

CAUSE NO. 2018-06745

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

vs.

18 SHALLOWFORD PL., LLC
JAVIER DUARTE DE OCHOA, JOSE A.
BANDIN, and MONICA BABAYAN

Defendants.

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IN THE DISTRICT COURT OF

334TH JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

JURY TRIAL DEMANDED

**PLAINTIFF'S FIRST AMENDED RESPONSE TO
DEFENDANTS' MOTION TO DISMISS PURSUANT TO THE
TEXAS CITIZENS' PARTICIPATION ACT (ANTI-SLAPP)**

Plaintiff files this first amended response to Defendants Jose Bandin, Monica Babayan, and 18 Shallowford PL., LLC (the "Bandin Defendants") motion to dismiss pursuant to the Texas Citizens' Participation Act ("ANTI-SLAPP" or "TCPA"). In support thereof, Plaintiff respectfully shows the following:

1. Factual Summary.

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, including setting up shell corporations, establishing bank accounts, engaging lawyers, and handling closing transactions. As you might expect, 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 funds could then be recouped.

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 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 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.¹ 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.² Defendant Bandin is a childhood friend of Moises Mansur. Mansur, who has been sued in other proceedings, introduced Mr. Bandin to Duarte. Together,

¹ Exhibit 1: Declaration of Armando Cedas.

² Exhibit 1: Declaration of Armando Cedas; Exhibit 2: Statement of investigation of Veracruz; Exhibit 3: Indictment of Bandin.

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.³ It seems highly unlikely that either Defendant will ever appear in a United States court or actually answer questions about their elaborate participation in the scheme. Indeed, this Court, and others, recently compelled Bandin and Babayan to be deposed in Spain. Both asserted their Fifth Amendment “rights” to almost every question.⁴

Even though they refuse to answer questions about their conduct, the evidence against them 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 Defendants either together or individually purchased at least the following Texas properties⁵:

- 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;

³ 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.

⁴ Exhibits 8, 9: Depositions of Jose Bandin and Monica Babayan.

⁵ Exhibit 4: Property records from the Harris County Appraisal District.

- 8350 Ashlane Way, Suite 3, The Woodlands, TX 77382;
- 8350 Ashlane Way, Suite 4, The Woodlands, TX 77382;
- 8350 Ashlane Way, Suite 8, The Woodlands, TX, 77382;
- 18 Shallowford Place, Tomball TX 77375; and
- 38 Shallowford Place, Tomball, TX 77375.

Moreover, Defendants formed these corporate entities in the same time period to purchase and own these properties⁶:

- 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 Defendants' involvement in the theft that afforded these purchases, Defendants are currently facing criminal prosecution in Mexico.⁷ The State of Veracruz, facing massive budgetary shortfalls, employed the undersigned to repatriate the stolen funds, and the real and personal property purchased with these stolen funds, back to their rightful owner.

⁶ Exhibit 5: Corporate formation documents from the Texas Secretary of State.

⁷ Exhibit 1: Declaration of Armando Cedas; Exhibit 2, Statement of investigation from the State of Veracruz, Exhibit 3: Indictment of Bandin.

2. Relevant law – 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).

a. The TCPA simply does not apply to this case.

In the instant case, Defendants' 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 their government without that government suing them into silence. There is no such issue in play in this case.

Indeed, as an initial matter, Defendants 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 Defendants are not "citizens" under the TCPA—they are not even in Texas. Moreover, these Defendants 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 Plaintiff is somehow infringing upon Defendants' U.S. Constitutional rights when these Defendants are not even in the United States is just wrong. More importantly, to claim the protections of the TCPA as "citizens" to prevent the Mexican government to recoup monies that were stolen borders on frivolous.

