

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****MONICA RIAL AND RON TOYE’S POST-HEARING BRIEF IN SUPPORT OF
SANCTIONS AND ATTORNEYS’ FEES**

Defendants Monica Rial (“Rial”) and Ronald Toye (“Toye”) (the “Moving Defendants”) submit their Post-Hearing Brief in Support of Sanctions and Attorneys’ Fees, as follows:

I. ARGUMENT AND AUTHORITIES**A. The Court Should Not Consider Issues Raised in Plaintiff’s Response But Not Raised at the Evidentiary Hearing.¹**

Plaintiff’s Response asserts a number of issues that were neither raised on November 21, 2019, nor was evidence introduced into the record to support such issues.² By way of example, Plaintiff purports that the Court should apply the rates of Ty Beard and Jim Bullock, yet neither of them (nor a qualified expert) took the stand to defend their rates, their legal acumen, or their

¹ On the eve of the November 21, 2019 evidentiary hearing, Plaintiff filed his Response and Objections to Monica Rial and Ron Toye’s Brief in Support of Sanctions and Attorneys’ Fees Pursuant to the Texas Citizens Participation Act (“Plaintiff’s Response.”).

² See *Interest of D.Z.*, 14-17-00938-CV, 2019 WL 3432160, at *9 (Tex. App.—Houston [14th Dist.] July 30, 2019, no pet. h.) (“However, Mother’s previous attorney did not testify about her attorney’s fees at the hearing, and the trial court did not admit Mother’s attorney’s affidavit or billing records. Mother instead presented her own testimony about the total amount of attorney’s fees she paid with a general description of her previous attorney’s services. Mother’s evidence ‘lacks the substance required to uphold a fee award’ and thus is legally insufficient. See *Nath*, — S.W.3d at —, 2019 WL 2553538, at *2; *Rohrmoos Venture*, — S.W.3d at —, 2019 WL 1873428, at *25.”).

qualifications to opine on reasonable fees in a TCPA case. Plaintiff raised isolated time entries in his Response, yet failed to ask any questions at the hearing on most of those issues. Plaintiff had several weeks to review and educate an expert (either from within the two (2) firms and six (6) attorneys listed on his Response, or externally) to create his own lodestar and submit that evidence to the Court as a counter-point to the Moving Defendants' evidence.

Simply put, the Court cannot accept assertions that have no evidentiary support in the record. *See Interest of D.Z.*, 2019 WL 3432160 at *9.

B. Moving Defendants Followed the Analysis of *Estate of Stokes* and *McGibney v. Rauhauser* to Ensure a Proper Predicate for Attorneys' Fees Recovery Exists.

Plaintiff's reliance on *Estate of Stokes* is curious because there the trial court had a battle of experts as to the appropriate amount of attorneys' fees under the lodestar method. *See Estate of Stokes*, 02-18-00234-CV, 2019 WL 4048863, at *1 (Tex. App.—Fort Worth Aug. 28, 2019, no pet. h.).³ The Fort Worth Court of Appeals remanded because of the recent issuance of *Rohrmoos Venture*.⁴ To avoid a similar remand, Moving Defendants analyzed and applied *Rohrmoos Venture*, including applying a billing judgment reduction of \$30,686.45. *See* Defendants Exhibits 3 and 7a. Moreover, and unlike *Estate of Stokes*, Plaintiff proffered no expert on attorneys' fees to challenge Moving Defendants' lodestar calculation as to rates or amounts of hours expended.

Plaintiff's reliance on *McGibney v. Rauhauser*, 549 S.W.3d 816 (Tex. App.—Fort Worth 2018, pet. denied), which Moving Defendants cited in their November 4, 2019 briefing, is misplaced. First, because redactions were an issue in *McGibney*, Moving Defendants tendered unredacted copies to the Court for an appropriate determination as to any reduction. *See*

³ ("On remand, the trial court conducted a three-day bench trial on the issue of attorney's fees. Almost all the fee testimony was from each side's expert. One issue that was disputed throughout the trial was whether the lodestar method⁴ applied to the entire attorney's-fee award under section 74.351.").

⁴ *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019).

