

CAUSE NO. 141-307474-19

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

**DEFENDANT FUNIMATION PRODUCTIONS, LLC'S RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION TO STRIKE OR, ALTERNATIVELY,
FUNIMATION'S MOTION FOR LEAVE TO SUPPLEMENT**

Defendant Funimation Productions, LLC responds to Plaintiff's Motion to Strike or Disregard Defendants' Late Filings, or, alternatively, moves to supplement the evidentiary record in support of its TCPA motion, as follows:

I. INTRODUCTION

The Court should deny Plaintiff's motion to strike Funimation's supplemental filings for several reasons. *First*, the TCPA does not prohibit Funimation from supplementing the evidentiary record in support of its TCPA motion; and Plaintiff has not cited a single case where a trial court has interpreted the TCPA to preclude a party from doing so. Accordingly, Funimation's supplemental filings were not "late," and there is no basis for the Court to strike or disregard them. *Second*, contrary to Plaintiff's restrictive reading of the statute, the Texas legislature mandated that the TCPA should be "construed liberally to effectuate its purpose and intent fully," which supports allowing Funimation to supplement its TCPA motion before the hearing. *Third*, Plaintiff has shown zero surprise or prejudice from Funimation's supplementation of the evidentiary record. In fact, the Court granted Plaintiff's a 29-day continuance of the hearing on Funimation's TCPA

motion, from August 8th until September 6th, because Plaintiff argued that he needed more time to respond to Funimation's supplemental evidence. For these reasons, and for the additional reasons set out below, the Court should deny Plaintiff's motion to strike. Alternatively, the Court should grant Funimation leave to supplement the record for its TCPA motion.

II. RELEVANT BACKGROUND

1. Plaintiff Vic Mignogna is a well-known voice actor and public figure who provided voice acting services to Defendant Funimation for several years. *See, generally*, Plaintiff's First Amended Petition ("Pet.") at ¶¶ 7-14. In late January 2019, after an investigation into allegations of misconduct by Mignogna made by several women, Funimation terminated its business relationship with him. Pet. at ¶ 21. On February 11, 2019, in response to the public outcry surrounding Mignogna, Funimation issued a short statement via Twitter regarding its decision to end its relationship with Mignogna. Pet. at ¶ 30. Mignogna then sued Funimation, claiming that Funimation's tweets were defamatory and claiming that Funimation was vicariously liable for social media statements made by two other voice actors, Monica Rial and Jamie Marchi, and by Monica Rial's fiancé Ron Toye.

2. Funimation timely filed its TCPA motion on July 1, 2019, and set its motion to be heard on August 8, 2019. Funimation's co-defendants filed their TCPA motions on July 19, 2019, and also set them for hearing on August 8.

3. Plaintiff filed evidentiary objections to Funimation's TCPA motion on July 24, 2019. *See* Plaintiff's Motion to Strike. In doing so, Plaintiff objected (among other grounds) that Funimation's Vice President of Operations Karen Mika was not competent to testify about her decision to terminate Mignogna and that Funimation's Senior Director of Public Relations Scott Barretto was not competent to testify about the media attention surrounding Mignogna and the intent behind Funimation's tweets about its decision to terminate Mignogna. *Id.* Plaintiff also objected

that Mika was not competent to testify about the business relationship between Funimation and its voice actors Rial and Marchi and that the best evidence of that relationship would be the underlying contracts between Funimation and those voice actors.

4. On July 29, 2019, Funimation supplemented its TCPA motion. Funimation's supplemental filing incorporated the evidence and arguments made by Defendants Monica Rial and Ron Toye. The supplement also incorporated Rial and Toye's evidence that Plaintiff is libel-proof and supplemented the record with excerpts from the depositions of Plaintiff, Rial and Toye. Finally, the supplement provided the Court the declaration of Defendant Jamie Marchi as further proof that she is not an employee or agent of Funimation and that Funimation does not control Marchi's social media accounts.

5. Because Funimation and two of its co-defendants supplemented the record, Plaintiff moved to continue the August 8th TCPA hearing until at least August 29th. The Court granted Plaintiff's request for additional time and continued the TCPA hearing until September 6, 2019.

6. The following week, on August 6, 2019, which was 31 days before the September 6th hearing on Funimation's TCPA motion, Funimation filed supplemental affidavits from its employees Karen Mika and Scott Barretto. These supplemental affidavits addressed the form objections contained in Plaintiff's motion to strike. For example, Ms. Mika attached copies of Funimation's agreements with Jamie Marchi and Monica Rial to address Plaintiff's best evidence objections; and Mr. Barretto confirmed that he drafted Funimation's February 11, 2019 tweets.

7. In response, Plaintiff filed a motion to strike or disregard Funimation's supplementation. For the reasons set out below, Plaintiff's motion should be denied.

III. ARGUMENT

A. The Court should deny Plaintiff's Motion to Strike.¹

Plaintiff's motion should be denied because it is not supported by the TCPA or by any of the hundreds of cases that have interpreted the TCPA since the statute was enacted. Indeed, Plaintiff has not cited a single TCPA case that supports his position, much less any provision of the TCPA that precludes a moving party from either (1) supplementing its TCPA motion before the hearing on that motion or from (2) filing supplemental affidavits in response to evidentiary objections.