Even assuming the Defendants are entitled to claim the protections of the TCPA, by its plain language the TCPA was put in place to protect citizens, who petition or speak on matters of public concern, from retaliatory lawsuits that seek to intimidate or silence them. TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011. The TCPA defines the "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." See TEX. CIV. PRAC. & REM. CODE § 27.001(3). A "communication" includes "the making or submitting of a statement

or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” *Id.* § 27.001(1). A “matter of public concern” includes an issue related to “(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace.” *Id.* § 27.001(7). These Defendants have failed to identify anything they have said or done, or attempted to say or do, that falls within the TCPA. Indeed, Defendants cannot point to a single legitimate instance in which they have made some statement from which Plaintiff is trying to silence or intimidate them. In this case, Plaintiff alleges that Defendants stole, or helped steal, Plaintiff’s property. Nothing whatsoever in Plaintiff’s allegations has anything to do with these Defendant’s alleged First Amendment rights. Defendants’ arguments to the contrary completely pervert the plain language of the TCPA and its intended purpose. Defendants obviously realize they cannot claim the protections of the TCPA under its clear language. Thus, instead of claiming that Plaintiff’s suit is “based on, relates to, or is in response to” Defendants’ “exercise of the right of free speech, right to petition, or right of association,” – as is required under this exact language of the statute – Defendants instead contend that the practical *effect* of Plaintiff’s lawsuit is an infringement on those rights. Defendants’ arguments are wrong. 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 Defendants 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.⁸ One would think that if Defendants had been sued in response to exercising some alleged First Amendment right, and then became so concerned about it that they filed the instant

⁸ Exhibits 8 and 9: Deposition of Jose Bandin (pages 44-50) and Monica Babayan (pages 45-49).

motion attempting to dismiss Plaintiff's claims based on same, 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 Defendants 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. Denton*, 897 S.W.2d 757, 760 (Tex.1995). Defendants' motion could and should be denied on this basis alone.

Similarly, in neither deposition nor pleadings, Defendants cannot and did not point to a single petition or act of public concern for which they are being retaliated against or intimidated. It would be one thing if Defendants 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 Defendants 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. Defendants do not fall into any of those categories. Defendants conspired with ex-Governor Duarte to steal Veracruz's funds, and then stole Veracruz's money in conjunction with Duarte. Defendants stole money that was intended for social programs.⁹ Further, based upon information and belief, Defendant Bandin is under indictment in Mexico.¹⁰ With this stolen money, Defendants opened bank accounts and purchased real estate across the Houston area, and across Texas. Plaintiff filed suit against Defendants to recoup these monies and property. Defendants' argument that they are being silenced or intimidated somehow because Plaintiff attempts to repatriate the monies stolen from

⁹ Exhibits 8 and 9: Depositions of Jose Bandin (pages 17-21) and Monica Babayan (pages 19-25 and 50-52).

¹⁰ Exhibit 3: Indictment of Bandin.

it is nonsensical. If such were the case, then every thief would be able to argue they were being intimidated and silenced by their accuser. Such was not the purpose of the TCPA, and this Court should reject Defendants' attempts otherwise.

Moreover, the private purchase of real estate is clearly not a matter of "public concern." Defendants 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 defendant lawyer fraudulently represented to plaintiff that the lawyer would comply with a previous judgment; therefore, TCPA did not apply). Filing of a deed is not speech—period.

Importantly, Plaintiff is not trying to stop Defendants from investing in real estate, or making any statements, or associating with any person or activity involving the investment in real estate. Plaintiff is simply trying to stop Defendants from investing in real estate with money that does not belong to them. Similarly, Plaintiff is suing to recover monies that were stolen from the Plaintiff and pocketed by Defendants. Defendants' argument is beyond flimsy, and requires both verbal contortions and tortured logic to make the TCPA fit into this situation. 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 Defendants.

Defendants have fallen well short of their burden to demonstrate the applicability of the TCPA – which is Defendants' 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, Defendants refused to answer.¹¹ The bottom line is that Plaintiff's intent is simply to recover money that was stolen by Defendants, not to restrict Defendants' First Amendment rights (to the extent they have any). If Defendants' argument is correct, then no theft or embezzlement case could ever proceed until the Plaintiff 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.

b. Plaintiff's Prima Facie Case.

In the unlikely event that this Court determines the TCPA applies—which it does not—Plaintiff must establish of 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);

¹¹ Exhibits 8 and 9: Deposition of Jose Bandin (pages 44-50) and Monica Babayan (pages 45-49).

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.).

