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CAUSE NO. 2019-11003

CARLOS GUIMARAES AND JEMIMA GUIMARAES	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	**HARRIS COUNTY, TEXAS**
vs.	§	
CHRISTOPHER SCOTT BRANN	§	
Defendant.	§	**270TH JUDICIAL DISTRICT**

PLAINTIFFS' RESPONSE TO DEFENDANT'S ANTI-SLAPP MOTION TO DISMISS UNDER TEX. CIV. PRAC. & REM. CODE § 27.003

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiffs, CARLOS GUIMARAES AND JEMIMA GUIMARAES, and file this Plaintiffs' Response to Defendant's Anti-SLAPP Motion to Dismiss Under TEX. CIV. PRAC. & REM. CODE § 27.003, and respectfully shows the following:

I. SUMMARY OF ARGUMENT

Fraud vitiates whatever it touches.

Hooks v. Samson Lone Star, LP, 457 S.W.3d 52, 57 (Tex. 2005) (citing *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex.1983)).

The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits.

In re Lipsky, 460 S.W.3d 579 (Tex. 2015).

This case arises from a fraud perpetrated by Christopher Scott Brann. Defendant's fraud likely began at his divorce trial from his ex-wife, Marcelle Guimaraes, the daughter of Plaintiffs Carlos and Jemima Guimaraes. At that trial, Brann offered knowingly fraudulent testimony absolving him of domestic violence in the marriage between he and Marcelle. It is unquestionably known that Brann's testimony at this trial is fraudulent due to the fact that Brann's testimony on approximately a year and a half earlier in Brazil (admitting to domestic violence and sexual deviance) was 180 degrees in opposite of his testimony at the divorce trial.

Approximately 2.5 years after Marcelle moved to Brazil and sought protection from Brann in the Brazilian courts, and approximately nearly a year ***after*** his divorce trial, Brann sought assistance from the US Attorney to seek prosecution of his ex-wife and ex-in-laws for international kidnapping. He sought such prosecution only ***after*** the Final Decree of Divorce was entered and what appears to be within the same week of entry of the Decree. This Decree was critical to Brann as domestic violence is an absolute affirmative defense to international kidnapping. Brann's securing of a fraudulently obtained judgment absolving him of domestic violence therefore radically weakened a key defense that would benefit Plaintiffs in a criminal prosecution. So, standing on the shoulders of his fraudulently obtained judgment, and with the domestic violence defense being radically weakened, Brann went (finally after 2.5 years from Marcelle's departure to Brazil) to the US Attorney. And the US Attorney decided to prosecute. This prosecution resulted in the incarceration of Plaintiffs and other damages.

Plaintiffs bring suit for Brann's fraud, their wrongful imprisonment, and other acts of slander committed by Brann. Brann now seeks immunity from his fraud by attempting to hide behind the Texas Citizens' Participation Act (hereinafter referred to as the TCPA, the Act or the Anti-SLAPP statute) essentially claiming that the Act protects him from suit as his fraud was

perpetrated by his words, which are protected free speech under the Act. His motion critically fails and simply will not support dismissal of all, or even part, of Plaintiffs' action.

Defendant cannot meet its initial burden, however, of demonstrating the Act's applicability. He has made no effort to meet this burden and cannot in any event. The Act does not apply to suits involving bodily injury, which unlawful incarceration is. As well, the speech under the Act that is protected must be regarding a matter of "public concern," where in this instance, this is all regarding a private, family matter. Texas legal authority is clear on these points. If Brann cannot or does not demonstrate applicability of the Act, his motion must be dismissed.

Second, even if Brann could demonstrate the applicability of the Act, the burden shifts to the Plaintiffs only to demonstrate a prima facie case regarding the essential elements of their causes of action. In meeting this burden, "Even the omission of an element is not fatal if the cause of action 'may be reasonably inferred from what is specifically stated.'" Expanding on this standard, the Texas Supreme Court stated that, simply, "a plaintiff must provide enough detail to show the factual basis for its claim," and "We accordingly disapprove those cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal." Brann's fraud, the wrongful imprisonment, and slanderous statements are decidedly set forth in Plaintiffs' Original Petition, and supported with clear and convincing evidence, meeting Plaintiffs' burden. So long as Plaintiffs meet this burden, Defendant's motion must be dismissed.

Third, assuming Brann's motion gets past both step one and step two, it is their burden to prove "by a preponderance of the evidence," "each essential element" of their claimed valid defense. They have failed to do so. Their defense of judicial privilege fails as it does not apply to Plaintiffs' claims for fraud on the court and false imprisonment and he waived his privilege by significant publication outside judicial proceedings. His alleged res judicata defense fails on its face (as discussed below), and his alleged defense for failure to demand retraction, correction or

clarification under the Defamation Mitigation Act fails and such demand was timely made and attached hereto.

In summary, Brann cannot carry his burden for any part of his motion and his attempts to seek dismissal of this action violate the Texas Supreme Court's stated purpose of the Act in the first place.

II. BACKGROUND

This case centers around the disturbing, fraudulent and likely sociopathic revenge scheme carried out by Christopher Scott Brann all stemming from his loss of the woman whom Brann attempted to possess, control and imprison through his pattern of terror, intimidation, deviance and violence, his coveted wife and the object of his psychologically disturbing actions, Marcelle Guimaraes. Brann's short marriage with Marcelle was marked by abuse, terroristic threats/intimidation, and sexual deviance/addiction that resulted in regular and repeated physical and emotional injuries to his wife, and, at minimum, likely emotional injuries to their son (who during the time period at issue was 0-3 years old and is still suffering the consequences of Brann's actions). Marcelle spent nearly 4 years trying to protect herself, and her son, from Brann's constant abuse.

Not surprisingly, Marcelle filed for divorce. When it became abundantly clear that Marcelle and her son were not protected from Brann's continual domestic violence and bizarrely disturbing behavior to the extent that she feared for her life as well as the life of her son, Marcelle (who had both Brazilian and US Citizenship) left for Brazil with her son and sought (and received) appropriate protection from the Brazilian courts. Although Brann admitted to much of his domestic violence and sexual addiction/deviance to the court in Brazil, he shielded this information from the Harris County family court presiding over their divorce and custody action. With Marcelle unable to return and properly defend herself, Brann, undoubtedly enraged by the escape of

"possession," decided to bastardize the divorce and custody proceeding in an effort to fraudulently obtain a judgment from the Harris County family court re-framing the history by absolving himself of any domestic violence and deviant behavior and pitching Marcelle as the aggressor in the relationship with boldfaced lies.

Brann made accusations that Marcelle's fleeing for her life was international kidnapping. He made spurious allegations of a conspiracy between Marcelle and her parents, the Plaintiffs in this action, Carlos and Jemima Guimaraes, with fanciful and baseless tales of power, influence and corruption with no evidence to support any of it. What is most telling is that, over 2 years after Marcelle left for Brazil with Nico, Brann had still not made any attempt to seek the assistance of law enforcement to assist him with this alleged kidnapping. Instead, he pursued his plan to fraudulently obtain a judgment clearing him of his unlawful and simply horrifying conduct, which he actually pulled off through procedural gamesmanship coupled with blatantly perjured testimony.

