Affirm and Opinion Filed September 30, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00443-CV

MARBLE RIDGE CAPITAL LP AND MARBLE RIDGE MASTER FUND LP, Appellants
V.
NEIMAN MARCUS GROUP, INC., MARIPOSA INTERMEDIATE HOLDINGS LLC, NEIMAN MARCUS GROUP LTD LLC, THE NEIMAN MARCUS GROUP LLC, AND NMG INTERNATIONAL LLC, Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-18371

OPINION

Before Justices Molberg and Partida-Kipness[1]
Opinion by Justice Molberg

Marble Ridge[2] appeals the denial of its amended motion to dismiss Neiman Marcus's counterclaims under the Texas Citizens Participation Act (TCPA), TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011.[3] We affirm for the reasons that follow.

[1] The Honorable David Bridges, Justice, participated in the submission of this case. However, he did not participate in the issuance of this opinion due to his death on July 25, 2020.

[2] We refer to all appellants as "Marble Ridge" and to all appellees as "Neiman Marcus."

[3] The Texas Legislature amended the TCPA effective September 1, 2019. Those amendments apply to "an action filed on or after" that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. Because the underlying lawsuit was filed before September 1, 2019, the law in effect before September 1, 2019, applies. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen.

Marble Ridge asks us to reverse the trial court's denial of its TCPA motion based on two disputed issues. After noting that the issue of TCPA coverage is undisputed,[4] Marble Ridge argues that under section 27.005(c), Neiman Marcus failed to establish a prima facie showing of three essential elements of its defamation and business-disparagement counterclaims. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c). Marble Ridge also argues it satisfied its burden under section 27.005(d) by establishing the judicial-proceedings privilege as a valid defense to those counterclaims. *See id.* § 27.005(d).

We disagree on both issues. Based on the record before us, reversal is not justified because Neiman Marcus met its burden under § 27.005(c) and Marble Ridge failed to meet its burden under § 27.005(d). *See id*. § 27.005(c), (d).

BACKGROUND

Parties and Procedural History

Marble Ridge Capital, LP, a hedge fund, specializes in "distressed debt investing and other strategic event-driven investment opportunities" and serves as a registered investment adviser[5] to Marble Ridge Master Fund, LP, a Cayman Islands

Laws 961–64, *amended by* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500. All citations to the TCPA are to the version before the 2019 amendments took effect.

[4] In the trial court and in its briefing here, Marble Ridge argues the TCPA applies to Neiman Marcus's counterclaims because the claims target its exercise of its right to free speech. While Neiman Marcus does not dispute this, the undisputed issue of TCPA coverage under section 27.005(b) does not alter the outcome in light of our conclusions regarding sections 27.005(c) and (d). *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b), (c), (d).

[5] Marble Ridge Capital, LP is an investment adviser registered by the United States Securities and Exchange Commission (SEC).

limited partnership. Marble Ridge was founded by Daniel Kamensky, its managing partner.

The Neiman Marcus Group is a luxury retailer headquartered in Dallas, Texas. It offers apparel, handbags, shoes, cosmetics, jewelry and other items through various brands to customers around the world. Appellees Neiman Marcus Group, Inc., Mariposa Intermediate Holdings LLC, Neiman Marcus Group LTD LLC, The Neiman Marcus Group LLC, and Neiman Marcus Group International LLC are members of the Neiman Marcus Group.

Neiman Marcus has roughly $4.7 billion of publicly traded debt, which is governed by two credit agreements (one, a term loan; the other, revolving credit) and various unsecured senior notes and debentures that were issued pursuant to three indentures (collectively, the "debt documents"). These debt documents contain covenants limiting some Neiman Marcus subsidiaries from taking certain actions, such as paying dividends, making investments, or disposing of assets.

Unrestricted subsidiaries, however, are generally not subject to the covenants, and various exceptions to the covenants exist. These covenant exceptions are called "baskets." Neiman Marcus can use these baskets to designate subsidiaries as unrestricted or to make transactions that otherwise would be prohibited by the covenants.

On December 10, 2018, Marble Ridge sued Neiman Marcus regarding certain designations and transactions it made under the debt documents, alleging, generally,

that Neiman Marcus's actions constituted fraudulent transfers of assets. In its original petition, Marble Ridge included four separate claims: (1) intentional fraudulent transfer, (2) constructive fraudulent transfer, (3) fraudulent transfer, and (4) for appointment of a receiver.

On December 14, 2018, Neiman Marcus filed an answer with general, specific, and verified denials. In that pleading, Neiman Marcus also asserted counterclaims for defamation and business disparagement, seeking relief for alleged harms caused by three allegedly defamatory communications Marble Ridge issued and released to the press: a press release on September 21, 2018; a September 18, 2018 letter that accompanied that release; and a September 25, 2018 letter sent to Neiman Marcus and to the press.

Also on December 14, 2018, Neiman Marcus filed a plea to the jurisdiction and, alternatively, special exceptions that challenged Marble Ridge's standing to proceed with its claims. Marble Ridge filed a response to the plea and an amended petition on January 28, 2019. In its amended petition, Marble Ridge added a new claim for declaratory judgment and repeated the same claims and many of the same facts as in its original pleading. Marble Ridge's amended pleading did not include an answer to or any defenses against Neiman Marcus's counterclaims.

The parties filed an additional response and reply regarding Neiman Marcus's plea to the jurisdiction, and on March 19, 2019, the trial court granted the plea and

entered an order dismissing Marble Ridge's amended petition for lack of subject matter jurisdiction.

In the meantime, on January 2, 2019, Marble Ridge filed a TCPA motion to dismiss Neiman Marcus's counterclaims and an amended motion twenty days later. Neiman Marcus filed a response in opposition on March 18, 2019. The trial court heard Marble Ridge's amended motion on March 21, 2019, and denied it on April 9, 2019. The order does not provide any reasons for the court's ruling. Marble Ridge timely appealed.

Marble Ridge's Allegedly Defamatory Communications

Neiman Marcus's counterclaims relate to Marble Ridge's communications on September 18, 21, and 25, 2018, all of which were shared with the press. Neiman Marcus alleges that as a result of these communications, it has been harmed in various ways, such as through downgraded credit ratings, lost business opportunities, lost profits and value, tarnish to its valuable brand, and harm to its relationships with customers and business partners.

Neiman Marcus's counterclaims are based on Marble Ridge's statements about certain designations and transactions made under the debt documents, some of which involved the designation of certain "MyTheresa" subsidiaries[6] as

[6] MyTheresa is "a retail entity that appeals to younger luxury customers primarily in Europe, Asia and the Middle East." Neiman Marcus's pleading explains, "[I]n late 2014 and early 2017, Neiman Marcus LTD designated the entities that operated [the MyTheresa subsidiaries] as unrestricted subsidiaries under the Debt Documents (the 'Designation')" and that "in September 2018, NMG International distributed its

unrestricted subsidiaries and Neiman Marcus's actions regarding certain real estate (the latter of which is referred to as the "PropCo Transaction").[7]

Specifically, Neiman Marcus alleges the following seven statements by Marble Ridge are defamatory:

1. "[B]ased on our review of all relevant public information, the Transactions appear to have violated the Indentures and, accordingly, [Neiman Marcus] may now be in default thereunder" (original emphasis omitted);

2. The Transactions "may trigger defaults under the Indentures";

3. Marble Ridge has "concerns that the Transactions do not comply with the Indentures";

4. What Marble Ridge knows about the Designation and PropCo Transaction "led us to believe that [Neiman Marcus] may be in default under its Indentures";

5. The Designation and PropCo Transaction "may have caused a default under the Indentures";

6. There was a "theft of assets by" Neiman Marcus's private equity sponsors; and

7. In its September 25, 2018 letter, Marble Ridge again referenced "serious questions" about Neiman Marcus's "potential defaults."

Other Context Regarding Marble Ridge's Communications

On September 21, 2018, Marble Ridge issued a four-page press release through PR Newswire concerning Neiman Marcus and certain designations and

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equity and debt interests in the MyTheresa [s]ubsidiaries to Neiman Marcus Inc. (the 'Distribution' and, with the Designation and PropCo Transaction, the 'Transactions')."

