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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. D-1-GN-18-001605
COURT OF APPEALS NO. 03-18-00614 FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS

MARCEL FONTAINE,) IN THE DISTRICT COURT
Plaintiff,) JEFFREY D. KYLE
Clerk
V.)
TRAVIS COUNTY, TEXAS
ALEX E. JONES, INFOWARS,)
LLC, FREE SPEECH SYSTEMS,)
LLC and KIT DANIELS,)
Defendants.) 459TH JUDICIAL DISTRICT

HEARING ON MOTION TO DISMISS

On the 2nd day of August, 2018, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable Scott H.
Jenkins, Judge presiding, held in Austin, Travis County,
Texas;

Proceedings reported by machine shorthand.

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I N D E X

VOLUME 1

HEARING ON MOTION TO DISMISS

AUGUST 2, 2018

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PROCEEDINGS

1
2 THE COURT: We are on the record in
3 Cause No. GN-18-1605. Is it Marcel Fontaine?

4 MR. BANKSTON: Yes, Your Honor.

5 THE COURT: Versus Alex Jones, InfoWars,
6 LLC, Free Speech Systems, LLC, and Kit Daniels. Would
7 you announce your presence for the record beginning with
8 counsel for plaintiff.

9 MR. BANKSTON: Yes, Your Honor. Mark
10 Bankston and William Ogden for the plaintiffs.

11 THE COURT: For defendants.

12 MR. TAUBE: Good afternoon, Your Honor.
13 Eric Taube and Kevin Brown on behalf of Alex Jones,
14 InfoWars, LLC, Free Speech Systems, LLC, and Kit
15 Daniels.

16 THE COURT: Thank you, Counsel. You are
17 set today on defendants' motion to dismiss under the
18 Texas Citizens Participation Act, which was filed on
19 June 5th of this year. As of first thing this morning,
20 the file reflected that that motion was filed,
21 plaintiff's response was filed on 6-26, but then late to
22 arrive in the file was something filed at almost
23 6:00 p.m. yesterday, defendants' reply to plaintiff's
24 response, which fortunately I've seen.

25 And then something was handed to me more

1 recently than that indicating that something was filed
2 late this morning, defendants' supplemental evidentiary
3 objections to plaintiff's response to defendants' motion
4 to dismiss. And I've been handed yet another document
5 indicating that plaintiff is in the process of
6 attempting to file a supplemental exhibit, and I've been
7 given notice of the supplemental exhibit.

8 You've announced that you will do this in
9 one hour per side. What I wish I had done yesterday and
10 what I will do today and what I'm going to do later this
11 afternoon on the case yesterday is to require the
12 lawyers to announce on the record and be bound by it
13 precisely what is in the file that is of any import to
14 this motion for this Court's consideration.

15 As you know, the Court has limited time to
16 rule. And so when the Court is given a record that is
17 not entirely clear or in some cases objections that are
18 just too voluminous to account for, it poses a real
19 problem, because you're entitled to a prompt ruling, but
20 you've got to make it possible for the Court to do that.

21 So you must use part of your hour to do
22 that. When you're out of time on your hour you're out
23 of time, no matter what else you might want to say. The
24 plaintiff -- I mean, I'm sorry, the defendant/moving
25 party will go first. You can use 45 minutes or more.

1 You can't reserve more than 15 minutes because you can't
2 sandbag, as you know, but you can expend most of your
3 energy on the front end explaining your position,
4 reserve a little bit of time to rebut their argument,
5 which they will make in one hour or less.

6 Does everybody understand and agree those
7 are the rules for this hearing?

8 MR. TAUBE: Of course, Your Honor.

9 MR. BANKSTON: Agreed, Your Honor.

10 THE COURT: All right. So when you first
11 stand and speak when it's your turn, identify
12 everything -- I just had a new and improved court
13 register just printed for me, which doesn't include this
14 plaintiff's notice of filing supplemental exhibit yet
15 because the clerk hasn't even had time to address that.
16 So you'll have to go item by item by item, and I will
17 flag them as you speak so I know what's in the file from
18 your perspective that I must consider. And hopefully
19 you don't have to use too much of your time doing that.
20 You may proceed.

21 MR. TAUBE: Thank you, Your Honor. If it
22 please the Court, Your Honor, Eric Taube on behalf of
23 each Alex Jones, InfoWars, LLC, Free Speech Systems,
24 LLC, and Kit Daniels. And Mr. Brown, Kevin Brown, is
25 with me here at counsel table.

1 Your Honor, we have supplied to the Court
2 a binder that has all of the information that I think is
3 in the record that needs to be in the record from our
4 perspective for the Court. It is --

5 THE COURT: But on the record I want you
6 to recite it so that there can be no dispute later
7 what's in the record and what's not.

8 MR. TAUBE: About to do that, Your Honor.

9 THE COURT: Sure.

10 MR. TAUBE: So plaintiff's original
11 petition.

12 THE COURT: Filed on -- that should be at
13 the beginning of my register. Got it.

14 MR. TAUBE: Yes, sir. Then defendants'
15 motion to dismiss under the Citizens Protection Act,
16 which was filed on June 5th, 2018; plaintiff's response
17 to the motion to dismiss, which is -- I don't have the
18 filing information on it, Your Honor, but I believe it
19 was filed about a week ago.

20 THE COURT: It was filed according to the
21 clerk's registry on July 26. Does that sound about
22 right to you?

23 MR. TAUBE: Yes, sir, it does. The
24 defendant -- and actually, Your Honor, just to make sure
25 it's clear, in our -- in the defendants' motion to

1 decision under the Citizens Protection Act, we have an
2 affidavit of Mr. Daniels, which is attached. And all
3 the exhibits obviously that are part of that should also
4 be included, including the exhibits that are part of
5 plaintiff's original petition.

6 THE COURT: I'm assuming when you recite
7 these things you're referencing everything that was
8 included with that filing.

9 MR. TAUBE: Fair enough, Your Honor.
10 Thank you. Then we filed yesterday and served on
11 counsel defendants' reply to plaintiff's response to the
12 motion to dismiss.

13 THE COURT: And that was filed at
14 6:00 p.m. yesterday; is that correct?

15 MR. TAUBE: Yes, sir.

16 THE COURT: Is that when you served it on
17 the other side?

18 MR. TAUBE: Yes, sir. I think we may have
19 served it at 6:00. I mean, it was served by ECF, but we
20 also emailed it to counsel at 6:01, 6:10, 6:15, in that
21 range.

22 THE COURT: So sometime after 6:00 p.m.
23 yesterday they received this reply.

24 MR. TAUBE: That's correct, Your Honor.

25 THE COURT: All right.

1 MR. TAUBE: And then also, Your Honor,
2 this morning we filed defendants' supplemental objection
3 to plaintiff's response to the motion to dismiss.

4 THE COURT: It appears to have been filed
5 about a quarter till 11:00 this morning.

6 MR. TAUBE: Yes, Your Honor. And it
7 relates to one specific statement in one affidavit filed
8 by plaintiff.

9 THE COURT: And counsel on the other side
10 is from out of town, so in what fashion or manner did
11 you allow him to be aware of this?

12 MR. TAUBE: I believe, again, it was
13 served by ECF, Your Honor, pursuant to the rules, and I
14 believe we also served it by email.

15 THE COURT: So if he had Wi-Fi in his
16 transit here on the way today or wherever he is in
17 Austin, he would have received it electronically.

18 MR. TAUBE: Yes, sir. And we also handed
19 it to him before we went into the courtroom today.

20 THE COURT: All right. Next. Anything
21 else?

22 MR. TAUBE: That's it, Your Honor.

23 THE COURT: Okay. Are you aware that
24 plaintiff is apparently attempting to file a
25 supplemental exhibit?

1 MR. TAUBE: Yes. Plaintiff made us aware
2 of that about five minutes ago.

3 THE COURT: Do you have a copy of it?

4 MR. TAUBE: I received it about three
5 minutes ago, Your Honor, yes, sir.

6 THE COURT: Okay. Well, everything at the
7 last minute. It was just like my hearing yesterday,
8 pouring in as we spoke. There we go.

9 MR. TAUBE: Thank you, Your Honor. First,
10 Your Honor, I want to make sure that I've stated that we
11 represent each of the defendants. I'm not going to talk
12 about them in bulk or collectively because that has been
13 the plaintiff's method in attempting to overcome the
14 fact that there is absolutely no evidence; in other
15 words, they have no evidence on various of defendants
16 with regard to claims that they've asserted.

17 Specifically, there is no evidence to
18 support claims against Alex Jones and InfoWars, LLC. In
19 all of the pleadings and the proof, plaintiff has
20 attempted to use the words InfoWars for everybody, and
21 that is inappropriate and legally incorrect. Alex Jones
22 is an individual. Each of Free Speech Systems, LLC and
23 InfoWars, LLC are separate entities and have legal
24 existence separate and apart from Mr. Jones, which they
25 have admitted actually in both their pleadings and in

1 their service of the pleadings.

2 Free Speech Systems, not InfoWars, LLC or
3 Alex Jones, owns and operates a website named
4 InfoWars.com. The photo which is the subject of
5 plaintiff's petition in this case and which is the
6 fulcrum from which all their claims emanate is
7 InfoWars.com, an entity owned by and operated -- excuse
8 me, a website owned by and operated by Free Speech
9 Systems, LLC.

10 THE COURT: And just because I'm curious,
11 who owns Free Speech Systems, LLC?

12 MR. TAUBE: Your Honor, I don't believe
13 there's anything in the record about that. And I
14 believe that Mr. Jones may actually own it, but there's
15 no record information of that at all, nothing from which
16 the Court can find clear and specific evidence to claim
17 the acts of one or the other, which is part of our
18 argument today.

19 Now, in their pleadings, Your Honor, they
20 admit that Free Speech Systems, not Alex Jones and not
21 InfoWars, LLC, owns and operates the website
22 InfoWars.com. If the Court looks at the petition in
23 Paragraph 9, Page No. 3 of the petition, they cite to
24 Wikipedia, which actually makes that statement. Also,
25 Your Honor, Mr. Daniels' affidavit, Exhibit A,

1 Paragraph 2 of our motion, which the Court I know has,
2 Mr. Daniels' affidavit specifically states that he is an
3 employee of Free Speech Systems and that Free Speech
4 Systems owns and operates the website InfoWars.com.
5 That's the evidence before the Court.

6 Your Honor, I do have and it is attached
7 to our exhibit -- excuse me, our reply that was filed
8 yesterday, and I've given a copy to counsel, if I might
9 approach, Your Honor.

10 THE COURT: I have everything.

11 MR. TAUBE: This is the --

12 THE COURT: I have everything. You can
13 leave it -- I have it all, printed it all, don't need
14 any extra. It would just confuse me.

15 MR. TAUBE: This is just a color copy,
16 Your Honor.

17 THE COURT: I have a color copy, as it
18 turns out.

19 MR. TAUBE: Excellent.

20 THE COURT: It was Exhibit 1, if I recall.

21 MR. TAUBE: It was exactly Exhibit 1,
22 Your Honor. Thank you. You're well ahead of me.

23 THE COURT: Well, I do my best to try to
24 read it.

25 MR. TAUBE: Your Honor, what this shows is

1 and what is truth from the record is there's no actual
2 proof of any activity related to the publication of the
3 photograph by Alex Jones or InfoWars.com. The person
4 who published the photograph is Mr. Daniels, who is an
5 employee of Free Speech Systems, not InfoWars, LLC and
6 not Alex Jones. Mr. Daniels in his affidavit,
7 Paragraph 2 specifically says that, and there is no
8 contrary evidence. It is completely unrefuted in the
9 evidence before the Court.

10 The plaintiff is desperate for this Court
11 to ignore all these facts and in fact includes an
12 affidavit from Mr. Zipp, which is their -- they don't
13 number or letter their affidavits, but it is the second
14 affidavit in their response that actually misquotes the
15 testimony that Mr. Daniels has given.

16 Mr. Zipp states in his affidavit that's on
17 Page No. 4, the second to the last paragraph that says
18 Kit Daniels identifies himself as a, quote, editor,
19 video journalist, and social commentator for
20 InfoWars.com and then cites to the declaration.

21 Mr. Daniels --

22 THE COURT: It cites to the Daniels
23 declaration?

24 MR. TAUBE: It does, Your Honor. But what
25 the Daniels declaration actually says when the Court has

1 an opportunity to look at it --

2 THE COURT: So when I read the affidavits
3 from the plaintiff, I won't see anyone who avers that
4 they have read a communication -- a representation by a
5 party opponent in some other location or some other time
6 in which Daniels or someone represents that Daniels is
7 an employee of InfoWars?

8 MR. TAUBE: There is -- in the record that
9 we've looked at and in their affidavit testimony, other
10 than what I've just cited, which Mr. Zipp misquotes
11 Mr. Daniels for, that's 100 percent correct, Your Honor.

12 THE COURT: So no other statements by
13 party opponents about this matter.

14 MR. TAUBE: No, Your Honor.

15 THE COURT: So there's no evidence
16 whatsoever about InfoWars or Alex Jones being complicit
17 in this particular --

18 MR. TAUBE: In the last --

19 THE COURT: -- posting; is that right?

20 MR. TAUBE: In the last three minutes,
21 Your Honor, I think what they've attempted to do was to
22 provide the Court something from the website that
23 they're going to argue suggests something different.
24 But in terms of the clear and specific evidence,
25 Your Honor, there is none. And I don't think that what

1 they just attempted to file comes even close to
2 establishing anything like that. There's zero affidavit
3 testimony. There's zero admissions. And there is the
4 testimony of Mr. Daniels.

5 THE COURT: Well, you'd better address it,
6 because if I read Chapter 27 correctly, there's no time
7 limit that's clear on the response, right?

8 MR. TAUBE: That's correct, Your Honor.

9 THE COURT: And so they can file things up
10 to the time of the hearing, and they did yesterday. It
11 was being filed that day.

12 MR. TAUBE: Yes, sir.

13 THE COURT: And sure enough, you're filing
14 things today. They're filing things today. And that's
15 it. Then the merry-go-round stops.

16 MR. TAUBE: Yes, sir.

17 THE COURT: Am I right about that?

18 MR. TAUBE: You are right, Your Honor.

19 THE COURT: Great. And so let's assume
20 that affidavit is part of the record. And I know you've
21 seen it, so you may as well address that and convince me
22 that it matters not. You started that, but don't assume
23 I'm not going to study it because --

24 MR. TAUBE: No, I assume the Court is
25 going to study it.

1 THE COURT: You should assume I am going
2 to study it, and tell me why it doesn't matter at all.

3 MR. TAUBE: Your Honor, since I haven't
4 had time to review each and every line, I assume that
5 what they're going to try to do is to make an argument
6 that it is unclear what InfoWars.com is and whether
7 InfoWars, LLC and Free Speech Systems are one in the
8 same. There is no allegation in the pleadings that says
9 that. The Court knows as a matter of law that these
10 entities, which are established, which they have served,
11 and which they've identified as separate identities, are
12 separate entities for the purpose of this claim. None
13 of those entities is Alex Jones.

