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TARRANT COUNTY
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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**

REPLY IN SUPPORT OF MONICA RIAL AND RONALD TOYE'S MOTION TO DISMISS

Pursuant to Texas Civil Practice and Remedies Code §§ 27.001, *et seq*. (the "TCPA"), Defendants Monica Rial and Ronald Toye ("Moving Defendants") hereby file this Reply in Support of their Motion to Dismiss Pursuant to the Texas Citizens Participation Act ("Rial/Toye MTD"), Supplemented on July 30, 2019 (Rial/Toye Supplement). In support thereof, Moving Defendants state as follows:

I.
ARGUMENT AND AUTHORITIES[1]

A. The Court Cannot Trust Plaintiff's Citation to Evidence and Has No Obligation to Search Over a Thousand Pages to Find Evidence.[2]

(1) By the second page of the Response, Plaintiff makes his first misleading statement, unsupported by the evidence:

> "Rumors of Vic "being an asshole," "using fans," and "being a pedophile" were begun by Funimation's "de facto manager" Chris Sabat, Monica, and Jamie in the early 2000's long before any posts or tweets cited by Defendants were made."[3]

(2) Calling someone an asshole or accusing him of using fans is not defamatory, nor would it support any element of Plaintiff's claims. But implying that Ms. Rial and Ms. Marchi accused Plaintiff of pedophilia undoubtedly would. Yet that implication is unsupported by the 1083 pages of "evidence" thrown at the Court, much less Plaintiff's specific citations on this point.[4] It also conflicts with the deposition testimony he submitted.[5]

(3) Moving Defendants cannot, nor should they have to, point out each misrepresentation of Plaintiff's evidence to the Court. Nor should the Court or Moving Defendants play "go fetch" and search through hundreds of pages of deposition testimony or

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[1] Moving Defendants also incorporate any replies filed by co-Defendants Funimation Productions, LLC ("Funimation") and Jamie Marchi ("Ms. Marchi"). Defendants' Omnibus Objections to Plaintiff's TCPA Evidence ("Defendants' Objections") is incorporated as if fully herein.

[2] As the Court is now aware, Plaintiff has filed a Second Amended Petition. Given the late hour and the voluminous amount of time spent assuming the First Amended Petition and Response were the relevant filings in play, some of these objections may no longer apply. "Petition" will refer to the First Amended Petition. The Moving Defendants apologize to the Court in advance.

[3] *See* Response, at p. 2 and fn7.

[4] *See id.* None of the ten paragraphs referenced in fn.7 even use pedophile and Ms. Marchi or Ms. Rial's name.

[5] *See* Response, at Mignoga Depo., 206:9-11 ("Q. Have any of the Defendants, to your knowledge, ever accused you of being a pedophile? A. Not to my knowledge.").

exhibits with no pinpoint cites.[6] *See Shelton v. Sargent*, 144 S.W.3d 113, (Tex.App.—Fort Worth 2004, pet. denied) (trial court has no obligation to search its file to support a litigant's arguments).

(4) A second, and more poignant example from the Response combines Plaintiff's misrepresentation of the evidence and deficiency in proper citation:

> Later, in her deposition and her motion to dismiss, Monica expanded on her forced kiss story claiming Vic invited her to his hotel room, threw her on his bed and forcibly kissed her, and that Stan Dahlin witnessed her leaving Vic's hotel room.56[7]
>
> Both Vic and Mr. Dahlin expressly deny Monica's allegations.57
>
> 56 Monica & Ronald's Motion at ¶20; Monica's Deposition at 31:1-8.
> 57 Vic's Affidavit at __; Exhibit __, Affidavit of Stan Dahlin.

(5) The highlighted section is a blatant misrepresentation of what Mr. Dahlin stated under oath. In truth, his factual statement is that he **has no memory** of any event concerning Plaintiff and Ms. Rial in 2007, yet he gratuitously speculates as to his belief that **he would remember** such an event, without laying any factual predicate to support that belief.[8]

[6] *See* Response, at fns 10, 25-27, 29-31, 33-36, 41-44, just to identify a few. All Defendants have moved the Court to strike these fns. *See* Defendants' Objections at §1(C).

[7] Ms. Rial's clear description of the incident is included in the evidence to the Response. *See* Response, Deposition of Monica Rial, at pp. 27:17-28:3; 28:16-32:14; (explaining Funimation investigation and Plaintiff's assault that she disclosed to Sony investigators); 61:4-62:9 (additional description of the assault); 74:19-75:16 (Ms. Rial came forward b/c of the twins); Rial Depo. at pp. 74:19-75:16 (came forward to corroborate other womens' similar stories).

[8] *See* Response at PDF page 89, Affidavit of Stan Dahlin, ¶¶ 5-6 ("(5) **I have no memory of the events** described in bullet point 4 of the Response. (6) If l had noticed Monica Rial being distressed leaving Victor Mignogna's room, I am certain that I would remember it.") (emphasis added); *see also* Defendants' Objections, at 1(E) to this testimony. Mr Dahlin lays no factual predicate for his memory or why he would remember the incident.

