

CAUSE NO. 141-307474-19

VICTOR MIGNOGNA,
Plaintiff,

v.

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

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IN THE DISTRICT COURT

141st JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

**PLAINTIFF’S OBJECTIONS TO AND MOTION TO STRIKE
EVIDENCE OFFERED IN SUPPORT OF
DEFENDANT FUNIMATIONS’ MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Victor Mignogna objects to and requests that the Court strike the following evidence which Defendant Funimation Productions, LLC (“Funimation”), offered in support of its *Motion to Dismiss under the TCPA* (“Funimation’s Motion”).

I. BACKGROUND

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.

II. OBJECTIONS TO FUNIMATION'S EVIDENCE

A. Affidavit of Karen Mika

Plaintiff objects to paragraphs 5, 7 and 9 of the *Affidavit of Karen Mika* attached as Exhibit A to Funimation's Motion (the "Mika Affidavit"). Ms. Mika testifies in paragraphs 1-2 of her affidavit that the facts in her affidavit are based on her personal knowledge as Funimation's Vice President of Operations. While a corporate employee is generally presumed to possess personal knowledge of facts that she would learn in the usual course of her employment, Brewer v. Green Lizard Holdings, L.L.C. Series SR, 406 S.W.3d 399, 402 (Tex. App.—Fort Worth 2013, no pet.), her affidavit must affirmatively show how her position with the company makes her competent to testify to the facts she declares (*i.e.*, how she acquired personal knowledge of the facts shown). Cunningham v. Zurich American Insurance Co., 352 S.W.3d 519, 534 (Tex. App.—Fort Worth 2011, pet. denied); Barham v. Sugar Creek National Bank, 612 S.W.2d 78, 79–80 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). Absent this evidence, the corporate affiant fails to provide the proper foundation for relevance and admissibility. TEX. R. EVID. 104 ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist").

In her affidavit, Ms. Mika does not show how, as Vice President of Operations, she obtained personal knowledge of the facts alleged in paragraphs 5, 7 or 9 — for example, she does not testify that she read (or that it was an essential role of her position as Vice President of Operations to read) the tweets or posts mentioned in paragraph 5, that she oversaw (or that it was an essential role of her position as Vice President of Operations to oversee) the investigation mentioned in paragraph 7, or that she controlled (or that it was an essential role

of her position as Vice President of Operations to control) the social media activity of Funimation's employees or contractors. In short, she failed to show personal knowledge of the facts alleged in these paragraphs. Cunningham, 352 S.W.3d at 534. In addition to the general lack of predicate for her testimony, Plaintiff further objects to the Mika Affidavit as follows:

1. Paragraph 5

In the fifth paragraph of her affidavit, Ms. Mika testifies that:

On the same day that Funimation released *Dragon Ball Super: Broly*, Funimation was tagged on twitter by user “@hanleia” with ... a link to allegations of sexual misconduct by Mr. Mignogna at anime conventions. The next day, on January 18, 2019, Funimation learned of additional allegations of sexual misconduct by Mr. Mignogna at anime conventions through negative twitter posts and from other sources within the anime community.

Plaintiff objects to Ms. Mika's testimony as hearsay. Ms. Mika is testifying about statements (*i.e.*, “allegations of sexual misconduct”) made by someone other than Ms. Mika (*i.e.*, by twitter user “@hanleia” and other “negative twitter posts and ... other sources within the anime community”) which are offered to prove the truth of the matter asserted (*i.e.*, that the content of these statements asserted “sexual misconduct” by Plaintiff); this is hearsay. TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802. Alternatively, under the “best evidence rule,” Ms. Mika was required to attach the actual allegations rather than summarize their content. TEX. R. EVID. 1002.

2. Paragraph 6

In the sixth paragraph of her affidavit, Ms. Mika testifies that:

Ms. Simon contacted Zack Hall, Executive Director of Human Resources for Sony Pictures Entertainment, to request the investigation.

Plaintiff objects to Ms. Mika's testimony as hearsay. Ms. Mika is testifying about a statement (*i.e.*, Ms. Simon requesting that Mr. Hall conduct an investigation) made by someone else (*i.e.*, Ms. Simon) which is offered to prove the truth of the matter asserted (*i.e.*, that Ms. Simon requested an investigation); this is hearsay. TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802.

3. Paragraph 7

In paragraph 7, the 2nd sentence, of her affidavit, Ms. Mika testifies that:

On or about January 29, 2019, Tammi Denbow reported to me and Trina Simon that Ms. Denbow had found certain allegations of inappropriate conduct made against Mr. Mignona were credible.

Plaintiff objects to Ms. Mika's testimony as hearsay. Ms. Mika is testifying about a statement (*i.e.*, allegations of inappropriate conduct) made by someone else (*i.e.*, Ms. Denbow) which is offered to prove the truth of the matter asserted (*i.e.*, that Ms. Denbow determined certain allegations were credible); this is hearsay. TEX. R. EVID. 801. Indeed, Ms. Mika's testimony is hearsay within hearsay: she is testifying about Ms. Denbow's statement (her report) which itself is based on statements supposedly made by persons other than Ms. Denbow (*i.e.*, "allegations of inappropriate conduct"). *Id.* Hearsay is inadmissible. TEX. R. EVID. 802.

4. Paragraph 9

In the ninth paragraph of her affidavit, Ms. Mika testifies that:

Funimation is not responsible for any tweets or other social media publications or commentary by co-defendants Monica Rial, Jamie Marchi or Ron Toye. Funimation does not have any control over what Marchi, Rial or Toye publish on their personal twitter accounts or in other social media. Rial and March are not employees or agents of Funimation; and they do not have actual or apparent authority to speak on behalf of Funimation. Mr. Mignogna and the other voice actors who work for Funimation, including Rial and Marchi, are independent contractors; and Funimation does not hold any of these voice

actors out as its employee or agent. For his part, Toye is the fiancé of Monica Rial. Toye is not an employee or agent of Funimation and has no relationship whatsoever with Funimation.

Plaintiff objects to Ms. Mika's testimony, because she is making legal conclusions regarding questions of law. Whether Defendants Rial, Marchi or Toye had actual or apparent authority to act as Funimation's agent is a mixed question of law and fact. *See Limon v. State*, 340 S.W.3d 753, 757 (Tex. Crim. App. 2011) (determinations of actual and apparent authority are reviewed as mixed questions of law and fact). Whether a relationship existed between Funimation and Rial, Marchi or Toye that obligated Funimation to exercise control over their social media activity is also a question of law. *See Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (the existence of a duty, imposed by the relationship between employer and employee or independent contractor and contractee is a question of law); *Boyd v. Texas Christian University, Inc.*, 8 S.W.3d 758, 760 (Tex. App.—Fort Worth 1999, no pet.) (whether such a duty exists is a threshold question of law). Ms. Mika cannot opine on these questions of law. TEX. R. EVID. 701; *see Goode v. Mazy*, 923 S.W.2d 746, 748 (Tex. App.—Tyler 1996, no writ) ("The affidavit must set forth facts, not legal conclusions.") (quoting *Cuellar v. City of San Antonio*, 821 S.W.2d 250, 252 (Tex.App.—San Antonio 1991, writ denied); *Puente v. A.S.I. Signs*, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied) (an expert is not permitted to give an opinion or state a legal conclusion regarding a question of law); *see also In re Lipsky*, 460 S.W.3d 579, 592 (Tex. 2015) (bare, baseless opinions and conclusory statements are not evidence).

B. Affidavit of Tammy Denbow

Plaintiff objects to the *Affidavit of Tammy Denbow* attached as Exhibit B to Funimation's Motion (the "Denbow Affidavit") as follows:

1. Paragraph 2

In the second paragraph, fifth sentence (*i.e.*, the last sentence), of her affidavit, Ms. Denbow testifies that:

When my investigation began ... there were allegations on social media that Mr. Mignogna had engaged in inappropriate conduct with female fans at anime conventions.

Plaintiff objects to Ms. Denbow's testimony as hearsay and lacking a proper foundation. Ms. Denbow is testifying about statements (*i.e.*, the allegations on social media) made by someone else (*i.e.*, not Ms. Denbow) which are offered to prove the truth of the matter asserted (*i.e.*, that these allegations had been made on social media); this is hearsay. TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802. Furthermore, her affidavit fails to establish personal knowledge of these allegations. *See Cunningham*, 352 S.W.3d at 534 (corporate affiant must affirmatively show how she acquired personal knowledge of the facts averred); *see also Jenkins v. Kemlon Products & Dev. Co.*, 923 S.W.2d 224, 228 (Tex. App.—Houston [14th Dist.] 1996, no writ) (corporate affiant's testimony cannot be based on hearsay). Absent this evidence, Ms. Denbow's testimony about these allegations lacks the proper foundation for relevance and admissibility. TEX. R. EVID. 104.

2. Paragraph 3

In the third paragraph, second and third sentences, of her affidavit Ms. Denbow testifies that:

Specifically, I was given information by Funimation about allegations from two female fans of inappropriate conduct by Mr. Mignogna that occurred at an anime convention. I was also alerted by Funimation that another of its voice actors, Monica Rial, wanted to share information about her personal experiences with Mr. Mignogna.

Plaintiff objects to Ms. Denbow's testimony as hearsay. Ms. Denbow is testifying about statements (*i.e.*, allegations; want to share information) made by someone else (*i.e.*, two female fans and Ms. Rial) which are offered to prove the truth of the matters asserted (*i.e.*, that two female fans made allegations of inappropriate conduct; that Ms. Rial wanted to share information about a personal experience); this is hearsay. TEX. R. EVID. 801. Indeed, Ms. Denbow's testimony is hearsay within hearsay: she is testifying about out-of-court statements supposedly made by someone else (*i.e.*, "I was given information by Funimation"; "I was also alerted by Funimation") about out-of-court statements supposedly made by different persons (*i.e.*, allegations by two female fans; Ms. Rial wanted to share information). *Id.* Hearsay is inadmissible. TEX. R. EVID. 802.

3. Paragraph 4

In the fourth paragraph, second through fourth sentences, of her affidavit, Ms. Denbow testifies that:

I then interviewed Monica Rial via telephone on January 23, 2019, about inappropriate conduct that she alleged was directed at her by Mr. Mignogna. On January 24, 2019, I interviewed the two female fans who alleged that Mr. Mignogna engaged in inappropriate conduct at an anime convention. During my investigation, I also learned that a former Funimation employee had complained about Mr. Mignogna's inappropriate conduct while she was employed at Funimation.

Plaintiff objects to Ms. Denbow's testimony as hearsay. Ms. Denbow is testifying about statements (*i.e.*, allegations) made by someone else (*i.e.*, Ms. Rial, two female fans, and an unnamed former Funimation employee) which are offered to prove the truth of the matters asserted (*i.e.*, that Ms. Rial, two female fans, an unnamed former Funimation employee alleged inappropriate conduct); this is hearsay. TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802.

C. Affidavit of Scott Barretto

Plaintiff objects to the *Affidavit of Scott Barretto* attached as Exhibit C to Funimation's Motion (the "Barretto Affidavit") as follows:

1. Paragraph 5

In the fifth paragraph of his affidavit, Mr. Barretto testifies that:

Allegations of misconduct against Mr. Mignogna began to receive media and social media attention in January 2019, with the publication of articles by Anime News Network and Polygon.com as well as tweets and social media posts from members of the anime community. During this same time and through today supporters of Mr. Mignogna, many of whom adopted the hashtag *#IStandwithVic*, threatened and harassed members of the anime community and others who supported the women who alleged misconduct by Mr. Mignogna, who used the hashtag *#KickVic*.

Plaintiff objects to Mr. Barretto's testimony as hearsay. Mr. Barretto is testifying about statements (*i.e.*, allegations, publications, tweets, social media posts, threats, support) made by persons other than Mr. Barretto (*i.e.*, Anime News Network, Polygon.com, unnamed members of the anime community, unnamed supporters of Plaintiff, unnamed supporters of those making allegations) which are offered to prove the truth of the matter asserted (*i.e.*, that the allegations had been made, that Anime News Network and Polygon.com published articles about the allegations, that unnamed persons threatened other unnamed persons, that unnamed persons supported other unnamed persons); this is hearsay. TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802.

2. Paragraph 6

In the first two sentences of the sixth paragraph of his affidavit, Mr. Barretto testifies that:

By late January, Funimation had received inquiries on social media and from the media whether Funimation intended to take any action or make any statement with respect to Mr. Mignogna. Due to the continued publicity

surrounding Vic, including the allegations against him about inappropriate treatment of women, Funimation decided to issue a short statement via Twitter regarding its decision to end its relationship with Mignogna, which Funimation did on February 11, 2019.

Plaintiff objects to Mr. Barretto's testimony as hearsay. Mr. Barretto is testifying about statements (*i.e.*, alleged inquiries on social media and from the media, the allegations) made by persons other than Mr. Barretto (*i.e.*, unnamed social media posters, unnamed media, unnamed persons making allegations) which are offered to prove the truth of the matter asserted (*i.e.*, that inquiries about Mr. Mignogna were made, that allegations of inappropriate conduct had been made); this is hearsay. TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802. Alternatively, under the "best evidence rule," Mr. Barretto was required to attach the actual inquiries referenced in the first sentence of paragraph six rather than summarize their content. TEX. R. EVID. 1002.

Later in the same paragraph, in the fourth, sixth and seventh sentences, Mr. Barretto also testifies that:

The purpose of the first tweet on February 11th was to inform the anime public of Funimation's decision to end its relationship with Mr. Mignogna ... The purpose of this additional tweet was to respond to the continued heated back-and-forth among anime fans about Mr. Mignogna and was an effort to engage civility in the anime community. Funimation nowhere stated or implied in any of its tweets that Mr. Mignogna had engaged in any harassment or intimidation, sexual or otherwise.

Plaintiff objects to this testimony because it lacks foundation, constitutes hearsay, and is inadmissible since the actual tweets are available. Though Mr. Barretto testifies that he is "familiar with Funimation's media and social media-related activities" and that he monitors "media and social media posts related to Funimation," he does not testify that he wrote Funimation's February 11, 2019 tweets. While a witness may testify to his own intent, Fuller v. Preston State Bank, 667 S.W.2d 214, 220 (Tex. App.—Dallas 1983, writ ref'd n.r.e.), Mr.

Barretto is required to show how he would know Funimation's intent underlying its tweets. Cunningham, 352 S.W.3d at 534. Absent this evidence, Mr. Barretto's testimony about Funimation's intent lacks the proper foundation for relevance and admissibility. TEX. R. EVID. 104. Moreover, if Mr. Barretto did not write the February 11th tweets, his testimony of Funimation's underlying intent is based on hearsay, for it must be testimony about statements (*i.e.*, what someone told him was Funimation's underlying intent) made by persons other than Mr. Barretto (*i.e.*, whoever wrote the tweets) which is offered to prove the truth of the matter asserted (*i.e.*, Funimation's intent in tweeting the statements on February 11, 2019). TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802; *see also* Jenkins, 923 S.W.2d at 228 (corporate affiant's testimony cannot be based on hearsay). Further, since the best evidence of Funimation's intent — the tweets themselves — are available, Mr. Barretto's testimony of their content is inadmissible. TEX. R. EVID. 1004.

3. Paragraph 7

In the first, second and fifth sentences in seventh paragraph of his affidavit, Mr. Barretto testifies that:

Funimation's February 11, 2019, tweets were truthful. I am aware than an investigation of Mr. Mignogna was conducted, that Funimation recast Mr. Mignogna in *Morose Mononokean 2*, and that Funimation will not be engaging Mr. Mignogna in future productions. In addition, part of Funimation's core mission is to celebrate the diversity of the anime community and to share it love for this genre and its positive impact on all, as stated in Funimation's February 11, 2019, tweet. Further, Funimation does not condone any kind of harassment or threatening behavior directed at anyone. No statement by Funimation in its February 11, 2019, tweets is intended to defame Mr. Mignogna in any way; nor do the statement imply that Mr. Mignogna engaged in any harassing or threatening behavior. Funimation has not made any other public statement about Mr. Mignogna since its tweets on February 11, 2019.

Plaintiff objects to Mr. Barretto's testimony because it lacks foundation, constitutes hearsay, and is inadmissible since the actual tweets are available. Mr. Barretto does not testify

that he wrote Funimation's February 11, 2019 tweets, that he was involved in (or that the essential functions of his job at Funimation involved him participating in) Funimation's investigation of Plaintiff, Funimation's decision to recast Plaintiff in *Morose Mononokean 2*, or its decision against engaging Plaintiff in future productions. His testimony thus fails to affirmatively show how he acquired personal knowledge of Funimation's investigation, its decision to recast Plaintiff, its decision against engaging Plaintiff in future productions, or the intent behind its February 11, 2019 tweets. See Cunningham, 352 S.W.3d at 534 (corporate affiant must affirmatively show how he acquired personal knowledge of the facts averred). Absent this evidence, Mr. Barretto's testimony about Funimation's intent lacks the proper foundation for relevance and admissibility. TEX. R. EVID. 104. Moreover, if Mr. Barretto did not write the February 11th tweets, his testimony of Funimation's underlying intent is hearsay, for it must be testimony about statements (*i.e.*, what someone told him was Funimation's underlying intent) made by persons other than Mr. Barretto (*i.e.*, whoever wrote the tweets) which is offered to prove the truth of the matter asserted (*i.e.*, Funimation's intent in tweeting the statements on February 11, 2019). TEX. R. EVID. 801. Hearsay is inadmissible. TEX. R. EVID. 802; see also Jenkins, 923 S.W.2d at 228 (corporate affiant's testimony cannot be based on hearsay). Further, since the best evidence of Funimation's intent — the tweets themselves — are available, Mr. Barretto's testimony of their content is inadmissible. TEX. R. EVID. 1004.

