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August 1, 2019

**Via ECF and HAND DELIVERY**

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

Re: Cause No. 141-307474-19; *Victor Mignogna v. Funimation Productions, LLC*, et al., In the 141st Judicial District Court, Tarrant County, Texas

Dear Judge Chupp:

I write on behalf of all Defendants to report some progress on narrowing the issues concerning today's 11:00 a.m. telephonic hearing on Plaintiff's Motion to Continue Hearing on TCPA Motions to Dismiss.<sup>1</sup> While the Defendants would prefer to move forward on the TCPA Motions next week (August 8th), yesterday we proposed an alternative hearing date that gives Plaintiff two additional weeks to respond to the TCPA Motions and creates a defined briefing structure.<sup>2</sup>

Assuming the Court wants to proceed along this new route, there are a few impasses that require your direction.<sup>3</sup>

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<sup>1</sup> Plaintiff's Amended Motion to Continue correctly identified the Defendants Motions to Dismiss pursuant to the Texas Citizens Participation Act "TCPA") and their attendant Supplements (the "TCPA Motions").

<sup>2</sup> The communications between myself and Plaintiff's counsel are attached as Exhibit A.

<sup>3</sup> I have reduced Defendants' proposal to a proposed Order, attached as Exhibit B.

### **The Conditional Agreements**

- (i) The TCPA Motions will be heard on August 22, 2019, from 10:00 a.m. to 12:00 p.m.<sup>4</sup>
- (ii) Defendants will share 1:05 of argument time and Plaintiff will have 0:55 to respond (dependent upon Court approval).

### **The Impasses**

Because the TCPA does not currently provide any statutory guidance in terms of briefing, there are three areas of conflict that turn solely on how the Court wants to conduct this hearing: (1) when and how evidentiary objections will be addressed; (2) when and how some as yet “Undisclosed Motion” Plaintiff intends to file will be addressed; and (3) the timing of briefs contesting or in support of the TCPA Motions.<sup>5</sup>

#### ***(1) Evidentiary Objections***

<b>Defendants’ Proposal</b>	<b>Plaintiff’s Proposal</b>
By written submission to the Court.	By oral argument to the Court, <b>prior</b> to the actual argument on the TCPA Motions.

The Court is obviously well versed in applying the Texas Rules of Evidence both in its trial rulings and summary judgment rulings. Absent some unique evidentiary issue the Court may want to hear oral argument on, Defendants submit that a multi-hour hearing solely to address evidentiary issues – then followed by the TCPA hearing – unnecessarily complicates the legal issues at play in the TCPA Motion.<sup>6</sup>

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<sup>4</sup> This date was selected because Mr. Lemoine is scheduled for a multi-day bench on August 26, 2019.

<sup>5</sup> Fortunately, the Legislatures recently passed HB 2730 (effective September 1, 2019) which requires twenty-one (21) day notice of the hearing and response briefing seven (7) days before the hearing. <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB02730S.pdf#navpanes=0>

<sup>6</sup> As Funimation pointed out in its opposition to the Continuance, whether the TCPA applies is typically decided by Plaintiff’s pleading. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex.2017). Whether Plaintiff meets his evidentiary burdens as to his four (4) claims will turn (presumably) on his yet unfiled evidence. *See* TCPA § 27.005(c). Affirmative defenses are then decided on Defendants’ evidence. *See id.* at § 27.005(d).

**(2) Plaintiff's Undisclosed Motion**

<b>Defendants' Proposal</b>	<b>Plaintiff's Proposal</b>
None	Oral argument on the Undisclosed Motions to the Court, prior to the actual argument on the TCPA Motions.

Defendants cannot address an Undisclosed Motion, other than to note that Tex. R. Civ. P. 21 typically requires three days' notice of such hearing. While there is no provision in the TCPA for an "Undisclosed Motion," at least one Court of Appeals has upheld an objection as to timeliness of "ambush" response filings in the TCPA context.<sup>7</sup> Defendants are thus opposed to any surprise arguments Plaintiff intends to advance, much less requiring those to occur prior to argument on the TCPA Motions.

