Opinion issued August 11, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00847-CV

KEANE FRAC, LP, Appellant

V.

SP SILICA SALES, LLC, F/K/A PREFERRED SANDS OF TEXAS, LLC, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2018-79957

O P I N I O N

In this interlocutory appeal, appellee SP Silica Sales, LLC, *f/k/a* Preferred Sands of Texas, LLC, sued appellant Keane Frac, LP, for breach of contract, fraud, and fraudulent inducement arising out of an agreement to purchase frac sand. Keane

filed a motion to dismiss the suit under the Texas Citizens Participation Act (TCPA). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011. The trial court denied the TCPA motion to dismiss, found that the motion was frivolous, and assessed attorney's fees and costs against Keane. In three issues, Keane argues that the trial court erroneously denied its TCPA motion because: (1) the TCPA applies to SP Silica's claims; (2) SP Silica has not established a prima facie case on each element of its claims; and (3) Keane established by a preponderance of the evidence that the defense of waiver bars SP Silica's claims. In a fourth issue, Keane argues that the trial court erred by awarding attorney's fees and costs against it.

We affirm in part and reverse and render judgment in part.

Background

A. Factual Background and the Contracts Between the Parties

SP Silica operates frac sand plants, and it sells frac sand to companies involved in the oil & gas industry. Keane provides well completion services, which includes both horizontal and vertical fracturing—an activity that requires large amounts of frac sand. In May 2017, Keane entered into a Sand Purchase Agreement ("the SPA") with Mullingar Ranch, LLC, to purchase frac sand. The SPA had an effective date of January 1, 2018. In the summer of 2017, Mullingar Ranch began construction on a frac plant in west Texas called the Monahans Plant. In December

2017, shortly before the effective date of the SPA, Mullingar Ranch assigned its rights and obligations under the SPA to SP Silica.

The SPA provided that the initial term of the agreement was from January 1, 2018, through December 31, 2019, and that Keane had the option to exercise two one-year renewal terms. Under the SPA, Keane would purchase a specified aggregate tonnage of sand from the Monahans Plant for each year of the contract, and SP Silica would make one-twelfth of that aggregate amount available to Keane each calendar month. Keane agreed that, each year of the contract, it would be obligated to take delivery of the aggregate amount per year, even if it could obtain the sand at a lower price from another supplier. Section 2(d) of the SPA provided that if SP Silica failed to deliver at least 95% of the total amount of sand under an accepted purchase order and Keane "purchases equivalent Sand to cover such shortfall" from a third-party supplier, then Keane would be entitled to receive a dollar per dollar credit on amounts payable to SP Silica.

Section 2(f) addressed operation of the Monahans Plant and provided that SP Silica "shall" source the sand that it provided to Keane from the Monahans Plant. However, if the Monahans Plant was not able to fulfill Keane's purchase orders by the effective date of the SPA, SP Silica could source the sand from one of its other plants. This section also provided that for each calendar month that the Monahans Plant was not operational, Keane could purchase up to one-twelfth of the aggregate

amount of its annual purchase amount from third parties on the "spot market," and, if the prices it paid on the spot market were higher than the price under the SPA, Keane had the option to receive a credit from SP Silica or reimbursement from SP Silica for the difference between the cost of third-party sand and sand under the SPA.

The SPA set out procedures for ordering sand, providing that Keane was to submit purchase orders to SP Silica via email and that no purchase order was binding on SP Silica unless SP Silica accepted it by confirming the order in writing within 48 hours. Upon SP Silica's acceptance of a purchase order, it had seven calendar days to have the purchased sand ready for loading onto Keane's trucks. The SPA provided remedies for Keane if SP Silica's loads of sand were late, including a credit towards the Annual Purchase Amount or the procurement of substitute sand from another source coupled with a "discount from what [Keane] pays on Seller's invoices under this Agreement."

Section 6(c)(iii) of the SPA also stated that Keane could terminate the agreement upon written notice to SP Silica if, during a twelve-month period, (1) Keane was not in default of its payment obligations, (2) Keane "has requested Sand pursuant to a Valid Purchase Order in quantities substantially consistent with the Annual Purchase Amount and the terms and conditions of this Agreement"; (3) on three or more occasions, SP Silica failed to deliver at least fifty percent of the

sand under a valid purchase order of more than 2,500 tons of sand; and (4) Keane "delivered prompt written notice of each such failure" to SP Silica.

In January and February 2018, the first two months in which the SPA was effective, the Monahans Plant was not yet operational, and Keane had to purchase frac sand from other sellers on the "spot market" and then submit the invoices to SP Silica for payment of the difference between that price and the price under the SPA. In March 2018, with the Monahans Plant still not complete, the parties recognized that this method was not sustainable, and they entered into a second agreement ("the Payment Agreement") on March 28, 2018. The Payment Agreement acknowledged that, as of the date of the agreement, the Monahans Plant "ha[d] not ramped to full production capacity"; that Keane "ha[d] already submitted multiple purchase orders ("POs") under the SPA that [had] not been filled by Payor [SP Silica] and [Keane] ha[d], therefore, been forced to make alternate purchases to acquire the sand that Keane ha[d] contracted to acquire from Payor under the SPA"; that the SPA permitted Keane to terminate the agreement if, within a twelve-month period, SP Silica failed on three occasions to deliver at least 50% of Keane's purchase order; that several provisions of the SPA allowed Keane to receive either credit or reimbursement, at Keane's option, to cover spot purchases that it had to make; and that the parties wished to "establish a means for resolving the issues created by the

[Monahans Plant's] not meeting Payor's supply obligations and certain of Keane's POs not being filled."

