No. 14-18-00752-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

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

APPELLEE'S BRIEF

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STATEMENT OF THE FACTS

Javier Duarte ("Duarte") was the Governor of the Mexican state of Veracruz from 2010 to 2016. Prior to that, Duarte was a governmental official and a congressman representing the Veracruz area. During his time in the service of the Veracruz government, Duarte and multiple co-conspirators stole billions dollars from the State of Veracruz through various methods. 2 CR 277.[1] These stolen funds were used to purchase both real and personal property all over the world. Specific to this case, such stolen funds were used to purchase a series of properties throughout the Houston area. 2 CR 513-522. To accomplish these purchases, Duarte was assisted by multiple co-conspirators, both within and outside of Mexico. This assistance included setting up shell corporations, establishing bank accounts, engaging lawyers, and handling the closing of transactions. 2 CR 513-522. To hide the whereabouts of the funds and cloak the origin of the monies, multiple bank accounts were used, whereby the funds would be wired from one account to another and then to another, and so forth. Further, in many cases, the actual real estate in question would be deeded to one shell corporation, then to

[1] For the purposes of consistency, Appellee cites to the Clerk's Record and the Reporter's Record in the same format as the Appellants'. " will refer to the clerk's record in No. 14-18-00752-CV as "1 CR __," and the clerk's record in No. 14-18-00847-CV as "2 CR __." References to the reporter's records in both cases will use the same shorthand and, because there were multiple hearings, the separate volumes of the record will follow the "RR" designation (for example, the first volume of the reporter's record in the 00847 case will be 2 RR 1:__)." Appellants' Brief, Footnote 4.

another, and then back to the original one—and once the transaction was completed, a mortgage would often be taken out on it so that the monies could be extracted from the real estate and hidden further.

Over time, the Mexican media began to notice the spending habits and the financial irregularities of Governor Duarte and his associates. Specifically, it was reported that Duarte and those closely associated with him—like Jose Bandin and his wife Monica Babayan—owned multiple properties all over the United States, but did not make a sufficient salary in Mexico to legitimately make such purchases. 2 CR 568. It was even reported that Duarte had become a member of a country club in North Houston. As the controversies surrounding his office mounted, Duarte fled Mexico and was later charged with corruption. Duarte was eventually captured in Guatemala and extradited back to Mexico. He is currently serving a lengthy prison sentence for these crimes. Duarte's wife was also recently arrested – in London – for similar crimes. Despite the claims of appellants, appellee is serving Appellant Duarte through the provisions of the Hague Convention, but, unfortunately, such is not a quick process.

After much investigative work, Appellee Free and Sovereign State of Veracruz de Ignacio de la Llave ("Veracruz") and its authorities revealed a global conspiracy, spanning several continents, but based in Houston. This conspiracy involved hundreds of individuals and entities, all engaged in one purpose---the

stealing of funds rightfully belonging to Veracruz and its people.[2] 2 CR 273-4. Veracruz's investigation revealed that two close Duarte associates, Appellants Jose Bandin and his wife, Monica Babayan, not only participated in and were the beneficiaries of the theft of Veracruz's funds, but were instrumental in the conspiracy.[3] Appellant Bandin is a childhood friend of Moises Mansur. Mansur, who has been sued in other proceedings, introduced Mr. Bandin to Duarte. Together, these three, and many others, engineered the theft of billions of dollars from the State of Veracruz.

Bandin and Babayan have now fled Mexico, and currently reside in Spain. Bandin was recently charged for his crimes, in Mexico.[4] It seems highly unlikely that either Appellant will ever appear in a United States court or actually answer questions about their elaborate participation in the scheme. Indeed, two separate Harris County courts compelled Bandin and Babayan to be deposed in Spain. At

[2] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas).
[3] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas); 2 CR 278 Exhibit 2: Statement of investigation of Veracruz); 2 CR 280 (Exhibit 3: Indictment of Bandin).
[4] 2 CR 280 (Exhibit 3: Indictment of Bandin).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.

those depositions, both asserted their Fifth Amendment "rights" to almost every question.[5]

Even though they have refused to answer questions about their conduct, the evidence against Bandin and Babayan is overwhelming. That evidence establishes that, during Duarte's time in office, both Bandin and Babayan created multiple shell corporations and opened several local bank accounts. Through those shell corporations, which they ultimately controlled, Bandin and Babayan purchased numerous properties. By way of example, during this time period, the Appellants either together or individually purchased at least the following Texas properties[6]:

- 83 West Jagged Ridge, The Woodlands, TX 77389;
- 87 West Jagged Ridge, The Woodlands, TX 77389;
- 175 W. New Harmony, The Woodlands, TX 77389;
- 18 Griffin Hill, Spring, TX 77382;
- 138 Bryce Branch Circle, The Woodlands, TX 77382;
- 43 N. Spinning Wheel, Spring, TX 77382;
- 8350 Ashlane Way, Suite 3, The Woodlands, TX 77382;
- 8350 Ashlane Way, Suite 4, The Woodlands, TX 77382;

[5] 2 CR 453-481 and 2 CR 482-512 (Exhibits 8, 9: Depositions of Jose Bandin and Monica Babayan.)