It was only then, upon the entry of the decree of divorce, that Brann sought the assistance of law enforcement through the filing of a fraudulent criminal complaint against Carlos and Jemima who had done nothing but support and take in their daughter and grandchild who were escaping from Brann's continuous course of terror and abuse. Brann was successful in selling his now-solidified fictional tale to the US Attorney, which resulted in their decision to seek the arrest and indictment of Marcelle Guimaraes, and Carlos and Jemima Guimaraes (then nearly 70 years old) for preposterous allegations of conspiracy to commit international kidnapping and related allegations. Standing on the shoulders of his fraudulently obtained judgment, and empowered by the acquiescence of the US Attorney by way of their decision to prosecute, Brann then proceeded to perjure himself in front of the US House of Representative, US Senate and the Federal District Court during the criminal trial of Carlos and Jemima, which led to various times of incarceration

of Carlos and Jemima, the expenditure of hundreds of thousands of dollars in legal fees, fines, monetary restitution, significant loss to their professional careers and income, and upcoming additional incarceration in Federal prison. And that is before one considers the incomprehensible emotional trauma they have endured. It is for this that Carlos and Jemima Guimaraes bring this action.

All of the fact presented herein are asserted in Plaintiffs' Original Petition, with documentary evidence in support of each assertion attached to that document. As such, Plaintiffs incorporate that document, its evidence, and the permissible inferences allowed by law herein by reference as if set forth in full and Plaintiffs respectfully request that this Court take judicial notice of same and the contents of its file.

III. THE "ANTI-SLAPP" STATUTE

A. THE ACT

The Texas Citizens Participation Act (hereinafter "TCPA" or the "Act") protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them. *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015) (citing TEX. CIV. PRAC. & REM. CODE §§ 27.001-.011). Under the Act, "[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, . . . that party may file a motion to dismiss the legal action." *Id.* at § 27.003(a). "Exercise of the right of free speech" means a communication made "in connection with a matter of public concern." *Id.* at § 27.001(3). "In determining whether a legal action should be dismissed . . . , the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability . . . is based." *Id.* at § 27.006(a). "[A] court shall dismiss a legal action . . . if the moving party shows 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 of free speech." *Id.* at § 27.005(b)(1).

The most significant rendition of the purpose of the Act (and the most germane to this action) was stated by the Texas Supreme Court in *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). As the Court stated:

> ***The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits.*** *See* TEX. CIV. PRAC. & REM. CODE § 27.002 (balancing "the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law" against "the rights of a person to file meritorious lawsuits for demonstrable injury").

Id at 589 (emphasis added).

B. THE ACT'S PROCESS/BURDEN/BURDEN SHIFTING

The 3-step Process. The Act provides for a 3-step process. Under the first step, the burden is initially on the defendant-movant to show "by a preponderance of the evidence" that the plaintiff's claim "is based on, relates to, or is in response to the [movant's] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." *In re Lipsky*, 460 S.W.3d at 586 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(b)). If the movant is able to demonstrate that the plaintiff's claim implicates one of these rights, the second step shifts the burden to the plaintiff to "establish[ ] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* at 587 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(c)). If the Plaintiff satisfies this second step, the burden shifts again to the Defendant-Movant to "establish[ ] by a preponderance of the evidence each essential element of a valid defense" to the Plaintiff's claim. *ExxonMobil Pipeline Co. v. Coleman,* 512 S.W.3d 895, 899 (Tex. 2017) (citing TEX. CIV. PRAC. & REM. CODE § 27.005(d)).

As Plaintiffs have already met its burden of establishing a prima facie case for each essential element of the claim(s) in question (although that will be addressed below), the critical issues of focus in this case are: (1) the applicability of the Act; and (2) the failure of Defendant to

meet his burden of establishing each essential element of a valid defense, both of which are addressed in detail herein.

Step 1 – Defendant's Burden to Show Applicability of the Act. The law is decidedly clear on the burdens themselves, how they are met, and how they shift. Regarding the initial step, The Texas Supreme Court has noted, "To assert a motion to dismiss under the Act, the defendant must show '***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 of free speech.'" *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (citing TEX. CIV. PRAC. & REM. CODE § 27.005(b)) (emphasis added). The Court continued, "The statute broadly defines 'the exercise of the right of free speech' as 'a communication made in connection with a matter of public concern.'" *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 27.001(3)). As such, the Court noted that, "Under this definition, the right of free speech has two components: (1) the exercise must be made in a communication and (2) the communication must be made in connection with a matter of public concern." *Id*. Provided a defendant-movant does so, the court is to turn to the second step.

Step 2 – Plaintiff's Burden, if Step 1 is Met. The plaintiff's burden is also clear. As the Texas Supreme Court stated, "The TCPA's direction that a claim should not be dismissed 'if the party bringing the legal action establishes by *clear and specific evidence a prima facie case* for each essential element of the claim in question' thus describes the clarity and detail required to avoid dismissal." *In re Lipsky*, 460 S.W.3d at 590 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(c)) (emphasis in original). The Court continued, "Even the omission of an element is not fatal if the cause of action 'may be reasonably inferred from what is specifically stated.'" *Id*. (citing *Boyles v. Kerr,* 855 S.W.2d 593, 601 (Tex. 1993)). Expanding on this standard, the Court stated that, simply, "a plaintiff must provide enough detail to show the factual basis for its claim." *Id.* at 591. The Court finished by opining, "We accordingly disapprove those cases that interpret the

TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal." *Id*.

Step 3 – Defendant's Burden Regarding an Alleged Valid Defense; the Highest Burden.

For step 3, the defendant must prove "by a preponderance of the evidence each essential element of a valid defense." TEX. CIV. PRAC. & REM. CODE § 27.005(d). For this, two things are certain: (1) the evidence presented by the defendant must meet the "preponderance of the evidence" burden; and (2) they must be able to meet such burden as to "each essential element" of their claimed valid defense. This step carries a significant deviation from the burden on the plaintiff. While a plaintiff must only make a prima facie showing where "even the omission of an element is not fatal," where elements may be "reasonably inferred," and where "direct evidence" is not required, the defendant must *prove* each and every element of a defense to meet its burden. While few cases have ever even addressed such an instance, the one that does is the very case relied upon by Defendant, which required proof by a preponderance of the evidence of each element of the claimed valid defense before supporting dismissal. *Johnson-Todd v. Morgan*, 480 S.W.3d 605 (Tex. App.—Beaumont 2015, pet. denied), *aff'd in part, reversed in part after remand,* 2018 WL 6684562 (Tex. App.—Beaumont 2018, pet. filed).[1] The critically important conclusion here is that the standard warranting dismissal based on a defense is significantly more burdensome than a plaintiff's burden to preserve its claims, particularly when they are meritorious.

[1] Plaintiffs would note that the subsequent history of this Beaumont case, the details of which this Court may find relevant, was omitted in Defendant's Motion.

IV. ARGUMENT

A. THE ACT DOES NOT APPLY/DEFENDANT HAS NOT MET THE BURDEN OF ESTABLISHING APPLICABILITY.

1. Defendant-Movant has Not Met the Burden of Establishing Applicability of the Act.

"To assert a motion to dismiss under the Act, the defendant must show '***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 of free speech.'" *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (citing TEX. CIV. PRAC. & REM. CODE § 27.005(b)) (emphasis added). In this case, however, the Defendant has made virtually *zero* effort to meet its burden. Defendant's motion in 3 paragraphs, basically says, "the Act is applicable. Just look at the Petition. And we generally assert that this is a matter of public concern." Defendant has presented no evidence other than Plaintiffs' Original Petition, relevant to establishing by a preponderance of the evidence that the Act applies. That is particularly true given the lack of any supporting evidence *or* authority for the proposition that the matters at issue are matters of public concern.

