

NO. 02-19-00394-CV

**In the Court of Appeals
Second Judicial District
Fort Worth, Texas**

VICTOR MIGNOGNA, Appellant,
v.
FUNIMATION PRODUCTIONS, LLC, JAMIE MARCHI, MONICA RIAL and
RONALD TOYE, Appellees

APPELLANT'S BRIEF

Oral Argument Requested

BEARD ♦ HARRIS ♦ BULLOCK ♦ CHRISTIE

Ty Beard (SBOT 00796181)

Carey-Elisa Christie

100 Independence Place

Suite 300

Tyler, Texas 75703

T: (903) 509-4900

F: (903) 509-4908

Ty@beardandharris.com

Carey@beardandharris.com

Jim E. Bullock

5 Cowboys Way

Suite 300

Frisco, Texas 75034

T: (903) 509-4900

F: (903) 509-4908

Jim@beardandharris.com

MARTINEZ HSU, P.C.

Michael Martinez

An Lee Hsu

Ryan Sellers

4001 Airport Freeway

Suite 150

Bedford, Texas 76021

T: (682) 224-7810

F: (682) 730-8998

msmartinez@mhlegallgroup.com

ahsu@mhlegallgroup.com

rsellers@mhlegallgroup.com

Attorneys for Appellant

Identity of Parties & Counsel

Appellant
Victor Mignogna, plaintiff in the
trial court.

The attorneys representing Victor Mignogna are:

Ty Beard
Carey-Elisa Christie
BEARD ♦ HARRIS ♦ BULLOCK ♦ CHRISTIE
100 Independence Place, Suite 300
Tyler, Texas 75703
T: (903) 509-4900
F: (903) 509-4908
ty@beardandharris.com
carey@beardandharris.com

Jim E. Bullock
BEARD ♦ HARRIS ♦ BULLOCK ♦ CHRISTIE
5 Cowboys Way, Suite 300
Frisco, Texas 75034
T: (903) 509-4900
F: (903) 509-4908
jim@beardandharris.com

Michael Martinez
An Lee Hsu
Ryan Sellers
MARTINEZ HSU, P.C.
4001 Airport Freeway, Suite 150
Bedford, Texas 76021
T: (682) 224-7810
F: (682) 730-8998
msmartinez@mhlegalgroup.com
ahsu@mhlegalgroup.com
rsellers@mhlegalgroup.com

Appellees

Funimation Productions, LLC,
defendant in the trial court.

The attorneys representing Funimation
Productions, LLC, are:

John Volney
Christian Orozco
LYNN PINKER COX & HURST, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
Telephone: (214) 981-3800
Fax: (214) 981-3839
jvolney@lynllp.com
corozco@lynllp.com

Jamie Marchi, defendant in the
trial court.

The attorney representing Jamie Marchi is:

Samuel Johnson
JOHNSON & SPARKS, PLLC
7161 Bishop Road, Suite 220
Plano, Texas 75024
Telephone: (972) 918-5274
Fax: (972) 918-5274
sam@johnsonsparks.com

Monica Rial and Ronald Toye,
defendants in the trial court.

The attorneys representing Monica Rial and
Ronald Toye are:

Rusty J. O’Kane
J. Sean Lemoine
WICK PHILLIPS GOULD & MARTIN, LLP
3131 McKinney Avenue, Suite 100
Dallas, Texas 75204
Telephone: (214) 692-6200
Fax: (214) 692-6255
rusty.okane@wickphillips.com
sean.lemoine@wickphillips.com

Casey Erick
COWLES & THOMPSON, P.C.
901 Main Street, Suite 3900
Dallas, Texas 75202
Telephone: (214) 672-2000

Fax: (214)672-2338
cerick@cowlesthompson.com

Andrea Perez
CARRINGTON, COLEMAN, SLOMAN &
BLUMENTHAL, LLP
901 Main Street, Suite 5500
Dallas, Texas 75205
Telephone: (214) 855-3070
Fax: (214) 855-1333
aperez@ccsb.com

Table of Contents

Identity of Parties & Counsel.....	i
Table of Contents.....	iv
Index of Authorities.....	vi
Statement of the Case	viii
Issues Presented.....	ix
Statement of Facts.....	1
Summary of the Argument.....	8
Argument & Authorities.....	9
A. The trial court’s dismissing Appellant’s claims against Appellees for defamation is reversible error. [Point of Error 1]	11
1. Jamie’s Tweets	12
2. Monica’s Tweets.....	13
3. Ronald’s Tweets	14
4. Funimation’s Tweets.....	16
B. The trial court’s dismissing Appellant’s claims against Appellees for tortious interference with existing contracts is reversible error. [Point of Error 2].....	18
C. The trial court’s dismissing Appellant’s claims against Appellees for tortious interference with prospective business relations is reversible error. [Point of Error 3]	20
D. The trial court’s dismissing Appellant’s claims against Funimation Productions, LLC, for vicarious liability is reversible error. [Point of Error 4].....	21
1. Funimation exercised control; Monica & Jamie acted like employees.....	22
2. Monica & Jamie were acting with authority when tweeting	24
E. The trial court’s dismissing Appellant’s claims against Appellees for conspiracy is reversible error. [Point of Error 5]	28
1. Vic’s conspiracy claim is not subject to the TCPA.....	28
2. Vic presented a prima facie case of conspiracy.....	30
F. The trial court’s refusal to consider Appellant’s second amended petition is reversible error. [Point of Error 6]	33
G. Appellees did not satisfy their evidentiary burden, because the trial court should have struck the evidence attached to their motions to dismiss. [Point of Error 7]..	35

1. Funimation’s Motion to Dismiss Evidence	36
2. Monica’s & Ronald’s Motion to Dismiss Evidence.....	39
H. The trial court’s ordering Vic to pay Appellees’ legal fees and sanctions is reversible error [Point of Error 8].	47
Conclusion & Prayer	47
Certificate of Compliance.....	49

Index of Authorities

Cases

<u>Agar Corp., Inc. v. Electro Circuits Int'l, LLC</u> , 580 S.W.3d 136 (Tex. 2019), reh'g denied (Sept. 6, 2019).....	28
<u>Barham v. Sugar Creek National Bank</u> , 612 S.W.2d 78 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ)	36
<u>Beving v. Beadles</u> , 563 S.W.3d 399 (Tex. App.—Fort Worth 2018, pet. denied).....	10, 11, 21, 24, 29
<u>Boyd v. Texas Christian University, Inc.</u> , 8 S.W.3d 758 (Tex. App.—Fort Worth 1999, no pet.)	37, 44
<u>Brugger v. Swinford</u> , 14-16-00069-CV, 2016 WL 4444036 (Tex. App.—Houston [14th Dist.] Aug. 23, 2016, no pet.)	10
<u>Crosstex North Texas Pipeline, L.P. v. Gardiner</u> , 451 S.W.3d 150 (Tex. App.—Fort Worth 2014), aff'd, 505 S.W.3d 580 (Tex. 2016)	34, 35
<u>Cunningham v. Waymire</u> , 14-17-00883-CV, 2019 WL 5382597 (Tex. App.—Houston [14th Dist.] Oct. 22, 2019, no pet.).....	28
<u>D Magazine Partners, L.P. v. Rosenthal</u> , 529 S.W.3d 429 (Tex. 2017), reh'g denied (Sept. 29, 2017).....	10, 11, 16, 18
<u>Dallas Morning News, Inc. v. Hall</u> , 17-0637, 2019 WL 2063576 (Tex. May 10, 2019)...	9, 11
<u>DeAngelis v. Protective Parents Coalition</u> , 556 S.W.3d 836 (Tex. App.—Fort Worth 2018, no pet.).....	35
<u>Deleon v. Villareal</u> , 02-19-00133-CV, 2020 WL 98142 (Tex. App.—Fort Worth Jan. 9, 2020, no pet. h.), reh'g denied (Jan. 30, 2020).....	26
<u>Diamond Consortium, Inc. v. Hammervold</u> , 733 Fed. Appx. 151 (5th Cir. 2018), reh'g denied (June 4, 2018).....	10, 11
<u>Exxon Mobil Corporation v. Rincones</u> , 520 S.W.3d 572 (Tex. 2017)	22, 23
<u>First United Pentecostal Church of Beaumont v. Parker</u> , 514 S.W.3d 214 (Tex. 2017)	31
<u>Greater Houston Transportation Co. v. Phillips</u> , 801 S.W.2d 523 (Tex. 1990).....	37, 44
<u>Hooper v. Pitney Bowes, Inc.</u> , 895 S.W.2d 773 (Tex. App.—Texarkana 1995, writ denied).....	26
<u>In re ADM Investor Services, Inc.</u> , 304 S.W.3d 371 (Tex. 2010).....	24, 25
<u>In re Lipsky</u> , 411 S.W.3d 530 (Tex. App.—Fort Worth 2013, no pet.).....	31
<u>In re Lipsky</u> , 460 S.W.3d 579 (Tex. 2015)	9, 10, 12, 14, 15, 16, 18
<u>Jenkins v. Kemlon Products & Dev. Co.</u> , 923 S.W.2d 224 (Tex. App.—Houston [14 th Dist.] 1996, no writ)	37
<u>Kawcak v. Antero Resources Corporation</u> , 582 S.W.3d 566 (Tex. App.—Fort Worth 2019, pet. denied).....	28, 29

<u>Laverie v. Wetherbe</u> , 517 S.W.3d 748 (Tex. 2017)	26
<u>Limon v. State</u> , 340 S.W.3d 753 (Tex. Crim. App. 2011)	37, 44
<u>Minyard Food Stores, Inc. v. Goodman</u> , 80 S.W.3d 573 (Tex. 2002)	22, 24
<u>Neely v. Wilson</u> , 418 S.W.3d 52 (Tex. 2013).....	16
<u>Painter v. Amerimex Drilling I, Ltd.</u> , 561 S.W.3d 125 (Tex. 2018).....	22, 23
<u>PanAmerican Operating v. Maud Smith Estate</u> , 409 S.W.3d 168 (Tex. App.—El Paso 2013, pet. denied).....	24, 25
<u>Republic National Leasing Corp. v. Schindler</u> , 717 S.W.2d 606 (Tex. 1986).....	38
<u>Tienda v. State</u> , 358 S.W.3d 633 (Tex. Crim. App. 2012).....	38
<u>TransDesign International, LLC v. SAE Towers, Ltd.</u> , 09-18-00080-CV, 2019 WL 2647659 (Tex. App.—Beaumont June 27, 2019, pet. denied)	35
<u>Universal Plant Services, Inc. v. Dresser-Rand Group, Inc.</u> , 571 S.W.3d 346 (Tex. App.—Houston [1st Dist.] 2018, no pet.).....	10, 11
<u>Van Der Linden v. Khan</u> , 535 S.W.3d 179 (Tex. App.—Fort Worth 2017, pet. denied)	12, 13, 15, 16, 18, 20
<u>Weber v. Fernandez</u> , 02-18-00275-CV, 2019 WL 1395796 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.)	10, 14, 15, 16, 17, 18
<u>WFAA-TV, Inc. v. McLemore</u> , 978 S.W.2d 568 (Tex. 1998).....	11