[6] 2 CR 295-328 (Exhibit 4: Property records from the Harris County Appraisal District).

- 8350 Ashlane Way, Suite 8, The Woodlands, TX, 77382;
- 18 Shallowford Place, Tomball TX 77375; and
- 38 Shallowford Place, Tomball, TX 77375.

Moreover, Appellants formed these corporate entities in the same time period to purchase and own these properties[7]:

- 18 Shallowford PL, LLC;
- 83 West Jagged Ridge, LLC;
- 87 West Jagged Ridge, LLC;
- 175 W. New Harmony, LLC;
- 18 Griffin Hill, LLC;
- 138 Bryce Branch Circle, LLC;
- 43 Spinning Wheel, LLC; and
- Banba Offices, LLC.

Because of these purchases, and the Appellants' involvement in the theft that afforded these purchases, Appellants are currently facing criminal prosecution in Mexico.[8] The State of Veracruz, facing massive budgetary shortfalls, employed

[7] 2 CR 329-391(Exhibit 5: Corporate formation documents from the Texas Secretary of State).

[8] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas); 2 CR 278 (Exhibit 2: Statement of investigation of Veracruz); 2 CR 280 (Exhibit 3: Indictment of Bandin).

the undersigned to repatriate the stolen funds, and the real and personal property purchased with these stolen funds, back to their rightful owner.

1. SUMMARY OF ARGUMENT

a. Application of TCPA

Appellee respectfully submits that Chapter 27 of the Texas Civil Practice & Remedies Code, commonly called the Texas Citizens Participation Act ("TCPA"), does not apply to the conduct in this case. Additionally, Plaintiff respectfully submits that the TCPA does not apply to non-U.S. citizens that are not currently residing in the United States, have never resided in the United States, and are not accused of wrong doing in the United States. Indeed, Appellants are Mexican citizens, residing in Spain, and accused of stealing government funds in Mexico. Such also begs the question as to what "public" is meant by the "public concern" referenced in the statute, as any public concern regarding these matters would almost certainly and exclusively exist in Mexico.[9] Most importantly, Appellants had the initial burden to prove by a preponderance of the evidence that the TCPA applies to this case. Appellants failed in this regard. The only evidence submitted to prove the application of this statute to this case was simply a litany of corporate records and property records. In other words, Appellants were required to provide by a preponderance of the evidence that this legal action was based on, related to,

[9] CPRC 27.001(7)

or was in response to a communication by Appellants. There was literally not a shred of evidence that proved (or even attempted to prove) such. Tellingly, Appellants even failed to provide a single affidavit from either of the Appellants. Undeniably, Appellants got sued because of their conduct - they stole money and tried to hide it in the United States. Appellants did not get sued because they formed corporations and then bought real estate. The instant suit was not based on, related to, or in response to Appellants purchase of property, and Appellants failed to prove otherwise. Appellants should lose on this point alone.

b. Veracruz's Clear and Specific Evidence

Additionally, even if this Court determines that the TCPA does apply, Appellee provided clear and specific evidence of a prima facie case for each element of the claims. Contrary to Appellants' argument that Veracruz failed to provide evidence of damages, Veracruz detailed the exact dollar figure of damages for each individual suit – which are the properties sued upon. Ironically, by providing the Harris County Appraisal District records for each property at issue in their initial motion, so did Appellants. Each suit was for a specific set of properties that were purchased using stolen funds. The exact value, as determined by Harris County, was provided by both Appellee and Appellants – namely in the HCAD records. For each individual suit, the exact damage figure was provided by the value of the properties. Appellee seems to suggest that Appellee was required to prove up

every last dollar that Appellants ever stole from Veracruz in their entire lives in each suit. Such is a perversion of the law. Plus, based on the sheer size of this theft, such may never be possible. Moreover, Appellee did not sue for all funds stolen by Appellants in a single suit. However, what Appellee did provide was the amount of damages for each suit, and did so to the last penny. Appellee also provided sworn testimony of what was stolen, how it was stolen, who stole it, and the factual basis for same by the special prosecutor in charge of the Mexican investigation. More importantly, when presented with this same evidence at deposition, Appellants pled the Fifth Amendment against self-incrimination to almost every question. In other words, Appellee presented probative evidence, including sworn testimony, to Appellants in deposition on these issues, and in response to that probative evidence, Appellants took the Fifth Amendment. A negative inference can and should be drawn from this. Appellee went above and beyond its burden to demonstrate clean and specific evidence of a prima facie case for each essential element. Appellants' appeal should be denied.

