

Appeals held unambiguously that, “Appellant had a right to rely on the local rule.”¹ Plaintiffs likewise have the right to rely on a court’s local rules, but the Court did not afford that right to Plaintiffs in the instant case.

2. The 67th District Court has its own set of local rules which are accessible through the Court’s website on a page titled, “Court Rules and Procedures.”² These rules contain a specific provision regarding a party’s request for oral hearings. This provision states, “Any oral hearing should be requested from the Court Coordinator. **The Court does not deny a request for oral hearing.**”³ On November 6th, 2015, in reliance on this local rule, Plaintiffs sent an email to Becky Holland, the Coordinator for the 67th District Court, requesting an oral hearing on Defendant’s motion for fees and sanctions.⁴ In addition, Plaintiffs filed a written pleading reiterating this request in response to Defendant’s November 4th motion asking the Court to rule by written submission.⁵ The Court did not fulfill Plaintiffs’ request. The Court did not set a hearing for written submission either, and instead ruled on Defendant’s motion without warning.

3. The local rules for courts in Harris County also address requests for oral hearings, but those rules contain an important distinction: the absence of language guaranteeing that a request for an oral hearing will be granted. This distinction played a pivotal role in the 2008 divorce case, *Argovitz v. Argovitz*. This case was appealed, in part, on the grounds that no oral hearing was held on a motion for summary judgment, despite a hearing having been requested. The Fourteenth District Court of Appeals held, “Because the trial court was not required to grant Paddy’s request for oral hearing under Local Rule 3.3.4, the trial court acted within its authority

¹ *Jack Adams Aircraft Sales, Inc. v. Hurley*, 569 S.W.2d 599, 601 (Tex. Civ. App. Texarkana 1978)

² Available at <http://access.tarrantcounty.com/en/civil-courts/district-courts/67th-district-court/court-rules-procedures.html>

³ Court Rules and Procedures, aka 2015 Bench Book, pg. 4, ¶ 6

⁴ Exhibit R - Email Correspondence Regarding Request for Oral Hearing

⁵ Plaintiffs’ Response to Defendant’s Request to Rule by Written Submission, filed November 13, 2015

when it denied Paddy's supplemental motion for leave to file an untimely response.”⁶ The court bases its holding on the absence of a guarantee for an oral hearing in those local rules.

Conversely, such a guarantee *does exist* in the local rules for the 67th District Court, but the Court did not adhere to it.

II. The Court Abused Its Discretion By Granting Defendant The Non-monetary Award of Plaintiffs’ Property

4. When the Court of Appeals for the Second District remanded the case at bar to this Court, it ordered that this Court “enter an order of dismissal in accordance with this opinion and for further proceedings relating to Rauhauser's court costs, attorney's fees, expenses, and sanctions under section 27.009(a)(1) and (2) of the TCPA.”⁷ Though the TCPA is unspecific on the type of sanctions that can be awarded, monetary sanctions are the norm. Plaintiffs have yet to find a Texas case in which non-monetary sanctions were awarded pursuant to the TCPA. As such, granting Defendant the requested relief of disclosing and transferring ownership of several Internet domain names was improper as a TCPA sanction.

5. The ordered domain transfer was not merely improper as a TCPA sanction; it was also a violation of Plaintiffs’ due process rights. The Constitutions of the United States and Texas both prohibit the deprivation of a person’s property without due process. “At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”⁸ Plaintiffs were not afforded an opportunity to be heard before being deprived of their property, despite having requested an oral hearing from the Court Coordinator *and* having requested an oral hearing through written motion filed with the Court.

⁶ *Argovitz v. Argovitz*, 2008 Tex. App. LEXIS 9147, *29 (Tex. App. Houston 14th Dist. Dec. 9, 2008)

⁷ *Rauhauser v. McGibney*, 2014 Tex. App. LEXIS 13290 (Tex. App. Fort Worth Dec. 11, 2014)

⁸ *Tex. Integrated Conveyor Sys. v. Innovative Conveyor Concepts*, 300 S.W.3d 348 (Tex. App. Dallas 2009)

6. Plaintiffs note that courts do consider Internet domain names to be property. In the landmark case *Kremen v. Cohen*, the Ninth Circuit Court of Appeals held “like other forms of property, domain names are valued, bought and sold...they are now even subject to in rem jurisdiction... Registering a domain name is like staking a claim to a plot of land at the title office. Kremen therefore had an intangible property right in his domain name...”⁹

III. If The Non-Monetary Relief Was Granted As A Remedy For Plaintiffs’ Alleged Criminal Misconduct Rather Than As A TCPA Sanction, This, Too, Would Be Improper Without A Hearing

7. Towards the end of this litigation, Defendant made several baseless allegations against Plaintiffs concerning “criminal aggravating misconduct.”¹⁰ It was in Defendant’s November 9th pleading that Defendant first requested the remedy of Plaintiffs’ turning over various domain names allegedly belonging to Plaintiffs.¹¹ Plaintiffs responded to these allegations by written response filed on or about November 23, 2015. Neither Defendant nor the Court ever set this motion for hearing, nor did the Court ever rule on this motion. Instead, Defendant bundled these additional remedies into a new, comprehensive proposed order that he filed December 3, 2015, one day before the proposed written submission date on his fees and sanctions motion. The record does not reflect when or if the Court separately considered these new claims, but all remedies requested were collectively present in the Court’s final order of December 30, 2015.

