

ORAL ARGUMENT REQUESTED

NO. 02-19-00394-CV

IN THE COURT OF APPEALS
FOR THE SECOND APPELLATE DISTRICT OF TEXAS AT FORT WORTH

VICTOR MIGNOGNA
Appellant/Cross-Appellee

v.

FUNIMATION PRODUCTIONS, LLC, JAMIE MARCHI, MONICA RIAL,
AND RONALD TOYE
Appellees/Cross-Appellants

FROM 141ST DISTRICT COURT
TARRANT COUNTY, TEXAS
CAUSE NO. 141-307474-19

**APPELLEES/CROSS-APPELLANTS' OPENING BRIEF AND
RESPONSE TO APPELLANT/CROSS-APPELLEE'S BRIEF**

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- APPENDIX B October 4, 2019 Order Granting Appellees/Cross-Appellants’ Motion to Dismiss Under the Texas Citizens Participation Act (“Dismissal Order”).
- APPENDIX C Chapter 27 Texas Civil Practices & Remedies Code.¹

¹ The Texas Legislature amended the Texas Citizens Participation Act (“TCPA”) effective September 1, 2019. Those amendments apply to “an action filed on or after” that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687 (codified at Tex. Civ. Prac. & Rem. Code § 27.003(a)). Because this lawsuit was filed before September 1, 2019, the law in effect before September 1 applies. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500. All citations to the TCPA, therefore, are to the version of the statute before the 2019 amendments took effect.

STATEMENT OF THE CASE

NATURE OF THE CASE:

This appeal arises out of a textbook “Strategic Lawsuit Against Public Participation” filed by Appellant/Cross-Appellee Victor Mignogna (“Appellant” or “Mignogna”) against Appellees/Cross-Appellants Monica Rial (“Rial”) and Ronald Toye (“Toye”) (together, “Appellees”) for comments they allegedly made about him on the internet. Mignogna is a public figure whose underlying lawsuit was an all-out assault on Rial and Toye, designed to silence their right to speak publicly on a matter of public concern (*i.e.*, Mignogna’s sexual harassment of children and women both in public and behind closed doors).²

COURSE OF PROCEEDING AND PROCEDURAL HISTORY:

Mignogna filed his underlying lawsuit against Rial and Toye, as well as Appellees Jamie Marchi (“Marchi”) and Funimation Productions, LLC (“Funimation”) on April 18, 2019. 3 Supp. CR 4-17.³ He then filed a First Amended Petition on July 12, 2019. 3 Supp. CR 31-44. Mignogna alleged four causes of action against Rial and Toye for (1) Defamation; (2) Tortious Interference with Existing

² Rial and Toye filed a cross-appeal challenging the fees awarded by the trial court after dismissing with prejudice Mignogna’s lawsuit in its entirety; however, for simplicity and ease of reading, this brief will simply refer to Rial and Toye either individually, or collectively as “Appellees,” rather than Appellees/Cross-Appellants. Likewise, the brief will refer to Mignogna by name or as “Appellant,” rather than Appellant/Cross-Appellee.

³ Citations to the Clerk’s Record (“CR”), Supplement Clerk’s Record (“Supp. CR”), and Reporter’s Record (“RR”) refer to the relevant volume, record or supplement, and page number, *e.g.*, 3 Supp. CR 4-17 refers to the Third Volume of the Supplemental Clerk’s Record at pages 4-17.

Contracts; (3) Tortious Interference with Prospective Business Relations; and (4) Civil Conspiracy (together, “Claims”). *Id.*⁴

After agreeing to extend the deadline to file so the Parties could conduct discovery, Rial and Toye filed a Motion to Dismiss Pursuant to the Texas Citizens Participation Act (“Anti-SLAPP Motion”). 1 CR 27-32; 2 CR 398-425. The Parties then signed a Rule 11 agreement that extended Mignogna’s deadline to file a Response to August 30, 2019. 3 CR 1188-89. Despite the extension, Mignogna not only missed his deadline but also submitted a filing that had blank spaces, missing citations, and attached fraudulent affidavits purportedly signed by Chuck Huber, Christopher Slatosch, and Mignogna (“Untimely Response”). 4 CR 1259-93, 1307-15, 1322-46, 1351-63; 6 CR 3000-13.

Recognizing that the affidavits attached to the Untimely Response were defective, Mignogna withdrew them from consideration on September 3, 2019. *See* 6 CR 2931; *see also* 3 RR 14:15-17, 15:12-17, 41:11-14. This is significant because Mignogna’s February 20, 2020 Opening Brief (“Brief”) relies heavily on factual allegations arising out of the withdrawn affidavits, particularly statements from Christopher Slatosch that are both objectionable and not properly part of the appellate record. Brief, pp. 2-3, 13-14.

⁴ Mignogna also asserted a claim for vicarious liability against Funimation for conduct allegedly committed by Rial, Toye, *or* Marchi (but failed to specify which).

After withdrawing the affidavits, Mignogna filed a Second Amended Petition three days before the TCPA hearing with brand new arguments and evidence seeking to circumvent the statute and Rule 11 briefing deadline. 4 Supp. CR 85-86; 5 CR 2467-95. Rial and Toye promptly objected and moved to exclude the Second Amended Petition because it included new arguments and inadmissible evidence that Mignogna was using to oppose the Anti-SLAPP Motion. 6 CR 3000-13. The trial court correctly excluded the untimely Second Amended Petition and evidence, acknowledging the surprise and prejudice it created. 6 CR 3225. Accordingly, Mignogna's First Amended Petition is the live pleading for purposes of this appeal.

TRIAL COURT'S DISPOSITION:

The trial court dismissed all Claims against all Defendants on October 4, 2019 ("Dismissal Order"). 6 CR 3224-28.⁵ As directed by the Dismissal Order, Appellees filed their Brief in Support of Sanctions and Attorneys' Fees, seeking \$282,953.80 in fees ("Rial/Toye Fees Motion"). 2 Supp. CR 129-41, 4 RR 25:13-18, 33:5-23 (\$282,953.80 plus \$55,000). On November 21, 2019, the trial court held an evidentiary hearing on the Rial/Toye Fees Motion whereby Appellees presented testimony and evidence in accordance with the recent Texas Supreme Court opinion *Rohrmoos Venture v. UTSW DVA Healthcare, LLP* to support their request for fees.

⁵ In the Dismissal Order, the trial court retained jurisdiction to rule on an award of attorneys' fees, costs, and other expenses incurred in defending this action, and an appropriate sanction pursuant to Texas Civil Practices and Remedies Code § 27.009. 6 CR 3228.

See 4 RR 1, 10:13-16, 139:21-140:13.⁶ Mignogna did not offer evidence, testimony, or an expert to contradict Appellees’ calculation. 2 Supp. CR 520-47.

On November 25, 2019, the trial court entered its Final Judgment, dismissing Mignogna’s Claims against Toye and Rial with prejudice and awarding them fees and sanctions (“Final Judgment”). 2 Supp. CR 549-50. However, the Final Judgment improperly awarded all Defendants—Rial, Toye, Marchi, and Funimation—the same amount of attorneys’ fees (\$50,000.00 each), even though the evidence and testimony supported a higher award for Rial and Toye. *See* 4 RR 29:2-4. Not only did the Final Judgment disregard Rial and Toye’s evidence of time and labor justifying an award of their full \$282,953.80, but Mignogna also failed to offer controverting evidence to reduce the fees. *See* 2 Supp. CR 548-52; *see also* 4 RR 23:10-25:23; *see also* 5 RR 112-13 (Ex. 7A).⁷

Rial and Toye, therefore, request that this Court affirm the dismissal of Mignogna’s Claims with prejudice, but reverse and render an award of attorneys’ fees of \$282,953.80 at the trial level and \$55,000.00 in conditional appellate fees.⁸

⁶ 578 S.W.3d 469 (Tex. 2019).

⁷ Volume 5 of the Reporter’s Record is the Exhibit Volume. The page number for this volume only refers to the PDF page number.

⁸ The trial court awarded Rial and Toye \$55,000.00 in conditional appellate fees, which Mignogna did not challenge below and does not challenge in his February 20 Opening Brief. 2 Supp. CR 549-50.

REQUEST FOR ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39, Appellees/Cross-Appellants request oral argument and believe that oral argument before the panel of Justices assigned to this matter would advance consideration and determination of the issues raised by this appeal, as well as give the Justices a more complete understanding of the facts and legal arguments presented in this appeal.

ISSUES PRESENTED AND RESTATED

Appellees/Cross-Appellants' Restated Issues in Response to Mignogna's Brief

- 1. The trial court properly found that Rial and Teye established by a preponderance of the evidence that Mignogna's Claims are based on, relate to, or in response to Appellees' exercise of their right to free speech and right of association.**
- 2. The trial court did not abuse its discretion by excluding evidence submitted by Mignogna after the agreed upon briefing deadline and in violation of Texas Rules Civil Procedure 59 and 70.**
- 3. The trial court properly found that Mignogna failed to establish, by clear and specific evidence, a prima facie case for each element of his Claim for Defamation.**
- 4. The trial court properly found that Mignogna failed to establish, by clear and specific evidence, a prima facie case for each element of his Claims for (1) Tortious Interference with Existing Contracts and (2) Tortious Interference with Prospective Business Relations.**
- 5. The trial court properly found that Mignogna failed to establish, by clear and specific evidence, a prima facie case for each element of his Claim for Civil Conspiracy.**
- 6. Even if Mignogna had presented competent evidence to support his Claims, the trial court could have properly granted the Anti-SLAPP Motion to Dismiss because Appellees established by a preponderance of the evidence their affirmative defenses of the Communications Decency Act, Qualified Privilege, and Mignogna's previously diminished reputation.**

Issue Presented on Rial and Teye's Opening Brief in Their Cross Appeal

- 1. The Final Judgment improperly awards Rial and Teye an amount of attorneys' fees (\$100,000.00) lower than the amount requested and supported by competent evidence in their motion for fees (\$282,953.80).**

STATEMENT OF FACTS

A. Mignogna Works in the Entertainment Industry for more than 20 Years, Becoming a Public Figure.

Mignogna is a 56-year-old voice and screen actor with over 350 acting credits to his name (2 CR 856) and, in his own words, has amassed a “pretty significant fan base.” 2 CR 487 (Mignogna Depo. at 242:3-17). He also claims to derive “a sizeable income from appearance fees . . . and from signing autographs, taking photos with fans, and appearing on guest panels.” 3 Supp. CR 33-34, ¶ 14.

His most prominent role developed from 2004 through 2018 when Mignogna alleges that he was a voice actor in at least ten anime films or television shows produced by Funimation, many of which were part of the popular Dragon Ball Z series. 1 CR 55, ¶ 4. “In 2018, Funimation cast Mr. Mignogna as the English voice for ‘Broly,’ the lead character in the fantasy anime martial arts film *Dragon Ball Super: Broly*.” *Id.* On January 16, 2019, *Dragon Ball Super: Broly* premiered in the United States, “earning \$7 million on its first day and \$24 million within the first five days of its premiere.” 3 Supp. CR 33, ¶ 13.

In addition to being a prominent voice actor in a wildly successful animated movie and featured guest at anime and other conventions, Mignogna also acts in front of the camera, with several on-screen credits to his name. He has also written, directed, and starred in an award-winning web series based on Star Trek. 2 CR 851, 854, 869. In fact, Mignogna is so popular that his verified Twitter account has over

113,000 followers, and since 2008 he has had a dedicated fan club called the “Risembool Rangers,” a reference to one of his most famous characters. 2 CR 438 (Mignogna Depo. at 48:16-21), 487 (Mignogna Depo. at 243:12-23).

B. On January 16, 2019, Allegations of Mignogna’s Long History of Sexual Harassment, Pedophilia, and Homophobia Erupt Online.

After years of reports and rumors about Mignogna’s sexual harassment of women, accusations concerning his sexual misconduct erupted after Twitter user “@hanleia” (“Hanleia”) posted on January 16, 2019, that Mignogna was “a homophobic rude asshole who has been creepy to underage female fans for over ten years and I’ve been screaming about this since 2010” 2 CR 531-32; 3 Supp. CR 34, ¶ 15. This Twitter user then “tagged” Funimation in a post asking “Hey @Funimation why do you employ a known pedophile[.]” 1 CR 55, ¶ 5. The post also included a link to previously published allegations about Mignogna’s sexual misconduct at anime conventions. *Id.*; 2 CR 514 (including allegations from one person quoted as being “approximately 14 years old when she attended New York Comic-Con in 2014 and met Mignogna.””).

Hanleia’s post received over 8,400 likes, 4,200 retweets with over 440 comments as of January 30, 2019, many of which discussed specific examples of unwanted and unsolicited physical contact by Mignogna. 2 CR 532. Importantly, ***Mignogna has no evidence that Rial, Toye, Marchi, or Funimation had anything to do with this Twitter post:***

Q: Do you have any evidence, any proof, any indication that any of the defendants had anything to do with someone putting a tweet out about you on . . . January 16th, 2019?

A: I do not, no.

2 CR 462 (Mignogna Depo. at 141:20-24).

Hanleia was not the first person to bring accusations against Mignogna; rather, her tweet merely reignited pre-existing discussions about Mignogna's misconduct from hundreds of others. Long before Rial or Toye are alleged to have tweeted anything, there were published reports about Mignogna's predatory behavior, with members of the anime community commenting online for over a decade. 2 CR 501-99; *see* 2 CR 695-697, ¶¶ 4-6, 10; *see also* 2 CR 677-78, 684-86 (describing similar experiences and knowledge of Mignogna's reputation for sexual misconduct in the anime industry).

i. After the allegations go viral, Mignogna weaponizes his fanbase, and issues a self-serving statement trying to spin the narrative in his favor.

