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COURT OF APPEALS
SECOND DISTRICT OF TEXAS

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IN THE

COURT OF APPEALS OF THE

SECOND SUPREME JUDICIAL DISTRICT

JAMES MCGIBNEY AND VIAVIEW, INC., APPELLANTS

V.

NEAL RAUHAUSER, APPELLEE

On Appeal from the 67th Judicial District Court of Tarrant County, Texas
Trial Court Cause No. 067-270669-14
Hon. Don Cosby, Presiding Judge

APPELLANTS BRIEF

Submitted by:

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ORAL ARGUMENT REQUESTED

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To the Honorable Justices of the Court of Appeals:

ViaView, Inc, and James McGibney, Appellants, submits this Brief in support of their appeal of the judgment dated April 14th, 2016 (CR4, 1400-1407):

Statement of the Case and Jurisdiction

This case is an appeal of a judgment under Cause Number 067-270669-14 from the 67th Judicial District Court of Tarrant County, Texas. (CR4, 1400-1407). Appellants James McGibney and ViaView were ordered, jointly and severally, to pay defendant Neal Rauhauser the following amounts:

1. Total reasonable attorney's fees, litigation expenses, and court costs for the trial and first appeal of **$300,383.84**, as justice and equity require.

2. Sanctions sufficient to deter the filing of similar actions by Plaintiffs in the future of **$150,000.00**.

3. Conditional appellate attorney's fees of **$50,000.00** for a second appeal to the court of appeals, which such appeal does not result in a complete reversal of all amounts awarded.

4. Conditional appellate attorney's fees of **$25,000.00** if a petition for review is filed in the Texas Supreme Court, which such petition does not result in a complete reversal of all amounts awarded.

The Trial Court awarded the following nonmonetary sanctions:

1. Plaintiffs shall disclose and transfer to Rauhauser the following domain names registered and used by Plaintiffs no later than 5 days after the date on which the Court signs its order:

nealrauhauser.com
nealrauhauser.net
nealrauhauser.org
nealrauhauser.info
nealrauhauser.exposed
rauhauserunmasked.com

2. Plaintiffs shall disclose all domain names that Plaintiffs or their agents have registered using any form of the name of attorney "Jeffrey L. Dorrell" no later than 5 days after the date on which the Court signs its order.

3. Plaintiffs shall publish for 365 consecutive days a written apology on the first page of all websites owned by either plaintiff for calling Rauhauser a "woman beater" and "pedophile supporter" and admitting that plaintiffs had no evidence to support such accusations when they made them.

4. Plaintiffs shall publish for 365 consecutive days a written apology on the first page of all websites owned by either plaintiff for calling Dorrell a "pedophile" and admitting that Plaintiffs had no evidence to support such an accusation when they made it.

On July 12th, 2016, Appellants filed a timely notice of appeal, thus perfecting this appeal. (CR5, 1773 – 1774); Tex. Rule App. Proc. 26.2(a). As a result, this Court has jurisdiction over this appeal.

Statement Regarding Oral Argument

Pursuant to Texas Rules of Appellate Procedure 39.1 and 39.2, Appellants request for an oral argument before this Court of Appeals. See Tex. Rule App. Proc. 39.1 & 39.2. Appellants believe that the facts and legal arguments are adequately presented in this Brief and in the record on appeal. Appellants also believes that the decisional process of the Court of Appeals will be significantly aided by oral argument. As a result, Appellants request an oral argument.

Issues Presented

Issue One: The Awarded Fees Were Not Actually Incurred.

Issue Two: The Awarded Fees Were Not Incurred in *Defending* Against Suit.

Issue Three: The Sanctions Awarded Were Imposed to Punish Rather Than to Deter.

Issue Four: The Judgment Awarding Non-Monetary Sanctions was an Improper Abuse of Discretion.

Issue Five: The Trial Court Abused its Discretion in Finding Willfulness and Maliciousness.

Issue Six: The Trial Court's Refusal or Failure to Rule In A Reasonable Period of Time Enabled Defendant's Interlocutory Appeal and Subsequent Snowballing of Fees.

Issue Seven: Awarding "Conditional" Attorney's Fees Per the Stated Terms Was Improper Because It Proposed an Impossible Condition.

Issue Eight: Plaintiff ViaView, Inc. was never afforded the Opportunity to Pursue its Counterclaims per the Appellate order.

Issue Nine: Plaintiff ViaView, Inc. Had No Standing to File a Suit for Defamation and Did Not File a Suit For Defamation–it Likewise Cannot Be Held Liable Under Texas' Anti-SLAPP Statute.

Facts

Plaintiffs are James McGibney and his corporation, ViaView, Inc.; Defendant is Neal Rauhauser. This case was remanded back to the Trial Court on February 19th, 2015, to dismiss McGibney's defamation claims and hold proceedings on awarding fees, sanctions, costs and expenses. On November 2nd, 2015, Defendant Rauhauser filed a motion asking the Court to award one million dollars in sanctions and more than three hundred thousand dollars in attorney's fees. Defendant Rauhauser also requested that the lower court rule on written submission of his motion to award attorney's fees and sanctions. On November 6th, 2015, Plaintiffs requested a hearing on Defendant's motion. On November 9th, 2015, Defendant Rauhauser filed a notice of Plaintiffs' New Criminal Aggravating misconduct and supplemental request for non-monetary sanctions. On November 13th, 2015, Plaintiffs responded to Defendant Rauhauser's request for written submission of his motion to award TCPA Attorney's fees and sanctions. On November 23rd, 2015, Plaintiffs responded to Defendant Rauhauser's request for non-monetary sanctions. On December 3rd, 2015 Defendant Rauhauser replied in support of TCPA Attorney's Fees and Sanctions. On December 30th, 2015 the Trial Court awarded Attorney's Fees and Sanctions, without holding the hearing that Plaintiffs requested. On December 30th, 2015 Plaintiffs responded to Defendant Rauhauser's "reply" of December 3rd, 2015 and filed a motion for a new trial, based in part on the lower court's failure to hold the requested hearing, which

was guaranteed to Plaintiffs by the court's local rules. On January 1st, 2016, Plaintiffs filed an emergency motion for stay of the Court's order granting fees and sanctions. On February 24th, 2016 the lower court granted Plaintiff's motion for new trial and set a hearing for Defendant Rauhauser's Motion for Attorney Fees and Sanctions. On April 7th, 2016 Plaintiffs responded to Defendant Rauhauser's motion for Fees and Sanctions. On April 14th, 2016 the Trial Court issued on a ruling on the new trial, award Defendant Attorney Fees and Sanctions, reducing its prior sanction award from $1,000,000 to $150,000. On April 19th, 2016, Plaintiffs filed a motion to Modify the Judgment, Clarify the Judgment and Stay the Judgment. The lower court never ruled on this motion. Plaintiffs then filed a notice of Appeal on July 12th, 2016.

