

CAUSE NO. 2018-06745

FREE AND SOVERIEGN STATE OF	§	IN THE DISTRICT COURT OF
VERACRUZ DE IGNACIO DE LA	§	
LLAVE	§	
	§	
Plaintiff,	§	
	§	HARRIS COUNTY, TEXAS
v.	§	
	§	
18 SHALLOWFORD PL., LLC, <i>ET AL.</i>	§	
	§	
Defendants.	§	334 <sup>th</sup> JUDICIAL DISTRICT

**THE BANDIN DEFENDANTS' MOTION TO DISMISS PURSUANT TO THE TEXAS  
CITIZENS' PARTICIPATION ACT (ANTI-SLAPP)**

Defendants Jose Bandin, Monica Babayan, and 18 Shallowford Pl., LLC (the "Bandin Defendants") file this motion to dismiss Plaintiff's claims, pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code, commonly referred to as the Texas Citizens' Participation Act or "TCPA."

**INTRODUCTION**

The TCPA was enacted in 2011 to facilitate early dismissal of meritless lawsuits arising from the exercise of constitutionally-protected rights. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (quoting TEX. CIV. PRAC. & REM. CODE § 27.002). The law permits a party defending any legal action that implicates the right of free speech or association to file an early motion to dismiss the claims, forcing the responding party to produce "clear and specific" evidence of each required element of its claims. *Id.* at 898-899 (citing §§ 27.005(b)-(c)).

Plaintiff's poorly pleaded claims are precisely the type of legal action the TCPA is intended to deter. Very little is clear from the tangled web of conclusory allegations in Plaintiff's petition. But there is one unmistakable common thread—Plaintiff's claims against the Bandin Defendants implicate constitutionally protected communications relating to a matter of public concern and

their right of association. In essence, the Bandin Defendants are being sued because of their alleged association in pursuing real estate investments that Plaintiff contends were purchased with government funds stolen by a public figure. The Bandin Defendants' deny these allegations. Because these allegations implicate a matter of public concern and the right of association, the TCPA requires Plaintiff to demonstrate a "clear and specific" basis for its allegations before its claims may proceed.

### **FACTUAL BACKGROUND**

This case arises out of the alleged corruption and theft of public funds from the government by a public official. Plaintiff contends that Javier Duarte De Ochoa ("Duarte"), when he was the Governor of Veracruz from 2010 to 2016, engaged in a scheme to divert money earmarked for public social programs to a network of sham companies, which in turn, purchased properties in the United States with the allegedly stolen funds. Plaintiff alleges that the Bandin Defendants "conspired with Duarte and his associates to steal and embezzle, and commit fraud on Plaintiff." Pl's. Pet. at 5. "The purpose of the conspiracy was to move as much money as possible from the State of Veracruz to the United States for the benefit of Mr. Duarte and his family." *Id.*

The Bandin Defendants deny all of Plaintiff's allegations.

In addition to suing the individual defendants, Plaintiff has sued a limited liability company that owns the properties at issue, which Plaintiff contends were purchased with the alleged stolen funds from the State of Veracruz.

Based on the face of Plaintiff's petition, this legal action arises out of and relates to the Bandin Defendants' right of free speech on a matter of public concern. Indeed, the public's interest in this lawsuit is evidenced by the parties to the lawsuit—the State of Veracruz, which is a governmental body—and the nature of Plaintiff's claims—which allege that government funds

intended for environmental, economic, or community well-being were diverted away by a public official.

Furthermore, Plaintiff's claims implicate the Bandin Defendants' right of association because it concerns communications relating to their right to join together collectively to express, promote, pursue, or defend common interests—namely, their common interests in acquiring and investing in real estate. For the reasons explained below, the TCPA applies, and Plaintiff's claims must be dismissed unless Plaintiff provides clear and specific evidence of each element of its claims.

### ARGUMENT

Recognizing that the legal system can be used as a hammer to threaten those who would otherwise freely exercise their constitutional rights, the Texas legislature enacted the TCPA to protect the rights to petition, speak freely, and associate freely by permitting early dismissal of unmeritorious lawsuits that impact those rights. TEX. CIV. PRAC. & REM. CODE §§ 27.001-.011. To protect these important rights, the TCPA is to be “construed *liberally* to effectuate its purpose and intent *fully*.” *Id.* § 27.011(b) (emphasis added).

The TCPA provides that “[i]f a legal action is based on, relates to, or is in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.” *Id.* § 27.003. The filing of a motion under the TCPA initiates a two-step procedure to determine whether the lawsuit should be dismissed.

First, the movant has the initial burden of showing by a preponderance of the evidence that the TCPA applies. *Coleman*, 512 S.W.3d at 898 (quoting § 27.005(b)). If the movant meets that burden, the trial court must dismiss the claims unless the responding party points to “clear and

specific evidence” that establishes a prima facie case for each essential element of its claim. *In re Lipsky*, 460 S.W.3d 579, 586-87 (Tex. 2015) (quoting § 27.005(c)).