Following the release of *Dragon Ball Super: Broly*, Mignogna immediately inserted himself into the online discussion by posting online statements responding to the allegations and recruiting his fan base to attack his accusers.

In fact, his first order of business was to sound the call to arms for his fan group, the Risembool Rangers, by personally asking them to combat the negative stories that were flooding the internet and to “do whatever you can do to counter all these lies and negativity.” 2 CR 534; 687.

While privately inciting his fans to attack his accusers, Mignogna publicly issued a Twitter “apology” to his 113,000 followers the next day on January 20, 2019, to address years of rumors about his sexual harassment. 1 CR 68-69; 2 CR 477 (Mignogna Depo. at 204:11-16). However, he minimized the allegations because he “come[s] from an affectionately expressive family where such displays are commonplace.” 1 CR 69. Mignogna’s self-interested apology failed to have its intended effect and allegations about his behavior continued to circulate online.

ii. The apology fails, the allegations keep coming, and numerous articles outline what many people have known for years.

In the days following the release of *Dragon Ball Super: Broly*, several articles appeared online that detailed Mignogna’s already poor reputation:

- *January 25, 2019, Polygon.com, “Dragon Ball Super: Broly voice actor responds to sexual harassment, homophobia claims” (2 CR 501-504):*

Many conventiongoers’ stories continue to come out on social media, detailing times when the actor acted flirtatiously towards them (***fondling, kissing, groping, etc.***) ***without their consent, most while they were still underage***. While these allegations are only just picking up steam, many of them ***go as far back as 2010***.

2 CR 504 (emphasis added) (published before Appellees’ tweets).

- *January 30, 2019, Anime News Network, “‘Far from Perfect’: Fans Recount Unwanted Affection from Voice Actor Vic Mignogna” (2 CR 514-521):*

Multiple individuals, many with friends present to corroborate, relayed their personal encounters with Mignogna with an increasingly common series of events.

2 CR 516 (published as several conventions cancelled).

- *February 1, 2019, thedaoofdragonball.com/blog, “Fixing the Staircase: Vic Mignogna’s Sexual Assault Allegations and the Voice Actors Who Speak Out” (2 CR 523-559):*

Vic Mignogna, the voice of Broly in *Dragon Ball Super*, has been accused of sexually assaulting women at anime conventions . . . However, numerous ***allegations of sexual assault have shadowed Mignogna’s career*** and continue up to today. ***During the research for this article, over 100 independent allegations surfaced, dating back to 2003.***

2 CR 524-25 (emphasis added) (published as several conventions cancelled).

- *February 19, 2019, Gizmodo.com, “One of Anime’s Biggest Voices Accused of Sexual Harassment.” (2 CR 598-616):*

Stories about Mignogna have been circulating online for over a decade . . . but the latest round of accusations started surfacing around mid-January of this year. io9 ***spoke with more than 25 voice actors, cosplayers, industry professionals, convention employees, and former fans about their experiences with Mignogna.***

2 CR 599 (emphasis added).

Mignogna concedes that the foregoing articles (collectively, the “Negative Press”) damaged his reputation. 2 CR 484 (Mignogna Depo. at 230:25-231:10). Importantly, the sources for the articles did not include Rial or Toye. Rather, they included “voice actors, cosplayers, industry professionals, convention employees, and former fans” who made over 100 allegations against Mignogna. 2 CR 525, 599.

- C. Given the extensive allegations, Funimation launched an investigation into Mignogna’s misconduct, found the allegations credible, and terminated its relationship with Mignogna.**

Beginning on January 22, 2019, while renewed allegations were swirling about Mignogna, Funimation launched an investigation into his behavior. *See* 1 CR

55, ¶¶ 5-7; *see also* 1 CR 60, ¶ 3. Sony Picture Entertainment’s (“Sony”) Executive Director of Employee Relations, Tammi Denbow, led the investigation into Mignogna. 1 CR 60, ¶¶ 3-4. As part of her investigation, Ms. Denbow interviewed Rial and four others, as well as Mignogna himself. 2 CR 672; 1 CR 60, ¶ 4. Based on her interviews, as well as the online commentary and articles, Denbow concluded that the allegations against Mignogna were credible. 1 CR 55-56, ¶¶ 7-8; 60, ¶ 5. Therefore, Funimation terminated Mignogna. 2 CR 597.

Funimation is not the only company to take action against Mignogna. After doing their own independent investigation into the allegations, on February 5, 2019, anime studio Rooster Teeth publicly terminated its relationship with Mignogna. 2 CR 596. In fact, between January 18, 2019 and February 6, 2019, Mignogna lost ten convention invites. 3 Supp. CR 35-36, ¶¶ 20, 22-23, and 25-27. Critically, not a single convention or studio came forward to say that the cancellations were because of something Rial or Toye are alleged to have said.

D. As the firestorm waged online, Appellees discuss their own negative experiences with Mignogna.

Rial has worked in voice acting over the last twenty years, including with Mignogna. 2 CR 774 (Rial Depo. at 9:11-10:2). Seeing how internet commentators were assailing Mignogna’s accusers as liars, Rial recounted her own personal experience with Mignogna from a convention in 2007. *See* 2 CR 795-798 (explaining that her experience was true, and that she came forward to corroborate

other women's similar stories); *see also* 2 CR 778 (Rial Depo. at 29:16-31:18) (testifying that while she and Mignogna were guests at Izumicon, Mignogna unexpectedly grabbed her by her arms and began aggressively kissing her, pushed her onto a bed, climbed on top of her, and continued to aggressively kiss her while holding her down). Other women also came forward and described similar experiences with Mignogna. *See, e.g.*, 2 CR 695-697, ¶¶ 4-6, 8-10 (affidavit of voice actor Kara Edwards supporting Rial and Toye's Anti-SLAPP Motion wherein she described Mignogna's aggressive attempts to have sex with her in 2008 and again in 2010).

The record is replete with evidence from countless sources describing similar experiences and knowledge of Mignogna's reputation for inappropriate sexual misconduct in the industry. 2 CR 535-36, 677-78, 685-86.

E. An internet "shock jock" injects himself into the controversy and raises over \$257,000 to fund Mignogna's lawsuit.

Perhaps there is no clearer evidence of Mignogna's status as a public figure and the retaliatory nature of the lawsuit than the online campaign created by his fans to fund the lawsuit against Rial and Toye. In February 2019, Minnesota resident Nick Rekieta contacted Mignogna to express support for the voice actor's "situation" and set up a Go Fund Me campaign to pay for lawsuits against Appellees, as well as bloggers, corporations, and "pseudo-anonymous keyboard warriors" ("GFM War Chest"). 2 Supp. CR 267-69; 2 CR 434-35 (Mignogna Depo. at 32:23-34:13, 36:9-

20). That GFM War Chest raised more than \$257,000 in order to “***Help Vic Kick Back.***” 2 Supp. CR 268, 269 (emphasis added):

This Fund is set up for Vic’s legal defense fees. There are MANY possible defendants in different jurisdictions, from boring bloggers to multi-million, even multi-billion dollar corporations. It takes an agile and experienced (read: not cheap) legal team to coordinate this kind of strategy.

* * *

BUT IT’S TIME TO FIGHT BACK. Brigades of pseudo-anonymous keyboard warriors cannot be allowed to defame and destroy decades of goodwill on rumor and unverifiable allegation. Companies cannot rely on non-credible accusations and devastate a career for virtue points.

2 Supp. CR 268-69.

F. Mignogna then tried to use the GFM War Chest and the threat of a lawsuit as leverage to silence Appellees.

After Rial, Toye, and Marchi publicly posted their comments, Mignogna not only had his fans (like Rekieta) attacking Appellees online, he also sent his friend Chuck Huber to threaten litigation if the women did not issue retractions and stop making allegations. 2 CR 622-623. Specifically, on March 6, 2019, after several exchanges about the threat of litigation, Huber emailed Rial to say that Mignogna was gearing up for a legal and social battle unless Rial and others kept quiet:

And please don’t mistake this [negotiation] as some weakness on their part. This is my effort to try and stop something I know will be very damaging. ***They have a full court press prepared that is not a minor effort.*** They will be extremely thorough ***in both the legal and social spheres.***

2 CR 622 (emphasis added).

Mignogna’s entire strategy was to unleash a torrent of internet abuse ***coupled with litigation*** to silence Appellees. 2 CR 622-623. These harassing and abusive tactics waged alongside the lawsuit were specifically designed to accomplish Mignogna’s stated intent—silence his accusers and retaliate against them.

G. Consistent with his threats, Mignogna files suit against Rial and Toye.

Unable to extort their silence, Mignogna filed his Claims against Rial and Toye—all of which arise directly out of communications that relate to, or are in response to, the exercise of Appellees’ rights to free speech and association. 3 Supp. CR 31-44. Specifically, Mignogna filed suit against Rial and Toye because they communicated with their Twitter followers for the ***collective purpose*** of publicly discussing Mignogna’s “sexual misconduct.” 3 Supp. CR 34, ¶¶ 15-16.

Mignogna vaguely alleges that, “one or more Defendants began actively defaming [Mignogna] directly to anime conventions, [telling people about] investigations and [Mignogna] being fired.” *Id.* at ¶ 17. These communications are at the heart of Mignogna’s lawsuit; he is retaliating against Rial (and Toye) for sharing their personal experiences and opinions about his dangerous predatory behavior, especially behavior toward underage female fans.

H. Mignogna had a poor reputation and history of convention bans long before Rial and Toye tweeted or re-tweeted anything.

Mignogna contends that Rial and Toye’s online comments cost him several

convention contracts and harmed his reputation. Brief, p. 47 (stating that “due to Appellees’ conduct,” Mignogna suffered “damage to his reputation”). Although Mignogna never identifies those contracts or specifies *how* his reputation was damaged, the evidence overwhelmingly contradicts this laughable proposition.

As an initial matter, the Negative Press (2 CR 501-616), as well as several affidavits, show that Mignogna had a poor reputation long before Rial or Toye’s tweets were posted online. *See, e.g.*, 2 CR 532 (Hanleia tweeting, “and I’ve been screaming about this since 2010.”). In fact, **sixteen** individuals submitted affidavits attached to the Anti-SLAPP Motion showing that Mignogna already had a “bad reputation with women and convention staff” (2 CR 714-15, ¶¶ 3-4) and was seen as “a sexual predator” dating back to 2003. *See* 2 CR 769, ¶ 5.

Mignogna states (falsely) in his Brief that, “[b]efore the cancellations listed in this Brief, Vic never had a convention cancel his appearance.” Brief, p. 3, fn 16. The evidence in the record, however, tells a different story. In reality, Mignogna has been banned and/or asked not to come back to conventions several times because of his misconduct—all before Rial or Toye’s tweets in late-January 2019. For example, Mignogna was banned from Tekkoshoccon starting in 2005, and after a brief return, was banned again in 2008 after being caught in a hotel room with an underage female. 2 CR 709-10, ¶¶ 6-8 (Affidavit of Lynn Hunt). Likewise, the Anime Central Convention received complaints about Mignogna’s behavior and banned him from

that convention in 2005. *Id.*, ¶ 5; 2 CR 714-716, ¶ 2; 6 (Kawaii Kon in Hawai'i and Anime Weekend in Atlanta banning Mignogna from those conventions).

I. Appellees timely file their Anti-SLAPP Motion to Dismiss and Mignogna botches the Response.

Following an agreed delay so the Parties could conduct discovery, Rial and Toye filed their Anti-SLAPP Motion on July 19, 2019, and supplemented on July 30, 2019. 2 CR 398-926; 3 CR 1124-51. On August 6, 2019, the Parties filed a Rule 11 agreement continuing the hearing to September 6 to give Mignogna more time to respond, and setting the briefing schedule for the TCPA hearing (the “Scheduling Agreement”). 3 CR 1188-1189 (continuing hearing and setting deadline to respond to Anti-SLAPP Motion to August 30).

Despite receiving an extension, Mignogna filed his response late, along with a motion for leave to file the untimely response, which the trial court granted. 4 CR 1259; 5 CR 2455; and 6 CR 3224-25. The Untimely Response was still rife with missing citations, incomplete arguments, and other errors. More importantly, the Untimely Response was based on sham affidavits signed by Mignogna, Huber, and Slatosch, which were not executed in the physical presence of the notary, who also happened to be Mignogna’s lead counsel, Ty Beard. 6 CR 3008.

To avoid the significant consequences involved with three fraudulent notarizations, Mignogna’s counsel filed a Notice with the trial court withdrawing the affidavits from the trial court’s consideration:

NOTICE

TO THE HONORABLE JUDGE OF SAID COURT:

Counsel for Plaintiff Victor Mignogna (“Plaintiff” or “Vic”) hereby notifies the Court and Opposing counsel that Plaintiff is withdrawing the Affidavits of Victor Mignogna, Chuck Huber and Christopher Slatosh that were attached to Plaintiff’s Response to Defendants’ TCPA Motions to Dismiss.

Respectfully submitted,
BEARD HARRIS BULLOCK HUGHES

By: /s/ Ty Beard

6 CR 2931; *see* 6 CR 3003. Therefore, the thirteen references in Appellant’s Brief to statements allegedly made by Appellees to Slatosh are improper because that evidence was withdrawn and excluded by the trial court. Brief, pp. 2-3; 13-14; 19.