(6) In contrast, Plaintiff's affidavit[9] (presumably ¶ 36), generically denies improper actions towards Ms. Rial,[10] which conflicts with his prior deposition testimony that he has no memory of this interaction:[11]

> Q. Did you do anything? Did you kiss, make out with, or have any type of sexual interaction with Ms. Rial at any point in time?
>
> A. If -- if -- I understand correctly, this -- this is from 11 years ago and I -- I don't -- I don't have any specific recollection. But what I can tell you is that I have had hundreds of interactions with Monica over the years since, and no indication whatsoever that I ever did anything that upset or offended her.[12]
> . . .
>
> As we sit here right now before reading the response, do you have any recollection of any type of interaction in your hotel room with Ms. Rial where you kissed her?
>
> A. No, sir.[13]
>
> . . .
>
> Q. Let me start over at the bullet point. Plaintiff continued in this fashion for several minutes, despite Defendant's fear and shock, until Ms. Dahlin knock -- Mr. Dahlin knocked on the Plaintiff's hotel door. Plaintiff left Defendant on the bed and hurriedly answered the door. Mr. Dahlin inquired whether the Defendant was okay, clearly noticing the stress. Defendant, however, was too shocked and afraid to admit what had occurred. You dispute that, right?
>
> A. I don't recall that at all.[14]

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[9] This morning Plaintiff withdrew his affidavit after the undersigned requested Plaintiff's counsel, Ty Beard, to explain whether Plaintiff, Chuck Huber, and Chris Slatosch, actually signed those affidavits before the notary (the "Fraudulent Affidavits"). The notary was Mr. Beard. Nearly identical declarations to the Fraudulent Affidavits were submitted by each of the individuals around 10:20 p.m., on September 2, 2013. For consistency, the Moving Defendants are only going to refer to the "Aff," but the arguments apply with the same force an effect to the new declarations that are attached to the Second Amended Petition.

[10] *See* Response, PDF at page 94, Affidavit of Vic Mignogna, ¶ 8 ("I have never attempted to sexually assault, sexually harass, touch inappropriately, or have any nonconsensual contact with Monica Rial or Jamie Marchi.").

[11] This is an impermissible attempt to create a factual dispute through a "sham affidavit." *See* Defendants' Objections, §I(D) citing *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 87, 90 (Tex. 2018).

[12] *See* Response, Deposition of Vic Mignogna, 207:7-15.

[13] *See* Response, Mignogna Depo, 210:1-5.

[14] *See* Response, Mignogna Depo., 211:14-24.

(7) Any reader, taking Plaintiff's factual assertion in the Response at face value, would assume that Mr. Dahlin and Plaintiff both "expressly denied" Ms. Rial's allegations, not that they have no recollection of Ms. Rial being in Plaintiff's hotel room in 2007.

(8) Plaintiff's evidentiary citation style (and lack thereof) has over complicated this dispute, prejudiced Moving Defendants' ability to properly respond, and is legally and professionally improper.[15]

B. The TCPA Applies and Plaintiff is a Public Figure.

(9) If an alleged sexual predator that makes his living surrounded by children and young women can sue his accusers for defamation and succeed on an argument that his behavior is not a matter of public concern the TCPA serves no purpose. The gravamen of Plaintiff's claims is he is a popular and successful voice actor figure who interacts with his fans and the public at large to make a living.[16] *Backes v. Misko* is on point as it included allegations about child safety, was publicly discussed on a public internet forums, and undermines Plaintiff's disingenuous queries as to how large the Japanese "anime community" is:

> By stating her strong suspicion that someone suffered from MBPS, Johns indicated a child was suffering abuse from a parent. **Thus, Johns's statement not only involved a matter of someone's health, but also a child's safety**. Because Johns's statement related to health or safety, it fell within the statutory definition of "matter of public concern." . . . *see also Nguyen v. Dallas Morning News, L.P.*, No. 2–06–298–CV, 2008 WL 2511183, at *5 (Tex.App.–Fort Worth June 19, 2008, no pet.) (mem.op.) ("**Protection of children from abuse is of the upmost importance in Texas.**") . . .
>
> Here, unlike *Pickens* and *Whisenhunt*, the Post was not on someone's personal blog or contained in private emails between individuals, **but rather written in a public internet forum frequently visited by others. The Post invited responses and in**

[15] The prejudice is now compounded as on the eve of the hearing the Second Amended Petition corrects the grotesque briefing errors in the Response.

[16] *See* Petition, ¶¶ 10, 13-15, 20, 22-27, 30; Response at PDF page 95, Mignogna Affidavit, ¶¶ 16-18; Rial/Toye MTD, §II at ¶¶ 14-34 (numerous affidavits detailing his improper activities at conventions); Response at PDF page 55 (Huber Affidavit, ¶ 77.

> **fact**, garnered both positive and negative replies. **It received 1255 views and one hundred twenty-six responses, seventeen of which are in the record**. Thus, unlike *Pickens* and *Miranda,* the record contains evidence that people besides Johns, Backes, and Misko engaged in discussions about the Post.

Backes v. Misko, 486 S.W.3d 7, 20 (Tex. App.—Dallas 2015, pet. denied); *see also Bilbrey v. Williams*, No. 02-13-00332- CV, 2015 WL 1120921, at *9 (Tex. App.–Fort Worth Mar. 12, 2015, no pet.).[17] To the extent Plaintiff thinks the TCPA is strictly limited to constitutional construction of "matters of public concern," the Texas Supreme Court rejected this limitation in *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018).[18]

(10) Plaintiff makes an additional legal error when he incorrectly asserts that in Step 1 of the TCPA the trial court "presumes the truth of Vic's assertions." *See* Response, p. 12. This is a misstatement of the law and based on a footnote in *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440 (Tex. 2017) taken out of context. *See Rosenthal*, at 440 n.9:

> D Magazine disputes this assertion, but at this stage of the proceedings we assume its truth.

