

CAUSE NO. 2018-06480

FREE AND SOVERIEGN STATE	§	IN THE DISTRICT COURT OF
OF VERACRUZ DE IGNACIO	§	
DE LA LLAVE	§	
	§	
	§	
Plaintiff,	§	
	§	HARRIS COUNTY, TEXAS
v.	§	
	§	
83 WEST JAGGED RIDGE, LLC,	§	
ET AL.	§	
	§	
Defendants.	§	295 <sup>th</sup> JUDICIAL DISTRICT

**CERTAIN DEFENDANTS’ RESPONSE TO MOTION TO COMPEL**

*“We have emphasized that one of the Fifth Amendments basic functions...is to protect innocent men...who might otherwise be ensnared by ambiguous circumstances.”*

*Ohio v. Reiner, 532 U.S. 17, 21 (2001).*

From the beginning of this case, Plaintiff has stated—no, boasted—that Jose Antonio Bandin and his wife, Monica Babayan, were thieves who looted the public treasury of the state of Veracruz. Plaintiff asserted on numerous occasions that Bandin and Babayan would be criminally pursued in Mexico and the United States. Attached, in fact, to Plaintiff’s response to the anti-SLAPP motion to dismiss were declarations from a state official in Veracruz and a former FBI agent in the US, making wild (but unsubstantiated) allegations, and Plaintiff has trumpeted (falsely) that the Veracruz official’s complaint is in fact an indictment against Bandin.

Bandin and Babayan deny the allegations, but they justifiably feared the power of a sovereign state and its threats of prosecution. When compelled to give depositions, they asserted their Fifth Amendment rights against self-incrimination. Now Plaintiff wants this Court to strip these individuals of their constitutional rights. The Court should deny Plaintiff's motion to compel because the right of these parties to assert their Fifth Amendment rights is well-established and inviolate.

*First*, the right against self-incrimination may be properly invoked when a witness reasonably apprehends a risk, even if no criminal charges are yet pending against him, and even if the risk of prosecution is remote. *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1979). Given Plaintiff's repeated assertions, that threat plainly exists here for Bandin and Babayan.

*Second*, the Fifth Amendment applies even to non-citizens of the United States. *United States v. Balsys*, 524 U.S. 666, 671 (1998) ("Resident aliens . . . are considered 'persons' for purposes of the Fifth Amendment and are entitled to the same protections under the Clause as citizens."). Forget that Plaintiff's petition alleges Bandin and Babayan are residents of Texas; their residence and citizenship do not matter if they are threatened with prosecution in this country.

*Third*, the fact the depositions were physically taken in Spain does not change the analysis. *See In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 199-201 (2d Cir. 2008) ("[W]e hold that foreign nationals interrogated overseas

but tried in the civilian courts of the United States are protected by the Fifth Amendment's self-incrimination clause.”). The depositions were taken for the purpose of using the testimony in the United States. And, Plaintiff has often commented it will provide information to the federal authorities here.

The lone authority cited by Plaintiff is inapposite. It deals not with the Fifth Amendment, but instead to the extraterritorial reach of the Fourth Amendment. Plaintiff asserts the case's reasoning applies to the Fifth Amendment as well, but the United States Supreme Court expressly disavowed that assertion: “[The Fourth Amendment] operates in a different manner than the Fifth Amendment, which is not at issue in this case. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).<sup>1</sup>

With no legal support for its motion to compel, Plaintiff closes with an additional draconian request to strike the pending motion to dismiss. We recognize, of course, that the Court may assign appropriate evidentiary weight to any reasonable adverse inference that can be drawn from the assertion of their

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<sup>1</sup> The Court explains that, unlike the Fifth Amendment, which applies to “any person,” the Fourth Amendment concerns “the right of the people,” which “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265; *see also United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995) (“Unlike the Due Process Clause of the Fifth Amendment, which protects all ‘persons,’ the Fourth Amendment protects only ‘the People of the United States.’ . . . The Fourth Amendment therefore protects a much narrower class of individuals than the Fifth Amendment.”).

constitutional right to silence. *See Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007). But to sanction these individual defendants for their lawful invocation of their Fifth Amendment rights by striking their motion to dismiss turns Chapter 27 of the Texas Civil Practice & Remedies Code on its head.

The purpose of the Chapter is to weed out unmeritorious claims that impinge on the defendants' rights of speech and association by requiring early proof of those claims. We understand Plaintiff is frustrated it cannot present such proof. Instead, it has sought delay at every turn and turned up the volume on its bellicose claims. It may not, however, punish these defendants for exercising their fundamental rights. *See Wehling*, 608 F.2d at 1087 (“[T]he district court had no authority to order Wheling to disclose privileged information and, consequently, should not have imposed sanctions when Wehling declined to answer.”).

The motion to compel should be denied.

Respectfully submitted,

**FOGLER, BRAR, FORD,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 23, 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.

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Unofficial Copy Office of Chris Daniel District Clerk