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IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

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JOSE BANDIN, MONICA BABAYAN AND 18 SHALLOWFORD PL., LLC.
Appellants,

v.

FREE AND SOVEREIGN STATE OF VERACRUZ DE IGNACIO DE LA LLAVE,
Appellee.

On Appeal from the 334th District Court, Harris County, Texas
Trial Court No. 2018-06745, Hon. Steven Kirkland, Presiding

--and--

No. 14-18-00847-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

CW OPERATING COMPANY, INC, ET AL
Appellants,

v.

FREE AND SOVEREIGN STATE OF VERACRUZ DE IGNACIO DE LA LLAVE,
Appellee.

On Appeal from the 295th District Court, Harris County, Texas
Trial Court No. 2018-08341, Hon. Caroline E. Baker, Presiding

APPELLANTS' REPLY BRIEF

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Oral Argument Requested

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TO THE HONORABLE COURT OF APPEALS:

ARGUMENT AND AUTHORITIES

1. The TCPA Applies to the Claims.

Veracruz makes two false assertions to oppose the application of the TCPA to its claims. First, it argues, with no precedential support, that the Bandin Parties ought not to be entitled even to invoke the TCPA because Bandin and Babayan now reside in Spain. Foreign nationals, it says, cannot seek the protections of the statute. This argument ignores the facts, the pleadings, and the language of the statute.

Begin with the statute. It says that a "party" may file a motion to dismiss a legal action under the TCPA. TEX. CIV. PRAC. & REM. CODE § 27.003. The statute does not limit its reach only to parties who reside in the United States; *any* party may file a motion to dismiss. Veracruz cites no case, and we could find none, in which a non-resident party was denied the right to seek the protections of the TCPA.[1]

In any event, the pleadings and the facts undermine this proposition. With no record citation, Veracruz claims Bandin and Babayan "have never resided in the

[1] In *Wakefield v. British Medical Journal Publishing Group, Ltd.*, 449 S.W.3d 172 (Tex. App.—Austin 2014, no pet.), the defendants, all residents of the United Kingdom, filed special appearances, followed by TCPA motions to dismiss. The court of appeals held that participation in the TCPA proceedings did not waive the special appearances. The opinion contains no hint that the TCPA would not apply because the defendants did not reside in the United States.

United States." Br. at 11.[2] Yet, each of the four petitions alleges that Bandin and Babayan are individuals "residing in Texas." *See, e.g.*, 2 CR 10. Veracruz's "evidence" repeats that allegation. 2 CR 290 ("The [Bandin] family leaves [sic] in The Woodlands, Texas…."). What was once asserted in the trial court as a plain attempt to avoid a personal jurisdictional challenge has now, however, become inconvenient. Veracruz behaves as if it never made these allegations, but they were never amended or superseded.[3]

Bandin and Babayan were made defendants because of communications and conduct occurring in Texas. Br. at 12 ("they stole money and tried to hide it in the United States"). Indeed, if Bandin and Babayan had not done anything here, the suit would likely have succumbed for lack of jurisdiction or venue. The fact they bought properties in Texas not only made them parties to suit here; it also afforded them the right to rely on the TCPA statute that on its face applies to them.

Moreover, Veracruz forgets that it also sued eight limited liability companies, all of which were incorporated in Texas and reside in Texas. *See, e.g.*, 2 CR 44, 57, 70, 82, 95, 107, 122, and 135. Were the statute worded so that non-residents sued in Texas could not seek its protection, still these company-defendants would

[2] Veracruz's Statement of the Facts is so irregular—with numerous sentences unsupported by the record and several record references that take liberties with pleadings—that reliance should be placed on it only with great caution.

[3] "[T]he plaintiff's petition…, as so often has been said, is the 'best and all-sufficient evidence of the nature of the action.'" *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (noting that under Section 27,006(a), the court *shall* consider the pleadings in determining the applicability of the TCPA to a legal action).

unquestionably have the right to do so. Veracruz's quasi-and-belated jurisdictional objection about the reach of the TCPA fails.

The second assertion meets the same fate. Veracruz argues that "statements made in private business disputes do not implicate the TCPA." Br. at 37. This argument was directly rejected by the Texas Supreme Court in *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) ("[t]he plain language of the statute imposes no requirement that the form of the communication be public."); *see also*, *Camp v. Patterson*, 2017 WL 3378904 at *4 (Tex. App.—Austin, August 3, 2017, no pet.) (holding that private texts and emails were communications under the statute).