(11) This "stage of the proceedings" is a reference to appellate court review, not Step 1 of the TCPA which occurs in the trial court. If *Rosenthal* changed the analysis then the Fort Worth Court of Appeals missed the memo for the last two (2) years. *See Weber v. Fernandez,* 02-18-00275-CV, 2019 WL 1395796, at *4 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.):

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[17] ("We agree that Williams's suit is based on statements Bilbrey made on a matter involving the well-being and safety of children in the community, that the statements were therefore on matters of public concern, and that the suit therefore is based on and arises out of the right of free speech as defined by the TCPA.[27] Bilbrey and Hall produced evidence suggesting that Williams has a history of losing his temper and acting aggressively at TCRBA games, including toward the teenage children who umpire the games. It was in that context that Bilbrey made the disputed statements to Hall.").

[18] ("It does not follow from the fact that the TCPA professes to safeguard the exercise of certain First Amendment rights that it should *only* apply to constitutionally guaranteed activities. . . . Whether that definition maps perfectly onto the external constitutional rights it aims to protect is irrelevant; we are bound by the statutory definition for the purposes of the TCPA.").

> The Supreme Court of Texas holds that because the basis of a legal action is determined by the plaintiff's allegations, "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant[s] need show no more" to satisfy the first step of the TCPA analysis and bring themselves within the TCPA's protections. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

No appellate court in the State of Texas has adopted this argument which may explain why Plaintiff cites no other case for this proposition, because it is legally incorrect.

(12) The same evidence and pleadings that confirm this is a matter of public concern also support a legal finding that Plaintiff is a public figure/limited public figure.[19] Plaintiff flees from his public status –a status he would otherwise bask in if the news was positive– with arguments that (a) he is not as popular as George Clooney or Tom Hanks; (b) has less Twitter followers than "Doug the Pug;" (c) implying that he artificially inflated his Twitter following with fake followers (so the Court should discount that number); and (d) that Wikipedia is unreliable. *See* Response, p. 16.

(13) The Fort Worth Court of Appeals shut down a similar line of attack in *Lane v. Phares*, 544 S.W.3d 881, 889 (Tex.App.–Fort Worth 2018, no pet. h.) where an opera singer and college voice professor similarly attempted to run away from her public figure status because of fear of the "actual malice" standard in defamation cases.[20] Focusing on the plaintiff's website, self-promotion, articles written about her, and her invitation of public attention, the Court of Appeals held she was a public figure.[21] The same set of facts exist here, including a self-promoting

[19] *See* Petition, ¶¶ 10, 13-15, 20, 22-27, 30; Response at PDF page 95, Mignogna Affidavit, ¶¶ 16-18; Rial/Toye MTD, ¶¶ 2, 10-34 (numerous affidavits detailing his improper activities at conventions); Response at PDF page 55, Huber Affidavit, ¶ 77.

[20] Apparently, the fact that Jennifer Lane was not as well-known as George Clooney or Tom Hanks did not prevent the Fort Worth Court of Appeals from reaching this conclusion.

[21] ("'The record conclusively shows that, as the trial court found, "Lane has chosen a career that regularly involves media attention and has invited public attention.' There is no question that Lane, in her career, has 'invite[d] attention and comment.' *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009 (stating that public figures "invite attention and comment'). Certainly, students outside of UNT knew of Lane as a voice teacher. Indeed, Lane's own affidavit asserts that she has a reputation as an exceptional singer, was nominated for a Grammy award, and was a member of an ensemble that

website, self-promoting statements in the Petition, and self-promoting statements in his deposition bar him from avoiding public figure status.[22] *See id.* at 889-890.

(14) Plaintiff's attack on his limited public figure status (that he is an involuntary participant) is contradictory as he first claims he did not seek out any media but then reverses himself to argue his public declaration of innocence proves the Moving Defendants acted with malice. *Compare* Response at p. 17 ("he did not seek out the news media") *with* p. 24 ("Vic publicly denied their allegations . . .").[23]

(15) But there is no dispute that he intervened publicly on five (5) separate occasions: (a) pre-apology chat with his fan group to stir them up to defend him, (b) two (2) public apologies (January 20, 2019 February 13, 2019)[24] to his 113,000 Twitter followers;[25] (c) his public support for the GoFundMe war chest;[26] and (5) providing commentary for at least one magazine during the controversy. While everyone has social media, not everyone has an electronic bullhorn that

won a Grammy.". . . 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.").

[22] *See* Petition, ¶¶ 10, 13-15, 20, 22-27, 30; Response at PDF page 95, Mignogna Affidavit, ¶¶ 16-18; Rial/Toye MTD, ¶¶ 2, 10-34 (numerous affidavits detailing his improper activities at conventions); Response at PDF page 55, Huber Affidavit, ¶ 77.

[23] Neither case cited on this point assists Plaintiff. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 573 (Tex. 1998) involved a reporter who became a limited purpose public figure because he involved himself in a news story about the Branch Davidian compound, after the controversy had erupted. *See id*. at 573-574. *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013) is the opposite of Plaintiff because that plaintiff refused to talk to the reporter about the broadcast, and therefore could not involuntarily become a limited purpose public figure. *See* Rial/Toye MTD, ¶¶ 31-34, 43-45,

[24] Plaintiff **<u>again</u>** fails to address the fraudulent nature of this apology as of the four (4) women involved in the Funimation allegation, Ms. Rial is the only person he tried to contact. *See* Response, Mignogna Depo. at p. 206, and Ex. 16. If he were truly desirous of apologizing or atoning for what those three women did not believe was consensual contact he failed to explain that stance in his affidavit.

[25] Plaintiff sidesteps having 113,000 Twitter followers as "like virtually every other human being in the developed world) has access to social media . . .". Response, at p.18.