14 THE COURT: How does one do that from the
15 plaintiff's standpoint given the fact that this arrests
16 every activity in the case, there's no more discovery,
17 everything's abated?

18 MR. TAUBE: Good question, Your Honor.

19 THE COURT: And with privately-held
20 companies, you don't have any public reporting. You
21 can't know controlling interests. You can't know all of
22 the things that you and I have done for close to 40
23 years of law practice --

24 MR. TAUBE: Yes, sir.

25 THE COURT: -- to discern who controls who

1 and who's responsible, right?

2 MR. TAUBE: As the Court knows,
3 Your Honor, there is a provision in the act, the TCPA,
4 that allows for a party to request expedited discovery.
5 And the Court is aware, like they did in the --

6 THE COURT: So your argument is they
7 should have requested expedited discovery on this once
8 they got your motion. Did your -- is that your point?

9 MR. TAUBE: Yes, sir.

10 THE COURT: And I take it. I thought that
11 your reply filed last night at 6:00 --

12 MR. TAUBE: Yes, sir.

13 THE COURT: -- was at least to me more
14 precise than the original motion in kind of framing this
15 particular defect on their part. Do you see what I
16 mean?

17 MR. TAUBE: It was, Your Honor. As the
18 Court knows, what the act requires is that we
19 describe -- our burden is to show that the act applies.
20 In fact, Your Honor, that's something that plaintiff has
21 actually admitted, not an issue.

22 THE COURT: And that's rarely an issue in
23 a media case. I mean, on a public event or a matter of
24 public concern it never would be an issue. So I don't
25 know why we waste a lot of paper on it. It seems like

1 that ought to just be stipulated by good counsel as I
2 have in this case from the outset.

3 But where did you put in your original
4 motion, golly, you didn't show controlling interest on
5 these two other defendants; therefore, you can't
6 continue -- because I take your point. I mean, you're
7 kind of assuming they can keep their case against
8 Daniels. They can survive this motion against Daniels
9 and against --

10 MR. TAUBE: I think no.

11 THE COURT: -- and against the entity that
12 controls the website --

13 MR. TAUBE: I think no.

14 THE COURT: -- just not the other two.

15 MR. TAUBE: You can for other reasons, but
16 not for that reason.

17 THE COURT: I know, but you haven't gotten
18 to that argument yet.

19 MR. TAUBE: That's correct, Your Honor.

20 THE COURT: You're hammering on I think --
21 I understand why you are because it appears to be
22 potentially thin ice for them. But I'm trying to
23 discern where in your original motion that was made
24 clear such that they would ask the Court for discovery
25 in order to counter that. Do you see my point?

1 MR. TAUBE: Of course, Your Honor.

2 THE COURT: Okay.

3 MR. TAUBE: The answer --

4 THE COURT: I've got your motion here.
5 I'm looking for it.

6 MR. TAUBE: Yeah. The answer, Your Honor,
7 is if the Court looks at each of the -- in the motion we
8 set out elements of each of the causes of action. And
9 in each of those elements and in the citations to each
10 of the cases, it requires that the plaintiff show that
11 the defendant acted in such a way.

12 So when we listed each of the elements for
13 each of the cases -- and I can walk through where that
14 is in each one of the -- in the motion. We cite to the
15 fact that, for example, for a defamation case, a
16 plaintiff has to show that a defendant published
17 something, in other words, and we point that out,
18 because we provide each of the elements. It's the same
19 thing with intentional infliction of emotional distress.
20 It requires an act of a defendant.

21 THE COURT: So in their pleading -- and
22 actually, you can consider their pleadings as part of
23 this motion too --

24 MR. TAUBE: Yes, sir.

25 THE COURT: -- which you can't in summary

1 judgment --

2 MR. TAUBE: Yes, sir.

3 THE COURT: -- but you can in these
4 motions.

5 MR. TAUBE: Yes, you can.

6 THE COURT: Had they pled control, had
7 they pled certain specific acts by each one of the four
8 defendants, that would have gotten them there, but they
9 didn't.

10 MR. TAUBE: Actually, Your Honor, the way
11 they did it -- and that's why I started out my
12 discussion with the Court about it. What they do is
13 they use the word InfoWars for everybody. And what they
14 say consistently with regard to each one of the
15 pleadings, with regard to each one of the causes of
16 action, with regard to each one of the acts is
17 defendants did this.

18 THE COURT: Stay at counsel table. Make
19 sure you do that.

20 MR. TAUBE: Yes, sir.

21 THE COURT: You know I'm old school in the
22 courtroom control.

23 MR. TAUBE: Of course, Your Honor.
24 Defendants took certain actions. And in their response
25 and in putting forward evidence which we received about

1 a week ago, they didn't do anything to put into the
2 record the specific allegations which we required them
3 to do by laying out the elements that the actual
4 defendants, in this case Alex Jones and InfoWars, took
5 any action. They failed to do that. We pointed it out
6 in the reply and were more specific because they did not
7 come forward with any clear and specific evidence
8 relative to those causes of action.

9 THE COURT: Did they plead control in
10 their petition, if I go back and study that, control by
11 InfoWars or Jones, that he's the controlling interest
12 and there are no acts by this other Free Speech entity
13 that are not his acts?

14 MR. TAUBE: Your Honor, what they pled was
15 *respondeat superior* and they pled conspiracy. Now, the
16 Court knows and part of the argument is that if it was a
17 corporate entity -- with a corporate entity, individuals
18 can't conspire with themselves. That's another reason
19 that that claim should be dismissed. And *respondeat*
20 *superior*, we pointed out that in order to have a
21 *respondeat superior* claim, they have to show who the
22 controlling entity is. That was part of our original
23 motion to dismiss.

24 We further responded to that in our reply,
25 because there's a complete absence of any evidence or

1 allegation that Alex Jones, for example, or
2 InfoWars.com -- excuse me, or InfoWars, which isn't
3 InfoWars.com -- InfoWars.com is a website and InfoWars,
4 LLC is an entity. InfoWars website is owned by Free
5 Speech Systems, LLC, which they admit in their
6 pleadings.

7 So we have from the beginning highlighted
8 and put that issue before the Court. Our reply provides
9 more specific indication of the absence of proof --

10 THE COURT: The reply was much more clear
11 to me about what the thin ice is from your perspective.

12 MR. TAUBE: Well, and obviously,
13 Your Honor, once we received their response, it was easy
14 to point out the fact that when you go through the
15 evidence, which they were required to provide, that
16 there was no evidence of those things. Until we got
17 that response, we didn't know what they were going to
18 try to put in that we would have to reply to. But what
19 the Court will see is there is an absence of any
20 evidence that Alex Jones did anything with regard to
21 this photograph or that InfoWars, LLC did anything with
22 this photograph. In fact, they didn't.

23 And Mr. Daniels' affidavit, which was part
24 of the original motion, points out that he is an
25 employee of Free Speech Systems. He's not an employee

1 of Alex Jones, he's not an employee of InfoWars, LLC,
2 and that he was the one who published the photograph in
3 his capacity as an employee of Free Speech Systems.

4 So for those reasons, Your Honor, that
5 alone requires the Court to dismiss all of the claims
6 against Mr. Jones individually and against InfoWars,
7 LLC. There is no clear and specific evidence that
8 either Mr. Jones or InfoWars, LLC took any action with
9 regard to the photograph, didn't publish it, didn't
10 approve it, didn't hear about it, didn't know about it
11 before. And to the extent that the plaintiff thought
12 that there was proof that that was not the case and that
13 somehow Mr. Jones was involved in a conspiracy or
14 approved it or took some action, they had an opportunity
15 to come before this Court and ask for expedited
16 discovery, which I know this Court would have granted,
17 to try to submit such proof to the Court, and they
18 failed to do it. There's simply nothing there.

19 Your Honor, I can go forward and maybe
20 just for the purpose of making a short argument, in
21 order to emphasize this point we did go through each of
22 the elements. So, for example, the defamation claim
23 requires -- and we've pointed to the specific cases in
24 which those elements are set out -- that the defendant
25 published a defamatory statement. Okay. There is no

1 evidence, again, with Mr. Jones or InfoWars.

2 With regard to the intentional infliction
3 of emotional harm, which again we point out specifically
4 the elements in our motion, it requires that the
5 defendants acted intentionally and recklessly, that the
6 defendants' conduct was extreme and outrageous, that the
7 defendants' action raised severe emotional distress.
8 And there are other problems with this which I'll get
9 back to in a moment, Your Honor. But there is zero
10 evidence as it relates to Mr. Jones and InfoWars.com --
11 excuse me, InfoWars, LLC.

12 Civil conspiracy, Your Honor. We pointed
13 out to the Court under the *TRI vs. JTT* case that it
14 requires a combination of two or more persons. There's
15 no allegation that Mr. Jones or InfoWars conspired with
16 Mr. Daniels and published it or Free Speech Systems to
17 take any action, that there was a meeting of the minds.
18 There's no allegation and there's certainly no evidence
19 that Mr. Jones or InfoWars and Mr. Daniels had a meeting
20 of the minds to do anything, that their persons
21 reached -- excuse me, one of -- they agreed to take one
22 or more unlawful acts taken in pursuit of a cause of
23 action. There is zero evidence before the Court
24 relative to Mr. Jones and InfoWars.

25 It's also again, Your Honor -- I probably

1 will not go back to this because we cited the case. I'm
2 happy to cite it again. The Court opinion, Your Honor,
3 in *Wilhite vs. H.E. Butt*, which is at Tab 29 in the
4 booklets that we've provided to the Court, makes it very
5 clear that an entity cannot conspire with itself.

6 So even as it relates to Mr. Daniels and
7 Free Speech Systems, his employer, established by his
8 affidavit, unrefuted in the evidence, there can be no
9 agreement, no conspiracy. That claim, Your Honor, is
10 simply without any basis whatsoever.

11 Your Honor, liability based upon
12 *respondeat superior*, it involves injury as a result of
13 an independent tort. The tort feisor has to be an
14 employee of the defendant. There is zero evidence that
15 Mr. Daniels, who is the alleged tort feisor for the
16 defamation, who is the publisher of the photo in
17 question, was an employee of InfoWars, LLC or Mr. Jones.
18 He's not. There's no evidence of that. So *respondeat*
19 *superior* as it relates to those two entities must be
20 dismissed.

21 We cited to the Court the *G&H Towing and*
22 *Magee* case that was in our original filing that sets out
23 all the elements. We've also established, Your Honor,
24 and argued the affirmative defense under Section 73.005
25 of the Civil Practice and Remedies Code with regard to

1 what was said, the truthfulness of it.

2 Your Honor, what I'm about to talk to the
3 Court now about these causes of action would apply
4 equally to Mr. Jones and to InfoWars, LLC because the
5 elements of the claims and the evidence before the Court
6 is devoid of specific clear proof to establish each of
7 the elements. The Court knows that that's the burden
8 that the plaintiff has once we've proved that the act
9 applies. It's unrefuted that the act applies. The
10 Court obviously has read the petition and knows that the
11 act applies. It applies equally. But I'm going to
12 really be talking about Mr. Daniels and Free Speech
13 Systems because those are the only parties for which any
14 action has actually been claimed or there's any proof
15 of.

16 So let me start if I could, Your Honor,
17 with intentional infliction of emotional harm, emotional
18 distress. You know, specifically, Your Honor, this
19 Court knows -- I know that this is not your first rodeo
20 with regard to this act nor with these cases -- that
21 this is a gap filler claim. And there's significant
22 case law starting with the Texas Supreme Court that
23 shows that where there exists another cause of action
24 based upon the same facts that the claim does not apply.

25 And specifically, Your Honor, we've

1 referenced the decision in *Hoffman-La Roche vs.*
2 *Zeltwanger* and also, Your Honor, the -- which is Tab 15
3 in the binder. And we've also referenced the *Warner*
4 *Brothers vs. Jones* case, which I know the Court is
5 imminently familiar with.

6 It's important here, Your Honor, in order
7 to have a claim for intentional infliction of emotional
8 distress, the plaintiff must also -- one of the elements
9 is the plaintiff must have actual damages. So again,
10 we've got a claim that's completely focused on the same
11 cause of action, the same facts, as for the defamation
12 and other claims. So there is another claim that fills
13 the gap that would be otherwise taken by the gap filler
14 claim of intentional infliction.

15 But one of the elements, Your Honor, is
16 damages. And importantly, in order for the Court to
17 find that there is an intentional infliction of
18 emotional distress claim, the evidence has to be clear
19 and specific. The plaintiff's evidence in this case,
20 Your Honor, is solely and completely a self-serving and
21 conclusory affidavit attached to the response to the
22 motion to dismiss.

23 Your Honor, again, their affidavits are
24 not marked. But if the Court looks at Mr. Fontaine's
25 affidavit, the sole and complete evidence of any damages

1 that Mr. Fontaine allegedly sustained is in Paragraph 3,
2 6, and maybe 7. Let me read it just real quickly for
3 the Court because it's very clear.

4 Mr. Fontaine says: The extreme shock,
5 stress, embarrassment, and fear from this incident
6 caused a major disruption in my daily routine. Then in
7 Paragraph 6 he says: As a result of these fears, my
8 sleep became highly irregular, and I continue to suffer
9 from severe insomnia. This also disrupted my usual
10 routine. I've been having frequent nightmares about a
11 confrontation with an InfoWars fan. When walking in
12 public places I've found myself having severe panic
13 attacks at the thought of those nightmares coming true.

14 And in Paragraph 7, Your Honor, his last
15 sentence, he said: I have decided to seek therapy to
16 help address these issues, not that he has seen a
17 therapist. There's no affidavit from a therapist.
18 There's no -- actually, Your Honor, there's no other
19 proof whatsoever.

20 THE COURT: I understand your gap filler
21 argument, which is different than this.

22 MR. TAUBE: Yes, sir.

23 THE COURT: You don't have to seek
24 therapeutic help in order to have an intentional
25 infliction of emotional distress claim --

1 MR. TAUBE: You do not --

2 THE COURT: -- do you?

3 MR. TAUBE: I'm sorry, Your Honor.

4 THE COURT: Do you?

5 MR. TAUBE: You don't, Your Honor, but you
6 have to have testimony that is far -- so this is
7 self-serving and conclusory.

8 THE COURT: No, I understand. But when
9 someone's experiencing emotional distress, there used to
10 be many years ago -- I'm old enough to remember and you
11 are too -- the old physical manifestation rule.

