemoine <slemoine@WickPhillips.com>
Subject: RE: Case No. 141-307474-19 8/1/19 Motion to Strike Supplemental Filings

To quote the great war gamer Sun Tzu,

"Noted."

EXHIBIT A

Sean Lemoine
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