[26] *See* Response, Plaintiff Depo., 183:13-21.

can spread like lighting to the point a "shock-jock" in Minnesota picks it up and becomes his online proxy to wage war on all the Defendants.[27]

(16) Plaintiff injected himself into this controversy, directly into the anime community, and is a limited public purpose figure. *See* M*ohamed v. Ctr. for Sec. Policy*, 554 S.W.3d 767, 775 (Tex. App.—Dallas 2018, pet. denied). Finally, there is simply no dispute this debate has been toxic for the anime community and a resolution would resolve such animosity.[28]

C. Plaintiff Failed to Answer Two Defenses.

(17) Plaintiff failed to respond to the affirmative defenses of consent/invitation which is a complete bar to the defamation claim and the application of the Communications Decency Act, which is a complete bar to the alleged retweets identified in the Petition.[29] *See* Rial/Toye Supplement, at II(A-B). The Court should dismiss the defamation claim in its entirety.

D. Plaintiff Failed to Meet the Elements of the Two Tortious Interference Claims.

(18) With regard to the tortious interference with contract and tortious interference with prospective business relationships claims, the only contract attached to the Response is the "Kamahea Con" contract which Plaintiff has judicially admitted was not breached.[30] Nor is there any evidence of damages related thereto.

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[27] *See* Rial/Toye MTD at ¶ 45-47.

[28] *See* Rial/Toye MTD at ¶ 47; Rial/Toye Supplement at Ex. V, ¶ 3 (toxic environment caused by the dispute); Ex. W, ¶¶ 7-8 (Plaintiff's fanbase had become hostile). The amount of damage the "shock jock" has done to Plaintiff's reputation along with creating division within the anime community is nothing shorty of amazing.

[29] *See Smith v. Holley*, 827 S.W.2d 433, 436 (Tex. App.-San Antonio. 1992, writ denied) ("[w]hen a plaintiff has consented to a publication, the defendant is absolutely privileged to make it, even if it proves to be defamatory."); *Barrett v. Rosenthal*, 40 Cal.4th 33, 51 Cal.Rptr.3d 55, 146 P.3d 510, 513 (Cal.2006) (holding that CDA immunity extended to individuals who republish via the Internet defamatory statements originally made by others in email and internet postings); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App.—Beaumont 2014, pet. denied) ("plaintiffs cannot circumvent the [CDA] by couching their claims as state law intentional torts.").

[30] ("(24) On February 1, 2019, Ronald tweeted he personally knew that Vic was "guilty of at least 4 accounts"; that day, the Kamehacon Dallas convention cancelled Vic's appearance (however, on March 24, 2019, Vic was re-invited to the Kamehacon Dallas convention)."); *accord* Second Amended Petition, ¶ 24.

(19) Moreover, there are no attached contracts or anticipated contracts to support either of these claims, and most importantly, there is no admissible evidence of causation. *See Van Der Linden v. Khan*, 535 S.W.3d 179, 195 (Tex. App.—Fort Worth 2017, pet. denied).[31] Plaintiff will argue that the speculative and hearsay statements of Chuck Huber and Plaintiff support causation, but the Fort Worth Court of Appeals has rejected that stratagem. *See id*. at 193; *see also* Defendants' Objections, at §1(D) (¶¶16, 19 of Mignogna Dec.), §1(E) (¶ 64 of Huber Dec.).

E. Plaintiff's Failure to Provide the Complete Context of the Defamatory Publications Requires Dismissal of Almost All of the Defamation Claims.

(20) Because libel is written a court can examine the publication and determine as a matter of law whether the statement is merely an opinion or actionable defamation, provided the full statement and context in which it is made are introduced:

> In defamation claims, context matters.[48] **We cannot say as a matter of law that the word "abusive" is defamatory per se without knowing the context of the statement. Williams, however, provided none to the trial court**. In neither Williams's petition nor his affidavit did he make clear what the conversation he had with Hall encompassed.[49] We expressly do not hold that statements to the effect that a person is abusive can never be defamatory per se. **But without providing the context of the statements, there was no basis in this case for the trial court to conclude that the statements were defamatory per se**.

Bilbrey v. Williams, 02-13-00332-CV, 2015 WL 1120921, at *12 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (emphasis added); *Jackson v. NAACP Houston Branch*, 14-15-00507-CV, 2016 WL 4922453, at *12 (Tex. App.—Houston [14th Dist.] Sept. 15, 2016, pet. denied). In the context of a "twitter war" this is particularly true because the nature of the discussion gives context to the

[31]("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."). It is shocking that Plaintiff relied on *Van Der Linden* (incorrectly albeit) to support his defamation claims but did not follow its holding with regard to the tortious interference claims. This may be a result that his hearsay assertions about the basis for convention terminations are perjurious. *See* Response, Mignogna Depo. at pp. 110, 141, 157, 172-173, 206.

debate and meaning of the tweet – which is not viewed in isolation. *See Feld v. Conway*, 16 F. Supp. 3d 1, 3–4 (D. Mass. 2014).[32]

(21) Plaintiff's decision not to include the context around the Moving Defendants' tweets is fatal to his defamation claim because such context is required to determine whether the statement if fact or opinion. *See Bilbrey*, 2015 WL 1120921, at *12; *Mogged v. Lindamood*, Ca. No. 02-18-00126-CV, 2018 WL 6920502, at * 5 (Tex. App. – Ft. Worth Dec. 31, 2018) (currently withdrawn for *en banc* hearing solely on an attorneys' fees issue). In the context of the TCPA, Plaintiff cannot establish the who, what, when, where, and why because the context of the defamation is missing. *See Mogged*, 2018 WL 6920502*id* at * 2.

(22) Paragraph 31 from the Petition proves this point:

(31) Later that day, Monica declared that Vic is "the legal definition of harassment." (*Figure 4*).

(23) It is not obvious to what Ms. Rial is responding to, nor is it clear who "he" is that is referenced. What is also not obvious, because of the complete absence of context, is that Ms.