The Payment Agreement provided that it covered purchase orders that Keane had already submitted under the SPA and future purchase orders that it would submit until the Monahans Plant was "in Full Performance," which the agreement defined as being achieved once SP Silica "has had two consecutive calendar months where it has not failed to deliver on all [purchase order] volumes up to 1/12 of the Annual Purchase Amount." After the Monahans Plant reached "Full Performance," the Payment Agreement would not cover any subsequent purchase orders. The Payment Agreement provided that, for any month in which the Monahans Plant was not in Full Performance, Keane "may submit invoices for cash and/or credit compensation . . . as outlined below" and that the terms specified in the agreement for invoices were "in lieu of the claim submission and compensation remedies" in three specific sections of the SPA.

The Payment Agreement attached as an exhibit invoices that Keane had already submitted to SP Silica for payment in January and February 2018. The agreement provided that "[n]o further backup documentation is required for the Exhibit A invoices than what has already been provided by Keane." The agreement further provided that, beginning March 1, 2018, if SP Silica failed to fully deliver under an accepted purchase order, and Keane purchased equivalent sand to cover the

shortfall, Keane might submit an invoice for the amount of equivalent sand. The Payment Agreement required Keane to submit a spreadsheet with the invoice that "document[s] such alternative purchases" and to "certify that the information in such spreadsheets is true and correct." Finally, the Agreement provided that within five business days of receiving an invoice, SP Silica "shall commit in writing . . . to satisfy the Invoice charges pursuant to this Agreement by making Installment Payments under Section 4 of this Agreement." SP Silica's installment payments would begin on April 1, 2018.

For each invoice that SP Silica acknowledged and committed to pay, it was to make its payments to Keane in five equal monthly installments. The installments would be applied as credits to sand delivered pursuant to the SPA during each of the five months following acknowledgement of the invoices. Under the Payment Agreement, "'Settlement' of an Invoice will occur when the total of Payor timely provided credits and/or payments compliant with this Agreement satisfy the amount due under an Invoice Acknowledged by Payor." Once an invoice was considered settled, Keane waived the right to count the purchase orders covered by the invoice as grounds for termination under Section 6(c) of the SPA and released SP Silica from any further payment obligation under the SPA. The Payment Agreement provided that if SP Silica failed to "make Settlement on an Invoice in a timely manner," Keane retained the right to count the purchase orders covered by the invoice "towards the

total necessary for termination of the SPA," under that agreement's terms. Keane could terminate the Payment Agreement upon SP Silica's failure to acknowledge an invoice or SP Silica's failure to make any payment in a timely manner.

On October 15, 2018, Keane sent SP Silica written notice terminating the SPA under Section 6(c)(iii). This notice identified eight purchase orders Keane had submitted in June 2018 that went unfilled by SP Silica. Keane stated that it had notified SP Silica of the shortfalls in sand delivered under those purchase orders and that, because SP Silica had failed on three or more occasions to fill at least 50% of a purchase order within the past twelve months, Keane was entitled to terminate the SPA.

B. Proceedings in the Trial Court

In November 2018, SP Silica sued Keane for breach of contract. SP Silica alleged that it had performed all of its obligations under both the SPA and the Payment Agreement "by delivering frac sand or alternatively timely crediting and/or timely reimbursing Keane for frac sand Keane purchased on the spot market." It alleged that Keane breached the SPA when Keane notified SP Silica that it was terminating the SPA because SP Silica had not fulfilled purchase orders that Keane had submitted in June 2018 under the SPA. It alleged that, because the Monahans Plant was still not fully operational in June 2018, purchase orders that Keane submitted to SP Silica in June 2018 were governed by the Payment Agreement, not

by the SPA, and that Keane's use of the June 2018 purchase orders "to count towards the total number of unfilled Purchase Orders needed to terminate the SPA" was a breach of the Payment Agreement. As damages, SP Silica sought both the amount it was owed under the SPA but did not receive due to Keane's early termination of the SPA and "the reimbursements [SP Silica] paid to and/or frac sand delivery credits provided to Keane in amounts greater than provided for under the Payment Agreement."

Keane answered and generally denied all of the allegations in SP Silica's original petition and specifically denied breaching either the SPA or the Payment Agreement. Keane later filed an amended answer in which it also asserted the affirmative defenses of waiver and accord and satisfaction.

In April 2019, SP Silica amended its petition. In addition to the allegations contained in its original petition, SP Silica alleged that Keane's certification that the invoices it sent SP Silica for January–May 2018 were true and correct was false and breached the Payment Agreement. It further alleged that Keane had "misrepresented the information in each of the January and February 2018 Invoices because the information corresponded to prices that exceeded the average market price for equivalent frac sand available in west Texas during those months." SP Silica alleged that Keane knew the information in these invoices was false when it submitted them to SP Silica and that Keane made the false representations "with the intent of creating

an unsustainable situation that would induce SP Silica to enter into the Payment Agreement so that Keane could then obtain sand at no cost to Keane." SP Silica further alleged that Keane falsely represented that it would perform under the Payment Agreement, "including that it would submit all purchase orders for sand according to the terms of the Payment Agreement until the Monahans Plant attained Full Performance," and that it made these representations to induce SP Silica into executing the Payment Agreement.

