Affirmed and Opinion filed June 17, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00043-CV

COMCAST CORPORATION, NBCUNIVERSAL MEDIA, LLC, MCLANE CHAMPIONS, LLC, AND R. DRAYTON MCLANE, JR., Appellants

V.

HOUSTON BASEBALL PARTNERS LLC, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2013-70769

O P I N I O N

The parties to this interlocutory appeal under the Texas Citizens Participation Act ("TCPA") had an interest in the 2011 sale of the Houston Astros Major League Baseball Club and its share of a regional sports television network. Two years after the sale closed, appellee Houston Baseball Partners LLC ("HBP") sued McLane Champions, LLC, R. Drayton McLane, Jr., Comcast Corporation, and NBCUniversal Media, LLC. HBP alleged claims for fraud, fraudulent

inducement, fraud by nondisclosure, negligent misrepresentation, and breach of contract. HBP also sought declaratory relief and alleged that the defendants engaged in a civil conspiracy to defraud. The defendants removed the case to federal court, where it remained for five years in connection with the sports network's bankruptcy. After remand to state court, the defendants/appellants filed a TCPA motion to dismiss, which the trial court denied.

Appellants contend the TCPA mandates dismissal because HBP lacks standing and otherwise failed to present prima facie evidence in support of its claims. In response, HBP says appellants filed their TCPA motion to dismiss untimely, the act does not apply, and, if it applies, the present claims fall within the act's commercial-speech exemption. In any event, HBP continues, prima facie evidence exists to support each claim.

We presume without deciding that the TCPA applies and was timely invoked. After careful review of the voluminous record before us, we conclude that HBP has standing, and that it produced clear and specific evidence for each essential element of its claims. Because HBP met its prima facie burden under the TCPA, we need not address the claimed exemption's applicability, and the trial court did not err in denying appellants' motion to dismiss. We affirm the court's order.

Background

A. The 2011 Sale of the Astros and its Interest in the Network

Before 2011, McLane Champions, LLC ("Champions"), an entity controlled by R. Drayton McLane, indirectly owned the Houston Astros.[1] The Astros and the Houston Rockets of the National Basketball Association formed the Houston

[1] Champions owned Houston McLane Company, LLC, which in turn owned the Astros. .

Regional Sports Network, L.P. (the "Network") in 2003 to broadcast their games to viewers in Houston and surrounding areas. The Network's owners initially sublicensed the Astros' media rights to a third-party broadcaster.

In October 2010, an affiliate of Comcast Corporation purchased a 22.5% equity interest in the Network, leaving the Astros with a 46.5% interest and Houston Rockets affiliates with a 31% interest. Following this restructuring, according to HBP, the Network would move "in-house" all the functions previously performed by the third-party broadcaster. Comcast agreed to distribute the Network's programming to Comcast subscribers and to market and sell the Network to other carriers.

In 2011, Jim Crane formed HBP with the intent to use that entity as a vehicle through which he and other investors would acquire the Astros and the Astros' interest in the Network. On May 16, 2011, HBP executed a Purchase and Sale Agreement ("PSA") with Champions, outlining the terms of the proposed transaction. The PSA set a purchase price of $615 million, subject to various adjustments. Over half of that amount was to be funded from equity investors. The transaction closed on November 22, 2011.

In the months before closing, Margaret Barradas, George Postolos, and Mike Slaughter conducted business due diligence on the purchaser's behalf. During the initial due-diligence phase, they learned that the Astros club had been losing money for years and was substantially in debt. Given that reality, the value of the Network became the critical factor driving how much the purchaser was willing to pay for the Astros and its interest in the Network. On this point, the due-diligence team allegedly was told by Champions' representative, Allen & Company,[2] that the

[2] Allen & Company is an investment-banking firm retained by Champions to conduct the sale. Champions informed HBP that Allen & Company was authorized to speak on Champions'

business plan underlying the October 2010 restructuring of the Network supported a $714 million valuation for the Network as a whole, which equated to a value of $332 million for the Astros' 46.5% interest. Allen & Company also allegedly represented that the economic projections and assumptions in the business plan created for the Network in October 2010 remained valid in 2011.