[32] ("**To determine whether or not a statement is opinion or hyperbole, 'a court must examine the statement in its totality and in the context in which it was uttered or published. The court must [also] consider all the words used ... [and] all of the circumstances surrounding the statement.**' *Yohe*, 321 F.3d at 41 (internal quotations *4 omitted). For example, the Supreme Court has repeatedly extended First Amendment protection to statements that, in context, do not reasonably state or imply defamatory falsehoods. . . . Plaintiff contends that defendant's allegedly defamatory tweet, standing alone, is 'an unexplained indictment of Mara Feld's sanity.' (Pl. Mem. at 2). The complaint, however, alleges that defendant posted her tweet as part of an 'ongoing online discussion and debate concerning the disappearance of Munition.' (Compl. ¶ 5). **The tweet cannot be read in isolation, but in the context of the entire discussion**. **In this case, the tweet was made as part of a heated Internet debate about plaintiff's responsibility for the disappearance of her horse. Furthermore, it cannot be read literally without regard to the way in which a reasonable person would interpret it.**") (citation omitted).") (emphasis added).

Rial testified that the "he's" was a typo and what she intended was "here's" because she was fighting with Twitter trolls.[33]

(24) Paragraphs 15-17, 19-20, 23-26, 28-36, Exhibits 28, 30-32, and 34 cannot, as a matter of law, support defamation in this case.[34]

F. Plaintiff Does Not Understand How "Actual Malice" Works for Defamation.

(25) Plaintiff mistakenly believes that merely denying allegations against him magically puts Ms. Rial and Mr. Toye on notice that (a) what Ms. Rial experienced, or (b) what Ms. Rial and the two sisters told Mr. Toye ,is somehow false. *See* Response at p. 26.[35] First, Plaintiff fails to explain what communications **he made** to both Ms. Rial or Mr. Toye about (a) his assault on Ms. Rial; (b) the twins; or (c) the third woman that were part of the Funimation investigation. It cannot be either of the apology letters (January 20 or February 13, 2019) because neither of those letters identify such women or could put anyone on notice that Plaintiff's version of the truth is unassailable. Second, even if he had communicated a denial to the Moving Defendants, Plaintiff is incorrect that his convenient denial of an allegation establishes actual malice:

> . . . "[t]he mere fact that a defamation defendant knows that a public figure has denied harmful allegations or offered an alternative explanation of events is not evidence that the defendant doubted the allegations."

[33] *See* Response, Rial Depo., 49:9-50:14.

[34] As described in the Defendants' Objections, numerous times Mr. Toye pointed out he could not answer the question because for reasons unknown, Plaintiff's counsel chose to just chop up Tweets and failed to provide the context to the discussion. *See* Plaintiff's Response, Toye Depo. at p. 37 (Ex. 28 is a binder introduced by Plaintiff's counsel); p. 113 ("Q. And it was our [Plaintiff's counsel] intention to produce these in chronological order, and I'm sure some of them probably aren't. But, generally speaking, my question is, after April 4th, 2019, did you tweet about Vic Mignogna?); p. 55 (context missing); p. 79 (context missing); p. 105 (can't confirm tweets because Mr. Toye didn't collect them); p. 110 (95 people commenting on a particular tweet); p. 125 (context missing); pp. 144-45 (explaining how twitter works and replies are to multiple different people); p. 147 (context missing); p. 156 (context missing); p. 176 (context missing); p. 182-183 (tweets are responses to people harassing him).

[35] ("Vic denied Monica's, Jamie's and Ron's claims. At this stage of the case, this is sufficient to establish that they knew their statements were false and, thus, the element of malice.").

Hearst Corp. v. Skeen, 159 S.W.3d 633, 639 (Tex. 2005) (citations omitted). Third, Plaintiff appears to deliberately confuse timelines, but the only relevant timeline is what the Moving Defendants believed when they made the statements, not what Plaintiff later claimed as the truth.[36] *See Rodriguez v. Gonzales*, 566 S.W.3d 844, 852 (Tex. App.—Houston [14th Dist.] 2018, pet. filed) (". . .that the defendant had serious doubts about the truth of the publication . . .").

(26) Plaintiff's reliance on *Van Der Linden* (cited above) is puzzling for several reasons, not to mention the case is devastating to his tortious interference claims. First, *Van Der Linden* is a private figure/negligence test, so the issue of "actual malice" is not at issue. *See Van Der Linden*, 535 S.W. 3d. at 201. Second, while *Van Der Linden* is a unique "he said/she said" scenario, it does not apply at all to Mr. Toye. Plaintiff does not cite to any evidence that he spoke to Mr. Toye about any of Mr. Toye's beliefs, much less prove Mr. Toye does not believe Plaintiff is in fact a predator.

(27) To the contrary, and in truly puzzling fashion, Plaintiff has introduced voluminous evidence that Mr. Toye personally spoke to four (4) women that accused Plaintiff of assault.[37] Plaintiff went on to include multiple examples of the research that Mr. Toye did in reading online accounts of Plaintiff's misbehavior, which, when combined with the personal recitations of assault

[36] *See* Response, at p. 25 ("Vic publicly denied their allegations, implicitly denied Monica's allegations in his email to her, and has denied them in his deposition and his affidavit; since only they and Vic know the truth of their allegations of assault, Vic's denials are sufficient to establish the falsity of her statement (moreover, Stan Dahl[sic] refuted Monica's description of events, which is further evidence of the falsity of her statement).").