Plaintiff 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 Defendants’ argument, Plaintiff’s burden is not a heavy one. In fact, Plaintiff is only required to put forth evidence that supports an inference that its claims have merit. Plaintiff can easily do so, and has done so. Plaintiff herein provides this Court with the sworn declarations from the Mexican special prosecutor overseeing this investigation and the subsequent deposition testimony of the Defendants.¹² 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, Plaintiff has engaged an ex-FBI agent who provides sworn expert testimony that corroborates the testimony of Mexico’s special prosecutor. Also, for context, Plaintiff provides multiple newspaper articles published by the Mexican press which provides additional information about the crimes of Defendants Bandin, Babayan, and Duarte.¹³ 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.

¹² Exhibit 2, 8 and 9.

¹³ Exhibit 7: Articles in the Mexican press regarding Defendants.

i. Depositions of Bandin and Babayan

As this Court is well aware, the depositions of both Defendants Bandin and Babayan recently occurred in Madrid pursuant to this Court's order. It is important to note that Defendants Bandin and Babayan are in Spain because they previously struck a plea bargain with the government of Veracruz in which the Defendants had agreed to return a portion of the funds they stole. However, these Defendants failed to live up to their end of the agreement, failed to return the stolen funds, and instead fled to Spain.¹⁴ During their depositions, these Defendants invoked their Fifth Amendment "right" against self-incrimination to every substantive question asked of them, and in response to the probative evidence presented to them. In other words, when Plaintiff confronted Defendants under oath with evidence about how much they stole, what they stole, how they stole it, etc., Defendants refused to answer because they would incriminate themselves of these crimes.¹⁵

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 Defendants refused to answer based on a Fifth Amendment privilege – which in this case would be every single question about every single claim. Plaintiff requests that this Court draw such inference.

ii. Conversion

In the instant case, Plaintiff submits to this Court sworn declarations from both the General Legal Director for the Ministry of Veracruz (special prosecutor) Armando Cedas in

¹⁴ Exhibits 8 and 9: Depositions of Jose Bandin (pages 6-10) and Monica Babayan (pages 6-10).

¹⁵ Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

Veracruz, and a former FBI agent, along with the testimony of Defendants as evidence of conversion.¹⁶ Mr. Cedas was involved with the investigation and prosecution of these Defendants, along with an ex-FBI agent, James Ellis, who was hired to further investigate these crimes in the United States by Plaintiff.¹⁷ The Defendants themselves corroborate this testimony with their deposition testimony. Each provide that these Defendants 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 Defendants 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 Defendants to submit false and overstated invoices to the various agencies of the State of Veracruz. Defendants and Javier Duarte made sure these invoices were paid in full. These invoices were for activities like road construction 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.¹⁸ 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 Defendants – these include the following: Terra Inmobiliaria, Grupo Brades, Inmobiliaria Cartujano, Boydar, Valkany, Controladora Prado Norte, and Inmobiliaria 135 Prado Norte.¹⁹ The monies were sent north to Houston where they were were transferred to shell companies in the United States, including Reban Construction,

¹⁶ Exhibit 1: Declaration of Armando Cedas; Exhibit 6: Declarations from James K. Ellis.

¹⁷ Exhibit 1: Declaration of Armando Cedas; Exhibit 6: Declarations from James K. Ellis.

¹⁸ Exhibits 8 and 9: Depositions of Jose Bandin (pages 17-20) and Monica Babayan (pages 17-25).

¹⁹ Exhibits 8 and 9: Depositions of Jose Bandin (pages 14-24) and Monica Babayan (pages 13-28).

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.²⁰ This money was eventually used to purchase the real estate in the names of the various shell companies which are subjects of multiple lawsuits.

Along with these affidavits, Plaintiff provides information on some of the properties in question that were purchased by Defendants during Duarte's term in office.²¹ Moreover, each of the corporate entities in question was formed by Defendants during Duarte's term in office.²² Additionally, Plaintiff provides this Court with evidence that Defendants are currently under investigation in Mexico for these crimes, and that Bandin has been indicted.²³ Such has been provided in Plaintiff's petition, as well.²⁴

To prove conversion, Plaintiff must show that it owned the funds in question, Defendants took control over these funds, and that Plaintiff suffered injury. Each of these elements is easily met with the affidavits and testimony provided, along with the property records submitted. More importantly, when Defendants Bandin and Babayan were confronted with this probative evidence, Defendants asserted their Fifth Amendment right against self-incrimination.²⁵ Moreover, the funds in question are now in the form of the properties listed and before the Court. The funds originally belonged to Veracruz, and Defendants stole them.²⁶ In other words, Plaintiff provided how the funds were stolen, who stole them, how much was stolen, the manner

²⁰ Exhibits 8 and 9: Depositions of Jose Bandin (pages 26-27, 62-102) and Monica Babayan (pages 60-109).