Essentially Defendant's assertion amounts to an argument that because the private matters between the parties at issue here are regarding a matter that, the general nature of which, could be somehow extended into a subject of public concern if the arguing party ignores that the speech at issue is related only to a private matter between this family, qualifies this as a matter of public concern under the Act. If that were true, the Act would have limitless applicability. For example, if the speech at issue was over the breach of a lawnmowing company's failure to adhere to a contract to mow someone's lawn every week that the Act applies because the public generally has an interest in contracts being enforceable. Likewise, if the speech at issue involved a painter stealing money from the counter of a person's house while painting the living room, that the Act applies because the speech concerns a theft, which is a crime. This simply is not the case.

Texas courts have cautioned the judiciary about arguments such as Defendant's unsupported assertion. Simply, the courts recognize that this type of tortured characterization of the facts can lead to equitably absurd results. As was pointed out by Justice Field from the Austin Court of Appeals:

> The first example of these broad definitions is the phrase "exercise of the right to petition," which is defined as "communications in or pertaining to ... a judicial proceeding." *Id*. § 27.001(4). If we are to construe these words liberally, as the Legislature has directed, *id*. § 27.011(b), or even simply apply the plain meaning of the words the Legislature chose, this definition would encompass a potentially limitless range of communications in nearly any legal proceeding, including those that are far removed from any form of public participation guaranteed by the Constitution. This definition could potentially include all demand letters, cover letters, and e-mails relating to litigation in some way. For that matter, the definition could conceivably extend to communications between private parties if it could be argued that those communications referred to a judicial proceeding, regardless of whether the private parties are even involved in the litigation.
> . . . .
> Obviously, the application of the TCPA to these hypothetical situations can lead to absurd results and ignores the underlying context and purpose of the statute— "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 persons to file meritorious lawsuits for demonstrable injury." *Id.* § 27.002 (emphasis added). . .
>
> The hypothetical situations and communications to which the TCPA could apply are endless based on the broad language used by the Legislature. It seems that any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case, in the hope that the case will not only be dismissed, but that the movant will also be awarded attorneys' fees. In short, it is difficult to imagine that the Legislature intended for the TCPA to turn civil litigation practice in general on its head; yet that is the natural consequence of the language used in the statute.

Nyland v. Thompson, 2015 WL 1612155 (Tex. App.—Austin 2015, no pet).

The reality of this case is that the speech at issue, as well as the suit at issue, involves only a private matter between an ex-husband and his ex-in-laws over family matter, no matter if the

actions resulted in, or from, a lawsuit, or a corresponding criminal action. Without any authority or evidence to the contrary, Defendant has simply not met his burden, by a preponderance of the evidence, establishing the Act's applicability, which means that the Motion must be denied. Further, the claims at issue are clearly not within the scope of the Act to begin with. *See* Sections IV.A.2-5, *infra*.

2. "Bodily Injury" – Plaintiffs' Claims Are Excluded From the Act.

Plaintiffs' suit is exempt from the Act by its own terms, in its entirety. As stated clearly in the Act, "This chapter does not apply to a legal action seeking recovery for bodily injury. . ." TEX. CIV. PRAC. & REM. CODE § 27.010(c).

The exemption of bodily injury suits does not only extend to standard injury claims, but can include claims arising from "words," including words that give rise to a bodily injury. This issue was addressed directly in *Kirkstall Road Enterprises, Inc, v. Jones,* 523 S.W.3d 251 (Tex. App.—Dallas 2017, no pet.). *Kirkstall Road* involved a "Witness, who appeared on a television program featuring murder investigations, brought negligence action against the program's producer, seeking recovery for four gunshot wounds he claimed were the result of producer's negligence in editing and producing the program, which caused witness's identity to be discernable." *Id*. In that case, Kirkstall argued that the bodily injury exemption was not intended to apply to protected speech but instead was intended to provide guidance to the courts that a motion to dismiss under the TCPA would be improper in a non-speech based personal-injury case. *Id*. at 253. In finding the Act inapplicable to Plaintiff's claims, the Dallas Court of Appeals held:

> The plain language of section 27.010(c) excludes legal actions seeking recovery for bodily injury. *See* TEX. CIV. PRAC. & REM. CODE § 27.010(c). Mr. Jones's negligence claim seeks to recover for the bodily injuries—four gunshot wounds—that he claims he sustained as a result of Kirkstall's negligence in editing and producing its program.

> Without expressing any opinion on the merits of his claim, we conclude that Mr. Jones has shown that it is exempted from application of the TCPA.

Id. The significance of the law in this area to the instant case is apparent on its face. If the words of the Defendant give rise to or are related to the bodily injury sustained by the Plaintiff, Plaintiff's claims as a whole are exempted from the Act, or in other words, the Act may not be applied to obtain dismissal of the plaintiff's claims by the defendant.

As is plainly evident from Plaintiffs' detailed, supported, 52-page Original Petition, the ***fraud*** committed by Defendant has led to the physical incarceration of both Plaintiffs. This is, unquestionably, a bodily injury that resulted from Defendant's conduct. That the Plaintiffs have related viable causes of action does not negate the fact that the central claim of this action is the fraud that gave rise to incarceration/bodily injury. As the *Lipsky* Court noted, "***The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits.***" *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). Defendant's motion seeks to avoid this central issue altogether and they attempt to use his Motion to do exactly what the Texas Supreme Court says he can not—attempt to dismiss a meritorious lawsuit under the guise of protected free speech, and irrespective of the fact that he can not demonstrate that such speech does not meet the test of being a matter of public concern. In fact, all of Plaintiff's claims arise from this fraudulent conduct that gave rise to the bodily injury in question. The simple fact that Defendant also defamed Plaintiffs in certain instances of non-privileged speech is of no consequence, nor could that conceivably warrant the dismissal of Plaintiffs action as a whole.

3. "Based on, relates to, or is in response to a party's exercise of the right to free speech" – the Act is Inapplicable to Plaintiffs' Claims.

The standard for dismissal of Plaintiffs' lawsuit under the Anti-SLAPP statute works as follows:

> If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition or right of association, that party may file a motion to dismiss the legal action.

TEX. CIV. PRAC. & REM. CODE § 27.003(a). Exercise of the right of free speech "means a communication made in connection with a matter of public concern." *Id*. at § 27.001(3). 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*. at § 27.001(7).

In keeping with the issues addressed in Section A.1., *supra*, the courts have routinely looked at the substance of the communications at issue. Like this case, the Houston Court of Appeals has found the defendant's burden not carried when the speech at issue was a not a matter of public concern, or a private issue between the parties, no matter the attempts to turn private matters into public concern. *Brugger v. Swinford,* 2016 WL 4444036 (Tex. App.—Houston [14th Dist.] 2016, no pet). *Brugger* involved a defamation, libel and business disparagement action wherein the allegedly protected speech involved communications regarding the self-dealing of a lawyer retained by the company over the misappropriation of intellectual property. The communications involved allegations of the commission of a crime, criminal charges, conspiracy to commit wire fraud and other issues. In declining to apply the Act, the Court stated that, "At most, the facts alleged in paragraph twelve establish that Brugger's communication is connected to a business dispute, which is insufficient to elevate it to a matter of public concern under the TCPA." *Id*.

The Dallas Court of Appeals has applied this same thought process when the same sort of argument as Defendant is making here was attempted in their Court. In *Pickens v. Cordia*, a blogger made public communications regarding private matters regarding parental abuse, father's responsibilities to their child and family, addiction and related issues, all concerning the plaintiffs.

