

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

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§
§ **JURY TRIAL DEMANDED**

PLAINTIFF'S FIRST AMENDED MOTION TO COMPEL

A. INTRODUCTION

Defendants Bandin, Babayan, and a host of the entities they own or control, recently filed a motion to dismiss pursuant to CPRC Chapter 27 – the Anti-SLAPP statute. The Anti-SLAPP statute provides that upon a showing of good cause the Court may allow specified and limited discovery relevant to the motion. CPRC § 27.006(b). Two other courts in this county recently ordered Jose Bandin and Monica Babayan to be deposed in Spain. Those depositions occurred in the recent past. In those depositions, both Defendants took the Fifth Amendment to each and every substantive question. As such, Defendants again refused to participate in discovery. Plaintiff now requests that Defendants' assertion of the Fifth Amendment right be overruled, and Defendants be compelled to answer Plaintiff's questions. Alternatively, Plaintiff asks that Defendants' motion to dismiss be struck as a sanction for Defendants' refusal to participate in discovery.

B. THESE DEFENDANTS HAVE NO FIFTH AMENDMENT RIGHTS

The Bandin Defendants are not entitled to the protections of the Fifth Amendment, or the First Amendment for that matter. Neither defendant is an American citizen, nor resides in the United States. Neither has a significant relationship with this Country, or plans to reside here or even travel here.

The Supreme Court has long taken the view that the Constitution is subject to territorial limitations. In *Ross v. McIntyre*, 140 U.S. 453, 11 S.Ct. 897, 35 L.Ed. 581 (1891), the Court rejected a habeas corpus petitioner's claim that his conviction by a United States consular court in Japan violated the Sixth Amendment right to a jury trial. The Court stated:

By the constitution a government is ordained and established "for the United States of America," and not for countries outside their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. Cook v. U.S., 138 U.S. 157, 181, 11 S.Ct. 268, 34 L.Ed. 906 [(1891)]. The constitution can have no operation in another country.

Ross, 140 U.S. at 464, 11 S.Ct. 897.

Indeed, the Supreme Court also rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; "[t]he alien ... has been accorded a generous and ascending scale of rights as he increases his identity with our society."

Id., at 770, 70 S.Ct., at 940. But the rejection of extraterritorial application of the Fifth Amendment was emphatic:

“...the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.”

“Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. Cf. Downes v. Bidwell, 182 U.S. 244 [21 S.Ct. 770, 45 L.Ed. 1088 (1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.” *Id.*, at 784, 70 S.Ct., at 947.

The *Eisentrager* Court stated that “the Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.” *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936 (1950) at 771 and 782-784. The Court specifically analyzed the application of Fifth Amendment protections to non-resident aliens and found that such non-resident aliens do not have these Constitutional protections.

The Supreme Court has further reiterated and affirmed these holdings in both *U.S. v. Verdugo-Urquidez*, as well as *Zadydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491 (2001). Both cases hold that as a general matter aliens outside the sovereign territory of the United States are not entitled to Fourth and Fifth Amendment rights, and cited to *Johnson* in holding such.

As provided in the Supreme Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), U.S. Constitutional protections are not available to foreign nationals not living in the United States. Under *Verdugo-Urquidez*, the Fourth Amendment does not apply to searches and seizures of nonresident aliens who have “no previous significant voluntary connection with the United States.” 494 U.S. at 271, 110 S.Ct. 1056; *see also Hernandez v. United States*, 785 F.3d 117, 124 (5th Cir.2015) (en banc) (Jones, J., concurring) (“This en banc court recognizes that the Supreme Court has foreclosed

extraterritorial application of the Fourth Amendment to aliens where the violation occurs on foreign soil and the alien plaintiff lacks any prior substantial connection to the United States.” (citing *Verdugo-Urquidez*, 494 U.S. at 261, 110 S.Ct. 1056)). Although it is a different Constitutional right implicated, the reasoning applies to the Fifth Amendment, as well. And, importantly, Courts since the *Verdugo-Urquidez* decision have recognized the principle and extended it even further.

In *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 2500 (2001) at 28-29, the Court held that it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders, citing *Verdugo-Urquidez* as authority and clearly distinguishing non-residents from resident aliens.

To the extent that Defendants rely upon *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.”), this case is not binding on this Court as it is the sole case cited by the Second Court of Appeals. The above-referenced cases from the United States Supreme Court and the Fifth Circuit Court of Appeals apply in this case. The Defendants do not reside in the United States and are foreign nationals not living in the United States. Furthermore, these Defendants are not being accused of committing crimes in this Country. Indeed, all of Defendants’ criminal conduct appears to have occurred in Mexico. Thus, the Bandin Defendants should not be permitted to hide behind the Fifth Amendment.

CONCLUSION

The Bandin Defendants filed the instant motion to dismiss, yet refuse to participate in discovery. And even after a Harris County Court ordered that they be deposed, Defendants still

refused to answer any questions based upon a Constitutional right they are not entitled to. As such, because these Defendants have flagrantly disregarded a Court order to participate in discovery, Plaintiff asks this Court to compel Defendants to answer the questions asked at deposition and overrule Defendants assertion of the Fifth Amendment. Alternatively, Plaintiff requests that Defendants' motion to dismiss be struck.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

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 24, 2018.

Via E-filing

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Unofficial Copy Office of Chris Daniel District Clerk