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Velva L. Price
District Clerk
Travis County
D-1-GN-18-001842
Sandra Henriquez

CAUSE NO. D-1-GN-18-001842

LEONARD POZNER AND VERONIQUE DE LA ROSA *Plaintiffs*	§ § §	IN DISTRICT COURT OF
	§	TRAVIS COUNTY, TEXAS
VS.	§ §	
ALEX E. JONES, INFOWARS, LLC, AND FREE SPEECH SYSTEMS, LLC, *Defendants*	§ § §	345th DISTRICT COURT

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO THE DECLARATIONS OF LEONARD POZNER AND VERONQIUE DE LA ROSA

Come now Plaintiffs, and file this Response to Defendants' Objections to their supplemental declarations, and would show the Court as follows:

I. Sufficiency of Plaintiffs' Declarations.

Defendants object that Plaintiffs' declarations "lack the required language of Chapter 132," and that the declarations are not in "compliance with the legislated form that provides that the declarant state his/her date of birth and address."[1] These objections are baseless and a waste of this Court's limited time. Basic research on Chapter 132 would have confirmed that Plaintiffs' declarations satisfy the statutory requirements. Defendants are not entitled to demand that Plaintiffs disclose their date of birth or address in a public document, potentially subjecting them to further harassment or attack. Not only is Defendants' objection legally frivolous, but it is also distasteful and harassing under the circumstances.

"Under section 132.001, the main requirements are that the declaration be in writing and 'subscribed by the person making the declaration as true under penalty of perjury'…If

[1] *See* Defendants' Objections, p. 2.

those requirements are met, courts have found the jurat substantially complies with the statute." *Bonney v. U.S. Bank Nat'l Ass'n,* 2016 WL 3902607, at *3 (Tex. App.—Dallas July 14, 2016, no pet.). Both of Plaintiffs' declarations state the declarants "do hereby declare under penalty of perjury that the following is true and correct."[2] "The inclusion of the phrase 'under penalty of perjury' is the key to allowing an unsworn declaration to replace an affidavit." *Dominguez v. State,* 441 S.W.3d 652, 658 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also Tex. Dep't of Pub. Safety v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012) (declarations must merely be subscribed as true "under penalty of perjury").

These rules have been repeatedly applied to situations in which the declarant chooses not to use the suggested language and form contained in the Remedies Code. As the El Paso Court explained in a similar case:

> We disagree with Appellee's contention that the Yoo Declaration's deviations from the statute render it inoperative and convert it into unsworn hearsay. Although the declaration jurat fails to contain Yoo's address and date of birth, such an omission is not fatal here. The operative part of the jurat is the portion subjecting the declarant to the penalty of perjury. Failure to include the declarant's birthdate or address is a formal defect having no effect on whether a false statement would render the declarant liable for perjury.

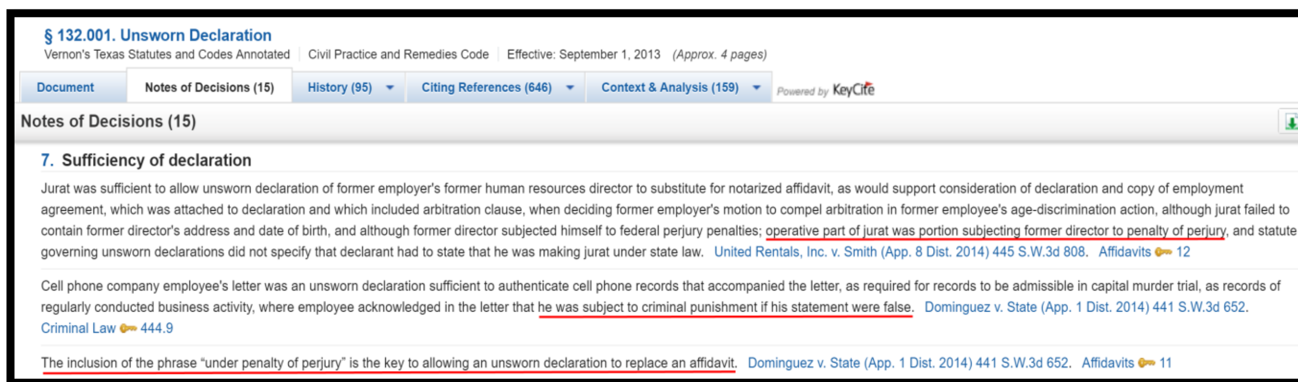
United Rentals, Inc. v. Smith, 445 S.W.3d 808, 812–13 (Tex. App.—El Paso 2014, no pet.).

