

CAUSE NO. 2018-06480

FREE AND SOVEREIGN STATE OF
VERACRUZ DE IGNACIO DE LA LLAVE
Plaintiff,

vs.

83 WEST JAGGED RIDGE, LLC, 87 WEST
JAGGED RIDGE, LLC, 175 W NEW
HARMONY, LLC, 18 GRIFFIN HILL, LLC,
138 BRYCE BRANCH, LLC, MONICA M.
TUBILLA, 43 SPINNING WHEEL, LLC,
JAVIER DUARTE DE OCHOA, JOSE A.
BANDIN, MONICA BABAYAN, and
BANBA OFFICES, LLC

Defendants.

§ IN THE DISTRICT COURT OF

§ 295TH JUDICIAL DISTRICT

§ HARRIS COUNTY, TEXAS

§ **JURY TRIAL DEMANDED**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO CONSOLIDATE

1. Introduction

Javier 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 of dollars from the State of Veracruz through various methods. 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. 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. In the scheme, 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 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 bulk of the monies could be extracted from the real estate.

Over time, the Mexican media began to take note of the spending habits and the financial irregularities involving Governor Duarte and his associates. Specifically, it was widely reported in Mexico (and the U.S.) that Duarte and those closely associated with him—like Bandin and Babayan—owned multiple properties all over the United States, but did not make a sufficient salary in Mexico to legitimately make such purchases. It was even reported that Duarte had become a member of a country club in North Houston. As the controversies surrounding his time in office mounted, Duarte fled Mexico and was later charged with corruption. Duarte was eventually captured in Guatemala and extradited back to Mexico. He currently awaits trial in Veracruz for his alleged crimes. Duarte's wife was also recently arrested – in London – for similar crimes. After much investigative work, Veracruz 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. Veracruz's investigation revealed that two close Duarte associates, Defendants 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. Together, these co-conspirators, and many others, engineered the theft of billions of dollars from the State of Veracruz. The State of Veracruz brings this action to repatriate these stolen funds back to the people of Veracruz.

The State of Veracruz filed seven different lawsuits in Harris County against various members of the above-described conspiracy. One case was removed to federal court, and one

case was non-suited. As such, there are five remaining active cases in Harris County. A summary of each is as follows:

Cause No.	Court	Defendants
2018-06480	295 th District Court	Bandin Defendants, Monica Tubilla, Javier Duarte.
2018-06526	190 th District Court	Mansur Defendants, Javier Duarte.
2018-06745	334 th District Court	Bandin Defendants, Javier Duarte.
2018-06752	127 th District Court	Reverte Defendants, Bandin Defendants, Antimo Defendants, Javier Duarte.
2018-09526	61 st District Court	Arturo Zurita, Sofia Hernandez, Javier Duarte.

As can be seen, there is not complete consistency amongst the Defendants in the various lawsuits. Importantly, the various cases are filed against each Defendant based upon the property that Defendant owns. And, in each of these cases, the properties are named *in rem*. Put another way, even though there are three different cases against the Bandin Defendants, each case involves three different sets of unique properties owned by the Bandin's, purchased through a series of unique transactions involving different banks, and various bank accounts. Defendants' request before the court is to consolidate all of the cases. Defendants' request is contrary to the law and the local rules of this County.

2. Argument & Authorities

a. The local rules do not contemplate a consolidation such as Defendants are requesting.

The local rules regarding consolidation are as follows:

3.2.3 Consolidation.

(a) Consolidation of Cases. Subject to subpart c, a motion to consolidate cases must be heard in the court where the first filed case is pending. If the motion is granted, the consolidated case will be given the number of the first filed case and assigned to that court.

(b) Consolidation of Discovery. Subject to subpart c, a motion to consolidate discovery in separate cases must be heard in the court where the first filed case is pending. If the motion to consolidate discovery is granted, the case will not transfer, but the case management will be conducted by the consolidating court.

(c) Consolidation to Special Dockets. Special dockets for the management of multi-court cases may be created by order of the Administrative Judge of the Civil Trial Division according to policies approved by the judges of the Civil Trial Division.

For the consolidation of two cases, 3.2.3(a) clearly applies. However, Defendants' motion requests the consolidation of at least five cases. For the consolidation of more than two cases, local rule 3.2.3(c) applies. And for the creation of a special docket for the management of multi-court cases, a different procedure would need to be followed. Defendants have not yet made the proper application regarding the creation of a special docket with the Administrative Judge responsible for this decision. Defendants picked the wrong mechanism for the relief they seek. But even had Defendants followed the correct procedure (asking for a special docket), that request was already rejected by at least one Harris County District Court judge.

b. The requested consolidation was already rejected.

