IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FREE AND SOVEREIGN STATE OF VERACRUZ DE IGNACIO DE LA LLAVE	§	CIVIL ACTION NO. 4:18-cv-00835
Plaintiff,	§	JURY TRIAL DEMANDED
vs.	§	
CW OPERATING CO., ET AL	§	
Defendants.	§	

THE BANDIN DEFENDANTS' REPLY IN SUPPORT OF MOTIONS TO DISMISS UNDER RULE 12(b)(6) AND TEXAS CITIZENS PARTICIPATION ACT (ANTI-SLAPP)

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The Bandin Defendants file this reply in support of their motions to dismiss.

INTRODUCTON

Plaintiff, the self-styled "Free and Sovereign State of Veracruz de Ignacio de la Llave," claims to have conducted "much investigative work" that revealed "a global conspiracy spanning several continents that was based in Houston and used to steal Veracruz's wealth." Dkt. No. 19 at 3. With such grandiose language, one must expect Plaintiff, with all the power and authority of a free and sovereign state available to it, to be to articulate in its pleading just how the Bandin Defendants are

alleged to be connected to this grand conspiracy. But Plaintiff cannot; hence, dismissal is proper under Rule 12(b)(6).

One might further presume that Plaintiff, when called upon by Texas law to provide clear and specific evidence of each element of its claims, would be able to demonstrate with precision and proof just how the Bandin Defendants are alleged to have used money stolen from Plaintiff to acquire property in Texas. But, once again, Plaintiff offers no proof; dismissal under the TCPA is therefore also proper.

RULE 12(b)(6) MOTION TO DISMISS

We begin by noting that, of course, we must accept the allegations of Plaintiff's complaint as true for purposes of the Rule 12(b)(6) motion to dismiss. We fear, however, that by combining our Rule 12(b)(6) motion, which limits the Court's consideration to the pleading, with a TCPA motion, which requires evidence, Plaintiff has conflated the two. Virtually all of the allegations Plaintiff relies upon in its response are not pleaded in its complaint.[1]

[1] Consider, for instance, the following statements:

- "Mexico's investigation has revealed that two close Duarte associates, Jose Bandin and his wife, Monica Babayan, participated in and were the beneficiaries of the theft of Veracruz's funds;"
- "Mr. Bandin was a childhood friend of Mr. Duarte;"
- "Bandin and Babayan have since both fled Mexico, and now even the United States, and are both currently reside in Spain;"
- "Based on information and belief, Mr. Bandin was recently indicted in Mexico;"
- "[D]uring Mr. Duarte's time in office, both Mr. Bandin and Ms. Babayan purchased numerous properties and created a slew of corporate entities in which to purchase and own them . . .;"

It is well-settled that a "Rule 12(b)(6) motion is limited to the factual allegations in the complaint and does not involve an evaluation of the merits of the supporting evidence." *Hopson v. Chase Home Finance, LLC*, 605 Fed. Appx. 267, 268 (5th Cir. 2015). As Plaintiff concedes in its response, the entirety of its allegations against the Bandin Defendants in its complaint are as follows:

> Mr. Duarte orchestrated a scheme in which hundreds of millions of dollars earmarked for social programs were diverted to an elaborate network of phantom companies – among other misdeeds. Indeed, he is alleged to have absconded with nearly $3 billion of his state's money. This stolen money was used to make investments and purchase luxury homes and cars all over the United States…
>
> Each of the Defendants named conspired with Javier Duarte to steal government funds from the State of Veracruz. Defendant Jose A. Bandin, who is married to Defendant Monica Babayan, has very close ties to Javier Duarte.

See Dkt. No. 19 at 10 (quoting Compl. at 2).

Standing alone, these allegations are wholly insufficient. In *Twombly*, a case involving a claim of conspiracy to restrain trade in the long-distance telephone market, the Supreme Court explained that a complaint "requires more than labels and conclusions" and "[f]actual allegations must be enough to raise a right to relief

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- "Defendants' acquisitions perfectly correspond with Mr. Duarte's time in office as Governor – it began in 2010 and concluded in 2016."

Id. at 4. None of these statements appear in the complaint.

above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, 550 US 544, 545 (2007).