Similarly, in *Gray v. Gray*, a declaration did not include a discrete jurat or acknowledgement; however, it did contain a statement that "I declare under penalty of perjury that the foregoing Motion is true and correct." 2015 WL 1535684, at *4 (Tex App.–Beaumont Apr. 2, 2015, no pet.). The *Gray* court held that because the "operative part of the jurat" that subjects the declarant to the penalty of perjury was included, the declaration was

[2] *See* Supplemental Exhibit J; Exhibit K.

substantially compliant with the statutory requirements and substituted for a "sworn verification." *Id*. The acceptance of such a declaration by Texas courts is not a recent development, as it was observed in *Owens v. State,* 763 S.W.2d 489, 490 (Tex. App.—Dallas 1988, pet. ref'd) ("We begin by noting certain variances from the statutory suggested form of declaration…We conclude that these variances from the statutory suggested form of declaration are not fatal to the permitted declaration.").

Had Defendants' counsel simply consulted the Notes of Decisions in the Remedies Code, they would have been immediately alerted to the authorities cited in this response:



§ 132.001. Unsworn Declaration
Vernon's Texas Statutes and Codes Annotated | Civil Practice and Remedies Code | Effective: September 1, 2013 *(Approx. 4 pages)*

Document | Notes of Decisions (15) | History (95) | Citing References (646) | Context & Analysis (159) | Powered by KeyCite

Notes of Decisions (15)

7. Sufficiency of declaration

Jurat was sufficient to allow unsworn declaration of former employer's former human resources director to substitute for notarized affidavit, as would support consideration of declaration and copy of employment agreement, which was attached to declaration and which included arbitration clause, when deciding former employer's motion to compel arbitration in former employee's age-discrimination action, although jurat failed to contain former director's address and date of birth, and although former director subjected himself to federal perjury penalties; operative part of jurat was portion subjecting former director to penalty of perjury, and statute governing unsworn declarations did not specify that declarant had to state that he was making jurat under state law. United Rentals, Inc. v. Smith (App. 8 Dist. 2014) 445 S.W.3d 808. Affidavits 12

Cell phone company employee's letter was an unsworn declaration sufficient to authenticate cell phone records that accompanied the letter, as required for records to be admissible in capital murder trial, as records of regularly conducted business activity, where employee acknowledged in the letter that he was subject to criminal punishment if his statement were false. Dominguez v. State (App. 1 Dist. 2014) 441 S.W.3d 652. Criminal Law 444.9

The inclusion of the phrase "under penalty of perjury" is the key to allowing an unsworn declaration to replace an affidavit. Dominguez v. State (App. 1 Dist. 2014) 441 S.W.3d 652. Affidavits 11

The decisions would have revealed the extensive body of case law on this issue. *See, e.g., Gillis v. Harris County,* 2018 WL 3061302, at *3 (Tex. App.—Houston [14th Dist.] June 21, 2018, no pet. h.) (A declaration need "not contain all of the jurat elements set forth in section 132.001—such as his address, date of birth, and middle name and the date and county of execution."); *Teixeira v. Hall,* 107 S.W.3d 805, 808 (Tex. App.—Texarkana 2003, no pet.) ("Section 132.002 requires the declaration be subscribed by the person making the declaration as true under penalty of perjury. This declaration contains that language."); *Ex Parte Lewis,* 2016 WL 4238681, at *3 (Tex. App.—Eastland Aug. 4, 2016, pet. denied) (Subscribing under penalty of perjury "substantially complied with Section 132.001(c) and