The due-diligence team focused efforts on evaluating and validating Allen & Company's Network valuation, which included assessing whether the assumptions imbedded in the Network's business plan were, as the due-diligence team put it, "reasonable and achievable." During the due-diligence period, it is alleged that several misrepresentations were made to the due-diligence team that were material to an assessment of the Network's value and hence to the purchaser's formulation of the price it was willing to pay. These alleged misrepresentations and omissions form the core of HBP's claims, and we discuss them in detail below. In short, HBP alleges it was led to believe that certain assumptions underlying the Network's business plan were reasonable and achievable, when in fact they were not and the seller and Comcast knew they were not.

One key assumption underlying Champions' valuation of the Network concerned the rates at which distribution partners, such as cable and satellite companies, would pay for the right to distribute the Network's programming to their subscribers. Understanding how the Network generated revenue is important to this aspect of the dispute. According to HBP, the due-diligence team was told that regional sports networks have two primary sources of revenue: (a) "affiliate fees" paid by "distribution partners" (cable, telco, and satellite companies) for the right to distribute the network's programming to their subscribers; and

---

behalf and that Allen & Company would be HBP's exclusive source, at least initially, for due-diligence information.

(b) advertising fees. Affiliate fees, which represent a greater share of revenue than advertising fees, are usually based on a monthly rate per subscriber that varies depending on the subscriber's proximity to the network's home city, with subscribers being grouped for this purpose into geographic zones. Under the plan, the zone in closest proximity to the Network's home city was known as "Zone 1" and commanded the highest subscriber rates. Comcast had agreed in October 2010 to pay certain rates applicable to four geographic zones, and the premise behind the Network's plan was that other distributors would agree to pay the same rates. The parties place the greatest emphasis on the rate assigned to Zone 1, which was the highest rate.[3] Although Comcast agreed to pay the Zone 1 rate specified in its affiliation agreement, the agreement contained a so-called "Most Favored Nations" clause, which provided that if the Network signed affiliation agreements with other distributors at lower base rates, then Comcast would be entitled to reduce its base rates to equal those lower rates. If, however, the rates contained in the 2010 Comcast affiliation agreement could in fact be achieved for both Comcast and non-Comcast subscribers at the market penetration levels provided by Allen & Company, the due-diligence team believed that those rates supported the Network valuation proposed by Allen & Company and Champions.

The Network, however, did not develop as desired. When the Network launched in 2012, it had signed no affiliate agreements other than Comcast's. According to Crane, after the November 2011 closing, Comcast was unable to deliver affiliation agreements with any distribution partners at rates "anywhere close to those set forth in the business plan," and "every potential agreement that Comcast proposed for our consideration guaranteed that the Network would lose money and that the Astros' equity in the Network would be wiped out." Because

[3] Zone 1 consisted of twenty-five southeast Texas counties, including and surrounding Harris County.

the Network was unable to secure affiliate agreements on terms consistent with the business plan assumptions underlying the Network's valuation and at rates comparable to those in Comcast's affiliation agreement, HBP contended the Network suffered financial distress and was unable to pay media rights fees to the Astros. HBP contends that appellants knew all along that the rates underlying the Network's 2010 plan, particularly the Zone 1 rate, were not realistically achievable.

B. HBP Sues the Seller and Others

HBP sued McLane, Champions, Comcast, and a Comcast subsidiary (NBCUniversal Media, LLC or "NBCUniversal"), asserting claims for fraud, fraudulent inducement, fraud by nondisclosure, and negligent misrepresentation against all defendants. HBP alleged that all defendants engaged in a civil conspiracy. HBP also asserted a claim for breach of contract against Champions and sought a declaratory judgment regarding Champions' indemnification obligations under the PSA. As a result of the defendants' alleged wrongful conduct, HBP claimed to have paid much more for the acquisition than it would have offered if it possessed accurate information and that it lost its equity interest in the Network, among incurring other damages.