Summary of the Arguments

Appellants present the following arguments in this Brief.

(1) The fees awarded to Defendant were improperly awarded because they were not actually incurred. The fee-shifting provision of Texas' anti-SLAPP statute (the TCPA) contemplates fees *actually incurred* during defense of a defamation action. Unlike traditional contingency fees for plaintiffs, Defendant and his counsel concocted a defense-on-contingency scheme in which Defendant, an out-of-state internet troll with a criminal history of online harassment, made a special appearance through counsel (because he was never served) and proceeded to accrue hundreds of thousands of dollars in fees without ever incurring actual liability for those fees. To force Plaintiff McGibney, the victim in this case, to pay these fees would be a gross miscarriage of justice.

(2) The fees awarded were not incurred by Defendant *in defending* against

Plaintiffs' claims, as required by statute. Defendant was never actually served in this suit. Moreover, Plaintiffs dismissed their claims when Defendant had only accrued approximately $40,000 in fees. Defendant appealed Plaintiffs' dismissal and subsequently continued to rack up over $300,000 *more* in fees. These fees were not incurred *in defending* Plaintiffs' suit.

(3) The lower court abused its discretion by awarding sanctions of $150,000 against Plaintiff McGibney. For comparison, the largest TCPA sanction ever awarded in Texas was against Schlumberger Ltd., a partnership worth $93.6 BILLION U.S. Dollars which employs over 120,000 people. That sanction was $250,000. McGibney is an individual with less than $5,000 in the bank at the time of the lower court's ruling and zero employees. Sanctioning him for $150,000 is blatantly punitive and exponentially greater than that needed to deter him from filing future defamation suits, particularly in light of all evidence indicating that Plaintiff would never file such a suit again.

(4) The Award of non-monetary sanctions was an abuse of discretion because such sanctions were not contemplated by Texas' TCPA and the sanctions were requested in response to alleged criminal conduct and/or contempt, for which Plaintiffs should have been entitled the appropriate due process, namely a criminal hearing or quasi-criminal contempt hearing. Moreover, this Court remanded the case to the lower court to determine *an amount*, as in a monetary amount, not arbitrary non-monetary sanctions.

(5) The lower court abused its discretion in finding willfulness and maliciousness because such findings were made in the total absence of evidence that could possibly indicate either willfulness or maliciousness. Counsel for defense sneaked this language into the final proposed order merely to attempt to prevent Plaintiffs from discharging this judgement through bankruptcy.

(6) Had the lower court ruled on Defendant's initial TCPA dismissal motion, rather than allowing it to expire, Plaintiff McGibney would have only owed a few thousand dollars in attorney's fees, at most. Instead, the lower court's failure to rule enabled Defendant to file an interlocutory appeal and litigate all subsequent proceedings to the tune of $300,000 more in fees, all of which Plaintiff McGibney has now been ordered to pay. But for the lower court's failure to rule, this TCPA fee award would never have reached six figures.

(7) The conditional fee award for an appeal is phrased in a manner in which no alternative outcome could ever occur, thereby making the "conditional" fee

award a guaranteed award, rather than a conditional award. The lower court's authorization of this was an abuse of discretion.

(8) In response to Defendant's interlocutory appeal, this Court ruled that Defendant failed to meet its burden to dismiss Plaintiff ViaView's business disparagement claims, yet the lower court refused to allow ViaView to pursue those claims on remand.

(9) Despite this Court's ruling that Defendant failed to meet its burden to dismiss ViaView's business disparage claims under the TCPA, the lower court is holding ViaView jointly liable for the fees and sanctions awarded against Plaintiff McGibney.

Introduction

Attorney Jeffrey Dorrell's representation of Defendant Neal Rauhauser is exceptionally unusual. Dorrell undertook this representation before Rauhauser was ever served. In fact, Rauhauser was never served with Plaintiffs' lawsuit. The representation was contingency-based, plus an initial payment of only $2,500 (CR4, 1375 - 1378). Plaintiffs nonsuited their claims against Rauhauser the same day Rauhauser filed his Motion to Dismiss and Rauhauser and his attorney had notice of this before filing their anti-SLAPP Motion to Dismiss. (CR4, 1276)

Despite Plaintiffs' attempts to dismiss this case, and the Court's actual dismissal of the case, Defendant has refused to allow the case to die. In hindsight, it is obvious that the Defendant and his attorney never intended this case to end without protracted litigation because protracted litigation is the only means for a defendant (or his attorney) to cash in on the uniquely flawed, but well intentioned,

TCPA. For illustration of the key flaw, Plaintiffs ask the Court to envision the following scenario:

- A harasser targets a victim of some minor notoriety, and then harasses the victim via the Internet until that victim sues the harasser for defamation.
- The harasser then uses the TCPA, in its current iteration, to halt all discovery, thereby blocking the victim's only avenues of obtaining records from web hosting companies and Internet Service Providers, which the victim needs in order to prove the harasser's identity and publication of the defamatory statements.
- Not only does the TCPA give the harasser total impunity for Internet-based defamation, it also entitles the harasser to then demand fees for having to defend against the defamatory statements he made.

Plaintiffs assert that this is the exact situation here and that Defendant Rauhauser admitted that he plans to perpetrate this identical scheme on future victims. (CR4, 1387 - 1389) Plaintiffs presented evidence supporting this admission to the trial court, however, the trial court ignored it. Plaintiffs ask only that the Court consider how easily the statute may be abused. This potential for abuse emphasizes the importance of how the Court evaluates the issue of whether justice and equity truly require an award of fees that is even remotely close to the exorbitant amount claimed by Defendant Rauhauser. Plaintiffs asserted that an oral hearing would be required for the Court to properly answer these questions because it is likely only through cross-examination that Plaintiffs can present sufficient details to the Court to reveal the scheme for what it is. (CR4, 1130 - 1149) No one is denying that the

defamatory statements were made and no one is denying Rauhauser's criminal record for past harassment. (CR4, 1242 - 1251) In particular, Plaintiffs wish to delve into matters of:

- The calculations underlying the total amount of fees.
- Whether the fees were truly incurred in defending Rauhauser.
- Whether Rauhauser discussed perpetrating this scheme on another victim.
- Whether Defendant Rauhauser is indeed the author of statements that he is "done with the case" and "all that's left is Dorrell's receivables." (emphasis added)

Plaintiffs James McGibney and ViaView, Inc, demonstrated to the trial court that Defendant's awarded attorney's fees were entirely unreasonable, were not actually incurred or were mostly incurred *after* Plaintiffs' suit was dismissed, and that justice and equity in this case require only a minimal fee award. Plaintiffs clearly showed that a minimal award of sanctions is all that is *necessary to deter* Plaintiffs from filing a similar suit. (CR4, 1231 - 1238) Defendant Rauhauser did not provide evidence towards all the relevant factors to show that the fees requested were reasonable. Mr. Dorrell's affidavit and invoices on the record (CR4, 1337 - 1373) primarily focus on the alleged expertise of Defendant's counsel, Mr. Dorrell, the assertion that counsel spent time on the case instead of another case and that everything done was necessary for the outcome achieved.