SP Silica reasserted its claims for breach of the SPA and the Payment Agreement. SP Silica also alleged a claim for "fraud/fraud in the inducement." SP Silica alleged that Keane's false representations included: (1) submitting invoices for January and February 2018 "reflecting prices for replacement sand that were in excess of the average market price for equivalent frac sand available in west Texas during those months"; (2) representing that, until the Monahans Plant became fully operational, Keane "would submit all future purchase orders for sand under a new payment agreement"; and (3) representing that it would continue purchasing sand from SP Silica for the full term of the SPA "once the Monahans Plant had attained Full Performance and the new payment agreement terminated." SP Silica alleged that Keane made these misrepresentations to induce it to enter into the Payment Agreement, which would allow Keane "to obtain sand for SP Silica for a substantial period of time at almost no cost," and that Keane made the misrepresentations with

the intent to apply future purchase orders to the SPA instead of to the Payment Agreement "so that Keane could use future purchase orders that were not filled as a basis to immediately terminate the SPA once all payments and sand credits under the Payment Agreement had been exhausted."

C. Keane's TCPA Motion to Dismiss

Keane moved to dismiss SP Silica's "new and amended" claims under the TCPA.[1] Keane first argued that the TCPA was applicable to SP Silica's fraud and amended breach of contract claims. Keane argued that the claims were based on, related to, or were in response to Keane's exercise of the right of free speech, statutorily defined in the TCPA as "a communication made in connection with a

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[1] Keane's motion stated, "Specifically, Keane moves to dismiss SP Silica's new and amended claims at ¶¶ 67, 68, and 72-88 of its April 17, 2019 Amended Petition." Paragraphs 67 and 68 of SP Silica's amended petition state:

> 67. Keane also breached Section 2(a) of the Payment Agreement by certifying that the information in the January 2018 and February 2018 Invoices was true and accurate, for at least the reason that the invoiced amounts exceeded market prices for equivalent sand available to Keane in west Texas in January 2017 and February 2018.
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> 68. Keane also breached Section 2(b) of the Payment Agreement by certifying that the information in the spreadsheets accompanying the March 2018, April 2018, and May 2018 Invoices was true and correct for at least the reason that the invoiced amounts exceeded the average market prices for frac sand available in west Texas during that time period.

Paragraphs 72–88 related to SP Silica's fraud/fraud in the inducement claims, which were newly added in the amended petition.

matter of public concern." Specifically, Keane argued that the alleged misrepresentations that formed the basis of SP Silica's claims concerned the amount Keane paid for replacement sand and its intent to perform under the Payment Agreement, which concerned "how SP Silica would pay for sand delivery failures." Keane therefore argued that the alleged misrepresentations concerned both "'a good, product, or service in the marketplace' (*i.e.*, sand, which SP Silica was selling to Keane and which Keane was buying on the spot market)" and the parties' economic well-being.

Keane further argued that SP Silica could not establish a prima facie case on each element of its new and amended claims. With respect to the fraudulent inducement claim, it argued that SP Silica could not present clear and specific evidence that it suffered any injury as a result of the alleged misrepresentations; that it justifiably relied on the alleged misrepresentations; and that, regarding alleged misrepresentations concerning January and February invoices, the representations were false or that SP Silica justifiably relied on them. With respect to the breach of the Payment Agreement claim, Keane argued that SP Silica could not produce clear and specific evidence that Keane breached the Payment Agreement because (1) the terms of the Payment Agreement itself incorporated several sections of the SPA and gave Keane the option to receive credit for reimbursement to cover purchases of sand on the spot market, and (2) there was no contractual requirement that Keane

"pay average 'market price' or below for replacement sand," and therefore Keane could not breach the Payment Agreement by submitting invoices for amounts exceeding the average market price. Keane also argued that SP Silica could present no evidence that Keane misrepresented the amount it paid for replacement sand.

In its response to Keane's motion to dismiss, SP Silica argued that its claims arose out of a private commercial transaction between two parties and did not implicate a "matter of public concern" as that phrase is defined in the TCPA. It argued that Keane's communications that formed the basis of SP Silica's claims were "certifications that the invoices it submitted to SP Silica for payment are true and accurate, along with a promise to perform under the terms of the Payment Agreement," and these statements did not concern goods or services in the marketplace or another matter of public concern. SP Silica pointed out that Keane's challenged communications did not concern the "quality or suitability or price of SP Silica's sand," but instead were a certification that it had purchased sand on the spot market to cover unfilled purchase orders and that the volume and price of this sand were true and accurate. SP Silica argued, "Keane's certifications only concern Keane's representation regarding the actions it undertook with respect to purchasing and then invoicing SP Silica for replacement sand" and any communications concerning Keane's promise about the Payment Agreement applying to purchase

orders before the Monahans Plant reached full performance also related "to Keane's conduct and ha[d] nothing to do with a good or service at all."

SP Silica also argued that it could produce clear and specific evidence of each element of its claims, and it attached affidavit evidence, the deposition testimony of two of Keane's corporate representatives, and business records between the parties. Further, SP Silica argued that Keane's motion to dismiss had no basis in law or fact and was therefore frivolous. SP Silica stated, "Keane's TCPA motion was served merely to delay discovery, improperly shift the TCPA burden to SP Silica, and cause SP Silica to incur unnecessary attorney's fees prosecuting its claims." SP Silica requested that, because Keane's motion was frivolous, the trial court award SP Silica its attorney's fees and costs incurred in responding to the motion.