Statutes

TEXAS CIVIL PRACTICE & REMEDIES CODE §27.005.....	9, 11
TEXAS CIVIL PRACTICE & REMEDIES CODE §27.006.....	10, 33
TEXAS CIVIL PRACTICE & REMEDIES CODE §27.009.....	47

Rules

TEXAS RULE OF APPELLATE PROCEDURE 44.....	35, 47
TEXAS RULE OF CIVIL PROCEDURE 63	34, 35
TEXAS RULE OF EVIDENCE 1002	37, 38
TEXAS RULE OF EVIDENCE 104.....	36, 37, 38
TEXAS RULE OF EVIDENCE 401.....	40, 44, 45
TEXAS RULE OF EVIDENCE 402.....	40, 44, 45
TEXAS RULE OF EVIDENCE 404.....	40, 41, 42, 43, 44, 45
TEXAS RULE OF EVIDENCE 701.....	37, 41, 42, 43, 44, 45, 46
TEXAS RULE OF EVIDENCE 801.....	36, 37, 38, 40, 41, 42, 43, 44, 45, 46
TEXAS RULE OF EVIDENCE 802.....	36, 37, 38, 40, 41, 42, 43, 44, 45, 46

Statement of the Case

Victor Mignogna sued Funimation Productions, LLC, Jamie Marchi, Monica Rial, and Ronald Toye for defamation, conspiracy, tortious interference with both existing contracts and prospective business relations, and (as to Funimation Productions, LLC only) vicarious liability.¹ Appellees filed motions to dismiss under the Texas Citizens Participation Act.² After a hearing,³ the trial court granted Appellees' motions and dismissed all of Appellant's claims with prejudice.⁴ After a subsequent hearing,⁵ the trial court ordered Appellant to pay attorneys' fees and sanctions.⁶

¹ CR Vol. 5, pp. 2467-2922; 3rd SUPP., pp. 4-17, 31-44. References to the clerk's record are designated "CR" and by volume number or supplement ("1st SUPP." filed on November 26, 2019; "2nd SUPP." filed on December 5, 2019, 3rd SUPP. filed on February 14, 2020).

² CR Vol. 1, pp. 34-201; Vol. 2, pp. 398-1032

³ RR Vol. 3. References to the reporter's record are designated "RR" and by volume number.

⁴ CR Vol. 6, pp. 3224-3228.

⁵ RR Vol. 4-5.

⁶ CR 1st SUPP., pp. 4-8.

Issues Presented

1. The trial court's dismissing Appellant's claims against Appellees for defamation is reversible error.
2. The trial court's dismissing Appellant's claims against Appellees for tortious interference with existing contracts is reversible error.
3. The trial court's dismissing Appellant's claims against Appellees for tortious interference with prospective business relations is reversible error.
4. The trial court's dismissing Appellant's claim against Funimation Productions, LLC, for vicarious liability is reversible error.
5. The trial court's dismissing Appellant's claims against Appellees for conspiracy is reversible error.
6. The trial court's refusal to consider Appellant's second amended petition is reversible error.
7. Appellees presented legally insufficient or factually insufficient evidence to satisfy their burden under the TCPA, and the trial court's finding otherwise is reversible error.
8. The trial court's ordering Appellant to pay Appellees' attorney's fees and sanctions is reversible error.

Statement of Facts

Appellant Victor Mignogna (“Vic”) is a voice actor whose voice is used for the English dubbing of Japanese anime productions; Appellees Monica Rial (“Monica”) and Jamie Marchi (“Jamie”) also are anime voice actors.⁷ Appellee Funimation Productions, LLC (“Funimation”) primarily dubs Japanese anime productions into English, then distributes the videos in the U.S. via streaming access, and has hired Vic, Monica and Jamie to provide their voice-over services.⁸ Most often, the voice actors recorded their lines at different times and locations (instead of together in the studio).⁹ At times, however, they saw each other at Funimation’s offices, and Vic considered Jamie and Monica to be friends.¹⁰ The voice actors also appeared (sometimes together) at fan conventions where they participated in “breakout” sessions sharing “behind the scenes” tidbits and answering fans’ questions and were paid for autographs and photographs with fans (often hugging, and sometimes giving kisses to, their fans).¹¹

On January 22, 2019, Funimation initiated an internal investigation into Monica’s allegations that (i) at a convention many years before, Vic had eaten a

⁷ CR Vol. 5, p. 2469; 3rd SUPP., pp. 5-6, 33.

⁸ Id.

⁹ CR Vol. 4, pp. 1468 (105:8-9), 1796-97 (76:20-77:7).

¹⁰ CR Vol. 4, pp. 1499 (136:22-23), 1570 (207:12-21), 1744 (24:17-25), 1765 (45:14-15), 1577-78 (214:22-215:10), 1607 (244:3-12), 1826.

¹¹ CR Vol. 4, pp. 1260, 1457-58 (94:17-95:20), 1608 (245:11-12).

jellybean which Monica gave him, on which she had written her name, and joked that he “ate Monica,” (ii) at a convention several years prior, Vic had propositioned two adult female fans, and (iii) that Vic and a co-worker had kissed (consensually) at Funimation’s office.¹²

Though Funimation had not yet informed Vic of the investigation, Monica’s fiancé—Appellee Ronald Toye (“Ronald”)—began telephoning and texting Christopher Slatosch, host of the Kameha Con convention, on January 22, 2019 that Funimation’s parent company, Sony, was conducting an investigation into Vic’s assaulting four women and that criminal charges would soon be filed against Vic.¹³ Monica told Slatosch that Vic was a “sexual predator” and that criminal charges would soon be filed against him.¹⁴ Both urged him to cancel Vic’s invitation to Kameha Con—despite Slatosch’s objection that doing so would breach his contract with Vic—and to refuse doing business with Vic in the future; otherwise, Ronald’s company would withdraw its financial sponsorship of the convention, and Monica

¹² CR Vol. 1, pp. 37, 160; Vol. 4, pp. 1352, 1360-61, 1479-80 (116:16-117:2), 1495-96 (132:5-133:3); 1482-86 (119:23-123:3), 1488-89 (125:3-126:14); Vol. 5, pp. 2470-71, 2480-81. Funimation later claimed that its investigation was triggered by a January 16, 2019 tweet “Hey @Funimation why do you employ a known pedophile” that linked to a post on “Pretty Ugly Little Liar.” CR Vol. 1, pp. 35, 37. However, the January 16th tweet did not state that Vic was the “known pedophile”; and a January 18, 2019 comment to the January 16th “Pretty Ugly Little Liar” post noted that former Funimation voice actor Illich Guardiola—*not Vic*—had been charged with sexually assaulting a minor. CR Vol. 4, p. 1261; Vol. 5, p. 2478. And Vic tweeted two days later that “any allegations of sexual harassment, sexual assault, or most disturbingly, pedophilia are COMPLETELY AND UTTERLY FALSE.” *Id.*

¹³ CR Vol. 1, pp. 60; Vol. 4, pp. 1262, 1322-23, 1333-46; Vol. 5, pp. 2479-80, 2540-41, 2551-54.

¹⁴ CR Vol. 4, pp. 1262, 1322-23, 1333-46; Vol. 5, pp. 2479-80, 2540-41, 2551-54.

would cancel her appearance and convince other voice actors to cancel their appearances.¹⁵ Slatosch complied.¹⁶

Two days later (on January 24, 2019), Ronald tweeted publicly “I know with 100% certainty that [Vic] assaulted 4 people I love.”¹⁷

The next day (January 25, 2019), Tammy Denbow, Executive Director of Employee Relations for Sony, informed Vic of Monica’s allegations (none of which involved abuse, assault or harassment); Vic explained that the Monica-jellybean exchange was friendly banter “many years ago” and that the kiss with his co-worker was consensual and occurred after a year of exchanging correspondence.¹⁸ Though Ms. Denbow admonished Vic that Sony’s investigation was “confidential,” she and co-worker Lisa Gibson gave Monica updates; Ms. Denbow “talk[ed] it through” with her, and Ms. Gibson encouraged her to “hang in there.”¹⁹

After Ms. Denbow informed Vic of the investigation, Ronald launched a barrage of tweets against him: on January 25, “I have 4 people very close to me who

¹⁵ Id.

¹⁶ Id. Before the cancellations listed in this brief, Vic never had a convention cancel his appearance; Slatosch eventually re-invited Vic to attend Kameha Con but only after considerable expense by both sides and requiring Vic to stand away from the other guests and pay for additional security (something which was not required of the other guests). CR Vol. 4, pp. 1262, 1323, 1354; Vol. 5, pp. 2480.

¹⁷ CR Vol. 4, pp. 1263, 2107; Vol. 5, pp. 2480, 2722.

¹⁸ CR Vol. 1, pp. 59-60; Vol. 2, pp 669-72; Vol. 4, p. 1263; Vol. 5, p. 2480-81.

¹⁹ CR Vol. 4, pp. 1263, 1353; Vol. 5, p. 2480.

had a similar experience with Vic. He assaulted them...”;²⁰ on January 26, Vic “is guilty” of “sexual assault”;²¹ on January 28, Vic is “a man with a clear history of [sexual] deviancy.”²² On January 29, 2019, Funimation abruptly terminated its contract with Vic.²³ The next day, January 30th, both the Anime NYC and the Anime Milwaukee conventions cancelled Vic’s appearances.²⁴

After Monica secretly asked Funimation what she could say publicly and when Funimation would “make a statement,” she, Ms. Gibson, and Scott Barretto, Funimation’s Senior Director of Public Relations, spoke via telephone on January 31, 2019.²⁵ That day, Ronald tweeted “I know of at least 4 assaults...I am glad to see conventions cancelled and the truth coming to light.”²⁶ That day, Kawaiicon cancelled Vic’s appearance.²⁷ Three days later, Monica likewise tweeted “[t]he truth will come out.”²⁸

Ronald later claimed: “I know without a question he hurt people very close to me” and that Vic was “a predator” with “over 100 ladies and counting coming

²⁰ CR Vol. 4, pp. 1263, 2111; Vol. 5, pp. 2481, 2723.

²¹ CR Vol. 4, pp. 1264, 1915 (80:8-18), 2111, 2117; Vol. 5, pp. 2481, 2723, 2725.

²² CR Vol. 4, pp. 1264, 2119; Vol. 5, pp. 2481, 2725.

²³ CR Vol. 4, pp. 1264; Vol. 5, pp. 2481.

²⁴ CR Vol. 4, p. 1353; Vol. 5, pp. 2471, 2568; 3rd SUPP., p. 35.