After filing his response late and withdrawing the affidavits, Mignogna shamelessly tried to circumvent the Scheduling Agreement by filing an untimely and improper Second Amended Petition three days before the TCPA hearing—attaching inadmissible declarations, exhibits, and arguments—and asking the trial court to consider this improper pleading as evidence to defeat the Anti-SLAPP Motion. 5 CR 2467-95.⁹ Mignogna also then filed a Supplement to his Second Amended Petition, making another attempt to introduce new, late-filed evidence. 6 CR 2932-45.

⁹ Mignogna’s Original and First Amended Petitions included 51 and 55 paragraphs, respectively. 3rd Supp. CR 16; 42-43. His Second Amended Petition included 89 paragraphs, and attached brand new Exhibits A through Q, including nearly identical declarations signed by the same three witnesses who signed the Fraudulent Affidavits. 5 CR 2467-94.

Appellees (together with Marchi) filed a Joint Response/Cross-Motion to Strike (1) [Mignogna's] Response to the TCPA Motions to Dismiss, (2) [Mignogna's] Second Amended Petition, and (3) Deny [Mignogna's] Motion for Leave to File Late Response to the TCPA Motions to Dismiss. 6 CR 3000-13. Appellees argued that the late filing and late submission of evidence beyond the agreed-upon August 30th deadline was prejudicial and constituted unfair surprise. 1 CR 3011 and 6 CR 3218-20.

J. The trial court excluded the Second Amended Petition and withdrawn affidavits, granted the Anti-SLAPP Motion, and awarded fees.

The Anti-SLAPP Motion was heard on September 6, 2019, and on October 4, 2019, the trial court properly dismissed all Claims. 6 CR 3224-3228. The Dismissal Order states that the trial court did not consider the three withdrawn affidavits, and did not consider the late-filed evidence attached to the Second Amended Petition because the evidence was untimely and prejudicial in violation of the Parties' Scheduling Agreement. *Id.*

The trial court then ordered Appellees to submit evidence of their attorneys' fees, costs, expenses, and a request for sanctions within 30 days of entry of the Dismissal Order. 6 CR 3228. Appellees filed the Rial/Toye Fees Motion on November 4, 2019, seeking attorneys' fees and sanctions arising out Mignogna's conduct leading up to the September 6, 2019 TCPA hearing. 2 Supp. CR 129-141.

On November 21, 2019, the Court conducted an evidentiary hearing during

which Appellees' counsel testified as to reasonable and necessary attorneys' fees (including billing discretion offsets) totaling \$282,953.80. *See* 4 RR 25:13-18; *see also* 5 RR 112-13 (Ex. 7A). Mignogna offered no expert testimony and did not provide the Court with alternative figures as to the reasonable hourly rate or reasonable amount of time that would go into an alternative lodestar analysis. *See* 2 CR 534-47 and 4 RR 4-5 (showing that Mignogna did not call any witnesses or present any evidence to contradict Appellees' fee calculation).

The trial court entered the Final Judgment on November 25, 2019, awarding attorneys' fees and sanctions to Rial and Toye. 1st Supp. CR 5-6. The trial court, however, improperly awarded the same amount of fees (\$50,000.00) to each of Rial, Toye, Marchi, and Funimation without properly accounting for the differences in time and labor expended.

The following table identifies the amount sought and awarded by the Court:

Defendant	Amount Sought	Amount Awarded
Rial and Toye	\$282,953.80 plus \$55,000 in conditional appellate fees	\$100,000 plus \$55,000 in conditional appellate fees
Marchi	\$48,137.50	\$48,137.50
Funimation	\$168,941.00	\$50,000

See 4 RR 25:13-18 and 33:5-23 (\$282,953.80 plus \$55,000); 4 RR 161:9-12 (\$48,137.50); and 113:12-16 (\$168,941.00).

SUMMARY OF ARGUMENT

Mignogna's Brief suffers from the same defects and misleading statements as his briefing below, namely the improper attempt to dump a series of string cites from ten volumes of the clerk's record and supplements hoping that this Court will do his job for him. *See Shelton v. Sargent*, 144 S.W.3d 113, (Tex. App.—Fort Worth 2004, pet. denied) (court has no obligation to search its file to support a litigant's arguments). Mignogna even attempts to bring entirely new allegations and arguments, again attempting to belatedly correct his prior mistakes.

Mignogna is a public figure whose lawsuit—and harassing public relations campaign—is a vengeful assault on Rial's and Toye's rights of association and free speech to comment on a matter of public concern. To silence Appellees, Mignogna unleashed a horde of online supporters to publicly harass and intimidate anyone who spoke up. When that failed, Mignogna filed the underlying lawsuit funded by his GFM War Chest. Mignogna filed his underlying lawsuit for no other reason than to intimidate Appellees, silence speech, and send a message to anyone who dared stand up against him.

Mignogna's pleadings, together with the evidence properly before the trial court, prove by a preponderance of the evidence that the Claims relate to, or are based on, Appellees' protected communications and associations. Once Appellees met their burden to show that the TCPA applies, Mignogna failed to present "clear and specific evidence" sufficient to meet his burden on *each element of each of his*

Claims. The trial court also properly excluded certain evidence that Mignogna dishonestly tried to slip into the proceeding by an untimely and prejudicial Second Amended Petition.

Mignogna continues to rely on objectionable evidence before this Court, but still fails to meet his burden of proof. In his brief to *this Court*, Mignogna unabashedly cites the withdrawn affidavits as evidence, without explaining that he withdrew them and that the trial court correctly excluded them from consideration *at Mignogna's urging*. Brief, pp. 12, 14, 19, 31; *see also* 6 CR 3003 and 3224-25. Even if Mignogna had presented clear and specific evidence, and even if this Court found that Judge Chupp abused his discretion in excluding Mignogna's untimely and prejudicial evidence, Appellees can rest on several affirmative defenses to defeat the Claims. Accordingly, the Anti-SLAPP Motion was properly granted in its entirety.

In accordance with the TCPA, Appellees are entitled to the full amount of reasonable fees for successfully defending against the underlying action.

The November 25 Final Judgment properly awards Appellees their attorneys' fees, but improperly awards the same amount of fees to Rial and Toye (\$50,000.00 each) that it awarded to Funimation (\$50,000.00) and Marchi (\$48,137.50), despite evidence supporting the full \$282,953.80 requested by Rial and Toye. Mignogna deposed only Rial and Toye, attached hundreds of communications that required a

costly response, and deliberately launched a strategy of creating nuisance filings against Rial and Toye to increase their litigation expenses.

Mignogna’s abuse of the court—along with his legion of followers, directed by Mignogna’s friend and financier, internet troll Nick Rekieta—required Rial and Toye to expend more time and money to respond to his bad-faith strategy. Appellees’ counsel had to spend considerably more time and money defending against the lawsuit than the other parties, but more importantly, the *uncontroverted* evidence presented in the Rial/Toye Fees Motion for fees supported a full award. Therefore, the trial court should have awarded Defendants their full fee amount of \$282,953.80 (plus conditional appellate fees).

ARGUMENT AND AUTHORITIES

A. Anti-SLAPP Legal Standard.

Chapter 27 of the Texas Civil Practices and Remedies Code seeks “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government 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. It does so by establishing a mechanism for early dismissal of lawsuits that threaten the right of free speech, right to petition, or right of association. The statute is to be “construed liberally to effectuate its purpose and intent fully.” *Id.* § 27.011(b).

The TCPA defines the *exercise of the right of association* to mean a communication among individuals who join together to collectively express, promote, pursue, or defend common interests. Tex. Civ. Prac. & Rem. Code § 27.001(2).

It goes on to define *exercise of the right of free speech* to mean any communication made in connection with a matter of public concern, which includes any communications *related to*:

- (A) health or safety;
- (B) community well-being; and
- (C) a public figure.

Tex. Civ. Prac. & Rem. Code § 27.001(3) and (7).

There is no requirement that the communications themselves be public; rather, the communication must simply *relate to* health and safety, community well-being, or a public figure. *Nguyen v. Dallas Morning News, LP*, 2-06-298-CV, 2008 WL 2511183, at *5 (Tex. App.—Fort Worth June 19, 2008, no pet.) (mem.op.) (stating that, “[p]rotection of children from abuse is of the utmost importance in Texas.”).

“The TCPA does not require that the statements specifically mention health, safety, environmental, or economic concerns, nor does it require more than a tangential relationship to the same; rather, ***TCPA applicability requires only that the defendant’s statements are in connection with*** issue[s] *related to* health, safety, environmental, economic, and other identified matters of public concern chosen by

the Legislature.” *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (citing Tex. Civ. Prac. & Rem. Code § 27.001(3), (7)) (internal quotations omitted) (emphasis added).

The legal question of whether Appellees established by a preponderance of the evidence that the challenged causes of action are covered under the TCPA is reviewed de novo. *See Serafine v. Blunt*, 466 S.W.3d 352, 357 (Tex. App.—Austin 2015, no pet.). This Court also reviews de novo a trial court’s determination of whether a non-movant presented clear and specific evidence establishing a prima facie case for each essential element of the challenged claims. *Id.*

Finally, the plain language of section 27.009(a)(1) mandates that successful movants for dismissal under the TCPA are entitled to an award of reasonable attorneys’ fees and other expenses incurred in defending against the action. *Avila v. Larrea*, 506 S.W.3d 490, 497 (Tex. App.—Dallas 2015, pet. denied) (citing *Cruz v. Van Sickle*, 452 S.W.3d 503, 522 (Tex. App.—Dallas 2014, pet. Filed). Importantly, the statute does not afford discretion to award no attorneys’ fees and other expenses when the amount is supported by record evidence. *Avila*, 506 S.W.3d at 497 (citing Tex. Civ. Prac. & Rem. Code § 27.009(a)(1)).

Rial and Toyé's Response to Appellant's Issues on Appeal:

- B. (Issue One): The trial court properly found that Rial and Toyé established by a preponderance of the evidence that Mignogna's Claims are based on, relate to, or in response to Appellees' exercise of their right to free speech and right of association.**

Mignogna's Brief barely mentions "Step 1" of the TCPA analysis, presumably because his Petition, together with the evidence and affidavits, show unequivocally that he sued Appellees for engaging in two prongs of protected communications: the rights to associate and speak freely. 3 CR 4-17 and 31-44; *see Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) ("When it is clear from the Appellant's pleadings that the action is covered by the Act, the defendant need show no more."). Mignogna sued Appellees for allegedly joining together and communicating with one another (and others) to collectively express opinions about him—a public figure—on the internet. *See Weber v. Fernandez*, 02-18-00275-CV, 2019 WL 1395796, at *5 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.) (finding that statements contained in Facebook messages and postings are communications as defined by the TCPA); *see also Smith v. Crestview NuV, LLC*, 565 S.W.3d 793, 798 (Tex. App.—Fort Worth 2018, pet. filed) (explaining that the breadth of the TCPA's definition of communication extends the application of the TCPA to "[a]lmost every imaginable form of communication, in any medium").

The October 4 Dismissal Order properly granted Appellees' Anti-SLAPP Motion because Appellees showed by a preponderance of the evidence that the

Claims *relate to* or are in response to, Appellees' rights to association or free speech, as defined by the statute. Tex. Civ. Prac. & Rem. Code § 27.001(3), (7).

i. Mignogna is a public figure and inserted himself into a public debate about his sexual harassment of minors and women.

Mignogna never actually denies that he is a public figure in his Brief to this Court. In fact, he admitted that he's been in the movies, been on television, voice acted for hundreds of Japanese anime films, and attends conventions where thousands of people show up. 2 CR 432 (Mignogna Depo. at 23:19-24:3).

Instead of disputing his public figure status, Mignogna's Brief simply argues one time that, "[b]ecause the trial court failed to sustain Vic's objections, the trial court's findings that Vic is a public figure and that Monica's and Ronald's tweets related to a public controversy are based on inadmissible evidence." Brief, p. 46. However, not only does Mignogna fail to identify and articulate his objections, he also failed to obtain a ruling on his objections in the trial court and never sent a TRAP 33 letter—*thus waiving any objection to his public figure status*. See Tex. R. App. P. 33.1(a) (preservation requires either a ruling or a refusal to rule); *Cimco Refrigeration, Inc. v. Bartush-Schnitzius Foods Co.*, 02-14-00401-CV, 2018 WL 1956325, at *5 (Tex. App.—Fort Worth Apr. 26, 2018, pet. denied), reh'g denied (May 31, 2018).

Regardless, the evidence pointing to Mignogna's status as a general purpose public figure is overwhelming. Mignogna's own Petition states that he is a well-

known voice and on-screen actor who appears at 35-40 conventions per year to sign autographs and take photos with fans. 3 Supp. CR 33, ¶¶ 10, 13-14. Mignogna has also amassed 113,000 Twitter followers, has had a dedicated fan club for over a decade, and had a fanboy raise more than \$257,000 to fund this lawsuit. 1 CR 68-69; 2 CR 477 and 629; *See Rodriguez v. Gonzales*, 566 S.W.3d 844, 850 (Tex. App.—Houston [14th Dist.] 2018, pet. denied), reh’g denied (Feb. 4, 2019) (reversing denial of TCPA Motion to Dismiss and barring defamation claim where the Plaintiff was a limited purpose public figure).