(e).”); *Hardwick v. Hardwick,* 2016 WL 5442772, at *2 (Tex. App.—Fort Worth Sept. 29, 2016, no pet.) (“declarations may be used in lieu of verifications or affidavits so long as they are subscribed as true under ‘penalty of perjury’”); *Scott v. Smith,* 2007 WL 925816, at *1, n.2 (Tex. App.—Houston [14th Dist.] Mar. 29, 2007, no pet.) (Declaration sufficient if it “signed under penalty of perjury.”); *Dominguez v. State*, 441 S.W.3d 652, 658(Tex.App.-Houston [1st Dist.] 2014, no pet. h.) (applying rule in criminal context).

There are obvious reasons why these Plaintiffs are *extraordinarily* hesitant about filing public documents containing their personal information, such as their address or date of birth, and they will not publish that information absent a legal obligation to do so. Information such as date of birth, addresses, *etc*., have been used in the past by InfoWars followers to locate and harass the Plaintiffs. Under these circumstances, and given Plaintiffs' clear right under Texas law to submit a declaration without this information, Defendants' objections are plainly harassing. Good faith would dictate that these objections be withdrawn.

II. The Court Should Consider Plaintiffs' Supplemental Declarations.

Defendant argues the Court should not consider Plaintiffs' supplemental declarations because they were filed during a recess of the hearing. As this Court correctly pointed out during the hearing, “[t]here is no statutory deadline for filing a response to an anti-SLAPP motion.” *See Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 Tex. Tech. L. Rev. 725 (Summer 2015), *citing* Tex. Civ. Prac. Rem. Code 27.004. Additionally, Defendants did not cite any authority prohibiting a party from filing a supplemental declaration in response to a TCPA motion, nor did they provide the Court with any examples of such a declaration being excluded.

Here, it is helpful to look at other dispositive proceedings. For example, "even in summary judgment proceedings, where the rules provide for strict deadlines in filing responses and supporting evidence," a trial court has the discretion "to admit late-filed evidence upon 'leave of court.'" *Wright v. Hernandez*, 469 S.W.3d 744, 755 (Tex. App.—El Paso 2015, no pet.). Even with statutory deadlines, a court is free to accept the evidence if it believes the interests of justice would be served.

In the summary judgment context, not only can evidence be accepted after the hearing, but it can even be accepted after summary judgment has been granted, as it was in the defamation case *Stephens v. Dolcefino*:

> On rehearing, the KTRK parties argue that we cannot consider the pager-camera test tape because it was admitted after the trial judge had rendered summary judgment. However, a trial judge may accept summary judgment evidence filed late, even after summary judgment, as long as he affirmatively indicates in the record that he accepted or considered it.

Stephens v. Dolcefino, 126 S.W.3d 120, 133 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

The rule is applied flexibly due to the finality of the motion. If the new evidence is material to the motion, then the court can "consider the late filing because of the harsh nature of a summary judgment disposition." *See* 3 McDonald & Carlson Tex. Civ. Prac. § 18:17 (2d. ed.). Therefore, in the summary judgment context, "courts are cautious in denying the right to file such documents." *Id.* Here, given the potential for a dispositive ruling and the early stage of the case, the Court should be equally if not more cautious. Indeed, it would be perverse if a party was allowed to supplement in the presence of a deadline, as in summary judgment, but unable to supplement in the absence of a deadline, as under the TCPA.

Another point of comparison is the procedure for responding to a special appearance. Like summary judgment practice, there is a deadline for responding, but a court is likewise

free to consider evidence after the deadline. *Phillips Dev. & Realty, LLC v. LJA Eng'g, Inc.,* 499 S.W.3d 78, 88 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("The trial court has discretion to allow the opposing party to file late affidavits."); *Leben v. Treen,* 2003 WL 22479150, at *2 (Tex. App.—Corpus Christi Oct. 30, 2003, no pet.) ("In a special appearance proceeding, the trial court has discretion to consider a late-filed affidavit.").