2. ARGUMENT

a. Chapter 27 of the CPRC.

Chapter 27 of the Texas Civil Practices and Remedies Code, also known as the Texas Citizens Participation Act ("TCPA"), is an anti-SLAPP statute. *In re Lipsky*, 411 S.W.3d 530, 536 n. 1 (Tex. App.—Fort Worth 2013, orig. proceeding)

("*Lipsky I*"), mand. denied, 460 S.W.3d 579 (Tex.2015) ("Lipsky II"). "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *Id*. The stated purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002.

The TCPA provides a mechanism for early dismissal of suits that infringe a party's exercise of the right of free speech, the right to petition, or the right of association. *Id*. § 27.003. When a TCPA motion is filed, the statute imposes the initial burden on the movant to establish by a preponderance of the evidence "that the legal action is based on, relates to, or is in response to the party's exercise of ... the right to petition." *Id*. § 27.005(b)—that is, that the law actually applies. Once such is established, the TCPA then shifts the burden to the non-movant, allowing the non-movant to avoid dismissal only by "establish[ing] by clear and specific evidence of a prima facie case for each essential element of the claim in question." *Id*. § 27.005(c). When determining whether to dismiss the legal action, the court must consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id*. § 27.006(a). The court may allow specified and limited discovery relevant to the motion on a showing of good

cause, but otherwise all discovery in the legal action is suspended until the court has ruled on the motion to dismiss. *Id*. §§ 27.003, 27.006(b).

b. Application of the TCPA to Appellee's lawsuit

i. Appellants failed to provide any evidence providing the application of the TCPA.

Appellants must prove by a preponderance of the evidence that they got sued because of their conduct, not communications. Such is a nuanced, but important point. A preponderance of the evidence is that quantum of evidence allowing a determination that it is more likely true than not that Appellee's claim involves the TCPA's protected rights. *See In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding). To determine as much, the Court must refer to any submitted affidavits in its de novo review, but are to look to Appellee's pleadings as "the best and all-sufficient evidence" of the nature of its claims against Appellants. *Smith v. Crestview*, --S.W.3d--, 2018 WL 6215763 (Tex. App.—Fort Worth, November 29, 2018)(*citing to Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017)); see Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a) (requiring court to consider pleadings and submitted affidavits).

In *Smith v. Crestview*, Crestview argued against applicability because its TSA (Texas Security Act) claim was factually based on Smith's conduct, not his communications, and, as such, the TCPA did not apply. And, in fact, the Court, after reviewing the claims at issue, found that Crestview "specifically and narrowly

alleged that Smith's actions aided Anderson in her violations of the TSA, not his communications. None of the allegations leveled against Smith referred to communications with Anderson. Rather, Crestview focused on Smith's actions and inactions." And based on same, the Court held the movant did not meet its burden, and found the TCPA did not apply.

Such is instructive in this case. The petitions at issue do not make a single reference to any communications, and certainly not in relation to any liability. The petitions do, however, reference Appellants' wrongful conduct – much like the petition in *Crestview*. And claims based on conduct simply do not trigger the TCPA. *See Bumjin Park v. Suk Baldwin Props., LLC*, No. 03-18-00025-CV, 2018 WL 4905717 at *3–4 (Tex. App.—Austin Oct. 10, 2018, no pet. h.) (mem. op.)(holding alleged tortious-interference and breach-of-contract counterclaims were based on conduct and were not within TCPA's purview). The petition at issue alleges Appellants engaged in wrongful conduct – in other words, stole money (conversion, Theft Liability Act, Constructive Trust, conspiracy, Texas Penal Code violations). There is no reference to any communications of any kind. In response to Appellee's petition, Appellants did not file an affidavit stating otherwise. Appellants simply filed corporate records and property documents. Appellants did not provide any other evidence to support their burden that the

nature of the claims involved communications. Accordingly, this case, like *Crestview*, does not fall within the purview of the TCPA.

ii. Based on its face, the TCPA simply does not apply to this case.

Laying aside Appellants lack of evidence, Appellants' TCPA motion is a complete perversion of the intended purpose of the TCPA. Like anti-SLAPP statutes in other states, the TCPA was put in place to protect the right to exercise free speech without being sued and bullied by a more powerful party. Specifically, the idea behind anti-SLAPP statutes is to allow citizens to question others without being sued into silence. There is no such issue in play in this case.

Indeed, as an initial matter, Appellants are Mexican citizens who fled Mexico to escape prosecution for the very deeds described in this case. They are fugitives who reside now in Spain. They are not in Texas, or the United States, and will likely never come here. Simply put, these Appellants are not "citizens" under the TCPA—they are not even in Texas. Moreover, these Appellants who purport to assert their First Amendment "rights" are not in the U.S. claiming such protections, they are instead hiding from Interpol in Spain. To argue that Appellee is somehow infringing upon Appellants' U.S. Constitutional rights when these Appellants are not U.S. citizens or even in the United States is wrong. More importantly, to claim the protections of the TCPA as "citizens" who are attempting to protect their

constitutional "rights" to prevent the Mexican government from recouping monies that were stolen borders is frivolous.

