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04-16-00675-CV
FOURTH COURT OF APPEALS
SAN ANTONIO, TEXAS
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**Case No.: 04-16-00675-CV**

IN THE FOURTH

COURT OF APPEALS

SAN ANTONIO, TEXAS

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**TOM RETZLAFF**
Appellant,

**Vs**.

**John S. Morgan, Philip R. Klein, Klein Investigations & Consulting James W. Landess, E.M. and V.B.M.**,
Appellees.

_____

Appealed from 73rd District Court
of Bexar County, Texas
Trial Cause No. 2014-CI-017145
Hon. Antonia (Toni) Arteaga, Judge

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# APPELLANT'S OPENING BRIEF

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Tom Retzlaff
PO Box 46424
Phoenix, AZ 85063-6424
P: 210-317-9800

Appellant, PRO SE

## APPELLANT REQUESTS ORAL ARGUMENT

# IDENTITIES OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, the attorneys, and any other person who has any interest in the outcome of this matter:

Jeffrey Dorrell, Hanszen Laporte Law Office, 11767 Katy Frwy., Suite 850, Houston, TX 77079 – attorney for anonymous appellees *E.M.* and *V.B.M.* (trial court plaintiffs).

Louis A. Wenzel, Schmidt & Wenzel, P.C., 14350 Northbrook Drive, Suite 245, San Antonio, TX 78232 – attorney for appellee James W. Landess (trial court defendant).

John S. Morgan, Morgan Law Firm, 2175 North Street, Suite 101, Beaumont, TX 77701 – pro se appellee and attorney for appellees Philip R. Klein and Klein Investigations & Consulting (trial court defendants).

Tom Retzlaff, PO Box 46424, Phoenix, AZ 85063-6424 – appellant.

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**NOTE:**

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| 1 RR | is the record from the Oct 11, 2016, hearing |
| 2 RR | is the record from the Oct 17, 2016, hearing |
| 3 RR | is the record from the May 16, 2016, hearing |
| CR | is the record filed on Nov 23, 2016 |
| 1 Supp CR | is the record filed Nov 30, 2016 |
| 2 Supp CR | is the record filed Dec 15, 2016 |

With regards to the documents in the appendix, in an effort to keep the page length of this brief to a manageable level, none of the exhibits that were attached to these motions originally are included in the Appendix. They are, however, all in the Clerk's Record.

Please use the Adobe bookmarks and internal document links (which are the boxes outlined in red) that have been provided to aid the reader in quickly and easily finding page locations as well as to documents cited to the Appendix.

# I. STATEMENT OF THE CASE

*Nature of the case*. This is an accelerated, interlocutory appeal of the trial court's order denying Retzlaff's Anti-SLAPP motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). On July 13, 2016, Morgan and the Klein defendants (Philip R. Klein and Klein Investigations & Consulting (KIC)) served three separate TRCP 201 deposition subpoenas on Arizona-based GoDaddy.com seeking the personal emails and business records of Retzlaff. (See CR 185, 193, and 201 for each of the three separate subpoenas, all of which are at Appendix Tab B.) Retzlaff filed a motion for protective order pursuant to TRCP 192.6(b), as authorized by TRCP 176.6(e), on July 29, 2016. (1 Supp CR 1; Apx Tab C.) Plaintiffs *E.M.* and *V.B.M.* also filed their own objection and motion for protection, too, on August 1, 2016. (CR 154.) Morgan (acting in his *pro se* capacity, as well as the attorney for the Klein defendants), on September 14, 2016, filed a motion to have both Retzlaff and the attorney for plaintiffs, Jeffrey Dorrell, held in contempt of court, fined nearly **$1 million** and jailed for approximately **31 ½ years**. (CR 326; Apx Tab D.)

*Course of proceedings*. On September 13, 2016, the Klein defendants filed a motion to strike all of Retzlaff's pleadings. (CR 302.) On September 16, 2016,

Retzlaff filed a motion to dismiss all of Morgan's and Klein's contempt of court claims under the Texas Citizens Participation Act. (CR 565; Apx. Tab E.) On October 5, 2016, the Klein defendants and Morgan filed their opposition to the TCPA motion. (CR 605; Apx Tab F.) Which they then supplemented on October 7, 2016. (CR 973.) On October 10, 2016, Morgan and the Klein defendants then filed an amended motion for contempt. (CR 1024.) On October 11, 2016, Retzlaff filed his reply to their TCPA opposition. (CR 1263.)

On October 11, 2016, the trial court held an oral hearing on Morgan's and the Klein defendant's motion to strike Retzlaff's pleadings. (RR vol. 1 – the Oct 11 hearing.)

*Trial court disposition*. Without Retzlaff being present, the trial court granted the motion to strike and signed an order striking ALL pleadings filed by Retzlaff on October 11, 2016. (CR 1280; Apx Tab A.) Retzlaff then filed his notice of appeal on October 16, 2016. (CR 1282.)

## II. STATEMENT OF JURISDICTION

The Court has jurisdiction to consider this appeal pursuant to TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) because this is an appeal from the trial court's interlocutory denial of Retzlaff's motion to dismiss filed under the "TCPA," or Texas Citizens Participation Act, TEX. CIV. PRAC. & REM. CODE § 27.003. *See also* TEX. CIV. PRAC. & REM. CODE § 27.008.

## Introduction – The Citizens Participation Act's Broad Protections and Procedural Requirements

By 2011, the growing use of what are now known as "SLAPPs" – Strategic Lawsuits Against Public Participation[1] had become so pervasive that the Texas Legislature enacted the "TCPA," or Texas Citizens Participation Act,[2] by a unanimous vote in both houses. (Apx. Tab G.) In doing so, Texas joined 28 other states[3] and the District of Columbia, who have all adopted their own versions of this statute.

The TCPA was intended "to encourage and safeguard the constitutional rights of a defendant to speak freely and otherwise participate in government to the extent provided by law." Tex. Civ. Prac. & Rem. Code § 27.002. To protect free-

[1] George W. Pring and Penelope Canan created the term "Strategic Lawsuits Against Public Participation" – SLAPP – to describe civil actions brought for the purpose of stifling expression of unpopular opinions. See George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("Slapps"): An Introduction for Bench, Bar and Bystanders (Introduction to SLAPPs)*, 12 Bridgeport L. Rev. 937, 938 (1992). Pring and Canan's study found that SLAPPs were filed by parties on one side of a public dispute in order punish or prevent opposing points of view and to transform the public dispute "into a private, legal adjudication, shifting both forum and issues to the disadvantage of the other side." *Id.* at 941. They found that this tactic works well for SLAPP filers because "[t]he costs immediately imposed on the defendants or targets can be substantial." *Id.* at 942. Most filers of SLAPPs lose their suits but win at achieving their purpose – although the "vast majority" of such suits are dismissed, they succeed in chilling public discussion. *Id*. at 941-44. See *Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 WL 1120921 at *7 (Tex. App. – Fort Worth 2015, no pet.) (memo. op.).

[2] Tex. Civ. Prac. & Rem. Code § 27.001, et seq. (Apx. Tab G.)

[3] Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, and Washington.

speech rights by cost-effective means, the TCPA requires a court to determine at an early stage whether a suit affecting such rights has merit.

A party invokes the trial court's determination by filing a motion to dismiss. *Id*., § 27.003(a), (b). The trial court is required to rule on the motion "not later than the 30th day following the date of the hearing on the motion." *Id.*, § 27.005(a). The hearing is to be held within 60 days of service of the motion. *Id*. § 27.004(a).

A court granting a motion to dismiss must award the moving party court costs, attorney's fees, and other expenses incurred in defending against the action as justice and equity may require. *Id.* § 27.009(a)(1). **An award of sanctions is *mandatory*.** *Id.*, § 27.009(a)(2); *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 723 (Tex. App. – Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds*, *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015); *see also* TCPA § 27.007(a).

With only a single exception, the trial court "shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of … the right of free speech." *Id*. § 27.005(b)(1); *Rehak*, 404 S.W.3d at 723. The exception:

> **The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific[4] evidence a prima facie case for each essential element of the claim in question.**

*Id*. at 723-24; TCPA § 27.005(c); *see also Farias v. Garza*, 426 S.W.3d 808, 813 (Tex. App. – San Antonio 2014, pet. denied), *disapproved on other grounds*, *In re Lipsky*, 2015 Tex. LEXIS 350 at *10, *18-19 (Tex. April 24, 2015) (reversing trial court's refusal to dismiss). Even if the nonmovant brings forth clear and specific evidence as required by § 27.005(c), the court may *still* be required to dismiss the nonmovant's legal action under § 27.005(d):

> **Notwithstanding the provisions of [§27.005](c), the court <u>shall dismiss</u> a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the movant's claim.**

TCPA § 27.005(d) (emphasis added).

In ruling on the motion to dismiss, a court considers "the pleadings and supporting and opposing affidavits stating facts on which liability or defense is

[4] "Clear and specific evidence" is not a recognized evidentiary standard. *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). The TCPA provides no guidance as to the quantum of proof necessary to meet it. *Better Bus. Bureau of Metro. Dallas v. BH DFW*, 402 S.W.3d 299, 309 (Tex. App. – Dallas 2013, pet. denied). Words not defined by statute and that have not acquired a special or technical meaning are typically given their plain or common meaning. *In re Lipsky*, 460 S.W.3d at 590. The words "clear" and "specific" in the TCPA mean, for the former, "'unambiguous,' 'sure,' or 'free from doubt'" and, for the latter, "'explicit' or 'relating to a particular named thing.'" *Id*., citing *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App. – Houston [1st Dist.] 2013, pet. denied) (quoting Black's Law Dictionary 268, 1434 (8th ed. 2004)).

based." *Id*. § 27.006(a). Courts are instructed to "construe [the TCPA] liberally to effectuate its purpose and intent fully." *Id*. § 27.011(b).

## STANDARD OF REVIEW

The Court's inquiry in this TCPA review is threefold:

(i) Did Retzlaff show by a preponderance of the evidence that Morgan's and Klein's legal action was based on, related to, or in response to his exercise of the right to petition?

(ii) Did Retzlaff show by a preponderance of the evidence each essential element of any valid defense to Morgan's and Klein's claims?

(iii) Did Morgan and Klein marshal "clear and specific evidence" of a *prima facie* case for each essential element of each claim in question?

*See* TEX. CIV. PRAC. & REM. CODE § 27.005(b), (c), and (d); *Sierra Club v. Andrews County*, 418 S.W.3d 711, 715 (Tex. App. – El Paso 2013) *reversed on other grounds*, 2015 Tex. LEXIS 436 at *2 (Tex. May 8, 2015); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd*., 416 S.W.3d 71, 80 (Tex. App. Houston [1st Dist.] 2013, pet. denied). These are all questions of law this Court reviews *de novo*.[5] *Id*.

[5] Retzlaff, who is appearing *pro se*, would like to remind the court that *Pro se* litigants' court submissions are to be construed liberally and held to less stringent standards than submissions of lawyers. If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with rule requirements. *Boag v. MacDougall*, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285,

## III. STATEMENT ON ORAL ARGUMENT

The Court should grant oral argument for the following reasons:

a. The issues presented have not been authoritatively decided. See Tex. R. App. P. 39.1(b). Specifically, the issue as to whether or not the so-called Vexatious Litigant statute applies to one who comes into court involuntarily has never before been decided by a Texas court.

b. Oral argument would give the Court a more complete understanding of the facts presented in this appeal. See Tex. R. App. P. 39.1(c). This case involves a convoluted set of players, spread out over the entire country, involving at least six completely separate (but nearly identical) state and federal lawsuits – all going on simultaneously. There are seven parties to the underlying case, all with different agendas and alliances. Sifting through this is best done in person so that the Court can ask questions and get a better understanding of who is whom and what they are all about.

c. Oral argument would allow the Court to better analyze the complicated legal issues presented in this appeal. See Tex. R. App. P. 39.1(c). Can one labeled a "vexatious litigant" still have the right to defend himself or herself in a lawsuit without the necessity of first getting permission from a local administrative judge? Is Retzlaff even a "vexatious litigant"? Is filing a contempt of court action considered a "legal proceeding" pursuant to the TCPA that would make the filer subject to an anti-SLAPP motion?

d. Oral argument would significantly aid the Court in deciding this case. See Tex. R. App. P. 38.1(e), 39.1(d). The give and take of oral arguments will allow the Court to gain a better appreciation of who the players are and what legal issues are at stake.