[37] *See* Plaintiff's Response, Toye Depo.. at pp.58:1-7 (believes Plaintiff assaulted four women); 59:7:-22 (identifies four women he believes Plaintiff assaulted, Ms. Rial described assault to him); 60:6-18 (Ms. Rial told him of assault in January 2019); 61:23-63:10 (describes knowledge of the assault on the twins); 65:19-25 (multiple women tell him about assaults by Plaintiff); 71:8-72:6 (believes accounts to be true based on personal knowledge of women he knows and accounts online, and Plaintiff's own statements); 74:2-25 (describes assault of friend by Plaintiff that formerly worked at Funimation); 119:5-120:9 (another sexual assault by Plaintiff); 127:4-19 (believes Plaintiff's a predator based on four women he knows with experience and online information); 169:21-1702:21 (recounts assault of Ms. Rial again). Plaintiff attached the Toye Depo. to the Second Amended Petition, creating the perfect trap to prevent him from establishing "actual malice."

by Plaintiff, firmly convinced Mr. Toye of Plaintiff's status as a predator.[38] Plaintiff's evidentiary filings actually go the exact opposite direction and establish, if not the truth, at minimum the lack of actual malice. *See Mogged*, 2018 WL 6920502, at *10 (factual basis existed for defendant's belief plaintiff was a predator).

(28) Plaintiff find himself in a similar boat with regard to Ms. Rial. Again, Plaintiff introduced evidence that he did not recall and had no memory of Ms. Rial's allegations.[39] In contrast, Plaintiff introduced Ms. Rial's description of the assault, her participation in the Funimation investigation, and her desire to corroborate other womens' stories that were similar to her own.[40] Her belief was buttressed with her knowledge of other investigations into Plaintiff's behavior.[41] Again, Plaintiff's own evidence prevents him from establishing clear and specific evidence of actual malice.

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[38] *See* Plaintiff's Response, Toye Depo. at pp. 41:16-42:2; (aware of Funimation investigation; 58:1-7 (believes Plaintiff assaulted four women); 59:7:-22 (identifies four women he believes Plaintiff assaulted, Ms. Rial described assault to him); 60:6-18 (Ms. Rial told him of assault in January 2019); 61:23-63:10 (describes knowledge of the assault on the twins); 65:19-25 (multiple women tell him about assaults by Plaintiff); 71:8-72:6 (believes accounts to be true based on personal knowledge of women he knows and accounts online, and Plaintiff's own statements); 74:2-25 (describes assault of friend by Plaintiff that formerly worked at Funimation); 119:5-120:9 (another sexual assault by Plaintiff); 127:4-19 (believes Plaintiff's a predator based on four women he knows with experience and online information); 129:15-130:16 (hundreds of women online and watching videos confirms predator opinion); 169:21-1702:21 (recounts assault of Ms. Rial again); 187:13-188:11 (personally seen inappropriate hugging of fans); 190:8-191:4 (online research to confirm evidence); 191:21-192:11 (online testimony confirms creepy actions at conventions); 195:22-196:18 (relied on friends that told him of assault, girls at convention lines, online research, YouTube videos, Plaintiff's own statements); 198:24-199:21 (Ex. 25 is forum about Plaintiff's behavior).

[39] *See supra* ¶¶4-8 (discussing the misleading nature of Plaintiff's attempt to claim that he and Mr. Dahlin "expressly disavow" Ms. Rial's allegations of assault).

[40] *See* Plaintiff's Response, Rial Depo. at pp. 27:17-28:3; 28:16-32:14; (explaining Funimation investigation and Plaintiff's assault that she disclosed to Sony investigators); 61:4-62:9 (additional description of the assault); 74:19-75:16 (Ms. Rial came forward b/c of the twins); Rial Depo. at pp. 74:19-75:16 (came forward to corroborate other womens' similar stories).

[41] *See* Plaintiff's Response, Rial Depo. at pp. 27:17-28:3; 28:16-32:14; (explaining Funimation investigation and Plaintiff's assault that she disclosed to Sony investigators); 35:20-35:24 (multiple women interviewed as part of the Funimation investigation); 35:25-36:6; 37:22-38:8 (prior investigation into Plaintiff over a different woman); 36:10-37:7; 47:18-25 (multiple investigations over the years, including recently, Roosterteeth).

G. Specific Allegations as to Ms. Rial.

(29) Each of the allegations against Ms. Rial fail to rise to the level of defamation for one or more reasons, and each are addressed in turn.

Alleged Defamatory Statement No. 1[42]

> (15) On January 16, 2019, the day *Dragon Ball Super: Broly* released in the U.S., Monica "liked" and "retweeted" the Tweet of someone with the Twitter handle "hanleia" that accused Vic of being "a homophobic rude asshole who has been creepy to underage female fans for over ten years…."

Alleged Defamatory Statement No. 2

> (16) The next day, Monica liked and retweeted two Tweets by Kaylyn Saucedo (who posts under the user name "Marzgurl") that accused Vic of "great volumes of sexual misconduct," urged Funimation to "reconsider hiring Vic Mignogna as a voice actor in the future," and initiated the hashtag "#KickVic."[5]

Alleged Defamatory Statement No. 3

> (17) The repeated attention that Monica, Jamie, and other Funimation's agents, employees or business partners, gave hanleia's and Marzgurl's accusations caused their Tweets to "go viral."[6] About the same time, one or more Defendants began actively defaming Vic directly to anime conventions, speaking of investigations and Vic being fired.

(30) Statements Nos. 1 -3 are not defamatory because (a) the full context of the statement is not included, and therefore it cannot be determined if it is fact or opinion; (b) a retweet is barred as defamatory under the CDA; (c) the statement is hyperbolic opinion; (d) it is true or substantially true that Plaintiff has been creepy with underage fans for several years; and (e) there is no evidence that Ms. Rial's retweet meets the standard of malice for defamation (as discussed above).