There are two types of public figures: (1) “general purpose” public figures “who have achieved such pervasive fame or notoriety that they become public figures for all purposes and in all contexts;” and (2) “limited-purpose” public figures whose status arises “for a limited range of issues surrounding a particular public controversy.” *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Even if Mignogna’s fame and notoriety were not enough to make him a general purpose public figure, he publicly intervened and addressed the controversy here on at least five separate occasions—making him a limited purpose public figure for purposes of Appellees’ Anti-SLAPP Motion.

Aside from his general fame, Mignogna publicly inserted himself into the online Twitter war (1) hosting a pre-apology chat with his fan group to stir them up to defend him (2 CR 463-464; 687), (2) making two public apologies (January 20,

2019 and February 13, 2019) to his 113,000 Twitter followers (1 CR 68-69 and 130-31); (3) publicly supporting the GoFundMe campaign (2 CR 629); (4) asking his fan club to “do whatever you can do to counter all these lies and negativity” (2 CR 533; 687); and (5) providing commentary for at least one magazine during the controversy (2 CR 613). *See Mohamed v. Ctr. for Sec. Policy*, 554 S.W.3d 767, 775 (Tex. App.—Dallas 2018, pet. denied) (father of arrested child became limited-purpose public figure by inviting press and public attention on several occasions and in several different ways during the course of the public debate); *see* 2 CR 572-74.

ii. Mignogna’s Claims relate to Appellees’ right of association.

On their face, Mignogna’s Claims implicate Appellees’ right of association because they arise out of communications among a group of people who publicly commented on the serious allegations against Mignogna, as well as the threat he poses to female fans and convention attendees. 2 CR 532; Tex. Civ. Prac. & Rem. Code § 27.001(2).

Appellees have the right to associate among themselves and communicate with others who have experienced Mignogna’s abuse and inappropriate behavior, and to communicate about those common interests within the larger community. *Backes v. Misko*, 486 S.W.3d 7, 20 (Tex. App.—Dallas 2015, pet. denied); *see Kawcak*, 582 S.W.3d at 579.

Even this Court’s decision in *Kawcak v. Antero Resources Corporation*, 582 S.W.3d 566, 569 (Tex. App.—Fort Worth 2019, pet. denied) and the Dallas Court

of Appeals’ decision in *Dyer v. Medoc Health Services, LLC*, 573 S.W.3d 418 (Tex. App.—Dallas 2019, pet. denied) require applying the TCPA to Mignogna’s Claims and dismissing them. The *Kawcak* and *Dyer* opinions held that the right of association’s “common interests” must be shared by a group of more than two and involve some form of public participation. *Id.* Those elements are met here because the gravamen of Mignogna’s allegations is that Toye and Rial joined together with Marchi and Funimation “agents, employees or business partners” to collectively make Twitter posts “go viral” by “re-tweeting” them and telling the world about Mignogna’s indiscretions. 3 Supp. CR 34-35, ¶ 17-19; *see also* 2 CR 531. 3 Supp. CR 34, ¶¶ 15-17; 23-26.

According to Mignogna, “Jamie, Monica, Ronald, or other Funimation employees or business partners [urged] anime conventions and other studios to terminate their contracts with [Mignogna]—telling some that Funimation was conducting an ‘investigation’ into allegations that [Mignogna] was a ‘sexual predator.’” 3 Supp. CR 35, ¶ 19. Not only are those statements literally true, but Mignogna admits that the statements arose out of public comments made online by a collective group.

The communications between Rial, Toye, Marchi, Denbow, and countless Twitter users were not private communications.¹⁰ Mignogna's Claims allege that Appellees communicated about him *publicly* on Twitter. Mignogna himself *publicly* responded to the online commentary and apologized, which further prompted participation from thousands of people via Twitter and YouTube, and even led to Mignogna's supporters ***donating more than \$257,000 to fund his lawsuit aimed at silencing Appellees.*** 2 Supp. CR 267-275 and 2 CR 514; 532.

Rial and Toye specifically testified that their purpose behind these communications was to (1) participate in Funimation's investigation, (2) share personal experiences, (3) to warn the public at large about Mignogna's inappropriate conduct towards women, and (4) support each other. *See Backes*, 486 S.W.3d at 20; 2 CR 777 (Rial's testimony sharing her personal experience with sexual assault and the importance of participating in Funimation's investigation and corroborating other women's similar stories); 4 CR 1906-07 at 71:8-72:6 (Toye believes accounts to be true based on personal knowledge of women he knows and accounts online, and Mignogna's own statements).

¹⁰ Mignogna now argues for the first time on appeal that the TCPA does not apply to his conspiracy claim because the public comments on Twitter are actually public statements ***about*** private matters, and therefore not the subject of the TCPA. Brief, pp. 28-29. This argument is both waived and unavailing for reasons explained throughout this Brief.

Therefore, even the most stringent reading of the TCPA requires applying the statute to Mignogna's lawsuit because the communications involved public participation about a sexual predator who harasses women all across the country.¹¹

iii. Mignogna's claims implicate Appellees' right of free speech.

The Dallas Court of Appeals recently addressed a similar issue and found that communications like the ones at issue here implicate the right of free speech. In *Backes v. Misko*, like here, the communications involved child safety and were discussed on a public internet forum:

By stating her strong suspicion that someone suffered from MBPS, Johns indicated a child was suffering abuse from a parent. **Thus, Johns' statement not only involved a matter of someone's health, but also a child's safety.** Because Johns' statement related to health or safety, it fell within the statutory definition of "matter of public concern."

* * *

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 fact, garnered both positive and negative replies. It received 1255 views and one hundred twenty-six responses, seventeen of which are in the record.**

Backes, 486 S.W.3d at 20; *see also Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 WL 1120921, at *9 (Tex. App.–Fort Worth Mar. 12, 2015, no pet.).

¹¹ Claims involving conspiracy, moreover, necessarily invoke the right of association because they are dependent upon communications among members of a purported enterprise for a common purpose. *Backes*, 486 S.W.3d at 20-21 (discussions used to support conspiracy claim "clearly fall under the 'right of association' as they were 'communication[s] between individuals who join together to collectively express, promote, pursue, or defend common interests'").

Setting aside the obvious fact that Mignogna sued Rial and Toye over public internet comments, Mignogna specifically alleges that they publicly communicated about his abuse of minors and women. 3 Supp. CR 34, ¶ 15-16 (stating that Rial (1) liked and re-tweeted Hanleia’s tweet that accused Mignogna of being a “rude asshole who has been creepy to underage female fans for over ten years;” (2) liked and re-tweeted a statement accusing Mignogna of “great volumes of sexual misconduct;” (3) re-tweeted another statement urging Funimation to “reconsider hiring Vic Mignogna as a voice actor in the future.”); *see also* 3 Supp. CR 36, ¶ 27 (alleging that Toye tweeted publicly that, “he is down because he took advantage of girls[.]”).

Affidavits attached to the Anti-SLAPP Motion show that the communications were aimed at community well-being in the face of an individual. 2 CR 690-770. Meanwhile, Rial and Toye testified that they communicated with their Twitter followers and with Funimation for the purpose of telling fans and possible conference attendees about Mignogna’s sexual misconduct with underage women and to corroborate the stories of others. *See* 2 CR 777; 820; *see also* 3 Supp. CR 34, ¶¶ 15-17.

Mignogna’s pleadings, combined with evidence and affidavits properly before the trial court, show that the thrust of his allegations is that Appellees communicated online about matters related to child safety, sexual harassment, and community well-being. *See* 1 CR 68-69 (Mignogna’s online apology attempts to excuse his misconduct as simply inappropriate hugging, kissing, and touching); *see also*

Coleman, 512 S.W.3d at 900 (stating that the TCPA applies to a lawsuit so long as the movant’s statements are “in connection with” “issue[s] related to” any of the matters of public concern listed in the statute); *Backes*, 486 S.W.3d at 20.

The trial court, therefore, correctly found that Appellees established by preponderance of the evidence that the above-referenced Claims are based on, relate to, or are in response to Appellees’ exercise of the right to free speech and/or right to association. 6 CR 3224-28 (Dismissal Order).

C. (Issue Two): The trial court did not abuse its discretion by excluding evidence submitted by Mignogna after the agreed upon briefing deadline and in violation of Texas Rules Civil Procedure 59 and 70.

Under the TCPA, if the movant “shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party’s exercise of the right to free speech [or] the right to association,” then the burden shifts to the non-movant (Mignogna) to establish “a prima facie case *for each essential element* of the claim in question” through *clear and specific* evidence. Tex. Civ. Prac. & Rem. Code § 27.001(2).

Mignogna failed to meet his burden because his evidence was properly excluded and, in the alternative, did not provide *clear and specific* evidence to support the elements of his Claims.

i. Mignogna's Second Amended Petition and evidence in Response to the Anti-SLAPP Motion were untimely, prejudicial, and unfairly surprising.

In his Brief, Mignogna argues unpersuasively that the trial court should have considered the Second Amended Petition and its attachments in deciding Step 2 of the TCPA analysis. Brief, pp. 33-34. An understanding of the case's procedural history quickly and easily defeats this argument. First and foremost, this Court reviews the decision to exclude evidence under an abuse of discretion standard, and the trial court's decision may only be disturbed if the decision to exclude evidence was "arbitrary, unreasonable, and without reference to any guiding rules or principles." *Dallas County Sheriff's Dept. v. Gilley*, 114 S.W.3d 689, 691 (Tex. App.—Dallas 2003, no pet.); *see Ordonez v. Solorio*, 480 S.W.3d 56, 67 (Tex. App.—El Paso 2015, no pet.) (stating that the court reviews admission of evidence at the dispositive motion stage under an abuse of discretion standard).

In this case, the Scheduling Agreement set Mignogna's deadline to respond to the Anti-SLAPP Motion to August 30, 2019. 3 CR 1188-89. It is undisputed that Mignogna did not file his response until after that deadline. 6 CR 3005. *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996) (holding that when movant agreed to delay hearing as long as respondent filed response at least one week before hearing, but respondent filed response and affidavit just one day before hearing—trial and appellate courts erred in considering belated affidavit).

Although the trial court would have been fully within its discretion to exclude Mignogna's Untimely Response, it granted Mignogna's request for leave to file a late response.¹² Even with the extra time, though, the Response was still fatally deficient. The Untimely Response was rife with missing citations, incomplete arguments, and other errors. 4 CR 1264-68, fn 29-58. More importantly, the Response was based on withdrawn affidavits signed by Mignogna, Chuck Huber, and Chris Slatosch, which were not executed in the physical presence of the notary—contrary to the notarization page signed by Mignogna's counsel, Ty Beard. 6 CR 3008. Appellees moved to strike the affidavits (6 CR 3000-3008), but rather than fight a losing argument, *Mignogna voluntarily withdrew them*. 6 CR 2931; 3 RR at 14:15-17; 15:12-17; and 41:11-14 (admitting that the affidavits were defective and did not intend for them to be considered at the TCPA hearing).

Realizing that withdrawing his affidavits meant that he had almost no evidence to support his Claims, Mignogna tried to bolster his Untimely Response by filing a Second Amended Petition correcting those errors and filling in *dozens* of citations that were previously omitted. 5 CR 2467-95 (Second Amended Petition,

¹² Mignogna told the trial court that his Response was late because of “technical issues.” However, at least one court has equated the failure of computer equipment to the classic dog-ate-my-homework excuse, noting that “[i]mperfect technology may make a better scapegoat from the family dog in today's world, but not so here.” *Fox v. Am. Airlines*, 389 F.3d 1291, 1294 (D.C. Cir. 2004) (emphasis added). The extent of the mistakes in Mignogna's Response completely undermines the excuse that it was untimely because of “technical issues.”

adding new arguments and evidence). In particular, the Second Amended Petition also sought to add unsworn declarations that were nearly identical to the withdrawn affidavits—including the declaration of Chris Slatosch that Mignogna relies on in his Brief—three days before the TCPA hearing. 5 CR 2540-42. Even the declarations, however, defectively failed to comply with Chapter 132 of the Texas Civil Practice & Remedies Code by not including a date of birth or address. *Id.*

Appellees objected to the admission of the new evidence and pleading, which the trial court ostensibly sustained. 6 CR 3000-25 (Appellees’ Motion to Strike Second Amended Petition and Response to Anti-SLAPP Motion); 6 CR 3086-112 (Omnibus Objections to Mignogna’s TCPA Evidence); *see* 6 CR 3224-28 (Dismissal Order excluding Second Amended Petition and affidavits).

Mignogna argues that the Second Amended Petition was neither surprising nor prejudicial. Brief, pp. 33-34. However, the extent to which the Second Amended Petition drastically altered the previous pleadings and sought to bolster Mignogna’s evidence contradicts that argument. In addition to being filed just three days before the September 6 hearing, the Second Amended Petition included over 34 new paragraphs of allegations, appended newly signed declarations, and attempted to shoehorn in additional inadmissible exhibits (Exhibits A and Q) not previously included. 5 CR 2467-95. In fact, the Second Amended Petition included a new seven-page argument conspicuously titled “Prima Facie Evidence” that was blatantly an attempt to augment the Untimely Response. 5 CR 2488-2489, ¶¶ 72-89.

These substantive and significant additions were wholly improper, and the trial court properly excluded them. *See Texas 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.) (holding that Tex. R. Civ. P. 59 precludes a party from attaching purely evidentiary matters to a pleading).