[7] Neiman Marcus's pleading states, "[I]n March 2017, Neiman Marcus LTD designated a separate entity, Nancy Holdings LLC, as an unrestricted subsidiary. Neiman Marcus LLC invested three real properties into Nancy Holdings, and Nancy Holdings then leased the properties back to Neiman Marcus LLC (the 'PropCo Transaction')."

transactions under the debt documents. The press release was entitled, "Marble Ridge Capital LP Sends Letter to Neiman Marcus Board Challenging the Validity of Self-Interested Asset Transfers and Asserting Company Is in Default under Bond Indentures." The first paragraph stated that "Marble Ridge is a holder of Neiman Marcus 8.75% Senior Notes and Term Loans" and had sent a letter "expressing concern that [Neiman Marcus] may be in default under its Indentures."

The press release included a copy of Marble Ridge's September 18, 2018 letter to Neiman Marcus and its counsel, quoted certain portions of the letter, and stated that the letter "highlight[ed] the recent transfer of the MyTheresa business without any consideration to Neiman Marcus Group, Inc." as having been "[a]mong several improper transactions." The press release also stated that the letter "asked [Neiman Marcus] to provide information in order to assess whether the transactions complied with the Indentures as well as [its] rationale for entering into the transactions." The press release quoted Kamensky as stating:

> It is clear that [Neiman Marcus Group, Inc.'s private equity sponsors] are looking to line their own pockets at the expense of [Neiman Marcus's] other stakeholders and employees. With management serving at their behest, these recent actions threaten the viability of a storied franchise that includes marquee brands such as Neiman Marcus and Bergdorf Goodman. Rather than allowing the theft of assets by [Neiman Marcus Group, Inc. private equity sponsors], we believe a more responsible Board, given its fiduciary obligations, would have engaged in a strategic review to maximize value for the benefit of all of [Neiman Marcus's] stakeholders. The potential sale of MyTheresa and the premier real estate owned by Neiman Marcus would generate billions of dollars in proceeds that could be used to substantially reduce

> [its] indebtedness and put [it] on more solid financial footing, enabling it to invest in and grow its core business.

Marble Ridge's four-page, September 18, 2018 letter is printed on Marble Ridge Capital LP's letterhead and signed by Kamensky on behalf of "Marble Ridge Capital." The letter begins with general references to the debt documents and to changes in the corporate structure disclosed on March 14, 2017, and September 18, 2018. The letter also refers to the designation of MyTheresa and other entities as unrestricted subsidiaries under the debt documents and states that while "[n]ot all the facts concerning the Redesignation are known to Marble Ridge . . . . what we do know led us to believe that [Neiman Marcus] may be in default under its Indentures." The letter includes additional statements about the MyTheresa transactions, several statements that were later quoted in the press release, and statements regarding the debt documents and certain requirements regarding a "minimum Interest Coverage Ratio."[8] The letter states, "[B]ased on our review of all relevant public information, the Transactions appear to have violated the Indentures and, accordingly, [Neiman Marcus] may now be in default thereunder." Finally, the letter requests Neiman Marcus to provide certain information "[t]o facilitate a meaningful dialogue," states the transactions "could be voidable and the directors of [Neiman Marcus] could face liability," and concludes by stating:

> Given the potential that the foregoing may lead to litigation, we hereby request that [Neiman Marcus] and its current and past board members

[8] According to the affidavits in the record (specifically, Eric Artho's affidavit), an "interest coverage ratio" is "a contractually defined metric that compares earnings to interest expense."

> [and other entities] retain all documents and communications relating to the Transactions, whether held electronically or in hard copy, notwithstanding any document-retention policies to the contrary. Please confirm in response to this letter that each of the foregoing have complied with this request.

Issues on Appeal

In its first issue on appeal, Marble Ridge argues Neiman Marcus failed to establish three necessary elements of its counterclaims—namely, that Marble Ridge made false assertions of fact with actual malice. Next, it argues it established the judicial-proceedings privilege as a valid defense to Neiman Marcus's counterclaims.

STANDARD OF REVIEW

The TCPA is meant "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002. The TCPA "protects citizens . . . from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding).

Section 27.005(b) of the TCPA provides:

> Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party 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 (1) the right of free speech; (2) the right to petition; or (3) the right of association.

TEX. CIV. PRAC. & REM. CODE § 27.005(b). Thus, the TCPA permits a defendant to move for dismissal of 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." *See id.* § 27.003(a).

As a matter of statutory construction, we review de novo a trial court's ruling on a TCPA motion to dismiss. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 833 (Tex. App.—Dallas 2020, pet. denied) (citing *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018)). In conducting that review, we consider, in the light most favorable to the nonmovant, the pleadings and any supporting and opposing affidavits stating the facts on which the claim or defense is based.[9] *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied).

We also ascertain and give effect to the legislature's intent as expressed in the language of the statute, considering the specific statutory language at issue and the TCPA as a whole, and we construe the statute's words according to their plain and common meaning, unless a contrary intention is apparent from the context or unless such a construction leads to absurd results. *Id.* at 424–25.

[9] In deciding a TCPA motion to dismiss, the trial court may consider "'the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.'" *Goldberg*, 594 S.W.3d at 824 (quoting TEX. CIV. PRAC. & REM. CODE § 27.006(a)). "However, the plaintiff's pleadings are usually 'the best and all-sufficient evidence of the nature of the action.'" *Id.* (quoting *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017)).

Our review of a TCPA ruling generally involves three steps. *Creative Oil*, 591 S.W.3d at 132; *Youngkin*, 546 S.W.3d at 679–80; *Goldberg*, 594 S.W.3d at 824. At step one, the party moving for dismissal has the burden to 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 association, right of free speech, or the right to petition. *See Creative Oil*, 591 S.W.3d at 132 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(b)); *Youngkin*, 546 S.W.3d at 679; *Goldberg*, 594 S.W.3d at 824.

If the movant does so, the analysis proceeds to step two, where the burden of proof shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of the claim. *See Creative Oil*, 591 S.W.3d at 132 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(c)); *Youngkin*, 546 S.W.3d at 679; *Goldberg*, 594 S.W.3d at 824.

A "prima face case" refers to "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *Lipsky*, 460 S.W.3d at 590 (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam) (orig. proceeding)). "Clear and specific" evidence is "unambiguous," "free from doubt," and "explicit" or "referring to a particular named thing." *Id*. (quoting *KTRK Television v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)). Thus, the term "clear and specific" pertains to the quality of evidence required to establish a prima facie case, and the

term "prima facie case" pertains to the amount of evidence necessary for a plaintiff to carry its minimal factual burden to support a rational inference establishing each essential element of a claim. *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 882 (Tex. App.—Austin 2018, pet. denied).

In *Lipsky*, the Texas Supreme Court explained how this evidentiary standard should be applied, stating, "[M]ere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim." *Lipsky*, 460 S.W.3d at 590–91 (internal citations omitted). The plaintiff (or, in this case, the TCPA nonmovant, Neiman Marcus) may rely on circumstantial evidence that creates an inference establishing a central fact unless the "connection between the fact and the inference is too weak to be of help in deciding the case." *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019) (quoting *Lipsky*, 460 S.W.3d at 589); *see also Lipsky*, 460 S.W.3d at 591 (holding that the TCPA "does not impose a higher burden of proof than that required of the plaintiff at trial" and does not "require direct evidence of each essential element of the underlying claim to avoid dismissal").

If the nonmovant satisfies its burden at step two, the analysis proceeds to step three, where the burden of proof shifts back to the movant to establish by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim, resulting in dismissal under the statute if the movant does so.

Creative Oil, 591 S.W.3d at 132 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(d)); *Youngkin*, 546 S.W.3d at 679–80; *Goldberg*, 594 S.W.3d at 824.