[42] The paragraph number in the box is a reference to the Amended Petition. The Moving Defendants did not have time to correlate to the Second Amended Petition.

(31) With regard to the alleged statements concerning investigations and Plaintiff being fired, the statements fail because (a) they do not meet the specificity test, (b) are not defamatory; (c) are literally true as he was both investigated by Funimation and Roosterteeth and he was fired; and (d) there is no evidence Ms. Rial made such statements, much less with malice.

Alleged Defamatory Statement No. 4

> (18) Barely a week later, Tammi Denbow ("Denbow"), a Sony executive, informed Vic she was investigating three allegations of "sexual harassment" against him. One, Monica alleged to have occurred six years prior at a convention (not at any Funimation or Sony facility or event) when, after she wrote her name on a jelly bean and gave it to him, Vic ate the jelly bean and joked that he "ate Monica"; Vic denied any sexual suggestion (he was joking in response to a fan's asking if he could be poisoned by the ink). Monica also alleged inappropriate conduct between Vic and two fans (not Funimation or Sony employees) at a convention three years prior (again not at any Funimation or Sony facility or event); Vic emphatically denied any inappropriate conduct. The third allegation involved a single, consensual kiss between Vic and a Funimation employee who was Vic's friend.

(32) The jellybean comment is (a) not defamatory; (b) true and/or substantially true as Plaintiff made the statement regardless of his intent; (c) is protected by the qualified privilege of an investigation; and (d) there is no evidence of Ms. Rial's malice in making the statement.

(33) The inappropriate conduct comment between Plaintiff and two fans is not defamatory because (a) Ms. Rial never made the statement; (b) it is true or substantially true as Plaintiff attempted to have sex with two twins (at the same time) which they viewed as wholly inappropriate even if he viewed it as consensual; (c) the twins conveyed that information to Ms. Rial and Tammi Denbow, therefore Plaintiff cannot establish malice.

Alleged Defamatory Statement No. 5

> (19) Denbow's telling Vic that her investigation was "a confidential matter" did not stop Jamie, Monica, Ronald or other Funimation employees or business partners from urging anime conventions and other studios to terminate their contracts with Vic—telling some that Funimation was conducting an "investigation" into allegations that Vic was a "sexual predator" or that charges were being filed against Vic and he would soon be arrested—or tweeting details about the "investigation"; for example, Ronald would Tweet on February 2, 2019 that Vic "is a predator" based on his (Ronald's) "[i]nsider knowledge" about Sony's investigation.

(34) The alleged statements fail as to Ms. Rial because (a) they do not meet the specificity test; (b) there is no evidence Ms. Rial made such statements; (c) they are not defamatory for reasons identified above; (c) the full context of the tweets are not included, and therefore it cannot be determined if it is fact or opinion; (d) they are literally true as he was investigated by Funimation and Roosterteeth; (e) are substantially true because his behavior is indicative of a sexual predator; (f) and statements about future acts are merely statements of opinion[43], (g) there is no evidence Ms. Rial made such statements, at all, or with malice.

Alleged Defamatory Statement No. 6

> (28) On February 6, 2019, Ronald tweeted that over 100 women had made accusations "of assault," that the allegations against Vic were "corroborated," that "[there were] mountains of testimony," and that Funimation "have proof. That's why they fired him." Monica (Ronald's fiancé) also tweeted on February 6 that "IT HAPPENED TO ME!" and that "I'm only one voice on a sea of many … He's hurt enough people. He's a sick man and he needs help…." Later that day, Jamie attempted to rebuff those questioning the veracity of Monica's post on Twitter. (*Figure 2*).

(35) The alleged statements fail as to Ms. Rial because (a) they do not meet the specificity test; (b) there is no evidence Ms. Rial made such statements, (c) they are not defamatory for reasons identified above; (c) the full context of the tweets are not included, and therefore it cannot be determined if it is fact or opinion (d) are literally true as he was investigated by

[43] *Pillar Panama, S.A. v. DeLape*, CIV.A. H-07-1922, 2008 WL 1777237, at *2 (S.D. Tex. Apr. 16, 2008) ("Observations and guesses about another's intentions are not facts; a listener knows that the speaker is speculating, making reliance unreasonable. They are also statements about future potential, making them not facts but predictions."); *Harrington v. Hall County Bd. of Supervisors*, 4:15-CV-3052, 2016 WL 1274534, at *9 (D. Neb. Mar. 31, 2016) ("A prediction about a possible future event is an opinion, not a factual assertion; even if the predicted event does not come to pass, the prediction itself is not "false" when made."); *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn.Ct.App.2001) ("prediction of a future event" is "not a fact capable of verification" and therefore is not defamatory as a matter of law).

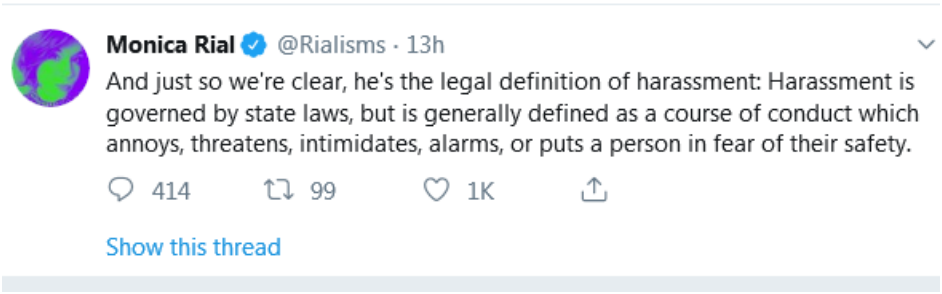
Funimation and Roosterteeth; (e) are substantially true because his behavior is indicative of a sexual predator; there is no evidence Ms. Rial made such statements with malice.