I. The Awarded Fees Were Not Actually Incurred

(A) Defendant Rauhauser admitted that he is not liable for the fees.

1. "Nope, don't care about James McGibney at all, so long as he leaves me and my family alone. The sole exception to that is the enormous legal bill he's on the hook for, but I don't have to do anything there, it's Hanszen Laporte's receivable. I am sure they have a strategy for collecting such debts, it's nothing I will have to spend my time handling". (CR4, 1220) As indicted within Defendant Rauhauser's blog-posting admission, a bona fide question still exists as to whether Defendant Rauhauser *actually incurred* the fees awarded in this case. Specifically, Rauhauser says that anything to come from this judgment is "Hanszen Laporte's receivable" and that Plaintiff McGibney, not Rauhauser, is "on the hook for" Rauhauser's "enormous legal bill". This admission comports with everything else we've learned from the colorful Tweets, Blog posts and public records in this case. (CR4, 1150, CR4, 1389 – 1396, CR5, 1664 - 1681) This also comports with our understanding of Rauhauser's lack of means and substantial debt, including his $68,000+ child support arrearage, for which a lien was served on the trial court by the State of Nebraska's Health and Human Services. (CR4, 1379 - 1380)

(B) There is no evidence that Rauhauser incurred or paid the requested Fees.

2. There is no evidence to show that Rauhauser has paid *any* fees in this case. The engagement letter describes a $2,500.00 initial retainer, (CR4, 1376) but Defendant has not provided evidence that this retainer was actually paid. No record of this payment appears on any of the Hanszen Laporte invoices. (CR4, 1342 – 1373) Those invoices likewise do not indicate *any* other payments made by Rauhauser. All we have is an engagement letter that states, "The firm's representation and compensation ***will be contingent*** upon a recovery after the first $2,500 is depleted". (emphasis added) (CR4, 1376) This means that Rauhauser has not incurred the fees – Hanszen Laporte has incurred the fees and Hanszen Laporte is the only entity to benefit from this protracted litigation.

(C) Defendant never agreed to pay fees allegedly accrued prior to engagement.

3. Invoices from Hanszen Laporte allege that fees started to be accrued on February 25, 2014 (CR4, 1342) despite the fact that Defendant had never been served. Defendant confidently sites to *American Heritage Capital, LP v. Gonzalez, 436 S.W.3d.865 (Tex. App. Dallas 2014)* in support of the notion that fees accrued in asserting an anti-SLAPP defense can begin to be incurred by their client before service, so service should be irrelevant. Plaintiffs do not dispute this. But it is well understood that a client cannot be liable to an attorney for fees accrued *prior to*

entering into an agreement with the attorney unless the agreement specifically addresses the fees already accrued. Defendant's engagement letter with Hanszen Laporte was not executed until March 14, 2014 and it makes no mention of work done prior to March 14. (CR4, 1375 - 1378) Since Defendant is not liable for those fees, and did not actually incur those fees, he has no standing to shift those fees to Plaintiffs under the anti-SLAPP statute or any other mechanism of law. The TCPA expressly provides the trial court shall award to Rauhauser "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require…." Tex. Civ. Prac & Rem. Code §27.009(a)(1). It is undisputed that Rauhauser, at most, incurred between $1,500.00 to $2,500.00 in fee payments to Hanszen Laporte Law Firm. Mr. Dorrell admitted Rauhauser did not incur $300,000.00 in legal fees. Under §27.009(a)(1), therefore, the total fee award should be between $1,500.00 to $2,500.00. See *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016) (attorney fee awards under §27.009(a)(1) must be reasonable, which is "one that is not excessive or extreme, but rather moderate or fair"). The record shows that Hanszen Laporte accrued $12,033.50 between February 25, 2014 and March 13, 2014 (CR4, 1256 - 1257) Plaintiffs are not liable for these fees.

II. The Awarded Fees Were Not Incurred in *Defending* Against Suit

4. Fees cannot be awarded for actions taken after a suit is defended against. **The anti-SLAPP statute is a shield, not a sword**. A fee award is not to be used for

retribution. It's not to be used for deterrence, either. *Sullivan*, 488 S.W. 3d 294. That's what sanctions are for. Here, the record clearly shows that Plaintiffs moved to nonsuit this case on March 20, 2014 (CR4, 1241). END. STOP. FINISH. DONE. OVER. WINNER: Neal Rauhauser – March 20, 2014. No fees incurred, except the original $1,500.00 to $2,500.00, had any possible relation to defending Plaintiffs' case, because Plaintiffs dismissed the case. Plaintiffs are not asserting that Defendant's Motion to Dismiss should not have survived their nonsuit. The law shows that it should have survived. When Plaintiffs withdrew their claims and effectively ceased any activity that would have needed *to be defended against* in Texas, fees could no longer be incurred. When Plaintiffs dismissed their case, Defendant Rauhauser cannot keep running up alleged and excessive attorneys' fees under the ruse that he is still "defending" himself.

5. When Plaintiffs dropped the suit, the Defendant could have pursued his counterclaims, his Rule 10 sanctions. Instead, he chose to file an interlocutory appeal about the anti-SLAPP motion to dismiss. Why are the Plaintiffs being punished for that? None of the time spent on the appeal, the subsequent hearings or related expenses can be characterized as having been incurred *in defending* against Plaintiffs' lawsuit. Only fees incurred in *defending* against the suit can be shifted to Plaintiffs and even then, those fees must be reasonable, actually incurred, *and* must be required by justice and equity. §27.009(a)(1); *Sullivan, supra*.

III. The Purpose Of Sanctions Is To Deter, Not Punish

6. The TCPA clearly states that sanctions under TCPA § 27.009 are intended to be, "sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." *Tex. Civ. Prac. & Rem. Code § 27.009* (2). Plaintiffs have publicly stated on the record (CR4, 1231 – 1237) that they will never file another defamation suit either in Texas, or anywhere for that matter, ever again.

7. The Trial Court abused its discretion in awarding sanctions so excessive as to not merely deter similar conduct, but to bankrupt Plaintiffs. The $1,000,000 in sanctions sought, and initially awarded (CR4, 1181 – 1188) by Defendant are, on information and belief, the largest anti-SLAPP sanction award in United States history. More importantly, such an award would be entirely disproportionate to the size of Plaintiffs' business and the amount of Plaintiffs assets. (CR5, 1557 – 1569). Defendant cites the $250,000 sanction in the Harris County case of *Schlumberger Ltd v. Rutherford, 472 S.W. 3d 881, 887 (Tex. App. – Houston 91st Dist. 2015, no pet.)* in support of the justification of his $1,000,000 sanction request (and initially awarded) against Plaintiffs. Defendant fails to mention, however, that Schlumberger has a current enterprise value of $93.6 **BILLION** U.S. dollars (Yahoo! Finance profile on Schlumberger Limited, http://finance.yahoo.com) and employs over 120,000 people. Plaintiff McGibney's company, by contrast, is a microscopic entity

that should not by any logic be compared to Schlumberger, much less sanctioned *more severely* than a company that is literally 120,000 times the size of Plaintiff McGibney's company.

