

**CAUSE NO. 141-307474-19**VICTOR MIGNOGNA,  
Plaintiff,§  
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IN THE DISTRICT COURT

v.

141<sup>st</sup> JUDICIAL DISTRICTFUNIMATION PRODUCTIONS, LLC,  
JAMIE MARCHI, MONICA RIAL,  
AND RONALD TOYE,  
Defendants

TARRANT COUNTY, TEXAS

**PLAINTIFF'S FIRST AMENDED MOTION TO CONTINUE HEARING  
ON TCPA MOTIONS TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Victor Mignogna respectfully requests that the Court continue the August 8, 2019 hearing on Defendants' motions to dismiss under the Texas Citizens Participation Act ("TCPA") to August 29, 2019.

**I. FACTS**

Defendant Funimation Productions, LLC, filed its motion to dismiss under the TCPA (with nearly 150 pages of attachments) on July 1, 2019 and set it for hearing on August 8, 2019; Funimation filed a supplemental brief with 54 pages of attachments on July 29, 2019. Defendants Rial and Toye filed their motion to dismiss (with 500 pages of attachments) on July 19, 2019 and, likewise, set it for hearing on August 8, 2019. On July 30, 2019, Defendants Rial and Toye filed a 28 page "Supplement to Motion to Dismiss". Defendant Marchi filed her motion to dismiss (with 88 pages of attachments) on July 19, 2019 and, likewise, set it for hearing on August 8, 2019. In total, Defendants have filed over 770 pages of attachments. Plaintiff asked Defendants to continue the hearing for three weeks (to August 29) to permit time to review the attachments, but Defendants refused.

## II. ARGUMENT & AUTHORITIES

A motion to dismiss under the TCPA must be heard within 60 days after it has been served, unless the trial court's docket requires a later hearing, on a showing of good cause, or by the parties' agreement (and, in any event, within 90 days after service of the motion). TEX. CIV. PRAC. & REM. CODE §27.004. Thus, Funimation is required to have its motion heard no later than August 30, 2019—Rial, Toye and Marchi no later than September 17, 2019. Plaintiff's request to continue the hearing to Defendants' motion is within the timeframe required by the TCPA. Plaintiff needs additional time to review nearly 770 pages of material attached to Defendants' motions and prepare a response to Defendants' motions.

In addition, Local Rule 3.06(a) states:

### **Rule 3.06: Motion Practice**

(a) Parties are directed to use all reasonable means to resolve pre-trial disputes to avoid the necessity of judicial intervention.

In compliance with this rule, Plaintiff has granted a number of extensions of time to opposing counsel. *See* Exhibit A, attached to this motion. Defendants have refused to grant Plaintiff the same consideration. *See* Exhibit B, attached to this motion.

Also, Mr. Lemoine's *ex parte* letter (July 30, 2019) to the court left out relevant communications between counsel. These communications are included in Exhibit B.

Finally, Plaintiff disagrees with opposing counsel that a verification is required for its motion for a continuance. However, out of an abundance of caution, such a verification is attached to this Amended Motion.

Plaintiff's motion is sought so that justice may be served and not for delay.

## III. PRAYER

WHEREFORE, premises considered, Plaintiff requests that the Court reschedule the hearing on Defendants' motions to dismiss from August 8, 2019 to August 29, 2019 and grant him such other and further relief to which he is entitled at law or in equity.

Respectfully submitted,  
BEARD HARRIS BULLOCK HUGHES

By: /s/ Ty Beard

Ty Beard  
Texas Bar No. 00796181  
Carey-Elisa Christie  
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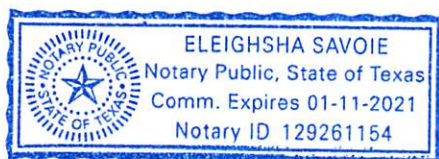
## VERIFICATION


BEFORE ME, the undersigned authority, on this day personally appeared Percy Tyrone Beard, who swore on oath that the following facts are true:

- "1. My full name is Percy Tyrone Beard.
- "2. The request to re-schedule a hearing is sought so that justice may be served and not for delay."
3. "Specifically, Plaintiffs require sufficient time to review over 770 pages of exhibits filed by Defendants in their motions to dismiss and in supplementary filings to those motions."