If a TCPA motion is granted at the third step, one might question whether section 27.005(d) operates as an unconstitutional deprivation of a claimant's right to trial by jury. *See* TEX. CONST. art. V, § 10 (right to have a jury resolve fact questions); *Bass v. United Dev. Funding, L.P.*, No. 05-18-00752-CV, 2019 WL 3940976, at *16 n.19 (Tex. App.—Dallas Aug. 21, 2019, pet. denied) (mem. op.). We are not presented with that issue, however, because the third step here—the application of the judicial-proceedings privilege—involves only a pure question of law. *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942) (concluding that jury's finding that an instrument was not privileged was on a pure question of law and, thus, was of no effect). Thus, while a constitutional question may loom in some cases under section 27.005(d), we need not decide that question here.[10]

[10] In considering whether a valid defense has been established under the third step, at least two of our sister courts have applied a standard of review essentially equivalent to a motion for summary judgment on an affirmative defense. *See Batra v. Covenant Health Sys.*, 562 S.W.3d 696, 708 (Tex. App.—Amarillo 2018, pet. denied) (explaining this and stating, "[I]n order to defeat the [nonmovant's] establishment of a prima facie claim, the [movant] must establish, as a matter of law, each essential element of at least one valid defense as to each of the [nonmovant's] claims."); *Rosales v. Comm'n for Lawyer Discipline*, No. 03-18-00725-CV, 2020 WL 1934815, at *4 (Tex. App.—Austin Apr. 22, 2020, no pet.) (mem. op.) ("The standard of review employed in considering whether a movant established a valid defense so as to be entitled to dismissal is 'essentially equivalent to a motion for summary judgment on an affirmative defense,' meaning we should consider the pleadings and evidence in favor of the nonmovant, taking evidence favorable to the nonmovant as true and indulging reasonable inferences and resolving doubts in favor of the nonmovant.") (quoting *Batra*, 562 S.W.3d at 708).

ANALYSIS

Step One: TCPA Application

As the movant, Marble Ridge had the initial burden under the TCPA to show by a preponderance of the evidence that the legal action is based on, relates to, or is in response to its exercise of the right of association, right of free speech, or the right to petition. *See Creative Oil*, 591 S.W.3d at 132 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(b)); *Youngkin*, 546 S.W.3d at 679; *Goldberg*, 594 S.W.3d at 824.

Marble Ridge argues it met that burden by showing that Neiman Marcus's counterclaims target Marble Ridge's exercise of its right of free speech. Neiman Marcus does not dispute this, and as a result, we will proceed directly to step two. *See D Magazine Partners, Inc. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (doing the same).

Step Two: Prima Facie Case on Neiman Marcus's Counterclaims

Once TCPA coverage applies, to defeat Marble Ridge's motion to dismiss, Neiman Marcus had to establish by clear and specific evidence a prima facie case for each essential element of its defamation and business-disparagement counterclaims challenged by Marble Ridge. TEX. CIV. PRAC. & REM. CODE § 27.005(c). "[M]ere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, [Neiman Marcus] must provide enough detail to show the factual basis for its claim." *Lipsky*, 460 S.W.3d at 590–91 (internal citations omitted). Generally, on defamation claims, when

pleadings and evidence establish the facts of "when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff," the evidence "should be sufficient" to defeat a TCPA motion to dismiss. *Id*. at 591.

Marble Ridge argues Neiman Marcus failed to present by clear and specific evidence a prima facie case of three common and essential elements for its defamation and business-disparagement counterclaims: (1) publication of a statement of fact, (2) falsity of the statement, and (3) actual malice.[11] In accordance with *Lipsky*, we review the record to determine whether Neiman Marcus provided, for each of these elements, the "minimum quantum" of "unambiguous," "explicit" evidence "necessary to support a rational inference that [its] allegation of fact is true." *Id*. at 590. We conclude that Neiman Marcus met this burden.

A. Publication of a Statement of Fact

Defamation requires "the publication of a false statement of fact to a third party." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 623 (Tex. 2018) (citing *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017)). Statements that are not verifiable as false are not defamatory. *Milkovich v. Lorain*

[11] Actual malice is not always required, but the parties agree the standard applies to Neiman Marcus. Defamation 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." *See Lipsky*, 460 S.W.3d at 593. Business-disparagement claims require a showing that "(1) the defendant published false and disparaging information about [plaintiff], (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff." *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003). The two claims have both similarities and differences, and "[d]epending on the circumstances . . . a plaintiff may have a claim for defamation, or for business disparagement, or for both." *Lipsky*, 460 S.W.3d at 591.

Journal Co., 497 U.S. 1, 21–22 (1990). "[S]tatements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact, are opinions. Whether a statement is an opinion is a question of law." *Tatum*, 554 S.W.3d at 639 (citing *Bentley v. Bunton*, 94 S.W.3d 561, 580 (Tex. 2002)). We must "focus not only 'on a statement's verifiability,' but also on 'the entire context in which it was made.'" *Id*. (quoting *Bentley*, 94 S.W.3d at 581). Additionally, we must remain mindful of the type of writing at issue. *Id*. ("The type of writing at issue, though not dispositive, must never cease to inform the reviewing court's analysis.").

Marble Ridge argues that its seven allegedly defamatory statements are statements of opinion, not fact, and that its sixth statement was also non-actionable rhetorical hyperbole.[12] Neiman Marcus disputes these arguments.

With its TCPA response, Neiman Marcus presented in its exhibits 8, 10, and 13 the full text of Marble Ridge's statements on September 18, 21, and 25, 2018, which allows us to consider them in their full context. Considering the source, subject matter, matter communicated, and expressed purpose of the communications, we conclude that a reasonable person of ordinary intelligence could conclude from Marble Ridge's statements that Marble Ridge, a sophisticated

[12] In *Greenbelt Co-operative Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 14 (1970), the Supreme Court used "rhetorical hyperbole" to describe a speaker's use of the word "blackmail" in a news article and described rhetorical hyperbole as "a vigorous epithet used by those who considered [the subject's] negotiating position extremely unreasonable." We have described rhetorical hyperbole as "extravagant exaggeration [that is] employed for rhetorical effect." *Backes v. Misko*, 486 S.W.3d 7, 26 (Tex. App.—Dallas 2015, pet. denied).

hedge fund claiming in its communications to hold certain Neiman Marcus interests, had reviewed information from which it had concluded that Neiman Marcus was in default of its Indentures.

Whether or not Neiman Marcus was in default of its Indentures is verifiable; thus, Marble Ridge's statements are statements of fact, not opinion. *See Tatum*, 554 S.W.3d at 634 (party cannot avoid liability for defamatory implications simply by couching them within subjective opinion) (citing *Milkovich*, 497 U.S. at 19); *D Magazine Partners, L.P.*, 529 S.W.3d at 437–38 (when viewing communications as a whole, reasonable person could perceive communications as accusing claimant of providing false information to agency in order to obtain benefits to which she was not entitled); *Bentley*, 94 S.W.3d at 569–71 (reasonable listener could interpret radio host's comments as defamatory).

In arguing its position, Marble Ridge primarily relies on *Paulsen v. Yarrell*, 537 S.W.3d 224 (Tex. App.—Houston [1st Dist.] 2017, pet. denied), which is distinguishable. There, the court concluded a lawyer's letter to a law school about a law professor's potential breach of ethics was a statement of opinion based on the context in that case, which included communications that were much less definitive than those involved here. *See id*. at 236–37.

We reject Marble Ridge's argument that its sixth statement regarding "theft of assets" was rhetorical hyperbole or mere opinion masquerading as fact. In *Moldovan v. Polito*, No. 05-15-01052-CV, 2016 WL 4131890, at *8 (Tex. App.—

Dallas Aug. 2, 2016 pet. denied) (mem. op.), we determined that although a customer's statement that wedding photographs were "being held hostage" could not be taken literally, the statement did not amount to rhetorical hyperbole, as a reasonable person would understand the statement to mean that the photographer was wrongfully refusing to release the photos that the couple had paid for and were entitled to receive. Similarly, we conclude that under the circumstances here, a reasonable person would understand Marble Ridge's sixth statement to mean that entities with a rightful claim to the assets were being harmed by the designations and transactions about which Marble Ridge complained.

We also distinguish another case that, although not cited by the parties, was recently issued by our Court. In *California Commercial Investment Group, Inc. v. Herrington*, we stated, "[I]n distinguishing between fact (verifiable as false) and opinion, we focus on a statement's verifiability," and even if it is verifiable as false, we "consider the entire context of the statement which may disclose that it is merely an opinion masquerading as fact." No. 05-19-00805-CV, 2020 WL 3820907, at *7 (Tex. App.—Dallas July 8, 2020, no pet.) (mem. op.) (quoting *Scripps NP Operating LLC v. Carter*, 573 S.W.3d 781, 795 (Tex. 2019)). There, we stated that an apartment manager's statements to police during a criminal investigation of an alleged burglary were statements of opinion. *Id*. at *7–8. In her second interview with the police, the manager stated she "kn[e]w[] very well that [Herrington, the TCPA nonmovant] staged the burglary so that he could steal property and sell it,"

and she listed six reasons why she doubted Herrington's story to the police about the alleged burglary at the location where she and Herrington both worked. *Id*. at *1, 8.