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50 L.Ed.2d 251 (1976)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Courts provide *pro se* parties wide latitude when construing their pleadings and papers, and use common sense to determine what relief the party desires. *S.E.C. v. Elliott*, 953 F.2d 1560, 1582 (11th Cir. 1992).

## IV. ISSUES PRESENTED FOR REVIEW

Issue 1: The trial court lacked authority to vacate the October 11, 2016, order granting the Klein defendants' motion to strike all of Retzlaff's pleadings.

Issue 2: There is no valid, enforceable final judgment declaring Retzlaff to be a "vexatious litigant" pursuant to Tex. Civ. Prac. & Rem. Code chapter 11.

Issue 3: Assuming that there is a valid, enforceable final judgment, the vexatious litigant statute does not apply to one who comes into court involuntarily.

Issue 4: Filing a contempt of court motion constitutes a "legal action" within the scope and meaning of the TCPA.

Issue 5: A private party / attorney is prohibited from prosecuting a criminal contempt action; thus, appellees' motion was frivolous and was a SLAPP.

Issue 6: Did Retzlaff show by a preponderance of the evidence that Morgan's and Klein's legal action is based on, relates to, or is in response to Retzlaff's exercise of the right to petition?

Issue 7: Morgan, in his *pro se* and individual capacity, is a proper party to this proceeding.

Issue 8: Did Retzlaff show by a preponderance of the evidence each essential element of any valid defense to Morgan's claims?

Issue 9: Did Morgan and Klein marshal "clear and specific evidence" of a *prima facie* case for each essential element of each claim in question?

Issue 10: Did the trial court abuse its discretion by denying Retzlaff's motion for protection from the Klein defendants' improper discovery requests – and thereby destroying Retzlaff's rights?

# V. STATEMENT OF FACTS

Appellant is Tom Retzlaff, originally a nonparty to the underlying proceeding. Appellees (and trial court defendants) are John S. Morgan (**in his *pro se* and individual capacity**), Philip R. Klein, Klein Investigations & Consulting (KIC), and James W. Landess. The anonymous appellee parties known as "E.M." and "V.B.M." are trial court plaintiffs.

For the purposes of this appeal, Retzlaff and the anonymous parties "E.M." and "V.B.M." are aligned against Morgan, the Klein defendants, and Landess.

The underlying case arises from nearly a decade of legal wrangling between plaintiff V.B.M. and her former husband, defendant James Landess, over custody of the two children of the marriage, T.L. and B.L. Landess lost. (See plaintiffs' 2nd amended petition *Section VII – Facts* starting at CR 4-13; see also RR vol. 2 (the Oct 17 hearing) starting at page 4.) After a trial on July 21 – 24, 2009, Judge Karen Pozza of the 288th District Court of Bexar County, Texas, signed an order giving V.B.M. the exclusive right to establish the primary residence of the children in Monclova, Mexico. V.B.M. did so. (CR 4 at ¶15.) Shortly after the custody ruling against him, Landess began claiming that V.B.M. "kidnapped" the children. (CR 4 at ¶15.) He then hired Nederland, TX based private investigator Philip Klein and Klein Investigations & Consulting to help him get his children back. This "help" allegedly consisted of Klein and Landess engineering false criminal

charges against the new husband, E.M., and the mother, V.B.M. In February 2013, E.M. was arrested in Hidalgo County, Texas, as he drove through Texas for a business trip. (CR 11 at ¶30-31.) Charges were soon dropped, however, and the arrest expunged. (CR 12 at ¶32.) Plaintiffs then filed an $8 million lawsuit against Landess and the Klein defendants. (CR 1.)

While the underlying case is fairly straight forward, it involves many allegations, numerous jurisdictions, and dozens of shadowy internet characters with intertwined legal claims. At the center of this maelstrom is James McGibney, operator of a revenge pornography / sexual blackmail website based in San Jose, CA, that posts the intimate photographs of little girls for which he charges them $499 to remove. (2 RR 5-6.) McGibney's attorney is John Morgan. Defendant Philip Klein, a failed internet detective from Nederland, TX, is one of McGibney's and Morgan's henchmen. Klein's attorney is also Morgan.

While it may initially seem unsavory to the Court for Retzlaff to be making personal comments about opposing counsel Morgan, it is important for this Court to understand that this case – this SLAPP suit – is just as much about John Morgan personally as it is about Morgan the attorney for the Klein defendants. Thus, his litigation history, criminal activities, and personal characteristics are important issues for discussion.

Morgan is notorious for filing SLAPPs around the state. Retzlaff and plaintiffs' attorney Jeff Dorrell have been on the receiving end of at least **six** SLAPP suits filed by Morgan either individually or on behalf of one of his clients / cronies.

a) *In re Does 1-2*, 337 S.W.3d 862 (Tex. 2011).

b) *Rauhauser, et al, v. McGibney & ViaView*, 2014 Tex. App. Lexis 13290 (Tex.App. – Ft. Worth Dec 11, 2014, no pet.).

c) *McGibney, et al. v. Retzlaff*, 2015 U.S. Dist. LEXIS. 79434 (N.D. Cal. June 18, 2015). (Apx. Tab K.)

d) *Johnson-Todd v. Morgan*, 2015 Tex. App. Lexis 4904 (Tex.App. – Beaumont 2015, pet. denied).

e) *Johnson-Todd v. Morgan*, 480 S.W.3d 605 (Tex.App. – Beaumont 2015, pet. denied). (Apx. Tab L.)

f) *Viaview, Inc. v. Retzlaff* (2016), 1 Cal.App.5th 198. (Apx. Tab J.)

Each of these cases resulted in a victory for Retzlaff and/or Mr. Dorrell. FYI – in the Fort Worth case the trial court there signed a SLAPP sanctions order against Morgan's client McGibney for over $450,383.84 on April 14, 2016. (1 Supp. CR 72; 2 RR 5-6.)[6]

[6] The original amount of anti-SLAPP sanctions was over $1.3 million on Dec 30, 2015. But that amount was later reduced upon the condition – and expectation – that Morgan's client would make a full and public apology to all concerned. Obviously, that apology did not happen. http://www.courthousenews.com/2016/01/15/1-3-million-in-anti-slapp-sanctions.htm

These are eventually followed by retaliatory legal actions against judges who dare to rule against Morgan and the attorneys who dare to defend his victims.

But retaliation is not the only purpose of the Klein-Morgan alliance. These lawsuits generate publicity for both Morgan's failing law practice and Klein's foundering "private investigation" business. Klein uses his inaptly-named, soap-opera-style blog, the "Southeast Texas Political Review," to praise Morgan, denounce Morgan's critics (including Retzlaff, attorney Jeffrey Dorrell, Texas District Court Judge Layne Walker, the justices of the Beaumont court of appeals, various federal court judges, opposing counsel, and others), and boost lagging sales of Klein's self- published books. Publicity-mongering Klein-Morgan stunt-suits include:

(i) *Klein & Associates Political Relations v. Port Arthur I.S.D.*, 92 S.W.3d 889 (Tex. App. – Beaumont 2002, pet. denied). Klein sued a school district for defaming him, but failed to prove his case.

(ii) *In re Does*, 337 S.W.3d 862 (Tex. 2011) (orig. proceeding) (granting mandamus of trial court's order *sub nom. PRK Enterprises, Inc. v. Google*). Klein sued Internet search giant Google under Tex. R. Civ. P. 202 to unmask anonymous bloggers Klein complained had defamed him, but failed to prove his case.

(iii) *City of Beaumont Police Dep't v. Klein Investigations & Consulting*, 2012 Tex. App. LEXIS 1043 (Tex. App. – Beaumont 2012, no pet.). Klein asked a civil court to issue "naked declarations" regarding criminal statutes, but failed to prove his case.

It is against this backdrop that Retzlaff asks the Court to dismiss Morgan's *latest* attempt to use his law license like a child who has found his father's gun and

to order payment of mandatory sanctions and attorney's fees.[7]

In the underlying lawsuit, anonymous plaintiffs "E.M." and "V.B.M" sued defendants Klein, KIC, and Landess for malicious prosecution, false imprisonment, and defamation after defendants procured false criminal charges against plaintiffs and then created a blog on which they falsely bragged that plaintiffs were "wanted fugitives" with "active warrants" for their arrest for interference with child custody. (CR 1.) Plaintiffs also pled three theories of vicarious liability and seek a permanent injunction against defendants' re-publication of the defamatory matter that precipitated this suit. (CR 4 – 13; 2 RR 4-5.)[8]

Retzlaff was involuntarily brought into the underlying lawsuit when Morgan and Klein "served" (by fax) Arizona-based GoDaddy.com served with a "deposition subpoena" from Beaumont, on July 13, 2016. (CR 185; 2 RR 6-7; Apx Tab B.) Morgan issued identical subpoenas in at least two other Texas cases, as

[7] Since 2013, Morgan and Klein have together orchestrated at least five retaliatory lawsuits against Hon. Layne Walker, former judge of the 252nd District Court of Jefferson County, Texas – two in state courts and three in federal courts: (i) Cause No. 195012, *Klein v. Walker* in the 136th District Court of Jefferson County, Texas; (ii) Cause No. 1:14-CV-00509, *Klein v. Walker* in the U.S. District Court of the Eastern District of Texas; (iii) Cause No. 1:13-CV-00327, *Morrison v. Walker* in the U.S. District Court for the Eastern District of Texas; (iv) Cause No. 1:13-CV-355; *Hartman v. Walker* in the U.S. District Court for the Eastern District of Texas; and (v) Cause No. 198246, *Hartman v. Walker* in the 58th District Court of Jefferson County, Texas. All have been resolved in Walker's favor. See, e.g., *Klein v. Walker*, 2016 U.S. Dist. LEXIS 174034 (E.D. Texas Dec 16, 2016). *Hartman v. Walker*, 2015 U.S. Dist. LEXIS 125027 (E.D. Texas Aug. 14, 2015).

[8] It should be noted that the Klein defendants are also being sued by a family in the State of Idaho regarding very similar allegations of misconduct by Klein with regards to a missing child case there. *Kunz, et al v. Klein & Klein Investigations*, case # CV-16-4788 filed in the 7th Judicial District Court, Bonneville County, Idaho. See CR 235.

well, all seeking the same information regarding Retzlaff's personal business records and email correspondence. (CR 193, 201; Apx Tab B.)

Morgan's stated purpose for these subpoenas was to try to establish some link between Mr. Dorrell and Retzlaff, who Morgan believes are members of the Aryan Brotherhood and who operate several child pornography websites together, which is how Morgan claims Mr. Dorrell makes his money. (CR 607 at lines 8-9; see also CR 327-28 at ¶5; CR 583-584 at ¶5; CR 1025-26 at ¶5.) He claims that Mr. Dorrell and Retzlaff are business partners and that Mr. Dorrell represents Retzlaff and shares the profits. Morgan further claims that Mr. Dorrell and Retzlaff are running an Aryan Brotherhood / "death threats" group out of the Hanzen LaPorte law offices in Houston with the assistance of each of the Justices on the Beaumont Court of Appeals, along with a local county sheriff and district attorney. (2 RR 6-7; CR 268, 799-810; see also 3 RR 8:19-20.)

> 5. Mr. Retzlaff is a convicted felon, pedophile, stalker, suspected rapist, and child pornographer who works for attorney Jeffrey Dorrell and the Hanszen LaPorte Law Firm to target and harass individuals on behalf of this law firm. See www.Thomasretzlaff.com (exposing his criminal record and his business relationship with attorney Jeffrey Dorrell and the Hanszen Laporte Law Firm). Business records currently in the possession

See e.g., CR 327 (Klein Motion for Contempt against Retzlaff).

2.Mr. Retzlaff is a nonparty to this case. He works directly for Hanszen LaPorte Law Firm and attorney Jeffrey Dorrell. Together with Mr. Dorrell and attorney Mark Sparks, they run a website www.viaviewfiles.net, in which they anonymously post death threats regarding my client, Mr. Philip Klein, as well as myself. Mr. Retzlaff also sends death threats via email from his IP address under the pseudonym of "James Smith." Mr. Retzlaff is currently working with Jeffrey Dorrell in a campaign to terrorize Mr. Klein, threaten death to his attorneys and their families (including the Undersigned and also the Honorable Rick

Espey, a prominent attorney in San Antonio, Texas). Mr. Dorrell has stated that the managing partner of his firm, Mr. Kent Hanszen, has knowledge of these activities and approves of them, in support of the terrorist campaigns of Mr. Dorrell and Mr. Retzlaff. Notably, on the

CR 303 (Klein's motion to strike Retzlaff's pleadings).