Although it is their burden to do so, these Appellants have failed to identify anything they have said or done, or attempted to say or do, that falls within the TCPA. Indeed, Appellants cannot point to a single legitimate instance in which they have made some statement from which Appellee is trying to silence or intimidate them. They do not even try. In this case, Appellee alleges that Appellants stole, or helped steal, Appellee's monies and used those monies to purchase property. As previously mentioned, each of these claims is conduct based, and fails to even mention communications. Nothing whatsoever in Appellee's allegations has anything to do with these Appellants' alleged communications. Appellants' arguments to the contrary completely pervert the plain language of the TCPA and its intended purpose. Appellants obviously realize they cannot claim the protections of the TCPA under its clear language. Thus, instead of claiming that Appellee's suit is "based on, relates to, or is in response to" Appellants' "exercise of the right of free speech, right to petition, or right of association," – as is required under this exact language of the statute – Appellants instead contend that the practical *effect* of Appellee's lawsuit is an infringement on those rights. In other words, they do not claim they got sued because they filed documents, but because they have been used they are no longer able to associate

freely. Appellants' arguments are not persuasive. If the Texas Legislature and the Texas courts interpreting this statute wished for the statute to cover claims that *caused* possible infringement of a person's rights of free speech, to petition or associate, they would have said so. However, the statute does not say that, and no court has ever held that.

In deposition, both Appellants were even asked under oath what First Amendment right of theirs was being infringed, and how it was being infringed – however, neither could provide an answer.[10] One would think that if Appellants had been sued in response to exercising some alleged First Amendment right, and then became so concerned about it that they filed the instant motion attempting to dismiss Appellee's claims, that they would at least be able to articulate how their First Amendment rights had been infringed. However, remarkably, neither would, or could. In fact, both Appellants pled another constitutional right in response to the questions - the Fifth Amendment's "right" against self-incrimination. This Court is free to make a negative inference from those answers. In a civil case, a fact finder may draw negative inferences from a party's assertion of the privilege against self-incrimination. See TEX. R. EVID. 513(c); *see also Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex.2007); *Tex. Dep't of Pub. Safety Officers Ass'n v.*

[10]2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) Deposition of Jose Bandin (pages 44-50) and Monica Babayan (pages 45-49).

Denton, 897 S.W.2d 757, 760 (Tex.1995). Appellants' appeal could and should be denied on this basis alone.

Similarly, in neither deposition nor pleadings, Appellants cannot and did not point to a single communication or act of public concern for which they are being retaliated against or intimidated. It would be one thing if Appellants were some of the journalists that stood up to the graft and cronyism involving Duarte in Veracruz, and then got sued for defamation, or even if Appellants had stood up to the current administration and were now arguing that they are being sued in response to that, but such is not the case. Appellants do not fall into any of those categories. Appellants conspired with ex-Governor Duarte to steal Veracruz's funds, and then stole Veracruz's money in conjunction with Duarte. Appellants stole money that was intended for social programs.[11] Further, Appellant Bandin is under indictment in Mexico.[12] With this stolen money, Appellants opened bank accounts and purchased real estate across the Houston area, and across Texas. Appellee filed suit against Appellants to recoup these monies and property. Appellants' argument that they are being silenced or intimidated somehow because Appellee attempts to repatriate the monies stolen from them is nonsensical. If such were the case, then every thief would be able to argue they were being intimidated

[11] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9); (Exhibits 8 and 9: Depositions of Jose Bandin (pages 17-21) and Monica Babayan (pages 19-25 and 50-52)).

[12] 2 CR 280 (Exhibit 3: Indictment of Bandin).

and silenced by their accuser. Such was not the purpose of the TCPA, and this Court should reject Appellants' attempts otherwise.

Moreover, the private purchase of real estate is clearly not a matter of "public concern." And to the extent it is a matter of public concern, it is a matter of public concern in Mexico. Appellants are attempting to argue that the filing of property deeds in private real estate transactions, and the ability to invest stolen funds in private real estate transactions, are the First Amendment communications that need to be protected in this case. Setting aside the silliness of this argument, it should be noted that it has been held multiple times that statements made in the context of private business disputes do not constitute speech related to a matter of public concern under the TCPA. *See Brugger v. Swinford*, No. 14-16-00069-CV, 2016 WL 4444036, at *3 (Tex. App.–Houston [14th Dist.] Aug. 23, 2016, no pet.)(mem. op.) (lawyer's allegedly defamatory statements to shareholders about a corporate officer were made in course of dispute between the shareholders and corporation, and were not communications in connection with a matter of public concern); *Lahijani v. Melifera Partners, LLC*, No. 01-14-01025-CV, 2015 WL 6692197, at *4 (Tex. App.–Houston [1st Dist.] Nov. 3, 2015, no pet.) (mem. op.) (statements critical of real estate agent with respect to commission and sharing of expenses in real estate joint venture did not relate to a "service in the marketplace," but were limited to the private business dispute, and were therefore not made in