Comcast immediately removed the case to federal court, where it had previously initiated an involuntary bankruptcy proceeding against the Network. There, the dispute remained for five years until the bankruptcy court exercised its discretion to abstain from hearing the matter. The case was remanded to state court.

C. The Defendants Seek Dismissal under the TCPA

Upon remand, McLane and Champions filed a TCPA motion to dismiss, which Comcast and NBCUniversal joined. According to the TCPA movants, the TCPA applied to all of HBP's claims because they related to the movants' exercise of the right of free speech or the right of association, as those terms were then defined under the TCPA. The movants also argued that HBP could not establish by clear and specific evidence a prima facie case for each essential element of its claims. Additionally, the movants argued that HBP lacked standing to assert any claim arising from the purchase of the Astros or the club's stake in the Network because HBP had assigned its rights under the PSA to another entity.

HBP presented several arguments in response. Acknowledging that it had assigned certain PSA rights to another entity, HBP argued that it retained a sufficient justiciable interest in the dispute to establish standing. Concerning the TCPA, HBP argued that its burden to present prima facie evidence was not triggered because: (1) the motion to dismiss was untimely;[4] (2) assuming the motion was timely, the act did not apply; and (3) assuming the act applied, the commercial-speech exemption removed the present claims from the act's purview. Finally, in the event the court disagreed with all of these initial propositions, HBP claimed to have met its prima facie burden based on evidence presented with the response.

The trial court denied the motion to dismiss, and the TCPA movants appeal. *See* Tex. Civ. Prac. & Rem. Code §§ 27.005, 27.008, 51.014(12). Before we

[4] The motion to dismiss was not filed until after remand when, according to HBP, it should have been filed in federal court while the case was pending in bankruptcy court. This delay, HBP said, rendered the motion to dismiss untimely. *See* Tex. Civ. Prac. & Rem. Code § 27.003(b) ("A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action.").

consider appellants' entitlement to relief under the TCPA, we first address the threshold jurisdictional question of HBP's standing.

Analysis

I. Standing Discussion

A. Applicable Standards

As jurisdictional questions go to the heart of a court's power to decide a dispute, we begin with appellants' challenge to HBP's standing. *See Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 95 (Tex. 2009); *Nunu v. Risk*, 567 S.W.3d 462, 465 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court. *See Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012). Generally speaking, three basic concepts determine when standing exists: the plaintiff must be personally injured; the injury must be traceable to the defendant; and the injury must be "likely to be redressed by the requested relief." *See id.* at 155. Only the first element is disputed here.[5] Whether a plaintiff has standing is a legal question we review de novo. *Id.* at 149-50.

We held recently that a defendant can challenge the plaintiff's standing in a TCPA motion to dismiss. *See Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 21-23 (Tex. App.—Houston [14th Dist.] 2020, no pet.). In *Buzbee*, we acknowledged that, because standing may be raised at any time and in any manner, a court should and must consider the issue when raised in the context of a TCPA

[5] Mindful of our duty to assess jurisdiction independently, *see M. O. Dental Lab. v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004), we have reviewed the record relevant to the unchallenged standing elements and conclude that HBP has sufficiently alleged an injury traceable to the defendants and that the alleged injury is likely redressable by the requested relief.

motion. *Id.* at 22. But because the TCPA serves an initial merits-screening function and is "ill-suited for resolving whether a court is authorized to decide a controversy," we said standing arguments raised in a TCPA motion to dismiss should be treated as though raised in a dilatory plea, like a plea to the jurisdiction. *Id.* at 22-23.