Like summary judgment, consideration of supplemental exhibits in response to a special appearance is favored. Courts should welcome pertinent evidence. Thus, it was proper to accept supplemental evidence when "[t]he court stated that it was refusing to strike [plaintiff's] affidavit because it wanted to consider all the information available." *Giacomini v. Lamping,* 42 S.W.3d 265, 270 (Tex. App.—Corpus Christi 2001, no pet.). Information which is otherwise relevant should not be suppressed.

Another strong point of comparison is a motion to compel arbitration, which is also effectively dispositive. In ruling on those motions, post-hearing evidence is likewise permitted. Courts have found the dispositive procedure "does not bar the trial court's consideration of [plaintiff's] supplemental affidavits filed after the hearing on the motion to compel arbitration." *Wright v. Hernandez,* 469 S.W.3d 744, 753 (Tex. App.—El Paso 2015, no pet.). Nearly all these motions are brought under the Federal Arbitration Act (9 U.S.C.A. § 2), which, like the TCPA, does not set a deadline for a response.

Here, consideration of the exhibits is consistent with the TCPA's command that "the court *shall* consider the pleadings and supporting and opposing affidavits." *See* Tex. Civ. Prac. & Rem. Code 27.006 (emphasis added). Texas appellate opinions have often directed courts to "consider whether the disputes will be decided by the facts revealed and not the facts concealed." *Browne v. Las Pintas Ranch, Inc.,* 845 S.W.2d 370, 374 (Tex. App.—Houston

[1st Dist.] 1992, no writ). In this case, Defendants first challenged the notion of pecuniary loss during oral hearing. While Plaintiffs dispute that pecuniary loss must be established to a dollar amount in a declaration under these facts and law, Plaintiffs have supplemented to provide a more complete record of the truth should the Court find it necessary to consider the dollar amount of pecuniary loss. This will ensure that regardless of the Court's interpretation of the law, the dispute will be decided by the facts revealed rather than concealed. Finally, there is no prejudice since the Court could not consider rebuttal to the declarations, which must be accepted in a light most favorable to the Plaintiffs. In addition, Defendants have been provided an opportunity to object to the substance of the declarations, which they have done.

In the absence of a rule setting a deadline for Plaintiff's response, it is potentially unnecessary to request leave to file supplemental exhibits prior to the Court's ruling. However, out of an abundance of legal caution, and in deference to the Court's inherent ability to control its docket, Plaintiffs request leave of the Court to consider the supplemental exhibits, and request that the Court state in its ruling that it has considered the Plaintiffs' pleadings and all supplemental exhibits. Plaintiffs have attached a proposed order consistent with this request.[3]

III. Defendants' Specific Objections to Certain Testimony in the Declarations Should be Overruled.

Although Plaintiffs believe the Court can simply review the declarations and determine they are not objectionable on their face, Plaintiffs have nonetheless responded to Defendants' specific line-by-line objections to their declarations as follows:

[3] Exhibit 1, Plaintiffs' Proposed Order.

Declaration of Leonard Pozner

Statement	Response
I have incurred medical expenses valued at $85 per session for my treatment.	The statement is not hearsay. There is no third-party statement being reported. Mr. Pozner has personal knowledge of his own medical bills. Mr. Pozner stated that he incurred the expenses, satisfying Tex. Civ. Prac. & Rem. Code 41.0105 (allowing recovery for expenses incurred). Mr. Pozner is not giving an opinion about value of the services; he is stating the value of the expenses he incurred.
To date, the total value of medical treatment I have received is $595.	The statement is not hearsay. There is no third-party statement being reported. Mr. Pozner has personal knowledge of his own medical bills. TRE 1002 does not apply because Mr. Pozner is not proving the contents of a writing; Mr. Pozner is testifying to his personal pecuniary loss within his personal knowledge. Defendants first objected because Mr. Pozner had not stated a dollar value. Now that he has stated a dollar value, they seem to demand that copies of his medical bills be attached to his TCPA response. No authority supports this demand.
I sought this treatment to address the pain caused by Mr. Jones' revival of the Sandy Hook hoax allegation.	Mr. Pozner is simply stating the reason he sought medical care – due to the mental anguish caused by Mr. Jones' revival of the Sandy Hook lie, all of which is thoroughly documented in his original affidavit.

However, I will disclose that subsequent to viewing the April 22, 2017 video, I purchased a Norton Security Premium package to protect my online security and privacy, because I knew would under more intense online attack by InfoWars followers after Mr. Jones revived the Sandy Hook hoax allegation.	Defendants' hearsay objection is baffling. There is no third-party statement being discussed. Defendants' remaining objections appear to dispute that Mr. Pozner had good reason to fear for his life when Jones revived his Sandy Hook allegations in 2017. Plaintiffs trust the evidence in record dispels that notion. The evidence is sufficient to find that Mr. Pozner made these purchases due to the stress, fear, and mental anguish caused by Mr. Jones' revival of the hoax allegations.
This purchase costs me $54.99 per year.	Again, there is no hearsay, because there is no third-party statement discussed. Mr. Pozner has personal knowledge about how much he pays for Norton Security.
Subsequent to viewing the April 22, 2017 video, my ex-wife Veronique and I split the purchase of a one-year, two-person plan for the DeleteMe Privacy Protection service, which provides online monitoring and removal of your personal information. Given the renewed attention to the Sandy Hook hoax claims, I wanted to take action to prevent an InfoWars follower from again discovering our personal details and location.	Again, Defendants appear to dispute that Mr. Pozner and his ex-wife had good reason to fear for their lives when Jones revived his Sandy Hook allegations in 2017. Plaintiffs trust the evidence in record dispels that notion. The revival of the Sandy Hook lie by Mr. Jones caused Plaintiffs to fear a repeat of the prior threats to their safety. This fear is reasonable and well-described in their affidavits, declarations, and pleadings.

A year of this service cost us $229.	Again, there is no hearsay, because there is no third-party statement discussed. Mr. Pozner has personal knowledge about how much he and his ex-wife paid for DeleteMe Privacy Protection.
Subsequent to viewing the April 22, 2017 video, my ex-wife Veronique and I split the purchase of two new interior motion detection alarms to supplement the security of my home and Veronique's home.	Defendants claim it is hearsay for Mr. Pozner to describe what his ex-wife did. In reality, hearsay is when a declarant describes what a third-party said, not what they did. Mr. Pozner has personal knowledge of what his wife did, as these are events he personally perceived using his own senses.
Given our prior experience with the Sandy Hook hoax allegations being revived, I felt it was prudent and appropriate to supplement the security inside our homes.	It is not hearsay for Mr. Pozner to discuss his shared experience with his ex-wife in fearing for their lives over the past five years. He has personal knowledge of that experience. Defendants also object that Mr. Pozner cannot show that the hoax allegations caused a need for extra security. Again, Plaintiffs' trust the evidence in the record soundly rebuts that argument. In any case, the question is whether the hoax allegations put Mr. Pozner in a mental state which caused him to seek extra security.
Each of the two systems cost us $49.99 each.	Mr. Pozner has personal knowledge of his and his ex-wife's expenses on the motion sensors they purchased together.

Due to Mr. Jones' broadcast, I have also suffered severe emotional distress and trauma which I cannot even begin to adequately describe. No human being should ever be asked to suffer through the torment Mr. Jones carried out. I have been asked to state a dollar figure for emotional loss. I find this enormously difficult because in many ways, our pain is beyond measure. But I would not expect anyone to willingly go through our ordeal for anything less than $50 million, which I would say is fair compensation if it was your job to have your life destroyed by Mr. Jones.	The statement is relevant to Plaintiffs' claim for emotional distress.