In its Dismissal Order, the trial court was clear that it did not consider the affidavits because they were withdrawn. 6 CR 3224-28. The court also did not consider the additional evidence submitted within the Second Amended Petition because the evidence was filed late, in violation of the parties’ Rule 11 agreement. 6 CR 3224-25. There has been no showing that the trial court abused its discretion in this regard, and the exclusion of Mignogna’s Second Amended Petition and withdrawn affidavits should be upheld. *EZ Pawn Corp.*, 934 S.W.2d at 91; *Ordonez*, 480 S.W.3d 56, 67; *Southwestern Bell Tel. Co. v. Meader Constr. Co.*, 574 S.W.2d 839, 843 (Tex. Civ. App.—El Paso 1978, writ ref’d n.r.e.) (stating that it is not an abuse of discretion for the trial court to refuse to consider untimely affidavits opposing a motion for summary judgment).

To the contrary, the trial court was guided by sound principles and authorities and was within its discretion to exclude the Second Amended Petition and evidence attached thereto.

D. (Issue Three): The trial court properly found that Mignogna failed to establish, by clear and specific evidence, a prima facie case for each element of his Claim for Defamation.

To avoid dismissal under the TCPA, Mignogna must establish by clear and specific evidence a prima facie case *for each element* of his Claims. Tex. Civ. Prac. & Rem. Code § 27.005(c). This means Mignogna must do more than simply provide notice—he must prove the Claims by providing detailed evidence to show the factual basis for them. *In re Lipsky*, 460 S.W.3d 579, 590-91 (Tex. 2015).

“To maintain a defamation cause of action, the Appellant must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the Appellant; (3) while acting either with actual malice, if the Appellant was a public official or public figure, or negligence, if the Appellant was a private individual, regarding the truth of the statement.” *WFAA-TV, Inc.*, 978 S.W.2d at 571.

To be defamatory, the statement must be materially false. *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 692 (Tex. App.–Houston 2013, pet. denied) (collecting cases). A statement is not actionable unless it asserts an objectively verifiable fact rather than an opinion. *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 875 (Tex. App.–Dallas 2014, no pet.); *accord Tatum v. Dallas Morning News*, 493 S.W.3d 646, 667–68 (Tex. App.–Dallas 2015, pet. pending). “[I]ndefinite or ambiguous individual judgments that rest solely in the eye of the beholder” and “loose and figurative terms employed as metaphors or hyperbole” are non-actionable expressions of opinion. *Avila*, 394 S.W.3d at 659 (quoting *Palestine Herald–Press*

Co. v. Zimmer, 257 S.W.3d 504, 509 (Tex. App.—Tyler 2008, pet. denied) (internal quotation marks omitted).

i. Mignogna’s defamation claims are fatally defective for failure to include the complete context of the alleged defamatory statements.

As a preliminary matter, Mignogna’s defamation claims fail because he failed or refused to provide the full context of the allegedly defamatory statements, relying instead on baseless speculation. Mignogna’s defamation claims are also based on libel, which requires the court to examine the entire publication and determine as a matter of law whether the statement is merely an opinion or actionable defamation. *See Bilbrey*, 2015 WL 1120921, at *12 (“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 . . . 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.”); *Jackson v. NAACP Houston Branch*, 14-15-00507-CV, 2016 WL 4922453, at *12 (Tex. App.—Houston [14th Dist.] Sept. 15, 2016, pet. denied). Mignogna’s evidence of Rial or Toye’s tweets suffer the same defect—they are intentionally out of context and do not constitute defamation.

While Toye is alleged to have posted hundreds of negative tweets about Mignogna, in the context of a “twitter war,” context is critical. This is particularly true because the nature of the discussion gives context to the debate and meaning of

these hyperbolic tweets. *See Feld v. Conway*, 16 F. Supp. 3d 1, 3–4 (D. Mass. 2014). (stating that, “[a] 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[.]*”) (emphasis added).

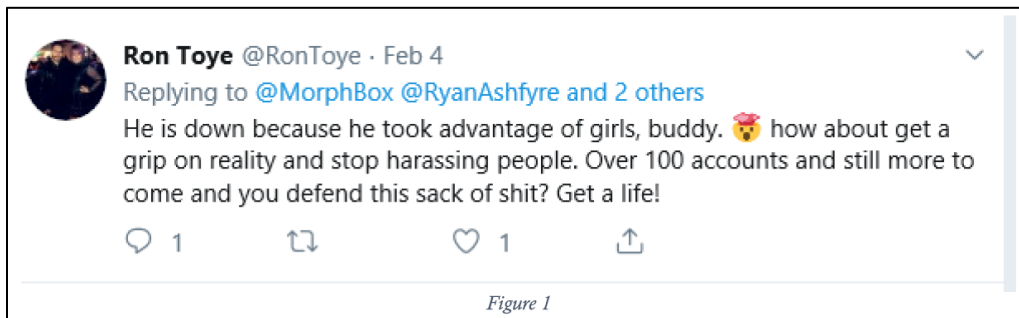
One example from Mignogna’s Petition proves this point. He includes a screen shot of one tweet to allege that Rial defamed him by stating that, “he’s the legal definition of harassment:”



Appellant’s Brief, p. 6; *see also* 3 Supp. CR 39, ¶ 31.

This tweet, without context, fails to establish who Rial is referring to, what she is responding to, or who “he” is. *See Bilbrey*, 2015 WL 1120921, at *12; *Mogged v. Lindamood*, Ca. No. 02-18-00126-CV, 2018 WL 6920502, at *2, 5 (Tex. App. – Ft. Worth Dec. 31, 2018) (currently withdrawn and transferred to the El Paso Court of Appeals for *en banc* hearing solely on an attorneys’ fees issue). Mignogna further fails to identify whether this tweet is defamation *per se* or *per quod*, a common failure among his conclusory arguments to this Court.

Mignogna employs the same strategy with Toye’s tweets:



3 Supp. CR 36.

This tweet in Mignogna’s Petition, without context, fails to establish who Toye is referring to, what he is replying to, or who “he” is. *Bilbrey*, 2015 WL 1120921, at *12; *Mogged*, 2018 WL 6920502, at *2, 5. Absent appropriate context, the court cannot determine if these statements are defamatory, much less whether they meet the standards for defamation *per se* or *per quod* (which also dictates the scope of Mignogna’s burden to establish actual damages). *See Neurodiagnostic Consultants, LLC v. Villalobos*, 03-18-00743-CV, 2019 WL 4892220, at *3 (Tex. App.—Austin Oct. 4, 2019, no pet. h.).

Even accepting as true that they refer to Mignogna, these tweets came during a heated internet debate. Rather than include the context of the tweets, Mignogna routinely selects certain excerpts out of context and merely concludes that the statements are defamatory: “[o]ver the next week or so, [Toye] tweeted ‘Evidence: He has been fired, there was an investigation . . . these actions have corroborated testimony,’ (February 13, 2019), ‘Their [Funimation’s] decision was on things that

happened to funimation employees,’ (February 18, 2019), and ‘let’s see who walks away a registered sex offender” (February 16, 2019).” 3 Supp. CR 39, ¶ 32.

All of these tweets occur *after* the conventions terminated Mignogna (*i.e.*, no causation). Moreover, the tweets are “indefinite or ambiguous individual judgments that rest solely in the eye of the beholder” and “loose and figurative terms employed as metaphors or hyperbole” are non-actionable expressions of opinion. *Avila*, 394 S.W.3d at 659. Setting aside these issues, Toye also testified that the context of his tweets were missing. *See, e.g.*, 2 CR 816 (Toye Depo. at 125:6-9):

Q. Okay. But you’re telling someone, Bye. Have fun with the predator. Can’t wait for you – your, I assume – apology?

A. It was supposed to be your, it looks like

Q. And who are you talking about?

A. Looks like on this one - - I’m not sure on this, but - - I’m not sure. I don’t know who or what was the previous conversation so it could be anybody.

Q. If you were a betting man, who would you say you were talking about?

A. I don’t know.

Further, the Untimely Response was so poorly briefed that it lacked proper citation (to at least 24 footnotes) and impermissibly thrust upon the trial court the obligation to sift through over a thousand pages of “evidence,” including one exhibit that contained 341 pages of out of context tweets compiled by Mignogna’s counsel. 2 CR 803; *see Shelton*, 144 S.W.3d at 113. Mignogna does the same thing with this Court and the voluminous appellate record.

- ii. *The tweets and statements allegedly made by Rial and Toye were not only true, but also could not have harmed Mignogna's already terrible reputation.*

In addition to being out of context, a statement cannot be defamatory unless it “tends to injure a living person’s reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person’s honesty, integrity, virtue, or reputation.” Tex. Civ. Prac. & Rem. Code § 73.001; *see also In re Lipsky*, 460 S.W.3d at 596.

To be clear, Mignogna concedes that the Negative Press independently damaged his reputation, and he makes no effort to show whether any alleged harm he suffered was *caused by* Rial, Toye, online statements, or the Negative Press. 2 CR 484 (Mignogna Depo. at 230:25-231:10). Mignogna has not shown that his alleged injury was due to Appellees’ statements, rather than the literally hundreds of other sources publishing Mignogna’s history of misconduct, including the Negative Press. 2 CR 501-99.

There is ample evidence in the record from several people who corroborated the allegations leveled against Mignogna describing similar experiences and knowledge of Mignogna’s poor reputation for sexual misconduct in the anime industry. 2 CR 650-771. In fact, *sixteen* individuals submitted affidavits attached to the Anti-SLAPP Motion showing Mignogna’s bad reputation. 2 CR 714, ¶¶ 3-4; and 769, ¶ 5.

Under such circumstances, Texas courts are clear that Mignogna is libel proof:

Although the three statements Swate complains about may be false, the *earlier newspaper articles and the disciplinary orders describe conduct that would have ruined Swate's reputation prior to the publication of Schiffers' article.*

* * *

These actions, and others, were reported in the numerous newspaper articles that were included in the defendants' summary judgement evidence. *While we need not include all of the details of these articles, let it suffice to say that Swate has been the target of extensive negative media attention for at least ten years, so much so that it is impossible to believe Swate's reputation could have been further damaged by the statements in Schiffers' article.*

See Swate v. Schiffers, 975 S.W.2d 70, 74-75 (Tex. App.—San Antonio 1998, pet. denied).

iii. Mignogna did not establish that Rial or Toye's communications were materially false, or made with "actual malice," which is fatal to his claim for Defamation.

The standard for defamation requires some degree of fault, which in the case of a claim by a public figure, is actual malice. *WFAA-TV, Inc.*, 978 S.W.2d at 571. As noted above, Mignogna is a public figure. 2 CR 438 (Mignogna Depo. at 48:16-21); 487 (Mignogna Depo. at 243:12-23). Accordingly, Mignogna must not only show that the allegedly defamatory statements are false, but also show that the statements were made with actual malice. *See Neely v. Wilson*, 418 S.W.3d 52, 56 (Tex. 2013) ("Truth is a defense to all defamation suits."); *See WFAA-TV, Inc.*, 978 S.W.2d at 571. "Actual malice arises when the defamatory statement is knowingly

false or conveyed with reckless disregard for its truth.” *Mogged v. Lindamood*, 02-18-00126-CV, 2018 WL 6920502, at *3 (Tex. App.—Fort Worth Dec. 31, 2018, pet. abated).

To show reckless disregard, Mignogna must do more than make conclusory assertions that the Appellees could not know the truth of their statements; rather, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Mignogna’s Brief completely ignores his heightened pleading requirement to show actual malice. *See Greer v. Abraham*, 489 S.W.3d 440, 445–48 (Tex. 2016). Instead, Mignogna’s Brief argues only that, “Vic specifically denied Monica’s accusations; this is clear and specific evidence that Monica’s publication was false and that Monica knew her publication was false.” Brief, p. 13. This conclusory statement is neither true, nor sufficient under the law. *Hearst Corp. v. Skeen*, 159 S.W.3d 633, 639 (Tex. 2005) (citations omitted); *Mogged*, 2018 WL 6920502, at *10 (factual basis existed for defendant’s belief plaintiff was a predator).

Mignogna attempts to establish Toye’s actual malice by pointing out that, “Ronald later claimed: ‘I know without a question he hurt people very close to me[.]’” Brief, p. 4. However, there is nothing defamatory about that statement because this is true and/or unverifiable opinion. Concerning Toye’s tweets about

Mignogna's assault of women, Mignogna argues only that "Ronald could not 'know with 100% certainty' that Vic assaulted them." Brief, p. 15. As is the case with all of Mignogna's allegations, he fails to show that Toye or Rial entertained serious doubts as to the truth of their statements—or even that their statements were false.

Mignogna deposed Toye and Rial, and yet conspicuously does not point to any testimony that would show either of them knew that their statements were false when made, or were made with reckless disregard for the truth. He simply concludes, with no basis, that he believes the statements are untrue so it must follow that Appellees knew the statements were untrue at the time they made them. Mignogna, of course, provides the Court with no basis for this inadequate argument.

In fact, all the evidence in the record reveals that Appellees *did not* act with actual malice, and sincerely believed every word they wrote. Rial truthfully described the assault against her, engaged truthfully in the Funimation investigation, and released her statement online because she felt it was important to corroborate other stories that were similar to hers. *See* 2 CR 777-78 (Rial Depo. at 27:17-28:3; 28:16-31:18) (testifying about the Funimation investigation and the assault that she disclosed to Denbow); 789 (Rial Depo. at pp. 75:1-16) (testifying that she came forward to corroborate other women's similar stories).

Likewise, Toye testified about his belief in the truth of his statements. *See, e.g.,* Toye Deposition attached to Mignogna's Untimely Response, 4 CR 1906-07 at 71:8-72:6 (Toye believes accounts to be true based on personal knowledge of women

he knows and accounts online, and Mignogna’s own statements); CR 1962 at 127:4-19 (Toye believes Mignogna is a predator based on four women he knows with experience and online information); CR 2022-23 at 187:13-188:11 (Toye has personally seen inappropriate hugging of fans).