connection with a matter of public concern under the TCPA); *I–10 Colony, Inc. v. Lee, Nos. 01–14–00465–CV & 01–14–00718–CV*, 2015 WL 1869467, at *5 (Tex. App.–Houston [1st Dist.] Apr. 23, 2015, no pet (mem. op.) (fraud claim was not based on communications about lawyer's services in the marketplace, but on allegation that Appellant lawyer fraudulently represented to Appellee that the lawyer would comply with a previous judgment; therefore, TCPA did not apply). Filing of a deed is not speech—period.

Importantly, Appellee is not trying to stop Appellants from investing in real estate, making any statements, filing deeds, or associating with any person or activity involving the investment in real estate. Appellee is simply trying to trying to recoup monies that were stolen. Appellants' argument is beyond flimsy, and requires both verbal contortions and tortured logic to make the TCPA apply to this case. The reality is that, as a matter of fact, as a matter of law, as a matter of its intended purpose, and, perhaps most importantly, as a matter of common sense, the TCPA does not apply to Appellants.

Appellants have fallen well short of their burden to demonstrate the applicability of the TCPA – which is Appellants' initial burden. Even when asked in deposition about the applicability of this statute to their case, which should be

the threshold inquiry of this statute, Appellants refused to answer.[13] The bottom line is that Appellee's intent is simply to recover money that was stolen by Appellants, not to restrict Appellants' First Amendment rights (to the extent they have any). If Appellants' argument is correct, then no theft or embezzlement case could ever proceed until the Appellee proved a prima facie case before filing – without the benefit of discovery. Such is not and cannot be the rule. Defendant's motion has no merit and should be denied.

iii. Appellants stand on shaky legal ground.

Each of the cases relied upon by Appellant involved claims that allege communications occurred related to the liability of the movant. Each of these cases is distinguishable from this case in that no such communications occurred. In *Elite Auto Body LLC v. Autocraft Bodywerks*, 520 S.W.3d 191, 196–99 (Tex. App.—Austin 2017, pet. dism'd), the Appellee specifically alleged that the Appellants improperly disclosed protected information to others, leading to the conclusion that the Appellee had alleged a communication as that term is defined in the TCPA. *Elite Auto*, 520 S.W.3d at 194, 197–98. And the court in *Elite Auto* even recognized that a trade-secret claim not involving the making or submitting of a statement or document would not be subject to dismissal under the TCPA because it would not be considered a communication. *Elite Auto*, 520 S.W.3d at

[13] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Deposition of Jose Bandin (pages 44-50) and Monica Babayan (pages 45-49)).

198. Appellants also rely upon *Quintanilla v. West*, 534 S.W.3d 34 (Tex. App.—San Antonio 2017, pet. granted). This case was granted review by the Supreme Court, and was recently subjected to harsh treatment before the Fifth Circuit in *Consortium, Inc. v. Hammervold*, 733 F. App'x 151, 158 (5th Cir. 2018) (per curiam) ("We decline to adopt Hammervold's interpretation of the outlier holding set forth in *Quintanilla v. West*, 534 S.W.3d 34, 46 (Tex. App.—San Antonio 2017), where that court concluded it was sufficient that the communicative activity that formed the basis for the Appellee's claims—the filing of financing statements in public records—were made in "in anticipation of imminent litigation.") Nonetheless, the allegation in that case was still that Quintanilla made false or fraudulent statements by filing the financing statements. *Id*. at. 39. Further, in *Schimmel v. McGregor*, 438 S.W.3d 847, 858-59 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) the suit turned on statements made by an attorney. In *Montoya v. San Angelo Community Medical Center*, 2018 WL 2437508 (Tex. App.—Austin May 31, 2018, pet. filed) (mem. op.), a physician sued a hospital for defamation based on an alleged 'whisper campaign.' In *Grant v. Pivot Tech. Sols., Ltd*., ––– S.W.3d ––––, ––––, No. 03-17-00289-CV, 2018 WL 3677634, at *12 (Tex. App.—Austin Aug. 3, 2018, no pet. h.) the issue was not whether the communications occurred, but whether they were protected by the TCPA. The fact that communications occurred in that litigation was a foregone conclusion, unlike

this case. The point is that each case relied upon by Appellants specifically found that the nature of the case involved communication, and, accordingly, are distinguishable from the instant case where no such communication occurred.

c. Appellee's Prima Facie Case.