Herrington is distinguishable because of the vastly different context and content of the statements at issue. The statements in this record are far less speculative, and far more definitive, than those at issue in *Herrington*, and they were made at Marble Ridge's own direction and discretion, not in response to questioning during a police investigation. Moreover, unlike Herrington, Neiman Marcus has presented other evidence of falsity, as we discuss in the next section. *See id*. at *7–8 (noting that manager's statements were the only proof of falsity Herrington relied on in trying to satisfy his prima facie case under a step-two TCPA analysis).

We conclude that Neiman Marcus presented sufficient prima facie proof that Marble Ridge's allegedly defamatory statements were verifiable statements of fact and therefore conclude Neiman Marcus satisfied its step-two burden on this element.

B. Falsity of the Statements

Marble Ridge also argues Neiman Marcus failed to establish a prima facie case that Marble Ridge's statements were false, which Neiman Marcus disputes. We agree with Neiman Marcus.

In its pleading and in the evidence submitted with its TCPA response, Neiman Marcus presented a detailed account of the events and transactions leading up to the current dispute, including those regarding the MyTheresa designation, the PropCo transaction, and the Marble Ridge communications at issue.

These materials included an affidavit and related attachments from Eric Artho,[13] the person responsible for assessing Neiman Marcus's compliance with the debt documents and for calculating relevant financial ratios and basket capacity thereunder. Artho attached to his affidavit the debt documents, including Neiman Marcus's term loan agreement, its revolving credit agreement, and its three Indentures. Taken together, these showed that Neiman Marcus was in compliance with the debt documents with regard to the interest-coverage ratio, the only specific grounds for default that Marble Ridge asserted. Thus, Neiman Marcus's pleadings and evidence explained how and why Neiman Marcus was in compliance with and was not in default under those debt documents regarding those events.

Marble Ridge cites no cases to support its argument that Neiman Marcus failed to satisfy its step-two burden on this particular element. Instead, Marble Ridge argues that certain information—specifically, a January 2017 officer's certificate—could be considered in calculating the interest-coverage ratio and that Neiman Marcus failed to "establish a prima facie case that the Indentures precluded use of [that information] in calculating the [interest-coverage ratio]." Marble Ridge also faults Neiman Marcus for failing to answer or address various questions Marble Ridge asked in its challenged communications.

[13] Artho's affidavit indicates he serves as Vice President, Corporate Finance and Treasurer for Neiman Marcus Group LTC LLC and The Neiman Marcus Group LLC.

As Neiman Marcus argues, Marble Ridge's response on this issue appears to be an attempt to simply rebut the information Neiman Marcus has provided in its response rather than to show that Neiman Marcus's information fails to satisfy its own TCPA burden. We "only consider the pleadings and evidence in favor of the plaintiff's case when determining whether it established the requisite prima facie proof." *Bass*, 2019 WL 3940976, at *18 (citations omitted). When considering that information here, we conclude that Neiman Marcus presented the necessary prima facie proof of falsity of Marble Ridge's allegedly defamatory statements.

C. Actual Malice

Marble Ridge also argues Neiman Marcus failed to provide sufficient prima facie proof of actual malice.

To establish this element, Neiman Marcus must show that a defamatory statement was published either with knowledge of its falsity or with reckless disregard as to its truth. *See Hearst Corp. v. Skeen*, 159 S.W.3d 633, 637 (Tex. 2005) (per curiam). Recklessness, which Neiman Marcus relies upon here, is a subjective standard focusing on the defendant's conduct and state of mind and requires evidence that the defendant "entertained serious doubts as to the truth" when the information was published and had a "high degree of awareness" of the probable falsity of the statements. *Bentley*, 94 S.W.3d at 591 (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)). Recklessness can be found when there are obvious reasons to doubt the speaker's veracity or accuracy.

See id. Neiman Marcus argues actual malice is demonstrated in several ways, including by Marble Ridge's "rush" to publish its accusations—which were designed to "pressure" Neiman Marcus and were sent despite Marble Ridge's own questions and its access to the truth—and by Marble Ridge's repetition of its accusations of default in its September 25, 2018 letter, after Neiman Marcus told Marble Ridge that it was not in default.

Neiman Marcus's pleadings do not include any specific allegations regarding actual malice except through allegations made on information and belief. The affidavits Neiman Marcus presented do not specifically mention "actual malice," but the parties presented evidence pertinent to this issue, including Artho's and Kamensky's affidavits and their respective attachments. According to Artho, Neiman Marcus's necessary interest-coverage ratio under the Indentures "was at least 2.0x" and "this requirement . . . was met in March 2017 [the month of the Designation under the Indentures], as the interest-coverage ratio was approximately 2.07x," "using Neiman Marcus financial information for the four quarters ending on October 29, 2016." Kamensky testified about that financial information as follows:

> [Questioning by Neiman Marcus's counsel; answers by Kamensky]
>
> Q: Mr. Kamensky, I hand you a document marked Exhibit 9 which was produced by Marble Ridge. Do you recognize this document?
>
> A: I do.
>
> Q: Is this a financial officer's certificate for Q1 2017?

A: Yes.

Q: Did you review this document before you produced it to Neiman Marcus?

A: I did.

Q: Is this one of the documents that you and your team of Marble Ridge folks analyzed in the exhaustive process you described in your affidavit to determine whether Neiman Marcus was in default?

A: Yes. As I said, there was a lot of, we spent a lot of time analyzing the company's covenants, we looked at the external research reports, relied on external experts. The documents here is [sic] the officer's certificate under the term loan agreement from, I believe, October 29, 2016. . . .

. . . .

Q: And it's your position that you can't determine the [interest-coverage ratio] that would have been in place, that would have been applicable as of the time of the transactions from this document, is that correct?

A: I believe that the [interest-coverage ratio] can be calculated from this document even though there are different definitions. I don't have that calculation in front of me. . . . I believe what this shows you is the calculation of the leverage ratio . . . .

Kamensky's affidavit reflects that "on September 14, 2018, [he] relayed [Marble Ridge's] concerns that the Redesignation may have caused a default under the Indentures . . . to provide [Neiman Marcus] with an opportunity to assuage those concerns." His affidavit also confirms that Marble Ridge made and sent the letter on September 18, 2018, the press release on September 21, 2018, and the additional letter on September 25, 2018.

Kamensky's affidavit also confirms Marble Ridge received Neiman Marcus's September 21, 2018 response informing Marble Ridge that "the allegations [Marble Ridge has] raised in its [September 18] letter are inaccurate, both legally and factually." The letter made additional statements regarding the designation and transactions in question, confirming that they were "permitted" and "allowed under the terms of [Neiman Marcus's] applicable debt documents" and also "complied with the law in all respects." Neiman Marcus indicated that its "ability to do these two transactions under the debt documents has been widely reported" and referred Marble Ridge to three specific media reports from various dates in 2017 and 2018.

Based on this record, we conclude Neiman Marcus met its burden under the TCPA to point to clear and specific evidence establishing that Marble Ridge's allegedly defamatory statements were made with actual malice, as Marble Ridge's actions under these circumstances amount to at least the minimum quantum of evidence necessary to establish a rational inference of reckless disregard of the truth. *See Bentley*, 94 S.W.3d at 591 (recklessness can be found when there are obvious reasons to doubt the accuracy of the informant's reports); *Bass*, 2019 WL 3940976, at *21–24 (concluding that actual malice had been established for TCPA purposes under circumstances analogous to those here).

Because Neiman Marcus satisfied its step-two burden on each of the challenged elements on its counterclaims, we overrule Marble Ridge's issue regarding section 27.005(c). *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c).