433 S.W.3d 179 (Tex. App.—Dallas 2014, no pet.). The Court of Appeals reasoned:

> While we agree that issues of "addiction, parental abuse, fathers' responsibilities to their children and family dynamics" generally may be matters of public concern, Michael's blog is not a general purveyor of information on those subjects. Rather, Michael's blog is akin to a personal diary of his journey from drug addiction to recovery in which he draws upon his perceived family experiences as an explanation for his addiction. Its primary focus is Michael. As his brief explains, his blog contains stories that "generally concern the historical events that have shaped his behavior and made him ultimately into the person he is today, revealing his own trial and tribulations." And it is just that—a personal account of his life, from his own perspective, in which he also makes remarks about his family members that they contend are false and defamatory. We cannot conclude that statements of private life, such as those recounted in Michael's blog, implicate the broader health and safety concerns or community well-being concerns contemplated by chapter 27.
>
> . . .
>
> As in *Byles*, nothing in this case suggests the public was discussing Michael's blog or that anyone other than the members of this family are likely to feel any impact from it. The topic of Michael's own addiction and allegations of abuse do not implicate any public issue. We conclude Michael failed to establish by a preponderance of the evidence that his family members' lawsuit was based on, related to, or was in response to his right to free speech.

Id. (citing and relating *Miranda v. Byles,* 390 S.W.3d 543 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

This case is no different. The communications at issue concern actions taken between the family members. They are actionable only due to the damage caused *to those family members*. Like *Brugger*, this is a private matter that does not implicate a greater public concern. Like *Pickens*, Defendant is not a "general purveyor" of information on these subjects. His accounts are of his life, his child, his in-laws, his wife, his story. While the broader subjects "generally may be matters of public concern," the Defendant's actionable conduct are a "personal account of his life," and thus, as the Texas Courts have held, not subject to the Act.

Additionally, Defendant make literally *zero* effort to establish which part of the Act's definition he meets. A matter of public concern under the Act "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." TEX. CIV. PRAC. & REM. CODE § 27.001(7). None of the matters at issue in this case fit within the factors included in the definition are met by the private matters at issue in this case. As the Courts have concluded above, the attempts of a "skilled litigator" (as referenced in *Nyland v. Thompson,* 2015 WL 1612155 (Tex. App.—Austin 2015, no pet)) to extract a general subject category of the allegedly protected communications to fit within one of the 5 parts of the Act's definition simply does not pass muster.

Defendant simply cannot meet his burden of establishing that the Act applies to this case. As such, his Motion must be denied.

4. Plaintiff's Position Supported by Newly-Passed Amendment to the Act Making Clear that the Act is Inapplicable to Plaintiffs' Claims.

Lest it not go unnoticed that the focal point of Plaintiffs' claims involve the *fraud* in the communications and speech of Defendant, that gave rise to unimaginable damages to Plaintiffs, including their incarceration in a Federal prison. It is simply not the law that a defendant can engage in fraudulent conduct that damages persons, then claim immunity from suit because his words are protected free speech. If this fundamental assertion were true, there would be no fraud. There would be no defamation. But yet, there is.

The tortured readings of the Act, and over-elastically stretched arguments of the Act's applicability in many cases, have resulted in amendments to the Act. HB2730, amending the Act, has now been passed by both the Texas House of Representatives *and* Texas Senate, as of May 20, 2019. The Amendment contains a critical amendment relevant to Plaintiffs' action, that is, the Act no longer applies to "a legal action based on a common law fraud claim," which is at the heart of

Plaintiffs' action. *See*, HB2730, enrolled 5/20/19, which would be codified as TEX. CIV. PRAC. & REM. CODE § 27.010(a)(12) when enacted. The obvious basis for same is axiomatic. A party should not be able to use speech to commit fraud, then claim a legislative right to dismissal of an action against him, as his fraud was performed with words, based on an Anti-SLAPP motion, which is precisely what the Defendant is attempting herein. What the new amendment instructs is that this type of use of the Anti-SLAPP statute is not now, nor ever has been, the intended applicability of the Act.

5. The "Right to Petition" – the Act is Inapplicable to this Case.

Although Defendant's motion contains the words "right to petition," it is of utmost importance that their motion does not purport to demonstrate the Act's applicability to this case by way of a right to petition issue and he certainly has not met his burden regarding same. It is Defendant's burden to demonstrate by way of a "preponderance of evidence" that the Act applies. His motion merely asserts that the Plaintiffs' Original Petition contains references to statements of Defendant made in the US Congress and in court. This is hardly proof by a "preponderance of evidence." Defendant's failure to meet this burden means that he cannot sustain a dismissal based on this point.

Nevertheless, even if the Court were to deem otherwise, Plaintiffs need only establish a prima facie case to avoid dismissal. As is clearly seen in Section B, *infra*, Plaintiffs have met their burden with regards to their causes of action so dismissal would not be warranted in any event. As noted herein, establishing the applicability of the Act is only the first step, not the last.

Further, any attempt by Defendant to apply the Act to this action based on a right to petition would be overreaching at minimum. "*The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). Applying the Act in this context would amount to a legal

method to commit fraud. Simply, so long as a fraudfeasor could perpetrate a fraud through a court, they could then hide behind the Act as a legal method for committing such fraud by claiming immunity from suit by claiming that any such suit would relate to a right to petition. These are exactly the types of arguments warned against by the Austin Court of Appeals in *Nyland*. And further, if this were true, causes of action like fraud on the court, wrongful prosecution and numerous others could not exist, but they do.

The Houston Court of Appeals has agreed on this point, finding that the Act simply cannot be extended to this degree. In *Jardin v. Marklund*, the Houston Court of Appeals, after examining the legislative history of the Act, wrote, "The statement of intent confirms the concept gathered from reading the statute as a whole that the Legislature was attempting by this law *to protect communications that may be in the public interest.*" 431 S.W.3d 765 (Tex. App.—Houston [14th Dist.] 2014, reh'g overruled). The Court stated, "Jardin would have us conclude that, simply by filing a pleading in a lawsuit between private parties, he has invoked the protections of the TCPA, despite the act's title, purpose, language and context, legislative history, and the particular meanings of the constitutional rights at issue." *Id*.

And it is now, and has long-been, the law that there is no public interest in protecting fraud. In fact,"Fraud vitiates whatever it touches." *Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 57 (Tex. 2005) (citing *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex.1983)). Incidentally, this has been the law since at least 1858, if not older. *Drinkard v. Ingram,* 21 Tex. 650 (1858).

B. EVEN IF THE ACT IS FOUND TO APPLY, PLAINTIFF HAS MET THEIR BURDEN.

As noted above, "The TCPA's direction that a claim should not be dismissed 'if the party bringing the legal action establishes by *clear and specific evidence a prima facie case* for each essential element of the claim in question' thus describes the clarity and detail required to avoid dismissal." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). (citing TEX. CIV. PRAC. & REM. CODE

§ 27.005(c)) (emphasis in original). The Court continued, "Even the omission of an element is not fatal if the cause of action 'may be reasonably inferred from what is specifically stated.'" *Id*. (citing *Boyles v. Kerr,* 855 S.W.2d 593, 601 (Tex. 1993)). Expanding on this standard, the Court stated that, simply, "a plaintiff must provide enough detail to show the factual basis for its claim." *Id.* at 591. Plaintiffs' Original Petition and its attached evidence meet this burden on its face.

Plaintiffs' case centers around 3 primary actions: (1) the fraud of the Defendant that led to the ultimate damage, including incarceration, suffered by Defendants; (2) false imprisonment that also led to the some of the same damage; and (3) slander/slander *per se* that led to damages, including presumed damages under the law. For each of these actions, Plaintiffs have unquestionably met their burden.

1. Fraud.

Plaintiffs' claim stems from the knowingly false testimony provided by Defendant that led to a fraudulently obtained judgment absolving him of any domestic violence in the marital relationship between he and his wife, Marcelle Guimaraes. Carlos and Jemima Guimaraes, the Defendant's ex-in-laws were not parties to that action and thus had no right to appear, and contravene Defendant's false testimony. The issue with the fraudulently obtained judgment is that it was used to create the platform for the subsequent criminal prosecution of the Plaintiffs, and their subsequent incarceration and other damages.