Though Veracruz was not always entirely clear in its brief, it seems to dispute that its claims were based on, relate to or are in response to the "communications" required by the TCPA.[4] As we pointed out in our main brief, the term

[4] Inconsistencies abound in Veracruz's brief. Compare, for example, these two statements:

"Appellants must prove by a preponderance of the evidence that they got sued because of their conduct, *not* communications." Br. at 15 (emphasis added).

"And claims based on conduct simply do not trigger the TCPA." Br. at 16.

Or, compare these statements:

"The instant suit was *not* based on, related to, or in response to Appellants [sic] purchase of property…." Br. at 12 (emphasis added).

"[T]he Appellants either together or individually purchased at least the following Texas properties…." Br. at 9. And, "Veracruz detailed the exact dollar figure of damages for each individual suit – *which are the properties sued upon*." Br. at 12 (emphasis added).

"communications" is defined in the statute. We are bound by the words of the statute, not by what people believe the statute might have been intended to cover. *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018) "we must construe the TCPA according to its text"). The Supreme Court, in fact, has had several opportunities to narrow the reach of the TCPA, but on each occasion it has declined to do so. In commenting on the breadth of the term "communication," the Supreme Court stated: "Almost every imaginable form of communication, in any medium, is covered." *Id*.

Not only does Veracruz try to restrict the categories of communications that qualify under the statute, it would limit also this Court's review only to its original petitions. Br. at 16 ("the petitions at issue do not make a single reference to any communications…"). This, no doubt, because its allegations there were so spartan. But, once again, the Supreme Court teaches us that "the unique language of the TCPA directs courts to decide its applicability based on a holistic review of the pleadings." *Id*. at 897. The responses filed by Veracruz to the TCPA motion to dismiss, the pleadings seeking discovery, and the amended petitions fill in the gaps. As we set out in our main brief, Veracruz's own pleadings tell of numerous communications that relate to matters of public concern,[5] such as:

[5] These pleadings distinguish this case from *Smith v. Crestview NUV, LLC*, 2018 WL 6215763 (Tex. App.—Ft. Worth, November 29, 2018, no pet.), so heavily relied on by Veracruz. In *Crestview*, the plaintiff's aiding and abetting claim under the Texas Securities Act was held to be based solely on the defendant's actions and inactions, not on communications. Of course, each case must be judged on its own record.

- Invoices submitted to various government agencies in Veracruz (2 CR 270)
- Wires of funds from one account to another (2 CR 258)
- Deeds from one "shell" corporation to another (2 CR 258)
- Directives from the Bandin Parties to local businessmen (2 CR 270)

Moreover, the very nature of the alleged conspiracy between Bandin and Duarte required communications to carry it out. The record amply supplies allegations that meet the standards mandated by our Supreme Court.

The communications themselves do not have to be directly related to the matters of public concern; in fact, they need not specifically mention those matters. In *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017), the Texas Supreme Court held that a "tangential relationship" between the communications and the matters of public concern was sufficient. *Id*. at 902. The Bandin Parties met their burden to show more than a tangential relationship between the matters of public concern at issue in the underlying legal actions and their communications.

We predicted Veracruz's disdain for the TCPA. Indeed, it expressed its opinion that applying the TCPA to this case was a perversion (Br. at 13) and frivolous (Br. at 18) and silliness (Br. at 21) and meritless (Br. at 37). Perhaps its frustration stems more from its inability to present clear and specific evidence of its claims than from the broad language of the statute. We turn now to that issue.

2. The Claims Lack Evidentiary Support.

Veracruz trumpets that the evidence against Bandin and Babayan is "overwhelming." Br. at 9. Yet, it concedes that all it managed to do is marshal "the minimum quantum of 'clear and specific evidence' necessary to support a rational inference establishing each essential element of its claims." Br. at 27. Even if that were the statutory test, it did not meet that low threshold.

The conversion claim provides the best example. Veracruz declares: "To prove conversion, Appellee must show that it owned the funds in question, Appellants took control over these funds, and that Appellee suffered injury." Br. at 32. No citation supports that statement.[6] As a general rule, in fact, a conversion claim will not lie for an unsegregated amount of money. *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008) ("money can be converted only if it is specifically identified and held in trust"). No evidence in the record identifies the money in question. Was it held in a specific bank account in the name of the State of Veracruz? Was it maintained as gold or silver bullion, or coins, or notes with identifying marks? Was it kept in a satchel in Duarte's office? We do not know.

[6] At least with the Theft Liability Act claim, Veracruz cites the statute (Texas Penal Code 31) to state the elements of the claim: "Appellee had a possessory right to the property, Appellant unlawfully stole the Appellee's property, the taking was made with the intent to deprive the Appellee of the property, and the Appellee sustained damages as a result." Br. at 33.