We first look to the pleadings to determine if the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). We construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the unchallenged factual jurisdictional allegations in the pleadings. *See id.* at 226. If the pleading is sufficient to demonstrate jurisdiction, and if the defendant does not challenge the plaintiff's factual allegations with supporting evidence, then our inquiry ends. *See id.* at 227-28. If, for example, as in *Buzbee*, a movant challenges the plaintiff's standing in a TCPA motion but presents no evidence negating the jurisdictional allegations, and if the plaintiff's petition sufficiently demonstrates standing, then the plaintiff has no duty to bring forth jurisdictional evidence in response to a TCPA motion as part of its prima facie showing. *See Buzbee*, 616 S.W.3d at 23-24. The court may properly reject the standing challenge based on the pleading alone, as it could if the court were considering the issue in the context of a plea to the jurisdiction.

If, however, the defendant challenges the existence of jurisdictional facts with evidence, we consider relevant evidence submitted by the parties to resolve the jurisdictional issues raised. *See Miranda*, 133 S.W.3d at 227. We take as true all evidence favorable to the plaintiff and indulge every reasonable inference and resolve any doubts arising from such evidence in the plaintiff's favor. *See id.* at 228. If the relevant evidence is undisputed or a fact question is not raised relative

to the jurisdictional issue, the court rules on the plea to the jurisdiction as a matter of law. *Id.* If the evidence creates a fact question regarding the jurisdictional issue, the court cannot grant the plea, and the fact issue will be resolved by the fact finder. *Id*. at 227-28.

Here, appellants raised the standing issue in their TCPA motions and attached evidence relevant to the jurisdictional question. We consider that evidence along with the responsive evidence offered by HBP.

B. Application

Challenging the first element of standing, appellants argue that HBP no longer has a personal stake in the controversy because HBP assigned its rights under the PSA to another entity.

Before the transaction closed, HBP created a separate entity called HBP Team Holdings, LLC ("Holdings") that would receive the ownership interest in the Astros. HBP owns 100% of Holdings, which HBP says was created to accommodate the financing structure for the transaction. On July 1, 2011, HBP and Holdings executed an assignment agreement (the "Assignment").

Looking first to the facts alleged in the petition, HBP alleged that it signed the PSA; that the defendants made false and material misrepresentations to HBP and its representatives throughout the due-diligence period; that HBP—as opposed to another entity—decided whether to proceed with the transaction and how much to pay; that HBP justifiably relied on the alleged misrepresentations in making those decisions; and that HBP was the party injured by appellants' allegedly tortious conduct and Champions' alleged breach of contract because HBP agreed to purchase the Astros and the Astros' interest in the Network at an artificially inflated price in reliance upon appellants' alleged misrepresentations. Further,

HBP alleged that it has indemnity rights under the PSA, even after the Assignment, for which it sought enforcement against Champions based on the alleged breaches of covenants, representations, and warranties in the PSA.

HBP's petition alleges facts sufficient to demonstrate that it is a personally aggrieved party. As such, HBP has standing to assert the claims against appellants unless the record shows that HBP was completely divested of any justiciable interest. *Vertical N. Am., Inc. v. Vopak Terminal Deer Park, Inc.*, No. 14-15-01088-CV, 2017 WL 4197027, at *3 (Tex. App.—Houston [14th Dist.] Sept. 21, 2017, pet. denied) (subst. mem. op.) (citing *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005)). According to appellants, HBP divested itself of a justiciable interest in the claims by executing the Assignment with Holdings. Appellants cite language in the Assignment stating that: HBP "assigns, conveys, and transfers to [Holdings] all of [HBP's] rights under the [PSA] (including, without limitation, [HBP's] right to purchase all of the Purchased Interests from Seller in accordance with the terms of the [PSA])"; that Holdings "shall have all of the rights of the 'Purchaser' under the [PSA]"; and that HBP "shall relinquish such rights." To this end, the PSA was amended in November 2011 to insert Holdings (in lieu of HBP) as the "Purchaser." Further, appellants urge that the Assignment is sufficiently broad to cover all tort and contract claims asserted by HBP because it unambiguously assigns "all" of HBP's rights under the PSA, "including, without limitation, [HBP's] right to purchase" the Astros.