8. Plaintiff James McGibney himself had a net worth of approximately $5,000 on January 1st, 2014 (CR4, 1201) and as of September 1st 2016, he had a net worth of $258.47 (CR5, 1557 – 1569) Plaintiff ViaView, Inc, had a net worth of approximately $120,000 on January 1st, 2014. (CR4, 1201) As of September 1st, 2016, ViaView, Inc is on the verge of shutting down and made less than $7,500 in revenue for 2015 (CR4, 1201, CR5, 1557 – 1569) and had $7.02 dollars as of September 1st, 2016. (CR5, 1557 – 1569) This information was provided to Defendant during discovery (CR3, 974 – 978), however it works heavily against his position and Mr. Dorrell made no mention of it in his motion for fees and sanctions. (CR4, 986 – 1120).

9. Plaintiffs have painfully witnessed firsthand that civil litigation is entirely ineffective to prevent or remedy the actions of internet trolls of this derangement and tenacity. This lawsuit in fact *increased* the severity and frequency of defamation and harassment targeted at Plaintiffs and those surrounding them. (CR3, 659 – 840) Even if Plaintiffs had "won" this suit, the trial Court could never have prevented or remedied the irreparable harm brought about when McGibney attempted to confront these malicious people. The record incontrovertibly shows that this irreparable harm

was not only suffered by McGibney, but by his family, his employer, and his multiple *attorneys*, as well as *their* families and *their* clients. (CR3, 659 – 840) The record clearly shows a consistent pattern of harassment, and in some instances, death threats made towards Plaintiffs' multiple law firms in this case:

1. Attorney John Morgan – merely seven days after Attorney John Morgan filed Plaintiffs initial lawsuit against Rauhauser and Thomas Retzlaff, Mr. Morgan informed Plaintiffs that he wanted to withdraw as counsel due to personal safety concerns. (CR4, 1239 – 1241)

2. Attorney Paul Gianni of Shannon Gracey – upon taking over the case from Attorney John Morgan, the attacks on Paul Gianni began immediately. (RR2, 46) (Supp.CR1, 27, 152)

3. Attorney Evan Stone – upon taking over the case from Attorney Paul Gianni, the attacks on Evan Stone, and his underage daughter began immediately. (Supp.CR1, 69 – 71, 153 – 154, 207)

10. Furthermore, we would like to draw the court's attention to Attorney John Morgan's notarized affidavit that was submitted to the trial court as Exhibit A on April 7th, 2016. (CR4, 1239 – 1241). Mr. Morgan admits the following:

> (i) "On or about February 27th, 2014, I received an email from Plaintiffs, and a subsequent phone call, in which Mr. McGibney stated he intended to dismiss the lawsuit in Texas in order to file the case in federal court in California.
>
> (ii)"On or about March 6, 2014, Plaintiff James McGibney informed me that ViaView, Inc had filed its Original Complaint federally (California Lawsuit No. 5:14-cv-01059)

(iii) "On or about March 7, 2014, Plaintiff James McGibney informed me orally that ViaView, Inc. and James McGibney wanted me to nonsuit the case in Texas."

These statements are important for a number of reasons.

(i) Plaintiffs James McGibney and ViaView, Inc instructed their Attorney of Record, John Morgan to dismiss their case *prior* to Defendant filing his TCPA Motion to Dismiss.

(ii) Plaintiffs James McGibney and ViaView, Inc have sworn to never sue for defamation in Texas, or anywhere for that matter, however they took that sworn statement one step further.

(iii) Rauhauser has continuously argued that Plaintiffs have "scorched the earth" with lawsuits against Neal Rauhauser and are "serial filers of SLAAP suits." (RR2, 57). This simply is not true. Plaintiffs sued Rauhauser in Texas, and upon confirming that he was a fugitive from the law who was, and still is, on the run, withdrew their lawsuit and filed it within a California Federal Court to obtain a wider range of jurisdiction. That's two lawsuits against Defendant Neal Rauhauser. The only other lawsuit filed was against Defendant Retzlaff, which was a workplace violence restraining order, which was granted in an effort to protect Mr. McGibney, his family, ViaView employees and Thomas Retzlaff's daughter, Brittany Retzlaff, from convicted felon Thomas Retzlaff. (CR3, 650 - 657). A warrant for Mr. Retzlaff's arrest was issued within that case for contempt. (Supp.CR1, 35 - 43)

11. There is no award of sanctions that could deter Plaintiffs more than they have already been deterred and devastated by the intensified harassment from which they originally sought relief. Defendant has not put forth any evidence to show how Defendant Rauhauser was harmed by the filing of this suit or any evidence to show that a monetary sanction of any significant amount is necessary to deter Plaintiffs from filing similar lawsuits. The Texas Supreme Court recently made it clear that an

extreme award of sanctions, such as occurred in this case, is disfavored and should not occur. In *Nath v. Texas Children's Hospital*, 446 S.W.3d 355 (Tex. 2014), the Supreme Court considered a trial court order sanctioning a physician for filing frivolous pleadings. The trial court awarded more than $1,400,000.00 in sanctions. The Texas Supreme Court reversed that award as outlandish, excessive, violative of due process, and an abuse of the trial court's discretion. The Court reasoned that a sanction imposed should be no more severe than necessary to satisfy its legitimate purpose, which includes securing compliance with the relevant Texas Rules of Civil Procedure, punishing violators and deterring other litigants from similar misconduct. Under the U.S. Constitution, Amendment 14, a sanctions award must be just but not excessive. In this case, the trial court's sanction award was extreme, excessive, and far more severe than the sanction award in *Schlumberger v. Rutherford*, 472 S.W.3d 881, when comparing the net worth of Schlumberger to Plaintiffs. Accordingly, this court should reverse the sanctions award in its entirety with instructions to the trial court to award a just sanction, but not a punitive and excessive sanction.

IV. The Judgment Awarding Non-Monetary Sanctions Was An Improper Abuse of Discretion.

12. The Trial Court ordered a litany of non-monetary penalties that were not only beyond the scope of the appellate court's mandate, but also beyond the scope of the TCPA. The Appellate Court asked the Trial Court to "determine the sanction

amount" (emphasis added) *Rauhauser v. McGibney, 2014 Tex. App. LEXIS 13290 (Tex. App. Fort Worth, Dec. 11, 2014*) Such phrasing plainly refers to a quantifiable figure, which in this context inarguably indicated a *monetary* sanction. Defendant, however, snuck several non-monetary penalties into his proposed order which were all granted. All are entirely inappropriate here and some are unconstitutional. The Trial Court, likely through mistake or accident, signed the order nonetheless.