Veracruz goes on to brag: "Appellee provided how the funds were stolen, who stole them, how much was stolen,[7] the manner in which the money was stolen, and the current location of the money." Br. at 32-33. Again, this naked assertion bears no record reference. We cannot find these elements of Veracruz's claims among the papers of this case.

As the Texas Supreme Court has instructed, the "clear and specific" standard requires the plaintiff's evidence to be "unambiguous," "sure," "free from doubt," and "explicit." *In re Lipsky*, 460 S.W.3d 579, 586-87 (Tex. 2015). Viewed most charitably, the "evidence" consists only of two items: (a) the conclusory declarations of Cedas (2 CR 277) and Ellis (2 CR 392) and (b) the negative inferences from the Fifth Amendment assertions of Bandin and Babayan (2 CR 453-512). For the reasons set out in our main brief, conclusory statements and bare baseless opinions do not establish a prima facie case. *Grant v. Pivot Tech. Solutions, Ltd*., 556 S.W.3d 865, 882(Tex. App.—Austin 2018, no pet. h.).

Yes, Cedas and Ellis offer beliefs that Bandin and Babayan stole money from Veracruz, but they fall far short of describing any facts upon which to base these opinions. Cedas admits his conclusion is based "on information and belief" and he

[7] Our opening brief pointed out a hole in Veracruz's proof regarding the amount of damages, an element of each claim that Veracruz did not mention in its evidence in the trial court. Now, for the first time on appeal, Veracruz states that its damages are circumscribed by the appraisal records for the properties. Br. at 12 ("the exact damage figure was provided by the value of the properties"). We accept the appraisal records as sufficient to provide the amount of the damages for each claim.

refers to "this State's investigation" without offering any details. The Ellis declaration is, if possible, even sketchier, making reference to "available evidence" yet not making any of that evidence available to the Court.

Veracruz must "provide enough detail to show the factual basis for its claim," *see id*. at 591, but noticeably absent in both declarations are any details to support Veracruz's claims. Neither Cedas nor Ellis attach any evidence showing money from Veracruz was transferred to entities owned by the Bandin Parties. They also fail to provide any proof that the Bandin Parties purchased property in Harris County with funds traceable to Veracruz. These declarations are no evidence at all.

The critical issue for this Court, then, is whether negative inferences from the assertion of Fifth Amendment rights alone can constitute "clear and specific" evidence of a prima facie claim under the TCPA. Our research revealed no case precisely on point, and Veracruz ignored the issue completely in its brief. The closest decision remains *Webb v. Maldonado*, 331 S.W.3d 879 (Tex. App.—Dallas 2011, pet. denied) which held negative inferences were not sufficient by themselves to defeat a no-evidence motion for summary judgment. This Court should apply the *Webb* reasoning to the TCPA—the assertion of the right against self-incrimination must be accompanied by independent proof or else the claims must be dismissed.

At a minimum, Veracruz must provide probative evidence that the properties at issue were purchased with funds obtained from it; this fact cannot be inferred from the Bandin and Babayan invoking their Fifth Amendment rights. *Id*.; *see also*

Matbon, Inc. v. Gries, 288 S.W.3d 471, 489 (Tex. App.—Eastland 2009, no pet.) (negative inferences drawn from truck driver's repeated invocations of the Fifth Amendment privilege against self-incrimination cannot rise beyond mere suspicion and consequently, cannot be considered evidence that the truck driver had actual awareness of the extreme risk created by his conduct); *Blake v. Dorado*, 211 S.W.3d 429, 433 (Tex. App.—El Paso 2006, no pet.) (automobile driver's assertion of his Fifth Amendment privilege against self-incrimination in answer to plaintiffs' interrogatories did not create an inference of liability sufficient to withstand a no-evidence summary judgment where plaintiffs presented no other relevant evidence).

Veracruz has failed to meet its burden because it has not provided any "clear and specific" evidence establishing that (1) the Bandin Parties received any money from Veracruz, or (2) any money from Veracruz was used by the Bandin Parties to purchase the properties at issue in Harris County. *See, e.g., Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007) ("A party seeking to impose a constructive trust has the initial burden of tracing funds to the specific property sought to be recovered."). This is fatal to all of Veracruz's claims against the Bandin Parties, which require it to prove that the Bandin Parties unlawfully obtained money from Veracruz. *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).

For these reasons, the Bandin Parties ask that this Court apply the TCPA to the claims, find that the evidence fails the "clear and specific" test, dismiss the claims and remand the case to the trial court for the imposition of fees and sanctions as required by the statute.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2019, a true and correct copy of the forgoing document has been served on all counsel of record, by the Electronic Service Provider, if registered, otherwise by email and/or fax.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because it contains 7006 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point font.

Dated: February 6, 2019.

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