The most significant of Plaintiffs' proof comes the direct contrast between the testimony Defendant provided at the divorce trial, where his ex-wife did not appear, (*see* PLAINTIFFS' ORIGINAL PETITION ¶¶ 57-71 and accompany Exhibit(s) (setting forth the testimony at the divorce trial)) versus his testimony provided in the Brazilian court on November 7, 2013 and November 13, 2013. *See* PLAINTIFFS' ORIGINAL PETITION ¶¶ 52-56 and accompany Exhibit(s) (setting forth the starkly-contrasting testimony in Brazil). His fraudulent testimony continued in the actual

criminal trial that resulted from his fraudulently obtained judgment. PLAINTIFFS' ORIGINAL PETITION ¶¶ 87-95 and accompany Exhibit(s) (again testifying in stark contrast to his earlier testimony in Brazil). His testimony in Brazil establishes multiple acts of domestic violence and sexual misconduct at minimum. His testimony in the US Courts is diametrically opposed.

Defendant's intent can be directly seen in the very substance of his diametrically opposed testimony, but as well in his Victim Impact Statement after the criminal trial on December 12, 2018 where he expanded his "story" beyond either trial to the point that the Court literally had to state on the record, "And as to the allegations or statements he's making have been unproven that I have no evidence of, I consider them as such." *See* PLAINTIFFS' ORIGINAL PETITION ¶¶ 96-104 and accompany Exhibit(s) (detailing the furtherance of his fraud and proof of his intent).

At the very least, this "the light was green" versus "the light was red" testimony establishes a reasonable inference of his intent, which is amply sufficient for Plaintiffs to meet their burden. *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015).

The Defendant's only attempt to contravene this is his attempt to cast Plaintiffs' action as non-existent under Texas law. He is wrong. To do so, he relies principally on a case from the Dallas Court of Appeals called *Dunn v. Murrin*, 2005 WL 2038057 (Tex. App.—Dallas 2005, no pet.). *Dunn* only dealt with the fact that a litigant attempted to use Federal Rule of Civil Procedure 60(b) to support his relief, which the Court noted has no Texas counterpart. Critically, the Defendant fails to bring to this Court's attention a subsequent case out of the ***same*** court.

In 2009, 4 years after the *Dunn* opinion, the same court, the Dallas Court of Appeals, rendered a decision in *Pyles v. Young*, 2009 WL 1875581 (Tex. App.—Dallas 2009, no pet.). This claim involved the allege fraud committed by Young in obtaining a judgment from a court regarding the ownership of a mobile home and its property line, alleged to have been through knowingly false testimony. When it was discovered, Pyles brought a suit (known as the second

suit in that case) for fraud on the court. In addressing the fraud on the court claim in *Pyles*, the Court stated, "As to the remaining fraud claims, Pyles asserted Youngs misrepresented the boundary line on the property, their ownership of the mobile home on the property, and that Loren Young falsely testified Youngs owned the mobile home, committing a "fraud on the court" during the second suit…Pyles' claim for "fraud on the court" was based on an action subsequent to the first suit." *Id*. at 6. The Court held:

> ***Accordingly, we conclude Pyles met his burden to raise a genuine issue of material fact as to whether Pyles's "fraud on the court" claim and his misrepresentation claims regarding the boundary line*** of the property and Youngs' ownership of the mobile home were compulsory counterclaims barred by res judicata.

Id. (citations omitted) (emphasis added). At the absolute minimum, the *Pyles* opinion establishes that an independent action is viable and can be asserted in an independent action based on a prior fraud on the court, particularly when damage has occurred to someone as a result. This case is no different. Defendant's perpetrated fraud on the court a led directly to damages sustained by the Plaintiffs, which are actionable under the law.

Plaintiffs have met their burden. As such, Defendant's motion must be denied.

2. False Imprisonment.

Plaintiffs' false imprisonment claim(s) center around the fact that the imprisonment resulted directly from the fraud committed by Defendant. The elements of false imprisonment are: (1) a willful detention; (2) performed without consent; and (3) without the authority of law. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex.1995). A person may falsely imprison another by acts alone or by words alone, or by both, operating on the person's will. *J.C. Penney Co. v. Duran*, 479 S.W.2d 374, 380 n. 9 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.).

Obviously the detention was willful, the Plaintiffs were incarcerated. Clearly they did not consent to same, as the very existence of this lawsuit establishes. The issue is "without authority of law." Defendant hides behind the criminal conviction and the decision to prosecute in the first instance. He also correctly asserts that one who has committed a crime cannot maintain action for his incarceration for same. But Plaintiff disregards the fact that the criminal prosecution, and therefore the conviction, were built on the foundation of Defendant's fraud. And "fraud vitiates whatever it touches." *Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 57 (Tex. 2005) (citing *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex.1983)).

Fraud in the reporting of the information to law enforcement satisfies the element of "without authority of law." This is an issue addressed by the Texas Supreme Court in the *Browning-Ferris Industries, Inc. v. Lieck* case. The *Lieck* Court began its analysis by examining a person's legal obligation to provide ***truthful*** information to law enforcement. In quoting the Restatement, the Court wrote:

> A private person who gives to a public official information of another's supposed criminal misconduct, of which the official is ignorant, obviously causes the institution of such subsequent proceedings as the official may begin on his own initiative, but giving the information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings initiated by the officer if it is left entirely to his discretion to initiate the proceedings or not. When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in [§ 653] even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.
>
> If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with

> responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false.

Browning-Ferris Industries, Inc. v. Lieck, 881 S.W.2d 288 (Tex. 1994) (quoting RESTATEMENT (SECOND) OF TORTS § 673, comment g). As the Texas Supreme Court reiterated several years later, "In *Browning–Ferris Industries, Inc. v. Lieck*, however, we held that knowingly providing false information to a public official satisfies the causation element, rather than the lack-of-probable-cause element, of a malicious prosecution claim." 952 SW.2d 515 (Tex. 1997).

Plaintiffs' Original Petition and accompanying evidence establishes that the criminal complaint at issue was based on fraudulent information provided by Defendant. *See* PLAINTIFFS' ORIGINAL PETITION ¶ 105, and accompanying exhibit(s). In fact, the Affidavit supporting the criminal complaint even references the fraudulently obtained judgment from the family court on its face.

Plaintiffs' proof as presented in its Original Petition more than sufficiently establish that they have met their burden of presenting evidence of a prima facie case that the criminal charges are, or may have been, the result of knowlingly false information provided to law enforcement by Defendant, which ultimately resulted in their incarceration. At the very minimum, "may be reasonably inferred from what is specifically stated." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). (citing TEX. CIV. PRAC. & REM. CODE § 27.005(c)). Plaintiffs' burden in this regard is only to "provide enough detail to show the factual basis for its claim." *Id.* at 591.

Plaintiffs have met their burden. As such, Defendant's motion must be denied.

3. Slander/Slander *Per Se*.

"In a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how

they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015). There should be no question that Plaintiffs have done so. In fact, in Plaintiffs' Original Petition, they not only describe the facts of when, where and what was said as well as the defamatory nature of the statements, they are literally set out in block quotes, and quoted verbatim. *See* PLAINTIFFS' ORIGINAL PETITION ¶¶ 125-131 and accompany Exhibit(s).