Retzlaff is not a party in any of the cases in which Morgan propounded this discovery. (2 RR 2-6.) However, Morgan's subpoenas can be challenged by Retzlaff as **a person affected by the subpoena**. Tex. R. Civ. P. 176.6(d), (e) (emphasis added). The Klein defendants are seeking business records, personal records, and emails from GoDaddy.com, Inc. that relate to Retzlaff, his business transactions, and his private email correspondence with third parties. They are seeking these records in the hopes of being able to find some kind of "smoking gun" that they can use in a Fort Worth SLAPP suit that Morgan and his client McGibney lost in which they were ordered to pay anti-SLAPP sanctions. http://www.courthousenews.com/2016/01/15/1-3-million-in-anti-slapp-sanctions.htm (1 Supp. CR 70.) (Just because the judgment in the Fort Worth case has been 'final' now for many months does not matter to Morgan. Nor does the fact that he is no longer the attorney of record in that case.) On July 29, 2016, pursuant to Tex. R. Civ. P. 192.6(b), Retzlaff filed his motion for protective order in the trial court, (1 Supp. CR 1); Apx Tab C, along with two supplements (CR 178, 230). Tex. R. Civ. P. 192.6(b).

What Morgan and Klein did here with these subpoenas is **exactly** the same things that the Texas Supreme Court has already told them that they are not authorized to do in *In re Does 1-2*, 337 S.W.3d 862 (Tex. 2011), which is a case

defended by Mr. Dorrell. But, as the Court will plainly see, constant relitigation of adverse decisions is a hallmark of Morgan / Klein SLAPP litigation.

In that motion for protection Retzlaff outlined various reasons why the GoDaddy subpoenas were illegal, irrelevant, and unenforceable, not the least of which is the fact that the Klein defendants were trying to subpoena an Arizona entity from well-outside the 150 mile subpoena range of the trial court as GoDaddy.com is in Scottsdale, AZ and the Klein defendants directed their subpoena to GoDaddy.com at that location. Tex. Civ. Prac. & Rem. Code §22.002 (Distance for Subpoenas). See Motion for Protective Order at ¶19 (1 Supp. CR 8); Apx Tab C.

On August 1, 2016, plaintiffs *E.M.* and *V.B.M.* filed their own motion for protection, too. (CR 154.) But before a hearing could be conducted on each of these motions for protection, on September 14, 2016, Morgan (in his individual and *pro se* capacity) and the Klein defendants filed their motion for contempt against Retzlaff seeking to have him fined (over $985,000) and jailed (for over 31 ½ years) based upon their claim that Retzlaff violated the Texas Vexatious Litigant statute by objecting to their deposition subpoenas. (CR 326; Apx Tab D.) They also sought fines against Mr. Dorrell and Hanszen LaPorte. (*Ibid.*)

Morgan has a history of filing bogus (i.e. factually and procedurally defective) motions for contempt against opposing parties. Specifically, Morgan

tried to get plaintiffs' attorney Mr. Dorrell locked up in the *Johnson-Todd* case that Retzlaff mentioned before based upon Morgan having obtained an illegal temporary injunction in which Morgan sought to conceal his criminal arrest and conviction records involving aggravated perjury committed by Morgan in Morgan's divorce and child custody case. (See *Retzlaff's Response to Appellees' Motion to Dismiss Appeal* filed October 21, 2016, in this Court at **Exhibit Ten** – *Amend. Motion for Contempt Against Dorrell*; see also 2 RR 2-7.) Only quick action by the Beaumont Court of Appeals saved the day! *Johnson-Todd v. Morgan*, 2015 Tex. App. Lexis 4904 (Tex.App. – Beaumont 2015, pet. denied).

Based upon the filing of this legal action against Retzlaff, Retzlaff filed an anti-SLAPP motion against both Morgan and the Klein defendants pursuant to the Texas Citizens Participation Act. (CR 565; Apx Tab E.)

Because Morgan and the Klein defendants argued that, as a supposed "vexatious litigant," Retzlaff was not allowed to file a motion for protective order without prior written permission from the local administrative judge, they filed a motion to have ALL of Retzlaff's pleadings stricken. (CR 302.)

Two days after the filing of the anti-SLAPP motion, Morgan realized that he just now opened himself up to personal sanctions by seeking contempt sanctions in his individual, *pro se* capacity, so he filed an amended contempt motion (CR 1024) in which he now claims that he is only seeking contempt relief for the Klein

defendants and not for himself, and he further claimed during the October 17, 2016, hearing that his inserting of his name was a "typo". (2 RR 19.) The fact that Morgan specifically used the words "*pro se*" in this motion shows that Morgan is on the hook here for SLAPP sanctions right alongside his clients, the Klein defendants.[9]

Morgan and the Klein defendants admitted to the trial court that the Fort Worth lawsuit involving Morgan's former client McGibney has absolutely nothing to do with the case at hand. (2 RR 11:17-24.) Furthermore, Morgan (who admits that he is no longer the attorney for McGibney) claims that the reason for issuing identical subpoenas to nonparty GoDaddy.com in three different lawsuits (CR 185, 193, and 201) was that he had received "terrorist threats via e-mail" allegedly from Retzlaff that Morgan claimed to the trial court were reported to the police and the Bexar County District Attorney's Office. (2 RR 12:4-11.)[10] Thus, Morgan actually admits that the subpoenas could not lead to information relevant or admissible in the three lawsuits that in which Morgan propounded them. See Tex.R.Civ.P. 192.3 (scope of discovery). Furthermore, Morgan's requests for copies of Retzlaff's emails was improper pursuant to the federal Stored

[9] Specifically, in the contempt motion Morgan states: "Accordingly, John S. Morgan, pro se, moves this Court to hold Retzlaff in Contempt of Court, as follows…" See the very last sentence at the bottom of CR 329.

[10] No evidence of these claimed reports to law enforcement were ever produced by Morgan.

Communications Act (SCA). See Title 18 U.S.C. § 2701, et seq. (prohibiting electronic communication services from disclosing "contents of a communication while in electronic storage by that service" or disclosing "the contents of any communication which is carried or maintained on that service"). Courts have applied the statute to telephone companies, Internet or e-mail service providers, and bulletin board services – **such as GoDaddy.com**. See, e.g., *Garcia v. City of Laredo*, 702 F.3d 788, 791 (5th Cir. 2012); *United States v. Councilman*, 418 F.3d 67, 80-81 (1st Cir. 2005) (en banc); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004).

Morgan led the trial court into error. The trial court conducted a hearing on October 11, 2016, and signed an order striking all of Retzlaff's pleadings. (CR 1280; 1 RR 9-11; see also 1 RR 14:5-6.) Retzlaff filed his notice of appeal on October 16, 2016. (CR 1282.) However, a different judge, seeing the error of Morgan's ways, tried to vacate the October 11, 2016, order during a hearing on October 17, 2016. (RR volume 2.) But because of the automatic stay of Tex. Civ. Prac. & Rem. Code § 51.014(b), the trial court lacked authority act. Tex. Civ. Prac. & Rem. Code § 51.014(b).

Due to Morgan's attempts at relitigating this and several other issues, this Court was forced to step in on October 17, 2016, and again on October 21, 2016, and **repeatedly** order a stay on all trial court proceedings pending the outcome of

this appeal. (Apx. Tab N; Apx. Tab O.) Two separate orders this Court was forced to sign because of Morgan's repeated insistence at violating the law.

One need only look at the documents (evidence is too strong a word) attached to Morgan's and the Klein defendants' responses to Retzlaff's TCPA motion to dismiss to see that they never had any evidentiary support for their legal action against Retzlaff. (CR 620-798; CR 980-1023.) These tactics are less about adducing evidence then they are about the endless pursuit of vengeful legal actions from court to court, abusing the judiciary for self-promotion at Retzlaff's and Mr. Dorrell's significant expense. Soon, Klein and Morgan will move to yet a **fifth** different court to pursue these same, bizarre theories, then emblazon them on a blog as some sort of fanciful "conspiracy" or secret "investigation" – unless the Court acts decisively to deter them using the tools of the TCPA.

## VI. SUMMARY OF THE ARGUMENT

The Court can cut the Gordian Knot of this case with two decisions:

First, the Court should decide whether filing a motion for contempt against a nonparty to the underlying case constitutes a "legal action" within the meaning of the Texas Citizens Participation Act. If not, then this appeal is over and Retzlaff loses.

Second, if the filing of the contempt motion does constitute a "legal action" under the TCPA, then the Court must decide whether (1) Retzlaff is a "vexatious litigant" within the meaning of the Texas Vexatious Litigant statute, and (2) if so, whether the Vexatious Litigant statute applies to Retzlaff, who was brought into court involuntarily. The vexatious litigant statute does not apply to Retzlaff either because there is no final judgment in *GoAmerica* or because Retzlaff is merely a defendant herein.

The next issues for the Court to decide is (1) whether or not Retzlaff met his burden under the TCPA of showing by a preponderance of the evidence that Morgan's and Klein's legal action was based on, related to, or in response to his exercise of the right to petition, and if so (2) did Retzlaff show by a preponderance

of the evidence each essential element of his defense of the Judicial Communication privilege as a valid defense to Morgan's and Klein's claims.[11]

The answers to these two questions can be found in the pleadings. There is no evidence to examine.

All of the other issues that Retzlaff raises in this appeal are all secondary to the above.

The first secondary issue is, due to the automatic stay of Texas Civil Practice & Remedies Code § 51.014(b) that arises upon the filing of a notice of appeal in an anti-SLAPP case, the trial court lacks jurisdiction to vacate the October 11, 2016, order denying Retzlaff's TCPA motion to dismiss.

The other secondary issue is: Does a private party or attorney even have the legal authority to prosecute a criminal contempt action? The violation of a prefiling order in the Vexatious Litigant statute is only punishable by contempt of court. However, this type of contempt has long been held by Texas courts to be constructive contempt and not direct contempt; thus, it requires an attorney to prosecute, it cannot be handled in a summary fashion, and all of the Due Process rights apply. Because such a violation is classified as a criminal contempt and not a coercive contempt, the Texas Disciplinary Rules for Professional Conduct and

[11] As a sub-issue to this, Retzlaff would further argue that the GoDaddy subpoena was frivolous, too.

US Supreme Court case law prohibit opposing counsel John Morgan and Louis Wenzel from prosecuting Retzlaff for criminal contempt.

Because this contempt of court action was just a sham – a way of SLAPPing Retzlaff to punish his moving for protection from Morgan's and Klein's abuse, and because Morgan and Klein are serial SLAPP violators having previously been adjudicated as such, Retzlaff is entitled to the full measure of sanctions that he requested – which is $1 million, plus his attorney's fees and expenses.

The final secondary issue is whether Retzlaff is entitled to protection from the three identical GoDaddy subpoenas.

# VII. ARGUMENT

**Issue One**: The trial court lacked authority to vacate the October 11, 2016, order granting the Klein defendants' motion to strike all of Retzlaff's pleadings.

## Argument & Authorities

This is an accelerated, interlocutory appeal of the trial court's order of October 11, 2016, denying Retzlaff's Motion to Dismiss Pursuant to the Texas Citizens Participation Act (TCPA), Chapter 27 of the Texas Civil Practice and Remedies Code. (CR 1280; Apx Tab A; see Apx Tab G for text of the TCPA.)[12]

Interlocutory appeals of such orders are specifically allowed pursuant to Civil Practice and Remedies Code § 51.014(a)(12) ("(a) A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that: … (12) denies a motion to dismiss filed under Section 27.003…"). Tex. Civ. Prac. & Rem. Code § 51.014(a)(12). Pursuant to Civil Practice and Remedies Code § 51.014(b), an appeal pursuant to § 51.014(a)(12) "stays the commencement of a trial in the trial court pending resolution of the

[12] Retzlaff uses the term "denied" because, as this Court previously held in its October 17, 2016, order granting a Stay in this case, the striking of a motion "is the functional equivalent of denying the motion", (citing *Lucchese, Inc. v. Solano*, 388 S.W.3d 343, 349 (Tex. App. – El Paso 2012, no pet.). (See Apx. Tab N.)

appeal… [AND] also stays all other proceedings in the trial court pending resolution of that appeal." Civil Practice and Remedies Code § 51.014(b).