The appellate record shows overwhelmingly that *Appellees’ did not make any of the allegedly defamatory statements with actual malice.*

E. (Issue Four): The trial court properly found that Mignogna failed to establish, by clear and specific evidence, a prima facie case for each element of his Claims for (1) Tortious Interference with Existing Contracts and (2) Tortious Interference with Prospective Business Relations.

To state a cause of action for tortious interference with contracts/prospective business relations, Mignogna must prove each of the elements of his claim with clear and specific evidence. Specifically, (1) there must be a “reasonable probability” that the Appellant had entered or would have entered into a contract; (2) the defendants’ conduct must have been independently tortious or wrongful; (3) the defendants committed the act with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur as a result of his conduct; (4) the defendants’ interference *must have been the proximate cause* of the Appellant’s actual harm or damages; and (5) when the interference is with prospective business relations, the *Appellant must show that the actions caused* third persons to refuse to deal with the Appellant. *Faucette v. Chantos*, 322 S.W.3d

901, 914 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *see also Prudential Ins. Co. of Am. v. Fin. Review Services*, 29 S.W.3d 74, 77 (Tex. 2000).

i. Mignogna did not prove any actual interference.

As an initial matter, Mignogna completely failed to introduce a single contract—or anticipated contract—to support either of these Claims. During the hearing on the TCPA Motions to Dismiss, counsel for Mignogna outright admitted that Mignogna did not present “any written agreements.” 3 RR 109:12-19. With respect to Kameha Con (Brief, p. 19), he relies on the withdrawn and defective affidavit from Slatosh and admits that *he was ultimately allowed to attend*.¹³ Like the facts in *Van Der Linden*, not a single contracting party (actual or prospective) testified that they terminated contracts with Mignogna (actual or prospective) based on something that Appellees said or did. 535 S.W.3d 179, 195-96 (Tex. App.—Fort Worth 2017, pet. denied). Compounding this deficiency is the fact that Mignogna refers to two conventions in his Brief—Emerald City Comic Con and Fan Expo Orlando—that Mignogna did not even include in his Petition or argue below. *Compare* Brief, p. 19 *with* First Amended Petition.

¹³ With regard to Kameha Con, Mignogna admitted that he actually attended this convention under a superseding contract that he ***did not enter into evidence***. Mignogna’s entire claim for tortious interference is based on a single convention that he was not barred from attending.

ii. Mignogna’s Brief is significantly and fatally defective with regard to causation.

Mignogna’s Brief suffers from that age-old fallacy *post hoc ergo propter hoc* (Latin for “after this, therefore because of this”), which assumes that simply because something occurred after an event, it was caused by the event. *See Van Der Linden*, 535 S.W.3d at 195 (temporal proximity between allegedly interfering statement and loss of contract **is not enough** to demonstrate causation because “conjecture, guess, or speculation” cannot survive clear and specific scrutiny under Chapter 27). The timing of any allegedly terminated contract, standing alone, is insufficient and too speculative to demonstrate causation. *Id.* Proximate cause requires proof of both cause-in-fact **and** foreseeability. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). The test for cause-in-fact is whether the tortious conduct was a substantial factor in bringing about the alleged injury; that is, **a factor without which the injury would not have occurred**. *Id.*; *see Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016). Mignogna’s evidence does not meet this standard.

Mignogna’s own timeline negates his claims for tortious interference and causation. In his zeal to blame Appellees for the cancellations, Mignogna conveniently ignores the effect of other public factors, including the Negative Press, thousands of retweets of Hanleia’s original tweet, and hundreds of online comments by people indicating that Mignogna sexually harassed women and minors. *See Van Der Linden*, 535 S.W.3d at 195.

Mignogna unpersuasively suggests that he lost his scheduled invitations to appear at several conventions because of Appellees' communications. 3 Supp. CR 34-35; Brief, pp. 19-20. However, at least one of the cancellations occurred *before* Toye's first public tweet about Mignogna. 3 Supp. CR 35, ¶ 20 (Phoenix Fan Fusion convention cancelled on January 18; Toye's first alleged tweet on January 26). With regard to Funimation's termination, Mignogna never showed that Funimation terminated him because of what Rial is alleged to have communicated. To the contrary, Denbow submitted an affidavit stating that the decision was based on several factors, including Mignogna's interview. 1 CR 60, ¶¶ 3-5; 2 CR 672.

Further, at least six of the conventions canceled Mignogna's appearance after publication of the Negative Press.¹⁴ Mignogna's evidence is non-existent with respect to which *specific Appellees'* alleged actions caused his purported damages. In other words, Mignogna offers no evidence that Rial, Toye, or Marchi were the specific reason that conventions canceled Mignogna's appearances.

Mignogna concedes that the Negative Press irreparably damaged his reputation. 2 CR 484 (Mignogna Depo. at 230:25-231:10). These articles were published at least beginning on January 25, 2019, and were themselves a reaction to public outcry concerning Mignogna's sexual harassment. 2 CR 501-504.

¹⁴ Mignogna admits that it's "not unusual at all" for actors to not be invited back to a convention two years in a row. 2 CR 452 (Mignogna Depo. at 101:13-23). Mignogna failed to show whether a convention's decision to not invite him was caused by Rial or Toye's statements, or a routine decision.

Importantly, the sources for these articles were *not Appellees*, but rather “voice actors, cosplayers, industry professionals, convention employees, and former fans” (2 CR 599) who identified and described “over 100 independent allegations . . . dating back to 2003.” 2 CR 525. Mignogna simply cannot—and in fact does not even try to—separate the influence that the Negative Press and other online statements had on his canceled convention appearances from the tweets by Appellees.

iii. Mignogna fails to identify any nexus between Appellees and his purported damages.

As with his defamation claim, Mignogna failed to offer any evidence identifying the nexus between Appellees’ alleged conduct and Mignogna’s purported damages. In *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, the Houston Court of Appeals held that a business’ showing of declining general revenue in the wake of a negative review is not sufficient for the damages element of a tortious interference claim under the TCPA. *Better Bus. Bureau of Metro. Hous., Inc.*, 441 S.W.3d at 361. The Texas Supreme Court also announced in *S & S Emergency Training Sols., Inc. v. Elliott* that evidence of damages must be “sufficient to support a rational inference that *[Appellees’] actions caused [Appellant] to lose some specific, demonstrable [damages].*” *Elliott*, 2018 WL 6711322, at *3 (citing *In re Lipsky*, 460 S.W.3d at 592–93) (emphasis added).

Mignogna “did not attempt to explain how any damages might have been the natural, probable, and foreseeable result” of Appellees’ alleged interference. *Elliott*,

2018 WL 6711322, at *3; *see also In re Lipsky*, 460 S.W.3d at 593 (dismissing claim where Appellant averred that it had suffered economic harm, but did not set out specific facts showing *how defendant's specific conduct* caused the harm.). Instead, he simply argued that he lost money from the convention cancellations. This is not enough. *See Van Der Linden*, 535 S.W.3d at 197 (“The supreme court has instructed us that ‘general averments of direct economic losses and lost profits’—even when a dollar amount is specified—do not satisfy the minimum requirements of the TCPA.”); *see also Rogers v. Soleil Chartered Bank*, 02-19-00124-CV, 2019 WL 4686303, at *10 (Tex. App.—Fort Worth Sept. 26, 2019, no pet.) (stating that, “conclusory damages allegation does not come close to what [plaintiff] needed to offer to establish a prima facie case on the element of damages for tortious interference with prospective business relations.”).

F. (Issue Five): The trial court properly found that Mignogna failed to establish, by clear and specific evidence, a prima facie case for each element of his Claim for Civil Conspiracy.

“The elements of civil conspiracy are that (1) two or more persons; (2) with an object to be accomplished; (3) with the meeting of minds on the object or course of action; (4) commit one or more unlawful or overt acts; (5) and causes damage or injury.” *Robinson v. Brannon*, 313 S.W.3d 860, 867 (Tex. App—Houston [14th Dist.] 2010, no pet.). Because a civil conspiracy claim is a vicarious liability theory, not an independent tort claim, this claim fails because each of the underlying tort claims fails. *Schoellkopf v. Pledger*, 778 S.W.2d 897, 900 (Tex. App.—Dallas 1989, writ

denied) (“Because we find that Pledger failed to establish any other substantive tort, we hold there is no independent liability for conspiracy.”); *see also Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 138 (Tex. App.—Texarkana 2000, no pet.). Here, the evidence in the record wholly undermines Mignogna’s Claims for defamation and tortious interference. Consequently, there is no basis to support the conspiracy claim. Further, conspiracy requires that a defendant commit “one or more unlawful, overt acts.” Here, none of Appellees’ alleged actions were unlawful.

In *Goldstein*, the Texas Court of Appeals in Austin instructed that a “conspiracy requires a meeting of the minds on the object or course of action, and some mutual mental action coupled with an intent to commit the act which results in injury; ***there must be a preconceived plan and unity of design and purpose.***” 113 S.W.3d at 779 (emphasis added). The *Goldstein* court also explained that, “[i]ndividual statements made by distinct entities are plainly insufficient for a conspiracy.” Here, Mignogna never showed a meeting of the minds sufficient to establish a conspiracy. In fact, Rial testified that she did not have a preconceived plan with Marchi or Toye. 2 CR 777 (Rial Depo. at 27:17-28:3; 28:16-32:14).

In *Backes*, the Dallas Court of Appeals addressed allegedly defamatory Facebook posts and determined that the TCPA “requires more than an inference that there was a meeting of the minds;” it requires “clear and specific evidence.” 486 S.W.3d at 27 (noting that evidence of “heated discussions” and “mean-spirited”

posts did not meet the threshold of “clear and specific evidence” of a meeting of the minds). *Lane v. Phares*, 544 S.W.3d 881 (Tex. App.—Fort Worth 2018, no pet.).

G. (Issue Six): Even if Mignogna had presented competent evidence to support his Claims, the trial court could have properly granted the Anti-SLAPP Motion to Dismiss because Appellees established by a preponderance of the evidence their affirmative defenses of the Communications Decency Act, Qualified Privilege, and Mignogna’s previously diminished reputation.

Under the TCPA, even if the non-movant can make a showing of each essential element of his claims, the Court *still* must dismiss the action “if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.” Tex. Civ. Prac. & Rem. Code § 27.005(d).

First and foremost, Mignogna’s Brief attempts to add entirely new defamatory statements that were never the subject of any Petition filed by Mignogna. The only allegedly defamatory statements that were the subject of this litigation are allegedly defamatory tweets (or retweets) made by Rial and Toye, not, as Mignogna now would have this Court believe, statements made to Slatosch. *Compare* Amended Petition (3 Supp. CR 33-40) and Brief, pp. 2-3; 13-14.¹⁵ The Court need only look to Mignogna’s Amended Petition to see that his entire lawsuit was based on tweets:

(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.
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¹⁵ As a reminder, the Slatosch Affidavit was withdrawn and therefore not part of the underlying record. 6 CR 2931.

i. Communications Decency Act precludes defamation because Appellees are not responsible for the allegedly defamatory content.

Mignogna’s Claims—as actually pleaded in the trial court below—allege the following instances of defamation attributable to Twitter users who are not parties to this litigation:¹⁶

Alleged Defamatory Statement No. 1

(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.”

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.” About the same time, one or more Defendants began actively defaming Vic directly to anime conventions, speaking of investigations and Vic being fired.

Because the alleged defamation is based on tweets, the claim is barred under section 230 of the Communications Decency Act (“CDA”) because Mignogna treats

¹⁶ The paragraph number in the box is a reference to the Amended Petition. 3rd Supp. CR 31-44.

Appellees as publishers of information provided by a third-party (*e.g.*, Hanleia or others). By its terms, section 230(c)(2)(A) of the CDA protects an action taken in “good faith”—that is, with an absence of malice. *Milo v. Martin*, 311 S.W.3d 210, 221 (Tex. App.—Beaumont 2010, no pet.). As identified above, neither Rial nor Toye acted with actual malice. 2 CR 777; 820.

Mignogna also failed to establish that Statements 1 through 3 are defamatory because (a) Mignogna failed to provide the full context of the statements, rendering it impossible for the factfinder to determine if the statements are fact or opinion; (b) the statements are true or substantially true because Mignogna has been creepy with underage fans (which was verified by separate affidavits in evidence) and Funimation terminated its relationship with Mignogna following an investigation; and (c) Mignogna failed to provide evidence that Rial’s retweets meet the standard of actual 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.

Mignogna failed to establish that Statement 4 is defamatory because (a) he did not establish that it had any negative impact on his reputation. *See Hancock v. Variyam*, 400 S.W.3d 59, 62 (Tex. 2013) (stating that defamatory statements are statements that injure an individual’s reputation)); (b) the alleged statements on Statement 4 are true or substantially true (*see In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (statement must be false to be defamatory)); (c) are protected by the qualified privilege of an investigation. *See Randall’s Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995)). Further, there is no evidence that the statements were made with actual malice, which protects them under the CDA. *See Lipsky*, 460 S.W. 3d at 593.

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.

These alleged statements are not defamatory because (a) they do not meet the specificity test (*i.e.*, Mignogna never identifies which of the four identified Appellees allegedly made the statement about the investigation); (b) Mignogna fails to include the full context of the tweets, and therefore it cannot be determined if it is

fact or opinion; (c) the statements are literally true because Funimation and Rooster Teeth investigated his conduct; and (d) statements about future acts are merely statements of opinion. *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 . . . They are also statements about future potential, making them not facts but predictions.”).