Plaintiffs claim defamation for any number of out of court statements by Defendant including things like: (1) Plaintiffs pre-meditated my son's abduction; (2) Plaintiffs instructed security guards to preclude access to Defendant's son and followed him to harass him; (3) Plaintiffs sought their own brand of "vigilante" justice; (4) Plaintiffs willfully violated court orders; (5) Plaintiffs embarked on some form of "endless assault on [Defendant's] character; (6) this is "a case of an ongoing crime" (made ***after*** the criminal trial verdict) and (7) some form on ongoing criminal financing of an ongoing abduction or criminal intent/enterprise. And this is just a sampling. All of this is set out in Plaintiffs' Original Petition, as cited in the preceding paragraph, with transcripts of the actual statements.

Defamation's elements include (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases. *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998). These statements were published as they were made in interviews, media, or unsworn statements. They are clearly defamatory in nature, statements of fact and derogatory in nature. The requisite degree of fault is an issue for the jury to decide in this action. But the clear establishment of Defendant's fraud is, again, sufficient to establish a prima facie case regarding this element, which "may be reasonably inferred from what is specifically stated." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (citing TEX. CIV. PRAC. & REM. CODE § 27.005(c)).

The Texas Supreme Court has found far, far less to be sufficient to withstand a TCPA motion. In *Lipsky,* the Supreme Court held:

> Afterward, Lipsky was quoted in news articles to state that the Commission's decision was "ridiculous," the product of a "corrupt system," and that "it was kind of sad." Although he had not participated in the hearing, he referenced the earlier EPA order and his own expert, who suspected that the contamination resulted from Range's nearby drilling. Thus, despite the Commission's conclusions to the contrary, Lipsky continued to maintain that Range was responsible for contaminating the aquifer and his domestic water well. The court of appeals concluded that there was some evidence of a defamatory statement concerning Range sufficient to defeat Lipsky's TCPA motion to dismiss, and we agree.

460 S.W.3d 579, 595 (Tex. 2015).

Regarding damages, Plaintiffs need not even establish a prima facie case as these statements constitute slander *per se*, and hence, damages are presumed. As held by the Texas Supreme Court, again in *Lipsky*:

> Pleading and proof of particular damage is not required to prevail on a claim of defamation per se, and thus actual damage is not an essential element of the claim to which the TCPA's burden of clear and specific evidence might apply. Although Range's affidavit on damages may have been insufficient to substantiate its claim to special damages, it was not needed to defeat Lipsky's dismissal motion because Range's defamation claim was actionable per se. The trial court accordingly did not abuse its discretion in denying Lipsky's motion to dismiss.

Id. at 596.

Defendants seek to hide behind the criminal trial to mask the defamation, wrongfully suggesting to this Court that the conviction was solely for "international parental kidnapping," pointing to the jury's verdict form at the end of the jury charge, attached as Exhibit B-3 to his Motion. But they ignore their own evidence in Exhibit B-4 that notes that the conviction was based on aiding and abetting and, in this case, based on retention of the child, not in "premeditated planning" as the defamatory comments remark. But as further plainly evident from Plaintiffs'

Original Petition, the defamatory remarks extend way beyond the charges or conviction and, as such, the conviction itself has no bearing on same. *See* PLAINTIFFS' ORIGINAL PETITION ¶¶ 125-131 and accompany Exhibit(s).

Plaintiffs have met their burden. As such, Defendant's motion must be denied.

4. Violations of the Texas Penal Code

Defendant seeks dismissal of causes of action regarding violations of the Texas Penal Code. He cites authority that the Texas Penal Code does not create a private right of action. He ignores 2 key points: (1) violations of the Texas Penal Code can be used as a basis for establishing the standard of care; and (2) Plaintiffs' lawsuit, on its face, does not seek recovery for Defendant's violations of the Texas Penal Code.

Texas law is clear that the Texas Penal Code can establish the standard of care, and therefore used for establishing an unlawful breach of duty. *See Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1988) (noting that the threshold issue for same is simply determining whether the injured was in the class of persons that statute intended to protect and the injury is the type of injury the statute intended to protect); *see also, Kelly v. Brown,* 260 S.W.3d 212 (Tex. App.—Dallas 2008, pet denied).

As to the second issue, on its face, Plaintiffs' Original Petition only notes that Defendant's violations of these statutes give rise to liability [through establishing the standard of care] and caused damages to Plaintiffs, which is required to show the injury is in the protected class of injuries the statute was designed to protect. As such, Defendant cannot support dismissal on this point.

C. EVEN IF THE ACT IS FOUND TO APPLY, DEFENDANT HAS NOT MET HIS BURDEN ON ANY VALID DEFENSE.

As noted above, to meet the burden of dismissal based on a valid defense, the defendant must prove "by a preponderance of the evidence each essential element of a valid defense." TEX.

CIV. PRAC. & REM. CODE § 27.005(d). For this, two things are certain: (1) the evidence presented by the defendant must meet the "preponderance of the evidence" burden; and (2) they must be able to meet such burden as to "each essential element" of their claimed valid defense. This step carries a significant deviation from the burden on the plaintiff. While a plaintiff must only make a prima facie showing where "even the omission of an element is not fatal," where elements may be "reasonably inferred," and where "direct evidence" is not required, the defendant must *prove* each and every element of a defense to meet its burden. The Defendant has failed to do so.

1. Defendants Claimed Defense of the Judicial Privilege Does Not Constitute a Valid Defense Supporting Dismissal of Plaintiffs' Suit.

Defendant cannot hide behind a judicial privilege. First, simply, a bad actor cannot protect his bad actions if they are fraudulent through the use of a qualified or absolute privilege. The fact is, even an absolute privilege can be lost, as it has been in this case. The Court of Appeals, in *Rose v. First American Title Ins. Company of Texas*, wrote:

> Appellant next argues that while privilege may generally apply, First American stepped out from under its protection. Appellant contends that by reading the October 12, 1990, letter seeking a settlement and the letter to the BPA together, it is evident that First American sought to abuse its absolute privilege. Appellant contends that First American sought to coerce and extort a settlement with the threat of filing a complaint with the BPA. Appellant asserts that when a party abuses its privilege, the court should not continue to shield that party from liability. Appellant, therefore, claims that several fact issues exist as to First American's motivation and interest in sending the complaint letter to the BPA. Appellant cites *Levingston Shipbuilding Co. v. Inland West Corp*. as supporting this position. *Levingston Shipbuilding Co. v. Inland West Corp*., 688 S.W.2d 192, 196 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) (citing De *Mankowski v. Ship Channel Dev. Co*., 300 S.W. 118 (Tex. Civ. App.—Galveston 1927, no writ)).
>
> In *Levingston* the court found that when Levingston filed its lawsuit, its petition was privileged. Levingston, however, trampled beyond the privilege's protection. *Id*. Immediately after filing, a Levingston employee gave the petition to the news media which resulted in extensive publication and harm to the other party's reputation for confidentiality. *Id*. The Levingston court found that

> although the initial pleading was privileged, the subsequent acts and re-publication of the pleading were not. The Levingston employee acted outside what the privilege was intended to protect. In *De Mankowski*, the court likewise held that a petition filed with the court was privileged. ***Yet, when that party re-expressed the accusations made in the petition outside the judicial proceeding, the party was no longer protected by judicial privilege.*** *De Mankowski*, 300 S.W. at 122. The *De Mankowski* court held that:
>
> > [t]he privilege accorded a litigant which exempts him from liability for damages caused by false charges made in his pleadings, or in the court in the course of a judicial proceeding, ***cannot be enlarged into a license to go out in the community and make false and slanderous charges against his court adversary and escape liability for damages caused by such charges on the ground that he had made similar charges in his court pleadings.***
>
> *Id*. (emphasis in original modified by added emphasis).