  
\_\_\_\_\_  
Percy Tyrone Beard

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public in and for the State of Texas, on this 31st day of July, 2019, by PERCY TYRONE BEARD, the affiant named above, to which witness and certify my signature and official seal.



  
\_\_\_\_\_  
NOTARY PUBLIC  
STATE OF TEXAS

***Certificate of Conference***

A conference was held via written correspondence with counsel for Defendants between July 25-29, 2019 on the merits of this motion. A reasonable effort has been made to resolve the dispute without the necessity of court intervention, and the effort failed. Therefore, it is presented to the Court for determination.

/s/ Ty Beard

Date: July 31, 2019

***Certificate of Service***

The undersigned certifies that the foregoing motion was electronically filed today and served via electronic filing manager on counsel of record.

/s/ Ty Beard

Date: July 31, 2019

## Exhibit A

### Extensions of Time Granted to Opposing Counsel

#### Example One

From: Ty Beard <ty@beardandharris.com>  
Sent: Tuesday, June 11, 2019 8:22 AM  
To: Erick, Casey <cerick@cowlesthompson.com>  
Cc: John Volney <jvolney@lynnllp.com>; Andrea Perez <APerez@kesslercollins.com>; 'sam@johnsonsparks.com' <sam@johnsonsparks.com>; Jim Bullock <jim@beardandharris.com>; Carey Christie <carey@beardandharris.com>; Laci Stovall <laci.stovall@beardandharris.com>  
Subject: RE: Deposition Dates

You're welcome. Also, remember that I've agreed to extend your TCPA filing deadline accordingly. When we schedule Vic's deposition, I can sign a Rule 11 agreement to that effect.

--Ty

#### Example Two

From: Ty Beard <ty@beardandharris.com>  
Sent: Thursday, June 13, 2019 2:14 PM  
To: Erick, Casey <cerick@cowlesthompson.com>  
Cc: Andrea Perez <APerez@kesslercollins.com>; Jim Bullock <jim@beardandharris.com>; Carey Christie <carey@beardandharris.com>; Laci Stovall <laci.stovall@beardandharris.com>  
Subject: RE: Rule 11 Agreement regarding depositions and TCPA deadline

Casey if you think you need more time, I'll agree to the 45 day extension. No problem; let me know.

--Ty

#### Example Three

From: John Volney <jvolney@lynnllp.com>  
Sent: Wednesday, May 8, 2019 1:09 PM  
To: Ty Beard <ty@beardandharris.com>  
Cc: Scott Smoot <SSmoot@lynnllp.com>  
Subject: Funimation matter

Ty –

Thanks for taking my call today. I can accept service on behalf of Funimation. Do you want to prepare a Rule 11 agreement where I accept service for Funimation as of a date certain?

**From:** Ty Beard [mailto:ty@beardandharris.com]  
**Sent:** Wednesday, May 08, 2019 1:28 PM  
**To:** John Volney <jvolney@lynnllp.com>  
**Cc:** Scott Smoot <SSmoot@lynnllp.com>  
**Subject:** RE: Funimation matter

Sure. It looks to me like the answer date would be June 3 if you're deemed served this week. If that works for you, I'll prepare the Rule 11 agreement and set tomorrow as the date of service. If you want it pushed to June 10, I'm okay with that too. We can set the service date as May 14 in that case.

**From:** John Volney <jvolney@lynnllp.com>  
**Sent:** Monday, May 13, 2019 8:47 AM  
**To:** Ty Beard <ty@beardandharris.com>  
**Cc:** Scott Smoot <SSmoot@lynnllp.com>  
**Subject:** RE: Funimation matter

Hi Ty – are you going to send me a R. 11 agreement re: service? I would prefer a May 14 service date.

Thanks.

John Volney  
LPCH, LLP  
214-981-3815

## Exhibit B

### Communications Between Counsel

**From:** Ty Beard <ty@beardandharris.com>  
**Sent:** Thursday, July 25, 2019 10:27 AM  
**To:** Sean Lemoine <sean.lemoine@wickphillips.com>; Jim Bullock <jim@beardandharris.com>; Carey Christie <carey@beardandharris.com>; cerick@cowlesthompson.com; APerez@kesslercollins.com; jvolney@lynnllp.com; sam@johnsonsparks.com  
**Subject:** Reschedule Hearing Date

Counsel, as you know, we've filed a Motion to Strike Evidence Offered in Support Of Defendant Funimation's Motion to Dismiss.

Assuming Rial/Toye's counsel opposes, we will file a similar motion to strike Rial/Toye's evidence today or tomorrow. We haven't evaluated filing a motion to strike Marchi's evidence. But if we do, they will likely be filed by Monday.

Assuming Rial/Toye opposes, we also intend to file a Motion for Sanctions and to Strike Pleadings under TRCP 13, TCPRC 9 and/or TCPRC 10. We haven't evaluated whether we will do the same regarding Jamie Marchi. But if we do, these motions will likely be filed by Monday.

The earliest date Jeff has is August 8, so we've set our Motion to Strike Evidence Offered in Support Of Defendant Funimation's Motion to Dismiss. We will set our other motions for the same time and date once they're filed.

Since the court's ruling on these motions will obviously affect our response to the Motions to Dismiss, will you agree to reschedule the August 8 hearing on the Motions to Dismiss?

I think a three week extension is all that would be required.

If you aren't willing to agree to an extension of time, please let me know and I'll file a motion with the court and set a hearing.

--Ty

**From:** Sean Lemoine <sean.lemoine@wickphillips.com>  
**Sent:** Monday, July 29, 2019 9:51 AM  
**To:** Ty Beard <ty@beardandharris.com>; Jim Bullock <jim@beardandharris.com>; Carey Christie <carey@beardandharris.com>  
**Cc:** cerick@cowlesthompson.com; APerez@kesslercollins.com; jvolney@lynnllp.com; sam@johnsonsparks.com; Sean Lemoine <sean.lemoine@wickphillips.com>  
**Subject:** RE: Reschedule Hearing Date

Mr. Beard,



I only speak on behalf of Ms. Rial and Mr. Toye.

First, you are simply incorrect about the law. The first step, i.e. does the TCPA apply, is quite literally determined by your Petition. You could strike ever exhibit attached by every Defendant and that would still be the law.

Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017) (“Indeed, it would be impossible to determine the basis of a legal action, and thus the applicability of the Act, without considering the plaintiff’s petition. As we have observed, “the plaintiff’s petition ..., as so often has been said, is the ‘best and all sufficient evidence of the nature of the action.’ ” The basis of a legal action is not determined by defendant’s admissions or denials but by the plaintiff’s allegations. Section 27.005(b)’s requirement that a defendant moving for dismissal show the basis of a legal action “by a preponderance of the evidence” must be read in harmony with Section 27.006(a) rather than in conflict. When it is clear from the plaintiff’s pleadings that the action is covered by the Act, the defendant need show the no more. We disapprove the contrary statements in Pickens and the cases that have followed it.”).

Second, your desire to move the hearing is a transparent attempt at delay. While your fear of dismissal is certainly understandable, there is no legal basis to have separate hearings to determine the admissibility of evidence that may or may not impact other evidentiary issues. Nor are we aware of any case where the trial court held a hearing on admissibility of evidence separate and apart from the actual hearing. Further, that kind of delay and multi-step hearing is contrary to the goal of a speedy dismissal of the Anti-Slapp.

Third, I have responded to your threat of Sanctions (attached hereto for everyone else to see).

On a final note, while I personally do appreciate you taking tactical direction from a fourth year attorney, if you want your Motion(s) to have the impact the 4th year so desperately desires, you probably should tell him not to broadcast what you are about to do on Youtube.

Sean Lemoine

**From:** Ty Beard <ty@beardandharris.com>  
**Sent:** Monday, July 29, 2019 11:12 AM  
**To:** Sean Lemoine <sean.lemoine@wickphillips.com>; Jim Bullock <jim@beardandharris.com>; Carey Christie <carey@beardandharris.com>  
**Cc:** cerick@cowlesthompson.com; APerez@kesslercollins.com; jvolney@lynlllp.com; sam@johnsonsparks.com  
**Subject:** RE: Reschedule Hearing Date

Mr. Lemoine, motion *[sic]* contains about 500 pages of exhibits. Funimation’s and Marchi’s motions contain another 200+ exhibits.