At the hearing on Keane's motion, the trial court granted Keane leave to file a post-hearing reply. Keane again argued that its communications forming the basis of SP Silica's claims were related "to a good in the marketplace—frac sand—and to the economic well-being of Keane and SP Silica." Keane also continued to argue that SP Silica could not establish a prima facie case on every element of its causes of action. Keane additionally argued that the trial court must dismiss SP Silica's breach of contract claim because SP Silica "expressly waived any right to challenge the Invoices" by acknowledging the invoices and agreeing to pay them and the "settlement" process under the Payment Agreement "'[s]ettled' any dispute

regarding the Invoices and therefore acted as an accord and satisfaction of the delivery failure charges for January to May 2018."

The trial court denied Keane's motion to dismiss. In its order, the trial court found that Keane's motion to dismiss was frivolous, and it ordered that SP Silica was entitled to an award of its costs and attorney's fees incurred in responding to the motion.[2] This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (providing for interlocutory appeal of order denying TCPA motion to dismiss).

Texas Citizens Participation Act

In its first three issues, Keane contends that the trial court erred by denying its TCPA motion to dismiss SP Silica's claims because: (1) the TCPA applies to SP Silica's claims; (2) SP Silica did not establish a prima facie case on each element of its claims; and (3) Keane established the defense of waiver by a preponderance of the evidence, and this defense bars SP Silica's claims. In its fourth issue, Keane contends that the trial court erred by assessing attorney's fees and costs against it.

[2] This order did not award a specific amount of costs and attorney's fees to SP Silica. Instead, the order stated, "Plaintiff shall submit evidence of its costs and attorney's fees incurred in responding to Defendant's motion within 30 days of the date of this Order." No such evidence appears in the appellate record.

A. Standard of Review

We review de novo a trial court's ruling on a TCPA motion to dismiss. *Jordan v. Hall*, 510 S.W.3d 194, 197 (Tex. App.—Houston [1st Dist.] 2016, no pet.). In conducting our review, we consider the pleadings and the evidence in a light favorable to the nonmovant. *Id.*

Whether the TCPA applies to a particular claim is an issue of statutory interpretation that we review de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018); *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 213 (Tex. App.—Houston [1st Dist.] 2014, no pet.). When construing a statute, our objective is to determine and give effect to the Legislature's intent. *Youngkin*, 546 S.W.3d at 680 (quoting *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)). In determining legislative intent, we look to the plain meaning of the statute's words, which is the best expression of legislative intent "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Cheniere Energy*, 449 S.W.3d at 213 (quoting *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)); *see Youngkin*, 546 S.W.3d at 680 (stating that "enacted language of the statute" is "[t]he 'surest guide to what lawmakers intended'") (quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 463 (Tex. 2009)). "We must endeavor to read the statute contextually, giving effect to every word, clause, and sentence." *In re Office of Attorney Gen.*, 422 S.W.3d 623,

629 (Tex. 2013) (orig. proceeding); *Cheniere Energy*, 449 S.W.3d at 213 (stating that we must not interpret statute in manner that renders any part of it meaningless or superfluous) (quoting *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008)). Although we must "adhere to legislative definitions of terms when they are supplied," we must also "construe individual words and provisions in the context of the statute as a whole." *Youngkin*, 546 S.W.3d at 680–81.

B. TCPA Statutory Framework

The Texas Legislature enacted the TCPA 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."[3] TEX. CIV. PRAC. & REM. CODE ANN. § 27.002; *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam). The TCPA "protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015).

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[3] In the 2019 legislative session, the Texas Legislature amended several provisions of the TCPA. These amended provisions became effective on September 1, 2019, and apply to legal actions filed on or after that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 12, 2019 Tex. Sess. Law Serv. 684, 687. For actions filed before September 1, 2019, the action "is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose." *Id.* This action was filed before September 1, 2019. All citations to the TCPA in this opinion are to the prior version of the Act.

A defendant in a legal action that is based on, related to, or in response to the defendant's exercise of the right of free speech, right to petition, or right of association, as those rights are statutorily defined, may file a motion to dismiss the action. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a); *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019). The TCPA defines "[e]xercise of the right of free speech" as a "communication made in connection with a matter of public concern," which includes an issue related to, among other things, economic well-being or a good, product, or service in the marketplace. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3), (7). "Communication" is broadly defined as including "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1).

Under the TCPA's burden-shifting framework, the movant bears the initial burden to establish, by a preponderance of the evidence, that the legal action is based on, related to, or in response to the party's exercise of the right of free speech, right to petition, or right of association. *Id.* § 27.005(b); *Hall*, 579 S.W.3d at 376. If the movant makes that showing, the burden shifts to the nonmovant—the party who brought the action—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 ANN. § 27.005(c); *Hall*, 579 S.W.3d at 376. Even if the nonmovant meets his burden to establish a prima facie case, the trial court must dismiss the action if the movant

establishes, by a preponderance of the evidence, each essential element of a valid defense to the nonmovant's claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d); *Hall*, 579 S.W.3d at 376. When determining the motion to dismiss, the trial court considers the pleadings and any supporting and opposing affidavits. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a); *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017).