McGibney, 549 S.W.3d at 821-22. Second, because the Court of Appeals expressed concern about inclusion of items unrelated to the TCPA motion in *McGibney* (*see id.* at 824-826), the Moving Defendants reduced the lodestar by reducing or excluding multiple hours from the lodestar that could fall into such category. *See* Defendants Ex. 3, 3(b), 4, and 7(a). Third, *McGibney* involved a dispute where the plaintiff immediately non-suited his claim, which is completely inapposite to this case where Plaintiff pressed forward with multiple depositions, hearings, and filings. *Compare McGibney*, 549 S.W.3d at 824-825 with Docket Sheet.⁵

C. The Moving Defendants Faced a More Complex Fact Pattern than Ms. Marchi or Funimation.

While Plaintiff may have plead the same causes of action against all of the Defendants, the Moving Defendants were clearly the target of Plaintiff's ire, given the unequal number of factual allegations against them as compared to Funimation Productions, LLC ("Funimation") and Jamie Marchi ("Ms. Marchi"). The following table identifies the vast difference between the factual allegations (that the Moving Defendants needed to address) as compared to their Co-Defendants.⁶

| First Amended Petition | Mr. Toye | Ms. Rial | Funimation | Ms. Marchi |
|--|----------------------------|-------------------------|----------------|------------------|
| Defendant mentions for substantive allegations | 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 |

Not only are the Moving Defendants two (2) separate people, they are **the only** Defendants deposed, **the only** Defendants that answered discovery, and were inarguably the primary target of the lawsuit. The Court can also review the billing records and Motions to Dismiss to determine

⁵ *McGibney* presented the highly unusual situation where (1) the defendant filed a TCPA motion before he was served (while knowing plaintiff intended to non-suit the lawsuit) and thus did not have to appear in the case; (2) plaintiff immediately non-suited the case (within hours of the TCPA filing); and (3) the trial court made zero reductions to the full amount sought by defendant. *See McGibney*, 549 S.W. 3d at 824-825.

⁶ Attached hereto as Exhibit A is a chart from the First Amended Petition. The Original Petition was introduced as Defendants Exhibit 8, and factually tracks the First Amended Petition with a few exceptions.

that it was **only** the Moving Defendants that secured sixteen (16) affidavits in support of their Motion to Dismiss, including the affidavits of five (5) women that were assaulted by Plaintiff and three (3) convention owners/directors that confirmed the Moving Defendants had nothing to do with the termination of Plaintiff's invitation to those conventions.⁷ As an example, 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 |

A comparison of the time records and Ms. Rial and Mr. Toye's Motion to Dismiss (28 pages with 12 affidavits, 2 declarations, 3 depositions, and 2 affirmative defenses) and Supplement to Motion to Dismiss (6 pages with 4 affidavits, and 2 affidavits) with the time records and Ms. Marchi's Motion to Dismiss (17 pages with 1 declaration, 1 deposition, and no affirmative defenses) reflects the complexity of allegations in the First Amended Petition against the three (3) different defendants. Ms. Marchi's work product cannot set the ceiling for attorneys' fees because that work product does not even cover one quarter (1/4) of the foundation of the allegations in the First Amended Petition.⁸

One final point raised by Plaintiff drives home the difference between Ms. Rial/Mr. Toye and Ms. Marchi, when he asserts "[c]ounsel for co-Defendant, Jamie Marchi, only required 2.5 hours to prepare for three (3) depositions." *See* Response, ¶ 18. Why would Ms. Marchi's attorney

⁷ The lack of interference with the eleven conventions is something that Mr. Mignogna had **no admissible evidence** of when the lawsuit was filed on April 18, 2019, on July 12, 2019 when he filed the First Amended Petition, or August 30, 2019 when he signed his affidavit. But the Moving Defendants had to defend against those allegations regardless.

⁸ Notably, Plaintiff's counsel did not raise with the undersigned the difference between Moving Defendants incurred fees and Ms. Marchi's incurred fees.

spend multiple hours preparing for Ms. Rial and Mr. Toye's depositions when he is not going to ask them any questions? Mr. Johnson had no need to spend multiple hours preparing for Plaintiff's deposition when his client is referenced a grand total of four (4) times and is being sued for defamation based on one (1) tweet that does not even mention Plaintiff. This is also evidenced by the minimal amount of time he had to spend asking Plaintiff's questions (in his deposition) about the one (1) tweet Plaintiff sued Ms. Marchi over.⁹

Ms. Rial and Mr. Toye were the primary target of the lawsuit and defended it accordingly. Their request for fees is not out of line with fees awarded two years ago in *Rich v. Range Res. Corp.*, 535 S.W.3d 610, 614–15 (Tex. App.—Fort Worth 2017, pet. denied) (\$470,012.41 in attorney's fees awarded by the trial court).

D. Block Billing is Allowed Under Texas Law.

Plaintiff asserts that "block billing" is not allowed under Texas law, by attempting to extrapolate *Rohrmoos Venture* and citing *Barrow v. Greenville Indep. Sch. Dist.*, 3:00-CV-0913-D, 2005 WL 6789456 (N.D. Tex. Dec. 20, 2005), *affd*, 06-10123, 2007 WL 3085028 (5th Cir. Oct. 23, 2007). *See* Plaintiff's Response, ¶ 10. First, *Rohrmoos* does not use the word "block," does not reference "block billing," and did not adopt the entirety of federal court jurisprudence with regard to attorneys' fees calculation. *See generally Rohrmoos Venture*, 578 S.W. 469. Second, while neither the Texas Supreme Court or Fort Worth Court of Appeals have addressed the issue, the Houston Court of Appeals rejected the assertion that Texas law is adverse to block billing. *See State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 100 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).¹⁰ Third, even assuming a block billing reduction is required (and it is not), *Barrow* (the

⁹ Plaintiff's complete deposition is attached to Ms. Rial and Mr. Toye's Motion to Dismiss (as Exhibit A). Mr. Lemoine's questioning covered pp. 10-234 while Mr. Johnson covered pp. 235-264.