12 MR. TAUBE: Of course.

13 THE COURT: It goes back a number of
14 decades and it was eradicated. And the courts come
15 close to embracing it again, but they haven't. And so
16 you still have what we call in personal injury practice
17 subjective manifestations of internal emotional
18 distress. All we can do is discern that from the person
19 who's experiencing the distress, right?

20 MR. TAUBE: I think, Your Honor, that had
21 he manifested it in a way that would be sufficient under
22 the law, in other words, had he --

23 THE COURT: Tell me what that required.
24 It doesn't require physical manifestation, which
25 30 years ago it did. It doesn't anymore. So what does

1 it require him to say in his affidavit to meet the
2 threshold of legally cognizable emotional distress?

3 MR. TAUBE: Great question, Your Honor.
4 In our reply, we cited to the Court -- it's Tab 5 in the
5 book that we provided. We cited to the Court the Austin
6 Court of Appeals case of *David Martin Camp and Bargains*
7 *for Millionaires, LLC vs. Patterson*. And I'm reading,
8 Your Honor, from printed Page No. 12 of that. And
9 here's the quote, which is -- I think the best way I can
10 describe it to you, Your Honor, is to tell the Court
11 what it isn't. And what it isn't is what Mr. Fontaine
12 did here in this case because the Court of Appeals
13 looked at an affidavit in exactly the same context with
14 exactly -- actually, even more significant description
15 in a self-serving and conclusory affidavit of
16 Mr. Fontaine and ruled as a matter of law it was
17 insufficient. May I --

18 THE COURT: Tell me what it does require.
19 I'm trying to understand what it does -- if only he had
20 said this much it would be okay, but that much is not.
21 And which Court was this, by the way?

22 MR. TAUBE: Third Court of Appeals,
23 Your Honor.

24 THE COURT: All right.

25 MR. TAUBE: Your Honor, what it says --

1 this is the best answer I can give you. The Court of
2 Appeals is quoting the plaintiff's affidavit that was
3 used to support the same claims as Mr. Fontaine was
4 making here: In her affidavit she stated that as a
5 result of Camp's conduct, she suffered tremendous
6 emotional distress, including but not limited to loss of
7 sleep, loss of appetite, depression and anxiety, and
8 Camp's conduct terrified her so that she reported it to
9 the police, in other words, even a manifestation of
10 something that was sufficient to require an official
11 report to the authorities, echoing virtually identical
12 statements in her response.

13 What the Court of Appeals said, what I
14 just read, which is exactly what Mr. Fontaine did in
15 this case, is -- it's a quote: We conclude that this
16 evidence does not constitute clear and specific evidence
17 of severe emotional distress.

18 THE COURT: Because what does constitute
19 that is what?

20 MR. TAUBE: Conclusory and self-serving
21 testimony.

22 THE COURT: No, no. How does the Court
23 define what the line is for severe emotional distress?
24 How does the Court now define it? Because the courts
25 have struggled with this over the years, and I've seen

1 it evolve somewhat. So tell me what you think the
2 latest iteration is for what it takes to articulate
3 legally cognizable severe emotional distress? What's
4 the best definition?

5 MR. TAUBE: I think the manifestation is
6 that you have gone to a doctor, that you've got
7 prescribed medical treatment, that there are -- you've
8 missed days of work, that you've actually manifested in
9 a way that is objectively determinable, something more
10 than what we have in this case that I just cited from
11 the Third Court of Appeals, the *Martin* case, and what
12 Mr. Fontaine cited in this case.

13 THE COURT: So there must be some
14 objective manifestation that others could see. It's not
15 enough for you to see it. Though it could be
16 tormenting, that's just not enough. You have to -- you
17 told me earlier you don't have to get medical treatment.
18 And I think you're saying now no, you don't, but if you
19 miss time from work, that might be enough for an
20 objective manifestation.

21 MR. TAUBE: Your Honor, what I think is
22 there has to be an objective manifestation of something
23 more than self-serving conclusory statements. And what
24 the Third Court of Appeals said is even reports to the
25 police parties, that somehow that they have been

1 emotionally damaged by somebody's act, which is at least
2 some manifestation of making something more than a
3 self-serving and conclusory statement to yourself in an
4 affidavit designed to support a claim, is not enough.

5 So I'm not sure, Your Honor, that I can
6 tell the Court what is enough. I know what I can tell
7 the Court is what isn't enough. And what isn't enough
8 as established by the Third Court of Appeals in this
9 case is exactly what Mr. Fontaine said and the only
10 evidence before the Court of any damages.

11 Your Honor, let me go real quickly on to
12 the issue of defamation. Again, in order to have
13 defamation -- I know the Court's heard this, but I think
14 it's important for me to repeat it. There are no acts
15 by Mr. Jones or InfoWars, LLC that are in the record.
16 In other words, in order to have a defamation claim, you
17 have to have a defendant who has done something. Doing
18 nothing does not support a defamation claim. It
19 doesn't.

20 Now, as to their elements, Your Honor --
21 and putting aside for now, because I know the Court will
22 read it, our affirmative defense that we've established
23 I think as a matter of law under Texas Civil Practice
24 and Remedies Code 73.005(a) and (b), their pleading --
25 let me take a half a step back, Your Honor.

1 In reviewing the pleading to support the
2 claim, the plaintiffs -- the plaintiff has asserted a
3 malice basis. Now, in their response, in their reply,
4 they seem to -- especially when you start looking at the
5 Binkowski affidavit and the Zipp affidavit, which
6 specifically talks about a standard of care, which, as
7 the Court knows, is not a malice concept; it's a
8 negligence concept. In their pleading there is no
9 negligence claim. It is an actual malice claim. And
10 that's the burden of proof, which actually in some
11 respects -- maybe I'm giving counsel not enough credit.
12 But because of the nature of the publication, the fact
13 that this was a public statement, they have to prove
14 actual malice.

15 Now -- and again, Your Honor, if the Court
16 looks at their pleadings to look at this particular
17 statement as what they think they're going to prove and
18 what they assert, malice is in Paragraph 49 of the
19 plaintiff's original petition through Paragraph 53.
20 Their entire proof, the Zipp affidavit and the Binkowski
21 affidavit, we have objected to those, Your Honor, and
22 I'd be happy to discuss those when the Court wants to if
23 the Court wants to. I think the objections are very
24 sufficiently stated and including the supplemental
25 objections, specifically Mr. Zipp's attempt to get into

1 the mind of Mr. Daniels. In other words, he says I
2 think that Mr. Daniels must have had some real concerns
3 about what this photograph was, which is completely
4 speculative, not within his expertise at all and not
5 something that he can testify to, which we've objected
6 to. Their entire proof is an attempt to establish a
7 standard of care.

8 Now, you do need actual malice because the
9 damages are not presumed here. Your Honor, let me call
10 the Court's attention to the *MacFarland vs. Le-Vel*
11 *Brands* case. That's in Tab 18 of our response in the
12 book. And specifically, Your Honor, it's at printed
13 Page 20 where the Court says, "Based on the authority
14 described above," which is the Supreme Court case in
15 *Hancock*, "we conclude general damages may be presumed in
16 defamation *per se* cases only when the speech is not
17 public" -- it is public here -- "or the plaintiff"
18 provides actual -- "proves actual malice."

19 In this case, Your Honor, their proof of
20 actual malice, okay, is not even -- is not even close.
21 So it is clear and the case law has established that
22 actual malice does not focus on what a defendant --
23 again, remember, no acts by Mr. Jones and no acts by
24 InfoWars, LLC, but Free Speech and Daniels, it doesn't
25 focus on what the defendant should have done or did not

1 do, which is almost the entirety of the Zipp affidavit.
2 It focuses on the state of mind of what the defendant
3 actually knew.

4 And, Your Honor, we've cited, and the
5 Court should look at when you have an opportunity,
6 *Bentley vs. Bunton*. That's in Tab 1 of our booklet.
7 And here's the statement, Your Honor, that was made in
8 *Bentley* by the Texas Supreme Court. "Thus, actual
9 malice means knowledge of or reckless disregard for the
10 falsity of a statement. Knowledge of falsehood is a
11 relatively clear standard. Reckless disregard is much
12 less so. Reckless disregard, according to the Supreme
13 Court" -- that's the United States Supreme Court that
14 they're referring to earlier in the opinion -- "is a
15 subjective standard that focuses on the conduct and
16 state of mind of the defendant. It requires more than a
17 departure from reasonably prudent conduct. Mere
18 negligence is not enough. There must be evidence that
19 the defendant in fact entertained serious doubts as to
20 the truth of his publication, evidence that the
21 defendant actually had a high degree of awareness of the
22 probable falsity of the statements. Thus, for example,
23 the failure to investigate the facts before speaking as
24 a reasonably prudent person would do standing alone is
25 not evidence of reckless disregard for the truth."

1 If the Court looks at the evidence that's
2 been provided by the plaintiff in this regard, that's
3 the best they get to. Most of Mr. Zipp's affidavit,
4 what's admissible, which again we've objected to,
5 relates to what Mr. Daniels -- again, no talks about
6 Mr. Jones, nothing about InfoWars -- should have done in
7 researching the information that he relied on in the
8 publication.

9 In fact, Your Honor, the evidence that we
10 objected to in Mr. Zipp's affidavit is I think
11 indicative of how desperate the plaintiff is to meet
12 this standard because they have Mr. Zipp say I know --
13 I'm a mind reader; I know what Mr. Daniels was thinking,
14 and I know he must have had serious issues with this
15 publication because of the source, the 4chan source.

16 Now, Your Honor, I think if you contrast
17 that evidence with the type of evidence that's in the
18 Third Court of Appeals case, the *Jones* case, where they
19 actually had evidence that the defendant had actual
20 knowledge of the falsity which was deemed to be
21 sufficient to show conscious disregard, that is the
22 difference between what the plaintiff has shown in this
23 regard, what the law requires, and why the evidence
24 before the Court is not clear and specific as to actual
25 malice, which is one of the elements that they need to

1 show. Your Honor, with that I'd like to reserve the
2 balance of my time.

3 THE COURT: You can reserve up to
4 15 minutes.

5 MR. TAUBE: I appreciate that, Your Honor.

6 THE COURT: You have more than 15 minutes
7 now. So if you have anything else you want to say, you
8 have probably another four or five minutes if you want.
9 It's up to you.

10 MR. TAUBE: Thank you, Your Honor. Let me
11 use it as effectively as I can.

12 Your Honor, one of the things that also is
13 required for defamation is damages. Okay. Once again,
14 in this case the plaintiff asserts that there is damages
15 *per se* because of the nature of the violation. And I've
16 already referenced the cases that we've cited to the
17 Court as to why that is not the case because this is a
18 public statement.

19 One of the things that's an oddity to me
20 in this case, particularly as it relates to the attempt
21 to establish damages, is that Mr. Fontaine, even in the
22 conclusory statements he makes about his loss of sleep
23 and his apprehension or anxiety about walking on the
24 street, which is probably the most significant
25 manifestation he actually complains of -- there is no

1 other evidence -- doesn't try to establish and --

2 THE COURT: I'm sorry. I haven't read in
3 detail his affidavit. I actually haven't read the
4 affidavit. I've just read what you've said about it.
5 Something on the street? What did you say?

6 MR. TAUBE: He said, Your Honor, and I
7 think it's in Paragraph 6 of his affidavit, that he's
8 afraid some InfoWars fan is going to accost him on the
9 street.

10 THE COURT: I see.

11 MR. TAUBE: That's what he says.

12 THE COURT: He's afraid to be in public.

13 MR. TAUBE: That's what he says, yes,
14 Your Honor. But one of the things that the plaintiff
15 does as part of their testimony in trying to refute --
16 in trying to establish malice is to say that
17 Mr. Fontaine was the subject of a hoax of this 4chan and
18 that his picture had been utilized as part of trolling
19 for communists before this picture was published by
20 Mr. Daniels.

21 So whatever Mr. Fontaine's apprehension
22 was, he was already being subject to public ridicule.
23 They don't try to and certainly don't effectuate any
24 relationship between the photograph and the publication
25 by Mr. Daniels and Free Speech Systems and what his

1 issues actually are. And in fact, Your Honor -- and I
2 know we've cited this -- the picture was published by
3 Free Speech Systems for a total of 13 hours without
4 Mr. Daniels' name on it.

5 Now, there's a lot of argument in the
6 motion -- in response to our motion about whether or not
7 that's sufficient. I'm not arguing that point today.
8 What I am arguing is to the extent that this lawsuit
9 provided notoriety and the relationship between
10 Mr. Fontaine and this picture or the allegation where
11 there was ongoing trolling of Mr. Fontaine that was
12 already on the Internet and 4chan, which they say we
13 should have looked at first before Free Speech -- when
14 Mr. Daniels published it, there is no attempt to
15 quantify any relationship between the effect that
16 Mr. Daniels and his self-serving and conclusory
17 affidavit says he has and what he's been suffering. In
18 other words --

19 THE COURT: But that's not fatal to this
20 motion today, is it? I mean, I understand your point
21 that it's going to be hard for them to somehow perform
22 the surgery on what amount of publication of his
23 identity was done by others separate and apart from what
24 you did --

25 MR. TAUBE: Right.

1 THE COURT: -- and what damages flowed
2 from what you did apart from damages that were flowing
3 from a lot of other reckless dissemination of his
4 photograph. That's your point.

5 MR. TAUBE: My point is --

6 THE COURT: But I don't know how that's
7 fatal to this motion.

8 MR. TAUBE: It's a little bit more than
9 that, Your Honor, because I don't know how he can
10 establish that there are any damages that flow from the
11 publication of this particular picture for 13 hours.

12 THE COURT: Well, but -- okay. You
13 wouldn't have to at this stage come up with a precise
14 methodology by which you tease that out, would you?

15 MR. TAUBE: No, you wouldn't, Your Honor.

16 THE COURT: Okay.

17 MR. TAUBE: But what you would do is you'd
18 have to establish that there's at least some damage that
19 relates to this publication, and they can't do that, and
20 they didn't do it. This is why the dismissal is also
21 appropriate under the defamation claim. And with that,
22 Your Honor, I'll sit down and reserve.

23 THE COURT: Okay.

24 MR. BANKSTON: Your Honor, before I begin,
25 I'm going to need the document camera at some point.

1 THE COURT: You're welcome to use the
2 camera. Ah, before you say anything else, go through
3 the record --

4 MR. BANKSTON: Absolutely, Your Honor.

5 THE COURT: Go through the record and
6 identify everything you think is in the clerk's record
7 that matters to this decision by this Court.

8 MR. BANKSTON: Absolutely. Let's do that.
9 There are four separate elements in the record that I
10 want to bring to your attention that I think you need to
11 consider. First is obviously plaintiff's petition. The
12 second is plaintiff's response brief to defendants'
13 motion filed July 26.