**(3) Timing of Briefing in relation to the August 22, 2019 (10:00 a.m.) Hearing**

<b>Defendants' Proposal</b>	<b>Plaintiff's Proposal</b>
<p>a) Plaintiff will file his Response and any evidentiary objections to the TCPA Motions by <b>Aug. 16, at 5:00 p.m.</b>;</p> <p>b) Defendants will file any Reply in support of the TCPA Motions and evidentiary objections to Plaintiff's Response by Aug. 20, at 5:00 p.m.; and</p> <p>c) Plaintiff will file any Response to Defendants' evidentiary objections by Aug. 21, at 5:00 p.m.</p>	<p>a) Plaintiff files his Response and any evidentiary objections to the TCPA Motions by Monday, <b>August 19, by 10:00 a.m.</b>;</p> <p>b) Defendants will file any Reply in support of the TCPA Motions and evidentiary objections to Plaintiff's Response by Aug. 20, at 5:00 p.m.; and</p> <p>c) Plaintiff will file any Response to Defendants' evidentiary objections by Aug. 21, at 5:00 p.m.</p>

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<sup>7</sup> See *Mission Wrecker Serv., S.A., Inc. v. Assured Towing, Inc.*, 04-17-00006-CV, 2017 WL 3270358, at \*3 (Tex. App.—San Antonio Aug. 2, 2017, pet. denied) ("The absence of a rule directly applicable to an issue should not be used as a means to ambush opposing counsel. *Gessmann v. Stephens*, 51 S.W.3d 329, 340 n.7 (Tex. App.—Tyler 2001, no pet). Instead, in the absence of a rule, the trial court should have the discretion to determine the timeliness of a response.").

Plaintiff's proposal compresses Defendants ability to file a cogent reply – along with any evidentiary objections – to thirty-one hours as compared to the ninety-six hours proposed by Defendants.<sup>8</sup> This timeframe stands in stark contrast to the fifteen days and twenty-three hours Plaintiff has to analyze and respond to the TCPA Motions, if Defendants had filed their TCPA Motions today at 10:00 a.m. instead of their actual filing dates.

### **Conclusion**

Defendants' proposal (contained in the attached Order) provides Plaintiff with ample time to respond to Defendants' TCPA Motions (and any supplements) and it avoids multiple hearings on evidentiary objections or Undisclosed Motions, while allowing the Court sufficient time to review the relevant papers before the August 22nd hearing.

Defendants look forward to receiving the Court's guidance on these matters.

Respectfully submitted,



John Volney

CC: All counsel of record (VIA ECF)

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<sup>8</sup> The thirty-one (31) hours offered by Plaintiff requires Defendants to work through the night to take advantage of the full amount of time.

# EXHIBIT A

## Christian Orozco

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**From:** Ty Beard <ty@beardandharris.com>  
**Sent:** Wednesday, July 31, 2019 5:19 PM  
**To:** John Volney; Carey Christie  
**Cc:** Jim Bullock; cerick@cowlesthompson.com; APerez@kesslercollins.com; Christian Orozco; sam@johnsonsparks.com; Sean Lemoine  
**Subject:** RE: Case No. 141-307474-19 8/1/19 Hearing Phone Number Confirmation

John, we will not agree to any particular time limit on our evidentiary objections and motions to strike.

We don't agree to the August filing 16 deadline, but can agree to moving the hearing out another couple of days, so that your deadlines aren't overly cramped.

--Ty

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**From:** John Volney <jvolney@lynnllp.com>  
**Sent:** Wednesday, July 31, 2019 5:13 PM  
**To:** Ty Beard <ty@beardandharris.com>; Carey Christie <carey@beardandharris.com>  
**Cc:** Jim Bullock <jim@beardandharris.com>; cerick@cowlesthompson.com; APerez@kesslercollins.com; Christian Orozco <corozco@lynnllp.com>; sam@johnsonsparks.com; Sean Lemoine <sean.lemoine@wickphillips.com>  
**Subject:** RE: Case No. 141-307474-19 8/1/19 Hearing Phone Number Confirmation

Ty:

Thank you for the response.

This is progress but the time table you propose is too compressed for us and we cannot agree to a pre-TCPA motion hearing on evidentiary objections or other motions you may file that we don't know about.