In the unlikely event that this Court determines the TCPA applies—which it does not—Appellee must establish a prima facie case to avoid early dismissal of this action. A prima facie standard generally "requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re E.I. DuPont de Nemours & Co*., 136 S.W.3d 218, 223 (Tex.2004) (orig. proceeding) (internal quotation marks and citation omitted); see, e.g., *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd*., 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (applying standard in Chapter 27 case and explaining that Legislature's use of "prima facie case" implies imposition of minimal factual 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*, 404 S.W.3d at 726 (citation omitted); *cf. Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex.2008) (per curiam) (explaining that summary-judgment movant's presentation of prima facie evidence of deed's validity established his right to summary judgment unless non-movants

presented evidence raising fact issue related to validity). "Conclusory statements are not probative and accordingly will not suffice to establish a prima facie case." *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc*., 441 S.W.3d 345, 355 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (*citing In re E.I. DuPont*, 136 S.W.3d at 223–34); *see also Lipsky II*, 460 S.W.3d at 592 (explaining that "bare, baseless opinions" are not "a sufficient substitute for the clear and specific evidence required to establish a prima facie case" under the Act).

The TCPA does not define "clear and specific" evidence; consequently, Texas courts have given these terms their ordinary meaning. *See TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex.2011). "Clear" means "free from doubt," "sure," or "unambiguous." *Black's Law Dictionary 307* (10th ed.2014); *Lipsky II*, 460 S.W.3d at 590 (approving this definition of "clear"); *see also Webster's Third New Int'l Dictionary 419* (2002) ("easily understood," "without obscurity or ambiguity," "easy to perceive or determine with certainty"). "Specific" means "explicit" or "relating to a particular named thing." *Black's Law Dictionary*, at 1616; *Lipsky II*, 460 S.W.3d at 590 (approving this definition of "specific"); *see also Webster's Third New Int'l Dictionary*, at 2187 ("being peculiar to the thing or relation in question," "characterized by precise formulation or accurate restriction," or "free from such ambiguity as results from careless lack of precision or from omission of pertinent matter"). Texas courts have concluded that

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 the non-movant's minimal factual burden. *See Combined Law Enforcement Ass'n of Tex. v. Sheffield*, No. 03–13–00105–CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (mem.op.).

Appellee herein has marshaled the minimum quantum of "clear and specific evidence" necessary to support a rational inference establishing each essential element of its claims. Unlike Appellants' argument, Appellee's burden is not a heavy one. In fact, Appellee is only required to put forth evidence that supports an inference that its claims have merit. Appellee can easily do so, and has done so. Appellee herein provides this Court with the sworn declarations from the Mexican special prosecutor overseeing this investigation and the subsequent deposition testimony of the Appellants.[14] This sworn declaration provides that the money at issue in this case belonged to Veracruz, how it was stolen, who stole it, how much was stolen, and where the funds went. Moreover, Appellee has engaged an ex-FBI agent who provides sworn expert testimony that corroborates the testimony of Mexico's special prosecutor. Regarding damages, the exact amount of damages being claimed in each case was provided by the Harris County Appraisal District

[14] 2 CR 278 (Exhibit 2); 2 CR 453-481 (Exhibit 8); and 2 CR 482-512 (Exhibit 9).

appraised values for each property. That is the exact amount of damages being claimed for each case. Such is proved up to the penny. These records are also in admissible form, as they are authenticated by affidavit.[15] However, such is a moot point as Appellants also attached these same records to their motion and properly authenticated them, and accordingly they are properly before this Court.

Also, for context, Appellee provides multiple newspaper articles published by the Mexican press which provides additional information about the crimes of Appellants Bandin, Babayan, and Duarte.[16] Finally, Mr. Bandin and Mrs. Babayan were recently deposed on these topics and pled the protections of the Fifth Amendment to avoid further implication of themselves.

i. Depositions of Bandin and Babayan

As this Court is well aware, the depositions of both Appellants Bandin and Babayan occurred in Madrid pursuant to court order. It is important to note that Appellants Bandin and Babayan are in Spain because they previously struck a plea bargain with the government of Veracruz in which the Appellants had agreed to return a portion of the funds they stole. However, these Appellants failed to live up to their end of the agreement, failed to return the stolen funds, and instead fled

[15] 2 CR 523 (Exhibit 11).
[16] 2 CR 393-452 (Exhibit 7: Articles in the Mexican press regarding Appellants).

to Spain.[17] During their depositions, these Appellants invoked the Fifth Amendment "right" against self-incrimination to every substantive question asked of them, and in response to the probative evidence presented to them. Specifically, counsel for Appellee presented sworn testimony from the investigating prosecutor in Mexico, records from each of the properties and corporate entities owned by them, and the investigation document provided by Appellee. In other words, when Appellee confronted Appellants under oath with probative evidence about how much they stole, what they stole, how they stole it, etc., Appellants refused to answer because they would incriminate themselves of these crimes.[18]

Importantly, and as previously discussed, in a civil case, a fact finder may draw negative inferences from a party's assertion of the privilege against self-incrimination. See TEX. R. EVID. 513(c); *see also Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex.2007); *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex.1995). As such, this Court is allowed to draw negative inferences to each question that Appellants refused to answer based on a Fifth Amendment privilege – which in this case would be every single question about every single claim. Appellee requests that this Court draw such inference.