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*).

These allegations do not establish a claim for defamation because (a) the full context of the tweets are not included, which would have clarified that these statements are hyperbolic opinion (*see Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636, 643 (Tex. App.—Fort Worth 1998, no pet.) (“In Texas, an opinion cannot form the basis of a defamation action.”)); (b) the statements are true because Mignogna was actually investigated by Funimation and Rooster Teeth; and (c) there is no evidence that the statements were made with actual malice or that they harmed Mignogna’s reputation—barring the claim under the CDA. *See Hancock*, 400 S.W.3d at 62.

Alleged Defamatory Statement No. 7

(33) On February 19, 2019 [after the Funimation investigation became public], 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 alleged statements do not constitute defamation because the statements (a) are literally true where Mignogna was actually investigated by Funimation and Rooster Teeth (*see Lipsky*, 460 S.W.3d at 593); (b) are true and/or substantially true because Mignogna’s behavior (corroborated by multiple affidavits) is indicative of a sexual predator or is otherwise hyperbolic opinion (*Id.*); (c) are protected by the qualified privilege arising out of an investigation (*see Johnson*, 891 S.W.2d at 646); and (d) because Rial testified that she made these statements for good faith reasons, which cannot constitute actual malice.

ii. Appellees are entitled to dismissal of the Claims based on the defense of qualified privilege.

The evidence in the record also mandates that this Court affirm the trial’s dismissal because Appellees’ tweets are protected by qualified privilege. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 582 (Tex. 1994) (“Qualified privileges against defamation exist at common law when a ***communication is made in good faith*** and the author, the recipient or a third person, or one of their family members, has an ***interest that is sufficiently affected*** by the communication. A communication may

also be conditionally privileged if it *affects an important public interest.*”) (internal citations omitted) (emphasis added); *see also Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 93 (Tex. App.—Dallas 1996, writ denied).

Rial unquestionably made the communications in good faith—she testified that she shared her personal experience because she was cooperating with an investigation and believed it was important to corroborate other women’s stories. See 2 CR 777-78; 820. Toye, as Rial’s fiancé, was aware of multiple allegations from victims concerning Mignogna’s predatory actions, including Rial. 2 CR 804-805; 808; and 814 (Toye Depo. at 41-42, 57-63, 71-72, 74, 119-120). Further, the contemporaneous articles written about Mignogna along with numerous statements by individuals online support Toye’s opinion that Mignogna was a predator *and* show that this was a matter of public concern. *See Hanssen*, 938 S.W.2d at 93.

iii. Mignogna failed to offer any evidence to overcome Appellee’s Diminished Reputation affirmative defense.

Finally, as noted above, Mignogna is libel proof not only because of the Negative Press, online comments, and affidavits about his reputation, but he admits there have been persistent rumors of pedophilia and sexual assault about him for years. 2 CR 452 (Mignogna Depo. at p. 101:3-6 (admitting, “these social media attacks have happened in the past”)); 5 CR 2562, ¶ 77 (Chuck Huber confirming that, “I believe Vic utilized his position of privilege in shameful ways in attempts to obtain sex.”); 2 CR 650-771 (affidavits demonstrating the extent of Mignogna’s

already terrible reputation). Under such circumstances, Texas courts are clear that Mignogna is libel proof and cannot establish damages. *Swate*, 975 S.W.2d at 74-75.

Rial and Toye's Issue on Cross-Appeal:

H. (Issue One): The Final Judgment improperly awards Rial and Toye an amount of attorneys' fees (\$100,000.00) lower than the amount requested and supported by competent evidence in their motion for fees (\$282,953.80).

Rial and Toye were correctly awarded attorneys' fees in defending against Mignogna's Claims, including conditional appellate fees. *See Van Sickle*, 452 S.W.3d at 526-27; *McGibney*, 549 S.W.3d at 828-829 (conditional appellate fees available for successful defense of TCPA grant). However, the arbitrary manner in which the trial court awarded attorneys' fees, coupled with Appellees' uncontroverted evidence, requires this Court to reverse and render an award of fees. *Hoelscher v. Kilman*, 03-04-00440-CV, 2006 WL 358238, at *4 (Tex. App.—Austin Feb. 16, 2006, no pet.).

“Evidence of attorneys' fees that is clear, direct, and uncontroverted is taken as true as a matter of law, *especially where the opposing party had the means and opportunity of disproving the evidence but did not*. In such instances, appellate courts will reverse a denial or minimization of attorneys' fees and *render judgment for attorneys' fees in the amount proved*.” *Hoelscher*, 2006 WL 358238, at *4 (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990) (emphasis added)). In this case, Appellees proved entitlement to \$282,953.80 in trial

fees, plus \$55,000 in conditional appellate fees, which Mignogna had the means and opportunity disprove, but did not.

The following table identifies the amount sought and awarded by the Court.

Defendant	Amount Sought	Amount Awarded
Rial and Toye	\$282,953.80 plus \$55,000 in conditional appellate fees	\$100,000 plus \$55,000 in conditional appellate fees
Marchi	\$48,137.50	\$48,137.50
Funimation	\$168,941.00	\$50,000

4 RR 25:13-18 and 33:5-23 (\$282,953.80 plus \$55,000); 4 RR 161:9-12 (\$48,137.50); and 113:12-16 (\$168,941.00).

Rial and Toye’s counsel testified extensively to the factors identified by the Texas Supreme Court in determining reasonable and necessary attorneys’ fees. 4 RR 14-15; 20:9-13; *see Stavron v. SureTec Ins. Co.*, 02-19-00125-CV, 2019 WL 6768125, at *7 (Tex. App.—Fort Worth Dec. 12, 2019, no pet.) (affirming fees under *Rohrmoos*); *Hoelscher*, 2006 WL 358238, at *4. To that end, Rial and Toye’s counsel analyzed and applied *Rohrmoos* by applying a billing judgment reduction, as appropriate. 4 RR 20:9-13 (testifying that, “I did that calculation on an Excel spreadsheet, tracked it, identified it by timekeeper. And so if you look at that Exhibit B to my affidavit, you can see the exact reductions that I made to meet the *Rohrmoos* billing discretion analysis.”); 5 RR 112-113 (showing reductions in Ex. 7A); 4 RR 17 (specifically testifying about the factors identified in *Rohrmoos* and how Rial and Toye complied with those requirements).

The fees that should have been awarded to Rial and Toye—and which should be rendered by this Court—is broken down as follows:

Attorneys' fees incurred by Wick Phillips and various co-counsel through October (after applying \$30,686.45 in reductions)	\$271,923.80
Attorneys' fees to be incurred through the November 4 hearing on attorneys' fees and sanctions and to secure a Final Judgment	\$11,250.00
Conditional Appellate Fees for Briefing to the Court of Appeals	\$55,000.00
Total	\$337,963.04 <ul style="list-style-type: none"> • \$282,953.80 at trial • \$55,000.00 in conditional fees

4 RR 25:13-18; 5 RR 112-113 (Ex. 7A).

- i. Rial and Toye faced a more complex fact pattern than Marchi or Funimation, and were forced to respond to significantly more attacks.*

The following table identifies the vast difference between the factual allegations against Rial and Toye as compared to their co-defendants:

First Amended Petition	Toye	Rial	Funimation	Marchi
Number of times particular defendant is mentioned	16	15	5	4
Substantive paragraphs raising tortious facts.	¶¶ 19-20, 23-28, 32, 34-35	¶¶ 15-19, 28, 30-31, 33	¶¶ 17, 19, 30,	¶¶ 17, 19, 28-29

The trial court wrongly suggested that, “[Marchi’s attorney] was able to [defend] the exact same case and get the same result for \$48,000.” 4 RR 189:4-20. Not only did Rial and Toye’s counsel have to defend two individuals as opposed to one, but also, Rial and Toye were **the only** Defendants deposed and **the only** Defendants that answered discovery. 4 RR 35; 42; and 52. Rial and Toye also bore the brunt of bad-faith litigation brought by a well-funded plaintiff bent on harassment and obstruction. *See* 4 RR 29:2-4 (Rial and Toye’s “anti-SLAPP motion in this case is the most complex anti-SLAPP motion that I’ve ever litigated before.”).

There is also evidence showing that Rial and Toye’s counsel led the charge to secure sixteen affidavits in support of their Anti-SLAPP Motion. 2 CR 650-771; 4 RR 35. A comparison of the Rial and Toye’s time records and Anti-SLAPP Motion with Marchi’s time records and Motion to Dismiss reflects the complexity of allegations against the different defendants. 2 Supp. CR 277-320 (Declaration of J. Sean Lemoine, attaching billing records); 4 RR 156 (Marchi billing records, Ex. 7C); *see also* 4 RR 8-10 (admitting billing records into evidence).

In fact, the following table demonstrates the difference in work between what Ms. Rial and Mr. Toye addressed and what Ms. Marchi addressed:

Rial/Toye MTD (28 pages)	Rial/Toye Supplement (6 pages)	Marchi MTD (17 pages)
12 affidavits 2 declarations 3 depositions 2 affirmative defenses	4 affidavits 2 affirmative defenses	1 affidavit 1 deposition 0 affirmative defenses

ii. *Mignogna did not dispute or offer rebuttal evidence of the time, labor, and fees introduced by Rial and Toye.*

In his response to Rial and Toye's request for fees, Mignogna argued that the Court should apply the rates of Ty Beard and Jim Bullock, yet neither of them (nor any expert) took the stand at the November 4 evidentiary hearing to defend their rates, their legal acumen, or their qualifications to opine on reasonable fees in a TCPA case. *See* 4 RR, generally; *see also Interest of D.Z.*, 14-17-00938-CV, 2019 WL 3432160, at *9 (Tex. App.—Houston [14th Dist.] July 30, 2019, no pet. h.) (failure to testify or offer affidavit or billing record into evidence is legally insufficient testimony to uphold fee award); *Day v. Fed'n of State Med. Boards of the United States, Inc.*, 579 S.W.3d 810, 827–28 (Tex. App.—San Antonio 2019, pet. denied) (no controverting testimony on fees offered). Similarly, because Mignogna declined to proceed with the testimony and never offered his own expert to refute Rial and Toye's fees, rendering judgment for the full amount is appropriate. *Hoelscher*, 2006 WL 358238, at *4; *Propel Fin. Services, LLC for Propel Funding Nat'l I, LLC v. Perez*, 01-17-00682-CV, 2018 WL 3580935, at *5-6 (Tex. App.—Houston [1st Dist.] July 26, 2018, no pet.).

Mignogna did argue (albeit incorrectly) that “block billing” is not allowed under Texas law, by attempting to extrapolate *Rohrmoos* and citing *Barrow v. Greenville Indep. Sch. Dist.*, 3:00-CV-0913-D, 2005 WL 6789456 (N.D. Tex. Dec. 20, 2005), *aff'd*, 06-10123, 2007 WL 3085028 (5th Cir. Oct. 23, 2007). *See* 2 Supp.

CR 508, ¶ 10. First, this argument fails because *Rohrmoos* does not reference “block billing,” and did not adopt or endorse a prohibition against blocking billing. *See Rohrmoos*, 578 S.W. at 469. Moreover, the lack of segregation issue limits some of the concerns articulated in block billing cases.

Second, Texas courts have rejected a block billing requirement where the admitted time entries allow for meaningful review of the time spent. *See State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 100 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (“State Farm argues that *El Apple* requires assigning a particular number of minutes to each individual task. We cannot agree that such level of detail is required to be able to meaningfully review a fee award.”); *John Moore Services, Inc. v. Better Bus. Bureau of Metro. Houston Inc.*, 01-14-00906-CV, 2016 WL 3162206, at *7 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.).

Here, Rial and Toye specifically entered their billing records, their counsel walked through the time entries, and they entered a chart identifying an appropriate reduction on time spent. The trial court offered no indication that the reduction of Appellees fees was based on block billing issues, or any other rationale. Therefore, the trial court abused its discretion in disregarding Rial and Toye’s uncontroverted evidence. *See Greenville Indep. Sch. Dist.*, 3:00-CV-0913-D, 2005 WL 6789456, at * 5-6 (block billing is permitted and reduction of fees by 10% to 20% is appropriate).

CONCLUSION AND PRAYER

WHEREFORE, Appellees Monica Rial and Ronald Toye respectfully prays for the reasons stated herein that this Court (1) affirm the trial court's decision to grant their Anti-SLAPP Motion and dismiss all Claims asserted against; and (2) reverse and render judgment that Appellees be awarded \$282,953.80 in attorneys' fees for defense of this matter at the trial court level, plus an additional \$55,000.00 in conditional appellate fees for briefing to this Court on appeal.

Respectfully submitted,

/s/ Rusty J. O'Kane

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CROSS-APPELLANTS**

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4, I hereby certify that, absent the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendices, the computer program used to prepare this document prior to its conversion to portable document format calculate the number of words in the foregoing brief as 14,944.

/s/ Rusty J. O'Kane
Rusty J. O'Kane

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, a true and correct copy of the foregoing document was served on counsel of record for all parties through the Court's e-filing system.

/s/ Rusty J. O'Kane
Rusty J. O'Kane

CAUSE NO. 141-307474-19

VICTOR MIGNOGNA,

Plaintiff,

v.

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

Defendants.