907 S.W.2d 639 (Tex. App.—Corpus Christi 1995, no writ) (emphasis added). This rule has continued to be reinforced. *See Alaniz v. Hoyt,* 105 S.W.3d 330 (Tex. App.—Corpus Christi 2003, no pet.), *see also, Dallas Ind. School Dist. v. Finlan*, 27 S.W.3d 220, 238 (Tex. App.—Dallas 2000, pet. denied) (acknowledging that publication outside of judicial proceedings results in waiver of the absolute privilege); RESTATEMENT (SECOND) OF TORTS, Appendix § 586 (noting that "The absolute privilege does not extend to a press conference.").

This Defendant has categorically waived that privilege. Defendant has repeatedly availed himself of the media to spread the claimed defamatory remarks, which waives his absolute privilege including both interviews, and press releases, to which the absolute privilege does not attach, as cited above. For example, On February 7, 2018, Defendant issued a press release stating:

> On July 1, 2013, Chris's now ex-wife Marcelle traveled from Houston to Salvador, Brazil, for her brother's wedding. Having joint custody of Nico, she had promised a Texas family court that she would return. Unbeknownst to Chris, she had been planning to abduct Nico and immediately filed for sole custody of her son in Brazil and in a few short weeks when he learned she would not return, his living nightmare began. Carlos Guimarães used resources of his company to facilitate the abduction. Despite being advised of

> his actions, the company's headquarters failed to respond to a request for help. And Jemima Guimarães used the resources of the primary school that she founded to forge documents filed in Federal District Court in Brazil, actions which are already under investigation by the Brazil Prosecutor General's Office.

Exhibit A. On June 13, 2016, another press release was issued by Defendant stating:

> There is irrefutable evidence in this case that Ms. Guimarães and members of her family premeditated Nico's abduction.

Exhibit B. Defendant availed himself of the opportunity to add more in his statement ot the US House of Representatives when he stated:

> I am fighting against forces larger than myself, with deep pockets and even deeper political influence in a foreign country. My former father-in-law Carlos Guimarães is the CEO of a global multinational company ED&F Man Brasil, whose headquarters are in London.

Exhibit C.

And that does not account for all of the following statements from his various on-camera media interviews including by both himself and his authorized agent and spokesperson:

> **ABC WORLD NEWS - 8-year-old in Brazil at the center of an international tug-of-war (Interview)**
>
> 0:23-0:32 – Chris Brann – There's no doubt that they illegally abducted my child. There's no doubt that they have retained him. And there's no doubt that they've done everything in their power to prevent me from having my son in my life.
>
> **Channel CW39 Interview - Federal Magistrate to soon decide if couple can post bond**
>
> 0:59-1:04 – Chris Brann – There's no doubt in my mind that if they were given bond, I would never see my son again.
>
> **Fox 26 Houston Interview - Father's fight for son continues 2-26-2018**
>
> 1:33 – Conspiracy to abduct and international parental child abduction. So, they masterminded, they planned, and they orchestrated the abduction of my child five years ago out of the United States, out of Texas, to Brazil.

> 1:47-2:01 – There's no doubt in my mind and there's overwhelming evidence to prove that. And there's no doubt in my mind that for the last five years as well, they have done everything in their power to keep me from having a meaningful relationship with my son.
>
> 2:15 – She told us why she left. She said that she had better resources to raise my son in Brazil, and what that speaks to is the unlimited resources that they have in Brazil. They're a very wealthy family.

> 1:47-2:01 – There's no doubt in my mind and there's overwhelming evidence to prove that. And there's no doubt in my mind that for the last five years as well, they have done everything in their power to keep me from having a meaningful relationship with my son.
>
> 2:15 – She told us why she left. She said that she had better resources to raise my son in Brazil, and what that speaks to is the unlimited resources that they have in Brazil. They're a very wealthy family.

> **PRESS CONFERENCE – Defendant's authorized agent outside the courthouse.**
>
> 15:00 This is a case of an ongoing crime. Let's not forget that. Carlos and Jemima Guimaraes have been in substantial ways throughout this case as Chris will describe in his victim impact statement, directly and personally responsible for every aspect of Nico's abduction – from the beginning to the middle to the present. And they're continuing to finance their daughter being able to live in Brazil. You know they claim that they can do nothing to impact their daughter's decision making. Cutting her off would have a big impact on her decision making and would force her to reevaluate the situation. They're just not willing to do that and its not what they want to do. You know this is a couple that's been able with total impunity to get away with anything you can imagine in Brazil.

These interviews are collectively offered as Exhibit D. However, due to the inability to electronically file video files, these exhibits are herein offered and will be tendered to the Court at the hearing on Defendant's motion and incorporated herein by reference.

More than sufficient evidence establishes that Defendant has waived this privilege, and therefore, cannot hide behind it.

Second, if Defendant's assertion were categorically true, Texas could not recognize fraud on the court as such would be substantially more than inconsistent with this rule. And Texas does.

See Section B.1., *supra* (addressing fraud on the court). And "fraud vitiates whatever it touches." *Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 57 (Tex. 2005) (citing *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex.1983)).

Defendant simply cannot, as a matter of law, prove by a preponderance of the evidence "each essential element" of this alleged defense. At bare minimum, a genuine issue of material fact exists, vitiating what is tantamount to a summary judgment on this defense, which precludes dismissal based on Defendant's motion.

2. Defendants Do Not Have a Valid *Res Judicata* Defense.

Res judicata precludes a second action by the parties or their privies on matters actually litigated and on causes of action or claims that arise out of the same subject matter and could have been litigated in the first suit. *Getty Oil v. Insurance Co. of N. America*, 845 S.W.2d 794, 798 (Tex.1992), cert. denied, 510 U.S. 820, 114 S.Ct. 76, 126 L.Ed.2d 45 (1993). As the Houston Court of Appeals wrote, "We further note there is no generally prevailing definition of privity which is automatically applied to all cases involving res judicata and collateral estoppel, and the determination of who are privies requires careful examination of the circumstances of each case." *Ayre v. JD Bucky Allshouse, P.C.*, 924 S.W.2d 24 (Tex. App.—Houston [14th Dist] 1996, writ denied) (citing *Getty Oil*, 845 S.W.2d at 800). A privy is one who is connected in law with a party to the judgment as to have such an identity of interests that the party to the judgment represented the same legal right. *Id*. Those in privity with a party may include persons who exert control over the action, persons whose interests are represented by the party, or successors in interest to that party. *Id*. (citing *Getty Oil*, 845 S.W.2d at 800–01). However, privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same facts. *Id*.

Plaintiffs in this action are not seeking to relitigate the issues from the criminal trial, as suggested by Defendant. That trial has concluded, punishment levied, and as of the time of the

hearing on Defendants' motion, punishment served. Rather, this action seeks redress for the fraud committed by Defendant that allowed for such to occur in the first place, as is evidenced from its face, as well as the bodily injury and monetary damages suffered by Plaintiffs as a result of same, along with their wrongful imprisonment. Plaintiffs' action, on its face, seeks damages due to the defamation of Plaintiffs for things they were ***not*** convicted of as well.

Equally important, the criminal trial cannot serve as a basis for res judicata of this action. Simply, the United States and Christopher Brann are simply not in privity. The United States, in the criminal action, sought to litigate and enforce its criminal code, which is not at issue in this case. Brann could not control the criminal action any more than the United States can control this litigation. While Brann, personally, may have had a partially aligned interest in seeking criminal retribution against Plaintiffs, this in no way constitutes representation of each other's interests.