Alleged Defamatory Statement No. 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*).

Alleged Defamatory Statement No. 8

(31) Later that day, Monica declared that Vic is "the legal definition of harassment." (*Figure 4*).



(36) The alleged statements fail as to Ms. Rial because (a) they do not meet the specificity test; (b) the full context of the tweets are not included, and therefore it cannot be determined if it is fact or opinion (c) are literally true as he was investigated by Funimation and Roosterteeth; (c) the harassment tweet was a type (as discussed above) (e) are substantially true because his behavior is indicative of a sexual predator; (f) there is no evidence Ms. Rial made such statements with malice.

Alleged Defamatory Statement No. 9 and Exhibit 33

(33) On February 19, 2019, Monica tweeted a lengthy post in which she accused Vic of "sexual harassment," kissing her without her consent and treating others similarly at conventions; she claimed to have spoken with "investigators" to "corroborate" the "testimony" of others telling stories similar to hers and spoke of Funimation's "investigations" (*Figure 5*); she closed by referring to Vic as a "predator."

> The investigations were incredibly thorough. Each person was interviewed, the evidence weighed, and a decision made. Each company has to look out for the safety of their employees. In this instance, these companies felt they made the best decision to protect their employees and contract workers. Also, these companies aren't obligated to share any information with you. Many of the women who've come forward have chosen to remain anonymous, especially after seeing the way that I've been attacked. Please respect their privacy.

(37) The alleged statements fail as to Ms. Rial because (a) they are not defamatory for reasons identified above; (b) are literally true as he was investigated by Funimation and Roosterteeth, and others; (c) are true and/or substantially true because his behavior is indicative of a sexual predator; (d) is protected by the qualified privilege; and (e) there is no evidence Ms. Rial made such statements with malice.

H. Defamation Claims Against Mr. Toye.

(38) Addressing the defamation claims against Mr. Toye is highlighted by the absurdity of Exhibit 28, which consists of over 320 pages of tweets taken out of context. This absurdity is carried over into the Second Amended Petition. Neither Mr. Toye nor the Court is required to piecemeal together Plaintiff's counsel's intentions with these tweets. As a matter of law, they cannot support defamation. *See Bilbrey*, 2015 WL 1120921, at *12. The requirement to include the full context of a statement is not only common sense, that requirement is discussed every case that discusses libel. Finally, by attaching Mr. Toye's deposition to the Response and Second Amended Petition, his own evidence, and now pleading, establish a lack of "actual malice."

I. Alleged Slander by Chris Slatosch

(39) The statements alleged by Slatosch assert, in conclusory fashion and without providing any context to such statements, that Ms. Rial and Mr. Toye called Plaintiff a "sexual predator" and stated he would soon be arrested. The alleged statements fails as to both because (a) they fail to provide the context surrounding the actual statements other than the actual phrases;

(b) are true and/or substantially true because his behavior is indicative of a sexual predator; (c) any statement that Plaintiff would be arrested in the future is a non-actionable opinion; and (d) there is no evidence that either made such statement Rial made such statements with malice.

(40) Independently, Plaintiff did not plead a claim for slander and instead brought a libel claim based on tweets.[44] *See Kreighbaum v. Lester*, 05-06-01333-CV, 2007 WL 1829729, at *2 (Tex. App.—Dallas June 27, 2007, no pet.) ("If a party pleads generally and then goes further and pleads specifically on the same subject, the specific allegations control. The pleader cannot rely on the general allegations but is confined to the specific allegations. . . *See Edlund v. Bounds*, 842 S.W.2d 719, 731 n. 5 (Tex.App.-Dallas 1992, writ denied).

J. The Conspiracy claims fails.

(41) Conspiracy dies on the vine absent an underlying tort. *See Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 138 (Tex. App.—Texarkana 2000, no pet.).

K. Affirmative Defenses.[45]

(42) It is difficult to imagine that the best way to fend off a "libel proof" affirmative defense, based in part because the Plaintiff admits to being dogged for years with rumors of pedophilia, by having his friend confirm those rumors.[46] Moreover, to have him confirm his own belief, without using the words "sexual predator," he describes him as follows:

> I believe Vic utilized his position of privilege in shameful ways in attempts to obtain sex.[47]

[44] *See* Petition, ¶ 39 ("The Defendants have tweeted false, defamatory statements about Vic that were published and read by third parties. Indeed, many of the Defendants' tweets are defamatory *per se*. The Defendants knew these statements were false or made them with negligent disregard for their truthfulness."); *accord* Second Amended Petition, ¶ 59 (identical language).

[45] Moving Defendants will address other arguments in support of their affirmative defenses at the hearing.

[46] *See* Response, Huber Aff., ¶¶ 13, 50,

[47] *See* Response, Huber Aff., ¶ 77.

One thing is true, many people in the anime community agree with Mr. Huber. Shutting them up is why Plaintiff filed this suit.[48]

II.
CONCLUSION AND REQUEST FOR RELIEF

For these reasons, the Moving Defendants respectfully request the Court grant an Order as follows:

1) Dismissal of all of Plaintiff's claims against the Moving Defendants;

2) An award of reasonable attorneys' fees and costs in accordance with the TCPA;

3) A hearing in which Plaintiff is present for cross-examination for determination of an appropriate sanction; and

4) Such other and further relief to which the Moving Defendants may be justly entitled.

[48] *See* Response, Mignogna Depo., 89, 91-92.

Dated: September 3, 2019.

Respectfully submitted,

/s/ J. Sean Lemoine
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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 September 3, 2019.

/s/J. Sean Lemoine
J. Sean Lemoine