²⁵ CR Vol. 1, p. 63; Vol. 4, p. 1264; Vol. 5, pp. 2481, 2500-01.

²⁶ CR Vol. 4, p. 2120; Vol. 5, pp. 2472, 2726.

²⁷ CR Vol. 4, p. 1353; Vol. 5, pp. 2472, 2568; 3rd SUPP., p. 36.

²⁸ CR Vol. 5, p. 2900.

forward” with accusations against him.²⁹ Afterwards, Denver Comicon cancelled Vic’s appearance.³⁰ On February 5, 2019, Ronald called on Funimation to make a statement about Vic and for him to “be banned indefinitely,” again, calling Vic “a predator.”³¹ Over the next 24 hours, Florida Supercon, Raleigh Supercon, Kamicon, and Hudson Valley Comicon all cancelled Vic’s appearances.³²

On February 6, Ronald tweeted that Vic “assaulted my fiancée,” implied that Vic was a “rapist,” and called Vic “a predator” “accused of over 100 accounts of assault,” and proclaimed that he wanted Vic “blacklisted and out of work.”³³ Later that day, Jamie announced that “name and shame” was faster than legal redress.³⁴

In a February 7, 2019 email to Funimation’s Trina Simon, Monica accused Vic of assaulting her in 2007.³⁵ Ronald immediately took to the Twittersphere to proclaim, on February 8, 2019, that “Vic assaulted Monica” and “other actors,” “sexually assaulted Monica, her friends, and countless fans” and again called Vic a “predator.”³⁶

²⁹ CR Vol. 4, pp. 1264-65, 2131-32, 2134, 2138-39; Vol. 5, pp. 2472, 2482, 2728-30.

³⁰ CR Vol. 4, p. 1353; Vol. 5, pp. 2472, 2568; 3rd SUPP., p. 36.

³¹ CR Vol. 4, pp. 1265, 2141-43; Vol. 5, pp. 2482, 2731.

³² CR Vol. 4, p. 1353; Vol. 5, pp. 2472, 2568; 3rd SUPP., p. 36.

³³ CR Vol. 4, pp. 1265, 2151, 2154, 2163, 2165, 2183; Vol. 5, pp. 2482, 2733-34, 2736-37, 2741.

³⁴ CR Vol. 5, p. 2473; 3rd SUPP., p. 37.

³⁵ CR Vol. 5, p. 2503.

³⁶ CR Vol. 4, pp. 2205, 2211, 2217, 2223, 2235-36; Vol. 5, pp. 2747-48, 2750-51.

On February 9, 2019, Jamie tweeted that Vic had assaulted her in Funimation’s lobby by grabbing her hair, yanking her head backwards, and whispering something “sexual” in her ear (though she could not recall what he said), that he had done “this exact thing to half a dozen other women that I personally know” and that he’s a “predator.”³⁷

Two days later (February 11, 2019), Funimation published two tweets: one, that “[f]ollowing an investigation...Funimation will not be engaging Mignogna in future productions...” and, two, “We do not condone any kind of harassment or threatening behavior being directed at anyone.”³⁸ Responding directly to Funimation’s tweet, Monica commented on Funimation’s Twitter feed that “[t]here were multiple investigations with testimony, proof, evidence...I am one of dozens of men and women who participated” and later tweeted “just so we’re clear, he’s the legal definition of harassment.”³⁹ Unsurprisingly, Funimation’s Twitter followers declared they understood Funimation was saying its investigation had determined that Vic had engaged in “harassment or threatening behavior.”⁴⁰

³⁷ CR Vol. 2, pp. 658-66, 950-54; Vol. 5, pp. 2918-2921.

³⁸ CR Vol. 1, pp. 39, 117-18; Vol. 2, p. 597; Vol. 4, pp. 1266, 1827-28; Vol. 5, p. 2474; 3rd SUPP., pp. 38.

³⁹ CR Vol. 1, pp. 39, 117-18; Vol. 2, p. 597; Vol. 4, pp. 1266, 1827-28; Vol. 5, pp. 2474, 2520, 2904; 3rd SUPP., pp. 39.

⁴⁰ CR Vol. 1, pp. 118-24; Vol. 4, pp. 1647 (284:17-20), 1827-28; Vol. 5, pp. 2517-27, 2536-38.

On February 16, 2019, Ronald implied that Vic would be “a registered sex offender.”⁴¹ Three days later (February 19, 2019), Monica tweeted that Vic had been accused of sexual harassment, alleged Vic had assaulted her by grabbing her hair and whispering in her ear, claimed she “witnessed” him do it “to so many people,” claimed he had forced a kiss on her in “[i]n the mid-2000s,” and called him a “predator.”⁴²

Vic consistently denied these allegations against him,⁴³ and he lost large amounts of income due to the cancelled conventions.⁴⁴ Vic sued Appellees for defamation, tortious interference with current and prospective contracts, and civil conspiracy (he also alleged that Funimation was vicariously liable for the actions of Jamie and Monica).⁴⁵ Appellees filed motions to dismiss under the Texas Citizens Participation Act.⁴⁶ Vic moved to strike much of Appellees’ evidence in support of their motions to dismiss.⁴⁷ The trial court denied Vic’s initial motion to strike Funimation’s evidence.⁴⁸ During the motion to dismiss hearing and in its October 4,

⁴¹ CR Vol. 4, p. 2313; Vol. 5, p. 2774.

⁴² CR Vol. 2, pp. 794-97.

⁴³ CR Vol. 1, pp. 130-31; Vol. 2, pp. 411, 627-28; Vol. 4, pp. 1351-52, 1498-99, 1503, 1618, 1624; Vol. 5, pp. 2566-67. Both Vic and Stan Dahlin refuted Monica’s allegation of what occurred “[i]n the mid-2000s.” CR Vol. 4, pp. 1347-52; Vol. 5, pp. 2906-09, 2566-67.

⁴⁴ CR Vol. 4, p. 1353; Vol. 5, p. 2568.

⁴⁵ *Supra* footnote 1.

⁴⁶ Texas Civil Practice & Remedies Code, chapter 27. *Supra* footnote 2.

⁴⁷ CR Vol. 3, pp. 1041-1055; 1218-1222; Vol. 4, pp. 1294-1306; Vol. 6, pp. 3212-3217.

⁴⁸ CR Vol. 6, p. 3113.

2019 order, the trial court indicated it would not consider anything filed by Appellees after the 60-day TCPA filing deadline.⁴⁹ Vic filed a written response to Appellees' motions to dismiss and amended (and supplemented) his petition;⁵⁰ however, the trial court refused to consider his amended and supplemented petition.⁵¹ After a hearing, the trial court granted Appellees' TCPA motions; after a subsequent hearing, the trial court entered its *Final Judgment* ordering Vic to pay attorney's fees and sanctions to Appellees.⁵² This appeal ensued.

Summary of the Argument

The trial court committed reversible error by dismissing Vic's claims for defamation, tortious interference with existing contracts, and tortious interference with prospective business relations, because Vic presented clear and specific evidence of a *prima facie* case against all Appellees. The trial court's dismissing Vic's claim against Funimation for vicarious liability, likewise, constituted reversible error, because he presented clear and specific evidence of a *prima facie* case that Funimation is vicariously liable for Jamie's and Monica's actions. And the trial court's dismissing Vic's claim of civil conspiracy is reversible error, because (a) his conspiracy claim is

⁴⁹ RR Vol. 3, pp. 74, 151; CR, Vol. 6, p. 3225.

⁵⁰ CR Vol. 4, pp. 1259-2446; Vol. 5, pp. 2467-2922; Vol. 6, pp. 2932-2945.

⁵¹ RR Vol. 3, pp. 37, 40, 42-43; CR., Vol. 6, p. 3225.

⁵² *Supra* footnotes 3-6.

not subject to the TCPA and (b) he, nonetheless, presented clear and specific evidence of a *prima facie* case against all Appellees.

Moreover, the trial court was required to consider Vic's second amended petition, and its failure to do so is reversible error. Additionally, the trial court's finding that Appellees satisfied their burden under the TCPA is not supported by the legally or factually sufficient evidence, because the trial court considered inadmissible evidence over Vic's objections which is reversible error. Finally, the trial court's ordering Vic to pay Appellees' legal fees and sanctions is reversible error.

The trial court's October 4, 2019 order and its *Final Judgment* must be reversed and vacated and this case remanded back to the trial court for trial.

Argument & Authorities

A motion to dismiss under the TCPA initiates a three-step process: initially, the movant must show, by a preponderance of the evidence, that the non-movant's claims are protected by the TCPA; if that burden is satisfied, the non-movant must establish a "prima facie case" for each essential element of his claim against the defendant by "clear and specific evidence." TEX. CIV. PRAC. & REM. CODE §27.005(b)-(c); In re Lipsky, 460 S.W.3d 579, 586–87 (Tex. 2015). A "prima facie case" means the minimum quantum of evidence that is necessary to support a rational inference that the allegation of fact is true (without considering rebuttal or contradiction). Dallas Morning News, Inc. v. Hall, 17-0637, 2019 WL 2063576, at *4 (Tex. May 10, 2019); Weber v. Fernandez, 02-18-00275-CV, 2019 WL 1395796, at *4

(Tex. App.—Fort Worth Mar. 28, 2019, no pet.). “Clear and specific evidence” is not a heightened evidentiary standard; rather, it means that the non-movant “must provide enough detail to show the factual basis for his claim [and] support a rational inference that the allegation of fact is true.” Id.; Lipsky, 460 S.W.3d at 590-91.

The Court considers the live pleadings as well as supporting and opposing affidavits stating the facts on which the claims are based. TEX. CIV. PRAC. & REM. CODE §27.006. At this stage of the proceedings, the Court presumes the truth of the non-movant’s assertions, D Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 440 fn. 9 (Tex. 2017), reh’g denied (Sept. 29, 2017), views the pleadings and evidence in the light most favorable to him, Diamond Consortium, Inc. v. Hammervold, 733 Fed. Appx. 151, 155 (5th Cir. 2018), reh’g denied (June 4, 2018), Universal Plant Services, Inc. v. Dresser-Rand Group, Inc., 571 S.W.3d 346, 355 (Tex. App.—Houston [1st Dist.] 2018, no pet.), Brugger v. Swinford, 14-16-00069-CV, 2016 WL 4444036, at *2 (Tex. App.—Houston [14th Dist.] Aug. 23, 2016, no pet.), and favors the conclusion that his claims are not predicated on protected expression. Beving v. Beadles, 563 S.W.3d 399, 407 (Tex. App.—Fort Worth 2018, pet. denied). The non-movant is not required to provide direct evidence. Hammervold, 733 Fed. Appx. at

155.⁵³ Indeed, he may rely on circumstantial evidence (if the inference drawn is reasonable). Hall, 2019 WL 2063576 at *4; Beving, 563 S.W.3d at 408.⁵⁴

A. The trial court’s dismissing Appellant’s claims against Appellees for defamation is reversible error. [Point of Error 1]

Vic met his burden to establish a “prima facie case” for each essential element of his defamation claim against each Appellee by “clear and specific evidence.” He was required to produce the minimum quantum of evidence supporting a rational inference that (1) an Appellee published a false statement (2) that defamed him (3) with the requisite degree of fault regarding the truth (negligence for private individuals, actual malice for public officials or public figures),⁵⁵ and (4) damages (unless the statement constitutes defamation per se). See Rosenthal, 529 S.W.3d at 434; *but see* McLemore, 978 S.W.2d at 571.⁵⁶ Pleadings and evidence that establish the facts

⁵³ The Texas Supreme Court has expressly disapproved interpretations of the TCPA that “require direct evidence of each essential element of the underlying claim to avoid dismissal” and, instead, has held that pleadings and evidence that establish the facts necessary to support the essential elements of a claim are sufficient to resist a TCPA motion to dismiss. Universal Plant Services, 571 S.W.3d at 359.