As stated by Mr. Dorrell in his October 19, 2016, briefing letter to this Court, although the trial court (Hon. Sol Casseb) on October 17, 2016, orally vacated Judge Arteaga's October 11, 2016, order striking Retzlaff's TCPA motion, Retzlaff's prior filing of the instant appeal had stayed the litigation before Judge Casseb ruled. Tex. Civ. Prac. & Rem. Code ¶51.014(b). As this Court has held:

> **We recognize and appreciate the effort of the trial judge in this case to keep the cases on his docket moving forward. We also recognize and appreciate the frustration of the appellees in being unable to proceed to trial. However, the stay set forth in section 51.014 is statutory and allows no room for discretion.**

*Sheinfeld, Maley, and Kay v. Belush*, 61 S.W.3d 437, 438-39 (Tex. App.—San Antonio 2001, no pet.); *see also In re Bliss & Glennon, Inc*., 2014 WL 50831 at *2 (Tex. App.—Houston [1st Dist.] orig. proceeding). Accordingly, Judge Casseb's oral order vacating the October 11, 2016, order signed by Judge Arteaga was a violation of the automatic stay. It must be ignored by this Court.

Analyzed correctly, the procedural posture of this case is that Retzlaff's anti-SLAPP motion has been denied and Retzlaff's interlocutory appeal of that denial is now properly before this Court in the instant appeal.

**Issue Two**: There is no valid, enforceable final judgment declaring Retzlaff to be a "vexatious litigant" pursuant to Tex. Civ. Prac. & Rem. Code chapter 11.

## Argument & Authorities

First, the documents proffered by Morgan and Klein to establish that Retzlaff is covered by Texas Civil Practice & Remedies failed to do so. Morgan and Klein offered only an unauthenticated document found on the internet. (See Exhibit One attached to the motion to strike Retzlaff's pleadings starting at CR 306.) There is no evidence to establish that appellees' Exhibit One is what it purports to be, or that it is linked to Retzlaff.

Retzlaff preserved these objections in the trial court. (See CR 1273 at ¶21.)

Alternatively, assuming that Morgan and the Klein defendants met their evidentiary burden, there is no valid court order declaring Retzlaff to be a "vexatious litigant." In support of their motion for contempt Klein relies on an October 15, 2008, order from Bexar County Court at Law No. 3 in which Retzlaff was supposedly labeled a "vexatious litigant." (See Exhibit 1 of the Klein defendants' Motion for Contempt at CR 338.) HOWEVER, the order that they cite to in support is not a valid court order and is unenforceable. On

October 7, 2011 – three years after the entry of that vexatious litigant order, the El Paso Court of Appeals vacated (in part) and reversed (in part), and remanded the case to the trial court for the entry of a new order. See *Retzlaff v. GoAmerica Comm'n Corp.*, 356 SW3d 689 (Tex.App. – El Paso 2011, no pet.). In the interim, however, the case was resolved between the parties and the trial court never signed a new order. Thus, there is no new Vexatious Litigant order to enforce.

Irrespective of Klein's or Morgan's so-called "evidence," with no valid order declaring Retzlaff a "vexatious litigant" **dated sometime after the October 2011 remand**, there is no order for this Court – or any other court – to recognize. In any event, in order for court records to be admissible as evidence, certified copies of the court records must be attached to their motion. See, e.g., *Souder v. Cannon*, 235 S.W.3d 841, 848 (Tex. App. – Fort Worth 2007, no pet.); *Graff v. Berry*, No. 06-07-00058-CV, 2008 Tex. App. LEXIS 2069, 2008 WL 704310, at *9 (Tex. App. – Texarkana Mar. 18, 2008, pet. denied)

Thus, under either of the two alternative theories above, the statute does not apply and Retzlaff wins.

**Issue Three**: Even assuming that there is a valid, enforceable final judgment, the vexatious litigant statute does not apply to one who comes into court involuntarily.

## Argument & Authorities

As noted above, Retzlaff was not a party in the underlying case until he was dragged under the chariot wheels of Morgan's lust for retribution when Morgan sought discovery of Retzlaff's personal business records and private email correspondence of no conceivable relevance in the case at bar. (See GoDaddy subpoenas at CR 185, 193, and 201; Apx Tab B.) The Vexatious Litigant statute applies only to plaintiffs, not to those coming into court involuntarily. Tex. Civ. Prac. & Rem. Code §11.001(5) ("Plaintiff" means an individual who commences or maintains a litigation pro se.) (see Apx Tab H for full text of CPRC ch 11). This is a common-sense reading of the plain language of the statute.

Because Retzlaff was brought into court involuntarily – in the posture of being a defendant in the trial court – even assuming that there is a **valid** prefiling order against Retzlaff, the Vexatious Litigant statute does not apply. Applying the statute in such a manner not only goes against Legislative intent, but it would also violate Retzlaff's fundamental Constitutional rights of Access to the Court and to Due Process.

Additionally, the statute provides that if permission to file is granted to a vexatious litigant plaintiff, the presiding judge may only "condition the filing of the litigation upon the furnishing of security for the benefit of the **defendants**." Tex. Civ. Prac. & Rem. Code §11.055 (emphasis added). Because appellees Morgan and Klein are acting in the posture of plaintiffs because they initiated legal actions against Retzlaff (the first a discovery subpoena and second a motion for contempt), Retzlaff is in the procedural posture of being a "defendant." But for Klein's and Morgan's choosing to bring Retzlaff into court, Retzlaff would not be here.

For his proposition that Retzlaff is a Vexatious Litigant Klein relied on *Retzlaff v. GoAmerica Communications*, 356 S.W.3d 689, 699 (Tex. App. – El Paso 2011, no pet.), But *Retzlaff* also supports the position that a "defendant who appeals an adverse ruling is not filing 'new' litigation or 'maintaining' litigation, but rather, is attempting to 'undo' the results of litigation that has been instituted against him or her." *Retzlaff*, 356 S.W.3d at 699-700 (citing *Mahdavi v. Superior Court* (2008), 166 Cal.App.4th 32, 82 Cal.Rptr.3d 121, 126.

Texas' vexatious Litigant statute is worded and applied identically to California's. Courts in Texas (such as the El Paso court in the *Retzlaff v GoAmerica* case above), have long looked to California courts for guidance in applying the Vexatious Litigant statute. See *There's a New Sheriff in Town: the*

*Texas Vexatious Litigants Statute and its Application to Frivolous and Harassing Litigation*, 31 Tex. Tech L. Rev. 1291 (2000).

In May 2016, the California Supreme Court issued its unanimous opinion overruling and disapproving of the cases cited by the El Paso court of appeals in *Retzlaff v. GoAmerica* – specifically holding that California Code of Civil Procedure § 391.7's prefiling requirements do not apply to a self-represented litigant previously declared a vexatious litigant seeking to appeal an adverse judgment or interlocutory order in an action where he or she was the defendant. See *John v. Superior Court of Los Angeles*, 369 P.3d 238 (Cal. 2016). (Apx Tab I.)

The *John* court held that applying the vexatious litigant statute to a person involuntarily brought into court would violate that person's Access to Courts rights and disapproved each of the California cases cited by the *Retzlaff v. GoAmerica* court to hold that the statute applied to appeals as well as initial lawsuits (*In re R.H.* (2009), 170 Cal.App.4th 678, 88 Cal.Rptr.3d 650, 661-63; *McColm v. Westwood Park Ass'n* (1998), 62 Cal.App.4th 1211, 73 Cal.Rptr.2d 288, 292-93; and, *Mahdavi v. Superior Court* (2008), 166 Cal.App.4th 32, 82 Cal.Rptr.3d 121, 126).[13] *John*, 369 P.3d at 243.

[13] Because the California Supreme Court in *John* rejected the line of cases used to support the El Paso's court determination in *Retzlaff v. GoAmerica*, that case's holding is of doubtful validity.

The bottom line is that, changing the language and the intent of the definitions in the Vexatious Litigant statute to give it Morgan's and Klein's expansive interpretation – defining appealing defendants as plaintiffs and responding plaintiffs as defendants – would ignore the statute's plain words, legislative intent, as well as undermine its reasonable application. It would also violate Retzlaff's fundamental Constitutional rights as a person involuntarily hauled into court from thousands of miles away.

If the vexatious litigant statute does apply to people coming into court involuntarily, then the statute is unconstitutional on its face – and as applied to Retzlaff – as a violation of his Access to Courts and Due Process rights.

**Issue Four**: Filing a contempt of court motion constitutes a "legal action" within the scope and meaning of the TCPA.

## Argument & Authorities

To meet its burden under the TCPA, the defendant must show that it is seeking to dismiss a "legal action." See TCPA §27.003(a).

A "legal action" under the TCPA includes not only a "lawsuit" but also a cause of action, a petition, a complaint, a cross-claim, a counterclaim, or any other judicial pleading or filing that requests legal or equitable relief. CPRC §27.001(6).

The TCPA has been applied recently even to a motion to dismiss a Rule 202 proceeding seeking pre-suit discovery. *See In re Elliott*, No. 03-16-00231-CV, 2016 WL 5887349, at *7 (Tex. App. – Austin October 7, 2016, orig. proceeding).

Morgan's and Klein's motion for contempt was clearly a "judicial pleading or filing that requests legal or equitable relief." It contains:

a) Identification of the parties.

b) A statement on jurisdiction and venue.

c) Causes of action outlined in individual "counts", in separate paragraphs, alleging facts and legal theories for recovery.

d) A request for contempt (with specific amounts for fines and jail time requested), along with a request for monetary damages (both liquid and unliquidated).

e) A demand for court costs and attorney's fees, along with interest.

f) A prayer for relief.

See, e.g., Tex. R. Civ. P. 45-61, and 78-82 (general rules for pleadings).

While Morgan and the Klein defendants may argue that their legal action against Retzlaff is exempt from TCPA scrutiny, the *plaintiff* – not the defendant – has the burden of proving that a legal action is exempt. See CPRC §27.010; *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex.App. – Houston [1st Dist.] 2013, pet. denied). Neither Morgan nor Klein offered any evidence of "exemption" in their response to Retzlaff's motion.[14] (See CR 605 for their opposition.)

In an identical case involving similar legal and factual issues in which Morgan acted *pro se* against the attorney representing his ex-wife in a child custody proceeding , Morgan argued that the TCPA did not apply to the ex-wife's attorney because she was not a party to the underlying lawsuit. However, the appellate court held that Section 27.003 of the TCPA – allowing a "party" to file a motion to dismiss – does not indicate that the Legislature intended the remedy of dismissal to be limited to those who were "parties" in some other suit. See *Johnson-Todd v. Morgan*, 480 S.W.3d 605, 611 (Tex.App. – Beaumont 2015, pet. denied). (Apx. Tab L.)

[14] Some examples of legal actions "exempt" under the TCPA are: (1) enforcement actions by the state; (2) commercial speech actions; (3) actions to recover for bodily injury, death, or survival; and, (4) insurance actions. See TCPA §27.010.

The *Johnson-Todd* court explained that the reference to "party" in § 27.003 refers to anyone the plaintiff has made a party in the retaliation suit and that the Legislature's use the term "party" in section 27.003 was not intended to restrict the protection provided by the TCPA solely to those who were named as parties in a prior suit that gave rise to the retaliation suit. *Id*. at 611. The stated purpose of the TCPA is to safeguard the rights of "persons to petition," which is exactly what Retzlaff was doing when he moved for protection below on July 29, 2016, and in all subsequent pleadings he filed.

Plainly, the motion for contempt filed by Morgan and the Klein defendants is a "legal action" within the meaning of the TCPA.

**Issue Five:** A private party / attorney is prohibited from prosecuting a criminal contempt action; thus, appellees' motion was completely frivolous and was a SLAPP.

