

Cause No. 141-307474-19

VICTOR MIGNOGNA,

Plaintiff,

v.

**FUNIMATION PRODUCTIONS, LLC,
JAMIE MARCHI, MONICA RIAL, and
RONALD TOYE,**

Defendants.

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IN THE DISTRICT COURT

141ST JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

**DEFENDANT FUNIMATION’S BENCH BRIEF ON
TEXAS RULE OF CIVIL PROCEDURE 59**

Plaintiff’s Second Amended Petition includes several attachments that purport to provide evidence in support of Plaintiff’s TCPA Response, including unauthenticated timelines, tweets, emails, and social media messages as well as the declarations submitted by Plaintiff and his witnesses after it was pointed out that their affidavits were improperly notarized.

The Court should disregard or strike these attachments from the evidentiary record. Under Texas Rule of Civil Procedure 59, the exhibits that may be attached to a pleading are strictly limited:

Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such ***No other instrument of writing shall be made an exhibit in the pleading.***

Tex. R. Civ. P. 59 (emphasis added). An instrument made part of the pleadings must constitute at least part of the cause of action and not be merely “an item of evidence,” such as the mixed bag of items attached to Plaintiff’s Second Amended Petition. *Tex. Elec. Serv. Co. v. Commercial Standard Ins. Co.*, 592 S.W.2d 677, 684 (Tex. Civ. App.–Fort Worth 1979, writ ref’d n.r.e.); *see also HSBC Bank USA, N.A. v. Watson*, 377 S.W.3d 766, 775 (Tex. App.–Dallas 2012, pet. dismiss’d) (recognizing

deed of trust as part of the pleading under Rule 59). For example, deposition transcripts are “purely evidentiary” and, therefore, not permitted pleading exhibits. *Texas Elec. Serv. Co.*, 592 S.W.2d at 684 (finding that a deposition cannot be attached to a pleading); *see also Smith v. Hogan*, 794 F.3d 249, 255 (2d Cir. 2015) (noting that a document with “no independent legal significance to [plaintiff’s] claim” was not integral to the complaint).

For the same reason, Plaintiff cannot simply attach declarations, tweets, and other writings to his petition to try to make them part of the evidentiary record, in an end-run around his failure to file a timely TCPA response with properly-notarized affidavits and with all intended attachments. *See id.* While Texas Civil Practice & Remedies Code § 27.006(a) permits courts to consider “pleadings and supporting and opposing affidavits” in ruling on a TCPA motion to dismiss, Rule 59 prohibits “other instrument[s] of writing” such as declarations, tweets, emails and other writings to be attached as exhibits to a pleading. There is no license to plead a case by exhibit. *Tex. R. Civ. P. 59*; *Texas Elec. Serv. Co.*, 592 S.W.2d at 684; *see also Perkins v. Silverstein*, 939 F.2d 463, 467 (7th Cir. 1991) (rejecting plaintiffs’ attachments of an assortment of letters, newspaper articles, commentaries, cartoons and miscellaneous other exhibits to their complaint). Nor is there any license for Plaintiff to avoid his agreed-upon filing deadline simply by attaching his exhibits to his amended pleading.

Accordingly, the Court should strike or disregard the following materials attached to Plaintiff’s Second Amended Petition and the Supplement thereto pursuant to Texas Rule of Civil Procedure 59, including but not limited to the following materials that were not part of Plaintiff’s Response to Defendants’ TCPA Motions:

- Ex. A – Timeline with attached emails/tweets
- Ex. B – Tweets in response to Funimation’s February 11, 2019 tweets
- Ex. C – Unsworn Declaration of Chris Slatosch

- Ex. D – Unsworn Declaration of Chuck Huber
- Ex. E – Unsworn Declaration of Victor Mignogna (also filed in Supplement)
- Ex. F – Archived tweets from @DBZUK_kamehouse twitter account
- Ex. G – Marchi tweets and related comments
- Ex. H – Marchi’s private messages
- Ex. L – More Rial tweets
- Ex. M – More Marchi tweets
- Ex. N – More Rial tweets

Dated: September 6, 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 September 6, 2019.

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