Step Three: Marble Ridge's Establishment of a Valid Defense

In its final issue, Marble Ridge argues it established a valid defense to Neiman Marcus's counterclaims, namely, the judicial-proceedings privilege. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d). In 1889, the Texas Supreme Court described the general concepts and policies behind the judicial-proceedings privilege, stating, "[F]or any defamatory matter in a pleading in a court of civil jurisdiction no action for libel may be maintained" and "proceedings in civil courts are absolutely privileged. Citizens ought to have the unqualified right to appeal to the civil courts for redress, without the fear of being called to answer for damages in libel." *Runge v. Franklin*, 10 S.W. 721, 724 (Tex. 1889). Since then, other "well-settled rules of law" have developed on the privilege, which may extend in certain cases to communications that are preliminary to—and not simply made in—a judicial proceeding. *See Reagan*, 166 S.W.2d at 912 (discussing various "well-settled rules of law" on the privilege); *Shell Oil Co. v. Writt*, 464 S.W.3d 650, 654–55 (Tex. 2015) (describing elements needed when communications are preliminary to a judicial proceeding). In *Shell Oil*, the court stated:

> The test for whether a communication is absolutely privileged when it occurs before judicial proceedings have begun entails both subjective and objective components. *See* RESTATEMENT (SECOND) OF TORTS § 588 cmt. e (1977) ("As to communications preliminary to a proposed judicial proceeding the rule . . . applies only when the communication has *some relation* to a proceeding that is *actually contemplated* in good faith and *under serious consideration* by the witness or a possible party to the proceeding.") (emphasis added). The fact that a formal proceeding does not eventually occur will not cause a communication

> to lose its absolutely privileged status; however, it remains that the possibility of a proceeding must have been a serious consideration at the time the communication was made. *See id*. ("The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered."); *see also United States v. Baggot*, 463 U.S. 476, 484 (1983) [(Burger, J., dissenting)] ("The words *preliminary to*" necessarily refer to judicial proceedings not yet in existence, where, for example, a claim is under study.").

Shell Oil, 464 S.W.3d at 655 (emphases on "actually contemplated" and "preliminary to" in original; other emphases added).[14] Marble Ridge argues the privilege applies to its allegedly defamatory statements. Neiman Marcus disputes this. In arguing their respective positions, the parties cite many cases, including *Shell Oil* and another Texas Supreme Court case,[15] various cases from our Court,[16] and several cases from our sister courts and the Fifth Circuit.[17] Of these cases, only *Landry's* involved review of the judicial-proceedings privilege in the TCPA context.

[14] In addition to section 587, which contains this comment as it pertains to statements by witnesses, the Restatement also contains similar comments in sections 586 and 587, which pertain to statements by lawyers or by parties. *See* RESTATEMENT (SECOND) OF TORTS § 586 cmt. e (for lawyers); *id*. § 587 cmt. e (for parties).

[15] *See James v. Brown*, 637 S.W.2d 914 (Tex. 1982) (per curiam).

[16] *See Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220 (Tex. App.—Dallas 2000, pet. denied) (op. on reh'g); *Odeneal v. Wofford*, 668 S.W.2d 819 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); *Russell v. Clark*, 620 S.W.2d 865 (Tex. App.—Dallas 1981, writ ref'd n.r.e.). We follow our own precedent and may not overrule a prior panel decision of this Court absent an intervening change in the law by the legislature, a higher court, or this Court sitting en banc. *Dyer*, 573 S.W.3d at 427; *MobileVision Imaging Servs., L.L.C. v. LifeCare Hosp. of N. Texas, L.P.*, 260 S.W.3d 561, 566 (Tex. App.—Dallas 2008, no pet.).

[17] *See BancPass, Inc. v. Highway Toll Admin., LLC*, 863 F.3d 391 (5th Cir. 2017); *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (motion for rehearing on the petition for review was filed July 15, 2020, and is currently pending); *McCrary v. Hightower*, 513 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (substitute opinion); *Krishnan v. Law Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied); *Bell v. Lee*, 49 S.W.3d 8 (Tex. App.—San Antonio 2001, no pet.); *Crain v. Smith*, 22 S.W.3d 58 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.).

See Landry's, 566 S.W.3d at 57–61.[18] We have also considered two TCPA cases from our Court involving the privilege, which the parties do not cite. *See Watson v. Hardman*, 497 S.W.3d 601, 608–09 (Tex. App.—Dallas 2016, no pet.); *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 284–85 (Tex. App.—Dallas 2015, pet. denied).[19] Based on the applicable law and the record before us and for the reasons we explain below, we conclude the privilege does not apply.

A. Pleading Status and Procedural Posture

Like other affirmative defenses, parties are generally required to plead the judicial-proceedings privilege because it is a defense meant to avoid or affirmatively defend against certain claims, including defamation and business disparagement claims. *See* TEX. R. CIV. P. 94 ("In a pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."); *Landry's*, 566 S.W.2d at 80 (Jewell, J., concurring and dissenting) (describing judicial-proceedings privilege as an affirmative defense); *Watson*, 497 S.W.3d at 608 (noting movant pleaded judicial-proceedings privilege in his answer as an affirmative defense); *Jenevein*, 114 S.W.3d at 745 (describing it as an

[18] *McCrary* also mentioned the TCPA, but only in the context of the procedural history of the case. *See McCrary*, 513 S.W.3d at 4–5 (affirming in part and reversing in part trial court's grants of summary judgment to various defendants claiming judicial-proceedings privilege).

[19] *Watson* and *Tervita* involved allegedly defamatory statements made during, not preliminary to, judicial or quasi-judicial proceedings. *See Watson*, 497 S.W.3d at 608 (allegedly defamatory statements made in a rule 202 petition); *Tervita*, 482 S.W.3d at 283 (allegedly defamatory statements made during workers' compensation benefits hearing). We also considered the privilege, but not in the TCPA context, in *Jenevein v. Friedman*, 114 S.W.3d 743, 745 (Tex. App.—Dallas 2015, no pet.).

affirmative defense); *Wilkinson v. USAA Fed. Sav. Bank Tr. Servs*., No. 14-13-00111-CV, 2014 WL 3002400, at *6 n.8 (Tex. App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op.) (same); *Clark v. Jenkins*, 248 S.W.3d 418, 433 (Tex. App.—Amarillo 2008, pet. denied) (the "privilege 'is an affirmative defense to be proved and is in the nature of confession and avoidance.'") (quoting *IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 471 (Tex. App.—Amarillo 2001, pet. denied)).[20]

Generally, an affirmative defense must be pleaded or it is waived. TEX. R. CIV. P. 94; *Shoemake v. Fogel, Ltd*., 826 S.W.2d 933, 937 (Tex. 1992). The requirement is not absolute, however, and in some cases, no waiver has been found when a defense is apparent on the face of the claimant's pleading and is established as a matter of law. *See Shoemake*, 826 S.W.2d at 937 (parental immunity not waived).

Pleadings are petitions and answers, not motions. *See* TEX. R. CIV. P. 45 (pleadings shall "be by petition and answer" and "consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's ground of defense"); *Rupert v. McCurdy*, 141 S.W.3d 334, 339 (Tex. App.—Dallas 2004, no pet.) ("[M]otions are not the functional equivalents of pleadings because insufficient similarities exist between a motion and a pleading to allow them to carry the same legal significance.") (multiple citations omitted).

[20] *See also* TEX. R. CIV. P. 81 ("When the defendant sets up a counter claim, the plaintiff may plead thereto under rules prescribed for pleadings of defensive matter by the defendant, so far as applicable.").

Marble Ridge included the judicial-proceedings privilege only in its TCPA motion but not in any pleading, and at the time of the TCPA hearing, Marble Ridge had no live pleading before the court.[21] Under these circumstances, one might reasonably question whether Marble Ridge asserted a "valid defense" under section 27.005(d) and whether an order granting Marble Ridge's motion on that basis would have resulted in a judgment not conforming to the pleadings.[22] However, because neither party has presented such questions for our review, we do not address them.[23] Instead, we assume, but do not decide, that the trial court could have granted Marble Ridge's TCPA motion based on a defense it never pleaded, and we turn to the question of whether Marble Ridge satisfied its burden under section 27.005(d).[24]

B. Substantive Analysis: Third-Step Burden Not Satisfied

Even assuming the trial court could have granted Marble Ridge's TCPA motion based on a defense it never pleaded, we conclude Marble Ridge failed to satisfy its third-step burden under section 27.005(d) regarding the judicial-proceedings privilege because, according to the record before us, Marble Ridge was

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[21] Marble Ridge's first amended petition, its last pleading, was dismissed with prejudice on March 19, 2019, two days before the TCPA hearing.

[22] *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d) ("court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim"); TEX. R. CIV. P. 301 ("judgment of the court shall conform to the pleadings").

[23] A failure to raise pleading defects waives the issue for appellate review. *See* TEX. R. CIV. P. 90.