## Argument & Authorities

The Texas Disciplinary Rules of Professional Conduct and US Supreme Court case law prohibit opposing counsel, John Morgan, the attorney for the Klein defendants, and Louis Wenzel, attorney for Landess, from prosecuting Retzlaff for criminal contempt. Their efforts to do so despite the well-established law shows that their motion for contempt was just a SLAPP case filed in retaliation for Retzlaff's petitioning the government in the form of his motion for protective order from the GoDaddy subpoenas (1 Supp. CR 1.) As such, the trial court should have granted Retzlaff's motion for dismissal and anti-SLAPP sanctions, and these two attorneys MUST be removed from this case upon remand by this Court due to State Bar rules.[15]

On September 14, 2016, the Klein defendants, **and their attorney John Morgan acting *pro se* and on his own behalf**, filed a motion to have Retzlaff held in criminal contempt of court for allegedly violating a prefiling order pursuant to

[15] Removal of them as attorneys is mandatory as State Bar disciplinary rules have the same force and effect as statutes. *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988).

the Vexatious Litigant statute, Texas Civil Practice & Remedies Code chapter 11, on account of Retzlaff seeking protection from their discovery requests.[16] (CR 326; Apx Tab D.) Landess, as a co-defendant, is a beneficiary of this contempt action.

Based upon that contempt filing Retzlaff then filed a Motion to Dismiss and for Sanctions Pursuant to the Texas Citizens Participation Act, (TCPA), Texas Civil Practice & Remedies Code chapter 27. (CR 565; Apx Tab E.)

The Texas State Bar Disciplinary Rules of Professional Conduct, Rule 4.04(b)(1), prohibit a party's counsel from prosecuting the opposing party for criminal contempt. Tex. Disciplinary R. Prof. Conduct 4.04(b)(1). But before getting started here, Retzlaff needs to make a few things clear to the Court.

Assuming both that (1) Retzlaff is a vexatious litigant subject to a prefiling order under Tex. Civ. Prac. & Rem. Code Ann. § 11.103(a) (which Retzlaff hotly disputes) and (2) that Retzlaff's motion for protection from discovery violated the prefiling order, then Retzlaff is subject to contempt of court. Tex. Civ. Prac. & Rem. Code §11.101(b). However, this type of contempt has long been held a **constructive contempt**, not a direct contempt. See, e.g., *Johnson v. Clark*, Tex. App. LEXIS 8593 (Tex.App. – Amarillo Oct. 28, 2011, no pet.).

[16] In the motion for contempt, attorney John Morgan specifically states that he is appearing pro se and requesting relief in his individual capacity, not just as an attorney for the Klein defendants. See Motion at bottom of pg. 4 at CR 453.

In a case involving identical legal and factual issues surrounding an alleged violation of a Section 11.101(a) prefiling order, the court in *Johnson* reversed a trial court's contempt judgment ruling that, because the violation of a prefiling order is constructive contempt, the full panoply of Due Process rights apply. *Johnson*, Tex. App. LEXIS 8593 at *6-7 (citing *Ex parte Krupps*, 712 S.W.2d 144, 147 (Tex.Crim.App. 1986) (explaining that constructive contempt adjudications satisfy due process if the contemnor is given notice, a hearing, and the opportunity to obtain an attorney).

Specifically, Due Process requires that full and unambiguous notice of an accusation of contempt be served on the alleged contemnor in a motion for contempt, show cause order, or equivalent legal process stating how, when, and by what means the party has been guilty of the alleged contempt *Ex parte Chambers*, 898 S.W.2d 257, 262 (Tex. 1995). A person is entitled to representation by counsel (or a court appointed attorney). *Ex parte Krupps*, 712 S.W.2d 144, 147 (Tex.Crim.App. 1986). And because Morgan and the Klein defendants are seeking to have Retzlaff sentenced to more than six months in jail and more than a $500 fine, Retzlaff is entitled to a full jury trial. *Ex parte Sproull*, 815 S.W.2d 250, 250 (Tex. 1991).

The contempt motion filed by Morgan not only seeks coercive contempt of court punishments (see, e.g., Motion at ¶15 (CR 332) ("*Klein Defendants request*

*that for each day of Mr. Retzlaff's violations of this Court Order, this Court Order Mr. Retzlaff to be held in contempt…*"), but also criminal contempt punishments as well (see Motion at ¶15 ("*Klein Defendants request… this Court Order maximum jail time for Mr. Retzlaff, at a minimum of at least 180 days in jail for: (1) each and every impermissible court filing by Mr. Retzlaff; (2) for each day Mr. Retzlaff remains in violation of this Court Order by each of his unlawful pleadings remaining on file; and (3) for each day Mr. Retzlaff did not post the required bond for each of his pleadings. Morgan requests that each period of confinement run and be satisfied concurrently, for Mr. Retzlaff.*") and ¶17 (CR 333.) ("*Klein Defendants then request that Mr. Retzlaff be placed on community supervision for ten (10) years on release from jail or suspension of commitment in jail.*").

So, assuming *arguendo* that Retzlaff violated the prefiling order and is subject to criminal contempt of court sanctions, opposing counsel Morgan is prohibited from prosecuting this matter and, in fact, must be disqualified from further representation of Klein in this case. The same is true for Landess' counsel, Mr. Wenzel, for the same reasons as he is a participant and beneficiary, too.

Retzlaff filed a motion to disqualify opposing counsel in the trial court thereby preserving this argument on appeal. (See, e.g., 2 Supp CR 1200.)[17]

[17] This specific document cites to Landess' response to Retzlaff's motion to disqualify. While the appellate record does not contain Retzlaff's motion to disqualify (Retzlaff did not ask that it be included in the Clerk's Record due to cost constraints and relevancy since it is not

## Civil Contempt vs Criminal Contempt

The most important classification of contempt is civil or criminal. Despite the name, this classification has nothing to do with the underlying case. Civil contempt may occur in a murder trial as easily as criminal contempt stems from a divorce. Rather, the classification is dependent on the purpose of the contempt: Civil contempt seeks to correct a violation, while criminal contempt punishes the violator. That theoretical distinction between compulsion and punishment underlies the doctrinal distinction between civil and criminal contempt, which has been maintained by the U.S. Supreme Court for more than a century. The Court first drew that line in 1904, declaring that criminal contempts were "prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders," whereas civil contempts were instituted to preserve and "enforce the rights and administer the remedies" that courts have announced. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 328 (1904).

Civil contempt is also known as "coercive" or "remedial" contempt because it seeks to remedy the violation of a court order. *In re Dotson*, 76 S.W.3d 393, 395 n.3 (Tex. Crim. App. 2002). The purpose of the contempt is to persuade the contemnor to obey a previous order. This is the classic situation of a witness being

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really germane to this anti-SLAPP appeal), this document here shows that there was a motion to disqualify filed against both counsel for Landess and the Klein defendants.

jailed until he agrees to testify. The judge may assess a fine, imprisonment, or both, and the sentence may be determinate or open-ended. The only requirement is that the contempt is conditional – the contemnor may escape the sentence by complying with the court order. In this way, the contemnors are said to carry "the keys of their prison in their own pocket." *Shillitani v. United States*, 384 U.S. 364, 368 (1966).

Criminal contempt, on the other hand, is also known as "punitive" contempt because it seeks to punish a violation. *Dotson*, 76 S.W.3d at 395 n.3. The lawyer fined for swearing in court is an example of criminal contempt. Or to jail a contemnor for what he did last Tuesday, again, criminal contempt is required. It is unconditional – the punishment stands regardless of what the contemnor may later do to comply with the court order. Criminal contempt thus requires due process and a higher standard on appeal because of this punitive nature. Criminal contempt in Texas is punishable by a maximum fine of $500 and confinement for no more than six months. Tex. Gov't Code § 21.002(b).

Due process must also be satisfied at the contemnor's hearing. Contempt proceedings are quasi-criminal in nature – that's true even for civil contempt because imprisonment is a possibility; thus they must comply with criminal standards of due process. *Ex parte Gonzales*, 945 S.W.2d 830, 836 (Tex. 1997). While a person held in civil contempt has no right to a jury trial, the right exists in

cases of criminal contempt if "serious" punishment is to be imposed. *Id.*; *Ex parte Werblud*, 536 S.W.2d 542, 547 (Tex. 1976). This is because there is no meaningful distinction between an individual's rights at stake in a constructive criminal contempt hearing and those at stake in an ordinary criminal trial. *Ex parte Johnson*, 654 S.W.2d 415, 421 (Tex. 1983).

Serious punishment is confinement for more than six months or a fine greater than $500. This determination is cumulative, so a series of smaller sentences for multiple violations can be combined to amount to a "serious punishment." *Ex parte Griffin*, 682 S.W.2d 261, 262 (Tex. 1984).

For these reasons, contempt proceedings must conform as nearly as practicable to other types of criminal proceedings. *Ex parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986). Further, although broad and inherent, the contempt power "must be exercised with caution." *In re Reece*, 341 S.W.3d 360, 362 (Tex. 2011).

## Opposing Counsel Cannot Prosecute

In 1987, the United States Supreme Court concluded that counsel representing a party in a lawsuit may not prosecute criminal contempt charges against the adverse party. Specifically, the Supreme Court has explained that criminal contempt proceedings arising out of civil litigation are between the public

and the defendant, and are not a part of the original cause. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (reversing criminal contempt judgment against defendants found to have aided or abetted violations of permanent injunction prohibiting infringement of manufacturer's trademark). In *Young*, the Court held that counsel representing a party to the original cause may not prosecute criminal contempt charges against another party. *Id.* at 809. Concurring, Justice Scalia also noted that the trial court itself cannot prosecute constructive criminal contempt charges. *Id.* at 816-19 (Scalia, J., concurring); *Crowe v. Smith*, 151 F.3d 217, 227-28 (5th Cir. 1998) ("where criminal contempt is involved, there must actually be an independent prosecutor of some kind, because the district court is not constitutionally competent to fulfill that role on its own").

In Texas, the First Court of Appeals, echoing the Supreme Court's holding in *Young*, has declared that counsel for a party who is a beneficiary of a court order may not prosecute a contempt action alleging violation of that order. *In re Luebe*, 2010 WL 1546961, at *5 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (citing *Young* and *In re Davidson*, 908 F.2d 1249, 1251 (5th Cir. 1990)). Likewise, the Eighth Court of Appeals has observed that prosecution of criminal contempt "is not left to the private citizen, but is the responsibility of the State." *Hawkins v. Walvoord*, 25 S.W.3d 882, 892 (Tex.App.—El Paso 2000, pet. denied).

In addition to Texas, numerous jurisdictions all across the country also adhere to the rule laid down by the U.S. Supreme Court in *Young*. See, e.g.:

- *Rogowicz v. O'Connell*, 786 A.2d 841 (N.H. 2001) (counsel for a party that is the beneficiary of a court order may not prosecute a criminal contempt action alleging a violation of that order);

- *In re Peak*, 759 A.2d 612 (D.C. 2000) (counsel for private parties should not be named to prosecute criminal contempt arising out of basic civil case);

- *McDermott v. McDermott*, 602 N.W.2d 676, 679 (Neb. App. 1999) (in criminal contempt proceedings where act charged was not committed in presence of court, prosecution must be brought by the state);

- *Hermina v. Baltimore Life Ins. Co.*, 739 A.2d 893, 903 (Md. App. 1999) (only the state's attorney may initiate criminal contempt proceedings in a civil case);

- *Trecost v. Trecost*, 502 S.E.2d 445 (W. Va. 1998) (it is improper to permit a party's private counsel in civil proceeding to prosecute charge of indirect criminal contempt arising from that proceeding);

- *Hancz v. City of South Bend*, 691 N.E.2d 1322, 1325 n.3 (Ind. App. 1998) (charge of criminal contempt should be prosecuted by the State in an independent action);

- *Burris v. Hunt*, 965 P.2d 1003, 1006 (Okla. App. 1998) (criminal contempt must be prosecuted by the state);

- *DiSabatino v. Salicete*, 671 A.2d 1344, 1352-53 (Del. 1996) (attorney for party that is beneficiary of court order in civil proceeding may not prosecute criminal contempt action alleging violation of that order);

- *Matter of Marriage of Dahlem*, 844 P.2d 208, 209 (Or. App. 1992) (criminal contempt action must be brought by city attorney, district attorney, or the attorney general);

- *Dept. of Social Serv., ex rel. Montero v. Montero*, 758 P.2d 298, 302 (Haw. App. 1988) ("We concur with Young's holdings and conclude that they should be applied in the courts of the State of Hawaii");

- *Anderson v. Anderson*, 667 P.2d 660, 664 (Wyo. 1983) ("once a contempt has been identified as criminal in nature, the proper aggrieved party is the State and not a private litigant");

- *Brotherhood of Locomotive Firemen & Enginemen v. U.S.*, 411 F.2d 312 (5th Cir. 1969) (counsel for private parties should not be named to prosecute criminal contempt arising out of basic civil case).