(A) An Award of Non-Monetary Sanctions is Beyond the Scope of the Court's Mandate and Beyond the Scope of The TCPA.

13. Though the TCPA is unspecific on the type of sanctions that can be awarded, monetary sanctions are the norm under Texas law. If any cases other than the instant exist in which non-monetary sanctions were awarded pursuant to the TCPA, they are an extreme minority. More importantly, the appellate court expressly stated, "the trial court possesses discretion to determine the sanction amount that is required to deter the party who brought the legal action from bringing similar actions in the future. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(2)" The fact that the appellate court cited the TCPA after making this statement supports Plaintiffs' assertion that TCPA sanctions are indeed limited to monetary sanctions. § 27.009(a)(2) The trial Court therefore does not have discretion, under the TCPA, to invent non-monetary punishments to deter a party from filing similar actions in the future. A trial court's discretion in determining TCPA sanctions is limited to an award of a monetary

sanction. As such, granting Defendant the requested relief of disclosing and transferring ownership of several internet domain names, and posting an apology to Defendant for making a statement that Defendant has not proven Plaintiffs made, were improper as TCPA sanctions.

(B) Requiring Plaintiffs To Relinquish Property Without Notice And A Hearing Was A Violation Of Plaintiffs' Due Process Rights

14. When the Court of Appeals for the Second District remanded the case to the Trial Court, it ordered the Court "enter an order of dismissal in accordance with this opinion and for further proceedings relating to Rauhauser's court costs, attorney's fees, expenses and sanction under section 27.009(a)(1) and (2) of the TCPA". *Rauhauser v. McGibney, 2014 Tex. App. LEXIS 13290 (Tex. App. Fort Worth Dec. 11, 2014*) Though the TCPA is unspecific on the type of sanctions that can be awarded, monetary sanctions are the norm. Plaintiffs have yet to find a Texas case in which non-monetary sanctions were awarded pursuant to the TCPA. The trial court's Final Judgment, which ordered Plaintiffs to transfer various internet domains to Defendant was not merely improper as a TCPA sanction, it also violated Plaintiffs' due process rights. The Constitutions of the United States and Texas both prohibit the deprivation of a person's property without due process. "At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Tex. Integrated Conveyor Sys. v. Innovative Conveyor*

Concepts, 300 S.W.3d 348 (Tex. App. Dallas 2009, no pet) Plaintiffs were not afforded an opportunity to be heard before being deprived of their property.

15. Plaintiffs acknowledge that an oral hearing on the question of fees and sanctions was ultimately granted, after Plaintiffs' initial requests for hearing were overlooked and Plaintiffs were forced to move for a new trial to obtain said hearing, (Supp.CR1, 10 - 25) but ironically, Plaintiff McGibney was *prohibited from testifying* at this hearing. Plaintiff McGibney did take the stand and speak, but only in a limited capacity in furtherance of his bill of exception. (RR5, 21 – 34) Plaintiffs, therefore were not afforded an opportunity to be heard, at a meaningful time and in a meaningful manner, prior to this Court depriving them of their property.

16. Plaintiffs note that courts do consider internet domain names to be property. In the landmark case *Kremen v. Cohen*, the Ninth Circuit Court of Appeals held "like other forms of property, domain names are valued, bought and sold…they are now even subject to in rem jurisdiction… Registering a domain name is like staking a claim to a plot of land at the title office. Kremen therefore had an intangible property right in his domain name…" *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. Cal. 2003)

(C) If The Non-Monetary Relief Was Granted As A Remedy For Plaintiffs' Alleged Criminal Misconduct Rather Than As A TCPA Sanction, This Would Also Be Improper Without A Hearing

17. Towards the end of this litigation, Defendant made several baseless allegations against Plaintiffs concerning "criminal aggravating misconduct." (CR4 1121 – 1129) It was in Defendant's November 9th pleading that Defendant first requested the remedy of Plaintiffs' turning over various domain names allegedly belonging to Plaintiffs. Plaintiffs responded to these allegations by written response filed on November 23, 2015. (CR4, 1150 – 1162) Neither Defendant nor the Court ever set this motion for hearing, nor did the Court ever rule on this motion. Instead, Defendant bundled these additional remedies into a new, comprehensive proposed order that he filed December 3, 2015, one day before the proposed written submission date on Rauhauser's fees and sanctions motion. The record does not reflect when or if the Court separately considered these new claims, but all remedies requested were collectively present in the Court's final order of December 30, 2015. (CR4, 1181 – 1188)

18. Defendant falsely accused Plaintiffs of criminal misconduct and requested remedies for such conduct that included the deprivation of Plaintiffs' property and the posting of a written apology on Plaintiffs' websites. ALL OF THIS IS OUTSIDE THE TCPA'S SCOPE AND PURPOSE. Therefore, the proceedings regarding that request should be treated as criminal proceedings or at the very least, quasi-criminal proceedings, much like contempt proceedings. In Texas, contempt hearings are "characterized as quasi-criminal proceedings which should conform as nearly as

practicable to those in criminal cases." *Ex parte Johnson*, 654 S.W.2d 415 (Tex. 1983) The Supreme Court of Texas goes on to state that treating proceedings as quasi-criminal means, *inter alia*, that "persons charged with criminal contempt pursuant to article 1911a are constitutionally guaranteed the right to be present at trial and confront witnesses." *Id*. Tex. Rev. Civ. Stat. Art. 1911a has since been repealed, but the underlying due process protections for quasi-criminal proceedings still stand. As stated by Thirteenth District Court of Appeals, "Texas courts have consistently held that alleged constructive contemnors are entitled to procedural due process protections before they may be held in contempt." *In re Dooley*, 129 S.W.3d 277 (Tex. App. Corpus Christi 2004, no pet) Plaintiffs were not afforded this right, despite being guaranteed this right by the Texas Constitution and the Supreme Court of Texas. The Court simply made a conclusory ruling without a hearing and in violation of Plaintiffs' 14th Amendment rights. Therefore, if the Trial Court's punishment of Plaintiffs was a remedy for Plaintiffs' alleged criminal misconduct, this too, was improperly ordered and violated Plaintiffs' due process rights under U.S. Constitution, 14th Amendment.

19. Further, the apology was sought by Defendant Rauhauser for the improper purpose of using it against Plaintiff McGibney in subsequent litigation, as evinced by Defendant's admission in the following tweet: "That apology is an admission of libel. Judge is basically ordering him to lose another case, should Jeff or I decide to

sue". (CR5, 1424) After the Court's ruling at issue, Defendant again goes on to admit the purpose of the apology: "The apology is also evidence for a slam dunk libel suit, one reason why I moved to California – no jurisdiction issues." (CR5, 1424) TCPA § 27.009 does not authorize an "apology sanction" that is intended only to bolster threatened, future litigation.