⁵⁴ Under the third-prong of the analysis, even if the non-movant satisfies his burden, the trial court must dismiss a claim if the movant can establish “each essential element of a valid defense” to that claim by a preponderance of the evidence. TEX. CIV. PRAC. & REM. CODE §27.005(d); Hall 2019 WL 2063576 at *4.

⁵⁵ A public official or public figure must establish that the defendant published a defamatory falsehood with “knowledge that it was false or with reckless disregard of whether it was false or not.” WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998).

⁵⁶ According to the McLemore Court, “to maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement.” McLemore, 978 S.W.2d at 571.

of when, where, and what was said, the defamatory nature of the statements, and how they damaged Vic were sufficient to defeat the Appellees' motions. Lipsky, 460 S.W.3d at 591.

1. *Jamie's Tweets*

Vic claimed that Jamie defamed him by publishing false statements about him. He showed that, on February 9, 2019, Jamie tweeted that he had assaulted her by grabbing her hair, yanking her head back, and whispering something "sexual" in her ear; she continued that he had done "this exact thing to half a dozen other women that I personally know" and that he's a "predator."⁵⁷ Vic specifically denied he did this to Jamie or anyone;⁵⁸ this is clear and specific evidence that Jamie's publication was false and that Jamie knew her publication was false. *See Van Der Linden v. Khan*, 535 S.W.3d 179, 198 (Tex. App.—Fort Worth 2017, pet. denied) (with only two parties to the alleged communication, non-movant's denial established a prima facie case for the essential element of falsity by clear and specific evidence).⁵⁹ And falsely accusing someone of a crime or of engaging in serious sexual misconduct is defamation per se, that is, statements so obviously harmful that general damages are presumed. Lipsky, 460 S.W.3d at 596. Vic thus established his prima facie case of

⁵⁷ *Supra* at footnote 37.

⁵⁸ *Supra* at footnotes 12 and 43.

⁵⁹ "We merely acknowledge the inescapable, logical conclusion that if the facts conclusively prove that the publisher of a defamatory statement had personal knowledge of whether the statement was true or false, proving the statement false also suffices to prove that the defamatory publisher acted with knowledge of the statement's falsity when she published it." Khan, 535 S.W.3d at 201.

defamation against Jamie by clear and specific evidence, and the trial court committed reversible error by dismissing his claim.

2. *Monica's Tweets*

Vic claimed that Monica defamed him by communicating and publishing false statements about him. He showed that, in January 2019, Monica told Christopher Slatosch that Vic was a “sexual predator” and that criminal charges would soon be filed against him.⁶⁰ He showed that, on February 7, 2019, Monica accused him of assaulting her, in an email to Funimation’s Trina Simon.⁶¹ He showed that, on February 11, 2019, Monica publicly declared that “[t]here were multiple investigations [into Vic]” and tweeted that “just so we’re clear, he’s the legal definition of harassment.”⁶² And he showed that, on February 19, 2020, Monica tweeted that Vic had been accused of sexual harassment, that he had assaulted her by grabbing her hair and whispering in her ear, that she “witnessed” him do it “to so many people,” that he had forced a kiss on her in “[i]n the mid-2000s,” and she called him a “predator.”⁶³ Vic specifically denied Monica’s accusations;⁶⁴ this is clear and specific evidence that Monica’s publication was false and that Monica knew her publication was false. Khan, 535 S.W.3d at 198. And Monica’s accusations were defamation per se. Lipsky, 460

⁶⁰ *Supra* at footnote 14.

⁶¹ *Supra* at footnote 35.

⁶² *Supra* at footnote 39.

⁶³ *Supra* at footnote 42.

⁶⁴ *Supra* at footnotes 12 and 43.

S.W.3d at 596. Vic thus established his prima facie case of defamation against Monica by clear and specific evidence, and the trial court’s dismissing his claim is reversible error.

3. *Ronald’s Tweets*

Vic claimed that Ronald defamed him by communicating and publishing false statements about him. He showed that on January 22, 2019, Ronald told Christopher Slatosch that Sony was conducting an investigation into Vic’s assaulting four women and that criminal charges would soon be filed against Vic.⁶⁵ However, Funimation was not investigating Vic’s “assaulting” anyone.⁶⁶ Moreover, Ronald does not work for a law enforcement agency, so he could not know that criminal charges were being filed against Vic (and none were).⁶⁷ Either Ronald knew what he said was false, or he acted with reckless disregard for the truth. Weber, 2019 WL 1395796 at *6, 16-17. And falsely accusing someone of a crime or of engaging in serious sexual misconduct is defamation per se. Lipsky, 460 S.W.3d at 596.

Vic also showed that Ronald tweeted on January 24, 2019 that “I know with 100% certainty that [Vic] assaulted 4 people I love,” on January 25, 2019 that Vic assaulted “4 people very close to [him],” and on January 31, 2019 that Ronald knew

⁶⁵ *Supra* at footnote 13.

⁶⁶ *Supra* at footnotes 12 and 18.

⁶⁷ CR Vol. 4, pp. 1870.

“of at least 4 assaults” by Vic.⁶⁸ Ronald later testified that the “4 people” and “4 assaults” to which he referred were the two adult women and co-worker about whom Ms. Denbow asked Vic and Monica.⁶⁹ Vic showed that Ronald tweeted on February 6 and 8, 2019 that Vic had assaulted Monica.⁷⁰ But Ronald admitted that he was not present when Vic allegedly assaulted Monica, the two adult women, or the co-worker;⁷¹ so, Ronald could not “know with 100% certainty” that Vic assaulted them. Plus, Vic has denied these allegations.⁷² At this stage of the case, this is clear and specific evidence that either Ronald knew what he said was false, Khan, 535 S.W.3d at 198, or he acted with reckless disregard for the truth. Weber, 2019 WL 1395796 at *6, 16-17. And falsely accusing someone of a crime or of engaging in serious sexual misconduct is defamation per se. Lipsky, 460 S.W.3d at 596.

Vic also showed that Ronald tweeted on January 26, 2019 that Vic “is guilty” of “sexual assault,” on January 28, 2019 that Vic is “a man with a clear history of [sexual] deviancy,” and implied via Twitter on February 16, 2019 that Vic would be “a registered sex offender.”⁷³ Ronald does not work for a law enforcement agency, so he could not have had any knowledge that Vic “is guilty” of sexual assault or would be “a

⁶⁸ *Supra* at footnotes 17, 20 and 26.

⁶⁹ CR Vol. 4, pp. 1894.

⁷⁰ *Supra* at footnotes 33 and 36.

⁷¹ CR Vol. 4, pp. 1895 (60:1-3), 1898 (63:2-3), 1909 (74:17-19).

⁷² *Supra* at footnotes 12 and 43.

⁷³ *Supra* at footnotes 21-22 and 41.

registered sex offender”; moreover, Ronald is not a physician or mental health expert with knowledge that Vic is “a man with a clear history of [sexual] deviancy.”⁷⁴ In fact, Vic has never been charged with, much less convicted of, sexual assault; moreover, he had already publicly denied the allegations against him.⁷⁵ At this stage of the case, this is clear and specific evidence that either Ronald knew what he said was false, Khan, 535 S.W.3d at 198, or he acted with reckless disregard for the truth. Weber, 2019 WL 1395796 at *6, 16-17. And Ronald’s falsely accusing Vic of a crime and of engaging in sexual misconduct is defamation per se. Lipsky, 460 S.W.3d at 596.

Vic thus established his prima facie case of defamation against Ronald by clear and specific evidence, and the trial court’s dismissing his claim is reversible error.

4. *Funimation’s Tweets*

Vic claimed that Funimation defamed him by publishing statements about him that, when viewed together, conveyed a false and defamatory meaning. Individual statements (even if literally or substantially true) published together can convey a false or defamatory meaning (for example, by omitting or juxtaposing facts). Rosenthal, 529 S.W.3d at 438; Lipsky, 460 S.W.3d at 594. Hence, a court examines the entire publication—not merely individual statements considered in a vacuum—to determine if it is capable of a defamatory meaning. Neely v. Wilson, 418 S.W.3d 52, 63 (Tex. 2013). The question is whether the words and how they were used are reasonably

⁷⁴ *Supra* at footnote 69.

⁷⁵ *Supra* at footnotes 12 and 43.

capable of defamatory meaning based on how a person of ordinary intelligence would perceive the statement as a whole; in this analysis, it is helpful to ask whether the statement published was more damaging than the truth. Weber, 2019 WL 1395796 at *8-9.

Vic showed that Funimation published two tweets on February 11, 2019 stating that “[f]ollowing an investigation...Funimation will not be engaging Mignogna in future productions...” and “We do not condone any kind of harassment or threatening behavior being directed at anyone.”⁷⁶ He showed that Funimation’s Twitter followers understood this to mean that Funimation had conducted an investigation and determined that Vic had engaged in “harass[ing] and threatening behavior.”⁷⁷ However, prior to Funimation’s tweets, Vic had denied the allegations against him, and Funimation’s investigation did not determine that Vic had engaged in “harass[ing] and threatening behavior.”⁷⁸ Yet, Funimation never clarified that its investigation did not conclude that Vic had engaged in “harass[ing] and threatening behavior.”⁷⁹

Vic showed that Funimation’s statements published together, as perceived by persons of ordinary intelligence, conveyed the false and defamatory meaning that

⁷⁶ *Supra* at footnote 38.

⁷⁷ *Supra* at footnote 40.

⁷⁸ *Supra* at footnotes 12 and 43; CR Vol. 1, pp. 37, 55, 59-60, 64-65.

⁷⁹ CR Vol. 4, pp. 1267; 3rd SUPP., p. 11.