[24] *See also Dyke v. Hall*, No. 03-18-00457-CV, 2019 WL 5251139, at *12 (Tex. App.—Fort Worth, Oct. 17, 2019, no pet.) (mem. op.) (court assumed party pleaded valid defense and did not reach pleading issue where court determined TCPA movant had not satisfied elements of an argued defense).

not actually contemplating and seriously considering a judicial proceeding when it made the communications forming the basis for Neiman Marcus's counterclaims. *See Shell Oil*, 464 S.W.3d at 654–55.

In explaining the judicial-communications privilege, *Shell Oil* cites the Restatement (Second) of Torts section 588, which, by its heading, applies to witnesses in judicial proceedings. *See* RESTATEMENT (SECOND) OF TORTS § 588 (1977). Similar provisions exist for attorney and party communications under sections 586 and 587, the latter of which applies here. *See id.* §§ 586–87.[25]

When communications are preliminary to (and thus not included within) judicial proceedings, the absolute privilege applies only "when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration," and "[t]he bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." *See id.* § 587 cmt. e. The Restatement contains similar provisions for communications by attorneys and witnesses. *Id.* at §§ 586, 588 cmt. e. We examine these factors by considering the communications as of the time they were made. *See Shell Oil*, 464 S.W.3d at 654–55.

[25] Here, the communications at issue were made by Kamensky, Marble Ridge's managing partner, a non-practicing lawyer. Because Kamensky's communications were made on Marble Ridge's behalf and in the apparent capacity as its managing partner, not as its lawyer, we conclude section 587 applies here. *See* RESTATEMENT (SECOND) OF TORTS §§ 586–87 (Section 586 applies to attorney communications "in a judicial proceeding in which [the attorney] participates as counsel").

1) Landry's *and* BancPass

In their arguments to the trial court, the parties primarily relied on two cases to support their positions, with Marble Ridge relying on *Landry's*, and Neiman Marcus relying on *BancPass*. *See Landry's*, 566 S.W.3d at 57–61 (concluding privilege applied); *BancPass*, 863 F.3d at 401–03 (concluding it did not). Both sides continue to rely on these cases on appeal, so we begin there.

In *Landry's*, the allegedly defamatory statements were made by an animal-rights group and its attorneys in a mandatory pre-suit notice letter under the Endangered Species Act and in related press releases, all of which communicated an intent to sue Landry's over its care and housing of tigers in an exhibit at one of the restaurants Landry's operated. *Landry's*, 566 S.W.3d at 49. After Landry's sued in response to those communications, the animal-rights group and its attorneys moved for dismissal under the TCPA, arguing Landry's claims related to their exercise of their rights of free speech, association, and petition. *Id.* at 52. The trial court granted the motion, and Landry's appealed. *Id*. On appeal, the court explained that, when the judicial-proceedings communications privilege involves statements made before judicial proceedings begin, the privilege requires both objective and subjective components, stating:

> If the statement was made before judicial proceedings were instituted, the statement is privileged only if it meets both an objective and a subjective component. Objectively, the statement must be related to the proposed litigation; subjectively, the proceeding must have been

> actually contemplated in good faith and under serious consideration when the statement was made.

Id. at 58. The court then examined the record and concluded the communications at issue were objectively related to a contemplated legal proceeding, where they described the allegations the group and its lawyers intended to make against Landry's; cited federal statutes, regulations, case law, scholarly articles, and other items; and made an offer to forgo litigation in exchange for an agreement to re-house the tigers. The court stated that the communications reflected that, at the time the challenged statements were made, "a lawsuit under the Endangered Species Act was not a mere possibility" and that the group was "taking affirmative steps toward litigation." *Id*. at 59. As to the subjective component, Landry's argued the privilege did not apply because litigation was not seriously considered at the time, when the group had not sued Landry's before the case was being argued on appeal, but the court rejected that argument, noting that Landry's had sued first, on the fifty-ninth day after receiving the mandatory sixty-day pre-suit notice letter. *Id*. at 60. Under those circumstances, the court stated: "That [the group] refrained from suing Landry's in federal court while simultaneously defending themselves in state court does not give rise to an inference that they had not been seriously contemplating a federal suit before Landry's sued them." *Id*. Based on that record, the court affirmed the dismissal of Landry's claims. *Id*. at 50, 61, 73–74.

In *BancPass*, the case Neiman Marcus primarily relies on, the court concluded that the privilege did not apply, mainly because of a disconnect between the purpose

of the communications at issue and the litigation that followed. *See BancPass*, 863 F.3d at 401–03. *BancPass* involved litigation between two competing toll service companies. *Id*. at 395. The allegedly defamatory statements at issue were made by HTA, a company that contracted with certain rental-car companies to set up various processes that, in essence, enabled easier tollway use and payment of tolls by rental-car customers. *Id*. HTA's statements were communicated in letters to the Texas Department of Transportation (TxDOT), Apple, and Google and accused a competitor, BancPass, of illegal activity in connection with BancPass's product, an application that rental-car drivers could add to their cell phones to accomplish a similar purpose without incurring the fees charged by HTA and similar toll-servicing companies. *Id*. at 395–96.

HTA's letter to TxDOT expressed concern about the app and BancPass's alleged intentional interference with contracts between rental-car companies and the rental-car companies' customers; informed TxDOT that HTA would work with counsel to take any and all legal actions necessary to protect its rights and comply with Texas law and its own agreements with TxDOT; and indicated HTA would hold BancPass or rental-car customers responsible for "any such actions involving the rental agency vehicles." *Id*. at 395. HTA's letters to Apple and Google referred to BancPass's app as "illegal," demanded that Apple and Google remove it from their app stores for alleged violations of their internal policies, and stated that the app allowed users to engage in unlawful activities, including a felony HTA alleged

users would "unwittingly commit" by misrepresenting to state authorities various details about vehicle registration. *Id*. at 395–96. Initially, BancPass had no knowledge of HTA's statements to TxDOT, Apple, or Google. However, after HTA threatened BancPass with legal action if it did not stop marketing the app to rental car customers, BancPass sued HTA for a declaratory judgment that BancPass was not tortiously interfering with HTA's contracts. During discovery, BancPass received HTA's letters to TxDOT, Apple, and Google and pleaded a claim for defamation thereafter. *Id*. at 396. HTA moved for summary judgment on BancPass's defamation claim and argued its communications were absolutely privileged under the judicial-proceedings privilege. *Id*. at 396, 401. The trial court denied summary judgment, and the court of appeals affirmed. *Id*. at 394, 406. In doing so, the court discussed the origins of the rule, analyzed various cases, and made an *Erie*[26] guess predicting how the Texas Supreme Court would resolve the issue if presented with the same case. *Id*. at 401–03. Based on its survey of Texas law, the court noted, "Texas caselaw is clear that our analysis must focus on the connection between the communications and the specific legal action HTA now claims that it was contemplating, rather than legal action more broadly." *Id*. at 402. The court concluded that the privilege did not apply, agreeing with the district court

[26] *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

that the law's "limits"[27] preclude application of the privilege, "most significantly because of the disconnect between the purpose of the communications and HTA's later tortious interference litigation." *Id*. at 403.

2) Texas Supreme Court Cases: James *and* Shell Oil

Next, we discuss the only binding cases the parties cite, *James* and *Shell Oil*.

James involved psychiatrists' communications about a party's mental-health condition to a probate judge in an involuntary-commitment proceeding under the mental health code. *James*, 637 S.W.2d at 916. Following her release, James sued the psychiatrists for libel and other claims in connection with those communications. *Id*. The trial court granted summary judgment for the psychiatrists, and the court of appeals affirmed in part and reversed in part. *Id*. James appealed, and the supreme court concluded that the psychiatrists' communications to the probate judge and to a lawyer were absolutely privileged and that the trial court's summary judgment regarding those communications was therefore proper. *Id.* at 917.