¹⁰ ("Essentially, 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. *See John*

case cited by Plaintiff) stands for the proposition that between 10% and 20% is appropriate (as opposed to the eighty percent (80%) sought by Plaintiff. *See Barrow*, 2005 WL 6789456. To the extent Plaintiff wished to challenge block billing and seek a reduction, it had an obligation to articulate those line items for which a reduction is necessary through cross-examination and/or its own expert testimony as to reasonableness of time expended.

II. CONCLUSION AND PRAYER

For these reasons, the Moving Defendants respectfully request the Court enter Final Judgment that (a) awards reasonable attorneys' fees, expenses, and costs in accordance with the TCPA (as described in the chart above); and (b) enter a sanction against Plaintiff sufficient to deter him in the amount of chosen by the Court, but between a range of \$100,000 and \$260,000; and (c) such other and further relief to which the Moving Defendants may be justly entitled.

Dated November 25, 2019

Respectfully submitted,

By: /s/ J. Sean Lemoine

J. Sean Lemoine

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Moore Servs., 2016 WL 3162206, at *6–7 (concluding that “block-billing technique” was “distinguishable from *El Apple*, in which there was far less evidence of attorney's fees, and it was presented in a far more summary fashion” and “distinguishable from the aggregate and conclusory time estimates provided in *Montano*” because entries “describe the work that was done, specify the date the work was done, provide the total amount of time spent accomplishing the tasks, and identify the person who did the work.”). Hanson's attorneys' time entries could be meaningfully reviewed because they included details about the nature of the work, who did it at what rate, what day the work was performed, and the time worked. *See El Apple*, 370 S.W.3d at 762.”).

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**ATTORNEYS FOR DEFENDANTS
MONICA RIAL AND RONALD TOYE**

CERTIFICATE OF SERVICE

I certify that on November 25, 2019, a true and correct copy of the foregoing was served on all counsel of record in accordance with Rule 21a of the Texas Rules of Civil Procedure.

/s/J. Sean Lemoine
J. Sean Lemoine

EXHIBIT A

MIGNOGNA PETITION ALLEGATIONS

MONICA RIAL

First Amended Petition

(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....”⁴

(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.”⁵

(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.”⁶ About the same time, one or more Defendants began actively defaming Vic directly to anime conventions, speaking of investigations and Vic being fired.

(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.

(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.

MIGNOGNA PETITION ALLEGATIONS

(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*).

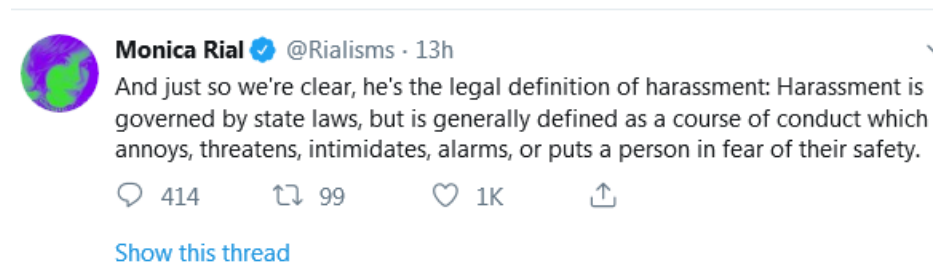


(30) On February 11, 2019, Funimation made its “investigation” public via Twitter, declaring it determined Vic had engaged in “harassment or threatening behavior”; Monica responded there were “multiple investigations with testimony, proof, evidence.” (*Figure 3*).

MIGNOGNA PETITION ALLEGATIONS



(31) Later that day, Monica declared that Vic is “the legal definition of harassment.” (Figure 4).



MIGNOGNA PETITION ALLEGATIONS

(33) On February 19, 2019, 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 investigations were incredibly thorough. Each person was interviewed, the evidence weighed, and a decision made. Each company has to look out for the safety of their employees. In this instance, these companies felt they made the best decision to protect their employees and contract workers. Also, these companies aren’t obligated to share any information with you. Many of the women who’ve come forward have chosen to remain anonymous, especially after seeing the way that I’ve been attacked. Please respect their privacy.

MIGNOGNA PETITION ALLEGATIONS

RON TOYE

(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.