We conclude, however, that HBP retains a sufficient interest in the claims asserted to confer standing despite the Assignment. First, the Assignment does not purport to assign any claims, including the claims asserted in this lawsuit. Moreover, although the Assignment assigns HBP's PSA rights to Holdings, HBP

expressly retained contractual obligations, including the obligation to *pay all amounts* due under the PSA. The Assignment states:

> Notwithstanding anything to the contrary in this Agreement, [HBP] shall remain liable for all obligations of the "Purchaser" under the Purchase Agreement, whether arising prior to or after the date hereof, including, without limitation, Purchaser's obligations, if any, *to make any payments to Seller* in accordance with the terms of the Purchase Agreement . . . . (Emphasis added.)

HBP was obligated to pay over $500 million to close the transaction. HBP presented evidence that it in fact paid a portion of the closing purchase price by depositing funds in an account owned by HBP at U.S. Trust and that these funds were then wired directly from the U.S. Trust account to Champions. HBP has a personal stake in the controversy by virtue of HBP's partial payment toward purchase of the Network. *Lovato*, 171 S.W.3d at 848; *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996).

Appellants contend that "the mere fact that HBP retained some liability and guaranteed payment by Holdings does not give it standing to sue," and cite several cases in support. *See Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102 (Tex. App.—Houston [14th Dist.] 1996, no writ); *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248 (Tex. App—Dallas 1990, no writ); *Amsler v. D. S. Cage & Co.*, 247 S.W. 669 (Tex. App.—Beaumont 1923, no writ). In *Twelve Oaks*, the issue was whether a lessee who assigned its entire interest under a lease to a third party nonetheless retained the right to terminate the lease. *Twelve Oaks*, 938 S.W.2d at 114. The court held that, although the assignor had a continuing obligation to pay rent based on privity of contract, the assignor was not entitled to invoke any benefit of the assigned lease, such as the termination clause. *Id.* at 115-16. In *ITT Commercial*, the court held that a group of guarantors had no independent right to assert a claim for wrongful foreclosure; that right instead

belonged to the guarantors' principal. *ITT Commercial*, 796 S.W.2d at 255. In *Amsler*, the court held that a plaintiff, who expressly transferred the claim at issue to his company, could not personally recover. *Amsler*, 247 S.W. at 669-70.

These cases are distinguishable or otherwise inapplicable. In *Twelve Oaks*, this court dealt with the assignment of a leasehold estate, and the original lessee had transferred its "entire interest" in the estate to a third party. *See Twelve Oaks*, 938 S.W.2d at 113. Generally, an assignment transfers one's whole interest, unless it is qualified in some way. *Id.* Here, it is undisputed HBP's transferred interest was qualified. Moreover, with the possible exception of indemnification rights, discussed next, HBP is not exclusively seeking to invoke benefits of the PSA that it otherwise assigned to Holdings. Rather, HBP sued appellants based on representations made both within and outside the PSA. *Cf. id.* at 114-16. Further, HBP was not simply a guarantor, liable to pay the purchase price only in the event Holdings did not. HBP itself negotiated and agreed to the purchase price and was responsible for funding (and did fund) the purchase, or a large percentage of it. *Cf. ITT Commercial*, 796 S.W.2d at 255. Finally, as mentioned, nothing in the Assignment conveyed the present claims from HBP to Holdings, and therefore *Amsler* is inapplicable.

While it is true that Holdings was substituted into the PSA as the defined "Purchaser" in November 2011, HBP retained certain indemnification rights. Section 13.1 of the PSA provided that Champions would "indemnify, defend and hold [harmless] Purchaser . . . and each of their respective . . . *direct* and indirect *owners*, . . . agents, [and] representatives" (emphasis added) against damages arising out of, inter alia, any of Champions' false representations in the PSA. HBP is the sole owner of Holdings and thus is included as an indemnified party under this clause. As Holdings' owner and thus a potential beneficiary of an indemnity

obligation, HBP "has a justiciable interest in determining its validity and effect and consequently a justiciable interest in pursuing the claims against [Champions]." *Vertical N. Am.*, 2017 WL 4197027, at *3-4 (entity that retained some interest in claim, which purportedly had been sold to third party, had standing to pursue litigation).