14 THE COURT: Hang on. I just managed to
15 lose my more recent court registry. I don't know what I
16 did with it. Here it is. It's the one I was using when
17 Mr. Taube was making his list. I'm sorry, Counsel.
18 Start again.

19 MR. BANKSTON: Sure. Plaintiff's
20 petition.

21 THE COURT: Right. The original petition.

22 MR. BANKSTON: Correct. Plaintiff's
23 response brief to defendants' motion under the TCPA
24 filed July 26.

25 THE COURT: All right.

1 MR. BANKSTON: Attached to that are four
2 exhibits. They are marked, Your Honor, on the bottom
3 corner, Exhibits A through D.

4 THE COURT: That's all right. If they're
5 in the clerk's file, they're in the clerk's file.

6 MR. BANKSTON: Okay.

7 THE COURT: As I mentioned to Mr. Taube,
8 whatever is attached to the things you're identifying
9 now as being in the file is part of the record.

10 MR. BANKSTON: Okay. And you also are
11 receiving today -- you received a courtesy copy of it;
12 it's being filed as we speak -- is plaintiff's notice of
13 filing supplemental exhibit.

14 THE COURT: And that, based on what's been
15 handed to me but what is not yet in the file that's at
16 least viewable, is an affidavit of Marcus Turnini?

17 MR. BANKSTON: Correct, Your Honor.

18 THE COURT: T-u-r-n-i-n-i?

19 MR. BANKSTON: Yes, Your Honor.

20 THE COURT: Okay. And that's the record.

21 MR. BANKSTON: That's the record. Those
22 are the only things that I think you have to look at.
23 Obviously you need to read defendants' motion. But
24 other than that, I don't think there's anything else you
25 really need to look at. I don't think there's anything

1 else you can look at.

2 So what I'd like to do, Your Honor, is I'd
3 like to go in a little backwards order from what they
4 did, which is I want to start with the merits and then
5 go to these procedural arguments which took the bulk of
6 our argument today.

7 So I was thinking about this last night,
8 Your Honor, and I thought what if you had a situation
9 where a defendant walked into your courtroom and it went
10 down something like this. He said, "Your Honor, you
11 have to dismiss this case. I was reporting a third
12 party's allegations."

13 And you say, "Okay. Who is the third
14 party?"

15 And defendant says, "I don't know. I
16 don't have any idea."

17 "Okay. When did you see it?"

18 "I'm not really sure."

19 "Okay. Can you show me exactly what the
20 third party said?"

21 "No, I don't have it. I remember that it
22 was graffiti that I found in a gas station bathroom, but
23 I can't exactly quote it to you."

24 "Okay. Well, did you have any reason to
25 believe it was a genuine allegation?"

1 "No. And in fact, the graffiti in this
2 particular gas station bathroom is extraordinarily well
3 known for making false accusations, especially in this
4 exact type of circumstance. In fact, I even wrote a
5 story about it recently, Your Honor."

6 If you had heard -- that's the argument
7 you're going to hear today in these briefings. That is
8 exactly the argument being put forth. And if this
9 argument is allowed to prevail, it would eviscerate all
10 defamation claims. Because what could happen then is
11 any time a reporter wants to publish something, he can
12 just call up a friend or even do it himself and publish
13 something anonymously to the Internet on a gutter site
14 like 4chan, print it, and then now he claims to be
15 immune.

16 Even if the statute that they claim for
17 their affirmative defense did apply, which we're about
18 to tell you why it doesn't, even if it did apply, it
19 couldn't apply to these facts, because what you must
20 determine is whether it can accurately report a third
21 party's allegation. And, Your Honor, when they stand up
22 again --

23 THE COURT: What you're now referencing is
24 73.005?

25 MR. BANKSTON: Correct, Your Honor. In

1 fact, let's go ahead and read that for the record. The
2 statute reads "In an action brought against a newspaper
3 or other periodical or broadcaster, the defense
4 described by Subsection A applies to an accurate
5 reporting of allegations made by a third party regarding
6 a matter of public concern."

7 THE COURT: And they seem to be saying
8 we've accurately reported what somebody's saying.

9 MR. BANKSTON: They did. However, you
10 have no ability to determine that, and it's their
11 affirmative defense to do it. Here's what I'd like you
12 to ask them if they stand back up again. Show me the
13 third party statement so I can see if you accurately
14 reported it. I need to compare your statement with the
15 third party statement and see if it was accurately
16 reported. Ask them for it. They're not going to give
17 it to you.

18 We'll talk a little bit more about that in
19 the facts when I break them down, but let's get this
20 defense out of the way, because you'll notice something
21 very important in the brief, Your Honor, is every time
22 they quote this statute, they take out the first phrase.
23 They replace that first phrase with the phrase media
24 defendant. That's not what the statute says. This is
25 not an action brought against a newspaper, periodical or

1 broadcaster. And there's a couple reasons you know
2 that.

3 One, InfoWars is obviously not a
4 newspaper. Under Texas law, under the *Reuters* case from
5 the Austin Court of Appeals, newspaper means a
6 publication printed on newsprint. That Court said the
7 definition distinguishes it from other media by several
8 format requirements. They don't meet it. They're not a
9 newspaper. That same definition is found in the Texas
10 Tax Code.

11 They're obviously not a periodical. A
12 periodical has legal significance. Periodicals are
13 found in things like the rules of evidence. A
14 periodical comprises magazines, trade publications,
15 scientific and academic journals, with weekly, monthly
16 or quarterly circulation. They're not a periodical.

17 Even if you just use the common dictionary
18 definition, OED, that's a magazine or journal issued at
19 regularly or stated intervals. Or you could also take
20 judicial notice of what the postal service defines it
21 as, which it uses the definition that has to be printed
22 on paper sheets.

23 THE COURT: I don't think they're saying
24 they're any of those things.

25 MR. BANKSTON: I don't think they are

1 either. I don't think they are. And so this is not an
2 action brought against a newspaper, periodical or
3 broadcaster. In the TCPA --

4 THE COURT: Well, you didn't address
5 broadcaster. It's not --

6 MR. BANKSTON: That's what I'm about to
7 address right now.

8 THE COURT: Okay. That's what I thought
9 you'd get to initially. Go ahead.

10 MR. BANKSTON: Sure. In the TCPA,
11 broadcaster is defined. Broadcaster is defined, quote,
12 means an owner, licensee or operator of a radio or
13 television station or network of stations or the agents
14 and employees of the owner, licensee or operator.

15 There is no evidence in the record that
16 they own a TV station. There's no evidence in the
17 record that they have a broadcast license. They cannot
18 broadcast to the radio or to TV. They are not a
19 broadcaster.

20 The Texas Association of Broadcasters got
21 this law passed, and one of the things that they made
22 sure is -- and you can go back and look at the
23 legislative history on this. It's really interesting
24 how this law is safe for use in the state of Texas
25 because the entities described here are independently

1 regulated in other ways. Newspapers, periodicals and
2 broadcasters have certain responsibilities under this --
3 in other words, there is an institutional protection
4 that these organizations at least have some basic
5 credibility or journalists are fit in this group that
6 the state legislature wants to protect.

7 THE COURT: Now you really have piqued my
8 interest. How are newspapers regulated in other ways?

9 MR. BANKSTON: Actually, there's a lot of
10 content requirements and formatting requirements for
11 things that newspapers have to do, and they --

12 THE COURT: By whom?

13 MR. BANKSTON: Well, first of all, the Tax
14 Code. The Tax Code has most of what newspapers have to
15 do.

16 THE COURT: Okay.

17 MR. BANKSTON: There are some elements in
18 the Government Code too that kind of control what
19 newspapers have to do in order to satisfy their duties
20 of publishing public notices and things of that nature.
21 In other words, a newspaper itself and broadcasters and
22 those entities were found by the legislature to be
23 different than, say, media defendants, right? Because
24 anybody pretty much can be a media defendant once they
25 start a blog. That is definitely not what they wanted

1 to protect. And in fact, there's testimony from the
2 senators talking about this is for professional
3 journalism organizations.

4 THE COURT: Now, this photograph that is
5 the basis of the suit wasn't published on the InfoWars,
6 whatever, news channel.

7 MR. BANKSTON: I guess --

8 THE COURT: Right?

9 MR. BANKSTON: There's no -- it's a
10 misnomer to call it channel.

11 THE COURT: Well, what --

12 MR. BANKSTON: They create a video.

13 THE COURT: What do you call it?

14 MR. BANKSTON: They appear on videos.

15 THE COURT: What is the InfoWars video
16 cast?

17 MR. BANKSTON: Sure.

18 THE COURT: What is it?

19 MR. BANKSTON: So it's a video that then
20 they sell to third parties to broadcast or they upload
21 it online to places like YouTube.

22 THE COURT: How do people see it? You
23 were here yesterday on another case, and you and the
24 other side showed me at length what appeared to be like
25 a broadcast sitting at an anchor desk.

1 MR. BANKSTON: Sure.

2 THE COURT: How do people see that?

3 MR. BANKSTON: Sure.

4 THE COURT: It was the first time I had
5 ever seen it. How do people see that?

6 MR. BANKSTON: YouTube, Your Honor.

7 THE COURT: I see.

8 MR. BANKSTON: They also publish it on
9 InfoWars.com. They stream it on various video sites
10 like Facebook. The actual broadcast can be heard in
11 audio form because InfoWars sells the broadcast or
12 licenses it, franchises it to broadcasters. Say if
13 you're KKHC in Anchorage --

14 THE COURT: So they rebroadcast it.

15 MR. BANKSTON: Yeah, they buy the InfoWars
16 program and they're the broadcasters. In other words --

17 THE COURT: Now, but this photograph was
18 not on that.

19 MR. BANKSTON: No.

20 THE COURT: It was on some website,
21 right --

22 MR. BANKSTON: Correct.

23 THE COURT: -- that's apparently,
24 listening to the other side, exclusively the operation
25 of Free Speech Systems?

1 MR. BANKSTON: Okay. Let's go to that
2 issue because I think that's a great time to turn to it.

3 THE COURT: But that is the only place it
4 was published, right?

5 MR. BANKSTON: Is on InfoWars.com, yes.

6 THE COURT: Yes. Okay. And that's not an
7 entity, InfoWars.com --

8 MR. BANKSTON: It is --

9 THE COURT: Excuse me. Let me get my
10 question out. That's not an entity, InfoWars.com;
11 that's just a website, right?

12 MR. BANKSTON: Correct. That's a website.
13 That's a place where somebody put it.

14 THE COURT: Okay.

15 MR. BANKSTON: It was also put out on
16 Twitter and probably a few social media channels in
17 which the link to the story was disseminated, right?
18 But the primary place it was published is on the domain
19 InfoWars.com.

20 Okay. So we can establish -- before we
21 talk about whether InfoWars has anything to do with it,
22 we can establish for all four defendants that none of
23 them are a newspaper, periodical or broadcaster, none of
24 them. So the statute simply does not apply. So all of
25 these cases in their brief that talk about, well,

1 they're talking about cases that are before the statute
2 under the old common law rule and those don't apply,
3 they absolutely apply. In this case they get no benefit
4 from the statute.

5 And, Your Honor, let me show you why
6 InfoWars, LLC -- let's break it down in two. First
7 we'll do InfoWars, LLC and then we'll do Alex Jones.
8 Let me show you something on the document camera. This
9 is what was filed today, Exhibit E to plaintiff's
10 motion.

11 THE COURT: I'm sorry. This was filed
12 today?

13 MR. BANKSTON: Yes. This is what was --
14 your last courtesy copy you've been provided and what
15 they were provided.

16 THE COURT: This is the affidavit of --

17 MR. BANKSTON: Of Mr. Turini.

18 THE COURT: Yes.

19 MR. BANKSTON: Yes. Now, what
20 Mr. Turini's affidavit states is that he visited two
21 websites. One was InfoWars.com/termsofservice. And the
22 other site he visited was a web archive known as the
23 Wayback Machine or archive.org that takes snapshots of
24 that website on any given day. So he has one from
25 InfoWars.com downloaded August 1st, and then he also has

1 a Wayback archive shot of that on February 14th, 2018,
2 the date of the publication.

3 This is on the website. This is a
4 document with legal significance, Your Honor. This is a
5 contract. This is a term of service and privacy
6 agreement that anybody who visits this website, anybody
7 who saw the article on the website agreed to. And as
8 you'll notice, it's InfoWars, LLC's privacy policy in
9 terms of use, right? And what you will see on this is
10 that you are agreeing to a contract when you do -- when
11 you visit this website. And then further down in
12 talking about the entire elements of the contract, "we"
13 and "us" and "our" means InfoWars, LLC, a Texas limited
14 liability company.

15 If you look through the terms of service
16 exhibit, Your Honor, what you will see is that InfoWars,
17 LLC has represented in legal contracts to visitors of
18 its website that it operates and publishes materials on
19 InfoWars.com.

20 I never actually thought that this would
21 be an issue. I'm just shocked that it is. And part of
22 the reason -- there's a couple reasons. You heard
23 yesterday InfoWars' other attorney stand up and say
24 InfoWars, LLC, Free Speech Systems, LLC, and Alex Jones
25 are all the same thing. They made that representation

1 to you on the record. And now their attorneys for legal
2 benefit in other case are telling you the exact
3 opposite.

4 THE COURT: Well, what people say in one
5 case is not a judicial admission in another.

6 MR. BANKSTON: I agree. I agree. So
7 right now you have evidence that InfoWars, LLC is the
8 operator and contractual person who enters in with the
9 people who read its website. That you have in evidence.

10 Defendant is right that if you want to,
11 you can order discovery. You can do so on your own
12 motion. You don't need to wait for my motion to do it.
13 And in doing so, you can actually make your life a lot
14 easier by having 60 extra days to rule on this motion.

15 One of the things that might be worthwhile
16 to do --

17 THE COURT: Oh, I have enough work to do
18 without creating my own motions. I'm doing good just to
19 rule on all the motions that are coming at me.

20 MR. BANKSTON: Well, then I will state for
21 the record right now, Your Honor, if there is an issue
22 that you don't think that there is clear and specific
23 evidence which this affidavit establishes that InfoWars,
24 LLC was involved somehow in the InfoWars.com website, I
25 would like you to order discovery on that or I'd like

1 you to do it on your own motion. I would like to sit
2 Alex Jones down in a chair or a corporate representative
3 for InfoWars, LLC and put these documents in front of
4 them and get answers on the record, because I don't
5 think we should be proceeding from this when we have
6 what's obviously a very ambiguous record in terms of
7 what the defendants have said. And the only evidence in
8 this case now is from the website that specifically put
9 it on.