Declaration of Veronique De La Rosa

Statement	**Response**
I have incurred medical expenses valued at $150.00 per session for my treatment.	The statement is not hearsay. There is no third-party statement being reported. Mrs. De La Rosa has personal knowledge of her own medical bills. Mrs. De La Rosa stated that she incurred the expenses, satisfying Tex. Civ. Prac. & Rem. Code 41.0105 (allowing recovery for expenses incurred). Mrs. De La Rosa is not giving an opinion about value of the services; he is stating the value of the expenses he incurred.
To date, the total value of medical treatment I have received is $900.00.	The statement is not hearsay. There is no third-party statement being reported. Mrs. De La Rosa has personal knowledge of her own medical bills. TRE 1002 does not apply because Mrs. De La Rosa is not proving the contents of

	a writing; she is testifying to his personal pecuniary loss within her personal knowledge. Defendants objected because Mrs. De La Rosa had not stated a dollar value. Now that she has stated a dollar value, they seem to demand that copies of her medical bills be attached to her TCPA response. No authority supports this demand.
I sought this treatment to address the pain caused by Mr. Jones' revival of the Sandy Hook hoax allegation.	Mrs. De La Rosa is simply stating the reason she sought medical care – due to the mental anguish caused by Mr. Jones' revival of the Sandy Hook lie, all of which is thoroughly documented in her original affidavit.
Because of the threats to our safety, my ex-husband and I have taken a number of measures to protect our privacy and security. One of the ways we have been vulnerable is that it is difficult to keep personal details off the internet. My ex-husband tries hard to stay on top of it, but it is a difficult thing to do.	Defendants claim it is hearsay for Mrs. De La Rosa to describe what her ex-husband did. In reality, hearsay is when a declarant describes what a third-party said, not what they did. Mrs. De La Rosa has personal knowledge of what her ex-husband did, as these are events she personally perceived using her own senses.
Subsequent to learning that Mr. Jones had been reviving the Sandy Hook hoax allegations throughout 2017, one of the steps Leonard and I took was to split the purchase of a two-person plan for the DeleteMe Privacy Protection, which cost us $229.	Mrs. De La Rosa has personal knowledge of what her ex-husband did, as these are events she personally perceived using her own senses. Mrs. De La Rosa has personal knowledge that Mr. Jones revived the Sandy Hook hoax allegations in 2017. It is not hearsay to state the cost she paid for DeleteMe Privacy Protection. Mrs. De La Rosa has personal knowledge of what she paid for the service.

	Defendants also object that Mrs. De La Rosa cannot show that the hoax allegations caused a need for extra security. Again, Plaintiffs' trust the evidence in the record soundly rebuts that argument. In any case, the question is whether the hoax allegations put Mrs. De La Rosa in a mental state which caused her to seek extra security.
Because of the renewed threat posed by the hoax allegations, Leonard and I also split the purchase of two new interior motion detection alarms to supplement the security of my home and Leonard's home.	Mrs. De La Rosa has personal knowledge of the purchase she made with her ex-husband. It is not hearsay. She is not reporting anything Mr. Pozner said. Defendants also argue Mrs. De La Rosa cannot show "there is a renewed threat from hoax allegation," and again, the record speaks for itself. Mrs. De La Rosa was terrified, and it is disappointing that Defendants would even argue that Mrs. De La Rosa had no justifiable reason to seek greater security for herself and her children.
Sometimes I lie awake at night worrying that despite our efforts at security, a determined conspiracy fanatic might gain entry to our home. I am hoping these new interior systems help ease my mind on nights when I cannot sleep.	Defendants disingenuously argue that Mrs. De La Rosa's loss of sleep was not caused by her fears after the InfoWars videos. Again, the record speaks for itself. Mrs. De La Rosa's fears are directly connected to the challenged video, and supported by her prior experience.
These systems cost us $49.99 each.	There is not hearsay. Mrs. De La Rosa has personal knowledge of the cost of the motion sensors she purchased with her ex-husband.
Due to Mr. Jones' revival of the Sandy Hook hoax allegation, we have been living in a near constant state of fear and worry. I don't believe my emotional state	The statement is relevant to Plaintiffs' claim for emotional distress.

will ever be anything even approaching normal ever again. Like my ex-husband stated, I would not expect anyone to willingly go through our ordeal for anything less than $50 million, which I would agree is fair compensation if it was your job to have your life destroyed by Mr. Jones.	

For the reasons stated above, Plaintiffs pray that this Court overrule Defendants' objections and grant leave to accept the supplemental exhibits into the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018 the forgoing document was served upon the following in accordance to Rule 21 of the Texas Rules of Civil Procedure:

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