We agree with HBP that the Assignment does not completely divest HBP of all justiciable interest in claims related to the PSA. Although the Assignment transfers HBP's rights "under the [PSA]," it does not transfer more than that. The Assignment's language is linked to those rights emanating from the PSA and is not broad enough to encompass additional rights that relate to or arise in connection with the PSA, such as an ancillary fraud claim. The Assignment therefore is silent as to HBP's tort claims, which may relate to the PSA but do not necessarily arise "under" it. *E.g.*, *Smith v. Kenda Cap., LLC*, 451 S.W.3d 453, 461 n.4 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (language referencing disputes "arising out of" contract is "drafted more narrowly" than language that includes "in connection with"); *cf. Robbins & Myers, Inc. v. J.M. Huber Corp.*, No. 05-01-00139-CV, 2002 WL 418206, at *2 (Tex. App.—Dallas Mar. 19, 2002, no pet.) (not designated for publication) (agreement to litigate any disputes "based on any matter arising out of *or in connection with*" the contract applied to the plaintiff's claims, "all of which concern representations appellees allegedly made to induce R & M to enter into the contract") (emphasis added).

Appellants contend that the operative Assignment language is, in fact, broad enough to transfer all of HBP's contract and tort claims that have any connection with the PSA. We find their cases unpersuasive, however. In *Banque Arabe et Internationale D'Investissement v. Maryland National Bank*, 57 F.3d 146 (2d Cir.

1995), the court, applying New York law,[6] construed language transferring "all of [assignor's] rights and interest in the *transaction described* in Paragraphs (a) and (b)," which referred to both the contract and the underlying loan, to be broader than an interest in the contract alone and therefore sufficient to effectively assign tort claims based on fraud. *Id.* at 151-52 (emphasis added by *Banque* court). In *Pro Bono Investments Inc. v. Gerry*, No. 03-CIV-4347, 2008 WL 4755760, at *10, 17-18 (S.D.N.Y. Oct. 29, 2008), the court held that an assignment of "all assets" was broad enough to encompass "all claims, causes of action, and lawsuits" belonging to the assignor, under New York law. Similarly, in *International Design Concepts, LLC v. Saks Inc.*, 486 F. Supp. 2d 229, 237 (S.D.N.Y. 2007), the assignment of "all of [assignor's] right, title and interest in and to all of the Collateral" was sufficiently broad to "encompass all causes of action." Here, in contrast, HBP did not assign to Holdings all rights pertaining to the entire underlying transaction or all of HBP's assets, or HBP's "claims, causes of action, and lawsuits." HBP specifically assigned its "rights under the [PSA]."

Because the Assignment did not unequivocally transfer HBP's claims, because HBP retained material obligations under the PSA and in fact paid part of the purchase price as it was obligated to do, and because HBP retained indemnity rights under the PSA, we hold that HBP has standing to assert the present claims. The trial court did not err in denying appellants' TCPA motion to dismiss on the ground that HBP lacked standing. We now turn to the other TCPA arguments raised by the parties.

[6] The Assignment is governed by the laws of the State of New York.

II. TCPA Discussion

A. Applicable Law and Standard of Review

The TCPA contemplates an expedited dismissal procedure applicable to claims brought to intimidate or silence a defendant's exercise of the rights enumerated in the act. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam). The party invoking the TCPA may file a motion to dismiss the "legal action" and must show by a preponderance of the evidence that the action is "based on, relates to, or is in response to" that party's exercise of the right of free speech, right to petition, or right of association. Tex. Civ. Prac. & Rem. Code §§ 27.003(a); 27.005(b); *see also Coleman*, 512 S.W.3d at 898.[7] If the movant satisfies the initial burden to show that the TCPA applies, the trial court must dismiss the lawsuit unless the nonmovant "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code § 27.005(c); *see also Coleman*, 512 S.W.3d at 899.