In *Shell Oil*, a former Shell employee sued Shell for defamation in connection with statements Shell made in a report provided to the United States Department of Justice (DOJ) relating to a criminal investigation by the DOJ of possible violations of the Foreign Corrupt Practices Act (FCPA) by one of Shell's contractors. *Shell Oil*, 464 S.W.2d at 651. Those communications occurred after DOJ sent an inquiry

[27] The court noted that despite the privilege's broad protection, the Restatement "recognizes limits on the reach of the privilege, particularly when the communications are made outside of judicial proceedings." *BancPass*, 863 F.3d at 402.

letter to Shell regarding its investigation and after a meeting between DOJ and Shell personnel in which Shell agreed to conduct an internal investigation and report its findings to the DOJ. *Id*. at 651–52. As a result of that internal investigation, Shell terminated the employment of Writt, one of the employees named in the investigation report. *Id*. at 652. Shell also provided the investigation report to the DOJ as agreed. *Id.* Writt then sued Shell for defamation and wrongful termination, and the trial court granted Shell's summary judgment motion, concluding that Shell's communications to the DOJ were absolutely privileged. *Id*. at 653. Writt appealed, and the court of appeals reversed, determining that the summary judgment evidence did not conclusively prove that at the time Shell provided its report to the DOJ, a criminal judicial proceeding against Shell or Writt was ongoing, actually contemplated, or under serious consideration by the DOJ or Shell, and that the communications were not absolutely privileged. *Id*. Shell appealed, arguing the DOJ solicited the information Shell provided as a result of an ongoing DOJ investigation and that the communications were absolutely privileged as preliminary to a proposed judicial or quasi-judicial proceeding. *Id*.

In deciding the appeal, the supreme court noted that it did not need to address whether the question of absolute privilege must be disproved as part of the plaintiff's case once it is raised or whether the privilege is an affirmative defense, because to obtain summary judgment, Shell had to present conclusive proof. *Id*. at 654. After discussing the judicial-communications privilege and various cases interpreting it,

see id. at 654–58, the court determined that Shell had provided conclusive proof that, when Shell provided the report to the DOJ, Shell was a target of the DOJ's investigation, the report related to the DOJ's inquiry, and Shell seriously contemplated the possibility that it might be prosecuted at the time it provided the report.[28] *Id.* at 658–59. As a result, the court ruled Shell's communication was absolutely privileged, reversed the judgment of the court of appeals, and reinstated the trial court's judgment. *Id.* at 659–60.

3) Various Cases by Our Court

Next, we discuss several of our own cases involving the privilege, three cited by the parties that were not in the TCPA context (*Russell*, *Finlan*, and *Odeneal*), and two others that were (*Tervita* and *Watson*). We applied the privilege in each of those cases, but those cases are distinguishable, as the communications in those cases were more closely connected to or were made in judicial proceedings.

In *Russell*, we considered whether the privilege applied to a letter written by Clark, an attorney, and sent to certain corporate investors following the supreme court's remand of earlier litigation between the corporation and the attorney's clients. *Russell*, 620 S.W.2d at 866. The earlier litigation involved a title dispute

[28] After Shell provided the report, but during the pendency of Writt's lawsuit, the DOJ filed an information charging Shell with conspiracy to violate the FCPA and aiding and abetting the making of false books and records, which was soon followed by the DOJ's and Shell's execution of a Deferred Prosecution Agreement, a type of agreement used by the DOJ when a company cooperates with an FCPA investigation. *Shell Oil*, 464 S.W.2d at 652.

over two oil and gas leases, and in that earlier litigation, Russell and Gulf States—the two plaintiffs who later sued Clark for libel—claimed title to those leases. *Id*.

In his letter to the corporate investors, Clark made various statements regarding Royal and Gulf States and developments in the earlier litigation, suggested those investors might also be victims of "dubious promotional techniques" by Russell and Gulf States, and requested information from those investors that, presumably because of the remand, might have yielded certain evidence. *Id.* at 866–68, 870. Russell and Gulf States then sued Clark for libel. *Id*. at 868. Clark claimed, in part, that his letter was absolutely privileged. *Id*. The trial court granted summary judgment for Clark, and Russell and Gulf States appealed. We affirmed. *Id*. at 869.

In doing so, we adopted the Restatement rule requiring some relationship between an attorney's allegedly defamatory communication and existing or proposed litigation[29] and concluded that Clark's letter was absolutely privileged under the circumstances there. *Id*. at 868–69. While we noted that the court must consider the entire communication in context and must extend the privilege to any statement bearing "some relation to an existing or proposed judicial proceeding," *see id.* at 870, we also warned that "the absolute privilege must not be extended to an attorney carte blanche. The act to which the privilege applies must bear some

[29] *See* RESTATEMENT (SECOND) OF TORTS § 586.

relationship to a judicial proceeding in which the attorney is employed, and must be in furtherance of that representation." *Id*. at 868.[30]

In *Finlan*, we considered whether the privilege applied to a lawyer's statements in an out-of-court press release following the filing of a petition in a case with a history of multiple lawsuits between multiple litigants. *Finlan*, 27 S.W.3d at 225, 237–38. We concluded the privilege applied because the press release had some relationship to the lawsuit and to other litigation between the same parties, and we affirmed summary judgment in DISD's favor on the claimants' defamation claims. *Finlan*, 27 S.W.3d at 239–40, 245.

In *Odeneal*, the plaintiffs sued an attorney for defamation in statements made to a State Bar of Texas Grievance Committee following a grievance regarding the attorney's conduct in connection with his representation of other parties in other litigation in which the grievants had been involved. *Odeneal*, 668 S.W.2d at 819. In reviewing the trial court's summary judgment in the attorney's favor, we affirmed in a two-page opinion, concluding that the attorney's statements "bore enough of a 'relation' to the proceeding to be afforded absolute privilege." *Id*. at 819–20.

In *Tervita*, a TCPA case, we considered a trial court's denial of an employer's TCPA motion in response to various claims brought by an injured employee,

[30] Immediately after stating these principles, we stated, "All doubt should be resolved in favor of the relevancy." *Id*. at 870. "Relevancy" in this context refers to the relation between the allegedly privileged communication and the judicial proceeding to which it allegedly relates. *See Senior Care Res., Inc. v. OAC Senior Living, LLC*, 442 S.W.3d 504, 513 (Tex. App.—Dallas 2014, no pet.) ("All doubt should be resolved in favor of the communication's relation to the proceeding.") (citing *Russell*, 620 S.W.2d at 870).

including claims for conspiracy and labor code violations for allegedly false statements made about the employee during testimony in the employee's worker's compensation benefit proceedings. *Tervita*, 482 S.W.2d at 285.

We concluded that the testimony in question, "given in a quasi-judicial proceeding before a governmental entity with the power to investigate and decide the issue, was an absolutely privileged communication." *Id*. (citations omitted). Thus, we determined that the company established a valid defense under section 27.005(d) as to those claims, *see* TEX. CIV. PRAC. & REM. CODE § 27.005(d), and we sustained the employer's issues regarding the portion of those claims relating to the false statements made in the worker's compensation benefit proceedings. *Tervita*, 482 S.W.2d at 285, 287.

In *Watson*, another TCPA case, we considered the privilege in connection with allegedly defamatory communications in a rule 202 petition filed against two persons who had collected and administered funds from a GoFundMe account following the death of a husband and wife in a serious car accident. *See* TEX. R. CIV. P. 202; *Watson*, 497 S.W.3d at 603–04. In that case, Watson, the person filing the rule 202 petition, claimed that the Hardmans, who had collected and administered the funds, had misappropriated those funds for their own use. *Watson*, 497 S.W.3d at 604. The Hardmans then brought a separate action for defamation and other claims, and in their amended petition they claimed Watson's statements in his rule 202 petition were "but one example" of communications accusing them of

malfeasance and theft. *Id*. Watson then filed a TCPA motion, which the trial court denied. *Id*. We reversed, concluding that Watson's statements in his rule 202 petition were absolutely privileged under section 27.005(d) and that the trial court erred in denying his motion as to that part of the Hardmans's claims. *Id*. at 608–09.

4) Other Cases

The parties also cite other cases to support their respective positions, but because of the obvious dissimilarity of most of them to the facts before us, we do not discuss them at length here.[31]

5) Application

Marble Ridge argues the privilege applies because its allegedly defamatory statements bear some relation to a judicial proceeding (objective requirement) that was contemplated in good faith and was being seriously considered at the time the statements were made (subjective requirement). Neiman Marcus disputes this.

We assume, without deciding, that Marble Ridge established the objective requirement for the judicial-proceedings privilege,[32] though we question it on these

[31] *See, e.g.*, *Krishnan*, 83 S.W.3d at 302 (in dissimilar case, privilege applied to attorney's mandatory pre-suit notice letter to physician regarding potential medical negligence claim); *Bell*, 49 S.W.3d at 11–12 (in dissimilar case, privilege applied to attorney's pre-suit demand letter regarding potential defamation claim); *Crain*, 22 S.W.3d at 60 (in dissimilar case, privilege applied to attorney's communications to chair of state bar's unauthorized practice of law committee and to lawyer for third party). The parties also cite *McCrary*, a case involving facts similar to those before us. 513 S.W.3d at 7 (court concluded privilege did not apply to pre-suit communications by wealth management advisor and third party where there was little to no nexus between statements and resulting lawsuit).