- (1) All three Anti-Slapp MTDs will be heard on August 22, 2019, and last from 10:00 a.m. to 12:00 p.m.
  - a. Time allocation will be 1:05 for Defendants and 55:00 for Plaintiff
- (2) You can use whatever part of your 55:00 to argue evidentiary objections. Alternatively, we ask the Court tomorrow to tell us how he wants to handle the evidentiary objections.
- (3) Plaintiff will file his Response and any Evidentiary objections to the MTDs by Aug. 16, at 5:00 p.m;
- (4) Defendants will file any Reply in support of the MTDs and evidentiary objections to Plaintiff's Response by Aug. 20, at 5:00 p.m.; and
- (5) Plaintiff will file any Response to Defendants' evidentiary objections by Aug. 21, at 5:00 p.m.

I think all defendants are on board with this proposal. If anyone is not, let us know please.

John Volney  
LPCH, LLP  
214-981-3815

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**From:** Ty Beard [<mailto:ty@beardandharris.com>]  
**Sent:** Wednesday, July 31, 2019 4:36 PM  
**To:** John Volney <[jvolney@lynnllp.com](mailto:jvolney@lynnllp.com)>; Carey Christie <[carey@beardandharris.com](mailto:carey@beardandharris.com)>  
**Cc:** Jim Bullock <[jim@beardandharris.com](mailto:jim@beardandharris.com)>; [cerick@cowlesthompson.com](mailto:cerick@cowlesthompson.com); [APerez@kesslercollins.com](mailto:APerez@kesslercollins.com); Christian Orozco

<[corozco@lynnllp.com](mailto:corozco@lynnllp.com)>; [sam@johnsonsparks.com](mailto:sam@johnsonsparks.com); Sean Lemoine <[sean.lemoine@wickphillips.com](mailto:sean.lemoine@wickphillips.com)>

**Subject:** RE: Case No. 141-307474-19 8/1/19 Hearing Phone Number Confirmation

Hey John. I appreciate your efforts to resolve this issue amicably. Here's what we are willing to agree to:

- (1) All three Anti-Slapp MTDs will be heard on August 22, 2019, and last from 10:00 a.m. to 12:00 p.m., subject to scheduling other hearings (see below).
  - a. No matter when the MTDs get heard, the time allocation will be 1:05 total for all three Defendants and 55:00 for Plaintiff.  
Comment – I suspect that the judge will take whatever time he wants, but we're willing to agree to the time limit.
- (2) We can't agree to deciding the evidentiary objections (or our motions to strike) by submission. We think the court needs to hear these, although we are willing to agree that our motions to strike and any other motions we file will be heard on the 22<sup>nd</sup> before the hearings on the MTDs.
- (3) We'll agree to file our Response and any Evidentiary objections to the MTDs by Monday, August 19, by 10 am;
- (4) Defendants will file any Reply in support of the MTDs and evidentiary objections to Plaintiff's Response by Aug. 20, at 5:00 p.m.; and
- (5) Plaintiff will file any Response to Defendants' evidentiary objections by Aug. 21, at 5:00 p.m.

--Ty

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**From:** John Volney <[jvolney@lynnllp.com](mailto:jvolney@lynnllp.com)>

**Sent:** Wednesday, July 31, 2019 4:12 PM

**To:** Ty Beard <[ty@beardandharris.com](mailto:ty@beardandharris.com)>; Carey Christie <[carey@beardandharris.com](mailto:carey@beardandharris.com)>

**Cc:** Jim Bullock <[jim@beardandharris.com](mailto:jim@beardandharris.com)>; Jeff E. Fisher <[JEFisher@TarrantCounty.com](mailto:JEFisher@TarrantCounty.com)>; [cerick@cowlesthompson.com](mailto:cerick@cowlesthompson.com); [APerez@kesslercollins.com](mailto:APerez@kesslercollins.com); Christian Orozco <[corozco@lynnllp.com](mailto:corozco@lynnllp.com)>; [sam@johnsonsparks.com](mailto:sam@johnsonsparks.com); Sean Lemoine <[sean.lemoine@wickphillips.com](mailto:sean.lemoine@wickphillips.com)>

**Subject:** RE: Case No. 141-307474-19 8/1/19 Hearing Phone Number Confirmation

Ty and Carey:

In an effort to resolve tomorrow's motion, here is a proposal that all Defendants can live with:

- (1) All three Anti-Slapp MTDs will be heard on August 22, 2019, and last from 10:00 a.m. to 12:00 p.m.
  - a. Time allocation will be 1:05 for Defendants and 55:00 for Plaintiff
- (2) All evidentiary objections will be decided by submission;
- (3) Plaintiff will file his Response and any Evidentiary objections to the MTDs by Aug. 16, at 5:00 p.m.;
- (4) Defendants will file any Reply in support of the MTDs and evidentiary objections to Plaintiff's Response by Aug. 20, at 5:00 p.m.; and
- (5) Plaintiff will file any Response to Defendants' evidentiary objections by Aug. 21, at 5:00 p.m.

Is this acceptable to you?

Thank you for letting me know.

John Volney  
LPCH, LLP  
214-981-3815

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**From:** Ty Beard [<mailto:ty@beardandharris.com>]

**Sent:** Wednesday, July 31, 2019 4:09 PM

**To:** [cerick@cowlesthompson.com](mailto:cerick@cowlesthompson.com); [APerez@kesslercollins.com](mailto:APerez@kesslercollins.com); Sean Lemoine <[sean.lemoine@wickphillips.com](mailto:sean.lemoine@wickphillips.com)>; Christian Orozco <[corozco@lynnllp.com](mailto:corozco@lynnllp.com)>; [sam@johnsonsparks.com](mailto:sam@johnsonsparks.com); John Volney <[jvolney@lynnllp.com](mailto:jvolney@lynnllp.com)>

**Cc:** Jim Bullock <[jim@beardandharris.com](mailto:jim@beardandharris.com)>; Carey Christie <[carey@beardandharris.com](mailto:carey@beardandharris.com)>; Jeff E. Fisher <[JEFisher@TarrantCounty.com](mailto:JEFisher@TarrantCounty.com)>

**Subject:** Case No. 141-307474-19 8/1/19 Hearing Phone Number Confirmation

Counsel, here are the phone numbers I have for each of you. Please confirm that your number is correct (or give me the correct number). If anyone does NOT want to be on the call, please let me know.

Sean Lemoine 214-740-4053

John Volney 214-755-9214

Christian Orozco at 214-981-3804

Casey Erick 214-672-2138

Sam Johnson 972-918-5274

Unfortunately, our system won't let me call more than six people. Therefore, Andrea or Christian, would you mind dialing in using the dial-in number below?

I'll start calling at 10:45 am. The instructions are to call Mr. Fisher a few minutes before 11 am at 817-884-1992 and he'll get the judge.

In case there's a problem with me calling you or if you get disconnected, below is the conference dial-in information that you can use at 11 am.

Dial-In Number:

+1 267-930-4000

Participant Access Number: 469 584 377

--Ty



# EXHIBIT B

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

141<sup>ST</sup> JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

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

On this day, the Court considered Plaintiff Vic Mignogna's ("Plaintiff") First Amended Motion to Continue on TCPA Motion to Dismiss (the "Continuance"). After considering the Continuance and the filings of Defendants Funimation Productions, LLC, Jamie Marchi, Monica Rial, and Ronald Toye (collectively "Defendants"), the Court rules as follows:

- (1) The Defendants' Motion to Dismiss pursuant to the Texas Citizens Participation Act, and supplements thereto (the "Motions"), shall be heard on August 22, 2019 from 10:00 a.m. to 12:00 p.m.
- (2) Time allocation will be 1:05 for Defendants (collectively) and 0:55 for Plaintiff.
- (3) Plaintiff will file any response and any evidentiary objections to the Motions not later than Aug. 16, 2019 at 5:00 p.m.;
- (4) Defendants will file any reply and any evidentiary objections to Plaintiff's response and evidentiary objections not later than Aug. 20, 2019 at 5:00 p.m.; and
- (5) Plaintiff will file any response to Defendants' evidentiary objections by Aug. 21, 2019 at 5:00 p.m.
- (6) All evidentiary objections to depositions, affidavits, or other evidence on file with the Court will be decided by written submission, unless otherwise directed by the Court.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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HONORABLE JOHN CHUBB