We construe the TCPA liberally to effectuate its purpose and intent fully. *See Adams v. Starside Custom Builders*, LLC, 547 S.W.3d 890, 894 (Tex. 2018); *Enterprise Crude GP LLC v. Sealy Partners, LLC*, 614 S.W.3d 283, 293-94 (Tex. App.—Houston [14th Dist.] 2020, no pet.); Tex. Civ. Prac. & Rem. Code § 27.011(b). A court's determination of whether claims fall within the TCPA's framework is subject to de novo review. *See Adams*, 547 S.W.3d at 894. We must consider the relevant pleadings and any supporting or opposing affidavits "stating

[7] The TCPA was amended in 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, 2019 Tex. Gen. Laws 684. The 2019 amendments do not apply to this case, which was filed before September 1, 2019. *See id.* §§ 11-12, 2019 Tex. Gen. Laws at 687 (providing that amendments apply to actions filed on or after September 1, 2019).

the facts on which the liability or defense is based." Tex. Civ. Prac. & Rem. Code § 27.006(a). We review these materials in the light most favorable to the nonmovant. *See Enterprise Crude GP*, 614 S.W.3d at 294.

The parties have generated nearly 3,000 pages in the clerk's record relevant to this threshold testing of the plaintiff's claims, and much of that voluminous briefing and evidence regards the parties' stark disagreement over whether the TCPA applies. For purposes of this interlocutory appeal, however, we will presume without deciding that the act applies. Because we agree with HBP that it established by clear and specific evidence a prima facie case for each essential element of its claims, our conclusion is dispositive and compels us to affirm the order denying the motion to dismiss without the need to address the parties' additional arguments. Tex. Civ. Prac. & Rem. Code § 27.005(c); Tex. R. App. P. 47.1.

B. HBP's Claims

A "prima facie case" means evidence that is legally sufficient to establish a claim as factually true if it is not countered. *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). It is "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 721 (Tex. 2016) (quoting *In re Lipsky*, 460 S.W.3d at 590). To meet its prima facie burden, "a plaintiff must provide enough detail to show the factual basis for its claim." *In re Lipsky*, 460 S.W.3d at 591. We address each claim in turn.

1. *Fraud and fraudulent inducement*

A plaintiff asserting a claim for fraudulent misrepresentation must prove the following elements: (1) a false material representation, (2) made with knowledge

of its falsity or made recklessly without knowledge of its truth, and (3) intending that the misrepresentation would be acted on by the other party, where (4) the other party acts in justifiable reliance on the misrepresentation, and (5) thereby suffers injury. *See, e.g.*, *JPMorgan Chase Bank, N.A. v. Orca Assets, G.P., LLC*, 546 S.W.3d 648, 653 (Tex. 2018); *Enterprise Crude GP*, 614 S.W.3d at 306.

Fraudulent inducement is a species of common-law fraud that shares the same basic elements as a fraud claim. *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (elements of fraudulent inducement are a material misrepresentation, made with knowledge of its falsity or asserted without knowledge of its truth, made with the intention that it should be acted on by the other party, which the other party relied on, and which caused injury). HBP alleges it was fraudulently induced into signing the PSA.

a. False and material representations made knowingly or recklessly

All of the alleged misrepresentations and omissions revolve around various iterations of two principal assertions. First, HBP allegedly was told that the Zone 1 rate in the Network's business model, to which Comcast agreed in its affiliation agreement, originated with and was proposed by Comcast, not the Astros or the Rockets. Second, HBP allegedly was assured that the Zone 1 rate was commercially reasonable and achievable. Among other evidence, HBP presented the declarations of Barradas, Postolos, and Crane, and deposition excerpts of Postolos, Jon Litner (Group President, NBC Sports Group of Comcast/NBCUniversal), and Robert Pick (Comcast's Senior Vice President, Corporate Development).