Further, unlike Defendant's assertion, there is no conceivable way that any result from this action could serve as a collateral attack of the Federal criminal trial verdict. First, request is not made for such in any way in Plaintiffs' action. Second, the time for appeal has lapsed to attack the criminal action, and the punishment has already been served. Third, there is simply no way a state civil action for Plaintiffs having had to serve that punishment and incarceration in the first place could ever be used to collaterally attack that jury's verdict.

But as important, yet again, Defendant seeks to hide his fraud behind some form of legal ratification of same. Accepting Defendant's argument is the literal acceptance of a policy that says that a fraudfeasor may legally escape their own fraud so long as they are successful in getting some form of adjudication ratifying their fraud, irrespective of the fact that they committed fraud to get it. And "fraud vitiates whatever it touches." *Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 57 (Tex. 2005) (citing *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex.1983)).

Defendant's claim that res judicata is a valid defense not only fails, the very argument behind it flies in the face of justice in every way.

3. Defendant Cannot Establish a Valid Defense Based On the Defamation Mitigation Act.

Defendant has asserted that dismissal of Plaintiffs' entire action is warranted due to an alleged valid defense of Plaintiffs' failure to request clarification, correction or retraction of certain defamatory statements made by Defendant regarding Plaintiffs. He cannot establish a valid defense based on the Defamation Mitigation Act ("DMA") for same. The DMA provides that, to maintain an action for defamation, a defamed person must request of the defamer clarification, correction or retraction, in writing, pursuant to Texas Civil Practice & Remedies Code § 73.051 *et seq.* While Defendant does not misquote the DMA, he is wrong.

First and foremost, the DMA permits a request for clarification, correction or retraction to be made "during the period of limitation for commencement of an action for defamation." TEX. CIV. PRAC. & REM. CODE § 73.055(b). This means that the request must come within 1 year of the alleged defamatory statement(s). Plaintiffs did so, and did so within the required time. Exhibit E, PLAINTIFFS' REQUEST FOR CLARIFICATION, CORRECTION OR RETRACTION. Plaintiffs' Original Petition is actioned upon statements made in December 2018, and the request was made on May 22, 2019, well within the 1-year mark. While it is stipulated that Defendant is entitled to abatement per Section 73.062 of the DMA, no request for same has been made yet. Nevertheless, the timely and sufficient request made by Plaintiffs satisfies the DMA and vitiates any defense based on same.

Second, even if Plaintiffs failed to make a timely request, dismissal of the action is not the legal remedy. To support his assertion that dismissal is required for Plaintiffs' alleged failure to make a qualifying request, Defendant points to *Zoanni v. Hogan*, 555 S.W.3d 321 (Tex. App.—Houston [1st Dist.] 2018, rehearing denied, pet. req'd.). First and foremost, *Zoanni* does not apply. The Court of Appeals in *Zoanni* <u>only</u> addressed a circumstance where no request was made by the

plaintiff ***and*** the time to do so had lapsed. The Court wrote:

> This case presents an issue of statutory interpretation that is a matter of first impression in our Court. On the facts of this case—where Hogan did not comply with the DMA and where, by the time he asserted the additional allegedly defamatory statements, the statutory deadlines had expired so compliance was no longer possible—the statute's plain language precluded the non-compliant defamation claims from proceeding to the jury. We need not address how the DMA applies in other circumstances.

Id. at 326. In such circumstance, the Court finds that dismissal of the action is warranted. It does ***not*** deal with a situation where the time period to make such request had not lapsed. In such circumstance, the Court states that dismissal is warranted.

But in yet another specifically relevant case that Defendant fails to bring to the Court's attention, the Dallas Court of Appeals addresses this issue directly, and in circumstances far broader than were addressed in *Zoanni*. The Court in *Hardy v. Communication Workers of America Local 6215 AFL-CIO* declined to interpret the DMA as to support dismissal for failure to send a qualifying request. The court stated:

> We next consider the statute as a whole to determine if it reflects an intent by the Legislature to subject a plaintiff's defamation claim to dismissal based on the failure to request a correction, clarification, or retraction. Although the trial court construed section 73.055(a), standing alone, as requiring the dismissal of Hardy's claim, the DMA does not expressly state that dismissal of the plaintiff's claim is the consequence for failing to make the required request. Rather, the Legislature expressly set out the consequence for failing to timely make the required request: a plaintiff who fails to request a correction, clarification, or retraction within ninety days of receiving knowledge of the publication is prohibited from recovering exemplary damages. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.055(c); *Neely*, 418 S.W.3d at 63. Similarly, regardless of whether a request is made, if a correction, clarification, or retraction is made in accordance with the DMA, the plaintiff may not recover exemplary damages unless the publication was made with actual malice. TEX. CIV. PRAC. & REM. CODE ANN. § 73.059. Although these provisions impact the damages recoverable by a plaintiff, they do not support a determination that the Legislature intended to deprive a plaintiff of a defamation claim based on a failure to request a correction, clarification, or retraction. Further,

> the DMA affords a defendant the right to challenge the timeliness, as well as the sufficiency, of a request for a correction, clarification, or retraction. See id. § 73.058(c). If a plaintiff's claim were subject to dismissal solely due to her failure to request a correction, clarification, or retraction of the statement, a defendant would have no need to ever challenge whether a request was timely. Rather, the defendant would simply wait until the limitations period on the claim had expired and then move to dismiss the case.

536 S.W.3d 38 (Tex. App.—Dallas 2017, pet. denied, reh'g of pet. denied). As such, the court directly held:

> Reading the DMA in its entirety, giving effect to all its provisions, and considering the purpose of the statute, we conclude a plaintiff who fails to make a timely and sufficient request for correction, clarification, or retraction may not maintain or continue her suit in the face of a timely-filed motion to abate. The plaintiff's claim, however, is not subject to dismissal solely based on the plaintiff's failure to timely and sufficiently request a correction, clarification, or retraction.

Id.

The Plaintiffs' request for clarification, correction or retraction being timely and sufficiently made, and with the law's clarification that the DMA does ***not*** support dismissal for failing to do so, Defendant cannot, as a matter of law, avail itself of the DMA as a valid defense. Even if it could, such would not warrant the dismissal of Plaintiffs' entire action pursuant to the TCPA.

V. CONCLUSION

Defendant simply cannot legally protect his wrongful conduct by a tortured application of the overused TCPA/Anti-SLAPP statute. As well noted herein, fraud vitiates all it touches. And as well, the clear and unambiguous intent of the Act is ***not*** to dismiss meritorious suits. Plaintiffs have well exceeded their burden of establishing a prima facie case for their causes of action, which burden does not even require direct or even existent proof of all elements, but which further allows for the use of reasonable inference. And that is actually the ***second*** step.

Defendant's motion fails on the predicating first step—the applicability of the Act. Plaintiffs' entire action is exempt from the Act given the existence of bodily injury, for which Plaintiffs seek recovery. Aside from that fact, the speech at issue is in no way protected as it in no way regards a matter of public concern, as required in the Act. Additionally, Defendant's claimed right to petition is not implicated either.

If Defendant cannot sufficiently establish applicability of the Act, his motion fails. And it does. Even if it did not, if Plaintiffs sufficiently establish a prima facie case for their causes of action, Defendant's motion fails. And it does here as well. And finally, Defendant simply cannot sufficiently establish a viable defense that justifies dismissal of Plaintiffs' action under the Act. His attempts to do all legally fail. Defendant has failed to mount any legally or factually sufficient argument to require dismissal of all, or even any, of Plaintiffs' claims under the TCPA.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs that this Court deny Defendant's Motion to Dismiss and for such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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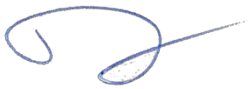
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the below parties in accordance with the Texas Rules of Civil Procedure on May 23, 2019.



Jeff Diamant