10 And you have to remember too, Your Honor,
11 if there is an ambiguous meaning, if there's an
12 ambiguous conclusion about whether they may or may not
13 have been involved, it can't -- right now you have to
14 accept the inferences that you can take from the
15 petition and that affidavit in the light most favorable
16 to me.

17 I want to talk a little bit about Alex
18 Jones. And just briefly, Your Honor, if you look at our
19 petition and you look at Mr. Zipp's affidavit, you'll
20 understand that the theory of this case is that
21 Mr. Jones created and acted, participated, and ratified
22 the exact conduct that we are saying caused this article
23 to be published.

24 Mr. Jones has engaged in a pattern of
25 conduct to zealously publish anticommunist content with

1 no regard for its accuracy. And we have shown in the
2 evidence that they have been caught doing this exact
3 same thing before, publishing reckless pictures in this
4 way. We have shown you through a five-year history,
5 some of which you heard yesterday, but a lot which will
6 be new to you in the petition, about how Alex Jones has
7 constructed a business model to profit off of doing
8 this, and that is what he has done. He has ratified
9 Mr. Daniels' conduct in doing it. He has encouraged it.
10 And in fact, he's participated in it himself. You will
11 see in Mr. Zipp's affidavit in the petition all the
12 examples of Alex Jones participating in this kind of
13 course of conduct that we believe is responsible for
14 this to happen.

15 Again, if you don't -- if you don't think
16 right now just from the reasonable inferences you can
17 draw from the pleadings, which I think are plentiful,
18 and from the statements in Mr. Zipp's affidavit about
19 why this shows that Mr. Jones was coordinating a
20 reckless act of conduct, then I also think it would be
21 appropriate to put Mr. Jones under deposition to find
22 out exactly on this, because I think you make an
23 excellent point, Your Honor, is that I can't sleep on my
24 client's rights. I can't -- I don't know exactly what's
25 going on behind the curtains at InfoWars. I haven't

1 been invited into all his castle yet, but I knew I had
2 to sue everybody I could. I'm not sleeping on the
3 rights.

4 And so look -- Your Honor, just to be
5 totally honest with you, if you decide today that, look,
6 Kit Daniels is obviously on the hook, Free Speech is
7 obviously on the hook, and I think InfoWars, LLC is
8 obviously on the hook, if you decide Mr. Jones isn't on
9 the hook today and you say he has to get dismissed and I
10 have to pay a pro rata share of the attorneys' fees from
11 whatever it was that just said Alex Jones, I'm going to
12 be honest with Your Honor; I might not even appeal that.
13 I might just pay it right out of my own pocket. Because
14 that's -- if that's what they want to say, that's fine.
15 That's not the gravamen of this case. But I think it's
16 going to be super awkward when we come back here in a
17 few months and I'm having to show you the evidence that
18 I've acquired that's going to have us put Alex Jones
19 right back into the case.

20 So right now I think from --

21 THE COURT: Well, once he's dismissed, can
22 you put him back into the case after you come back?

23 MR. BANKSTON: I would hope that if I
24 ended up in discovery and suddenly we found out that
25 everything we've been told is false, that my inferences

1 made in my petition were actually true --

2 THE COURT: I don't know. I've never
3 encountered that circumstance, but wouldn't it be a
4 dismissal that would be binding?

5 MR. BANKSTON: Part of me says that that's
6 merely a fraudulent misrepresentation to get him out of
7 the case.

8 THE COURT: I don't know, Counsel.

9 MR. BANKSTON: I'm not sure.

10 THE COURT: I can't give you, obviously,
11 legal advice. I don't even do that for pro se
12 litigants. I'm always tempted. I come close.

13 MR. BANKSTON: Right.

14 THE COURT: But I don't.

15 MR. BANKSTON: Well, I'll tell you --

16 THE COURT: So I can't do that and I
17 won't.

18 MR. BANKSTON: Right.

19 THE COURT: And so you have to decide,
20 because I have 30 days to decide, and you might get the
21 decision right around the 30th day. I start a jury
22 trial on Monday. I have other cases I have to deal
23 with. You've given me stuff that's just not even yet in
24 the file that I'm going to read. I don't blame you for
25 that. You're doing your best.

1 I may very well, because it's not
2 physically possible to do otherwise, rule at the very
3 end of the deadline. And then you've got a choice. You
4 have a choice today. There is no motion for additional
5 discovery. I don't see one filed. I don't know whether
6 you can make an oral one at the time of this hearing or
7 not. I don't know. But, you know, these are your
8 choices to make, not mine.

9 MR. BANKSTON: Absolutely.

10 THE COURT: All I'm going to do is start
11 ruling on motions that I have to rule on. And the only
12 motion I have to rule on is this motion to dismiss, to
13 grant or deny in whole or in part. That is it. That's
14 all I'm going to do. So you have to decide -- if you
15 want me to do something different, then you have to tack
16 the boat in a different direction.

17 MR. BANKSTON: I'll tell you what my
18 position is, Your Honor, is that I think we have plenty
19 in terms of the pleadings rational inferences and in the
20 affidavits to connect Alex Jones in a rational way to
21 the conduct that happened here. That being said, if you
22 don't feel that that's the case and that that hasn't
23 been --

24 THE COURT: I'm telling you I will not
25 know whether I feel that's the case -- let me finish.

1 MR. BANKSTON: Sure.

2 THE COURT: -- until I issue my order.

3 Then you will know --

4 MR. BANKSTON: Absolutely.

5 THE COURT: -- that that's the way I feel,
6 and you'll learn that perhaps 30 days from now, too late
7 to do anything else.

8 MR. BANKSTON: Oh, what I'm saying is if
9 that happens, I'll live with it.

10 THE COURT: Oh.

11 MR. BANKSTON: And I will never have
12 regretted putting Alex Jones in this case.

13 THE COURT: Okay.

14 MR. BANKSTON: And if that costs me a few
15 dollars, I'm going to pay it. I certainly am not going
16 to let this poor young man in Boston pay it.

17 THE COURT: I understand. So there's no
18 other motions other than the motion by defendants to
19 dismiss, correct?

20 MR. BANKSTON: Correct. Again, although I
21 have brought up the idea of if you wanted to, you could
22 bring a motion for more discovery.

23 THE COURT: And I've told you before I'm
24 not going to do that on my own motion.

25 MR. BANKSTON: Okay.

1 THE COURT: Parties can do that.

2 MR. BANKSTON: Then I think that --

3 THE COURT: And if you want to live on
4 what you've got, then you live on what you've got.

5 MR. BANKSTON: Exactly. And I think the
6 list of what I read at the beginning of the hearing,
7 that's what you need to make your decision on.

8 THE COURT: All right.

9 MR. BANKSTON: One thing I would like you
10 to look at is in the exhibit of the actual publication,
11 right, the actual publication itself. This is
12 Defendants' Exhibit 2. It's also attached to Mr. Zipp's
13 affidavit.

14 In that article, Mr. -- the phrase "Alex
15 Jones" -- the name "Alex Jones" is featured 12 times in
16 that document. In the -- the phrase "Alex Jones show"
17 is featured six times in that document. The word
18 "InfoWars," not InfoWars.com, just InfoWars, is
19 mentioned 12 times. Mr. Jones' sale of supplements
20 is -- there's an ad for his supplement of Mr. Jones.
21 And there's Mr. Jones' YouTube channel mentioned two
22 times.

23 The article itself has Mr. Jones'
24 fingerprints all over it. And it's a little ridiculous
25 to say that there's no clear and specific evidence that

1 he had anything to do with this, that he was in any way
2 connected to the people who were publishing this,
3 because that's really all we have to get there on
4 anyway.

5 I think you will see that there's
6 absolutely no dispute that Free Speech Systems and Kit
7 Daniels definitely are the proper defendants. InfoWars,
8 LLC, I think the only information you have is that they
9 are proper defendants. And with Mr. Jones, yeah, I
10 think the inferences in the affidavit will get you
11 there. I really do.

12 Let's talk a little bit about conspiracy
13 because there were some cases given to you in an update.
14 And it's my opinion that they're just being read wrong,
15 that they're not quite getting their head around this
16 right.

17 Conspiracy is frequently a derivative
18 tort. In other words, there's an upper tort that
19 conspiracy serves. Sometimes, though, plaintiffs are
20 kind of inartful and there's not a primary tort. They
21 just put whatever their bad conduct is as the conspiracy
22 tort.

23 So if you look at their cases that they
24 cited on conspiracy claims being dismissed under the
25 TCPA, you'll see that in *MVS*, that was a non-derivative

1 conspiracy claim. That claim involved altered invoices
2 and violations of Chapter 32 of the Texas Penal Code
3 that had individual factual averments that were not
4 subsumed and derivative of a defamation claim. It had
5 to be dismissed because they had to address it.

6 If you'll look at *Hicks* which they cite,
7 *Hicks*, the Corpus Christi case, that was derivative, and
8 that was dismissed only because the primary claim
9 failed. They said in that case we had already
10 determined that Hicks met her initial burden of showing
11 by the evidence that her statements were made in a
12 matter of public concern satisfying the affirmative
13 defense on the defamation; therefore, the conspiracy has
14 to go.

15 The same thing in *Tervita*, which they
16 cite, which the primary claim failed. They had
17 established a valid defense from the causes of action
18 based on the defendants' public statements, so there can
19 be no conspiracy because it was derivative. It failed.

20 And then go look at *Craig v. Tejas*, which
21 is their other one. That also is not derivative of a
22 defamation claim. That was actually not even brought.
23 The other claims were declaratory relief and breach of
24 contract. But in a separate claim they alleged
25 conspiracy and misappropriate trade secrets. So based

1 on the speech implicit in that conspiracy claim, that
2 had to be analyzed under the TCPA.

3 In this case, the conspiracy claim is
4 absolutely derivative. You'll see from the Austin court
5 just last year that talked about a derivative conspiracy
6 claim not analyzed under the TCPA.

7 THE COURT: Their main conspiracy
8 argument, at least just now, seemed to be if Jones and
9 InfoWars are out, the remaining two parties cannot be in
10 a conspiracy.

11 MR. BANKSTON: In an idea of being --

12 THE COURT: Do you agree with that?

13 MR. BANKSTON: -- an employee cannot
14 conspire with his corporate employer?

15 THE COURT: I believe that's what he said,
16 exactly.

17 MR. BANKSTON: I believe that is what he's
18 trying to say.

19 THE COURT: Yes.

20 MR. BANKSTON: I think that's probably
21 accurate.

22 THE COURT: So if Jones and InfoWars leave
23 the case, conspiracy leaves too?

24 MR. BANKSTON: Not necessarily, no.

25 THE COURT: Tell me why not.

1 MR. BANKSTON: Because this case is a
2 purely derivative claim. In other words, there's
3 nothing being claimed in the conspiracy claim that isn't
4 in the overriding claim. Now, if I was bringing a
5 conspiracy claim that was alleging forms of conduct that
6 were not addressed in the primary claim, it's no longer
7 purely derivative, and --

8 THE COURT: Well, you have to -- but a
9 conspiracy claim, you have to have one actor in the
10 conspiracy take a specific act. And that's I guess the
11 individual who works for Free Speech, right?

12 MR. BANKSTON: And I guess if I get to
13 summary judgment and I can't prove that, you'll have to
14 get rid of that claim.

15 THE COURT: And then you have to have an
16 agreement among the four to pursue that act, right?

17 MR. BANKSTON: Correct.

18 THE COURT: Where's the evidence in your
19 *prima facie* case there was an agreement among the four
20 to pursue the act?

21 MR. BANKSTON: I don't have to bring any
22 of it, Your Honor.

23 THE COURT: Okay.

24 MR. BANKSTON: This is the TCPA. At this
25 point I don't have to.

1 THE COURT: Okay.

2 MR. BANKSTON: It's a derivative claim.

3 THE COURT: So merely alleging it without
4 anything beyond that is enough.

5 MR. BANKSTON: As long as I have it
6 straight outside of the factual averments of my primary
7 claim, right?

8 THE COURT: Okay.

9 MR. BANKSTON: If I start telling you
10 other stuff happened, other actionable things happened
11 that weren't addressed in my primary claim, you're going
12 to have to address and perhaps dismiss that. And that's
13 what you saw in the first two cases I talked to you
14 about.

15 THE COURT: So your argument is in
16 response to Mr. Taube, even if you haven't put on
17 evidence in your affidavits of what specifically Alex
18 Jones did about the publication of this photograph or
19 what specifically InfoWars did about the publication of
20 the photograph or what control of the operations that
21 person and that entity has over the people -- or the
22 entity and the person who did distribute the photograph,
23 even without all of that, they stay in the case on a
24 conspiracy theory.

25 MR. BANKSTON: And you've accurately

1 described what *Warner Brothers* said last year, yes.

2 THE COURT: And I just want to understand
3 your position.

4 MR. BANKSTON: That is my position. I
5 agree with the court in *Warner Brothers*. I agree that a
6 purely derivative conspiracy claim is not analyzed under
7 the TCPA.

8 THE COURT: Well, since you mentioned
9 *Warner Brothers*, you've got to get rid of intentional
10 infliction under *Warner Brothers*, don't you?

11 MR. BANKSTON: Yes. So let's talk about
12 intentional infliction.

13 THE COURT: Because *Warner Brothers* seems
14 head on on intentional infliction. If it is basically a
15 duplication of everything you're pursuing on the
16 defamation action, you cannot also pursue it as an
17 intentional infliction case.

18 MR. BANKSTON: There is some contrary
19 authority to that, but you're sitting underneath that
20 Austin court, so let's talk about that Austin court
21 right now.

22 THE COURT: Yeah. So if I follow *Warner*
23 *Brothers*, Justice Bourland's opinion, as I recall --

24 MR. BANKSTON: Uh-huh.

25 THE COURT: Yeah. If I follow that, I

1 must get rid of this intentional infliction case,
2 correct?

3 MR. BANKSTON: Only if you don't -- only
4 if you don't dismiss my defamation case. If you dismiss
5 my defamation case --

6 THE COURT: No, no, no, I understand.

7 MR. BANKSTON: Right, okay.

8 THE COURT: Your defamation case, if it
9 survives, it means the intentional infliction must go
10 per *Warner Brothers*.

11 MR. BANKSTON: I believe that is a
12 reasonable interpretation of *Warner Brothers*. I
13 believe --

14 THE COURT: Well, do you have any argument
15 that it's not the correct interpretation of *Warner*
16 *Brothers* since that's the Court that grades my paper?

17 MR. BANKSTON: Yes. I will argue that
18 *Warner Brothers* is wrongly decided on that issue, yes.

19 THE COURT: Okay.

20 MR. BANKSTON: But I can't give you any
21 authority of that. So if you were to rule against me, I
22 wouldn't take that up with you; I'd take that up with a
23 different court.