**A. The TCPA Applies to this Case.**

The TCPA defines “exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” TEX. CIV. PRAC. & REM. CODE § 27.001(3). A “communication” includes “the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” *Id.* § 27.001(1). A “matter of public concern” includes “an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace.” *Id.* § 27.001(7).

Plaintiff’s claims implicate four of these criteria—though only one needs to be satisfied for the TCPA to apply—because they relate to: (1) health or safety, (2) environmental, economic, or community well-being, (3) the government, and (4) a public official or public figure. Indeed, Plaintiff’s petition explicitly details how this lawsuit affects a matter of public concern by alleging that “hundreds of millions of dollars earmarked for social programs were diverted” by a public figure, and the “money stolen by Duarte rightfully belongs to the people of the State of Veracruz.” Pl.’s Pet. at 1-2. Plaintiff’s allegations go directly to the heart of the TCPA.

The communications made in connection with these matters of public concern are the numerous documents filed in the public record relating properties at issue and the entity that own such properties, including but not limited to the deeds, land records, taxation and appraisal information, and ownership and formation documents. **Exs. 1-8.** Because Plaintiff contends that the “funds used to purchase these propert[ies] were stolen from Veracruz,” *see* Pl.’s Pet. at 5, these communications—*i.e.*, the land and ownership records—relate to a matter of public concern.

Furthermore, Plaintiff's allegations implicate the Bandin Defendants' right of association. The TCPA defines "[e]xercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(2). The Bandin Defendants filed numerous documents in the public record for the collective purpose of furthering and developing their common interests in acquiring and investing in real estate. Thus, Plaintiff's allegations relate to the Bandin Defendants' right of association, and the TCPA applies.

**B. Plaintiff Cannot Present Clear and Specific Evidence to Support a Prima Facie Case for Each Element of Their Causes of Action.**

Because the Bandin Defendants have established the TCPA applies to this case, the burden shifts to Plaintiff to establish by "clear and specific evidence a prima facie case for each essential element of" Plaintiff's causes of action, including conversion, theft liability act, constructive trust, civil conspiracy, joint and several liability, and Texas Penal Code section 31.03(e)(7). *Id.* § 27.005(c). Plaintiff cannot satisfy its heavy burden.

"Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue. In other words, a prima facie case is one that will entitle a party to recover if no evidence to the contrary is offered by the opposite party." *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 725 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds by Lipsky*, 460 S.W.3d at 587. The Texas Supreme Court has defined "clear" as "free from doubt," "sure," or "unambiguous," while "specific" is understood to mean "explicit" or "relating to a particular named thing." *Lipsky*, 460 S.W.3d at 590. Plaintiff cannot satisfy this burden for any of elements of any of the causes of action alleged against the Bandin Defendants. These claims must therefore be dismissed.

**C. The Bandin Defendants are Entitled to Fees and Sanctions.**

Upon dismissing Plaintiff's claims, the Court "shall award" the Bandin Defendants fees and sanctions. TEX. CIV. PRAC. & REM. CODE § 27.009(e).

### **CONCLUSION & PRAYER**

The Bandin Defendant request that (1) the Court stay all discovery until the Court has ruled on this motion as required by TEX. CIV. PRAC. & REM. CODE § 27.003(c); (2) set a hearing on the motion within 60 days as required by § 27.004(a); (3) grant their motion to dismiss pursuant to § 27.005(b); (4) award attorneys' fees, sanctions, and costs of court to them as mandated by § 27.009(a); and grant such other and further relief to which they may be entitled.

Respectfully submitted,

**FOGLER, BRAR, FORD,  
O'NEIL & GRAY, LLP**

/s/ Murray Fogler

Murray Fogler

State Bar No. 07207300

[mfogler@fbfog.com](mailto:mfogler@fbfog.com)

Jas Brar

State Bar No. 24059483

[jbrar@fbfog.com](mailto:jbrar@fbfog.com)

909 Fannin Street, Suite 1640

2 Houston Center

Houston, Texas 77010

Tel: 713.481-1010

Fax: 713.574-3224

**COUNSEL FOR THE BANDIN DEFENDANTS**

## **CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2018, a true and correct copy of the forgoing document has been served on all counsel of record, listed below, by the Electronic Service Provider, if registered, otherwise by email and/or fax.

/s/ Murray Fogler

**MURRAY FOGLER**

Anthony G. Buzbee ([tbuzbee@txattorneys.com](mailto:tbuzbee@txattorneys.com))  
Christopher J. Leavitt ([cleavitt@txattorneys.com](mailto:cleavitt@txattorneys.com))  
The Buzbee Law Firm  
JP Morgan Chase Tower  
600 Travis, Suite 6850  
Houston, Texas 77002

Unofficial Copy Office of Chris Daniel District Clerk