Although the TCPA defines neither "prima facie case" nor "clear and specific evidence," the Texas Supreme Court has held that "prima facie case" means "evidence that is legally sufficient to establish a claim as factually true if it is not countered." *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018); *Lipsky*, 460 S.W.3d at 590. That is, a prima facie case is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Elliott*, 564 S.W.3d at 847 (quoting *Lipsky*, 460 S.W.3d at 590). "Clear" means "unambiguous, sure, or free from doubt," and "specific" means "explicit or relating to a particular named thing." *Id.* (quoting *Lipsky*, 460 S.W.3d at 590). In establishing a prima facie case, the nonmovant may rely on circumstantial evidence "unless 'the connection between the fact and the inference is too weak to be of help in deciding the case.'" *Hall*, 579 S.W.3d at 377 (quoting *Lipsky*, 460 S.W.3d at 589). Conclusory statements, however, are not probative and will not suffice to establish a prima facie case. *Serafine v. Blunt*, 466 S.W.3d 352, 358 (Tex. App.—Austin 2015,

no pet.) (quoting *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 355 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)).

The TCPA also provides that if the trial court finds that a motion to dismiss is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(b).

C. Whether the TCPA Applies to SP Silica's Claims

We first address whether the TCPA applies to SP Silica's claims against Keane. In its TCPA motion, Keane argued that the challenged communications were made in connection with a matter of public concern because they addressed an issue related to economic well-being and a good, product, or service in the marketplace. On appeal, Keane focuses its argument solely on whether its communications concerned an issue related to a good, product, or service in the marketplace. As stated above, the TCPA defines "[e]xercise of the right of free speech" as "a communication made in connection with a matter of public concern" and defines "[m]atter of public concern" as including "an issue related to":

(A) health or safety;
(B) environmental, economic, or community well-being;
(C) the government;
(D) a public official or public figure; or
(E) a good, product, or service in the marketplace.

TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3), (7). Private communications made in connection with a matter of public concern fall within the statutory definition of "exercise of the right of free speech." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 427–28 (Tex. App.—Dallas 2019, pet. denied). The TCPA does not require that the communication specifically mention concerns about a service in the marketplace, nor does it require more than a tangential relationship to such an issue. *See ExxonMobil Pipeline*, 512 S.W.3d at 900. "[R]ather, TCPA applicability requires only that the defendant's statements are 'in connection with'" issues related to "identified matters of public concern chosen by the Legislature." *Id.*; *Fawcett v. Rogers*, 492 S.W.3d 18, 25 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (stating that "private nature of the communications" that were basis of plaintiff's defamation suit "does not affect the applicability of" TCPA to plaintiff's claims).

In *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, the Texas Supreme Court addressed the "in the marketplace" modifier with respect to whether a communication is made in connection with an issue related to "a good, product, or service in the marketplace" and whether that communication relates to a "matter of public concern." *See* 591 S.W.3d 127 (Tex. 2019). In that case, Lona Hills Ranch entered into an oil and gas lease with Creative Oil & Gas, LLC, and Creative Oil & Gas Operating, LLC, was the operator of the sole producing well on the lease. *Id.* at

130. Lona Hills sued the Creative entities for trespass and trespass to try title and sought a ruling that the lease had been terminated due to cessation of production. *Id.* The Creative entities filed counterclaims alleging (1) that Lona Hills falsely told third-party purchasers of production from the lease that the lease had expired, and (2) that Lona Hills breached the lease by filing suit and filing an administrative action with the Texas Railroad Commission. *Id.* Lona Hills sought to dismiss the counterclaims under the TCPA and argued that the first counterclaim, concerning its statements to third parties regarding the lease, was based on communications made in connection with a matter of public concern and thus implicated its exercise of the right to free speech. *Id.*

The Texas Supreme Court addressed whether the Creative entities' counterclaims concerning Lona Hills's communications to third parties were based on, related to, or were in response to a communication made in connection with a matter of public concern—specifically, a good, product, or service in the marketplace. *Id.* at 132–36. The court re-emphasized that courts must apply the TCPA "as written" and "refrain from rewriting text that lawmakers chose," but it also pointed out that the "text-based approach to statutory construction" requires courts to construe the specific provision at issue *within the context of the statute as a whole*. *Id.* at 133 (quoting *Entergy Gulf States*, 282 S.W.3d at 443, and *Ritchie v. Rupe*, 443 S.W.3d 856, 867 (Tex. 2014)).

The court acknowledged that "nearly all contracts involve 'a good product or service,'" but the TCPA "refers to a 'good, product, or service *in the marketplace*,'" and the phrase "in the marketplace" should not be treated as surplusage. *Id.* at 134 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(E)). The court noted that although the TCPA does not statutorily define "in the marketplace," Black's Law Dictionary defines marketplace as "[t]he business environment in which goods and services are sold *in competition with other suppliers*." *Id.* (quoting *Marketplace,* BLACK'S LAW DICTIONARY (11th ed. 2019)). The court then stated:

> The "in the marketplace" modifier suggests that the communication about goods or services must have some relevance to a wider audience of potential buyers or sellers in the marketplace, as opposed to communications of relevance only to the parties to a particular transaction.
>
> Given the "in the marketplace" modifier, the TCPA's reference to "a good, product, or service" does not swallow up every contract dispute arising from a communication about the contract. By referring to communications made in connection with goods, products, or services "in the marketplace," the definition confirms that the right of free speech involves communications connected to "a matter of *public* concern."

Id. It concluded, "The words 'good, product, or service in the marketplace' . . . do not paradoxically enlarge the concept of 'matters of public concern' to include matters of purely private concern." *Id.* at 135.