24 THE COURT: I understand. We call that
25 not thin ice but no ice at all.

1 MR. BANKSTON: But here's why I think you
2 can understand the existence of that claim. Again, I'm
3 not sleeping on his rights. If you decide today he has
4 no defamation claim because of some technicality reason
5 that fences him out, then that intentional infliction
6 claim is designed for that exact purpose.

7 THE COURT: I understand. It fills that
8 gap if you can make that claim.

9 MR. BANKSTON: Exactly. So if I could not
10 in good faith have just brought the defamation claim,
11 because if I come in here and I lose it and I walk out
12 and I'm walking to Marcel and say I could have brought
13 an intentional infliction claim but I didn't, and the
14 reason it was is because I was scared of paying a
15 portion of a motion's fees, again, Your Honor, I'm going
16 to be super happy paying that because it was necessary
17 for me to defend both of his rights.

18 And if the Texas law at this point
19 requires that I cannot bring these two conditional
20 causes of action and that if one gets dismissed I'm out
21 in the cold and that my only remedy for that is bringing
22 a motion -- having a motion brought against me under the
23 TCPA, if that's the state of the law, that's the state
24 of the law, but you're darn right I'm bringing that
25 intentional infliction claim every time.

1 THE COURT: Am I required then to award
2 attorneys' fees on that portion of the case that's
3 dismissed? It appears there's law that says that's
4 true.

5 MR. BANKSTON: I think that's true.

6 THE COURT: And so you were put in this
7 sort of difficult choice of having to decide whether to
8 keep the gap filler for belt and suspenders purposes
9 knowing that when you lose the belt or the suspenders
10 you're going to have to pay for it.

11 MR. BANKSTON: You're exactly right,
12 Your Honor.

13 THE COURT: Okay.

14 MR. BANKSTON: I consider that a case
15 investment cost under a very unjust Texas law. And I'm
16 willing to deal with that. And I'll tell you one thing,
17 is that if I come back from this order and you tell me I
18 have no defamation claim but I do have an intentional
19 infliction claim, I'll know I made the right choice.
20 But if you come back and you tell me I have a defamation
21 claim and I don't have an intentional infliction claim,
22 I will still believe I made the right choice.

23 I don't believe -- and we'll talk about
24 the fees. But I don't believe that there was any
25 significant amount of the gravity of this motion, of

1 this ten-page motion that they did that revolves around
2 intentional infliction that has much of a gravity to
3 that.

4 THE COURT: Well, there was some.

5 MR. BANKSTON: They did. They researched
6 some cases, absolutely. And I'll pay for that research
7 if it turns out you think I don't have that claim. But
8 what I do --

9 THE COURT: Well, you just conceded you
10 don't have the claim if you prevail on defamation.

11 MR. BANKSTON: Correct. But I may have it
12 if I don't.

13 THE COURT: I understand.

14 MR. BANKSTON: Right. So what I'm saying,
15 Your Honor, is that when you're determining the fees,
16 you've got to understand they filed an affidavit and
17 they're claiming over \$60,000 in fees. Again, I'll make
18 the same statement I made to yesterday. That amount is
19 just obscene.

20 I have actually claimed fees in this case
21 because I think you will look at this, Your Honor, and
22 you will see this motion is frivolous on all the
23 respects of our primary claim. When you're talking
24 about is Kit Daniels and Free Speech Systems and
25 InfoWars on the hook for defamation, it's a frivolous

1 argument. It's the argument I talked about with the gas
2 station graffiti and a law that doesn't even apply to
3 them that they know doesn't apply to them. And I've
4 only claimed \$20,000 in fees for everything that I've
5 done in a 35-page motion and going around the country
6 talking to different experts. And they filed a ten-page
7 motion and a little supplement with some research and
8 they're claiming 64,000.

9 Now, I think if you do have to try to
10 isolate what is worth what, I think you do have to see
11 in that motion when is intentional infliction, what did
12 it take to write the one sentence that says Alex Jones
13 didn't have anything to do with this, what is the
14 reasonable value of that, because I'll submit to you
15 it's not much. It's a pretty small number.

16 We do object to the amount of the
17 affidavit in terms of we don't believe that those are
18 reasonable attorneys' fees. We think the rate is too
19 high. We think the hours are too high. We don't think
20 from what they've stated that that amount should be
21 anywhere close to that much.

22 THE COURT: Well, since we're talking
23 about that and since you've conceded if you -- no matter
24 how you win --

25 MR. BANKSTON: I'm going to lose some way.

1 THE COURT: -- you're going to lose some
2 way. You're going to have to pay for something.

3 MR. BANKSTON: Something.

4 THE COURT: Yes.

5 MR. BANKSTON: I think so.

6 THE COURT: And so we have to talk about
7 this. What is your hourly rate versus the other side's
8 hourly rate since that's part of your critique of what
9 attorneys' fees I should award?

10 MR. BANKSTON: They're a little higher
11 than mine. I think that the average --

12 THE COURT: That was a specific question.
13 What are they?

14 MR. BANKSTON: Oh, I'm sorry, Your Honor.
15 It's \$140 more than mine. I'm putting it on -- and in
16 fact, I actually put evidence in front of the Court. My
17 usual and customary billing rate -- I do MDL work -- is
18 550. I reduced that because I don't think this case is
19 the same as a mass medical device tort. So my billing
20 rate is \$450 an hour. That's what I charge. They
21 charge 150 -- 140, 150 more than that per hour. And I
22 don't think it --

23 THE COURT: So you're at 450 an hour;
24 they're at 600 an hour?

25 MR. BANKSTON: I believe at 590 is where

1 it's at. 450 to 590. If I'm not right, they'll correct
2 me on that. I have a feeling Mr. Taube feels it's not
3 correct. My co-counsel seems to believe it's 590. That
4 was my memory as well.

5 THE COURT: I think judges are only about
6 60 an hour, so it's a real bargain, maybe less. I don't
7 know.

8 MR. TAUBE: Your Honor, to be clear, my
9 rate is 590. I am an almost-40-year lawyer. Counsel is
10 a nine-year lawyer. Mr. Brown's rate is a lot lower.

11 THE COURT: It's not your turn, but I
12 appreciate how that created some urgency on your part to
13 stand and address that.

14 Go ahead. Even I had to say something
15 about it. Go ahead.

16 MR. BANKSTON: And mainly our complaint is
17 it's an extraordinary amount of hours. I mean,
18 Your Honor, \$60,000 for bringing a motion is just -- I
19 object to it as being unreasonable.

20 Your Honor, can I ask you how much time I
21 have left?

22 THE COURT: I don't know exactly. You've
23 got less than a half hour left.

24 MR. BANKSTON: That's what I figured. I
25 was thinking I was coming in at about 20 minutes. I

1 would like to talk to Your Honor --

2 THE COURT: I think you have about
3 28 minutes, I believe, maybe 27.

4 MR. BANKSTON: Okay. One of the other
5 issues -- you know, Your Honor, I know you read the
6 briefing. I don't want to go through the total
7 timeline. But I think we know how this generally
8 happened, right? We have -- some people we have
9 documented are neo-Nazi users on the website 4chan.
10 I've given you the information about what 4chan is and
11 the opinions on that and the judicial opinions even on
12 it.

13 And it turned out that two -- four days
14 before or two days before these users were making fun of
15 Mr. Fontaine. And I'm sure you've seen the t-shirt he
16 was wearing, and that was what they focused on. These
17 neo-Nazi users were attacking this person that they
18 thought was this dimwit lefty, you know, this commie
19 that they didn't like. They had done that for a couple
20 days.

21 And then we don't know exactly what
22 happened next. But according to -- we have -- what Kit
23 says -- Kit Daniels says happened is that he saw
24 something on 4chan. He saw a post there. And it comes
25 to reason that it's the same -- you know, the same

1 users, the users that are participating in that, did a
2 joke of, look, it's the shooter; it's that guy we've
3 been picking on; let's put his picture and pretend he's
4 the shooter.

5 We don't actually know that because,
6 again, they can't -- they don't show it to you. It
7 doesn't exist. They don't have it. They've never
8 offered into evidence what the actual third party
9 statement is.

10 They gave you -- and I'll show you in
11 this -- I'll use the document camera here. This is
12 quoted in our motion, and it's also an exhibit to
13 defendants' motion. They showed you this. And this is
14 going to help you understand why this isn't an accurate
15 report even if this was the picture.

16 Your Honor, this is the post that they
17 submitted from the 4chan website. And as you'll see
18 from all the sources, it's the absolute gutter of the
19 Internet. This is an anonymous post. And I'm going to
20 point out a couple things if I can approach the screen,
21 Your Honor.

22 THE COURT: You may.

23 MR. BANKSTON: You'll notice here that
24 this is a time stamp. This says 1750:12. That's on a
25 GMT time scale. Mr. Daniels' article was published

1 roughly 1702, something in that neighborhood. This
2 postdates Mr. Daniels' article.

3 The other thing you'll notice is that if
4 you look at the actual article itself -- so this is not
5 the source. But the other thing you can tell is the
6 standard formatting of the 4chan post, which it has a
7 picture. It has all of that next to it. It has all
8 this information. It has text areas. And it has a
9 picture where you can put a caption even below it if you
10 want to.

11 So I'm going to now replace this image
12 with the actual image that they published. This is the
13 article. All right. Your Honor, and what you'll see
14 about this is that this photograph and this
15 commentary -- again, if I can approach here. This is a
16 cropped image. You can't see it very well in this
17 image, but there's a border here. This has been
18 cropped. This is not the full 4chan post, because as
19 you can see from the last format we saw, it has a lot of
20 other information in it. So this is the source. It's
21 not this. It's not the tweet that they showed later.
22 They show you at one point the Laguna Beach Antifa
23 tweet. It's not that. That's the source.

24 And if you are going to have to decide was
25 that accurately reported, you don't have the source. If

1 you want to ask what did they say, what is the exact
2 language of the post, what did it contain, was it
3 accurately reported, you don't know, because what they
4 did is they cropped a piece of it out. And, Your Honor,
5 I'm really strongly of the opinion that if we did have
6 the original source, if it was located, we would find
7 out that what they have cropped out would demonstrably
8 show it's a joke, it's a hoax, it's a stupid thing on
9 4chan. And instead, all we have is the cropped image.
10 So we will never know. We'll never know what the third
11 party allegation is or what it said.

12 The other thing I wanted to show you,
13 Your Honor, is this, because I have a feeling they may
14 try to fall back on it. This is a tweet. And I'm not
15 sure how familiar you are with Twitter. But this here
16 is the account, LagBeachAntifa, Laguna Beach Antifa.

17 THE COURT: You correctly assumed I know
18 nothing about Twitter.

19 MR. BANKSTON: Okay. Twitter works by --

20 THE COURT: And I hope I never do.

21 MR. BANKSTON: Have to, exactly. Twitter
22 works by individuals making an account and then creating
23 a content, and then that content is distributed to
24 anybody who follows that account. And so then that gets
25 distributed to their timelines, and then those people

1 can distribute it to more timelines.

2 In this case, this account is pretty well
3 known. We talked about that in our brief. The most
4 basic Google search on there would have shown that
5 they're a parody account. They exist to do hoaxes and
6 trolls and make jokes. They're not even doing it
7 maliciously necessarily, I guess. They're just a joke
8 account. They're just not serious content.

9 The other problem here is, of course, this
10 is not the source because if, again, you compare this to
11 the article, not the same photo, not the same language,
12 none of that. So they are not accurately reporting this
13 tweet, which doesn't even say the word communist. It
14 doesn't do any of that.

15 RT stands for retweet, right? And retweet
16 means that if I got it on my timeline, I'll send it to
17 everybody I know. And what this is is a joke.

18 THE COURT: But please don't send it to
19 anybody else.

20 MR. BANKSTON: Right, exactly, yeah, yeah,
21 look at this. And everybody who saw this knew it was a
22 joke. This is not an allegation. It's not a serious
23 allegation. Most importantly, it's not the source of
24 the article. So none of that should give them any kind
25 of defense from any of this.

1 The last thing I want to talk about is
2 reckless and malice. Now, there were some objections on
3 the affidavits. I just want to briefly respond in
4 exactly the same way as yesterday. They object like to
5 the last sentence, reckless disregard. Well, all of
6 this is supported by all these facts. And there's some
7 really important ones I wanted to bring to your
8 attention. And the first one I want to show you is a
9 headline written by Mr. Daniels.

10 THE COURT: Well, they objected to more
11 than just the last sentence. And if at some point you
12 feel -- and I have this in summary judgments all the
13 time -- we don't need that as part of the record, simply
14 retract it. Simply say the Court need not consider that
15 particular line in the Zipp affidavit for the purposes
16 of this hearing. That would obviate the need, and I
17 would be ever so grateful, for this Court to have to
18 address each and every jot and tittle of every
19 objection.

20 MR. BANKSTON: Yeah, I agree.

21 THE COURT: Does that make sense?

22 MR. BANKSTON: Yes, I do.

23 THE COURT: So think about that, Counsel,
24 and confer with opposing counsel and see. I do that in
25 summary judgments all the time. The lawyers just

1 graciously agree, which I think there's a good chance of
2 in this case, this is the record, we don't need that for
3 your purposes of your decision, we do need this, but not
4 that, and just clarify the record, okay?

5 MR. BANKSTON: Yeah, I think we'll do
6 that. We'll talk after the hearing about how best to do
7 that.

8 THE COURT: I appreciate that.

9 MR. BANKSTON: Okay. This article is a
10 headline written by Mr. Daniels, BBC Falls Victim to
11 4chan Trolling, MSM Caught Sounding Like Idiots. This
12 is one of the several pieces of evidence in Mr. Zipp's
13 affidavit where he has to give you -- I mean, look, it's
14 routine that you're going to have a journalism expert
15 talk about the standard of care, the breach, and the
16 state of mind. I have to offer circumstantial evidence
17 on the author's state of mind. Obviously I can't offer
18 direct evidence. I mean, I don't have a mind reader.
19 So what the court says is that I can offer
20 circumstantial evidence of all this.

21 This is one of them. There's another one.
22 When he says MSM, he's talking about mainstream media
23 and that he's different; he's smarter than them. So he
24 knows what's going on with 4chan. And you can see the
25 other evidence in our motion where he has talked about

1 4chan in the past and understands exactly what they are.

2 You'll see not only that, but of course
3 there's this bit that immediately after the subject
4 article was posted, commenters on InfoWars were, hey, I
5 just ran a reverse image search and that's not the guy;
6 here it is on 4chan a couple days ago; that's a totally
7 different guy; that's not him.