Clearly, the Klein defendants, attorney Morgan (in his *pro se* capacity), and defendant Landess, are all private citizens and are all beneficiaries of that court order.

However, in addition to the case law from the U.S. Supreme Court and the various Texas state courts of appeals, under Texas law, a private attorney is disqualified from prosecuting criminal contempt charges. For disqualification purposes, the *Texas Disciplinary Rules of Professional Conduct* are guidelines that articulate relevant considerations. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990). Disciplinary Rule 4.04(b)(1) provides that a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to gain an advantage in a civil matter. Tex. Disciplinary R. Prof. Conduct 4.04(b)(1).

An attorney attempting to prosecute criminal contempt charges against a client's adversary may violate this rule by, for example, offering to drop the contempt charges in exchange for some concession from the adversary. See 48A

Tex. Prac., *Tex. Lawyer & Jud. Ethics* § 9.4 (2012) (Rule 4.04 prohibits linking a criminal action to resolution of a related civil dispute). Or, a court might determine that the mere fact of the prosecution creates an unseemly appearance of conduct that violates Rule 4.04(b)(1).

The Supreme Court admonished in *Young* that an arrangement "represents an actual conflict of interest if its potential for misconduct is deemed intolerable." *Young*, 481 U.S. at 807, n. 18. Further, allowing counsel for an interested party to bring a contempt prosecution creates "at least the appearance of impropriety." *Id.* at 806; see also *Dunn v. Koehring Co.*, 546 F.2d 1193, 1203 (5th Cir. 1977) ("Seemingly, Koehring's only reasons for aiding in Dunn's prosecution were either a desire to see Dunn personally punished or to use this prosecution as a means to gain an advantage in the Mississippi suit for breach of warranty").

As mentioned previously, Retzlaff filed in the trial court a motion to disqualify opposing counsel Morgan and Landess. While disqualification is not specifically at issue in this anti-SLAPP appeal here, the appearance of impropriety is an important consideration in ruling on a disqualification motion. *In re Hoar Const., L.L.C.*, 256 S.W.3d 790, 798 (Tex. App. – Houston [14th Dist.] 2008, orig. proceeding). The integrity of legal proceedings and fairness in the administration of justice are also compelling considerations. *In re Seven-O Corp.*, 289 S.W.3d 384, 391 (Tex. App. – Waco 2009, orig. proceeding). Thus, a trial court might

decide that "in its proper function as internal regulator of the legal profession," it must disqualify an attorney from prosecuting criminal contempt charges against a client's adversary. *Howard v. Tex. Dept. of Human Servs.*, 791 S.W.2d 313, 315 (Tex. App. – Corpus Christi 1990, no writ).

Then you have got to figure out what procedures to use and how. In a normal criminal prosecution, the State (the District or County Attorney's Office) has obligations under the *Michael Morton Act*, SB 1611, as well as under *Brady*. But does any of this stuff transfer over to private attorneys who prosecute criminal contempt of court actions? NO! Are they even required to Mirandize folks before talking to them? How about Open File rules and such? But yet Due Process **requires** that all of these things MUST apply to criminal contempt cases. Private attorneys are neither trained nor equipped to handle these kinds of cases. Nor do they enjoy any of the same Sovereign Immunity protections that regular DA's and CA's get to have.

This is why this Court is asked to make a ruling here – a bright line in the sand – that says "**private attorneys are NOT allowed to prosecute criminal contempt of court actions in the state of Texas – period**."

Lastly, the fact that Morgan also admits that both he and Landess' counsel, Mr. Wenzel, are all witnesses to these alleged terrorist threats and email death

threats, that alone would bar him from prosecuting this matter. (See 2 RR 12:4-11.)

Because Morgan was prohibited from prosecuting this contempt of court action – either on his own behalf (*pro se*), as alleged, or as counsel for the Klein defendants – this legal action was completely frivolous and was, therefore, a SLAPP action; thus, Retzlaff wins and should be awarded mandatory sanctions and attorney's fees / expenses upon remand.

**Issue Six**: Did Retzlaff show by a preponderance of the evidence that Morgan's and Klein's legal action is based on, relates to, or is in response to Retzlaff's exercise of the right to petition?

## Argument & Authorities

Yes. In Morgan's live pleading, Morgan judicially admits:

> *Count 1 – Thomas Retzlaff violated this Exhibit "1" Order Declaring Tom Retzlaff a Vexatious Litigant. On July 29, 2016, Mr. Retzlaff deliberately, and with knowledge of the Order Declaring Tom Retzlaff a Vexatious Litigant, filed "Nonparty Tom Retzlaff's Motion to Quash/Motion for Protection from Discovery & Request for Sanctions Against Defendants Klein and Klein Investigations for Violation of CPRC Ch. 27 Anti-SLAPP Discovery Stay."* (CR 330 at ¶8; Apx Tab D.)
>
> *Count 2 – Mr. Retzlaff violated this Exhibit "1" Order Declaring Tom Retzlaff a Vexatious Litigant. On August 3, 2016, Mr. Retzlaff deliberately, and with knowledge of the Order Declaring Tom Retzlaff a Vexatious Litigant, filed "Supplement to Nonparty Tom Retzlaff's Motion to Quash and for Sanctions."* (CR 330 at ¶9.)
>
> *Count 3 – Mr. Retzlaff violated this Exhibit "1" Order Declaring Tom Retzlaff a Vexatious Litigant. On September 12, 2016, Mr. Retzlaff deliberately, and with knowledge of the Order Declaring Tom Retzlaff a Vexatious Litigant, filed "Second Supplement to Nonparty Tom Retzlaff's Motion to Quash and for Sanctions."* (CR 331 at ¶10).

Morgan's judicial admission conclusively establishes the basis of his suit without further evidence. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d

562, 568 (Tex. 2001). Morgan is barred from disputing it. *Id*. Thus, Morgan's suit is indisputably based on Retzlaff's communication in a judicial proceeding.

No further evidence is required to establish the application of the TCPA. *See In re Lipsky*, 411 S.W.3d 530, 542 (Tex. App. Fort Worth 2013, orig. proceeding) *mandamus denied*, 2015 Tex. LEXIS 350 (Tex. April 24, 2015) (a movant's showing that the TCPA applies may be based on the nonmovant's pleadings alone). It is not seriously in question that the TCPA applies to Morgan's claims arising from Retzlaff's exercise of the right to petition.

A recent case with nearly identical legal and factual issues that involve the TCPA and the Judicial Communications privilege with regards to depositions subpoenas is *Watson v. Hardman*, No. 05-15-01355-CV, 2016 Tex. App. LEXIS 7111, 2016 WL 3626091 (Tex. App. – Dallas, July 6, 2016, no pet.) (considering appeal from trial court's denial of TCPA motion to dismiss). In *Watson*, the TCPA motion to dismiss was filed in a separate lawsuit, not in the Rule 202 proceeding. 2016 Tex. App. LEXIS 7111, [WL] at *1-2. The TCPA movant sought to dismiss the plaintiffs' defamation claims against him, asserting that their claims were based on his TCPA-protected right to petition because they were based in part on statements made by the movant in a Rule 202 petition. The court of appeals held that the TCPA movant carried his burden of showing that the nonmovants' defamation claims were based on his protected right to petition. 2016 Tex. App.

LEXIS 7111, [WL] at *3-4. The court concluded that a Rule 202 petition is a "communication in or pertaining to . . . a judicial proceeding" within the meaning of the Act, and therefore, the movant's Rule 202 petition was an exercise of his right to petition. 2016 Tex. App. LEXIS 7111, [WL] at *3. The court also determined that the nonmovants' claims based on the movant's Rule 202 petition should have been dismissed by the trial court because they were barred by his defense of the absolute privilege that protects communications made in the course of judicial or quasi-judicial proceedings. 2016 Tex. App. LEXIS 7111, [WL] at *6.

An absolute privilege applies to communications published during the course of a judicial proceeding. *Johnson-Todd v. Morgan (Johnson-Todd II)*, 480 S.W.3d 605, 610 (Tex. App. – Beaumont 2015, pet. denied) (Apx Tab L.); *Senior Care Res. v. OAC Senior Living, LLC*, 442 S.W.3d 504, 512 (Tex. App. – Dallas 2014, no pet.). Communications made in the due course of a judicial proceeding will not serve as the basis of a civil action, regardless of the negligence or malice with which they are made. *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982); *Johnson-Todd II*, 480 S.W.3d at 610; *Fitzmaurice v. Jones*, 417 S.W.3d 627, 633 (Tex. App. – Houston [14th Dist.] 2013, no pet.). This privilege extends to any statements made by the judges, jurors, counsel, parties, or witnesses and attaches to all aspects of the proceedings, including statements made in open court, pre-trial

hearings, depositions, affidavits, and any of the pleadings or other papers in the case. *Brown*, 637 S.W.2d at 916-917. As the Texas Supreme Court has held for over 70 years:

> **An absolutely privileged communication is one for which, by reason of the occasion upon which it was made, no remedy exists in a civil action for libel or slander.**

*Reagan v. Guardian Life Ins. Co*., 166 S.W.2d 909, 912 (Tex. 1942). The absolute privilege functions "as an immunity" because it is based on the actor's personal position or status and not the actor's motivation. *Hurlbut v. Gulf Atl. Life Ins. Co*., 749 S.W.2d 762, 768 (Tex. 1987). In other words the "absolute privilege is not a defense. Rather, absolutely privileged communications are not actionable." *CEDA Corp. v. City of Houston*, 817 S.W.2d 846, 849 (Tex. App. – Houston [1st Dist.] 1991, writ denied).

Under Section 27.006(a) of the TCPA, the trial court may consider pleadings when determining whether to dismiss a legal action though the TCPA does not require a movant to present testimony or other evidence to satisfy his evidentiary burden. See *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015) ("[T]he court is to consider the pleadings and any supporting and opposing affidavits" when considering dismissal.); *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App. – Austin 2015, no pet.). Thus, Retzlaff has established his immunity.

**Issue Seven**: Morgan, in his *pro se* and individual capacity, is a proper party to this proceeding.

## Argument & Authorities

As is often the case when dealing with a Morgan / Klein lawsuit, when faced with opposition from both the law and the facts, Morgan will engage in a game of *Whack-a-Mole* with endless amendments and supplementations to whatever pleading is supposed to be the "live" pleading in order to attempt escape from the consequences of his own incompetence. This case is no different.

Specifically, on September 14, 2016, the Klein defendants and their attorney John Morgan (**acting in his pro se capacity**) filed their motion for contempt against Retzlaff. (CR 326; Apx Tab D.) However, on October 10, 2016, the Klein defendants and Morgan filed an amended motion for contempt that deletes all references to Morgan acting in his *pro se* capacity in an admitted attempt to avoid having Morgan declared a Vexatious Litigant and suffer TCPA sanctions – **or at least that is what they thought**.[18] (CR 1024.)

[18] Even in the amended motion Morgan is still requesting relief on his own behalf (i.e. pro se). See, e.g., "*Morgan requests that each period of confinement run and be satisfied concurrently, for Mr. Retzlaff.*" D's Amend. Mot. at ¶15 found at CR 1030.

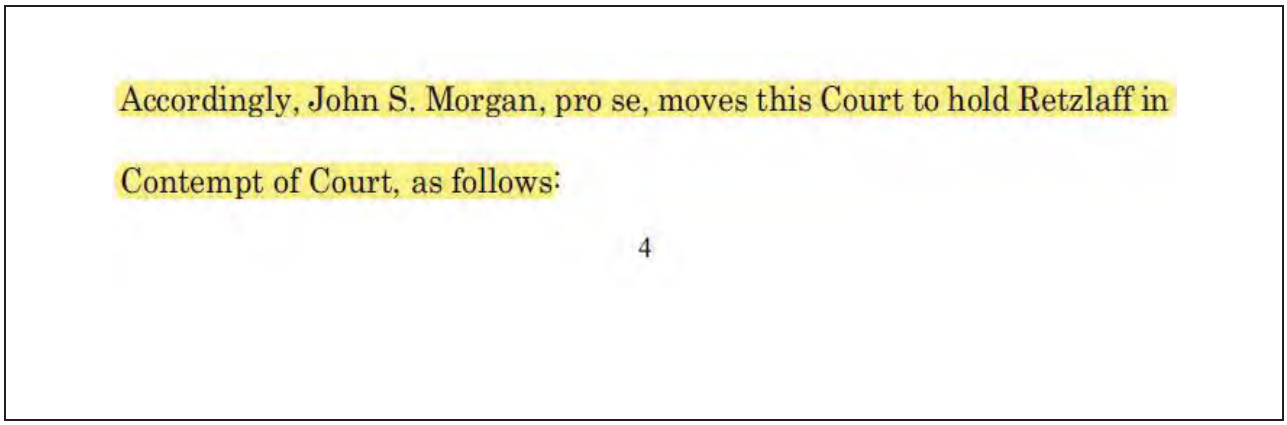
## Morgan Cannot Escape Sanctions By Amendment Of Pleadings

Pursuant to the Texas Citizens Participation Act (TCPA), Texas Civil Practice & Remedies Code Chapter 27, Morgan and the Klein defendants are prohibited from trying to escape sanctions via the amendment of their pleadings.