i. First alleged misrepresentation

We begin by examining the evidence supporting HBP's allegation that the Zone 1 rate imbedded in the Network's business model and agreed to by Comcast in its affiliation agreement originated with and was proposed by Comcast, rather than the Astros or the Rockets. As explained by Crane and Barradas, the source of the Zone 1 rate was material to HBP because Comcast was charged with executing the Network's business plan and purported to have the expertise necessary to assess whether the rate was reasonable and achievable in the market.[8] To Crane, because Comcast was not itself selling anything as part of the contemplated acquisition, "Comcast did not have the same incentive that McLane would have had to overstate the Network's value." Barradas stated similarly that "Champions had every incentive to overstate the value of the Network, either to increase the amount that Comcast would pay for its 22.5% stake in the Network or to increase the amount that a purchaser might be willing to pay for the Club." Thus, she continued, "if we had known that the rates and the subscriber numbers in the business plan and in the Network's financial models (including, importantly, the [rate] for Zone 1) had originated with the Astros or the Rockets, we would have viewed them with a high degree of suspicion."

A representation is material if it is important to the plaintiff in making a decision, such that a reasonable person would be induced to act on and attach importance to the representation in making the decision. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011) (citations omitted). The above evidence is sufficiently clear and specific to support

[8] Crane was told that Comcast owned or operated at least ten similar networks around the country.

HBP's allegation that the representation that the Zone 1 rate originated with Comcast was material.

More than one witness supported HBP's allegation that the representation was in fact made. Barradas, who was personally involved in the due-diligence process, stated in her declaration that Allen & Company made this representation as the Astros' agent;[9] that the Astros made this representation in April 2011;[10] and that Litner made this representation in an April 12, 2011 phone call intended to verify the prior representations by Allen & Company and the Astros.[11] Postolos testified similarly in his declaration, adding that "Litner confirmed that this was a bona fide business plan that Comcast had put together based on its own judgment and experience and that it had not been proposed by the Astros for the purpose of seeking a higher sales price for the team or a higher value for the equity in the Network." Crane testified that the representation was "confirmed and adopted by Drayton McLane on multiple occasions to me personally." Because the representation that the Zone 1 rate originated with one party as opposed to another is a statement of fact, it is actionable as fraud. *See id.* at 337-38 (fraud requires misstatement of fact); *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 746 (Tex. App.—Dallas 2012, no pet.) (same).

HBP also presented clear and specific legally sufficient evidence that the representation was false. In their declarations, Crane and Postolos described a

[9] Allen & Company's Steve Greenberg "emphatically represented that the rates and related information in the Network's business plan and the financial model had come from Comcast — and not from the Astros or the Rockets."

[10] "Pam Gardner, President of the Astros, and Jacqueline Traywick, CFO of the Astros[,] . . . represented to us, in conversations occurring around April 7, 2011, that Comcast (not the Astros or the Rockets) had proposed the rates and other financial information in the Network's business plan and financial models."

[11] Litner "represented to us that the rate and subscriber numbers in the business plan and the financial model had in fact originated with Comcast (not the Astros or the Rockets)."

December 2012 meeting they attended with Comcast representatives to discuss the Network's financial status one year after the acquisition closed. During the meeting, they heard Pick say that Comcast included the Zone 1 rate, and built the business plan around it, because the Astros and the Rockets "insisted" on that rate. Crane and Postolos said Pick's statement directly contradicted what they were told during due diligence that "Comcast had come up with the rates." In depositions, both Pick and Litner affirmed that during the 2010 negotiations between Comcast and the teams, the Astros and Rockets were "insistent" in wanting the particular Zone 1 rate that was ultimately included in the plan. Litner recalled that McLane and Gardner were the Astros representatives who requested the specific Zone 1 rate in 2010. Litner did not know how the teams came up with that particular rate.

A representation is false if it consists of words or other conduct that suggest to the plaintiff that a fact is true when it is not. *See Custom Leasing, