

CAUSE NO. DC-11-13741-C

AMERICAN HERITAGE CAPITAL, LP,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	68 <sup>TH</sup> JUDICIAL DISTRICT
	§	
DINAH GONZALEZ and ALAN	§	
GONZALEZ,	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

Notice

Defendant, Alan Gonzalez, hereby notifies the Court that, pursuant to Local Court Rules 1.06 and 1.07(a), this action is subject to transfer to an earlier filed action styled *Dinah L. Gonzalez v. American Heritage Capital, L.P.*, in the 134<sup>th</sup> Judicial District Court under Cause No. DC-11-13709-G.

DEFENDANT’S MOTION TO DISMISS

Defendant, Alan Gonzalez (“Mr. Gonzalez”), pursuant to § 27.003 of the Texas Civil Practice & Remedies Code, hereby moves to dismiss the above-entitled and numbered action, and in support thereof respectfully shows:

**Background**

1. On August 5, 2011, Defendant, Dinah Gonzalez (“Mrs. Gonzalez”), and American Heritage Capital, LP, doing business as “ahc Lending.com” (“AHC”), entered into a Rate Lock Confirmation and Agreement (“Agreement”) wherein the parties agreed to certain terms and conditions under which AHC would provide Mrs. Gonzalez with financing to purchase certain real property and improvements in Weslaco, Texas. *Affidavit of Dinah L. Gonzalez* (“Gonzalez Aff.”) at pg. 1-2, ¶¶ 1-4 & Exhibit 1A.<sup>1</sup>

<sup>1</sup> The affidavit is attached to Defendant’s Motion to Dismiss filed by Mrs. Gonzalez on November 16, 2011, as Exhibit No. 1, and by reference is made a part hereof.

2. Mrs. Gonzalez performed or tendered performance of the Agreement at all relevant times. *Gonzalez Aff.* at pg. 2, ¶ 5. Nonetheless, the rate lock lapsed by its own terms on September 19, 2011, and AHC continued to process Mrs. Gonzalez's loan application without any mention of the lapse. *Gonzalez Aff.* at pg. 2, ¶ 7. In addition, AHC frustrated and voluntarily acted to make Mrs. Gonzalez's performance impossible. *Gonzalez Aff.* at pg. 2-3, ¶¶ 6-8. Specifically, instead of performing its contractual obligations, AHC stalled the loan process by repeatedly requesting more information and documentation from Mrs. Gonzalez until time expired under the Agreement. *Gonzalez Aff.* at pg. 2, ¶ 7.

3. AHC subsequently terminated its "loan commitment" to Mrs. Gonzalez effective October 14, 2011. *Gonzalez Aff.* at pg. 3, ¶ 8.

4. Mr. Gonzalez, *not* Mrs. Gonzalez, visited several websites which allow users to comment on the quality of various businesses. *Gonzalez Aff.* at pg. 3, ¶ 9. Mr. Gonzalez posted various comments on the websites to caution visitors of AHC's poor handling of his wife's loan application. *Gonzalez Aff.* at pg. 3, ¶ 9 & Exhibit 1B.

5. On October 18, 2011, apparently under the belief that Mrs. Gonzalez posted the comments, the President of AHC, Mr. Nash Prasla, sent an e-mail correspondence ("E-mail") to Mrs. Gonzalez demanding that the comments be deleted. In the E-mail, Mr. Prasla threatened Mrs. Gonzalez as follows:

Word to the Wise though. "Don't fight on every hill. Choose your battles wisely. You never know whom or what you are up against." You started this. You can end it. Otherwise I will end it for you, and it won't be pretty. I will protect my company at any cost.

*Gonzalez Aff.* at pg. 3-4, ¶ 11 & Exhibit 1C.

6. On October 27, 2011, AHC filed its Original Petition and Request for Disclosures (“Petition”) commencing the instant action. Based exclusively on Mr. Gonzalez’s comments, AHC asserts claims of libel and tortious interference with prospective business relationships against Mrs. Gonzalez in an attempt to restrain the exercise of constitutionally-protected free speech. *See Plaintiff’s Original Petition and Request for Disclosure* at pg. 4-6; ¶¶ 18-33.

7. As noted, Mrs. Gonzalez filed her motion to dismiss this action on November 16, 2011. *See generally Defendant’s Motion to Dismiss*. The motion remains pending before the Court. Specifically, the Court held a hearing on the motion on December 19, 2011. At the conclusion of the hearing, the Court continued the hearing to January 30, 2012, ordered the parties to participate in mediation prior to the continued hearing and permitted the parties the right to take limited depositions prior to the continued hearing.

8. Prior to the hearing on Mrs. Gonzalez’s motion to dismiss, AHC filed its First Amended Petition joining Mr. Gonzalez as a defendant in this action and the same claims of libel and tortious interference with prospective business relationships against Mrs. Gonzalez in an attempt to restrain the exercise of constitutionally-protected free speech. *See Plaintiff’s First Amended Petition* at pg. 5-7; ¶¶ 20-35.

### **Argument & Authorities**

#### **A. Anti-SLAPP Statutes.**

9. As the United States Court of Appeals for the Fifth Circuit has recently observed:

In the forty-five years since the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), courts

and legislatures have endeavored to strike a balance between individuals' interests in their reputation and the public interest in free and robust debate. The resulting interplay of defamation law and the *First Amendment* has substantially lessened the chilling effect of abusive tort claims for conduct stemming from the exercise of *First Amendment* rights. While these efforts have shielded individuals from the chill of liability, they have often failed to protect speakers from the similarly-chilling cost and burden of defending such tort claims. Concerned over the growth of meritless lawsuits that have the purpose or effect of chilling the exercise of *First Amendment* rights, a number of state legislatures have created a novel method for better striking the balance between interests in individual reputation and freedom of speech.

\* \* \*

A number of state legislatures have expressed concerns over the use (or abuse) of lawsuits that have the purpose or effect of chilling the exercise of *First Amendment* rights. These suits are commonly referred to as "strategic lawsuits against public participation," or "SLAPPs." In response to the growth of SLAPPs, some states have provided a procedural method--often called a "special motion to strike" but also known as an "anti-SLAPP motion" or "SLAPPback"--to weed out and dismiss meritless claims early in litigation. Dismissal of these frivolous tort claims saves defendants the cost and burden of trial and minimizes the chilling effect of these lawsuits. At the same time, meritorious claims proceed, vindicating the interests of those who actually suffered from defamation or other torts.

*Henry v. Lake Charles American Press, LLC*, 566 F.3d 164, 167-68 & 169 (5<sup>th</sup> Cir. 2009)

(italics in original) (analyzing Louisiana's anti-SLAPP statute).

## **B. The Texas Anti-SLAPP Statute.**

### **1. The Act's Purpose.**

10. Following the trend in several other states, earlier this year, the Texas Legislature passed the "Texas Citizen Participation Act" or "Texas Anti-SLAPP statute" which is now codified in Chapter 27 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE § 27.001 et seq. (2011) ("Act").<sup>2</sup>

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<sup>1</sup> Enacted by Acts 2011, 82<sup>nd</sup> Leg., ch. 341 (H.B. 2973), § 2, effective June 17, 2011.

11. The Legislative history of the Act indicates its broad application. The purpose of the Act “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. (2011) (emphasis added). In fact, only a few states have more expansive anti-SLAPP statutes than Texas. Prather, *Passage of the Texas Anti-SLAPP Statute*, MLRC MEDIA LAW LETTER at 18 (July 2011) (“Prather”).<sup>3</sup>

12. More specifically, the purpose of the Act is to encourage “citizen participation” which includes “commenting on the quality of business.” HOUSE COMM. ON JUDICIARY & CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2973, 82<sup>nd</sup> Leg., R.S. at pg. 1 (2011) (hereinafter “Bill Analysis”).

13. Likewise, the Legislature acknowledged an acute need for the protections afforded by the Act in light of the fact that “the Internet has created a more permanent and searchable record of public participation.” *Bill Analysis* at pg. 1. Because of the growing use of the internet, more people are exposed to strategic lawsuits against public participation through “self-publishing, citizen journalism, and other forms of public speech.” *Bill Analysis* at pg. 1. To this end, the Legislature adopted the Act to add protection to free speech on the internet. *Bill Analysis* at pg. 1.

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<sup>3</sup> “Although technically Texas is the 28<sup>th</sup> state in the nation to pass an Anti-SLAPP statute, only a handful of those state laws cover statements made outside the governmental setting.” *Prather* at 18.

**2. The Act's Mandate.**

14. To further the its broad purpose, the Act allows a court to dismiss a legal action that 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.” TEX. CIV. PRAC. & REM. CODE § 27.003 (2011).

15. In this vein the Act establishes a burden-shifting motion practice for weeding out frivolous or SLAPP suits. To succeed on a motion to dismiss, the defendant must show that the Act covers the activity underlying the suit. If the lawsuit is addressed to a party’s exercise of free speech, the court must dismiss the lawsuit.<sup>4</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(b)(1) (2011). If the defendant makes this showing, the burden then shifts to the plaintiff to “establish[] by *clear and specific evidence* a prima facie case for each essential element of the claim in question.” TEX. CIV. PRAC. & REM. CODE § 27.005(c) (2011) (emphasis added). If the plaintiff fails to make this showing, the trial court dismisses the claim. Otherwise, the trial court denies the motion and the suit proceeds as it normally would.<sup>5</sup>

16. A prevailing defendant is to be awarded court costs, reasonable attorneys’ fees and other expenses, together with an award of “sanctions against the party who brought the legal action as the court determines sufficient to deter the part who brought the legal action from brining similar actions.” TEX. CIV. PRAC. & REM. CODE § 27.009(a) (2011).

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<sup>4</sup> In addition, lawsuits addressed to a party’s right to petition or right of association is also protected and must be dismissed. TEX. CIV. PRAC. & REM. CODE § 27.005(b)(2) & (3) (2011).

<sup>5</sup> Once a defendant files motion to dismiss, all discovery in the case is stayed until the court rules on the motion, TEX. CIV. PRAC. & REM. CODE § 27.003(c) (2011), except that which the court, "on a motion by a party or on the court’s own motion and on a showing of good cause," orders to be conducted. TEX. CIV. PRAC. & REM. CODE § 27.006(b) (2011).

**C. The Act Mandates Dismissal of this Lawsuit.**

**1. The Comments are Protected Speech.**

17. Unquestionably, the Act specifically defines “exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” TEX. CIV. PRAC. & REM. CODE § 27.001(3). In turn, the Act defines a “matter of public concern” as “an issue related to . . . a good, product, or service in the marketplace.” TEX. CIV. PRAC. & REM. CODE § 27.001(7); n.2, *supra*. The Act exempts only enforcement actions by the State, actions brought against sellers and lessors of goods and services under some circumstances, and actions seeking recovery for bodily injury, wrongful death, or survival. TEX. CIV. PRAC. & REM. CODE § 27.010.

**2. The Act Requires Dismissal of this Action.**

18. The instant case should be dismissed pursuant to the Act. Mr. Gonzalez’s comments are an exercise of his free speech and they address a matter of public concern. TEX. CIV. PRAC. & REM. CODE § 27.003. Namely, the comments directly relate to AHC’s poor service given to Mrs. Gonzalez during her loan application process. TEX. CIV. PRAC. & REM. CODE § 27.001(7).

19. The Comments are precisely the type of speech that the Legislature intended to encourage and protect by the Citizens’ Participation Act. Specifically, Mr. Gonzalez’s comments directly address the inadequate quality of AHC’s business. *Bill Analysis* at pg. 1. Moreover, they were posted on the internet which the Act intends to shield as a safe place for speech on matters of public concern. *Bill Analysis* at pg. 1. AHC’s instant SLAPP suit squarely demonstrates what the Act is intended to prevent. *Bill Analysis* at pg. 1.

20. None of the exemptions to the Act apply in this case. TEX. CIV. PRAC. & REM. CODE § 27.010. As such, the instant suit should be dismissed in accordance with the Citizens' Participation Act and Mr. Gonzalez should be awarded costs and attorneys' fees and the statutorily mandated sanctions to deter AHC from bring similar actions subject to the Act.<sup>6</sup> TEX. CIV. PRAC. & REM. CODE §§ 27.003, 27.009.

21. This case is the quintessential SLAPP suit that the Act was passed to remedy. The Act was designed to prevent plaintiffs such as AHC to SLAPP individuals like Mr. Gonzalez such that they would be chilled in their freedom of speech. This action must be dismissed and Mr. Gonzalez recover the statutory awards mandated under the Act.

#### **Relief Requested**

Mr. Gonzalez respectfully requests that the Court dismiss this action, that the Court award him all court costs, reasonable attorneys' fees, other expenses incurred in defending this action, award her sanctions, and all further relief to which she may be entitled.

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<sup>6</sup> AHC describes itself as "one of nation's leading lenders" and "not a broker, but a lender with our own financial strength and capital to meet the funding needs of our valued customers." <http://www.ahclending.com/ShowCMS.aspx?CmsHeaderid=44> (visited November 16, 2011).

Respectfully submitted,

/s/ David M. O'Dens

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**Certificate of Conference**

The undersigned counsel hereby certifies that on January 5, 2012, he personally contacted Seema Tendolkar, counsel for Plaintiff, regarding the above and foregoing Motion to Dismiss, wherein there was a substantive discussion of the same. Ms. Tendolkar stated that Plaintiff is opposed to the granting of this motion.

/s/ David M. O'Dens

David M. O'Dens

**Certificate of Service**

This certifies that this document was served in accordance with Texas Rules of Civil Procedure on January 5, 2012.

/s/ David M. O'Dens

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