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October 24, 2019

**VIA ECF**

Hon. John J. Chupp  
Tom Vandergriff Civil Courts Building  
3rd Floor  
100 North Calhoun Street  
Fort Worth, Texas, 76196

Re: Cause No. 141-307474-19; *Mignogna v. Funimation, et al.* currently pending  
before the 141st District Court of Tarrant County, Texas.

Dear Judge Chupp:

I write on behalf of Monica Rial and Ron Toye to address Plaintiff's recent notice of appeal of this Court's October 4, 2019 Order ("Order") granting all Defendants' respective Motions to Dismiss (the "Appeal").

Because the Appeal is legally improper, we will file a Motion to Dismiss as soon as the clerk issues a cause number. We suspect the Fort Worth Court of Appeals will quickly dismiss the Appeal. *See Hollis v. ProPath Associates, PLLC*, 02-19-00167-CV, 2019 WL 3024472, at \*1 (Tex. App.—Fort Worth July 11, 2019, no pet.) (order granting dismissal under the TCPA that does not resolve all claims is not subject to appeal as a final judgment or on an interlocutory basis); *Pope-Nixon v. Howard*, 05-18-01215-CV, 2019 WL 911745 (Tex. App.—Dallas Feb. 25, 2019, no pet.) (mem. op.) (dismissing appeal for want of jurisdiction for lack of finality where trial court granted TCPA motion but reserved the issue of attorneys' fees, costs, and other expenses for future determination).

As Plaintiff acknowledges in his Notice of Appeal, he does not appeal a final judgment ("Vic desires to appeal the Order Granting Defendants' [Motions to Dismiss] (*and all orders granting fees, costs or sanctions thereafter*).") Emphasis added.).

Accordingly—at best—Plaintiff attempts to appeal an interlocutory order. In anticipation of potential arguments from Plaintiff, no stay is in place in this matter because there is no appeal of a *denial* of a TCPA dismissal. Texas Civil Practice & Remedies Code § 51.014 addresses appeals from interlocutory orders as follows:

§ 51.014(a): A person **may appeal** from an interlocutory order of a district court, county court at law, statutory probate court, or county court that:

...

**(12) denies a motion to dismiss filed under Section 27.003;**

§ 51.014(b): An interlocutory appeal under Subsection (a)(3), (5), (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.”).

Plaintiff’s premature Appeal meets none of the criteria for a stay.

Absent further direction from the Court, we will comply with the Order and appear for an evidentiary hearing on November 21, 2019, at 10:30 a.m.

In the intervening period, in accordance with Texas Rule of Appellate Procedure 33.1(a)(1)-(2), Defendants request the Court issue orders on a few issues.<sup>1</sup>

First, given that Plaintiff has tipped his hand as to appeal, we request that the Court enter an Order on Defendants’ Omnibus Objections to Plaintiff’s TCPA Evidence (filed September 3, 2019) (the “Objections”). While we agree that the Court properly disallowed the attachments to Plaintiff’s Second Amended Petition,<sup>2</sup> in the event that the Fort Worth Court of Appeals were to consider such evidence (much of which is hopelessly defective), a ruling on the Objections (even a blanket grant or denial) would preserve the issue for review and prevent a remand to consider those evidentiary issues. *See Van Der Linden v. Khan*, 535 S.W.3d 179, 192 (Tex. App.—Fort Worth 2017, pet. denied) (reviewing hearsay and speculation objections overruled on the record).

Second, we request that the Court strike the Second Amended Petition in its entirety pursuant to Monica Rial, Ronald Toye, and Jamie Marchi’s Joint Response/Cross-Motion to Strike (1) Plaintiff’s Response to the TCPA Motions to Dismiss, (2) Plaintiff’s Second Amended Petition, and (3) to Deny Plaintiff’s Motion for Leave to File Late Response to Defendants’ TCPA Motions to Dismiss Due to Technical Issues (filed September 3, 2019).

Again, we agree that the Court correctly noted in the Order that it excluded the attachments to the Second Amended Petition. However, allowing the Plaintiff to effectively ambush the Defendants with a late filed pleading—even absent its attached evidence—furtheres the Plaintiff’s improper strategy. Without a clear exclusion of the petition, as well as the evidence, Plaintiff will undoubtedly attempt to rely on the Second Amended Petition on appeal. A ruling on the objection raised as to the filing of the Second Amended Petition would also allow the Court of Appeals to determine if Plaintiff’s tactics are appropriate, and also avoid remand on this issue.

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<sup>1</sup> Defendants make these requests without prejudice to raising similar requests as may be necessary.

<sup>2</sup> *See* Order (“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. 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.”).

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**WICK PHILLIPS**

I will make myself available should the Court wish to address any of the foregoing issues.

Regards,

A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of loops and a long horizontal stroke.

J. Sean Lemoine

cc: All counsel of record *via* ECF.