(D) Ordering Plaintiffs To Apologize Is An Unconstitutional Abuse Of Discretion

20. A court cannot force speech except in extreme circumstances. Plaintiffs' alleged defamatory tweeting about opposing counsel is not such a circumstance. Surely the Court must acknowledge the irony of requiring Plaintiff McGibney, a former U.S. Marine with an impeccable record, who served two tours of duty with Third Surveillance Reconnaissance Intelligence Group and Marine Security Guard Battalion, (CR4, 1231) to prove each essential element of his defamation claims against Defendant, but upon hearing mere defamation allegations from Defendant Rauhauser, a fugitive with a criminal record for online harassment, (CR4, 1242 – 1251) the Court required no such proof and concluded automatically that Rauhauser was entitled to a public apology from Plaintiffs and an award of Plaintiffs' property.

21. Despite the apparent double standard and the absence of due process, even if the Court made an evidence-based finding that Plaintiffs had defamed Defendant, the Court cannot compel Plaintiffs to issue an apology, at least not in this context. The

U.S. District Court for the Southern District of Texas, citing an opinion of the Texas Supreme Court, stated that a defamation defendant, “cannot be compelled to publish or be enjoined from publishing future materials …regardless of their nature, as "equity does not enjoin a libel or slander and **the only remedy for defamation is an action for damages**."” (emphasis added) *Tackett v. KRIV-TV*, 1994 U.S. Dist. LEXIS 21712 (S.D. Tex. Mar. 23, 1994) Therefore, this Order for Plaintiffs to apologize amounts to an unconstitutional abuse of discretion for improperly enjoining Plaintiffs’ speech and must be overturned on appeal.

22. This applies equally to the mandate to transfer domain names to Defendant. Plaintiff McGibney, a United States Marine, should be afforded the same Constitutional rights and due process that defendant, Neal Rauhauser, a fugitive from the law, was given. The Defendant’s pleading on November 9th, 2015 (CR4, 1121) accuses Plaintiff McGibney of criminal misconduct. In this pleading Defendant cites to various online statements in support of his allegations. The statements were out-of-court statements offered by Defendant to prove that Plaintiff McGibney committed various offenses. All of Rauhauser’s allegations are false. Under the Texas Rules of Evidence, the legal characterization of those statements is *hearsay*. Unless and until Defendant proves that the statements were made by Plaintiff McGibney, Defendant cannot seek to have those statements admitted as non-hearsay

admissions of a party-opponent. Further, even if Rauhauser's allegations were true, these allegations are irrelevant to any monetary sanctions under TCPA § 27.009 (2).

23. More importantly, Defendant's assertions that opposing counsel Jeffrey Dorrell and his firm Hanszen-Laporte are the subjects of the online statements are also completely false. The statements *never* mention Hanszen-Laporte or opposing counsel Jeffrey Dorrell by name or description. Additionally, Plaintiff James McGibney has sworn, under oath: "I have never made that statement. I did not hack into counsel's email system nor did I ever claim to or 'admit' to." Defendant's new claim that Plaintiff McGibney's alleged hacking of Hanszen-Laporte's email system was "for the stated purpose of inserting exogenous pedophilic pornography into it" is *entirely* fabricated. Plaintiffs do not merely deny associating with this statement, Plaintiffs assert that the statement *does not exist.* There is nothing on the record remotely resembling a statement like this and Plaintiff McGibney emphatically denied making this statement. "I have never claimed to have hacked into the email system of Hanszen-Laporte and I did not hack into the email system of Hanszen-Laporte. Furthermore, I never stated that I inserted exogenous pedophilic pornography into it, nor did I insert data of any kind into their systems or interact with their systems in any way." (Supp.CR1, 81 - 85).

24. The Trial court ordered that "Plaintiffs shall publish for 365 consecutive days a written apology on the first page of all websites owned by either plaintiff for

calling Dorrell a “pedophile” and admitting that Plaintiffs had no evidence to support such an accusation when they made it.” Plaintiff McGibney swore, under oath, that he has never called Attorney Jeffrey Dorrell of Hanszen-Laporte a “pedophile” (Supp.CR1, 92 - 101) and there is absolutely zero proof that he did. The Court cannot force Plaintiffs to issue an apology for speech that was never made. Further, TCPA § 27.009 does not authorize a “forced apology” as a sanction. Further, this “forced apology” is unconstitutional. Within Plaintiffs’ response to Defendant Rauhauser’s request for non-monetary sanctions (CR4, 1150 – 1162), Plaintiffs requested sanctions against Defendant Rauhauser and Attorney Jeffrey Dorrell. Plaintiffs argued that a court must impose sanctions against an attorney or party who signs a pleading, motion or other paper if it (1) is groundless, and (2) was brought in bad faith or for the purpose of harassment. Tex. R. Civ. P. 13. Plaintiffs requested that the trial court impose appropriate Rule 13 sanctions against Defendant Rauhauser and/or his attorney, however the Trial court never ruled on Plaintiffs’ motion. (CR4, 1158).The Trial court ordered that “Plaintiffs shall publish for 365 consecutive days a written apology on the first page of all websites owned by either plaintiff for calling Rauhauser a “woman beater” and “pedophile supporter” and admitting that plaintiffs had no evidence to support such accusations when they made them.” Plaintiffs provided the trial court with supporting evidence which included:

1. A notarized affidavit from Defendant's former wife, Nancy Nogg, which clearly states that Defendant Rauhauser physically abused her. (CR4, 1160 - 1162). This also included restraining orders that were filed against Defendant Rauhauser by his former wife and minor children. (CR4, 1161). Nancy states, "I filed multiple restraining orders against [Rauhauser] to protect [herself] and [her] two children over the years. Neal has a long history of both mental and physical abuse. He also kidnapped one my children. Neal has consistently harassed and stalked myself and my children online for over a decade. The kids even had a restraining order against Neal which the school district adhered to even though Neal couldn't be served because his [sic] is on the run".

2. Defendant Rauhauser's partner in crime, convicted felon Thomas Retzlaff, is a court documented pedophile and rapist, (CR2, 257 - 476) who Rauhauser openly supports.

25. Nevertheless, that is not the issue as hand. Forcing Plaintiffs to apologize for factual statements is not only unconstitutional, it is outside the TCPA's scope. If Mr. Rauhauser feels the statements made by Plaintiff McGibney are untrue, then he should attempt to remedy the situation through a defamation suit.

(**E**) **Granting of Nonmonetary Relief was Procedurally Improper**

26. The monetary relief granted in the final order (CR4, 1400 - 1407) was granted in error because the relief was not requested in Defendant's anti-SLAPP Motion to Dismiss, but instead requested in response to later alleged criminal misconduct for which no due process was afforded to Plaintiffs before judgment. Moreover, the nature of the alleged criminal misconduct was itself an issue of free speech.

Additionally, such an award of nonmonetary relief would allow Defendant to take possession of property that may be subject to the lien filed by the Office of Child Support Enforcement Services of Douglas County, Nebraska. (CR4, 1379 – 1380)

V. The Trial Court Abused its Discretion in Finding Willfulness and Maliciousness

27. The Trial Court made findings of acts of "willfulness and maliciousness" on the part of Plaintiffs to injure Rauhauser, despite the absence of any evidence to support these findings. (CR4, 1400 - 1407) This phrasing is a term of art from bankruptcy law that was tactfully included by the Defendant as an attempt to prevent Plaintiffs from discharging the judgment in the case through bankruptcy. Without evidence, these findings were made in error and these, too, should be modified by the court.

28. Plaintiffs sued Neal Rauhauser for defamation, harassment and tortious interference with business contracts along with other claims. (CR1, 7 – 20) There is no dispute that Plaintiffs were defamed, harassed, and that their contracts were tortuously interfered with. After much due diligence, Plaintiffs determined that Defendant Rauhauser was a key actor behind the actions and speech that gave rise to Plaintiffs' claims. This decision was not made recklessly or maliciously. Plaintiffs also discovered that Defendant Rauhauser has a criminal record for online harassment and still has warrants out for his arrest for these crimes. (CR4, 1242 –

1251) The evidence pointing to Rauhauser, along with his established record for similar crimes, caused Plaintiffs to have a good faith belief that Defendant Rauhauser was a proper defendant in this case. There is no evidence to show that Plaintiffs willfully and maliciously injured Defendant Rauhauser merely by filing this suit. Further, whether subsequent alleged acts of Plaintiffs may have risen to the level of maliciousness is irrelevant to a determination of fees and sanctions under the TCPA. The fees and sanctions, if any, should be strictly pursuant to the mandate of the Second Court of Appeals without modification or embellishment.

VI. The Trial Court's Refusal To Rule In A Reasonable Period Of Time Was An Abuse Of Discretion

29. Numerous courts have held that a court's refusal or failure to rule on a pleading within a reasonable period of time is an abuse of discretion. *See In re Blakeney*, 254 S.W.3d at 662-63; *In re Ramirez*, 994 S.W.2d 682, 684 (Tex. App.—San Antonio 1998, orig. proceeding) (holding that a trial court's failure to rule on a motion for default judgment for over eighteen months was an abuse of discretion); *Kissam v. Williamson*,

545 S.W.2d 265, 267 (Tex. App.--Tyler 1976, orig. proceeding) (holding that a trial court's delay of more than thirteen months in ruling on an election of incorporation was unreasonable and constituted an abuse of discretion); see also *In re Reeves County*, No. 08-09-227-CV, 2009 Tex. App. LEXIS 6702, at *6 (Tex. App.--El Paso

Aug. 26, 2009, orig. proceeding) (holding that a trial court's failure to rule on a motion to compel arbitration for nineteen months was an abuse of discretion); *In re Mitchell*, No. 10-07-250-CV, 2008 Tex. App. LEXIS 507, at *4 (Tex. App.--Waco Jan. 23, 2008, orig. proceeding) (holding that a trial court's failure to rule on a motion for default judgment for fifteen months was an abuse of discretion).

30. Here, we need not labor over the question of how much time would amount to an unreasonable amount of time to fail to rule. The TCPA has answered this question for us: thirty days. Tex. Civ. Prac. & Rem. Code § 27.003(b) The answer is (30) thirty days, because the deadline for a court to rule on an anti-SLAPP motion to dismiss, after a hearing, *is thirty days*. *Id*. Therefore, a court's failure to rule on an anti-SLAPP motion to dismiss within that thirty-day timeframe is *de facto* unreasonable per the TCPA. The untimeliness of the trial court has already been heard by the Court of Appeals, which found that the Trial Court did err. But on remand the trial Court decided to punish *Plaintiffs* for the Court's failure. This, too, was in error because it has resulted in a fee award that goes well beyond what Defendant incurred *in defending* against Plaintiffs' suit.

31. The Trial Court's failure to rule in the instant case resulted in windfall profits for Defendant's attorneys and multiplied the fee award against Plaintiffs six times over. Mr. Dorrell clearly seems to have anticipated the possibility that this would

happen when choosing to represent Defendant Rauhauser on a contingency basis. (CR4, 1375 – 1378)

VII. Awarding "Conditional" Attorney's Fees Per The Stated Terms Is Improper Because It Proposes An Impossible Condition

32. The Court has conditionally awarded Defendant appellate attorney's fees, in two instances, if either of Plaintiffs' appeals "does not result in a complete reversal of all amounts awarded…" (CR4, 1400 – 1407) The trial court's conditioning language is in error. The Court of Appeals ruled Defendant is entitled to an award of fees and sanctions. Plaintiffs do not now contest this, nor would they ever appeal on these grounds as this issue has already been decided. The issues related to this award are: **1**) the reasonableness of attorney's fees; **2**) whether the fees were incurred in defending against Plaintiffs' action; and **3**) whether the amount of sanctions was beyond what was sufficient to deter Plaintiffs from filing similar actions. The "condition" as stated is an impossibility because no alternative outcome could ever occur nor would such an alternative outcome (one with no fee or sanction award) ever be sought. Ergo, the award of appellate attorney's fees as stated is not truly conditional. Instead, it amounts to a Due Process violation as a taking — a deprivation of Plaintiffs' property without due process. This taking is an abuse of discretion and must be rescinded. The trial court's Final Judgment should have made recovery of Defendant's attorneys' fees "conditional on [Defendant's] success of

appeal." *See e.g., T.A.M.E v. Langley*, No. 04-00-00379-CV; 2002 WL 86865 (Tex. App. – San Antonio 2002, no pet.).

VIII. Plaintiff ViaView, Inc was never afforded the Opportunity to Pursue its Business Disparagement or Tortious Interference claims.

33. The Order of the Court of Appeals for the Second District of Texas, in its mandate issued on February 19th, 2015 was very clear and specific. The Court held: "we remand this case to the trial court to enter an order dismissing all claims against Rauhauser **EXCEPT** ViaView's business disparagement claim and tortious interference with business relationship claims." (CR3, 612)

34. Plaintiffs promptly filed a Motion to Clarify with the Trial Court on March 16th, 2015. (Supp.CR1, 4) On March 26th, 2015, a telephonic hearing took place between all active parties. (RR3, 1 – 10) The following is an excerpt from that hearing:

> **THE COURT:** Yeah. Which leads me now to say the only thing – And Mr. Dorrell, you'll have to follow me on this. The only issues that I see before the Court are whatever was told or ordered by the Court of Appeals, which I have as only Mr. Dorrell your client's issues regarding attorney fees, sanctions, expenses, and costs as so stated in the Court of Appeals decision. And then, Mr. Dorrell, your client had some counterclaims against ViaView and McGibney. Those are the only remaining issues because --
>
> **MR. STONE:** Actually, Your Honor, the appellate court specifically

said that they are granting the -- the -- that you order the dismissal of all claims except ViaView's business disparagement claim and tortious inference with business relationships claiming that those claims are not --

THE COURT: But listen, you dismissed those. How can I -- how can I re -- even though the Court of Appeals said that, you dismissed them -- or not you, but the prior counsel dismissed them.

MR. STONE: Yes, Your Honor. And the appellate court is well aware of the nonsuit. They addressed the simple claims in there, but they think that the defense's motion to dismiss survived my client's nonsuit. And if you think about it; they can't file a motion to dismiss and then lose and still win a dismissal. It just doesn't work that way. And surviving the motion to dismiss and surviving the nonsuit, the appellate court fully addressed that and decided these claims are being set aside or they remanded the ViaView disparagement claims and tortious interference claims to be tried by –

MR. STONE: Your Honor, my client would not have dismissed it, you know, twice saying they could never refile. When it was nonsuited the first time, the defendant still included those claims in their motion to dismiss. They can't now act as if those claims didn't exist when my client filed a nonsuit and then fully address those claims in their motion to dismiss. They were -- they were very aware those -- they wanted those claims included in their motion to dismiss so they could try to get their attorney's fees for those claims.

THE COURT: I –

MR. STONE: -- partially one motion to dismiss after quoting specifically, expressly from the opinion, which remands the business –

THE COURT: I –

MR. STONE: -- and –

THE COURT: -- shut up --

THE COURT: The Court just hung up on Mr. Stone.

35. Plaintiffs attempted within every subsequent filing and hearing to discuss ViaView's claims, however the Trial Court refused to address this issue. Even when the Trial Court, after acknowledging its mistake derived from the December 30th, 2015 judgment (CR4, 1181 - 1188) by ordering a New Trial (CR4, 1206), continued to ignore Plaintiff ViaView's live counterclaim.

36. During the March 26th, 2015, telephonic hearing (RR3, 1 – 10) the Defendant argued that the two dismissal rule was in play because the Plaintiffs dismissed Defendant Rauhauser, without prejudice, from the Federal lawsuit (CR4, 1384 -1385). Rauhauser failed to address why Plaintiffs had no choice but to dismiss Rauhauser from the Federal case, which are as follows:

1. Plaintiffs' attempting to serve Mr. Rauhauser for over six months' in multiple states.

2. His attorney in Texas, Jeffrey Dorrell, refused to accept service on his client's behalf.

3. Mr. Rauhauser has four outstanding warrants for his arrest in multiple jurisdictions, and he claims to not have a driver's license or any permanent residence.

4. Plaintiffs had private investigators, process servers and sheriffs try to serve him in three states and look for him in two more plus the District of Columbia to no avail.

37. This has been the Plaintiffs' argument from the beginning. Plaintiffs decided to non-suit the case against Defendant Rauhuaser in Texas because he was, and still is, a fugitive from the law and Plaintiffs wanted to have a wider range of jurisdiction over Defendant since they could not track down his physical location.

38. Judge Cosby's refusal to abide by the mandate issued by the Court of Appeals for the Second District of Texas, on February 19th, 2015 (CR3, 612) caused irreversible harm to Plaintiffs and was a fatalistic dereliction of duty and an abuse of discretion. ViaView had live business disparagement claims and tortious interference with business relationship claims which were inexplicably ignored by the Trial Court and summarily dismissed sua sponte by the trial court. This dereliction of duty, coupled with the judgment rendered on December 30th, 2015 (CR4, 1181 - 1188) and Defendant's press release on January 13th, 2016, which made national news (CR4, 1397) had permanent, devastating effects on Plaintiffs, especially for ViaView, Inc., which included, but were not limited to:

1. Loss of any potential discovery rights Plaintiffs had to pursue their business disparagement claims and tortious interference with business relationship claims.

2. Loss of business contracts including a lucrative, future earnings contract with Warner Brothers/Telepictures.

3. Loss of potential new investors keen on working with ViaView to ensure the success of their Warner Brothers contract.

4. Loss of remaining advertisers.

5. Loss of remaining board members.

IX. How can Plaintiff ViaView, Inc be held liable for Defamation claims?

39. The Mandate issued by the Court of Appeals for the Second District of Texas on February 19th, 2015 included the following statement, which Plaintiff ViaView attempted to get clarification, "and to award sanctions against McGibney, ViaView, or both in an amount that the trial court determines sufficient to deter them from bringing similar actions under section 27.009(a)(1) and (2) of the TCPA". Plaintiff ViaView didn't sue Defendant Rauhauser for defamation. ViaView sued Rauhauser for business disparagement and tortious interference with business relationships. The appellate court stated, "we remand this case to the trial court to enter an order dismissing all claims against Rauhauser **EXCEPT** ViaView's business disparagement claim and tortious interference with business relationship claims." (C.R. 3 pp. 612). If those claims remained active, how could ViaView be held liable for any fees and/or sanctions awarded by the Trial Court while still maintaining multiple active claims? The trial court's Final Judgment, therefore, erred in awarding fees and sanctions against ViaView, and therefore should be reversed.

X. Conclusion and Prayer

40. Plaintiffs have shown that the great weight and preponderance of evidence militate against an award of the $300,000 in attorney's fees in this case. The interests of justice and equity cannot require Plaintiffs to pay attorney's fees that Defendant would not otherwise have incurred but for the Court's allowance of Plaintiffs' nonsuit and failure to timely rule on Defendant's initial anti-SLAPP motion to dismiss. Such an award would improperly penalize Plaintiffs for the Court's acts, not the Plaintiffs' acts. Plaintiffs have also shown that the amount of sanctions awarded are entirely inappropriate in these circumstances and are not necessary to deter Plaintiffs from similar filings.

41. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the award of attorney's fees be modified to reflect, at most, only the fees accrued by Defendant from the period of March 13th – March 24th, 2014. This amount is $31,000. Alternatively, an attorneys' fee award should be $1,500.00 to $2,500.00, because there was no evidence Rauhauser incurred any more attorneys' fees.

42. Plaintiffs have also shown that amount of sanctions awarded are entirely inappropriate in these circumstances and are not necessary to deter Plaintiffs from similar filings. As such, Plaintiffs pray that the Court grant a minimal sanction of $5,000 or less.

43. Plaintiffs further pray that this Court modify the order as requested herein, and in particular, to remove any provisions granting nonmonetary relief, remove conditional award of attorney's fees and remove the finding of malicious and willful conduct on the part of Plaintiffs.

44. Lastly, Plaintiffs respectfully request that they be awarded all fees associated with this appeal.

Respectfully submitted,

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I hereby certify that a copy of this brief was electronically served through efile.texas.gov on all persons who have appeared in this case.

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1. This brief complies with the type volume limitation of Tex. R. App. P. 9.4(i)(2) because:
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