The court also looked to the statutory context of "good, product, or service in the marketplace," noting that the phrase does not appear in isolation "but as part of

the statute's explanation of what is meant by 'matter of public concern.'" *Id.* The court, while noting that the TCPA defines "matter of public concern" by listing several categories as examples, refused to ignore the common meaning of the words being defined. *Id.* "The phrase 'matter of public concern' commonly refers to matters 'of political, social, or other concern *to the community*,' as opposed to purely private matters." *Id.* (quoting *Brady v. Klentzman,* 515 S.W.3d 878, 884 (Tex. 2017)) (emphasis added). The court stated that while the phrase "good, product, or service in the marketplace" when read in isolation could be interpreted in two manners—"one that includes many purely private economic matters and one that does not"—the latter reading of the phrase is correct because it gives meaning to "in the marketplace" and it "comports with the text's context within the statute's explanation of the well-worn phrase 'matter of public concern.'" *Id.*

In *Creative Oil & Gas,* the Texas Supreme Court ultimately concluded that the Creative entities' counterclaim was not covered by the TCPA. *Id.* at 135–36. The counterclaim was "based on private business communications to third-party purchasers of a single well's production." *Id.* at 136. The court stated:

> The record is devoid of allegations or evidence that the dispute had any relevance to the broader marketplace or otherwise could reasonably be characterized as involving public concerns. On the contrary, the alleged communications were made to two private parties concerning modest production at a single well. These communications, with a limited business audience concerning a private contract dispute, do not relate to a matter of public concern under the TCPA.

Id. The court acknowledged that, in previous decisions, it had held that private communications can be covered by the TCPA. *Id.* (citing *ExxonMobil Pipeline*, 512 S.W.3d 895, and *Lippincott*, 462 S.W.3d 507). However, the court distinguished those cases, noting that they "involved environmental, health, or safety concerns that had public relevance beyond the pecuniary interests of the private parties involved," whereas the case before it did not. *Id.* The court concluded by stating, "A private contract dispute affecting only the fortunes of the private parties involved is simply not a 'matter of public concern' under any tenable understanding of those words." *Id.* at 137 (rejecting Lona Hills's argument that the counterclaims implicated "economic well-being under section 27.001(7)(B)" because claims affected economic interest of parties to dispute).

Here, the parties do not dispute that SP Silica's breach of contract and fraud claims are based on communications made by Keane in connection with a private commercial matter. In its amended petition, SP Silica alleged that Keane breached the Payment Agreement by certifying that the information in the invoices that it had submitted to SP Silica in January and February 2018 was true and accurate because the invoiced amounts exceeded market prices for equivalent sand available to Keane in west Texas during those months. SP Silica also alleged that Keane breached the Payment Agreement by certifying that the information contained in spreadsheets accompanying invoices that Keane sent to SP Silica in March, April, and May 2018

was true and correct because the invoiced amounts exceeded the average market price for frac sand available in west Texas during that time. With respect to its fraud claims, SP Silica alleged that Keane misrepresented the prices it had paid for replacement sand when it submitted the January and February 2018 invoices. SP Silica also alleged that Keane misrepresented that, until the Monahans Plant became fully operational, Keane would submit all future purchase orders for sand under the Payment Agreement and not the SPA, and misrepresented that it would continue purchasing sand from SP Silica during the full term of the SPA after the Monahans Plant became fully operational and the Payment Agreement terminated.

Keane argues that all of the communications that form the basis of SP Silica's claims were made in connection with Keane's purchase of spot market frac sand, a good or product in the marketplace, and thus the communications relate to a matter of public concern. Keane points out that SP Silica's amended petition "repeatedly reference[s] frac sand in the market," pointing out that the SPA allowed Keane to purchase replacement frac sand on the "spot market" if SP Silica could not fulfill its obligations to provide the full amount of sand that Keane ordered, that SP Silica alleged that Keane submitted invoices to it seeking reimbursement of the differences between the price of sand under the SPA and the price Keane paid for replacement sand on the spot market, and that the prices of sand contained in the submitted invoices exceeded the price of sand on the market at the time. Keane thus argues,

"[t]he claims are expressly based on and relate to communications made in connection with frac sand in the marketplace" and thus constitute a matter of public concern. We disagree.

The sale and purchase of frac sand—a good or product that is sold in the marketplace—forms the basis of the contractual relationship between Keane and SP Silica. However, "[e]very communication made in connection with economic or community well-being, or a good, product, or service in the marketplace . . . does not necessarily implicate a party's right to free speech because not every communication regards a matter of public concern." *Newpark Mats & Integrated Servs., LLC v. Cahoon Enters., LLC*, —S.W.3d—, No. 01-19-00409-CV, 2020 WL 1467005, at *8 (Tex. App.—Houston [1st Dist.] Mar. 26, 2020, no pet. h.); *see Creative Oil & Gas*, 591 S.W.3d at 137 ("[N]ot every communication related somehow to one of the broad categories set out in section 27.001(7) always regards a matter of public concern."); *Forget About It, Inc. v. BioTE Med., LLC*, 585 S.W.3d 59, 68 (Tex. App.—Dallas 2019, pet. denied) ("Construing the [TCPA] to denote that all private business discussions are 'a matter of public concern' if the business offers a good, service, or product in the marketplace . . . is a potentially absurd result that was not contemplated by the Legislature.").