It seems that your argument is that the 700+ pages of exhibits in the defendants' motions are irrelevant to the TCPA analysis. Is that a correct summary of your position? If they are irrelevant, as you seem to argue (and Mr. Volney seems to agree), then why not agree to strike them? And if so, does defendants' counsel agree to withdraw all of the exhibits?

Also, it is unreasonable to dump 600+ pages of material on us and then schedule two additional hearings within 13 business days. At least Mr. Volney gave us 5 weeks.

Finally, your tactical advice is appreciated and will be given all of the consideration it deserves.

--Ty

**From:** Sean Lemoine <sean.lemoine@wickphillips.com>  
**Sent:** Monday, July 29, 2019 12:37 PM  
**To:** Ty Beard <ty@beardandharris.com>; Jim Bullock <jim@beardandharris.com>; Carey Christie <carey@beardandharris.com>  
**Cc:** cerick@cowlesthompson.com; APerez@kesslercollins.com; jvolney@lynlllp.com; sam@johnsonsparks.com; Sean Lemoine <sean.lemoine@wickphillips.com>  
**Subject:** RE: Reschedule Hearing Date

Mr. Beard,

How the TCPA evidentiary burdens function are straightforward.  
<https://www.antislaptexas.com/forlawyers>

Step 1: Does the TCPA apply – Movants' (Ms. Rial, Mr. Toye, Funimation, Ms. Marchi) burden, which is satisfied by non-movant's Petition. See *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (quoted below).

Step 1 ½ -- Does commercial speech exemption apply – not in play.

Step 2: Can the non-movant meet each element of his claim (your burden).

Step 3: Can the movant establish each element of a valid defense (our burden).

So no one is saying the Movants' evidence is irrelevant. Your briefing suggests Funimation cannot meet their burden on Step 1 because you (incorrectly) believe the evidence will all be stricken, which is legally incorrect per *Hersh*.

PLAINTIFF'S OBJECTIONS TO AND MOTION TO STRIKE EVIDENCE  
OFFERED IN SUPPORT OF DEFENDANT FUNIMATIONS' MOTION TO  
DISMISS, at p. 1

“Funimation’s Motion asks the Court to dismiss Plaintiff’s claims under the Texas Citizens Participation Act (Texas Civil Practice and Remedies Code, Chapter 27). The TCPA requires that Funimation show, by a preponderance of the evidence presented, that Plaintiff’s claims are based on, relate to, or are in response to Funimation’s exercise of the right of free speech, to petition, or of association. TEX. CIV. PRAC. & REM. CODE §27.005(b). Under a preponderance of the evidence standard, the factfinder must determine whether the movant’s version of the events is more likely than not true. See *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). Hence, the admissibility of Funimation’s evidence is a threshold question for the Court.” (emphasis added)

The Court does not need to reach the Movant’s evidence (in this particular case given Plaintiff’s pleadings) until Step 2, at the earliest.

As to you argument about lack of time to prepare, Plaintiff has twenty (20) days you will have had to formulate a response (July 19 to Aug 8). That is, of course, one day shy of the amount of notice you would get to respond to a Rule 166a(c) motion.

If you are filing a Motion for Sanctions, that wholly undermines any assertion about preparation time. A multi-page Sanctions motion would indicate that rather than spend time responding to the Ant-Slapps, you have spent the last ten (10) days working on a Sanctions motion that is, premature, at best.

But you are free to file whatever you (or your advisor) want to file, as long as our opposition is duly noted.

Sean Lemoine

**From:** Ty Beard  
**Sent:** Monday, July 29, 2019 12:39 PM  
**To:** Sean Lemoine <sean.lemoine@wickphillips.com>; Jim Bullock <jim@beardandharris.com>; Carey Christie <carey@beardandharris.com>  
**Cc:** cerick@cowlesthompson.com; APerez@kesslercollins.com; jvolney@lynlllp.com; sam@johnsonsparks.com  
**Subject:** RE: Reschedule Hearing Date

Noted.