4. Paragraph 8 & Exhibits D-W attached to Funimation's Motion

Plaintiff objects to the eighth paragraph of the Barretto Affidavit for its failure to show the requisite predicate for his testimony, constitutes hearsay, and fails to authenticate Exhibits D-W attached to Funimation's Motion; also, Plaintiff objects to Exhibits D-W as unauthenticated and hearsay.

In the eighth paragraph of his affidavit, Mr. Barretto testifies that Exhibits D-W attached to Funimation’s Motion are “true and correct copies.” However, he does not proffer any evidence that he is a custodian of records or otherwise has any requisite personal knowledge to establish what each exhibit is. TEX. R. EVID. 104, 901; *see* Cunningham, 352 S.W.3d at 534 (corporate affiant must affirmatively show how he acquired personal knowledge of the facts averred). If he is testifying to what others told him about the documents (or what the documents purport to say about themselves), that is hearsay — for he is testifying to out-of-court statements made by other persons offered to prove the truth of the matter asserted. TEX. R. EVID. 801. And hearsay is inadmissible. TEX. R. EVID. 802; *see also* Jenkins, 923 S.W.2d at 228 (corporate affiant’s testimony cannot be based on hearsay).

His testimony that the exhibits are “true and correct copies” merely begs the question: “true and correct copies” of what? Mr. Barretto does not provide any testimony about what each exhibit is or that each exhibit is what he claims it to be. *See* TEX. R. EVID. 901 (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”). At a minimum, proof of authorship or composition or proof of a business record is required to authenticate these exhibits. *See* Tienda v. State, 358 S.W.3d 633, 640–42 (Tex. Crim. App. 2012) (discussing authentication of electronic evidence). Mr. Barretto makes no effort to provide such *prima facie* evidence of authentication. Indeed, Mr. Barretto does not even testify that the attachments are true and correct copies “of the original documents.” *See* Republic National Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (authentication requires sworn affirmation that the attached documents were true and correct copies of the originals).

Hence, paragraph 8 of Mr. Barretto's affidavit fails to authenticate Exhibits D-W to Funimation's Motion; and authentication is a condition precedent to admissibility. TEX. R. EVID. 104, 901; Tienda, 358 S.W.3d. at 638. Moreover, Exhibits E-I, K, M, and O-W all are hearsay. Each is an out-of-court statement made by someone other than Mr. Barretto which are offered to prove the truth of the matter asserted therein. TEX. R. EVID. 801. And hearsay is inadmissible. TEX. R. EVID. 802.

III. THE COURT SHOULD STRIKE FUNIMATION'S EVIDENCE

The Mika Affidavit lacks the requisite predicate for her to testify about the tweets or posts mentioned in paragraph 5 of her affidavit, the investigation mentioned in paragraph 7 thereof, and the social media activity of Funimation's employees or contractors. Additionally, her testimony in paragraphs 5-6 of her affidavit contain inadmissible hearsay, and her testimony in paragraph 5 violates the best evidence rule. Plaintiff respectfully requests that the Court strike the Mika Affidavit or such portions that the Court determines violate the Texas Rules of Evidence as argued above.

Paragraphs 2-4 of the Denbow Affidavit contain inadmissible hearsay, and she fails to provide the requisite predicate for her statements in paragraph 2. Plaintiff respectfully requests that the Court strike the Denbow Affidavit or such portions that the Court determines violate the Texas Rules of Evidence as argued above.

Paragraphs 5-7 of the Barretto Affidavit are based on hearsay. Mr. Barretto lacks the personal knowledge to testify to the matters in paragraphs 6-7, and his testimony in paragraphs 6-7 is precluded by evidentiary rule 1004. His testimony in paragraph 8 lacks the requisite predicate, is hearsay, and fails to authenticate Exhibits D-W attached to Funimation's Motion. Hence, Funimation's Exhibits D-W are unauthenticated (a condition

precedent to admissibility) and constitute inadmissible hearsay. Plaintiff respectfully requests that the Court strike the Barretto Affidavit, or such portions that the Court determines violate the Texas Rules of Evidence as argued above, and strike Exhibits D-W attached to Funimation's Motion.

IV. PRAYER

WHEREFORE, Plaintiff requests that the Court sustain his objections and strike the Mika Affidavit, the Denbow Affidavit, and the Barreto Affidavit, or such portions that the Court determines violate the Texas Rules of Evidence as argued above, strike Exhibits D-W attached to Funimation's Motion, and award him such other and further relief to which he may be entitled at law or in equity. Plaintiff prays for general relief.

Respectfully submitted,
BEARD HARRIS BULLOCK HUGHES

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Certificate of Conference

A conference was held via email with John Volney, counsel for Defendant Funimation on July 24, 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 24, 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 24, 2019