8 Daniels didn't do a reverse image search
9 before publishing it. And, of course, he knew about
10 them and published about them before. Their argument
11 seems to be that you can't have recklessness by any lack
12 of investigation. And that's not really the law. If
13 you really look at *Warner Brothers*, what *Warner Brothers*
14 talks about is the very first thing you should do is
15 determine the seriousness of the allegations made
16 against the plaintiff. That's your first step in actual
17 malice. And a high -- an extremely serious allegation
18 requires a correspondingly high standard of
19 investigation. And when a defendant has done no
20 investigation and shows that they really had a desire to
21 avoid finding out the truth and you can support that
22 inference, that's actual malice. And in this case I
23 think the law is very clear on that. You're going to
24 see a lot of law discussing the various different things
25 that can trigger actual malice. In this case, it's just

1 a constant flow of it.

2 So not only do you have -- the article
3 itself suffers from just the appearance of recklessness
4 because every fact in the article, not just our client's
5 picture -- every fact in it's just wrong. It's just a
6 manifestly incorrect article. Mr. Zipp goes through
7 that.

8 He also talks about the history of doing
9 this exact type of thing and being consistent with that
10 pattern. But mostly it's that Mr. Daniels knows and
11 understands all of the steps he should have taken. He
12 understands exactly the problems of this content and yet
13 he took zero steps. He abjectly disregarded all
14 journalistic standards. And that can give you evidence
15 that he had serious doubts at the time he published the
16 image. To me there's no doubt that this was published
17 with some sort of doubt. That's absolute. But in this
18 case we actually have the evidence to show that anybody
19 in this position would have had serious doubts and
20 Mr. Daniels in fact did have serious doubts.

21 When you look at this case, what it comes
22 down to is that they want you to give a decision that
23 will bless the idea that you can accuse a person of mass
24 murder to the entire world based on an anonymous message
25 from a gas station bathroom in the Internet and that you

1 can do so with zero attribution, never identify the
2 third party and just say the statement is true. And
3 again, like I say, Your Honor, that ends defamation law.
4 There is no defamation law once that happens because the
5 Internet is changing in such a way that you could create
6 anonymous third party allegations completely
7 untraceable.

8 For instance, one of the big reasons for
9 the third party allegation statute is that if there's a
10 third party who actually says defamation, then I need to
11 sue them, and I can't sue this person. I could never
12 even discover who they are. Maybe if I even knew where
13 the post was, perhaps there could be a chance through
14 subpoenaing and unmasking that I might be able to
15 discover who this anonymous person in their home
16 basement is. But because we can't even identify the
17 post, we have no idea what it is, I can't sue anybody
18 else. They're the only person I can sue.

19 Let's talk a little bit about damages.
20 We've cited some stuff in our brief, the *Hancock* case
21 and some others, where, yeah, affidavits from a person
22 are absolutely acceptable. There's no rule that says a
23 self-serving affidavit just gets thrown out. I mean,
24 otherwise we're throwing out every one. I mean, there
25 goes Daniels' as well. That's not what the law is.

1 Obviously they can give testimony about that.

2 Mr. Fontaine in his affidavit used the
3 phrase "I have decided to seek medical care," and he
4 said that back when he filed the motion. And he had
5 already sought medical care and he has been seeking
6 medical care.

7 THE COURT: But the affidavit doesn't say
8 that.

9 MR. BANKSTON: It doesn't. I will concede
10 that Mr. Fontaine's usage in that last line is subject
11 to possible interpretation. You could interpret that as
12 saying he hasn't visited a doctor yet. You can also
13 interpret it that he made that decision and that's a
14 past decision and he has returned to see a doctor. If
15 that's important to you, if that clarification needs to
16 be made, Mr. Fontaine will amend his affidavit,
17 absolutely.

18 THE COURT: Counsel, I'm not going to
19 decide what you need for the motion.

20 MR. BANKSTON: Well, then that's --

21 THE COURT: I'm going to go back to what I
22 said earlier. You just need to decide what your record
23 is and I'm going to do my job after you do that.

24 MR. BANKSTON: Okay. I don't believe it
25 is ambiguous. I believe it reflects that this has

1 caused him to need to seek medical treatment. That
2 being said, because of this discussion, let me add to my
3 list that I will at the conclusion of this hearing
4 supplement to you an amended declaration from
5 Mr. Fontaine in which he tells you specifically, yes, in
6 that sentence what I meant to indicate is that the
7 decision has already been made and treatment has already
8 been sought. I will supplement that for you at the end
9 of the hearing. That will be the last piece of
10 information I give you.

11 Even apart from that statement, though,
12 the other things in the affidavit clearly get you there
13 on mental anguish. He didn't mention everything that's
14 in there. And part of it is, of course, Mr. Fontaine
15 knows my other clients. He knows what happened when
16 they got sucked into an InfoWars thing. He knows
17 exactly about that and he's terrified of that, and he
18 talks about it. And he talks about seeing the weird
19 stuff he sees online. He talks about seeing the threats
20 and the harassments and the people who still think he's
21 a crisis actor even today. And these things have him
22 scared for his life.

23 The standard that you were asking for
24 earlier about when do you get there on mental anguish,
25 it's when the plaintiff's degree of mental stress causes

1 a substantial disruption to their daily routine. That's
2 the standard. And he clearly meets that. That's
3 definitely set forth in his affidavit.

4 But this man -- look, when you're a young
5 man, a sensitive young man like Marcel --

6 THE COURT: But he read through the
7 affidavit and apparently -- and I forget the case he
8 cited. It's a fairly recent Austin Court of Appeals
9 opinion for the proposition that even with the
10 disruptions in that affidavit that seem to correspond
11 perfectly to the disruptions in the other person's life,
12 that's not enough of a disruption in their daily life.
13 You have to miss work or something, I guess.

14 MR. BANKSTON: Well, Your Honor, I would
15 say look at the language used in those cases. Those
16 people had worry and they lost some sleep and they
17 were -- you know, they had some stress. This man is in
18 fear of his life. He is in literal fear of his
19 safety --

20 THE COURT: So losing sleep is not enough
21 apparently.

22 MR. BANKSTON: I think if you lose enough
23 sleep that it causes a disruption in your daily routine
24 it is.

25 THE COURT: Well, that's the question.

1 MR. BANKSTON: That is the question.

2 THE COURT: Does the affidavit address
3 disruption in daily routine sufficient to hurdle the
4 case law that is most recently coming out?

5 MR. BANKSTON: Well, he absolutely says
6 those exact words, that this emotional distress has been
7 so severe that it has disrupted my daily routine and
8 describes methods in which that has happened.

9 THE COURT: All right.

10 MR. BANKSTON: And there are several ways
11 in which that has happened. I think you're right,
12 Your Honor, that when a young man is scared to go out in
13 public for fear of being attacked by an InfoWars fan,
14 that is compensable mental anguish. There's no question
15 that given what he has described about having his image
16 spread as a mass murderer across the world, he's
17 expressed compensable mental anguish. And I think if
18 you look at the cases we cited for that, you'll see that
19 we're well over that standard. And I think what will
20 get you there *per se* like in Hancock is once he's had
21 mental anguish enough that's caused him to seek medical
22 treatment, yeah, you're there. That's compensable.
23 There's no question that's compensable. So I don't
24 think that there's any way we can talk about it not
25 being compensable.

1 He talks about that he doesn't ever think
2 he's going to be the same. He thinks this has changed
3 him forever. And I think all of us can sympathize with
4 that, but the language he uses is not conclusory. So
5 again, just go through the affidavit and understand that
6 he is making very specific statements. He had to --
7 this young man had to describe the actual pain to them.
8 And describing emotional pain isn't an easy thing to do,
9 and I thought he did a superlative job.

10 All right. Your Honor, I do want to talk
11 a little bit about the correction just real quick
12 because I think that's important on the falsity issue.

13 THE COURT: I'm sorry. The what?

14 MR. BANKSTON: The correction. And so --

15 THE COURT: What do you mean by that?

16 MR. BANKSTON: After being sued,
17 defendants issued a correction on their website.

18 THE COURT: Oh, yes.

19 MR. BANKSTON: In doing so --

20 THE COURT: And in fact, your original
21 pleading says we requested a correction and it didn't
22 come.

23 MR. BANKSTON: It didn't come until after
24 we sued, correct.

25 THE COURT: Yes.

1 MR. BANKSTON: Yes. So there was a 30-day
2 clock. We sued on the 30th day and to see if they would
3 give a correction. And upon being served with the suit,
4 they did give a correction. They had never done so
5 before that. That correction was issued under Remedies
6 Code 73.057(b)(1), which is different from (b)(3), and
7 that's very important in this case.

8 The retraction under that section -- if
9 you issue a retraction under that section, what you're
10 saying is the publication of an acknowledgement that the
11 statements specified as false and defamatory is
12 erroneous. So they've made a public statement that
13 their statements on their website were erroneous. The
14 retraction admits -- the quotation of it is InfoWars
15 stated incorrect --

16 THE COURT: Well, their take on that is
17 they agree the photograph was erroneous, but it wasn't
18 otherwise erroneous.

19 MR. BANKSTON: Well, that's --

20 THE COURT: That's their position, I
21 believe.

22 MR. BANKSTON: That's not the retraction
23 I'm currently reading you. That's not what it says.

24 THE COURT: All right. Well, tell me
25 what --

1 MR. BANKSTON: The retraction says --

2 THE COURT: Excuse me. We're talking at
3 the same time, which makes her job impossible. So when
4 I start a question, I've just got to be able to finish
5 it. What specifically did their retraction say that was
6 published?

7 MR. BANKSTON: The retraction admits that,
8 quote, "InfoWars stated incorrectly that it was an
9 alleged photo of the suspected shooter." All right.
10 That means their publication is false. That is not a
11 statement that we accurately published a third party
12 statement who was wrong. That is we stated incorrectly
13 that it was an alleged photo, because it wasn't an
14 alleged photo. There's never been anybody who's ever
15 made a genuine allegation that he's the shooter. It's
16 just never happened.

17 If they wanted to do a third party
18 defense, they would have had to use (b)(3), 73.057(b)(3).
19 That would be a retraction that is, quote, "a statement
20 attributed to another person who the publisher
21 identifies and the publisher disclaims an intent to
22 assert the truth of a statement." That's the third
23 party defense correction. They didn't issue that
24 correction. And in fact, in their own motion it says
25 that it's based on their inadvertent publication of the

1 image, not a true report of a third party making an
2 allegation. That's just not what they say.

3 So I think -- one, I think they're
4 estopped from asserting that it's the truth if they do a
5 retraction under (b) (1) because they have now admitted
6 the statement is erroneous. But more importantly, I
7 think it is another piece of evidence that this Court
8 can consider that they are not -- that even they
9 acknowledge they are not truthfully reporting the third
10 party's allegation, that even their own public
11 statements acknowledge that we incorrectly stated that
12 this was an alleged photo, because that's what they did.
13 They made a horrible, horrible mistake.

14 Ultimately publishing anonymous
15 accusations without attribution is not a defense. It's
16 evidence of actual malice. That's another thing you'll
17 see in the cases, is that if your story was based on a
18 wholly anonymous unverified tip, that's actual malice.
19 In those cases, the defendant's affidavit is going to be
20 completely irrelevant based on a wholly anonymous tip,
21 which is exactly what this was.

22 Also, when you're making allegations based
23 on a third party, what *Warner Brothers* says is that
24 recklessness may be found when there are obvious reasons
25 to doubt the veracity of the informant or the accuracy

1 of his report, and there are obvious reasons here. You
2 don't even have to go to my affidavits. You don't even
3 have to go to what Mr. Daniels said about 4chan. You
4 can go to -- we tried to see what the Sixth Circuit said
5 about 4tran, and it's pretty unequivocal. It is a site
6 designed to provide false information, to troll its
7 users. It is obviously inaccurate and unreliable. And
8 because they relied on that and they get no protection
9 from 005 as a broadcaster or a newspaper or anything
10 like that, this is textbook definition of actual malice.

11 So, Your Honor, at the end of the day, I
12 think you see the same conduct at heart in the
13 intentional infliction claim as well. So to the extent
14 that there aren't defamation claims against any party in
15 this case, these same facts are going to support the
16 intentional infliction claim as well.

17 Like you said, though, Your Honor, I do
18 believe that you're right, that no matter how I walk out
19 of here today, I walk out with some sort of chip being
20 taken off my shoulder. And if that's the case, I think
21 what we really have to do is look at those fees, look at
22 what the different parts of this motion are and what
23 happened.

24 The primary allegation and weight of the
25 original TCPA motion is not these peripheral things.

1 The weight of -- what we had to do to respond does not
2 address these peripheral things. But I will concede to
3 you that if there are some small issues in this case
4 that would require a small award of fees, those may be
5 if my defamation claim is granted. We think we've
6 brought you all that today.

7 I simply don't see how this case can be
8 defended from a substantive standpoint. There's clearly
9 not a real allegation. And even if there was, they're
10 not entitled to protection. And even if they were, they
11 didn't identify a third party, and there's no way that
12 any of this can actually be verified. There's no way
13 you can check it against its accuracy. We've cited you
14 an incredible amount of law that the publication of a
15 person's photo, even when the correct subject is
16 identified by name, is defamatory of and concerning
17 them.

18 THE COURT: You have five minutes left in
19 your one hour.

20 MR. BANKSTON: Okay. We think all of
21 those things are pretty self apparent. Without the
22 defense of the statute, this case falls exactly if you
23 were going to write an outline of how you could have an
24 incredibly malicious act of defamation because here you
25 have the anonymous source. You have absolutely -- I

1 mean, if you think about it, Your Honor, try to imagine
2 what steps, if any, Mr. Daniels took at all of any care
3 that he took to make sure that this was the right photo,
4 and there isn't any. There's not one thing they can do.
5 He saw it on a gutter site, you know, and then he saw a
6 tweet later. That's it. That is an abject lack of
7 care. And there's just -- you can't say that that
8 establishes any amount of care, so therefore, there's
9 no way you can say that that's not reckless and
10 malicious.

11 The other argument that I've been hearing
12 is that because the plaintiff has attempted to show you
13 clear and specific evidence of actual malice, that
14 therefore we haven't been able to prove negligence. And
15 the way I had always viewed that and the way I had
16 always learned about it is that if I'm going to try to
17 prove gross negligence, I have proved negligence in the
18 process. I have overflowed the cup. If I have the cup
19 of negligence and I keep pouring reckless acts into it
20 till it overflows into reckless and gross conduct, then
21 I have also proved negligence. So I don't think that's
22 an issue in this case.

23 At the end of the day, the only complaints
24 in this case have to do with procedural and party
25 matters, which I think are fairly addressed by

1 inferences in the case, by the case law, and the
2 affidavits. So for that reason, Your Honor, we'd ask
3 you to deny the motion in total.

