

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, *ET AL.* §
§
Defendants. § 334th JUDICIAL DISTRICT

**RESPONSE OF THE BANDIN DEFENDANTS
TO “EMERGENCY” MOTION FOR DISCOVERY**

Plaintiff’s motion for leave to do discovery arrives too late, both as a matter of statute and of practicality.

First, the statute. The Texas Citizens Participation Act suspends all discovery when a motion to dismiss is filed, with one exception. The court may permit, *upon a showing of good cause*, “limited and specific” discovery related to the motion. TEX. CIV. PRAC. & REM. CODE § 27.006(b). This type of limited discovery, however, must occur *before* the hearing on the motion to dismiss. That order is made clear because the statute sets hard deadlines for the hearing, which may be extended *if* the court allows any discovery. *Id.* § 24.004(c). The statute does not contemplate a hearing, followed by a request for discovery, especially when the it is requested for the sole purpose of shoring up insufficient evidence. *Id.*

As we discussed at the hearing, the statute also requires a decision on the motion no later than 30 days after the hearing. *Id.* § 27.005(a). This illustrates the practical problem of seeking discovery after the hearing. By the time of the hearing on this motion (which is an emergency only of Plaintiff’s own making), one week will have passed from the hearing. Plaintiff seeks depositions of two individuals now residing in Spain¹. Considering the logistics of arranging travel to Spain (Plaintiff may not compel these defendants to appear in Houston for their depositions), not to mention the vacation plans of counsel, it is virtually impossible to meet the statutory deadline.

One additional point bears mention. The belated effort to seek leave to do discovery speaks loudly about the insufficiency of Plaintiff’s evidence in support of its claims. If Plaintiff had any confidence in its evidence that its evidence met the statutory requirement, it would not have dashed off its emergency motion. But merely conceding inadequacy of evidence is not enough—Plaintiff must demonstrate good cause for the discovery. It must, for example, provide reasons why the evidence it already has in its own possession fails to meet the test, and also what it hopes to attain by the “limited and specific” discovery targeted to respond to the motion. Here, the motion fails, too.

¹ The TCPA does not authorize the use of depositions as evidence. TEX. CIV. PRAC. & REM. CODE § 27.006(a) (“...the court shall consider the pleadings and supporting and opposing affidavits...”).

For these reasons, the Plaintiff's emergency motion should be denied.

Respectfully submitted,

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

/s/ Murray Fogler

Murray Fogler

State Bar No. 07207300

mfogler@fbfog.com

Jas Brar

State Bar No. 24059483

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 July 18, 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