The Harris County Administrative Judge responsible for determining whether cases should be consolidated pursuant to 3.2.3(c) has already determined that such a consolidation was not warranted.¹ Judge Engelhart considered a consolidation exactly like the one being proposed to this Court. Obviously, Judge Engelhart rejected that idea and denied the consolidation. Despite this, Defendants now ask for the same relief from this Court. The result should be the same as before.

c. Relevant case law.

Laying aside the local rules, the Texas Rules of Civil Procedure also disfavor a consolidation such as Defendants are requesting. Rule 174 of the Texas Rules of Civil Procedure governs consolidation of actions. Rule 174(a) provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

TEX.R. CIV. P. 174(a). Rule 174 gives the trial court broad discretion to consolidate cases with common issues of law or fact. *See Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d 734, 737 (Tex.App.-Houston [1st Dist.] 1992, writ denied). As the Texas Supreme Court stated in *Womack v. Berry*:

The use of the permissive word “may” imports the exercise of discretion in such matters. But the court is not vested with unlimited discretion, and is required to exercise a sound and legal discretion within limits created by the circumstances of the particular case. The express purpose of the rule is to further convenience and avoid prejudice, and thus promote the ends of justice. When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion.

¹ Ex. 1: February 14, 2018 Order denying transfer of cases from the 61st District Court to the 127th District Court.

Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677, 683 (1956); *Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 615 (Tex.App.-El Paso 1992, no writ). Courts apply the same principles in considering the propriety of consolidation under rule 174 as apply to the ordering of separate trials under that authority. *See Dal-Briar Corp.*, 833 S.W.2d at 615. The trial court may consolidate actions that relate to substantially the same transaction, occurrence, subject matter, or question. *Crestway Care Ctr., Inc. v. Berchelmann*, 945 S.W.2d 872, 873–74 (Tex.App.-San Antonio 1997, orig. proceeding) (op. on rehearing) (en banc); *Lone Star Ford, Inc.*, 838 S.W.2d at 737. The actions should be so related that the evidence presented will be material, relevant, and admissible in each case. *Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 716 (Tex.App.-Dallas 1997, no pet.); *Crestway Care Ctr., Inc.*, 945 S.W.2d at 873–74. A trial court may abuse its discretion by “incorrectly resolving the relatedness issue” or by consolidating cases when the consolidation results in prejudice to the complaining party. *Crestway Care Ctr., Inc.*, 945 S.W.2d at 874 (citing *Lone Star Ford*, 838 S.W.2d at 738).

In deciding whether to consolidate, the trial court must balance the judicial economy and convenience that may be gained by the consolidation against the risk of an unfair outcome because of prejudice or jury confusion. *See Dal-Briar*, 833 S.W.2d at 615; *Owens-Corning Fiberglas Corp.*, 942 S.W.2d at 716. Even if the cases share common questions of law and fact, an abuse of discretion may be found if the consolidation results in prejudice to the complaining party. *Lone Star Ford, Inc.*, 838 S.W.2d at 738. However, prejudice is not to be presumed; it must be demonstrated. *Id.* Where the cases do share common questions of law and fact, and the record does not reveal actual prejudice, the consolidation does not provide a basis for reversal. *See Hall v. Dorsey*, 596 S.W.2d 565, 569 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd

n.r.e.). The dominant consideration is whether the trial will be fair and impartial to all parties. *In re Ethyl Corp.*, 975 S.W.2d 606, 614–15 (Tex.1998).

d. The various cases are all in wildly different procedural postures.

Defendants ask that all of these cases be consolidated into a single super case, but in doing so Defendants gloss over the different procedural postures each of the cases are in. For instance, the case pending in the 334th District Court is already on appeal. In that case, the Court already held three hearing regarding Defendants' Anti-SLAPP motion. And ordered depositions to occur in Spain. The ruling in that case has already been appealed for the second time by these same Defendants. An almost identical motion is pending in this Court, and will be heard along with this motion. In the 127th District Court, there have already been two discovery motions regarding Defendants' Anti-SLAPP motion, and a hearing is currently set on that motion to dismiss. Curiously, Defendants request that all of the cases get consolidated so that there are not inconsistent rulings, however Defendants have done this after asking multiple Courts for the same relief. Defendants seem to want to change horses mid-stream because they did not like the rulings they received in these other courts.

e. The cases may involve common issues of law, but the facts will be different in each case.