²¹ Exhibit 4: Property records.

²² Exhibit 5: Corporate formation documents.

²³ Exhibit 3: Indictment of Bandin.

²⁴ Exhibit 10: Plaintiff's Amended Petition.

²⁵ Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

²⁶ Exhibit 1: Declaration of Armando Cedas.

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. Plaintiff easily provided this Court with prima facie evidence of conversion.

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

Plaintiff incorporates the previously provided information herein.

Much like conversion, the Texas Theft Liability Act and Texas Penal Code 31 provide the following elements: Plaintiff had a possessory right to the property, Defendant unlawfully stole the Plaintiff's property, the taking was made with the intent to deprive the Plaintiff of the property, and the Plaintiff sustained damages as a result. Plaintiff re-incorporates the same proof as provided above. Defendants stole the funds from Veracruz.²⁷ Duarte was arrested for such. Defendants were under investigation for these crimes, and have since been indicted. Defendants fled to Spain after the investigation was initiated and remain there currently. When confronted with this information, and other probative evidence of their crimes, Defendants refused to answer a single question, instead asserting their Fifth Amendment right against self-incrimination.²⁸ Plaintiff easily meets the elements of the Texas Theft Liability Act.

iii. Constructive Trust

Plaintiff incorporates the previously provided information herein.

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). Plaintiff re-incorporates all evidence previously provided; Mr. Duarte had a special, fiduciary relationship with the State of Veracruz, and he and

²⁷ Exhibit 1: Declaration of Armando Cedas; Exhibit 6: Declarations from James K. Ellis.

²⁸ Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

Defendants 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.²⁹ Additionally, the bank accounts in question received those funds. When confronted with this information and other probative evidence, Defendants refused to answer a single question, instead asserting their Fifth Amendment right against self-incrimination.³⁰ It is clear that Plaintiff met each of these elements, as well.

iv. Civil Conspiracy

Plaintiff incorporates the previously provided information herein.

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 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.³¹ 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.³² Moreover, these stolen funds were used to purchase the properties previously identified and

²⁹ Exhibit 1: Declaration of Armando Cedas; Exhibit 3: Indictment of Bandin.

³⁰ Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

³¹ Exhibits 8 and 9: Depositions of Jose Bandin (pages 14-24, 29-34, 51, 60-64) and Monica Babayan (pages 13-18, 25-28, 34 -44, 50-54).

³² Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

deposit the funds in the accounts in question.³³ When confronted with this information and other probative evidence, Defendants refused to answer a single question, instead asserting their Fifth Amendment right against self-incrimination.³⁴ Plaintiff can easily meet these elements, as well.

3. Conclusion

Defendants' motion to dismiss has no merit. With growing frequency, defendants sued in all types of lawsuits are filing motions to dismiss pursuant to the TCPA. Many of these 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 also 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 defendant a strategic advantage. A TCPA motion provides a defendant an excellent way to cause delay and expense to the other side. And, it gives a defendant a stay of discovery, and an automatic interlocutory appeal even if their motion is denied. Because discovery is stayed, a defendant can force an adjudication on the merits without typically having to respond to document requests, or answer questions under oath. And if their motion is granted, a defendant 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 Defendants' TCPA motion is meritless. Defendants claim that statements they are making in private business transactions – filing deeds and associating for real estate investment – are being infringed upon. Unfortunately for Defendants' argument, statements made in private business disputes do not

³³ Exhibit 6: Declaration of Jim Ellis.

³⁴ Exhibits 8 and 9: Depositions of Jose Bandin (pages 51-57, 110-111, 103-105) and Monica Babayan (pages 49-55, 117-118).

apply for the TCPA. Undeterred by this, Defendants' ask that Plaintiff's claims be dismissed upon that basis alone. Defendants do not even address whether foreign nationals who are not currently residing in the United States can even seek the protections of the TCPA – Plaintiff respectfully submits they cannot. Defendants' motions 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 August 10, 2018.

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