

NO. D-1-GN-18-001842

LEONARD POZNER AND	§	IN THE DISTRICT COURT OF
VERONIQUE DE LA ROSA	§	
<i>Plaintiffs,</i>	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
ALEX E. JONES, INFOWARS, LLC,	§	
AND FREE SPEECH SYSTEMS, LLC	§	
<i>Defendants</i>	§	345 th JUDICIAL DISTRICT

**DEFENDANTS’ BRIEF IN SUPPORT OF ITS MOTION TO DISMISS
UNDER THE TEXAS CITIZENS PARTICIPATION ACT**

COME NOW, Defendants Alex E. Jones, Infowars, LLC and Free Speech Systems, LLC, (collectively, the “Defendants”), and hereby file this, their Brief in Support of its Motion to Dismiss Under the Texas Citizens’ Participation Act and in support thereof would respectfully show this Honorable Court as follows:

In their attempt to avoid dismissal of several claims brought for the purpose of silencing Defendants, Plaintiffs – literally at the last minute – have dropped all claims relating to the Megyn Kelly interview on June 18, 2017. In total, Plaintiffs dropped the following claims:

Pozner:	Legal action of Defamation per se “in the particulars”	1
	Legal action of Defamation per se “gist”	1
	Legal action of Defamation per quod “in the particulars”	1
	Legal action of Defamation per quod “gist”	1
	Legal action of conspiracy for Defamation per se “in the particulars”	1
	Legal action of conspiracy for Defamation per se “gist”	1
	Legal action of conspiracy for Defamation per quod “in the particulars”	1
	Legal action of conspiracy for Defamation per quod “gist”	1
	Legal action of Respondeat Superior for Defamation per se “in the particulars”	1
	Legal action of Respondeat Superior for Defamation per se “gist”	1
	Legal action of Respondeat Superior for Defamation per quod “in the particulars”	1
	Legal action of Respondeat Superior for Defamation per quod “gist”	1

De La Rosa :	Legal action of Defamation per se “in the particulars”	1
	Legal action of Defamation per se “gist”	1
	Legal action of Defamation per quod “in the particulars”	1
	Legal action of Defamation per quod “gist”	1
	Legal action of conspiracy for Defamation per se “in the particulars”	1
	Legal action of conspiracy for Defamation per se “gist”	1
	Legal action of conspiracy for Defamation per quod “in the particulars”	1
	Legal action of conspiracy for Defamation per quod “gist”	1
	Legal action of Respondeat Superior for Defamation per se “in the particulars”	1
	Legal action of Respondeat Superior for Defamation per se “gist”	1
	Legal action of Respondeat Superior for Defamation per quod “in the particulars”	1
	Legal action of Respondeat Superior for Defamation per quod “gist”	1

TOTAL LEGAL ACTIONS DROPPED BY PLAINTIFFS 64*

Whether by non-suit or amendment, dropping claims after a TCPA motion has been filed does not protect Plaintiffs from Defendants’ Motion.

*16 total claims times 3 (the number of defendants they sued for Defamation) = 48 and 8 total claims times 2 (the number of defendants they sued for liability under Respondeat Superior) =16

As the Fort Worth Court of Appeals explained in *Rauhauser v. McGibney*, 508 S.W.3d 377, 381 (Tex. App.—Fort Worth 2014, no pet.), a motion to dismiss under the TCPA can still be pursued – and granted – even after all the claims at issue have been withdrawn or nonsuited. This is because “a defendant's motion to dismiss that may afford more relief than a nonsuit affords constitutes a claim for affirmative relief that survives a nonsuit.” *Id.* (collecting Texas Supreme Court cases). Thus, “[a]lthough a plaintiff decides which of its own claims to pursue or to abandon, that decision does not control the fate of a nonmoving party's independent claims for affirmative relief.” *Id.*

In *Rauhauser*, although the plaintiffs took a non-suit of all their claims after the defendant filed a TCPA motion to dismiss, the court held that the defendant was still entitled to be heard on his motion to dismiss seeking dismissal with prejudice, attorney fees, and sanctions. *Id.* at 382. On appeal, the court held that the defendant had met his burden under the TCPA, so the court remanded the case to the trial court with instructions to enter an order of dismissal and to grant attorney fees, expenses and appropriate sanctions. *See id.* at 390.

As the Texas Supreme Court has explained, when the purpose of a statutory provision authorizing a motion for dismissal, sanctions, and attorney's fees is deterrence of frivolous claims, “[r]emoving a defendant's ability to appeal a denial of [the motion for dismissal, sanctions, and attorney's fees] after a nonsuit frustrates this purpose; a claimant could simply nonsuit a meritless claim and later re-file the claim with impunity.” *Villafani v. Trejo*, 251 S.W.3d 466, 470 (Tex. 2008). Following this reasoning, numerous appellate courts have held that TCPA motions to dismiss survive withdrawal or nonsuit of claims. *See, e.g., Rauhauser*, 508 S.W.3d 377; *Walker v. Hartman*, 09-16-00299-CV, 2017 WL 1173827 (Tex. App.—Beaumont Mar. 30, 2017, no. pet. h.); *Souza v. Tessmer*, 04-15-00153-CV, 2015 WL 4932567 (Tex. App.—San Antonio Aug. 19, 2015, no pet.); *James v. Calkins*, 446 S.W.3d 135 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

If a TCPA motion to dismiss survives a complete nonsuit of all claims asserted, it follows that such a motion would survive any amendment of the pleadings that attempts to withdraw some claims or change the nature of the claims. Thus, in the instant case, Plaintiffs’ attempts to withdraw claims is futile and each of those claims, on which there is admittedly no clear and specific evidence should immediately be dismissed with an award of statutory fees and costs.