Why is that? Well, as the Court well-knows, amended pleadings and their contents take the place of prior pleadings. Tex. R. Civ. P. 62; *J.M. Huber Corp. v. Santa Fe Energy Res.*, 871 S.W.2d 842, 844 (Tex.App. – Houston [14th Dist.] 1994, writ denied). So, causes of action not contained in amended pleadings are effectively nonsuited or dismissed at the time the amended pleading is filed. *FKM Prtshp. v. Bd. of Regents of the Univ. of Houston*, 255 S.W.3d 619, 633 (Tex. 2008). Thus, when Morgan and the Klein defendants filed their amended motion for contempt (in which they now claim to have removed all references to Morgan being *pro se* and entitled to relief against Retzlaff in his individual capacity), this amendment acted as a voluntary nonsuit or dismissal of these claims.

While Morgan and the Klein defendants try to characterize this amendment as merely a correction of a typographical error, Retzlaff would say **"That is a lie."**

Here is what Morgan said in that original motion for contempt:

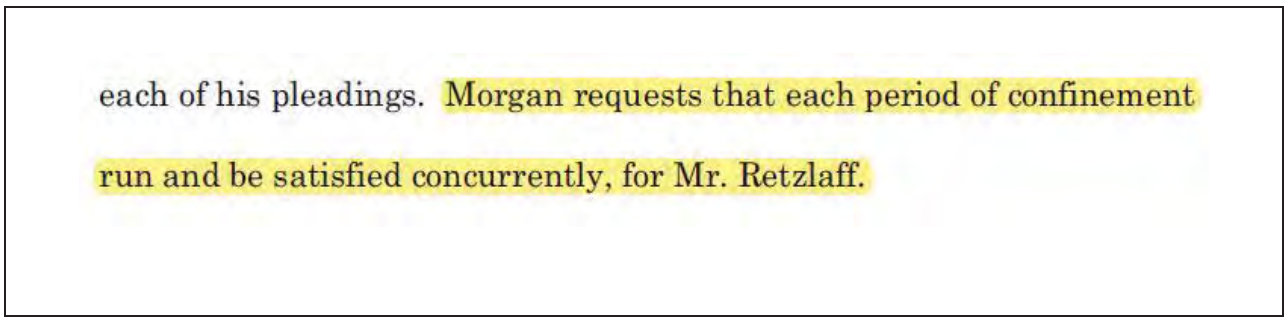


Accordingly, John S. Morgan, pro se, moves this Court to hold Retzlaff in Contempt of Court, as follows:

4

(See last sentence in ¶7 at CR 329, bottom of the page; Apx Tab D.)

This is not a typographical error. This is a complete sentence consisting of 105 separate and distinct strokes on the keyboard. **But wait – there's more!**



each of his pleadings. Morgan requests that each period of confinement run and be satisfied concurrently, for Mr. Retzlaff.

(See last sentence in ¶15 at CR 332.)

Mr. Dorrell's filings in this case. Mr. Morgan requests this Court order sanctions in the amount of $12,500.00 for each lie by Mr. Retzlaff and Mr. Dorrell that can be demonstrated to the Court through appropriate testimony.

(See last sentence of ¶22 at CR 335.)

violations the Court Order of Judge Karen Crouch. Mr. Retzlaff should be Ordered to pay John S. Morgan reasonable attorneys' fees, expenses and costs, by Mr. Retzlaff, and a judgment should be rendered in favor of John S. Morgan against Thomas Retzlaff and Order Thomas Retzlaff to pay

(See middle of ¶18 at CR 333.)

So, as the Court can plainly see, we have four separate instances in which Morgan is acting *pro se* and demanding relief in his individual capacity, not in his

capacity as the attorney for the Klein defendants, in that original motion for contempt.

By this new amendment (at CR 1024), Morgan is now attempting to escape the consequences of his "typographical" errors and flee from TCPA sanctions. This scenario is identical to one played out in a previous Morgan-authored SLAPP suit that was filed against Retzlaff almost 3 years ago and that resulted in the signing of that sanctions order in *Rauhauser v. McGibney*, 2014 Tex. App. LEXIS 13290 (Tex. App. – Fort Worth Dec 11, 2014, no pet.) (http://www.courthousenews.com/2016/01/15/1-3-million-in-anti-slapp-sanctions.htm). The unanimous decision from the Fort Worth Court of Appeals is that a TCPA motion for sanctions survives plaintiff's nonsuit. This holding was also reached by this Court in *Souza v. Tessmer*, 2015 Tex. App. LEXIS 8686, *4 n.2 (Tex. App. – San Antonio Aug. 19, 2015) (request for attorney's fees and costs under the TCPA is a claim for affirmative relief that survived nonsuit).

As mentioned in the Retzlaff TCPA motion to dismiss, under the TCPA, a "legal action" includes not only a "lawsuit" but also a "cause of action." TCPA §27.001(6). Plainly, the motion for contempt filed by Morgan and the Klein defendants is a "legal action."

Keep in mind, too, that Morgan only filed the amended motion for contempt after Retzlaff had already filed his anti-SLAPP motion.

While it is true that a nonsuit renders some interlocutory orders moot and unappealable, *Univ. of Tex. Med. Branch at Galveston v. Blackmon,* 195 S.W.3d 98, 101 (Tex. 2006), notable exceptions apply. *Villafani v. Trejo*, 251 S.W.3d 466, 469-70 (Tex. 2007).

> **Just as the trial court has jurisdiction to enter a dismissal with prejudice upon the filing of a nonsuit to effectuate a settlement agreement, it must also have jurisdiction to enter a dismissal with prejudice in other nonsuit situations**.

*Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010) [emphasis added]; *see also Villafani*, 251 S.W.3d at 469-70. Although *Villafani* was decided under the Medical Liability Insurance Improvement Act, at least two courts have relied on *Villafani* to hold that a TCPA motion to dismiss was not "rendered moot" by a plaintiff's nonsuit. *See James v. Calkins*, 446 S.W.3d 135, 144 (Tex. App. – Houston [1st Dist.] 2014, pet. denied) (holding that the reasoning of *Villafani* "applies with equal force" to a TCPA case); *Rauhauser v. McGibney*, 2014 Tex. App. LEXIS 13290 at *5- 8 (Tex. App. – Fort Worth 2014, no pet.) (nonsuit 3 days after filing TCPA motion; $450,000 in attorney's fees and sanctions awarded on remand).

Morgan's eleventh-hour attempt to escape the consequences of filing SLAPP claims against Retzlaff by quietly abandoning them – *after* Retzlaff had already incurred significant expenses and fees to defend – avails Morgan nothing.

In both versions of the motion for contempt (original and amended) Morgan is seeking to punish Retzlaff on account of his objecting to a deposition subpoena from them in which the Klein defendants sought Retzlaff's private email correspondences and business records. Thus, Retzlaff has met his burden of establishing that this legal action is based on, relates to, or is in response to Retzlaff's exercise of the right of free speech or petition and the Court is required to dismiss the contempt action, award Retzlaff his fees and expenses, **as well as mandatory sanctions against Morgan in his individual and pro se capacity**.

While coming from a federal case, Retzlaff finds these words to be applicable to Morgan:

> An attorney is schooled in the law. Because of his unique relationship with his clients and with the public, he is taught ethics and governed by rules of professional ethics. The Court has a right to expect him, as an officer of the Court, to lend his assistance in preserving order and decorum in the Court; to be truthful and forthright with the Court and other counsel; to be truthful and not mislead the Court or other counsel. His signature certifies that pleadings and other documents filed by him are "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11. He is bound to preserve the integrity of the law and the Constitution of the United States and the several states and to seek justice in his representation of clients before the Court. In his conduct in this case, [counsel] has actively violated almost every one of these ethical and professional responsibilities.

*Nasco, Inc. v Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 144 (W.D. La. 1989), *aff'd and remanded*, 894 F.2d 696 (5th Cir. 1990), *aff'd sub nom.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

**Issue Eight**: Did Retzlaff show by a preponderance of the evidence each essential element of any valid defense to Morgan's and the Klein defendants' claims?

## Argument & Authorities

Yes. Retzlaff filed a motion to dismiss Morgan's and the Klein defendants' claims (CR 689) under TCPA § 27.003, which provides:

> **If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, to petition, or right of association, that party may file a motion to dismiss the legal action.**

TCPA § 27.003(a). With only a single exception,

> **[A] court must dismiss a legal action against the moving party if the party shows by a preponderance of the evidence that the legal action is based on, relates, or is in response to the party's exercise of:**
>
> **(1) the right of free speech;**
> **(2) the right to petition; or**
> **(3) the right of association.**

TCPA § 27.005(b); *Rehak*, 404 S.W.3d at 723. As noted above, the exception is:

> **The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.**

TCPA § 27.005(c); *Johnson-Todd v. Morgan II*, 480 S.W.3d 605, 606 (Tex. App. – Beaumont 2015, pet. denied). (Apx. Tab L.) Thus, in the first part of its inquiry, the Court must determine whether the TCPA applies.

Dismissal under the TCPA may be based upon facts alleged in Morgan's and the Klein defendants' pleadings alone and even the *response* of them itself to Retzlaff's TCPA motion to dismiss.

> **We conclude, based on the facts alleged by Range in its pleading and in its response to Relator's motions to dismiss, that Range's claims are based on Relators' exercise of their 'right to petition'….**

*In re Lipsky*, 411 S.W.3d 530, 542 (Tex. App.—Fort Worth 2013, orig. proceeding), *mandamus denied*, 460 S.W.3d 579 (Tex. 2015). Other courts have similarly held:

> **[I]n their petition in intervention, appellees stated their claims for defamation and intentional infliction of emotional distress were filed as a result of appellants' "false statements posted on Angie's List." Therefore, the claims were filed in response to appellants' exercise of the right to free speech as required by the TCPA.**

*Young v. Krantz*, 434 S.W.3d 335, 342 (Tex. App. – Dallas 2014, no pet.), *disapproved on other grounds*, *In re Lipsky*, 460 S.W.3d 579, 587, 591 (Tex. 2015); *see also Watson v. Hardman*, 497 S.W.3d 601 (Tex. App. - Dallas 2016, no pet.); *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App. – Austin 2015, no pet.).

Thus, the Court need look no further than Morgan and the Klein defendants' pleadings to determine whether their "legal actions" were based on, related, or in response to Retzlaff's exercise of the rights of free speech or to petition. If so, then the TCPA applies.

However, before we get to whether or not they can meet their burden under the statute, even if Morgan and the Klein defendants met this burden, the Court is required to dismiss the claims if Retzlaff establishes by a preponderance of the evidence each essential element of a valid defense to their claim. TCPA § 27.005(d).

In the case at hand, Klein's and Morgan's own pleadings establish that the absolute *judicial communications privilege* provides Retzlaff a valid defense with respect to all of Klein's and Morgan's claims. See *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982). Under the judicial communications privilege, statements made in the due course of judicial proceedings cannot serve as the basis for civil actions. *Id*. This privilege extends to statements made by the judges, jurors, counsel, parties, or witnesses, and the privilege attaches to all aspects of the proceedings, including statements that are made in open court, pretrial hearings,

depositions, affidavits, **and any of the pleadings or other papers filed in a case.**

*Id*. at 916-17 (emphasis added). [19]

[19] It is unlikely that Morgan is as oblivious to the broad scope of the absolute judicial communications privilege as he pretends to be given that attorney John S. Morgan is a gluttonous consumer of its benefits as clearly evidenced by his pleadings in both this Court and in the trial court below.