In fact, in enacting the TCPA, the Legislature rejected restrictive interpretations of the statute by providing that the statute should be "liberally construed to effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem. Code § 27.011(b). Importantly, courts that have considered the procedures for motion practice under the TCPA have refused to engraft requirements on the parties that are not expressly set out in the TCPA. *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 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.").

Moreover, supplements and amendments to TCPA motions 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. Code § 27.002. If Plaintiff has a meritorious lawsuit, he should not fear amendments or supplements. Plaintiff should be focused

¹ On August 29, 2019, Defendants Monica Rial and Ron Toye filed their response to Plaintiff's Motion to Strike or Disregard Late Filings. Defendant Funimation incorporates the arguments made in Rial and Toye's response.

on gathering clear and specific evidence for each of the elements of his claims instead of quibbling about procedural and evidentiary matters.

Consistent with an interpretation of the TCPA that allows for supplementation of the evidentiary record, Sections 27.004(c) and 27.006(a)-(b) of the TCPA allow the parties to conduct discovery and to file supporting and opposing affidavits stating the facts on which the liability or defense is based. These provisions clearly anticipate that amendments or supplements to the record may occur as evidence supporting and opposing a TCPA motion is developed by the parties. These provisions do not preclude supplementation of a timely-filed TCPA motion, nor do they prevent a party from supplementing affidavits to address evidentiary objections. It is both illogical and counter to the liberal interpretation of the TCPA to provide an extension of the hearing date to Plaintiff so that Plaintiff can review and respond to Funimation's supplemental evidence but then bar Funimation from amending its motion or supplementing the relevant evidence several weeks before the hearing occurs. Accordingly, because Plaintiff's restrictive interpretation of the TCPA undermines key components of the TCPA, it should be rejected.

Finally, Plaintiff has not shown any surprise or prejudice from Funimation's supplementation of the evidentiary record. Plaintiff filed no affidavits or evidence showing surprise or prejudice; and Plaintiff did not seek any discovery from Funimation or from anyone else because of the supplementation. In fact, Funimation's supplementation included Plaintiff's own deposition and excerpts from two depositions that Plaintiff's counsel took, so there is no possible surprise or prejudice there. Funimation also supplemented the affidavits of its employees Karen Mika and Scott Barretto to address the form objections that Plaintiff filed in late July. Plaintiff invited this supplementation when Plaintiff objected to Funimation's affidavits, so there is no basis for Plaintiff to complain.

Finally, none of Funimation's supplementation of the record prejudiced Plaintiff because the Court granted Plaintiff a continuance of the hearing on Funimation's TCPA motion, from August 8th until September 6th, because Plaintiff argued that he needed more time to address that supplemental evidence.

B. Alternatively, the Court should grant Funimation leave to supplement the evidentiary record in support of its TCPA Motion.

As set out above, Funimation strongly contends that Plaintiff's motion to strike is without merit and should be denied. That said, in the alternative to denying Plaintiff's motion to strike in its entirety, the Court should grant leave to Funimation to supplement the record on its TCPA motion with the materials filed by Funimation on July 29, 2019 and August 6, 2019. There is good cause to do so because it allows Funimation to provide a complete evidentiary record to the Court on its TCPA motion, consistent with the intent and purpose of the TCPA. Funimation's supplementation incorporates evidence submitted and arguments made by Funimation's co-defendants – whose conduct Plaintiff is attempting to hold Funimation vicariously liable for – and provides the Court testimony from Mignogna, Rial and Toye, much of which is already in the Court's record. Further, allowing Funimation to supplement the affidavits of its employees to address evidentiary objections is consistent with standard practice in summary judgment proceedings, which allows for supplementation to address evidentiary objections such as those lodged by Plaintiff in this case. *See* Tex. R. Civ. P. 166a(f) (“The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. . . Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.”). Here, Funimation supplemented the affidavits of its employees thirty-one days before the hearing on its TCPA

motion. Funimation's supplementation of the record was not the result of conscious indifference or neglect, and it should be allowed for good cause shown.

IV. CONCLUSION

For these reasons, the Court should deny Plaintiff's motion to strike in its entirety. Alternatively, the Court should grant Funimation leave to supplement the record with the materials submitted by Funimation on July 29th and August 6th. While Plaintiff clearly hopes to escape the TCPA's broad reach by quibbling about evidentiary matters and by whining about procedure, it is now time for Plaintiff to come forward with clear and specific evidence for each of his claims against Funimation.

Dated: August 29, 2019

Respectfully Submitted,

/s/ John Volney

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of foregoing has been served upon counsel of record via the court's e-filing service on August 29, 2019.

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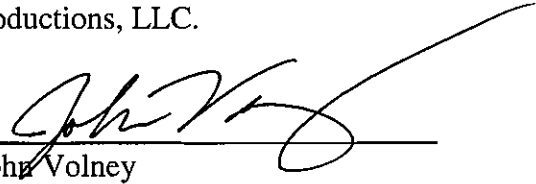
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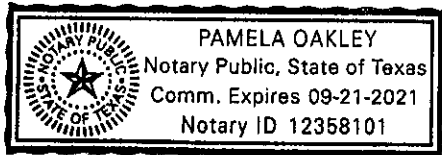
/s/ John Volney
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VERIFICATION

I, John Volney, swear under penalty of perjury that the factual statements in Section III(B) above are within my personal knowledge and are true and correct by virtue of my involvement in this case as lead counsel for Defendant Funimation Productions, LLC.


John Volney

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




NOTARY PUBLIC in and for the
State of Texas

My Commission Expires: 9/21/2021