As the Texas Supreme Court emphasized in *Creative Oil & Gas*, the phrase "good, product, or service in the marketplace" must be considered in the context in

which it appears within the TCPA: as an example of communications relating to a "matter of public concern." *See* 591 S.W.3d at 135–36. "'Matter of public concern' commonly refers to matters 'of political, social, or other concern to the community,' as opposed to purely private matters." *Id.* at 135 (quoting *Brady*, 515 S.W.3d at 884). The Texas Supreme Court repeatedly stated that to give effect to both "in the marketplace" and "matter of public concern," the communications regarding goods or services "must have some relevance to a wider audience of potential buyers or sellers in the marketplace, as opposed to communications of relevance only to the parties to a particular transactions," that the phrase "good, product, or service in the marketplace" does not enlarge the concept of "'matters of public concern' to include matters of purely private concern," that the communication "must have some relevance to a public audience of potential buyers or sellers," and that communications "with a limited business audience concerning a private contract dispute do not relate to a matter of public concern under the TCPA." *Id.* at 134–36.

The communications alleged to form the basis of SP Silica's claims against Keane were made by Keane to SP Silica in the context of their contractual relationship. When the Monahans Plant had not reached full production by the effective date of the SPA and SP Silica could not fulfill Keane's purchase orders, Keane had to purchase frac sand on the spot market to cover the amounts it needed, and it submitted invoices to SP Silica for reimbursement. SP Silica alleges that

Keane misrepresented to SP Silica the prices of the replacement sand that it had purchased from third parties and that these misrepresentations not only breached the Payment Agreement but also induced SP Silica to enter into the Payment Agreement in the first place. SP Silica alleges that Keane made further misrepresentations that it would submit all future purchase orders under the Payment Agreement until the Monahans Plant became fully operational and that, once the Monahans Plant became fully operational and the Payment Agreement terminated, Keane would continue to purchase sand from SP Silica for the full term of the SPA.

These alleged communications by Keane solely concern the contractual relationship between itself and SP Silica, and the only parties these communications affect are itself and SP Silica. SP Silica does not allege, for example, that Keane made any statements to third parties, such as statements about the quality or price of SP Silica's sand, which might be relevant to other buyers and suppliers of frac sand.[4] Instead, SP Silica alleges that Keane misrepresented, to SP Silica, the amount that

[4] Keane argues that the private nature of the communications is not determinative and that the Texas Supreme Court has held that private communications may fall within the TCPA. This is correct, but as the Texas Supreme Court noted in *Creative Oil & Gas*, the two cases in which the court had held that private communications fell within the TCPA "involved environmental, health, or safety concerns that had public relevance beyond the pecuniary interests of the private parties involved." *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 136 (Tex. 2019) (citing *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017) (per curiam), and *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015) (per curiam)). *Creative Oil & Gas*, however, unlike *ExxonMobil Pipeline* and *Lippincott*, involved a private business dispute that only had relevance to the parties involved. The same is true for this case.

Keane paid for replacement sand on the spot market in an effort to obtain reimbursement and sand credits from SP Silica under the SPA and the Payment Agreement. These communications have no "relevance to the broader marketplace" and no "relevance to a public audience of potential buyers or sellers," but instead were only made "with a limited business audience concerning a private contract dispute." *See Creative Oil & Gas*, 591 S.W.3d at 135–36. The only parties this dispute affects are Keane and SP Silica, and the only parties whose pecuniary interests are affected are Keane and SP Silica.[5] *See id.* at 137 ("A private contract dispute affecting only the fortunes of the private parties involved is simply not a

[5] Keane argues that this Court should follow the Austin Court of Appeals' 2017 decision in *Camp v. Patterson*, in which the Austin court held that text messages to a former employee accusing that employee of fraudulently creating invoices and emails to third-party vendors informing the vendors of the allegations against the former employee and requesting that all account activity for the company be suspended pending an investigation and legal action against the former employee were related to a matter of public concern because they were made in connection with issues related to goods and products sold by the company in the marketplace. *See* No. 03-16-00733-CV, 2017 WL 3378904, at *4–5 (Tex. App.—Austin Aug. 3, 2017, no pet.) (mem. op.). We first note that *Camp* was a memorandum opinion for which no petition for review was filed, and it was decided in 2017, two years before the Texas Supreme Court issued *Creative Oil & Gas*, which emphasized that communications relating to private business disputes with no relevance to the broader, public marketplace of buyers and sellers do not implicate a matter of public concern and do not fall under the TCPA. *Camp* also involved communications to third parties concerning allegedly fraudulent invoices created by a former employee and sent to those third parties, thus affecting the pecuniary interests of those other parties. This case, by contrast, solely concerns communications made by Keane to SP Silica, and the only parties that are at all affected by the alleged communications are Keane and SP Silica. This case has no relevance to the broader marketplace involving frac sand.

'matter of public concern' under any tenable understanding of those words."); *Newpark Mats*, 2020 WL 1467005, at *8–9 (concluding that dispute at issue was private business dispute between two companies that was not relevant to broader marketplace and, therefore, communications concerning dispute did not implicate matter of public concern and TCPA did not apply); *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 829–30 (Tex. App.—Dallas 2020, pet. denied) (noting that email communications offering to buy or sell scrap metal were "made in connection with an issue related to a good, product, or service in the marketplace," but all communications were "private communications between private parties about purely private economic matters" and were not made in connection with matter of public concern under TCPA).