**Issue Nine**: Did Morgan and Klein marshal "clear and specific evidence" of a prima facie case for each essential element of each claim in question?

## Argument & Authorities

No. In fact they did not even attempt it. The pleadings show that the reason for filing the motion for contempt was Retzlaff's filing of his motion for protective order from the abusive and illegal subpoenas that Morgan and Klein faxed to Arizona.

The entire premise of this contempt action is invalid because (1) a private attorney cannot prosecute criminal contempt actions against an opposing party, (2) the vexatious litigant statute does not apply because Retzlaff is acting "defensively" and was brought into court involuntarily, and (3) Retzlaff enjoys "immunity" based upon the Judicial Communication Privilege. Thus, no evidence supports any element of their claims.

Instead of offering evidence, Morgan and Klein chose to attach to their pleadings hundreds of pages of unauthenticated, inadmissible conjecture of wild conspiracy theories based on claims of what "some guy said on the internet." (CR 996-1023.) Specifically, Morgan and Klein appended 178 pages of miscellaneous documents (CR 620-798) to their response to Retzlaff's TCPA motion to dismiss and an additional 43 pages to their supplemental response (CR 980-1023) – in the

apparent belief that merely making a document part of the Clerk's Record would transform it into "clear and specific evidence" a court could consider to defeat Retzlaff's motion. Morgan and Klein are mistaken.

The TCPA provides express instructions for what a court may consider in ruling on a TCPA motion to dismiss:

> **In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating facts on which liability or defense is based.**

TCPA § 27.006(a) [emphasis added]; *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015, orig. proceeding).

Despite filing several THOUSANDS of pages of documents with the trial court *not one page* of Morgan's or Klein's documents is an "affidavit stating facts on which liability or defense is based." Obviously, if simply typing allegations into a pleading could transmogrify naked allegations into "evidence," no legal action could ever be dismissed under the TCPA.[20]

[20] In the case at bar, as the Court has already seen several times, these claims include such bizarre fantasies as that Retzlaff and/or Mr. Dorrell are the captains of a "death threat" conspiracy against Klein's counsel that uses "convicted felons" and shadowy minions of the "Aryan Brotherhood" to practice "extortion" and other crimes – and even involves extensive *ex parte* communications with the members of this Court, with federal courts, and the Texas Supreme Court.

**Issue Ten**: Did the trial court abuse its discretion by denying Retzlaff's motion for protection from the Klein defendants' improper discovery requests – and thereby destroying Retzlaff's rights?

## Argument & Authorities

Retzlaff claims the trial court violated Retzlaff's fundamental rights to privacy and Due Process by striking his objections and motion for protection from these GoDaddy subpoenas at the October 11, 2016, hearing. (See 1 Supp. CR 1 for Retzlaff's motion for protection and CR 1280 for order granting motion to strike Retzlaff's pleadings.)[21]

Morgan and the Klein defendants admitted to the trial court that the Fort Worth lawsuit involving Morgan's former client McGibney has absolutely nothing to do with the case at hand. (2 RR 11:17-24.) Furthermore, Morgan admits that he is no longer the attorney for McGibney and that he was the attorney for McGibney for a "very, very short period of time" before another attorney (Paul Gianni) took over. (*Ibid*.) Morgan goes on to state during the October 17, 2016, hearing that the reason why he issued all of these subpoenas to nonparty GoDaddy.com (CR 185, 193, and 201) had something to do with claims of "terrorist threats via e-mail"

[21] Retzlaff attempted to raise this issue in a recent Petition for Writ of Mandamus that he filed with this Court on Nov 15, 2016, but which was denied. See *In re Retzlaff*, 2016 Tex. App. LEXIS 12521 (Tex. App. San Antonio Nov. 23, 2016). Thus, other than this appeal, Retzlaff has no other way of seeking review of the denial by the trial court. So this Court should rule on this matter, too.

allegedly from Retzlaff that Morgan claimed were reported to the police and the Bexar County District Attorney's Office. (2 RR 12:4-11.)[22] However, it should be noted that two of the subpoenas were issued in cases far outside of Bexar County. Specifically, one subpoena was issued in the case *Morgan v. Johnson-Todd*, Case # 126,841 in the County Court at Law #1 of Jefferson County, Texas. This is the case in which the Beaumont Court of Appeals ordered Morgan to pay anti-SLAPP sanctions last year in *Johnson-Todd v. Morgan*, 480 S.W.3d 605 (Tex.App. – Beaumont 2015, pet. denied). (CR 262.) The second is a case filed Justice Court of Pct. 1, Place 2 of Jefferson County, in the case *Morgan v. ARD Well Services, LLC*, Case # 11,789. This lawsuit was filed on February 14, 2014. (CR 300.) While Mr. Dorrell is the attorney in the Johnson-Todd case, neither Mr. Dorrell nor Retzlaff have any involvement whatsoever in the ARD Well Svc case.

Of course, Morgan offers no explanation whatsoever as to why he, personally, needed to get these documents even though the police and the Bexar County District Attorney were supposedly investigating (agencies one can presume

[22] No evidence of these claimed reports to law enforcement were ever produced by Morgan. Which is really strange when the Court considers the fact that Morgan and Klein never hesitated to file anything else in their pleadings (no matter how outlandish or ridiculous), such as: Their 238 page Defendants' Motion for Contempt Against Tom Retzlaff (CR 326-564); their 238 page Amended Motion for Contempt (CR 1024-1262); or their 41 page Notice of Filing Death Threat Article (2 Supp CR 1203-1244); or their Notice of Filing Threatening Email from Thomas Retzlaff (2 Supp CR 1245); or their 50 page Supplemental Response in Opposition to Retzlaff's TCPA Motion to Dismiss (CR 973-1023); or their Notice of Filing Thomas Retzlaff and Jeffrey Dorrell's Blog Post Providing Personal Information of Defendant Philip R. Klein (2 Supp CR 1248).

are knowledgeable and experienced in investigating emails and terrorist threats). And, of course, Retzlaff does not need to point out that John Morgan is a convicted criminal and an admitted perjurer who is facing disbarment proceedings. (1 Supp CR 29.)[23] So anything he says in court should be taken with a very heavy grain of salt. Please understand that this is simply not an *ad hominem* attack against opposing counsel. Morgan's criminal history is relevant to the trial court's determination (and this Court's determination) as to Morgan's credibility and whether or not what he says makes sense and is reasonable.

But what is not relevant to this lawsuit involving appellees *E.M & V.B.M. v. Philip Klein, Klein Investigations & Consulting, and James Landess* is anything having to do with Tom Retzlaff and the Fort Worth lawsuit against Morgan's long-ago former client, San Jose, CA, revenge pornographer / sexual blackmail artist James McGibney. Even if this Court were to accept as true Morgan's claims of "terrorist threat emails" and a "death threat conspiracy" involving Retzlaff and Mr. Dorrell, so what? All of this supposed stuff took place long after the lawsuit against Landess and the Klein defendants was filed.

As explained in the motion for protection, the GoDaddy subpoenas (1) were served well outside the 150 mile subpoena range (1 Supp. CR 8 at¶19); (2) were

[23] For a more detailed look at Morgan's criminal activities and appellate court findings of aggravated perjury, Retzlaff would direct this Court's attention to *In the Interest of A.K.M.*, 2014 Tex. App. LEXIS 2230 (Tex. App. Beaumont Feb. 27, 2014, pet. denied) attached as Apx Tab M.

seeking emails in violation of the Stored Communications Act, 18 U.S.C. § 2702(a)(1) (1 Supp. CR 7-8 at ¶18); (3) were served not in compliance with TRCP 201 (See Tex. R. Civ. P. 201.1(a)(1)-(4)); and (4) wholly failed to comply with the mandatory requirements of the Uniform Interstate Depositions and Discovery Act that is codified in Arizona Rule of Civil Procedure 45.1 with regards to their attempt to subpoena an Arizona based entity (1 Supp. CR 8-9 at ¶20).

The bottom line is that each state has the right to control the manner and method by which records are produced within the borders of that state, but no state has the right to command the production of records from another state that violates the law of the place where the records are kept. A Texas subpoena, or even an order from a Texas court, is not valid cross state lines.

Not too long ago this Court decided a similar case that also involved the right of a nonparty to object to object to a discovery request and file a motion for protection. *In re Shell E & P, Inc.*, 179 S.W.3d 125, 130 (Tex.App. – San Antonio 2005 (orig. proceeding) (holding that nonparty had right under Rule 192.6(a) to seek protection).

Lastly, Retzlaff would direct the Court's attention to the Klein Appellees' Motion to Strike Retzlaff's Correspondence that was filed in this Court on December 16, 2016. Specifically, in the Conclusion of this motion (on page 8) Morgan and the Klein appellees make the following statement:

***Mr. Retzlaff is a Vexatious Litigant who has literally hijacked this case. He is not a party. He is not a witness.***

Thus the question begs: If Retzlaff is not a party and not a witness, then why the hell did those guys come all the way out to Arizona to subpoena Retzlaff's business records and personal email correspondence? The obvious answer is: This was done for SLAPP purposes and for intimidation.

## VIII. CONCLUSION

Normally people resort to the court system to resolve grievances and discover the truth. But in all of these SLAPP cases involving myself and Mr. Dorrell, however, Morgan and Klein have used this system to create strife and perpetuate lies.

To put it bluntly, this is a **bullshit, frivolous legal action** brought in bad faith and pursued in bad faith by a lunatic client intent on using the courts as a defamation-free zone to promote his increasingly bizarre conspiracy theories, and by a lawyer who has been called out on several occasions by this Court – and other courts – for his lack of competence and professional ethics and apparent inability to follow the Court's rules. Morgan and Klein are no strangers to the legal system and they are all too familiar with filing bogus lawsuits to extort people.

In case the Court has not figured it out by now, John Morgan is a marginal solo practitioner, (more commonly known as a *ham and egg lawyer*). He works alone and he lives paycheck to paycheck. Morgan does not have a job so much as he has an office, with a phone, that he shares space in. Morgan dresses up like a lawyer, goes in to work, and sits at his desk. The phone hasn't been ringing much (or at all if you want to get technical about it). Big cases don't come Morgan's way; court appointments do. Thus, there is no reason for Morgan not to be filing

SLAPP suits because, for him, there are no downsides. Blackmail and extortion in the defamation-free zone of the courtroom are his bread and butter.

Despite the personal and financial difficulties suffered by myself here, it is important that justice be done – not only done, but *seen* to be done – if anyone is to ever trust the courts again. Klein and Morgan are men of unlimited stupidity. Y'all need to drop a hammer on these fools and I want a million dollars in SLAPP sanctions for my troubles.

Respectfully submitted,

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Appellant, pro se

## IX. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 14,866 words, including footnotes, (excepting caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix).

In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Respectfully submitted,

Thomas Retzlaff

# CERTIFICATE OF SERVICE

I certify that on January 13, 2017, a copy of this document was electronically filed with the Texas e-Filing system, which will automatically serve a Notice of Electronic Filing on the following counsel of record:

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Thomas Retzlaff

**04-16-00675-CV**

TOM RETZLAFF,

*Appellant,*

v.

JOHN S. MORGAN, PHILIP R. KLEIN, KLEIN INVESTIGATIONS & CONSULTING
JAMES W. LANDESS, E.M. AND V.B.M.,

*Appellees*

# APPELLANT'S APPENDIX

## LIST OF DOCUMENTS

8. Vexatious Litigant Statute, Tex. Civ. Prac. & Rem. Code chapter 11 ..... **TAB H**

9. *John v. Superior Court of Los Angeles*, 369 P.3d 238 (Cal. 2016) .... **TAB I**

10. *ViaView, Inc. v. Retzlaff* (2016), 1 Cal.App.5th 198 ..... **TAB J**

11. *McGibney, et al. v. Retzlaff*, 2015 U.S. Dist. LEXIS. 79434 (N.D. Cal. June 18, 2015) ..... **TAB K**

12. *Johnson-Todd v. Morgan*, 480 S.W.3d 605 (Tex. App. – Beaumont 2015, pet. denied) ..... **TAB L**

13. *In the Interest of A.K.M.*, 2014 Tex. App. LEXIS 2230 (Tex. App. Beaumont Feb. 27, 2014, pet. denied) ..... **TAB M**

14. Appellate court order of Oct 17, 2016 ..... **TAB N**

15. Appellant court order of Oct 21, 2016 ..... **TAB O**