[32] *See Russell*, 620 S.W.2d at 868–69; *Finlan*, 27 S.W.3d at 239–40, 245; RESTATEMENT (SECOND) OF TORTS § 588 cmt c. ("It is not necessary that the defamatory matter be relevant or material to any issue before the court. It is enough that it have some reference to the subject of the inquiry.")

facts, where the pre-suit communications were largely focused on Neiman Marcus's potential breach of its Indentures, a claim not raised below.

However, as to the subjective requirement, we conclude Marble Ridge failed to establish that at the time it made the September 18, September 21, and September 25 communications, Marble Ridge was contemplating in good faith and seriously considering a judicial proceeding.

First, in his June 19, 2019 affidavit, Kamensky stated Marble Ridge's September 18, 2018 letter "sets out the purposes and concerns of [Marble Ridge] that prompted its writing" and that it "accurately reflects [its] views and intentions . . . at the time it was written." Although Kamensky states Marble Ridge "was seriously contemplating bringing a suit against [Neiman Marcus]" when it sent the September 18, 2018 letter, that letter and its later communications reflect other purposes and intentions. The letter indicates Marble Ridge sought additional information from Neiman Marcus "[t]o facilitate a meaningful dialogue." In its press release, Marble Ridge explained it "asked [Neiman Marcus] to provide information in order to assess whether the transactions complied with the Indentures as well as [Neiman Marcus's] rationale for entering into the transactions." In its September 25, 2018 letter (sent just a week after the September 18 letter), Marble Ridge stated, "In our September 18, 2018 letter . . . we requested information necessary to further understand the Transactions with the hope of opening a

constructive dialogue." Marble Ridge concludes its September 25, 2018 letter by stating:

> The potential sale of MyTheresa and the premier real estate owned by Neiman Marcus would generate billions of dollars in proceeds that could be used to substantially reduce [Neiman Marcus's] indebtedness and put [Neiman Marcus] on more solid financial footing, enabling it to invest in and grow its core business.
>
> We believe a transaction along these lines would result in (1) immediate deleveraging of [Neiman Marcus] from over 10x to approximately 6x; (2) immediate reduction of interest expense; and (3) increased cash flows to [Neiman Marcus]. Moreover, we believe this approach would likely result in an extended runway for [Neiman Marcus] to meet its long-term potential while avoiding potentially significant tax consequences.
>
> We are prepared to provide financial support for this approach and are available to discuss the details of our proposal with you and [Neiman Marcus's] various stakeholders. We are confident a recapitalization along these lines is superior to any alternative proposal supported by [Neiman Marcus's] out-of-the-money Sponsors.
>
> We look forward to receiving your response to our proposal.

Similarly, Kamensky's deposition testimony also reflects there was no serious consideration of a judicial proceeding at the time the statements were made. Ten days after signing his affidavit, Kamensky was deposed and testified as follows:

> Q: So the only purpose of this [September 18, 2018] letter is to get facts from the company concerning the redesignation, correct?
>
> A: A hundred percent, yes.
>
> . . . .
>
> A: . . . I'm sorry, apologies. Can I go back and add something to the answer I gave two back about this letter and the purpose of it? . . . .

Q: Yes, you said it was [a] hundred percent.

A: So let me just clarify that answer.

Q: Okay.

A: At the time that we wrote this letter my hope was that we were going to get answers from the company, but that [was] because we had been stonewalled the entire time, I held very little – the hope that I had had been severely diminished because we had been stonewalled so much. And so by the time we wrote this letter, my view was that this was likely going to be litigation.

And so by the time that we wrote this letter, my view was that we were giving them an opportunity to answer to questions, but given their course of conduct up to that point, we were likely going to have to sue to enforce our rights.

. . . .

Q: . . . . Sitting here today you don't recall what you did with the letter after September 18th on September 21st?

A: I think what you're referring to is the fact that we released the letter publicly, right?

Q: Right.

A: . . . . In my mind the only way that the company was going to have any reaction is if there was some pressure put on them, if there was some third party, right? They weren't answering our questions, and that's when the letter was released to the press.

Q: So your testimony is that you released the letter to the press to put pressure on the company?

A: My testimony is that we released the letter to the press to make the market aware of our concerns. That is my testimony.

Based on this record, we conclude Marble Ridge did not satisfy its burden under section 27.005(d) regarding the judicial-communications privilege because Marble Ridge was not actually contemplating and giving serious consideration to a

judicial proceeding when making its September 18, September 21, and September 25, 2018 communications. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d); *Shell Oil*, 464 S.W.3d at 655; RESTATEMENT (SECOND) OF TORTS § 587 cmt. e ("bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered").

Though none of the cited cases involve the precise situation we face here, this case is more similar to *BancPass* and *McCrary*, which we find analogous, than to *Landry's*, *Krishnan*, *Bell*, *Crain*, or *Russell*, which we find distinguishable. *Compare BancPass*, 863 F.3d at 401–03 (privilege did not apply to pre-suit communications by business entity and its lawyers where disconnect existed between purpose of communications and entity's litigation that followed), *and McCrary*, 513 S.W.3d at 7 (privilege did not apply to allegedly defamatory, pre-suit communications by individual wealth management advisor and third party where pleadings did not affirmatively establish nexus to lawsuit under serious consideration), *with Landry's*, 566 S.W.3d at 57–61 (mandatory pre-suit notice letter cited federal statutes, regulations, case law, scholarly articles, and other items and made offer to forgo litigation in exchange for certain agreements), *Krishnan*, 83 S.W.3d at 302 (privilege applied to attorney's mandatory pre-suit notice letter to physician regarding potential medical negligence claim), *Bell*, 49 S.W.3d at 11–12 (privilege applied to attorney's pre-suit demand letter regarding potential defamation claim), *Crain*, 22 S.W.3d at 60 (privilege applied to attorney's communications to

chair of state bar's unauthorized practice of law committee and to lawyer for third party), *and Russell*, 620 S.W.2d at 866 (privilege applied to attorney's letter referring to other pending litigation). Unlike the communications in *Landry's*, *Krishnan*, *Bell*, *Crain*, and *Russell*, the communications here bore only a tangential connection to a judicial proceeding, and they do not support an inference that Marble Ridge was taking affirmative steps toward litigation.

On this record, we agree with Neiman Marcus that applying the privilege to Marble Ridge's communications would be an unprecedented expansion of the privilege—one we find both unwarranted and not in furtherance of the privilege's underlying goals. Because we conclude Marble Ridge failed to satisfy its burden regarding the judicial-communications privilege on this record, we overrule Marble Ridge's issue regarding section 27.005(d). *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d) ; *Shell Oil*, 464 S.W.3d at 655; RESTATEMENT (SECOND) OF TORTS § 587 cmt. e.

CONCLUSION

We affirm the trial court's April 9, 2019 order denying Marble Ridge's amended motion to dismiss Neiman Marcus's counterclaims.

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/Ken Molberg/
KEN MOLBERG
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARBLE RIDGE CAPITAL LP AND MARBLE RIDGE MASTER FUND LP, Appellants

No. 05-19-00443-CV V.

NEIMAN MARCUS GROUP, INC., MARIPOSA INTERMEDIATE HOLDINGS LLC, NEIMAN MARCUS GROUP LTD LLC, THE NEIMAN MARCUS GROUP LLC, and NMG INTERNATIONAL LLC, Appellees

On Appeal from the 116th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-18-18371. Opinion delivered by Justice Molberg. Justice Partida-Kipness participating.

In accordance with this Court's opinion of this date, the trial court's April 9, 2019 order denying appellants' amended motion to dismiss appellees' counterclaims is **AFFIRMED**.

It is **ORDERED** that appellee NEIMAN MARCUS GROUP, INC., MARIPOSA INTERMEDIATE HOLDINGS LLC, NEIMAN MARCUS GROUP LTD LLC, THE NEIMAN MARCUS GROUP LLC, and NMG INTERNATIONAL LLC recover their costs of this appeal from appellants MARBLE RIDGE CAPITAL LP and MARBLE RIDGE MASTER FUND LP.

Judgment entered this 30th day of September, 2020.