We conclude that the communications forming the basis of SP Silica's amended breach of contract claim and fraud claims do not implicate a matter of public concern and, therefore, Keane did not meet its burden to establish by a preponderance of the evidence that SP Silica's claims were based on, related to, or were in response to an exercise of Keane's right to free speech. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) (defining "exercise of the right of free speech"), (7) (defining "matter of public concern"). We hold that, as a result, the trial court did not err by denying Keane's TCPA motion to dismiss. *See id.* § 27.005(b)(1) (providing that court shall dismiss legal action if moving party shows by

preponderance of evidence that action was based on, related to, or in response to party's exercise of right of free speech).

We overrule Keane's first issue.[6]

D. Whether Keane's Motion to Dismiss was Frivolous

If the trial court finds that a motion to dismiss under the TCPA is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(b). Generally, we review a trial court's decision to award attorney's fees for an abuse of discretion. *Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 857 (Tex. App.—Austin 2018, pet. denied); *see Lei v. Nat. Polymer Int'l Corp.*, 578 S.W.3d 706, 717 (Tex. App.—Dallas 2019, no pet.) ("An attorney's fees award under section 27.009(b) is entirely discretionary and requires the trial court to find the motion was frivolous or solely intended to delay.").

The TCPA does not define "frivolous." *Caliber Oil & Gas, LLC v. Midland Visions 2000*, 591 S.W.3d 226, 243 (Tex. App.—Eastland 2019, no pet. h.); *Lei*, 578

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[6] Because we hold that the TCPA does not apply to SP Silica's claims, we need not address Keane's second issue—whether SP Silica presented a prima facie case of each essential element of its claims—or its third issue—whether it established a valid defense to SP Silica's claims by a preponderance of the evidence. *See Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 833 (Tex. App.—Dallas 2020, pet. denied) (concluding that because appellants failed to prove by preponderance of evidence that TCPA applied to appellees' claims, court need not address appellants' claims that appellees did not establish prima facie case); *Caliber Oil & Gas, LLC v. Midland Visions 2000*, 591 S.W.3d 226, 242 (Tex. App.—Eastland 2019, no pet. h.) (same).

S.W.3d at 717; *Sullivan*, 551 S.W.3d at 857. Courts that have addressed this issue have noted, however, that the "common understanding" of the word frivolous "contemplates that a claim or motion will be considered frivolous if it has no basis in law or fact and lacks a legal basis or legal merit." *Sullivan*, 551 S.W.3d at 857 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 913 (2002), and BLACK'S LAW DICTIONARY 739 (9th ed. 2009)); *see Caliber Oil & Gas*, 591 S.W.3d at 243 (following *Sullivan*); *Lei*, 578 S.W.3d at 717 (same). Prior to filing a motion to dismiss under the TCPA "the movant must evaluate whether there is a legal basis to assert that the nonmovant's legal action is based on, related to, or in response to the movant's exercise of a right protected by the statute," which "necessarily involves an analysis of the specific communications underlying the nonmovant's claims." *Caliber Oil & Gas*, 591 S.W.3d at 243. The fact that a TCPA motion to dismiss is ultimately denied is not sufficient, standing alone, to support a finding that the motion was frivolous. *Id.* at 244.

Keane argues that there was at least a colorable basis in law and fact for its TCPA motion. Based on the unclear state of the law at the time Keane filed its motion to dismiss in June 2019, we agree. At the time Keane filed its motion, the Texas Supreme Court had not yet decided *Creative Oil & Gas*, which made it clear that the TCPA does not apply to private business disputes that affect only the fortunes of the parties involved in the dispute. Courts had construed the TCPA

expansively, holding that the TCPA could apply to private and internal communications, *see, e.g.*, *ExxonMobil Pipeline*, 512 S.W.3d at 900, *Lippincott*, 462 S.W.3d at 509, breach of contract actions, *see, e.g.*, *Toth v. Sears Home Improvement Prods., Inc.*, 557 S.W.3d 142, 150–52 (Tex. App.—Houston [14th Dist.] 2018, no pet.), and fraud actions, *see, e.g.*, *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 880 (Tex. App.—Austin 2018, pet. denied). Although the Dallas Court of Appeals had, by the time Keane filed its motion, started limiting the scope of "matters of public concern," *see, e.g.*, *Dyer*, 573 S.W.3d at 428, the Austin Court of Appeals had held that communications concerning the termination of an oil and gas lease were made in connection with a matter of public concern, *see Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC*, 549 S.W.3d 839, 846–47 (Tex. App.—Austin 2018), *rev'd*, 591 S.W.3d 127 (Tex. 2019).

Due to the expansive construction of the TCPA and the uncertainty among the intermediate courts of appeals as to whether the TCPA applied to private business disputes—a matter that was not settled until the Texas Supreme Court's opinion in *Creative Oil & Gas*, which issued six months after Keane filed its TCPA motion—we cannot conclude that Keane's TCPA motion to dismiss had *no* basis in law or fact. We therefore hold that the trial court erred to the extent that it determined that Keane's motion to dismiss was frivolous at the time it was filed and awarded SP Silica attorney's fees and costs.

We sustain Keane's fourth issue.

Conclusion

We affirm the order of the trial court to the extent that it denied Keane's motion to dismiss under the TCPA. We reverse the trial court's award to SP Silica of its attorney's fees and costs and render judgment denying SP Silica's request for attorney's fees and costs.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Kelly, and Landau.