Although these cases might involve common issues of law – they are all based upon the same legal claims that Defendants stole money from the State of Veracruz – each will involve vastly different issues of fact. For example, although each of the Defendants was involved in a conspiracy led by the state's governor, Javier Duarte, the methods employed to carry out the conspiracy by each co-conspirator were different. In other words, each Defendant involved in this conspiracy to steal money actually stole the money in very different ways. The Bandin Defendants used a group of local business people to send inflated invoices for road construction

and the sale of medicine to defraud the State of Veracruz. Based upon information and belief, the Mansur Defendants used a different technique – tax fraud. And finally, based upon information and belief, the Zurita Defendants diverted federal funds directly from the Secretariat of Public Security and into their private coffers (Mr. Zurita was the head of the state police in Veracruz). These different factual scenarios involve very different questions of fact. The different sets of defendants did not steal money in the same transaction or occurrence. These different defendants stole money in different ways and at different times. These facts cut sharply against consolidation; as a prerequisite for consolidation the cases should relate to substantially the same transaction, the same occurrence, or the same subject matter. And that the evidence presented in one case will be material, relevant, and admissible in the others. Such is not the case here – quite the opposite. In the event of a consolidation, Plaintiff will be forced to present evidence of multiple different fraudulent schemes, occurring at different times over many years, and involving different individuals. Such is a far cry from the same transactions and occurrences referenced in the case law.

Also, importantly, there is not complete consistency between the parties. Despite this, Defendants propose that this Court consolidate three of the five cases (although no explanation is provided as to why all five are not being consolidated) into this Court. This “super case” will then have eight different defendant groups: (1) Javier Duarte, (2) Tubilla Defendants, (3) Mansur Defendants, (4) Bandin Defendants, (5) Reverte Defendants, (6) Antimo Defendants (related to Bandin Defendants), (7) Zurita Defendants, and (8) Sofia Hernandez Defendants, and at least as many schemes that stole money from Veracruz. These different cases will involve different fact witnesses and different evidence for different frauds perpetrated against the state.

A consolidation will necessarily create a trial in which different Defendants who did not steal money in the same way, or even in the same time frame, and who are not currently co-defendants, will be forced into a single trial. This will be as prejudicial to Plaintiff as Defendants. Not only will there be an unnatural meshing of the cases, the consolidation will create a logistical nightmare and jury confusion. Defendant's plan will create a trial with an unmanageable number of witnesses and factual scenarios that need to be presented to the jury in one sitting. The trial will then take weeks (maybe months), and involve multiple different questions of unrelated fact. Certainly the evidence against one party will not be relevant or pertinent to the others. Evidence of half finished roads will have no bearing on a fraud involving the collection of tax reimbursements, and evidence of unfilled orders for insulin will have nothing to do with wire transfers directly out of the budget for the police forces. The bottom line is that each scheme in the conspiracy was different, the methods used to steal the money were different, the people stealing the money in each unique way were different, and the witnesses and evidence will all be different – consolidation should be precluded on this issue alone.

To attempt to consolidate all of the cases together into a single case will create unfair prejudice to Plaintiff. To force Plaintiff to try one giant case involving all aspects of the fraudulent behavior and corruption against various defendants that stole money in different ways over many years will create duplication and confusion. There will be an impossibly large number of witnesses and facts all thrown together. Such could easily overwhelm any jury, assuming a jury could be seated for a trial that might last several months. Such an immense amount of information will be confusing to a jury and create a trial that is unmanageably large in terms of time and scope. This cuts against the objectives of TRCP 174, which include increasing the convenience to the parties and the Court.

f. These cases do not warrant consolidation – prejudice and confusion will result

Consolidation is typically used to increase both judicial economy and convenience to the parties and jury. This proposed consolidation will have the exact opposite result. In order to have a proper consolidation, the actions should relate to substantially the same transaction, occurrence, or subject matter. *Crestway Care Ctr., Inc. v. Berchermann*, 945 S.W.2d 872, 873–74 (Tex.App.-San Antonio 1997, orig. proceeding) (op. on rehearing) (en banc). The reason this is the standard is so that the evidence used in one case can be used in all of the consolidated actions. However, if the evidence will not be material or relevant in each case, then the aims of TRCP 174 begin to crumble. In the instant scenario, Defendants request that at least five defendant groups be joined into a single case. Each of the defendant groups were part of a conspiracy led by Javier Duarte, yet each carried out its portion of the conspiracy in different ways – road construction, tax fraud, theft from the treasury, etc. As such, the evidence against one defendant group will not be relevant against any others. Accordingly, there will be no economies of scale created by consolidation. And if successful, the consolidation will leave the Plaintiff with a large, unmanageable trial involving distinct frauds committed by distinct people. Such will take substantially longer to complete as compared to the current configuration. The odds of jury confusion will go up exponentially. And the ultimate result will be that Plaintiff is prejudiced. Consolidation is not proper and should be denied.

3. Conclusion

For these reasons, Plaintiff Veracruz asks the Court to deny Defendants’ motion to consolidate.

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 August 14, 2018.

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