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[17] 2 CR 454-455 and 2 CR 483-4 (Exhibits 8 and 9: Depositions of Jose Bandin (pages 6-10) and Monica Babayan (pages 6-10)).

[18] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Depositions of Jose Bandin; 2 CR 453-481 (pages 51-57, 110-111, 103-105) and Monica Babayan; 2 CR 482-512 (pages 49-55, 117-118).

ii. Conversion

In the instant case, Appellee submits to this Court sworn declarations from both the General Legal Director for the Ministry of Veracruz (special prosecutor) Armando Cedas in Veracruz, and a former FBI agent, along with the testimony of Appellants as evidence of conversion.[19] Mr. Cedas was involved with the investigation and prosecution of these Appellants, along with an ex-FBI agent, James Ellis, who was hired to further investigate these crimes in the United States by Appellee.[20] The Appellants themselves corroborate this testimony with their deposition testimony. Each provide that these Appellants diverted state money intended for social programs into their personal coffers, and then sent those funds to Houston, where it was deposited in banks and used to purchase real estate. Importantly, the depositions of Appellants revealed that Bandin and Babayan had unique roles in this global conspiracy. Each was responsible for recruiting a group of local business people in the State of Veracruz. These local businessmen were directed by Appellants to submit false and overstated invoices to the various agencies of the State of Veracruz. Appellants and Javier Duarte made sure these invoices were paid in full. These invoices were for activities like road construction

[19] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas); 2 CR 392 (Exhibit 6: Declarations from James K. Ellis).
[20] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas); 2 CR 392 (Exhibit 6: Declarations from James K. Ellis).

and the procurement of medicine for the sick citizens of Veracruz. However, the roads were not getting completely built (or the amount of materials used were overstated) and the medicine was not being purchased. Instead, the people of Veracruz were left with shoddy and half built roads, and saline instead of insulin.[21] Once the invoices were paid, the local business people would receive a "commission" for their participation, and the balance of the funds were sent to shell companies in Mexico owned and controlled by Appellants – these include the following: Terra Inmobiliaria, Grupo Brades, Inmobiliaria Cartujano, Boydar, Valkany, Controladora Prado Norte, and Inmobiliaria 135 Prado Norte.[22] The monies were sent north to Houston where they were transferred to shell companies in the United States, including Reban Construction, LLC, Reban Safety, LLC, 18 Shallowford PL, LLC, 83 West Jagged Ridge, LLC, 87 West Jagged Ridge, LLC, 175 W. New Harmony, LLC, 18 Griffin Hill, LLC, 138 Bryce Branch Circle, LLC, 43 Spinning Wheel, LLC, and Banba Offices, LLC.[23] This money was eventually used to purchase the real estate in the names of the various shell companies which are subjects of multiple lawsuits.

[21] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Depositions of Jose Bandin (pages 17-20) and Monica Babayan (pages 17-25).
[22] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Depositions of Jose Bandin (pages 14-24) and Monica Babayan (pages 13-28).
[23] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Depositions of Jose Bandin (pages 26-27, 62-102) and Monica Babayan (pages 60-109).

Along with these affidavits, Appellee provides information on some of the properties in question that were purchased by Appellants during Duarte's term in office.[24] Moreover, each of the corporate entities in question was formed by Appellants during Duarte's term in office.[25] Additionally, Appellee provides this Court with evidence that Appellants are currently under investigation in Mexico for these crimes, and that Bandin has been indicted.[26] Such facts were also pled in Appellee's petition.[27]

To prove conversion, Appellee must show that it owned the funds in question, Appellants took control over these funds, and that Appellee suffered injury. Each of these elements is easily met with the affidavits and testimony provided, along with the property records submitted. More importantly, when Appellants Bandin and Babayan were confronted with this probative evidence, Appellants asserted their Fifth Amendment right against self-incrimination.[28] The funds originally belonged to Veracruz, and Appellants stole them.[29] In other words, Appellee provided how the funds were stolen, who stole them, how much

[24] 2 CR 295-328 (Exhibit 4: Property records from the Harris County Appraisal District).
[25] 2 CR 329-391 (Exhibit 5).
[26] 2 CR 280 (Exhibit 3).
[27] 2 CR 513 (Exhibit 10: Appellee's Amended Petition).
[28] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).
[29] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas)

was stolen, the manner in which the money was stolen, the shell companies used to steal the money, what happened to the money after being stolen, and the current location of money. Appellee has easily provided this Court with prima facie evidence of conversion.