(20) The fallout from the Defendants' actions was swift. On January 18, 2019, the Phoenix Fan Fusion convention cancelled Vic's appearance. A few days later, on January 26, 2019, Ronald tweeted that Vic was "a predator" (a charge Ronald would repeat in at least 15 more Tweets); shortly after, the Rangerstop Convention cancelled Vic's appearance.


(23) In January 31, 2019 Tweets, Ronald claimed to know of "at least 4 assaults" by Vic and crowed "I am glad to see conventions cancelled"; that day, Kawaiicon cancelled Vic's appearance.

(24) On February 1, 2019, Ronald tweeted he personally knew that Vic was "guilty of at least 4 accounts"; that day, the Kamehacon Dallas convention cancelled Vic's appearance (however, on March 24, 2019, Vic was re-invited to the Kamehacon Dallas convention).

(25) On February 2, 2019, Ronald tweeted that Vic needed to prove himself "not to be a predator." The next day, Ancient City Con cancelled Vic's appearance.


(26) On February 4, 2019, Ronald tweeted multiple times that Vic was "a predator," called Vic a "perp," and asserted there are "over 100 accounts and still more to come...." (*Figure 1*); that day, Denver Comicon cancelled Vic's appearance.


MIGNOGNA PETITION ALLEGATIONS


**Ron Toye** @RonToye · Feb 4
Replying to @MorphBox @RyanAshfyre and 2 others
He is down because he took advantage of girls, buddy. 🤔 how about get a grip on reality and stop harassing people. Over 100 accounts and still more to come and you defend this sack of shit? Get a life!
1 1 1

(27) On February 5, 2019, Funimation informed Anime News Network that Vic's employment had been terminated, and Ronald again tweeted his accusation that Vic is a "predator." Over the next 24 hours, Florida Supercon, Raleigh Supercon, Kamicon, and Hudson Valley Comicon all canceled Vic's appearances.

(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).

**Jamie Marchi** @marchimark
Replying to @AlishaNico @Rialisms
Yes, I want his head. I want his balls. I want him to feel an ounce of the pain he's cause others and then fucking choke on it. I want you to take his dick out of your ears so you can actually hear reality. But, you know, that's just me.
9:05 PM - 6 Feb 2019
28 Retweets 583 Likes
83 28 583

**Andrew Kemble** @AndrewKembleDM · Feb 7
Replying to @marchimark @AlishaNico @Rialisms
And what about "Innocent Until Proven Guilty"?
3 2 85

**Jamie Marchi** @marchimark · Feb 7
Works in a court of law. Sometimes, name and shame is the fastest way to the courtroom.
27 32

FIRST AMENDED PETITION

6

MIGNOGNA PETITION ALLEGATIONS

(32) Over the next week or so, Ronald 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).

(34) Ronald continued carpet-bombing Vic on Twitter accusing him of “assaulting” Monica (February 21, 2019), of “cheat[ing] on his fiancé, assault[ing] ladies, [and] rob[bing] fans” and assaulting “way more people” than Monica (February 23, 2019), and of “forc[ing] himself on people in a sexual manner without consent and that resulted in assault” (April 7, 2019).

(35) In fact, Ronald has tweeted more than 80 times that Vic sexually assaulted or assaulted Monica, more than 10 times that Vic sexually assaulted or assaulted three of his “very close friends,” more than 10 times that Vic has been accused of hundreds and possibly thousands of assaults, and at least 17 times that Vic is a “predator.”

MIGNOGNA PETITION ALLEGATIONS

JAMIE MARCHI

(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.”⁶ About the same time, one or more Defendants began actively defaming Vic directly to anime conventions, speaking of investigations and Vic being fired.

(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.

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MIGNOGNA PETITION ALLEGATIONS

**Jamie Marchi**  @marchimark

Replying to @AlishaNico @Rialisms

Yes, I want his head. I want his balls. I want him to feel an ounce of the pain he's cause others and then fucking choke on it. I want you to take his dick out of your ears so you can actually hear reality. But, you know, that's just me.

9:05 PM - 6 Feb 2019

28 Retweets 583 Likes



 83  28  583



**Andrew Kemble** @AndrewKembleDM · Feb 7

Replying to @marchimark @AlishaNico @Rialisms

And what about "Innocent Until Proven Guilty"?

 3  2  85

**Jamie Marchi**  @marchimark · Feb 7

Works in a court of law. Sometimes, name and shame is the fastest way to the courtroom.

 27  32

(29) Two days later, Jamie tweeted that Vic had assaulted her several years prior by grabbing her hair and whispering in her ear (what he whispered she couldn't remember), that "[i]n the last week or so, I've heard accounts of him doing this exact thing to half a dozen other women that I personally know," and that Vic is a "predator."

MIGNOGNA PETITION ALLEGATIONS

FUNIMATION

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MIGNOGNA PETITION ALLEGATIONS