Plaintiff alleges there was a vast conspiracy to steal $3 billion dollars from Veracruz, but it offers no details on how the alleged conspiracy operated or the Bandin Defendants' role in the alleged conspiracy other than having "very close ties to Javier Duarte." Dkt. No. 19 at 10 (quoting Compl. at 2). Plaintiff has failed to allege, among other things, when this alleged conspiracy was formed, how it was formed, the object to be accomplished, and the meeting of the minds between Duarte and the Bandin Defendants on the course of action of the alleged conspiracy. *See Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

Likewise, Plaintiff has failed to assert sufficient factual allegation showing the Bandin Defendants unlawfully appropriated property that belonged to Veracruz, which is required for its Theft Liability Act and Texas Penal Code 31.03(e)(7) claims. *See* TEX. CIV. PRAC. & REM. CODE § 134.002(2); TEX. PENAL CODE § 31.03(a). Indeed, there is no explanation of how much money was allegedly taken from Veracruz's accounts and transferred to the Bandin Defendants, how that money was transferred to the Bandin Defendants in the United States (by check, wire, or cash), or how Plaintiff can establish the Bandin Defendants used money from Veracruz to purchase the specific properties at issue in the United States.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Here, there is no factual content in Plaintiff's complaint—other than the meaningless statement that the Bandin Defendants and Duarte are "very close"—to show the Bandin Defendants are liable for the misconduct alleged. *See, e.g., U.S. v. Forrest*, 620 F.2d 446, 451 (5th Cir. 1980) ("That one is married to, associated with, or in the company of a criminal does not support the inference that that person is a criminal or shares the criminal's guilty knowledge."). Guilt by association is an insufficient basis to satisfy Plaintiff's pleading burden.

Even taking the expanded allegations in Plaintiff's response as true, when boiled down to its essence, the only factual support for Plaintiff's claims are the fact that Bandin and his wife purchased properties in the United Stated during the 6-years that Duarte was governor of Veracruz. That is it.

There is nothing unlawful about purchasing property, particularly if your business is to invest in real estate. The mere fact that the Bandin Defendants purchased property in the United States while they were living here is no indication they had any role in some vast international conspiracy. This is especially true without any factual basis to link the Bandin Defendants' purchases of the properties in the United States with money from Veracruz. That essential link is missing from

Plaintiff's complaint, warranting dismissal. *Ashcroft*, 556 U.S. at 678 ("Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement."); *see also Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.").

If Plaintiff's contention that Bandin is subject to an "indictment" in Mexico is true (which, as explained below, it is not), then Plaintiff should be able to plead its claims with sufficient factual detail. One would presume that the investigation would have revealed facts implicating the Bandin Defendants' role in the alleged conspiracy. Plaintiff should have information showing the alleged trail of money from Veracruz's accounts, to Duarte, to the Bandin Defendants, to the purchases of properties in the United States. But rather than plead the actual factual bases to support these allegations, Plaintiff wants the Court to presume sufficient facts exists.

Normally, a plaintiff with a deficient complaint would be given an opportunity to amend before its claims are dismissed. Here, though, this Plaintiff has put its cards on the table in connection with the TCPA motion. Because, as set forth below, Plaintiff has no factual basis for its allegations, dismissal at this time is entirely appropriate. *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) ("Denying a motion to amend is not an abuse of discretion if allowing an amendment would be futile.").

TCPA MOTION TO DISMISS

After trumpeting the diligence of its multi-year investigation, Plaintiff makes the curious assertion that "[t]here is no public way for Plaintiff to discover Defendants' ability to source of the funds [sic] that Defendants used to purchase this real estate." Dkt. No. 19 at 18. There is no plainer admission that Plaintiff has no clear and specific evidence to support the elements of its claims.

Recognizing this shortcoming, Plaintiff asks for discovery. This request reveals Plaintiff's misapprehension about the TCPA. The statute is designed to weed out unmeritorious claims *before* a defendant is forced to respond to discovery. *NCDR, LLC v. Mauze & Bagby, PLLC*, 745 F.3d 742, 748 (5th Cir. 2014) ("The purpose of an anti-SLAPP motion is to determine whether the defendant is being forced to defend against a meritless claim, not to determine whether the defendant actually committed the relevant tort.") (internal quotations omitted); *Williams v. Cordillera Commc'ns, Inc.*, 2014 WL 2611746 at * 1 (S.D. Tex. June 11, 2014) (explaining that the TCPA is designed to "stay discovery and obtain early dismissal of meritless suits" so a defendant does not have to incur "the time and expense of defending against litigation that has no demonstrable merit").

1. The TCPA Applies to this Case.

Plaintiff does not like the TCPA or the Bandin Defendants' use of it. It argues that the TCPA "motion is a complete perversion of the intended purpose of the law"

and "borders on the frivolous." Dkt. No. 19 at 13. It claims the statute is not intended to protect an alleged "thief" from being "intimidated and silenced by their accuser." *Id*. at 14. This strident language is misplaced.

Plaintiff's problem is with the plain language of the statute, but the plain language of the statute controls. *Whatley v. Resolution Trust Corp*., 32 F.3d 905, 909 (5th Cir. 1994); *Kelly v. Boeing Pet. Servs., Inc*., 61 F.3d 350, 362 (5th Cir. 1995). The Texas Supreme Court has made it clear the TCPA must be applied as written. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 902 (Tex. 2017) ("[w]e do not substitute the words of a statute in order to give effect to what we believe a statute should say; instead, absent an ambiguity, we look to the statute's plain language to give effect to the Legislature's intent as expressed through the statutory text.").

Plaintiff fails to cite a provision of the TCPA, or a court interpreting the statute, that provides support for the proposition that the statute does not apply to the circumstances here. It does not matter that the Bandin Defendants are Mexican citizens. Dkt. No. 17 at 13. The statute does not say it applies only to United States citizens. Nor does it matter that Plaintiff accuses them of theft. *Id*. The statute does not exclude theft claims from its reach. *See* TEX. CIV. PRAC. & REM CODE § 27.010 (exemptions). Instead, the TCPA states explicitly that it "shall be construed *liberally* to effectuate its purpose and intent *fully*." *Id*. § 27.011 (emphasis added).

Furthermore, Plaintiff contends that the TCPA is intended to prevent only conduct that silences or infringes upon constitutional rights of free speech or association. But this, too, is a misreading of the plain language of the statute. As the Texas Supreme Court recently explained, the applicability of the TCPA does not require any infringement of constitutional rights, but rather the communications at issue must merely relate to an issue of public concern, as set forth in the statute:

> Instead, the court of appeals improperly narrowed the scope of the TCPA by ignoring the Act's plain language and inserting the requirement that communications involve more than a "tangential relationship" to matters of public concern. The TCPA does not require that the statements specifically "mention" health, safety, environmental, or economic concerns, nor does it require more than a "tangential relationship" to the same; rather, TCPA applicability requires only that the defendant's statements are "in connection with" "issue[s] related to" health, safety, environmental, economic, and other identified matters of public concern chosen by the Legislature.

Coleman, 512 S.W.3d at 902 (internal citations omitted); *see also Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism'd) ("And in *Coleman's* wake, we must reject [plaintiff's] attempts to limit TCPA 'communications' solely to those the First Amendment protects. The Act defines 'communication' with no such limitation . . . [and] with no reference to constitutional rights or concepts.") (internal quotations omitted).

Here, Plaintiff's claims go to the heart of the TCPA because as they are "in connection with" a matter of public concern—specifically Plaintiff alleges that "hundreds of millions of dollars earmarked for social programs were diverted" by

former-Governor Duarte—a public figure— and the "money stolen by Duarte rightfully belongs to the people of the State of Veracruz." Pl.'s Compl. at 2. Indeed, this lawsuit is being brought by the government, alleging theft of monies by a public figure, that purportedly deprived the health, safety, and economic well-being of the community. The TCPA therefore applies.

Plaintiff argues that the TCPA does not apply to private speech. Dkt. No. 19 at 15. This argument too has been expressly rejected by the Texas Supreme Court. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) ("The plain language of the statute imposes no requirement that the form of the communication be public."). As a result, the court held that communications about a private employment matter in the context of providing medical services related to health and safety, and, therefore, the communications qualified as a matter of public concern under the TCPA. *Id*. at 509–10; *see also Coleman*, 512 S.W.3d at 901 ("The statements, *although private and among EMPCo employees*, related to a 'matter of public concern' because they concerned . . . potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground.") (emphasis added).

The TCPA also applies to this case because Plaintiff's allegations relate to the Bandin Defendants' exercise of their right of association—namely, their right to join together to promote, pursue, or defend their common interests of real estate

investing. TEX. CIV. PRAC. & REM. CODE §§ 27.003, 27.001(2). In exercise of the right of association, the Bandin Defendants filed numerous communications in the public record establishing their ownership of the property at issue. Because the definition of "right of association" is drafted broadly, courts have routinely applied the TCPA to business disputes like this one:

- *Elite Auto Body*, 520 S.W.3d at 205 (holding communications "in furtherance of the Precision business enterprise relative to Autocraft's competitive position" satisfy the "exercise of the right of association" under the TCPA).
- *Neyland v. Thompson*, 2015 WL 1612155, at *1, *4 (Tex. App.—Austin Apr. 7, 2015, no pet.) (internal communications among homeowners' association members regarding performance of property manager were made in "exercise of the right of association");
- *Combined Law Enforcement Associations of Texas v. Sheffield*, 2014 WL 411672, at *1, *3, *5 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (internal communications regarding former employee's use of laptop were made in "exercise of the right of association").

Because Plaintiff's claims relate to the Bandin Defendants' right of association, the TCPA applies to this case. TEX. CIV. PRAC. & REM. CODE § 27.003.

2. Plaintiff Cannot Meet Its Evidentiary Burden.

The TCPA mandates dismissal unless Plaintiff can establish "by *clear and specific* evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC & REM. CODE § 27.005(c) (emphasis added). Plaintiff asserts hopefully that its burden "is not a heavy one." Dkt. No. 19 at 15.

Under the TCPA, the term "clear and specific evidence" refers to the quality of evidence required to establish a prima facie case, while the term "prima facie case" refers to the amount of evidence required to satisfy Plaintiff's factual burden. *Serafine v. Blunt*, 466 S.W.3d 352, 358 (Tex. App.—Austin 2015, no pet.). On the one hand, Plaintiff has the benefit of presenting a one-sided case at the anti-SLAPP stage. *In re Lipsky*, 460 S.W.3d 579, 586-87 (Tex. 2015) (Prima facie evidence is evidence that is "sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted."). But on the other hand, not just any one-sided evidence will do. The "clear and specific" standard requires the plaintiff's evidence to be "unambiguous," "sure," "free from doubt," and "explicit." *Id.* at 586-87.

Unreasonable "inferences" and "conclusory" statements are not probative and will not suffice to establish a prima facie case under the TCPA. *Id*. at 592 (explaining that "bare, baseless opinions" are not "a sufficient substitute for the clear and specific evidence" required by the TCPA). As the Texas Supreme Court explained, "a plaintiff must provide enough detail to show the factual basis for its

claim." *Id*. at 591. "[M]ere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice." *Id*. at 590-91.[2]

Plaintiff's so-called evidence falls well short of this standard. Plaintiff has attached the following: (1) a declaration from Armando Garcia Cedas, an alleged special prosecutor in Mexico, (2) a declaration from James K. Ellis, a former FBI agent, (3) a copy of an "indictment" of Bandin, (4) an alleged statement of investigation from Veracruz, (5) property records from Harris County Appraisal District and corporate formation documents from Texas Secretary of State, and (6) newspaper articles.

Before we discuss each of the Plaintiff's exhibits, we note that five of the six exhibits are either hearsay themselves or replete with hearsay within them (the lone exception being the property records and corporate formation documents). All of the conclusions in the exhibits are sheer speculation. Were this evidence for trial or summary judgment, it would be stricken or excluded, and we object for the record to the consideration of these exhibits.

[2] It is well-settled that bare, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA. *See, e.g.*, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 871-73 (1990) (holding "conclusory allegations are insufficient to create fact issue); *Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994) (same for "unsubstantiated assertions"). Opinions must be based on demonstrable facts and a reasoned basis. *U.S. v. Carlock*, 806 F.2d 535, 551 (5th Cir. 1986) ("There must be sufficient evidence to support a finding that the witness has personal knowledge of the facts from which the opinion is derived.").

1. The Cedas Declaration.

The declaration from Cedas, who purports to be a Veracruz government official, is wholly conclusory, as he admits that he is basing his conclusion on "information and belief" rather than substantiated evidence:

> Based upon information and belief, and this State's investigation, it is believed that Mr. Bandin and Mrs. Babayan participated in a conspiracy with Javier Duarte to steal money from the State of Veracruz.

Dkt. No. 19-1 at ¶ 3. In other words, Cedas admits that he has no factual basis to link the Bandin Defendants to the alleged conspiracy other than his suspicion and belief. This is the antithesis of "unambiguous," "sure," "free from doubt," and "explicit" evidence that is required. *In re Lipsky*, 460 S.W.3d at 586-87.

Against the backdrop of this fatal admission, Cedas goes on to explain his belief that the Bandin Defendants would set up shell companies to receive stolen funds from Veracruz and then purchase properties in the United States with those funds, totaling in excess of $100,000,000.[3] Noticeably absent are any factual bases to support this claim. Cedas does not attach any records showing money being diverted from the State of Veracruz to entities owned by the Bandin Defendants. Nor does he explain how those entities transferred allegedly stolen funds to Houston,

[3] This amount is completely unsubstantiated and belied by Plaintiff's own evidence. The value of the properties referenced in Plaintiff's petition and attached to its response is below $4 million. *See* Dkt. No. 19-4. And the Bandin Defendants' bank accounts from Wells Fargo and BBVA Compass interpleaded in this lawsuit contained a total of $1,555.42 and $6,475.95. *See* Dkt. Nos. 7 and 10. This is far short of $3 billion or even $100 million.

Texas. And he certainly does not explain or provide any proof that the Bandin Defendants purchased property in the United States with funds traceable to Veracruz.

Cedas' other theory fares no better. He claims, without any evidentiary or factual support, that the Bandin Defendants would obtain government contracts for public works and overcharge the government for the work being done, or not done at all, diverting the money for their ill-gotten gains. Yet Cedas does not identify any government contracts allegedly obtained by the Bandin Defendants, the amount of money provided to the Bandin Defendants under such contracts, or how the Bandin Defendants marked up the value of such contracts or provided little to no work under the contracts. Cedas' opinions that the Bandin Defendants are involved in an alleged conspiracy are pure *ipse dixit*.

2. The Ellis Declaration.

The declaration of Ellis, a former FBI agent, suffers from the same defects. He claims that it is his "expert opinion that Mr. Bandin was involved in the laundering of ill-gotten gains in the United Sates," but admits that he is basing this opinion on hearsay and speculation. Dkt. No. 19-6 at ¶ 4. He relies on meetings with the Governor of Veracruz and his staff, but he fails to mention who was in attendance at those meetings, when they occurred, and what was discussed at those meetings. *Id*. Even if the Court could get past the hearsay stacked upon hearsay

(some unknown person telling Ellis who is now telling this Court), it is impossible for the Court to draw a reasonable inference that the Bandin Defendants are liable without any factual details explaining what happened at these meetings—or more specifically, how these unknown persons came to the conclusion that the Bandin Defendants participated in a conspiracy with Duarte.

Ellis then claims that he read newspaper articles in Mexico to form his opinion. *Id*. Putting aside the inherent unreliability of newspaper articles and hearsay issues, he fails to mention which newspaper articles he read, from what sources, and what was described in the articles. Ellis wants the Court to believe that the newspaper articles are somehow evidence of the Bandin Defendants' liability, but he fails to provide any information for the Court to draw that conclusion. Presuming that the newspaper articles are the same ones attached to Plaintiff's response are the same ones Ellis reviewed, none provide any factual basis to support that the Bandin Defendants used money from Veracruz to purchase properties in the United States. The articles merely report speculation that such conduct occurred, but there is no factual proof in the articles.

Likewise, Ellis claims that he reviewed the "indictment" of Bandin, but Bandin has not been criminally charged in Mexico for any acts related to this case. Moreover, Ellis fails to explain what crimes, if any, Bandin has been charged with, or the evidence set forth in the "indictment" establishing Bandin's alleged guilt.

Ellis certainly has not explained any of the specific facts set forth in the "indictment" that help form his opinion that Bandin was part of a conspiracy.

Next, Ellis claims that he has examined the property records, the timing of real estate purchases by the Bandin Defendants, and their creation and use of limited liability entities to make such purchases. *Id*. Without any further explanation, Ellis claims that this information helped formed his opinion. This opinion is conclusory, as Ellis fails to explain exactly what about the timing of the purchases and the use of limited liability entities shows that the Bandin Defendants are liable. The mere fact that the Bandin Defendants purchased property in the United States during the 6-years Duarte was in office is indicative of nothing. Many people from Mexico purchased property in the United States during the same time. The creation of limited liability companies is also a standard real estate investment practice. These facts are insufficient to draw a reasonable inference of the Bandin Defendants' liability.

Lastly, Ellis claims that Bandin's relationship with Duarte and Bandin's position in the last administration leads him to believe that the Bandin Defendants were involved in the theft of funds from Veracruz. *Id*. at ¶ 5. But once again, Ellis provides no factual bases to explain how such relationship establishes any liability on the Bandin Defendants.

3. The "indictment."

Of all the evidence presented by Plaintiff, perhaps the most misleading and infirm is Exhibit 3, the so-called "indictment." Small wonder the document has not been translated into English by a certified translator. Dkt. No. 19-3.[4] Plaintiff prefers the Court to accept Plaintiff's own characterization of it.

The "indictment" is not a criminal indictment of Bandin, which Plaintiff knows and tries to hide away in a footnote. *See* Dkt. No. 19 at 7 n.4 ("Obviously, Mexico's judicial system does not mirror the United States, and so the term 'indictment' does not have a direct corollary in Mexico, but based on information and belief the closest American counterpart for Exhibit 3 is an indictment."). This document is really just a complaint filed against Bandin by Cedas, the same person whose declaration adorns the Plaintiff's response. It is dated June 21, 2018, timed suspiciously to manufacture evidence for the response, but it certainly does not establish that Bandin has been formally charged with any crimes in Mexico.

Plaintiff chooses not to explain what is contained in the Cedas complaint. Plaintiff does not explain whether or how the complaint shows the Bandin Defendants were involved in any conspiracy with Duarte, particularly with respect to his wife, Babayan, who is not a party to the complaint. Nor does Plaintiff identify

[4] Plaintiff also fails to attach a properly authenticated copy of the document. *See* FED. R. CIV. P. 44 (requiring certificate of genuineness for a copy of a foreign record); FED. R. EV. 902(3) (same); *Dominguez v. Gulf Coast Marine & Assoc.*, 2014 WL 1998052, at * 7 (E.D. Tex. 2014) (explaining that Mexico and the United States are signatories to the Hague Convention Abolishing the Requirement for Legalization for Foreign Public Documents, which requires documents from foreign courts to be apostilled and translated in order to be authenticated).

whether or how the complaint establishes that the Bandin Defendants purchased properties in the United States with money diverted from Veracruz. To meet its burden under the TCPA, Plaintiff must "provide enough detail to show the factual basis for its claim," *see Lipsky*, 460 S.W.3d at 591, but it has failed to do so.

4. The alleged statement of investigation.

Plaintiff attaches as Exhibit 2 an alleged statement of investigation from Veracruz, but this document is also not translated or properly authenticated. Dkt. No. 19-2. It suffers from the same infirmities as Exhibit 3.

5. Property records and formation documents.

Plaintiff attaches property records and entity formation documents showing that the Bandin Defendants purchased properties in the United States using limited liability companies. Dkt. Nos. 19-4, 19-5. This is standard practice in the real estate industry and no evidence of any wrongdoing. Plaintiff certainly has not established that the Bandin Defendants used any money from Veracruz to purchase properties in the United States.

6. Newspaper articles.

Plaintiff has attached newspaper articles, many of which are in Spanish and those in English are not translated by a certified translator. Dkt. No. 19-7. Newspaper articles are "classic, inadmissible hearsay" and are unusable to meet evidentiary burdens. *See Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir.

2005); *Hicks v. Charles Pfizer & Co., Inc.*, 466 F.Supp. 2d 799, 804 (E.D. Tex. 2005). "They are not sworn or certified, and the authors are not subject to cross-examination," rendering such articles incompetent evidence. *Hicks*, 466 F. Supp. 2d at 804. Many of the articles attached by Plaintiff also contain quotes from other persons, which is hearsay within hearsay. *See United States v. Ismoila*, 100 F.3d 380, 392–93 (5th Cir. 1996) (explaining double hearsay).

In sum, Plaintiff is required, as an essential element of all of its causes of action against the Bandin Defendants, to prove that they unlawfully obtained money from Veracruz; however, Plaintiff has failed to provide any factual basis for this essential element of their claims. *See, e.g.*, *Lopez v. Lopez*, 271 S.W.3d 780 784 (Tex. App.—Waco 2008, no pet.) (elements of conversion); *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2015) (constructive trust); TEX. CIV. PRAC. & REM. CODE § 134.002(2) (civil theft); TEX. PENAL CODE § 31.03(a) (criminal theft). Plaintiff's claims must therefore be dismissed pursuant to the TCPA.

CONCLUSION

Plaintiff's claims should be dismissed, pursuant to Rule 12(b)(6) and/or the TCPA. If the dismissal is made pursuant to the TCPA, the Court must award fees and sanctions against Plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 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