iii. Theft Liability Act/ Texas Penal Code 31.03(e)(7)

Much like conversion, the Texas Theft Liability Act and Texas Penal Code 31 provide the following elements: 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. Appellee re-incorporates the same proof as provided above. Appellants stole the funds from Veracruz.[30] Duarte was arrested for such. Appellants were under investigation for these crimes, and have since been indicted. Appellants fled to Spain after the investigation was initiated and remain there currently. When confronted with this information, and other probative evidence of their crimes, Appellants refused to answer a single question, instead asserting their Fifth Amendment right against self-incrimination.[31] Appellee easily meets the elements of the Texas Theft Liability Act.

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[30] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas); 2 CR 392 (Exhibit 6: Declarations from James K. Ellis).

[31] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

iv. Constructive Trust

A party seeking to impose a constructive trust must establish (1) breach of a special trust or fiduciary relationship or actual or constructive fraud, (2) unjust enrichment of the wrongdoer, and (3) an identifiable res that can be traced back to the original property. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex.2015). Appellee re-incorporates all evidence previously provided; Mr. Duarte had a special, fiduciary relationship with the State of Veracruz, and he and Appellants Bandin and Babayan used that special relationship to steal money for their own benefit. Some of those funds were funneled to purchase real estate – those properties are an identifiable *res* that can be traced back to the original funds of Veracruz.[32] Additionally, the bank accounts in question received those funds. When confronted with this information and other probative evidence, Appellants refused to answer a single question, instead asserting their Fifth Amendment right against self-incrimination.[33] It is clear that Appellee met each of these elements.

v. Civil Conspiracy

An actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful

[32] 2 CR 277 (Exhibit 1: Declaration of Armando Cedas); 2 CR 280 (Exhibit 3: Indictment of Bandin).
[33] 2 CR 453-481 (Exhibit 8) and 2 CR 482-512 (Exhibit 9) (Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

means. *Great National Life Insurance Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex.1964); *State v. Standard Oil Co.*, 130 Tex. 313, 107 S.W.2d 550, 559 (1937). The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. 15A C.J.S. Conspiracy § 1(2) (1967). In the current case, there are at least two civil conspiracies; one between Bandin and Babayan, and another between Duarte, Bandin and Babayan. For both conspiracies, the unlawful act(s) is the theft of Veracruz state funds – for which Duarte and his wife are in custody, and for which both Bandin and Babayan are under investigation in Mexico. Moreover, these stolen funds were used to purchase the properties previously identified and deposit the funds in the accounts in question. When confronted with this information and other probative evidence, Appellants refused to answer a single question, instead asserting their Fifth Amendment right against self-incrimination.

vi. Damages

As previously mentioned, the damages for both lawsuits are found in the properties sued and sued and sued upon. The value of each property is provided for by its HCAD record, which is attached by both Appellee and Appellants. As such, the exact value of the damages for each lawsuit – the value of the properties

– is properly presented in an authenticated and admissible format to a precise value.

3. CONCLUSION AND PRAYER

Appellants' arguments have no merit. With growing frequency, Appellants sued in all types of lawsuits are filing motions to dismiss pursuant to the TCPA. Many of these anti-SLAPP motions involve conduct (like this one) that has nothing to do with the infringement of First Amendment rights contemplated by the legislature. As this Court is aware, the purpose of the TCPA was to protect whistle blowers and the like who were sued by those attempting to shut them up. The instant case is a far cry from that intent. Unfortunately, the real reason these motions get filed in almost every non-personal injury case is because a TCPA motion gives a Appellant a strategic advantage. A TCPA motion provides an Appellant an excellent way to cause delay and expense to the other side. And, it gives an Appellant a stay of discovery, and an automatic interlocutory appeal even if its motion is denied. Because discovery is stayed, an Appellant can force an adjudication on the merits without typically having to respond to document requests, or answer questions under oath. And if its motion is granted, an Appellant will be awarded fees and costs.

The motion before the Court is a perfect example of the way in which this important law is being perverted to obtain a strategic advantage. Irrespective of

the history of the TCPA, its intended purpose, or widespread abuse, in this case it is clear that these Appellants' TCPA motion is meritless. Appellants claim that statements they are making in private business transactions – filing deeds and associating for real estate investment – are being infringed upon. Unfortunately for Appellants' argument, statements made in private business disputes do not implicate the TCPA. Undeterred by this, Appellants' ask that Appellee's claims be dismissed upon that basis alone. Appellants do not even address whether foreign nationals who are not currently residing in the United States can even seek the protections of the TCPA – Appellee respectfully submits they cannot.

Appellants' appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been duly served on all known counsel of record and pro se parties in accordance with the Texas Rules of Civil Procedure on January 22, 2019.

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