4 THE COURT: Well, actually, what you're
5 asking me to do, best-case scenario you've conceded,
6 grant the motion only as to the intentional infliction
7 of emotional distress claim and allow every other claim
8 against all parties to survive.

9 MR. BANKSTON: Let me --

10 THE COURT: That's really what you're
11 asking.

12 MR. BANKSTON: Yes. So let me amend that
13 slightly. I agree that if you follow the *Warner*
14 *Brothers* decision on intentional infliction that is over
15 at the Third Court of Appeals right now, I can
16 absolutely agree that that's the decision you would
17 probably arrive at. I don't want to say that I wouldn't
18 want to appeal that decision and possibly try to change
19 that law.

20 THE COURT: Because you believe that
21 decision may be wrong.

22 MR. BANKSTON: Yes, I do.

23 THE COURT: All right.

24 MR. BANKSTON: And I think it's
25 fundamentally unjust to plaintiffs.

1 THE COURT: All right.

2 MR. BANKSTON: But I don't expect you to
3 defy your governing court.

4 THE COURT: I understand. I understand
5 your position.

6 MR. BANKSTON: So I don't want it to be
7 taken as a waiver of any argument on appeal or anything
8 like that.

9 THE COURT: I understand your position.

10 MR. BANKSTON: Okay. Thank you,
11 Your Honor.

12 THE COURT: You have 15 minutes if you
13 wish to use it.

14 MR. TAUBE: Thank you, Your Honor.
15 Your Honor, I want to try to address kind of some of
16 these things in a very succinct manner so the Court
17 understands exactly what the argument is. I do want to
18 note that for the most part counsel fairly addressed
19 much of what we said today and much of the argument,
20 particularly as it relates to the parties.

21 So again, let me focus just for a second
22 on Mr. Jones individually. There is zero evidence in
23 the record that Mr. Jones had anything to do with this
24 photo or the publication of the photo. There's actually
25 zero record. And I can -- I will talk to the Court

1 about what evidence -- what the standard of evidence is
2 under *Warner Brothers* and what is clear and specific
3 evidence because it's specifically cited in *Warner*
4 *Brothers*. But the evidence that they are trying to use
5 as it relates to InfoWars, LLC is at best confusing and
6 at worst nonexistent.

7 So let me start with Mr. Jones. Their
8 basic argument with respect to Mr. Jones is Mr. Jones
9 did all these other things that they allege, no real
10 proof of it but they allege through Mr. Zipp's
11 affidavit, with regard to other things; therefore, he
12 must have been involved with this photograph.

13 So if I walk down the street, Your Honor,
14 and I turn right every time I come to an intersection,
15 it must be that when I come to this particular next
16 intersection, I'm going to turn right.

17 THE COURT: Aren't they also alleging that
18 Mr. Jones is the decider for InfoWars, to quote a former
19 president? He's the decider for InfoWars. And your own
20 website says InfoWars controls this website. You see
21 what I mean?

22 MR. TAUBE: What it says --

23 THE COURT: This latest piece of evidence
24 that is being filed as we speak purports to show that
25 InfoWars controls the website that is in question here

1 and that Mr. Jones is the decider for InfoWars. I don't
2 think there's really any dispute about that, but okay.

3 MR. TAUBE: Your Honor, there's no
4 evidence of it, which is what the Court is required to
5 look at.

6 THE COURT: But the Court can consider
7 pleadings. And at some point, in order to survive these
8 motions to dismiss at the front end of the case, can't
9 the Court consider that?

10 MR. TAUBE: What the Court has to do is to
11 look at the clear and specific evidence. And what the
12 court in *Warner Brothers* -- Court of Appeals in *Warner*
13 *Brothers* says is clear means free from doubt, sure or
14 unambiguous, specific, Black's Law Dictionary, specific
15 as being peculiar to the thing in relation in question,
16 characterized by precise formulation or accurate
17 restriction or free from such ambiguity as results from
18 careless lack of precision or from omission of pertinent
19 matter. That's the definition.

20 Now, with regard to the evidence that they
21 point to recently of InfoWars, if the Court actually
22 looks at the full body of what they said -- and I can
23 pull it up if the Court wants, but you'll see it -- it
24 says -- it says InfoWars.com is a Free Speech System
25 company. So the evidence that they provided to the

1 Court is not specific, doesn't meet the definition, is
2 at best ambiguous, and there is no other evidence that
3 they have provided to the Court or even pled that
4 suggests that InfoWars, as opposed to Free Speech
5 Systems, LLC, per Mr. Daniels' uncontroverted affidavit
6 operates the InfoWars.com website. There's no evidence
7 that InfoWars, LLC did anything with regard to this
8 photograph and less evidence that --

9 THE COURT: Well, operating the website,
10 that's why they're using this recent exhibit, right?

11 MR. TAUBE: Yes.

12 THE COURT: To suggest they are operating
13 the website or have some control over the website,
14 right?

15 MR. TAUBE: That's a fair -- yes. But
16 what I would suggest to you, Your Honor, is if you look
17 at the entire document, it's ambiguous, which is
18 specifically contrary to the level of evidence that the
19 plaintiffs are required to produce and which, as the
20 Court notes under the statute, they could have asked for
21 discovery in order to try to provide the Court the
22 record from which you must find clear and specific
23 evidence that InfoWars, LLC published anything.

24 The allegations with respect to Mr. Jones
25 are zero. The fact that his name is on the web -- I'm

1 not saying -- I don't want to suggest to the Court it's
2 beyond -- it's beyond even suggestion that this website,
3 Free Speech Systems, LLC, doesn't advertise for an
4 entity for Mr. Jones. But that has nothing to do with
5 the specific evidence that is required with respect to
6 publication.

7 What they're saying is that Mr. Jones
8 defamed Mr. Fontaine, that he published something, and
9 he published nothing. It also suggests that somehow
10 under *respondeat superior*, even though Mr. Daniels is an
11 employee, uncontroverted in his affidavit, Paragraph 2,
12 of Free Speech Systems, LLC and is not an employee of
13 Mr. Jones and is not an employee of InfoWars, LLC, that
14 somehow there's a conspiracy and somehow there is a
15 relationship where Mr. Daniels is acting as an employee
16 of Mr. Jones. There's just -- there's nothing there,
17 and there's nothing for the Court to base that ruling
18 on.

19 Your Honor, I also want to talk at least
20 for a second about the argument somehow that the Court
21 must do one or the other as it relates to intentional
22 infliction, in other words, that if the Court denies the
23 defamation claim, it must keep alive intentional
24 infliction. That is not what the case law suggests.

25 THE COURT: No, no, no. I was picking on

1 him using *Warner Brothers* to basically get him to
2 concede that under governing law, if defamation
3 survives, intentional infliction must go. He doesn't
4 want to waive that argument, but he conceded, graciously
5 I thought, that that is the current state of the law.

6 MR. TAUBE: But the inverse is -- what
7 he's also suggesting is somehow the inverse is also
8 true. It's based on the same set of operative facts.
9 In other words, if the Court determines that defamation
10 doesn't exist in this case because they haven't met the
11 requirements of proof, it doesn't mean that intentional
12 infliction must live. In fact, since it's based upon
13 the same facts, it doesn't live. It isn't violated. It
14 isn't valid against the parties who did nothing. And in
15 fact, Your Honor --

16 THE COURT: Because the facts really come
17 within a defamation claim. And if you can't meet the
18 standards for that, there need be no gap filler because
19 you didn't -- you didn't meet the claim for which there
20 is a cause of action.

21 MR. TAUBE: As usual, Your Honor, the
22 Court said it better than I did.

23 THE COURT: No, I understand. I
24 understand your position.

25 MR. TAUBE: And the other part,

1 Your Honor, just to make a final point, there's still no
2 evidence of damages that would be necessary for
3 intentional infliction. This whole argument about the
4 affidavit and the affidavit testimony and what it says,
5 I simply would ask the Court to go back and look at the
6 Third Court of Appeals opinion which we cited that talks
7 about what isn't sufficient. And this affidavit by
8 definition isn't sufficient because it lines up
9 precisely with what the Third Court says doesn't amount
10 to intentional infliction damages. It's that clear.

11 Your Honor, the whole issue with regard to
12 malice I must admit kind of confuses me. If the Court
13 goes back and looks at what their pleading is, okay, and
14 the analogy about the filling the negligence cup, okay,
15 they didn't suggest negligence. They don't plead
16 negligence. They plead actual malice. And they've
17 tried to establish a negligence claim, which is
18 inapplicable in this case because you have a public
19 statement. And the courts have been very clear about
20 that, and I read you the quote from the Texas Supreme
21 Court on that exact issue.

22 The idea that somehow they can -- I mean,
23 I do not contest that circumstantial evidence can be
24 considered in that issue. That is what the case law
25 says. But if the Court compares what that evidence

1 is -- and *Warner Brothers* is the best example. In
2 *Warner Brothers*, the Court found that -- I'm quoting,
3 Your Honor, from Page 806. Defendants had serious
4 doubts about the truth of the publication, but they also
5 had knowledge that the statements were false. Jones
6 argued that the story itself was inherently implausible
7 and that TMZ defendant selectively omitted certain facts
8 and deliberately distorted others.

9 In other words, it's not just, well, you
10 didn't do what somebody should have done, which, again,
11 the courts have rejected every single time. It's not a
12 matter of what you could have done. It's a matter of
13 the state of mind. And there is nothing, especially
14 given the timing that this was taken down within
15 13 hours when evidence did become available to
16 Mr. Daniels that this picture was not correct, that
17 there was serious doubts about the publication at the
18 time it was published.

19 THE COURT: But have they made a case or
20 at least stated evidence that survives dismissal that
21 using this website at all for a journalist is running
22 through a red light with sirens and, you know, like a
23 railroad signal? I mean, you just wouldn't do it. No
24 self-respecting journalist would use this site is what
25 I'm reading.

1 MR. TAUBE: It is what they're saying.

2 THE COURT: And if that's what they say
3 and if they have a respected journalist saying it,
4 doesn't that survive dismissal --

5 MR. TAUBE: No, sir.

6 THE COURT: -- on that allegation?

7 MR. TAUBE: No, sir.

8 THE COURT: Why not?

9 MR. TAUBE: That's negligence. In other
10 words, the standard --

11 THE COURT: No, no, no, no. No, that no
12 self-respecting journalist would ever post anything --
13 publish anything from this site.

14 MR. TAUBE: Well, Your Honor, what they --

15 THE COURT: That it's such an incendiary,
16 you know, unreliable pool of, you know, discredit that
17 you just wouldn't do it; nobody would do it. I'm going
18 to go back and read the Zipp affidavit.

19 MR. TAUBE: Sure.

20 THE COURT: But that's what I'm
21 understanding he says.

22 MR. TAUBE: That is what --

23 THE COURT: You just wouldn't touch this
24 thing.

25 MR. TAUBE: That's what he says. And

1 also --

2 THE COURT: Wouldn't touch it with a
3 ten-foot pole. Why isn't that recklessness to just do
4 it anyway?

5 MR. TAUBE: Well, what they base it on in
6 fact is an alleged finding in the Sixth Circuit case
7 that that is what 4chan says. Now, if the Court
8 actually looks at that --

9 THE COURT: I don't know. I'm just saying
10 if they make the allegation and they have someone
11 willing to swear that that's true, that's the
12 journalistic standard, doesn't that survive dismissal?

13 MR. TAUBE: No, Your Honor.

14 THE COURT: And then we need to have a
15 fact-finder hear the evidence on that to decide who's
16 right about it. But this is a dismissal stage, and
17 you're saying that provides not really any evidence to
18 state the claim.

19 MR. TAUBE: It's not evidence of actual
20 malice, Your Honor.

21 THE COURT: Okay.

22 MR. TAUBE: And we've cited at least five
23 cases to say that what you should have done, in other
24 words, what Mr. Zipp suggests is to back check from this
25 source, is not sufficient to establish actual malice.

1 It must be a state of mind where there is serious
2 disregard for the content that is being used.

3 And again, Your Honor, I just want to
4 point out the Sixth Circuit case that they keep going
5 back to, it's actually a criminal case where the
6 defendant is charged with destroying evidence. And what
7 the Sixth Circuit looks at in that case is the fact that
8 it was reported on 4chan that his activity was being
9 reported to the authorities and that based upon that
10 information, the defendant should have known that there
11 was ongoing investigation so that what he did with his
12 computer was illegal. There's no finding about 4chan.
13 What it says is that people use 4chan for Internet
14 trolling. It doesn't find that it is a cesspool as
15 suggested. It makes no finding.

16 THE COURT: I don't know. I haven't read
17 the Zipp affidavit. I'm trying to infer what I'm going
18 to read in it when I finally read it based on what he's
19 telling me is in it. And so I'm just sort of -- I'm
20 trying to paraphrase what I suspect I may read in there
21 and trying to get you to answer. If I do read that, why
22 does that mean I still need to dismiss because that's no
23 evidence of recklessness?

24 MR. TAUBE: It is not sufficient because
25 all that does is establish a standard of care. And what

1 the case law says is what you should have done, okay, is
2 not enough. In other words, you have to show that there
3 were, not could have been, not might have been, serious
4 doubts about the truthfulness which the defendant
5 actually had at the time of publication.

6 THE COURT: Down to your last minute.

7 MR. TAUBE: Thank you, Your Honor.

8 Mr. Zipp's affidavit in that regard establishes only a
9 standard of care, and that's not enough to establish
10 actual intent, malicious intent enough to establish
11 malice and therefore defamation.

12 Your Honor, the Court's paid obviously
13 very close attention to all the matters that are before
14 the Court. On behalf of all my clients, I thank you.

15 I do want to point out, Your Honor, for my
16 last 30 seconds in regard to the attorneys' fees claim,
17 most -- Mr. Brown did most of the work on this case.
18 His hourly billing rate is less as a plus-20-year lawyer
19 than the nine-year lawyer on the other side. Mine is
20 590, Your Honor, and I am close to 40 years of practice.

21 THE COURT: I knew you wouldn't --

22 MR. TAUBE: Between us, that I think shows
23 that we are reasonable in the attorneys' fees.

24 THE COURT: I knew you couldn't let that
25 go.

1 MR. TAUBE: Sorry, Your Honor. I had to
2 discuss it.

3 THE COURT: All right. Thank you,
4 Counsel. That concludes our record.

5 *(Court adjourned)*

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REPORTER'S CERTIFICATE

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THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Chavela V. Crain, Official Court Reporter in and for the 53rd District Court of Travis County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered in evidence by the respective parties. I further certify that the total cost for the preparation of this Reporter's Record is \$840.00 and was paid by counsel for Defendants.

WITNESS MY OFFICIAL HAND this the 27th day of September, 2018.

/s/ Chavela V. Crain
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