8. Defendant accused Plaintiffs of criminal misconduct and requested remedies for such conduct that included the deprivation of Plaintiffs’ property and the posting of a written apology on Plaintiffs’ websites. Therefore, the proceedings regarding that request should be treated as criminal proceedings or at the very least, quasi-criminal proceedings, much like

⁹ *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. Cal. 2003)

¹⁰ Defendant’s Filing of November 9th, 2015

¹¹ *Id.* ¶ 5(i)

contempt proceedings. (In Texas, contempt hearings are “characterized as quasi-criminal proceedings which should conform as nearly as practicable to those in criminal cases.” *Ex parte Johnson*, 654 S.W.2d 415 (Tex. 1983)) The Supreme Court of Texas goes on to state that treating proceedings as quasi-criminal means, *inter alia*, that “persons charged with criminal contempt pursuant to article 1911a are constitutionally guaranteed the right to be present at trial and confront witnesses.” *Id.*¹² Plaintiffs were not afforded this right, despite being guaranteed this right by the Texas Constitution, the Supreme Court of Texas *and* this Court’s local rules. Therefore, if the Court’s punishment of Plaintiffs was a remedy for Plaintiffs’ alleged criminal misconduct, this too, was improperly ordered and was a violation of Plaintiffs’ due process rights.

IV. The Court Abused Its Discretion In Awarding Sanctions So Excessive As To Not Merely Deter Similar Conduct, But To Bankrupt Plaintiffs

9. Defendant cites the \$250,000 sanction in the Harris County case of *Schlumberger v. Rutherford* in support of the justification of his \$1,000,000 sanction request against Plaintiffs. Defendant fails to mention, however, that Schlumberger has a current enterprise value of \$93.6 **BILLION** U.S. dollars¹³ and employs over 120,000 people. Plaintiff McGibney’s company, by contrast, is a microscopic entity that should not by any logic be compared to Schlumberger, much less sanctioned *more severely*. Plaintiff James McGibney himself had a net worth of approximately \$5,000 on January 1st, 2014 and as of June 1st, 2015 he had a net worth of \$2,800.¹⁴ Plaintiff ViaView had a net worth of approximately \$120,000 on January 1st, 2014.¹⁵ As of June 1st, 2015, ViaView is on the verge of shutting down and made less than \$7,500 in

¹² Tex. Rev. Civ. Stat. Art. 1911a has since been repealed, but the underlying due process protections for quasi-criminal proceedings still stand. As stated by Thirteenth District Court of Appeals, “Texas courts have consistently held that alleged constructive contemnors are entitled to procedural due process protections before they may be held in contempt.” *In re Dooley*, 129 S.W.3d 277 (Tex. App. Corpus Christi 2004)

¹³ Yahoo! Finance profile on Schlumberger Limited, available at <http://finance.yahoo.com/q/ks?s=SLB>

¹⁴ Exhibit A - Affidavit of James McGibney

¹⁵ *Id.*

revenue for 2015.¹⁶ Although this information was provided to Defendant during discovery, it works heavily against his position and he makes no mention of it in his motion for fees and sanctions.

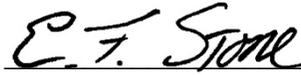
10. Plaintiffs have vowed NEVER to sue for defamation in Texas again, regardless of the accusations levied against them. Plaintiffs have painfully witnessed that civil litigation is entirely ineffective to prevent or remedy the actions of stalkers of this derangement and tenacity. This lawsuit in fact *increased* the severity and frequency of defamation and harassment targeted at Plaintiffs and those surrounding them. Even if Plaintiffs had “won” this suit, this Court could never have prevented or remedied the irreparable harm brought about when McGibney attempted to confront these malicious, vile people. The record incontrovertibly shows that this irreparable harm was not only suffered by McGibney, but by his family, his employer, and his multiple *attorneys*, as well as *their* families and *their* clients. There is no award of sanctions that could deter Plaintiffs more than they have already been deterred and devastated by the intensified harassment from which they originally sought relief.

V. CONCLUSION & PRAYER

11. For these reasons, Plaintiffs implore the Court to stay the award of fees and sanctions until the Court can properly evaluate the assertions and arguments of all parties.

¹⁶ *Id.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 1, 2016, a true copy of this motion was electronically served through efiletexas.gov on all active parties that have appeared in this case.