Funimation’s investigation determined that he had engaged in “harass[ing] and threatening behavior.” Rosenthal, 529 S.W.3d at 438; Lipsky, 460 S.W.3d at 594; Weber, 2019 WL 1395796 at *8-9. Funimation knew this conveyed meaning was false. And, while falsely accusing someone of a crime or of engaging in serious sexual misconduct is defamation per se, Lipsky, 460 S.W.3d at 596, Vic nonetheless showed that he suffered damages from Funimation’s defamatory tweets.⁸⁰ Vic thus established his prima facie case of defamation against Funimation by clear and specific evidence, and the trial court committed reversible error by dismissing his claim.

B. The trial court’s dismissing Appellant’s claims against Appellees for tortious interference with existing contracts is reversible error. [Point of Error 2]

Vic met his burden to establish a prima facie case, by clear and specific evidence, for each essential element of his claim that Appellees tortiously interfered with his existing contracts with fan conventions. He was required to produce the minimum quantum of evidence supporting a rational inference that (1) he had a contract with a convention, (2) which an Appellee knowingly and intentionally interfered with (causing an actual breach is not necessary), (3) this interference proximately caused his damages, and (4) he incurred actual damage or loss. Khan, 535 S.W.3d at 191.

⁸⁰ *Supra* at footnote 44.

Vic showed that he had a contract to appear at the Kameha Con convention.⁸¹ He showed that Ronald and Monica telephoned and texted Christopher Slatosch (the host of the Kameha Con convention), defamed Vic, and demanded that Slatosch cancel Vic's appearance in breach of his contract.⁸² He showed that, in response to Ronald's and Monica's interference, Slatosch cancelled Vic's appearance at the convention.⁸³ And Vic showed that he was able to attend only after incurring legal fees negotiating a new agreement with Slatosch and the cost of providing additional security that the other guests were not required to provide (he also was required to participate in the convention away from the other guests).⁸⁴

Additionally, Vic showed that he had written agreements to appear at several other conventions (*e.g.*, Emerald City Comic Con and Fan Expo Orlando).⁸⁵ He showed that both Jamie and Funimation knew he attended such fan conventions: Jamie attended some with him, and at a minimum Funimation knew because two of Monica's three allegations she reported to Funimation took place at fan conventions.⁸⁶ He showed that several of these conventions cancelled his appearances, in breach of

⁸¹ CR Vol. 4, pp. 1322, 1326-31, 1353; Vol. 5, pp. 2540, 2544-49, 2568.

⁸² *Supra* at footnotes 13-15.

⁸³ *Supra* at footnote 16.

⁸⁴ *Id.*

⁸⁵ CR Vol. 4, pp. 1453; Vol. 5, pp. 2568; *supra* at footnotes 24, 27, 30 and 32.

⁸⁶ CR Vol. 1, pp. 55, 60; *supra* at footnotes 11-12.

his contracts with them, because of Appellees' defaming statements.⁸⁷ And he showed that he suffered actual damages due to these cancellations.⁸⁸

Vic thus established his prima facie case, by clear and specific evidence, of tortious interference with existing contracts against all Appellees, and the trial court's dismissing these claims is reversible error.

C. The trial court's dismissing Appellant's claims against Appellees for tortious interference with prospective business relations is reversible error. [Point of Error 3]

Vic met his burden to establish a prima facie case, by clear and specific evidence, for each essential element of his claim that Appellees tortiously interfered with his prospective business relations with fan conventions. He was required to produce the minimum quantum of evidence supporting a rational inference that (1) there was a reasonable probability that he and a fan convention would have entered into a contractual relationship, (2) that an independently tortious or wrongful act by Appellees prevented the relationship from occurring, (3) that Appellees did the act with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur as a result of the conduct, and (4) that he incurred actual harm or damage as a result of Appellees' interference.

Khan, 535 S.W.3d at 196.

⁸⁷ CR Vol. 4, pp. 1453; Vol. 5, pp. 2568; *supra* at footnotes 24, 27, 30 and 32.

⁸⁸ *Supra* at footnote 44.

Vic showed that he previously and regularly appeared at several fan conventions each year and that he fully expected to participate in the same conventions in 2019.⁸⁹ He showed that, because of the Appellees' tweets defaming him, these conventions did not invite him to participate in 2019.⁹⁰ Vic showed that, between Ronald's January 26, 2019 and February 4, 2019 tweets, six conventions cancelled his appearance.⁹¹ Thus, based on this evidence, it is reasonable to infer that Appellees were substantially certain that their defaming publications would result in further cancellations. *See Beving*, 563 S.W.3d at 408 (under TCPA review, the court may draw reasonable inferences from circumstantial evidence). Indeed, this was Ronald's conscious desire—to see Vic “blacklisted and out of work,” and he was “glad” to see the conventions cancelling—working together with Jamie's plan to “name and shame.”⁹² Vic thus established, by clear and specific evidence, a prima facie case of tortious interference with prospective business relations against all Appellees, and the trial court's dismissing this claim is reversible error.

D. The trial court's dismissing Appellant's claims against Funimation Productions, LLC, for vicarious liability is reversible error. [Point of Error 4]

Vic met his burden to establish a prima facie case, by clear and specific evidence, for each essential element of his claim that Funimation was vicariously liable

⁸⁹ CR Vol. 4, p. 1353; Vol. 5, p. 2568.

⁹⁰ *Id.*

⁹¹ *Supra* at footnotes 24, 27, 30 and 32.

⁹² *Supra* at footnotes 26, 33-34.

for the acts of Monica or Jamie. Under the doctrine of vicarious liability, the liability for one's torts are imputed to another solely because of their relationship—one in a position to control another must exercise the control or bear the loss. Painter v. Amerimex Drilling I, Ltd., 561 S.W.3d 125, 130-131 (Tex. 2018). An employer is liable for the acts of its employee within the scope of her general authority as an employee in furtherance of her employer's business and for the accomplishment of the object for which she was hired. Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 577 (Tex. 2002). Supervisory liability arises for harm caused by an independent contractor where the employer retains some control over the manner in which the contractor performs the work that causes the damage (even if that degree of control is not the same "which would subject him to liability as a master"). Painter, 561 S.W.3d at 133.

1. Funimation exercised control; Monica & Jamie acted like employees

Vic was required to produce the minimum quantum of evidence supporting a rational inference that, at the time of their defamatory tweets, (1) Monica or Jamie were employees of Funimation, Goodman, 80 S.W.3d at 577, or (2) Funimation retained some control over Monica's or Jamie's actions that caused the damage. Painter, 561 S.W.3d at 133; Exxon Mobil Corporation v. Rincones, 520 S.W.3d 572, 589 (Tex. 2017).

Vic showed Monica's testimony that Funimation controlled when and how she performed her job as a voice-actor, that she used her Twitter account for her job, and

that she sought Funimation’s approval of what she could say in the public arena.⁹³ This is clear and specific evidence that Funimation retained some control over Monica’s work and her social media postings. Given this evidence and the evidence that Jamie held virtually the same position at Funimation as Monica,⁹⁴ it is reasonable to infer that Funimation also retained some control over Jamie’s work and her social media postings. Hence, Funimation is subject to supervisory liability for Monica’s and Jamie’s social media postings. Painter, 561 S.W.3d at 133; Rincones, 520 S.W.3d at 589.

Alternatively, Vic showed that Monica acted like and was treated like an employee. She reported her allegations to and sought the assistance of Funimation’s and Sony’s human resources department just as an employee would; and her concerns were promptly forwarded to the companies’ “employee relations” executives.⁹⁵ Monica testified that she used her Twitter account for her job, and she sought Funimation’s approval of what she could say.⁹⁶ She described Funimation as her “workplace”; in fact, Ronald even tweeted that Monica was a Funimation employee.⁹⁷ Given this evidence, it is reasonable to infer that Monica was a Funimation employee using her Twitter account in furtherance of her employer’s business. Goodman, 80

⁹³ CR Vol. 5, p. 2501.

⁹⁴ *Supra* at footnote 7; CR Vol. 4, pp. 1259-60.

⁹⁵ *Supra* at footnotes 12 and 35; CR, Vol. 1, pp. 37, 55, 59.

⁹⁶ CR Vol. 4, pp. 1761-62; Vol. 5, p. 2501.

⁹⁷ CR Vol. 4, pp. 1744, 1765, 2313; Vol. 5, p. 2774.

S.W.3d at 577; Beving, 563 S.W.3d at 408. Additionally, with this evidence and the fact that Jamie provided virtually identical services for Funimation as Monica,⁹⁸ it is reasonable to infer that Jamie also was a Funimation employee using her Twitter account in furtherance of her employer’s business. Id.

2. *Monica & Jamie were acting with authority when tweeting*

An agent’s authority to act on behalf of the principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority). In re ADM Investor Services, Inc., 304 S.W.3d 371, 374 (Tex. 2010). As the El Paso Court of Appeals explained:

Apparent authority arises when a principal either knowingly permits its agent to hold himself out as having authority or acts with such a lack of ordinary care as to clothe its agent with indicia of authority. Only the principal’s conduct is relevant in determining whether apparent authority exists[,] and it is gauged by the standard “of a reasonably prudent person, using diligence and discretion to ascertain the agent’s authority.” Such conduct, however, “is not limited to spoken or written words...Silence may constitute a manifestation when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence. Failure then to express dissent will be taken as a manifestation of affirmance.

PanAmerican Operating v. Maud Smith Estate, 409 S.W.3d 168, 172–73 (Tex. App.— El Paso 2013, pet. denied) (citing Gaines v. Kelly, 235 S.W.3d 179, 182-83 (Tex. 2007) and Restatement (Third) of Agency §1.03, cmt. b (2006)). Here, Vic showed that

⁹⁸ CR Vol. 4, pp. 1607, 1647; *supra* at footnotes 7 and 94.

Monica sought Funimation’s approval of what she could say publicly.⁹⁹ Additionally, despite Monica’s false signal boosting on Funimation’s Twitter feed that “[t]here were *multiple* investigations with testimony, proof, evidence...I am one of *dozens* of men and women who participated,”¹⁰⁰ and despite Funimation’s Twitter followers understanding Funimation and Monica to say that these “multiple investigations” had determined that Vic had engaged in “harassment or threatening behavior,”¹⁰¹ Funimation never clarified its statement nor contradicted or corrected Monica’s. This is clear and specific evidence that Funimation’s silence communicated its affirmance of Monica’s apparent authority to its Twitter followers. ADM, 304 S.W.3d at 374; PanAmerican, 409 S.W.3d at 172–73. Hence, when she later tweeted that Vic was the very definition of harassment, she did so clothed with the indicia of Funimation’s authority. Id. Given this and the fact that Jamie held virtually the same position at Funimation as Monica, it is reasonable to infer that Jamie, too, acted with apparent authority, clothed with the indicia of Funimation’s authority, id., in her social media postings.

Alternatively, Vic showed that Monica and Jamie were acting with apparent authority as Funimation’s employees. The relevant inquiry is whether there was a connection between Monica’s and Jamie’s job duties as employees and their tortious

⁹⁹ CR Vol. 5, p. 2501; *supra* at footnote 96

¹⁰⁰ *Supra* at footnote 39 (emphasis added).

¹⁰¹ *Supra* at footnote 40.

conduct. Laverie v. Wetherbe, 517 S.W.3d 748, 753 (Tex. 2017). There may be such a connection even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to his or her job responsibilities. Id. An employee's defamatory statements regarding an individual being investigated by the employer have been found to meet this threshold. *See* Hooper v. Pitney Bowes, Inc., 895 S.W.2d 773, 776 (Tex. App.—Texarkana 1995, writ denied) (reversing a take-nothing judgment against an employer under vicarious liability because the finding was against the great weight of the evidence in regard to scope of authority); *see also* Deleon v. Villareal, 02-19-00133-CV, 2020 WL 98142, at *3 (Tex. App.—Fort Worth Jan. 9, 2020, no pet. h.), reh'g denied (Jan. 30, 2020) (police officer acted within scope of employment for purposes of Texas Tort Claims Act when testifying, notwithstanding allegations of perjury). Further, the fact that an employee's tortious acts were committed outside of her place of employment is not dispositive. Hooper, 895 S.W.2d at 777.

Monica and Jamie each worked for Funimation providing voice-acting for its English-dubbed anime programs.¹⁰² Funimation's business includes not only producing these programs but also promoting its programs (as well as itself in general) via its social media accounts.¹⁰³ As its employees, Monica and Jamie regularly

¹⁰² *Supra* at footnote 7-8.

¹⁰³ CR, Vol. 1, pp. 54-55, 64-65.

attended conventions and utilized their Twitter accounts.¹⁰⁴ Monica prompted and participated in Funimation’s investigation of Vic, and both Monica and Jamie published tweets accusing Vic of assault and referenced Funimation’s investigation in their tweets.¹⁰⁵ The question presented is whether Monica and Jamie, as employees who utilized social media to further their employer’s business (promoting Funimation and its programs), acted within the scope of their employment when they published tweets accusing Vic of assault.

The record shows that Funimation acted in concert with Monica and Jamie in publishing tweets with substantively identical accusations against Vic. Each was acting to promote the same goal: promoting Funimation and disparaging Vic. Further, Monica testified she used her twitter account “for work.”¹⁰⁶ Monica testified that she sought permission from Funimation concerning what she could publicize.¹⁰⁷ It would be disingenuous for Funimation to argue that its social media, and that of its employees, does not promote Funimation’s business interests—the accounts existed for exactly that purpose.

Whether Monica and Jamie were acting as employees or contractors, Vic established, by clear and specific evidence, a prima facie case of vicarious liability

¹⁰⁴ *Supra* at footnotes 11 and 96; CR Vol. 2, p. 964.

¹⁰⁵ *Supra* at footnotes 12, 28, 34, 37, 39 and 42.

¹⁰⁶ *Supra* at footnote 96.

¹⁰⁷ *Supra* at footnotes 25 and 96.

against Funimation, and the trial court committed reversible error by dismissing his claim.

E. The trial court’s dismissing Appellant’s claims against Appellees for conspiracy is reversible error. [Point of Error 5]

The trial court erred by dismissing Vic’s claim of civil conspiracy against Appellees, because (a) his conspiracy claim is not subject to dismissal under the TCPA and (b) Vic nonetheless established, by clear and specific evidence, a prima facie case that Appellees conspired to harm him.¹⁰⁸

1. Vic’s conspiracy claim is not subject to the TCPA.

Vic’s conspiracy claim is not subject to the TCPA because Appellees’ actions were not in furtherance of a protected “common interest.” This Court has previously held that the TCPA’s protected right of association “requires the expression, promotion, pursuit, or defense of ‘common interests’ which implicates more than the narrow selfish interests of persons who act jointly to commit a tort.” Kawcak v. Antero Resources Corporation, 582 S.W.3d 566, 569 (Tex. App.—Fort Worth 2019, pet. denied). In order to trigger protection under the TCPA (*i.e.*, before a plaintiff must present a prima facie case), it is the *defendants’* burden to show, by a preponderance of the credible evidence, that they were acting in concert to promote,

¹⁰⁸ Civil conspiracy is not an independent tort; rather, being derivative, it is entirely dependent on the injury caused by the underlying tort. Agar Corp., Inc. v. Electro Circuits Int’l, LLC, 580 S.W.3d 136, 142 (Tex. 2019), reh’g denied (Sept. 6, 2019). As a derivative tort, it “survives alongside” the underlying tort. Cunningham v. Waymire, 14-17-00883-CV, 2019 WL 5382597, at *15 (Tex. App.—Houston [14th Dist.] Oct. 22, 2019, no pet.).

pursue or defend an interest common to the public (or a group larger than themselves) not merely their own selfish concerns. *Id.*, 582 S.W.3d at 575. “When a legal action is in response to both expression protected by the TCPA and other unprotected activity, the legal action is subject to dismissal *only to the extent that it is in response to the protected conduct*, as opposed to being subject to dismissal in its entirety.” *Beving*, 563 S.W.3d at 409 (emphasis in original). Hence, the TCPA is not a shield against conspiracy merely because defendants claim they were pursuing *their* common interest; instead, in order to enjoy the protection afforded by the TCPA, defendants must show, by a preponderance of the credible evidence, the larger, common interest that their conduct was promoting, pursuing, or defending.

At the outset, Appellees’ public comments referred to events that, if they had occurred, would have been a private matter between complainants and Vic; they did not involve the interests of any group or the public. Indeed, Appellees showed no correlation between their comments (alleging assault, harassment, or threatening behavior in private settings) and the public comments they referenced (alleging over-friendly, over-affectionate behavior at conventions); rather, Appellees attempt to make their accusations *into* a public matter via social media. Appellees provided no evidence (or, at least, factually insufficient evidence) that what they alleged happened between them and Vic in private was a common interest shared by the public at large at or before the time of publishing their tweets.

Moreover, the trial court made no finding of a larger, common interest that Appellees were promoting, pursuing, or defending; rather, the trial court focused solely on Vic's prima facie case of conspiracy. Vic claimed that Appellees acted together in a conspiracy to defame him and interfere with his contracts and prospective business relations—*i.e.*, the end-point of their conspiracy was to destroy his career.¹⁰⁹ However, Appellees provided no evidence (much less factually sufficient evidence) that destroying his career was a “common interest” shared by the public—nor could they: the evidence which Vic provided showed that the public opposed Appellees' aim to destroy his career.¹¹⁰ Furthermore, Appellees have vigorously denied acting together.

Appellees failed to show that the TCPA applied to Vic's conspiracy claim, and the trial court's dismissing his claim is reversible error.

2. *Vic presented a prima facie case of conspiracy*

Nonetheless, even if this Court finds that Appellees' accusations were furthering a common interest, Vic's claims for conspiracy should not have been dismissed, because Vic established a prima facie case. Vic showed, by clear and specific evidence, each essential element of his claim that Appellees conspired to defame and interfere with his contracts and prospective business. He was required to produce the minimum quantum of evidence supporting a rational inference that (1)

¹⁰⁹ *Supra* at footnotes 31, 33-34; 3rd SUPP. pp. 15, 42; CR Vol. 5, p. 2487.

¹¹⁰ *Supra* at footnote 40.

two or more Appellees, (2) seeking to accomplish an object or course of action, (3) reached a meeting of the minds on the object or course of action, (4) then took one or more unlawful, overt acts in pursuance of the object or course of action, and (5) damages occurred as a proximate result. First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 222 (Tex. 2017). A civil conspiracy claim may be proved by circumstantial evidence and reasonable inferences from parties' actions. In re Lipsky, 411 S.W.3d 530, 549 (Tex. App.—Fort Worth 2013, no pet.). Once the conspiracy is proven, each co-conspirator is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination. Id.

Vic showed that Appellees engaged in a coordinated effort with the goal of “nam[ing] and sham[ing]” so that Vic was “blacklisted” and “out of work.”¹¹¹ He showed that Monica’s allegations initiated Funimation’s investigation and that Funimation kept her updated about its confidential, internal investigation.¹¹² He showed that Monica asked Funimation what she could say publicly, and, shortly after those discussions, Ronald and Monica told Christopher Slatosch that Funimation was conducting an investigation into allegations against Vic and that criminal charges would soon be filed¹¹³—and Ronald maintained a continuous barrage of tweets accusing Vic of assault. He showed that Ronald and Monica publicly urged

¹¹¹ *Supra* at footnotes 92.

¹¹² *Supra* at footnotes 12, 19 and 25.

¹¹³ *Supra* at footnotes 13-14.

Funimation to make a statement about Vic, and, in an orchestrated response, Funimation tweeted that its internal investigation determined Vic had engaged in threatening and harassing behavior¹¹⁴—which Monica signal boosted with her description of “multiple” investigations involving “dozens” of participants and of Vic as the very definition of harassment.¹¹⁵ The reasonable inference drawn from their actions is that Funimation, Monica and Ronald conspired to defame Vic by falsely proclaiming that Funimation determined he had assaulted, harassed or threatened women. Not only were these statements defamatory per se, for which damages are presumed, but Vic also showed that he suffered actual damages as a result.¹¹⁶

Vic also showed that, prior to their defamatory tweets, Monica and Jamie had discussed how to harm Vic in a private discord server.¹¹⁷ Not long after their discussion, they published virtually identical stories: of Vic grabbing their hair, yanking their heads back, and whispering something sexual in their ears and of witnessing him do this multiple other times.¹¹⁸ In the interim, before and after their tweets, Ronald repeatedly tweeted that Vic had assaulted four of his friends, whom he later testified included Monica and Jamie, and “countless” others.¹¹⁹ The reasonable

¹¹⁴ *Supra* at footnotes 12, 40, 43, 78-79.

¹¹⁵ *Supra* at footnote 39.

¹¹⁶ *Supra* at footnote 44.

¹¹⁷ CR Vol. 5, pp. 2572-2614.

¹¹⁸ *Supra* at footnotes 37-38, 42, 57 and 63.

¹¹⁹ *Supra* at footnotes 17, 20 and 26.

inference drawn from their actions is that Jamie, Monica and Ronald conspired to defame Vic by falsely proclaiming that he had assaulted numerous women. Not only were these statements defamatory per se, for which damages are presumed, but Vic showed that he suffered actual damages as a result.¹²⁰

Vic thus established, by clear and specific evidence, a prima facie case that Funimation, Monica and Ronald conspired to defame Vic by falsely proclaiming that Funimation determined he had assaulted women or engaged in threatening and harassing behavior and a prima facie case that Jamie, Monica and Ronald conspired to defame Vic by falsely proclaiming that he had assaulted Jamie and Monica. Hence the trial court's dismissing Vic's civil conspiracy claim is reversible error.

F. The trial court's refusal to consider Appellant's second amended petition is reversible error. [Point of Error 6]

The TCPA requires the trial court to “*consider the pleadings* and supporting and opposing affidavits stating the facts on which the liability or defense is based” when determining whether a legal action should be dismissed. TEX. CIV. PRAC. & REM. CODE §27.006(a) (emphasis added). However, the trial court refused to consider Vic's second amended petition, because it was filed within seven days of the hearing on Appellees' motions to dismiss under the TCPA; the trial court focused instead only on

¹²⁰ *Supra* at footnote 44.

Vic's amended petition and his response to Appellees' motions.¹²¹ The trial court's refusing to consider Vic's second amended petition constitutes reversible error.

Generally, a party may amend its pleadings freely, but any pleading filed within seven days of the date of trial requires the trial court's permission which shall be granted unless there is a showing of surprise by the opposite party. TEX. R. CIV. P. 63. Indeed, the trial court has no discretion to refuse an amendment unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense and thus is prejudicial on its face, and the opposing party objects to the amendment. Crosstex North Texas Pipeline, L.P. v. Gardiner, 451 S.W.3d 150, 176–77 (Tex. App.—Fort Worth 2014), *aff'd*, 505 S.W.3d 580 (Tex. 2016). The allegations and claims in Vic's second amended petition were the same as those in his original petition and his amended petition.¹²² The facts stated in, and the exhibits attached to, Vic's second amended petition were consistent with and complimentary to those stated in and attached to his response to Appellees' motions to dismiss,¹²³ belying any claim of surprise by Appellees. Therefore, the trial court had no discretion to disregard Vic's second amended petition in conjunction

¹²¹ RR Vol. 3, pp. 37, 40, 42-43.

¹²² *Compare* CR 3rd SUPP., pp. 4-44 *with* CR Vol. 5, pp. 2467-2922.

¹²³ *Compare* CR Vol. 4, pp. 1259-2446 *with* CR Vol. 5, pp. 2467-2922.

with his response to Appellees' motions, TEX. R. CIV. P. 63, Gardiner, 451 S.W.3d at 176–77, and the trial court's refusal to do so is reversible error.¹²⁴

G. Appellees did not satisfy their evidentiary burden, because the trial court should have struck the evidence attached to their motions to dismiss. [Point of Error 7]

Vic moved to strike much of the evidence submitted by Appellees in their motions to dismiss, because it was inadmissible under the Texas Rules of Evidence.¹²⁵ The trial court denied Vic's initial motion to strike Funimation's inadmissible evidence.¹²⁶ By its October 4, 2019 order and its *Final Judgment*, the trial court implicitly denied Vic's other motions to strike Appellees' inadmissible evidence. Thus, the trial court considered inadmissible evidence supporting Appellees' motions which caused the rendition of an improper judgment and constituted reversible error. TEX. R. APP. P. 44.1.

¹²⁴ The trial court indicated that considering Vic's second amended petition might be contrary to the rules of civil procedure. CR Vol. 6, p. 3225. However, this Court considered a similar situation wherein the plaintiffs filed their second amended petition prior to the hearing on the defendants' TCPA motions to dismiss. DeAngelis v. Protective Parents Coalition, 556 S.W.3d 836, 845 (Tex. App.—Fort Worth 2018, no pet.). Citing Texas Civil Practice & Remedies Code §27.006(a), this Court considered the second amended petition in its TCPA analysis. Id., 556 S.W.3d at 855; *see also* TransDesign International, LLC v. SAE Towers, Ltd., 09-18-00080-CV, 2019 WL 2647659 (Tex. App.—Beaumont June 27, 2019, pet. denied) (the trial court noted that “the TCPA did not prohibit the trial court from considering a late-filed pleading.”).

¹²⁵ *Supra* at footnote 47.

¹²⁶ *Supra* at footnote 48.

1. *Funimation's Motion to Dismiss Evidence*

Vic objected to paragraphs 5-7 and 9 of the *Affidavit of Karen Mika* attached as Exhibit A to Funimation's motion to dismiss,¹²⁷ paragraph 2 of the Affidavit of Tammy Denbow attached as Exhibit B to Funimation's motion to dismiss,¹²⁸ and paragraphs 5-6 and 8 of the Affidavit of Scott Barretto attached as Exhibit C to Funimation's motion to dismiss and Exhibits D-W attached thereto.¹²⁹

Ms. Mika's affidavit did not affirmatively show how, as Funimation's Vice President of Operations, she obtained personal knowledge of the facts alleged in paragraphs 5, 7 or 9 and thus failed to provide the proper foundation for relevance and admissibility.¹³⁰ TEX. R. EVID. 104(b); 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). In the fifth, sixth and seventh paragraphs of her affidavit, Ms. Mika testified about statements made by others which were offered to prove the truth of the matters asserted which is inadmissible hearsay.¹³¹ TEX. R. EVID. 801(d), 802. Also, Paragraph 5 of her affidavit references “negative twitter posts and...other sources within the anime community”; in addition to being inadmissible hearsay, Id.,

¹²⁷ CR Vol. 3, pp. 1041-1054.

¹²⁸ CR Vol. 3, p. 1046.

¹²⁹ CR Vol. 3, pp. 1048-1053.

¹³⁰ CR Vol. 3, pp. 1042-1043.

¹³¹ CR Vol. 3, pp. 1043-1044.

she should have attached the actual allegations (properly authenticated) rather than summarize their content.¹³² TEX. R. EVID. 1002. Finally, Ms. Mika’s testimony in the ninth paragraph of her affidavit constitutes legal conclusions regarding questions of law (agency, authority and liability) on which she was not qualified to testify.¹³³ TEX. R. EVID. 701; Limon v. State, 340 S.W.3d 753, 757 (Tex. Crim. App. 2011); Greater Houston Transportation Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990); Boyd v. Texas Christian University, Inc., 8 S.W.3d 758, 760 (Tex. App.—Fort Worth 1999, no pet.).

In the fifth sentence of paragraph 2 of her affidavit, Ms. Denbow testified about statements made by others which were offered to prove the truth of the matters asserted which is inadmissible hearsay.¹³⁴ TEX. R. EVID. 801(d), 802. Further, her affidavit failed to establish her personal knowledge of these matters and, thus, failed to provide the proper foundation for relevance and admissibility.¹³⁵ TEX. R. EVID. 104(b); Cunningham, 352 S.W.3d at 534; Jenkins v. Kemlon Products & Dev. Co., 923 S.W.2d 224, 228 (Tex. App.—Houston [14th Dist.] 1996, no writ).

In the fifth and sixth paragraphs of his affidavit, Mr. Barretto testified about statements made by others which were offered to prove the truth of the matters

¹³² CR Vol. 3, p. 1043.

¹³³ CR Vol. 3, pp. 1044-1045.

¹³⁴ CR Vol. 3, p. 1046.

¹³⁵ Id.

asserted, which is inadmissible hearsay.¹³⁶ TEX. R. EVID. 801-802. In paragraph eight of his affidavit, Mr. Barretto merely testified that Exhibits D-W to Funimation’s motion to dismiss were “true and correct copies” without any testimony that he is a custodian of records or otherwise has any requisite personal knowledge to establish what each exhibit is and, thus, failed to establish the requisite predicate for authentication of Funimation’s Exhibits D-W.¹³⁷ TEX. R. EVID. 104, 901; Tienda v. State, 358 S.W.3d 633, 640–42 (Tex. Crim. App. 2012); Republic National Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986); Cunningham, 352 S.W.3d at 534.¹³⁸

Funimation relied on this evidence to prove that Vic is a public figure and that its tweets related to a public controversy.¹³⁹ Because the trial court failed to sustain Vic’s objections, the trial court’s findings that Vic is a public figure and that Funimation’s tweets related to a public controversy are based on inadmissible evidence; the trial court’s failure to sustain Vic’s objections led to an improper judgment and is reversible error. Funimation thus failed to establish, by a

¹³⁶ CR Vol. 3, pp. 1048-1050. 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. CR, Vol. 3, p. 1050; TEX. R. EVID. 1002.

¹³⁷ CR Vol. 3, pp. 1051-1053.

¹³⁸ Moreover, Exhibits E-I, K, M, and O-W to Funimation’s motion all were hearsay. Each was 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.

¹³⁹ CR Vol. 1, pp. 35-41, 43-47. In fact, Monica and Ronald relied on Ms. Mika’s affidavit and Ms. Denbow’s affidavit, too. CR Vol. 2, p. 410.

preponderance of the credible evidence, that the TCPA applied to Vic's claims against it, and the trial court's dismissing Vic's claims against Funimation is reversible error.

2. Monica's & Ronald's Motion to Dismiss Evidence

Vic objected to Exhibits 1-13, 15-18 and 22 attached to Exhibit A of Monica's and Ronald's motion to dismiss, the affidavit of Robin Michelle Blankenship Carroll (Exhibit B to Monica's and Ronald's motion to dismiss), the affidavit of Kara Edwards (Exhibit C to Monica's and Ronald's motion to dismiss), the affidavit of Lynn Hunt (Exhibit D to Monica's and Ronald's motion to dismiss), the affidavit of Faisal Ahmed (Exhibit E to Monica's and Ronald's motion to dismiss), the affidavit of Mary Reese (Exhibit F to Monica's and Ronald's motion to dismiss), the affidavit of Whitney Falba (Exhibit G to Monica's and Ronald's motion to dismiss), the affidavit of Neysha Perry (Exhibit H to Monica's and Ronald's motion to dismiss), the affidavit of Adam Sheehan (Exhibit J to Monica's and Ronald's motion to dismiss), the affidavit of Kelly Loftus (Exhibit K to Monica's and Ronald's motion to dismiss), the affidavit of Michelle Specht (Exhibit L to Monica's and Ronald's motion to dismiss), the affidavit of John Prager (Exhibit M to Monica's and Ronald's motion to dismiss), the affidavit of Sean Lemoine (Exhibit P to Monica's and Ronald's motion to dismiss) and the exhibits attached thereto, the affidavit of Monica Rial (Exhibit R to Monica's

and Ronald's motion to dismiss) and Exhibits Q and R attached to Monica's and Ronald's motion to dismiss.¹⁴⁰

Exhibits 1-13, 15-18 and 22 attached to Exhibit A of Monica's and Ronald's motion to dismiss are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁴¹ TEX. R. EVID. 801-802.

The affidavit of Robin Michelle Blankenship Carroll is not relevant or material to any issue in this case and is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁴² TEX. R. EVID. 401-402, 404.

The affidavit of Kara Edwards is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁴³ TEX. R. EVID. 404. Paragraphs 2-7, 10-12, 14, 16-18, 20-21, and 23 of Ms. Edward's affidavit constitute inadmissible opinion testimony.¹⁴⁴

¹⁴⁰ CR Vol. 4, pp. 1295-1302. Vic also objected to the exhibits attached to Funimation's and Monica's and Ronald's supplements to their motions to dismiss. CR, Vol. 4, pp. 1302-1304. However, the trial court indicated that it would not consider anything filed by Appellees after the TCPA filing deadline. RR Vol. 3, p. 74. If any portion of the trial court's October 4, 2019 order or its *Final Judgment* relies on the exhibits attached to Funimation's and Monica's and Ronald's supplements to their motions to dismiss, Vic asserts that the trial court's failure to sustain his objections thereto likewise constitutes reversible error.

¹⁴¹ CR Vol. 4, p. 1295.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

TEX. R. EVID. 701. Paragraphs 14, 17 and 18 of Ms. Edward's affidavit and the exhibits attached thereto are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁴⁵ TEX. R. EVID. 801-802.

The affidavit of Lynn Hunt is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁴⁶ TEX. R. EVID. 404. Paragraphs 2-10 of Ms. Hunt's affidavit constitute inadmissible opinion testimony.¹⁴⁷ TEX. R. EVID. 701. Paragraphs 5-7 and 9-10 of Ms. Hunt's affidavit are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁴⁸ TEX. R. EVID. 801-802.

The affidavit of Faisal Ahmed is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁴⁹ TEX. R. EVID. 404. Paragraphs 3-7 of Mr. Ahmed's affidavit constitute inadmissible opinion testimony.¹⁵⁰ TEX. R. EVID. 701. Paragraphs 3-7 of Mr. Ahmed's affidavit are out-of-court statements made by someone other

¹⁴⁵ CR Vol. 4, p. 1296.

¹⁴⁶ Id.

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Id.

than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁵¹ TEX. R. EVID. 801-802.

The affidavit of Mary Reese is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁵² TEX. R. EVID. 404. Paragraphs 3-15 and 17 of Ms. Reese's affidavit constitute inadmissible opinion testimony.¹⁵³ TEX. R. EVID. 701. Paragraphs 8-11 of Ms. Reese's affidavit are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁵⁴ TEX. R. EVID. 801-802.

The affidavit of Whitney Falba is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁵⁵ TEX. R. EVID. 404. Paragraphs 3-10 of Ms. Falba's affidavit constitute inadmissible opinion testimony.¹⁵⁶ TEX. R. EVID. 701. Paragraphs 8-9 of Ms. Falba's affidavit are out-of-court statements made by someone other than

¹⁵¹ CR Vol. 4, 1297.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id.

¹⁵⁶ Id.

the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁵⁷ TEX. R. EVID. 801-802.

The affidavit of Neysha Perry is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁵⁸ TEX. R. EVID. 404. Paragraphs 3-4 of Ms. Perry's affidavit constitute inadmissible opinion testimony.¹⁵⁹ TEX. R. EVID. 701. Paragraphs 4-5 of Ms. Perry's affidavit are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁶⁰ TEX. R. EVID. 801-802.

The affidavit of Adam Sheehan is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁶¹ TEX. R. EVID. 404. Paragraphs 4, 7-8, and 10-11 of Mr. Sheehan's affidavit constitute inadmissible opinion testimony.¹⁶² TEX. R. EVID. 701. Paragraphs 4, 6-8 and 10 of Mr. Sheehan's affidavit are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of

¹⁵⁷ CR Vol. 4, p. 1298.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ CR Vol. 4, p. 1299.

¹⁶² Id.

the matters asserted, which is inadmissible hearsay.¹⁶³ TEX. R. EVID. 801-802. Finally, Mr. Sheehan's testimony in the fifth paragraph of his affidavit constitutes legal conclusions regarding questions of law (agency, authority and liability) on which he was not qualified to testify.¹⁶⁴ TEX. R. EVID. 701; Limon, 340 S.W.3d at 757; Phillips, 801 S.W.2d at 525; Boyd, 8 S.W.3d at 760.

The affidavit of Kelly Loftus is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁶⁵ TEX. R. EVID. 404. Paragraphs 3-5 of Ms. Loftus' affidavit constitute inadmissible opinion testimony.¹⁶⁶ TEX. R. EVID. 701. Paragraphs 5-7 of Ms. Loftus' affidavit are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁶⁷ TEX. R. EVID. 801-802.

The affidavit of Michelle Specht is not relevant or material to any issue in this case and is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁶⁸ TEX. R. EVID. 401-402, 404.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ CR Vol. 4, p. 1300.

¹⁶⁶ Id.

¹⁶⁷ Id.

¹⁶⁸ Id.

The affidavit of John Prager is offered as character evidence to prove that Vic acted in accordance with a certain character or trait on a particular occasion and, therefore, is inadmissible.¹⁶⁹ TEX. R. EVID. 404. Paragraphs 3, 5 and 9 of Mr. Prager's affidavit constitute inadmissible opinion testimony.¹⁷⁰ TEX. R. EVID. 701. Paragraphs 3, 4 and 7 of Mr. Prager's affidavit are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁷¹ TEX. R. EVID. 801-802.

The exhibits attached to the affidavit of Sean Lemoine (Exhibit P to Monica's and Ronald's motion to dismiss) are out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted, which is inadmissible hearsay.¹⁷² TEX. R. EVID. 801-802. Indeed, Mr. Lemoine's affidavit is not relevant or material to any issue in this case and therefore, is inadmissible.¹⁷³ TEX. R. EVID. 401-402.

The affidavit of Monica Rial (Exhibit R to Monica's and Ronald's motion to dismiss) constitutes inadmissible opinion testimony and out-of-court statements made

¹⁶⁹ CR Vol. 4, pp. 1300-1301.

¹⁷⁰ CR Vol. 4, p. 1301.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Id.

by someone other than the person testifying which were offered to prove the truth of the matters asserted which is inadmissible hearsay.¹⁷⁴ TEX. R. EVID. 701, 801-802.

Exhibits Q constitutes inadmissible opinion testimony and out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted which is inadmissible hearsay.¹⁷⁵ TEX. R. EVID. 701, 801-802.

Exhibit S contains out-of-court statements made by someone other than the person testifying which were offered to prove the truth of the matters asserted which is inadmissible hearsay.¹⁷⁶ TEX. R. EVID. 801-802.

Monica and Ronald relied on this evidence to prove that Vic is a public figure and that their tweets related to a public controversy.¹⁷⁷ Because the trial court failed to sustain Vic's objections, the trial court's findings that Vic is a public figure and that Monica's and Ronald's tweets related to a public controversy are based on inadmissible evidence; the trial court's failure to sustain Vic's objections led to an improper judgment and is reversible error. Monica and Ronald thus failed to establish, by a preponderance of the credible evidence, that the TCPA applied to Vic's

¹⁷⁴ CR Vol. 4, p. 1302.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ CR Vol. 2, pp. 401-409, 411-414.

claims against them, and the trial court's dismissing Vic's claims against Monica and Ronald is reversible error.

H. The trial court's ordering Vic to pay Appellees' legal fees and sanctions is reversible error [Point of Error 8].

The TCPA provides for an order to pay legal fees and a sanction only if the non-movant's claims are properly dismissed. TEX. CIV. PRAC. & REM. CODE §27.009. As shown, the trial court improperly dismissed Vic's claims against Appellees. Accordingly, the trial court's order that Vic pay attorney's fees and sanctions is likewise improper and reversible error. TEX. R. APP. P. 44.1.

Conclusion & Prayer

Appellees, in a concerted conspiracy to destroy Vic, published defamatory texts, tweets and email about him, knowingly interfered in his existing and prospective appearances at fan conventions, and he suffered monetary damages due to Appellees' conduct—in addition to the damage to his reputation. When called to account for their tortious conduct, they sought protection behind the TCPA using inadmissible evidence which the trial court improperly admitted over Vic's objections. However, Vic made a prima facie showing, by clear and specific evidence, of each claim he brought against them, in both his response to their motions and in his second amended petition which the trial court was required to consider but wrongly disregarded.

In short, the trial court committed reversible error under Texas Rule of Appellate Procedure 44.1 by dismissing Vic's claims, refusing to consider Vic's second amended petition, failing to strike the objectionable evidence and finding (based on inadmissible evidence) that Appellees presented legally and factually sufficient evidence to satisfy their burden under the TCPA, and ordering Vic to pay Appellees' legal fees and sanctions.

Vic prays that this Court will reverse and vacate the trial court's October 4, 2019 order and its *Final Judgment*, remand this matter back to the trial court for trial, and grant him such other and further relief this Court deems equitable or just.

Respectfully submitted,
BEARD ♦ HARRIS ♦ BULLOCK ♦ CHRISTIE and
MARTINEZ HSU, P.C.

By: /s/ Jim E. Bullock

BEARD ♦ HARRIS ♦ BULLOCK ♦ CHRISTIE
Ty Beard
SBOT 00796181
Carey-Elisa Christie
SBOT 24103218
100 Independence Place, Suite 300
Tyler, Texas 75703
T: (903) 509-4900
F: (903) 509-4908
Ty@beardandharris.com
Carey@beardandharris.com

Jim E. Bullock
SBOT 00795271
5 Cowboys Way, Suite 300
Frisco, Texas 75034
T: (903) 509-4900

F: (903) 509-4908
Jim@beardandharris.com

and

MARTINEZ HSU, P.C.
Michael Martinez
SBOT 24078933
An Lee Hsu
SBOT 24078699
Ryan Sellers
SBOT 24096803
4001 Airport Freeway, Ste. 150
Bedford, TX 76021
T: (682) 224-7810
F: (682)730-8998
msmartinez@mhlegalgroup.com
ahsu@mhlegalgroup.com
rsellers@mhlegalgroup.com

Attorneys for Appellant

Certificate of Compliance

This document complies with the form requirements of Texas Rule of Appellate Procedure 9.4 and contains 11,571 words (except for those items excluded by Rule 9.4(h)(1)).

Dated: February 19, 2020

/s/ Jim E. Bullock
Attorney Certifying

Certificate of Service

The undersigned certifies that, on this day, a copy of the foregoing and the Appendix attached hereto was served in accordance with Texas Rules of Appellate Procedure 6.3 and 9.5, electronically via efile.txcourts.gov to:

(a) Appellee Funimation Productions, LLC, by and through counsel of record, John Volney and Christian Orozco of LYNN PINKER COX & HURST, LLP;

(b) Appellee Jamie Marchi, by and through counsel of record Samuel Johnson of JOHNSON & SPARKS, PLLC; and

(c) Appellees Monica Rial and Ronald Toye, by and through counsel of record Sean Lemoine of WICK PHILLIPS GOULD & MARTIN, LLP, Casey Erick of COWLES & THOMPSON, P.C., and Andrea Perez of CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, LLP.

Dated: February 19, 2020

Jim E. Bullock
Attorney Certifying