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IN THE DISTRICT COURT

141ST JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

FINAL JUDGMENT

On October 4, 2019, the Court entered an Order Granting Defendants' Funimation Productions, LLC's Motion to Dismiss Under the TCPA, Monica Rial and Ron Toye's Motion to Dismiss Under the TCPA, and Jamie Marchi's Motion to Dismiss Under the TCPA, dismissing this action against Defendants with prejudice (the "Dismissal Order").

In the Dismissal Order, the Court retained jurisdiction in order to rule on an award of attorneys' fees, costs, and other expenses incurred in defending this action, and an appropriate sanction pursuant to Texas Civil Practice and Remedies Code § 27.009.

On November 4, 2019, Defendant Funimation Productions, LLC ("Funimation") filed its Motion for Reasonable Attorney's Fees, Costs and Sanctions (the "Funimation Motion").

On November 4, 2019, Defendants Monica Rial and Ronald Toye ("Rial and Toye") filed their Brief in Support of Sanctions and Attorneys' Fees Pursuant to the Texas Citizens Participation Act (the "Rial/Toye Motion").

On November 4, 2019, Defendant Jamie Marchi ("Marchi") filed her Motion to Determine Sanctions and Attorney's Fees (the "Marchi Motion" and together with the Funimation Motion and the Rial/Toye Motion, the "Motions for Fees").

FINAL JUDGMENT



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On November 21, 2019, the Court commenced the hearing on the Motions for Fees.

The Court, having reviewed the applicable law, pleadings in this action, the evidence of the parties, and the arguments of counsel, finds that Defendants herein should be awarded attorneys' fees and sanctions in this action, and that a Final Judgment should be entered in this action.

As provided by Section 27.009 of the Texas Civil Practice and Remedies Code, the Court makes the following findings:

Reasonable and Necessary Attorneys' Fees

Fees to Funimation: Funimation shall have and recover from Plaintiff Victor Mignogna the amount of \$ 50,000.00, representing Funimation's reasonable and necessary attorney's fees, plus the amount of \$ 7,504.00, representing Funimation's litigation expenses in defense of this matter through November 21, 2019.

Funimation shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorney's fees, in the event Plaintiff files a Notice of Appeal:

1. \$ 50,000.00 in the event there is no modification of or change to the Judgment or the Judgment is affirmed by the Court of Appeals;
2. \$ 25,000.00 in the event a Petition for Review is filed by any party and the result is that there is no modification of or change to the Judgment;
3. \$ 15,000.00 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change to the Judgment; and
4. \$ 10,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of the case, and the result is that there is no modification of or change to the Judgment

Fees to Rial and Toye: Rial and Toye shall have and recover from Plaintiff Victor Mignogna the amount of \$ 100,000.00, representing Rial's and Toye's reasonable

and necessary attorney's fees, plus the amount of \$ 15,526.96, representing Rial's and Toye' litigation expenses in defense of this matter through November 21, 2019.

Rial's and Toye' shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorney's fees, in the event Plaintiff files a Notice of Appeal:

1. \$ 55,000.00 in the event there is no modification of or change to the Judgment or the Judgment is affirmed by the Court of Appeals;
2. \$ 12,500.00 in the event a Petition for Review is filed by any party and the result is that there is no modification of or change to the Judgment;
3. \$ 22,500.00 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change to the Judgment; and
4. \$ 15,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of the case, and the result is that there is no modification of or change to the Judgment.

Fees to Marchi: Marchi shall have and recover from Plaintiff Victor Mignogna the amount of \$ 48,137.50, representing Marchi's reasonable and necessary attorney's fees, plus the amount of \$ 1,873.96, representing Marchi's litigation expenses in defense of this matter through November 21, 2019.

Marchi shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorney's fees, in the event Plaintiff files a Notice of Appeal:

1. \$ 37,500.00 in the event there is no modification of or change to the Judgment or the Judgment is affirmed by the Court of Appeals;
2. \$ 22,500.00 in the event a Petition for Review is filed by any party and the result is that there is no modification of or change to the Judgment;
3. \$ 12,500.00 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change to the Judgment; and
4. \$ 10,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of the case, and the result is that there is no modification of or change to the Judgment.

Mandatory Sanctions

IT IS FURTHER ORDERED that, as required by § 27.009 of the Texas Civil Practice and Remedies Code, Funimation shall have and recover from Plaintiff sanctions in the amount \$ 5,000.00 which the Court determines is sufficient to prevent Plaintiff Victor Mignogna from bringing similar actions in the future.

IT IS FURTHER ORDERED that, as required by § 27.009 of the Texas Civil Practice and Remedies Code, Rial and Toye shall have and recover from Plaintiff sanctions in the amount \$ 5,000.00 which the Court determines is sufficient to prevent Plaintiff Victor Mignogna from bringing similar actions in the future.

IT IS FURTHER ORDERED that, as required by § 27.009 of the Texas Civil Practice and Remedies Code, Marchi shall have and recover from Plaintiff sanctions in the amount \$ 5,000.00 which the Court determines is sufficient to prevent Plaintiff Victor Mignogna from bringing similar actions in the future.

IT IS FURTHER ORDERED all amounts awarded in this Final Judgment shall bear post-judgment interest at the rate of 5% per annum, pursuant to §304.002 of the Texas Finance Code, from the date this Final Judgment until the date this Final Judgment is paid.

IT IS FURTHER ORDERED that all costs of court be taxed against Plaintiff, Victor Mignogna.

IT IS FURTHER ORDERED that all writs and processes necessary for enforcement of collection of this judgment or the costs of court may issue as are necessary.

All other relief requested and not expressly granted herein is hereby denied. This judgment finally disposes of all parties and all claims and is appealable.

SIGNED this 25 day of November, 2019.


JUDGE PRESIDING

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FINAL JUDGMENT

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APPENDIX B

CAUSE NO. 141-307474-19

VICTOR MIGNOGNA,
Plaintiff

v.

FUNIMATION PROCUCTIONS, LLC,
JAMIE MARCHI, MONICA RIAL,
AND RONALD TOYE,
Defendants

§ IN THE DISTRICT COURT
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§ 141ST DISTRICT COURT
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§ TARRANT COUNTY, TEXAS

FILED
TARRANT COUNTY
2019 OCT -4 AM 11:32
THOMAS A. WILDER
DISTRICT CLERK

ORDER GRANTING DEFENDANTS' FUNIMATION PRODUCTIONS, LLC'S MOTION TO DISMISS UNDER THE TCPA, MONICA RIAL AND RON TOYE'S MOTION TO DISMISS UNDER THE TCPA, and JAMIE MARCHI'S MOTION TO DISMISS UNDER THE TCPA

On September 6, 2019, this Court considered Defendant Funimation Productions, LLC's ("Funimation") Motion to Dismiss under the TCPA, Monica Rial ("Rial") and Ron Toye's ("Toye") Motion to Dismiss Pursuant to the Texas Citizens Participation Act, Defendant Jamie Marchi's ("Marchi") Motion to Dismiss Pursuant to the Texas Citizens Participation Act, the responses, the replies, the evidence, other documents on file, and the arguments of counsel. The Court finds that the three Motions should be and are **GRANTED** in full.

Plaintiff filed an Original Petition on April 18, 2019. Defendants answered and then filed Motions to Dismiss under the Texas Citizens Participation Act ("TCPA").¹ The Parties agreed in a Rule 11 agreement filed with the Court on August 6, 2019, that Plaintiff's response to the TCPA Motions would be filed on or before August 30, 2019. It appears from the arguments of counsel and documents on file that Plaintiff made a good faith attempt to file Responses according to the terms of the Rule 11 agreement but due technical errors was unable to meet the deadline; therefore, the Court **FINDS** that Plaintiff's Response to Defendants' TCPA Motions to Dismiss is deemed

¹ TEX CIV. PRAC. & REM CODE ANN §§27.001-010.

ORDER GRANTING TCPA MOTIONS

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By Jeff Fisher

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Attorney of record
On 10/4/19
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timely filed. On September 3, 2019, Plaintiff withdrew the affidavits of Victor Mignogna, Chuck Huber and Christopher Slatosch that were attached to Plaintiff's Response to Defendants' TCPA Motions to Dismiss, therefore the Court did not consider the withdrawn affidavits. Plaintiff additionally filed Plaintiff's Second Amended Petition on September 3, 2019, which added additional evidence that was not included in Plaintiff's Response to Defendant's TCPA Motion to Dismiss. "Nothing in the [TCPA] statute prohibits claimants from amending their pleadings; however, amendment after a TCPA motion is filed would be contrary to the purpose of the statute, and possibly a violation of the Texas Rules of Civil Procedure.² Accordingly, the Court did not consider evidence submitted after the agreed upon deadline in the Rule 11 agreement with the exception of Plaintiff's Response to Defendants' TCPA Motions to Dismiss (without the withdrawn affidavits), which was deemed timely filed by this Order.

The purpose of the TCPA is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government 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.³ The TCPA shall be construed liberally to effectuate its purpose and intent fully.⁴

Plaintiff Mignogna has filed causes of action against all Defendants for Defamation, Tortious Interference with Existing Contracts, Tortious Interference with Prospective Business

² See Laura Lee Prather & Robert T. Sherwin, *The Changing Landscape of the Texas Citizens Participation Act*, TEX. TECH LAW REV. 1, 18 nn. 152-53 (print version scheduled for publication Winter 2019) (available online at <https://ssrn.com/abstract=3447482>) (citation omitted).

³ TEX CIV. PRAC. & REM CODE ANN §27.002.

⁴ TEX CIV. PRAC. & REM CODE ANN §27.011(b).

Relations, and Civil Conspiracy. Plaintiff has also sued Defendant Funimation for Vicarious Liability for the conduct of Defendants Marchi, Rial, and Toye.

The Court **FINDS** that Defendants have shown by a preponderance of the evidence that all causes of action against all Defendants asserted by Plaintiff Mignogna are based on, relate to, or are in response to the Defendant's right to free speech, the right to petition, or the right to association under the TCPA.⁵

Additionally, the Court **FINDS** that Defendants have shown by a preponderance of the evidence that the communications related to Plaintiff's causes of action relate to a public concern, and the communications involve allegations of conduct by Plaintiff that relate to health and safety, environmental, economic or community well-being.⁶

DEFAMATION

Plaintiff has asserted in his Petition that:

Vic is a voice actor who has performed the voices of animated characters for over 22 years, mainly in "anime" productions. In June 2017, Funimation contracted with Vic to provide the voice for dubbed anime properties it was distributing within the U.S. In 2018, Vic was cast as the English voice for "Broly," the lead character in the fantasy martial arts anime film *Dragon Ball Super: Broly*. The cast also included Monica. *Dragon Ball Super: Broly* was released in the U.S. on January 16, 2019 and was an instant financial success for Funimation, earning \$7 million on its first day and \$24 million within the first five days of its premiere." 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.

In addition to Plaintiff's assertions, Defendants provided specific evidence in their Motions and Replies that are before this Court and they have argued that Plaintiff is a Public Figure as contemplated by Texas defamation law. This Court must recognize and apply the reasoning of

⁵ TEX CIV. PRAC. & REM CODE ANN §§27.005.

⁶ TEX CIV. PRAC. & REM CODE ANN §27.001(7).

the Second Court of Appeals in *Lane v Phares*, 544 S.W.3d 881, (Tex. App – Fort Worth 2018, no pet.), which has similar facts and circumstance as the instant case. Therefore, the Court **FINDS** by a preponderance of the evidence that Plaintiff Mignogna is a public figure. Additionally, the Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **DEFAMATION** cause of action against all Defendants.

TORTIOUS INTERFERENCE WITH EXISTING CONTRACTS

The Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **TORTIOUS INTERFERENCE WITH EXISTING CONTRACTS** cause of action against all Defendants.

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

The Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS** cause of action against all Defendants.

CIVIL CONSPIRACY

Plaintiff has alleged in his Petition that “Defendants conspired and acted in concert to defame Vic, unlawfully (or, alternatively, lawfully by unlawful means) interfere with his existing contracts, and unlawfully (or, alternatively, lawfully by unlawful means) interfere with his prospective business relations, and each knowingly assisted and participated in the other’s actions”. The underlying causes of action have been dismissed by this Order under the TCPA. The Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **CIVIL CONSPIRACY** cause of action against any and all Defendants.

VICARIOUS LIBAILITY

Vicarious liability claims against Defendant Funimation relate to causes of action and conduct by Defendants Marchi, Rial and Toye that have been dismissed by this Order under the TCPA. The Court **FINDS** that Defendants have shown by a preponderance of the evidence that the Defendants Marchi, Rial and Toye were Independent Contractors at all times while associated with Defendant Funimation. The Court additionally **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **VICARIOUS LIBAILITY** claim against Defendant Funimation.

Therefore, the Court **GRANTS** the TCPA Motions. Plaintiff Victor Mignogna's claims against Defendants Funimation, Marchi, Rial and Toye are thus **DISMISSED WITH PREJUDICE**.

The Court retains jurisdiction so that Defendants may submit evidence and briefing in support of an award of attorneys' fees, costs, and other expenses incurred in defending the action, and an appropriate sanction pursuant to TEX. CIV. PRAC. & REM. CODE § 27.009. Defendants shall file their request for fees, costs, expenses, and appropriate sanctions within 30 days of this Order.

SIGNED on October 4, 2019.



JUDGE JOHN P. CHUPP
141ST JUDICIAL DISTRICT COURT

APPENDIX C

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE B. TRIAL MATTERS

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of

public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government 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.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no

event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

- (1) the right of free speech;
- (2) the right to petition; or
- (3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the

pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. [2973](#)), Sec. 2, eff. June 17, 2011.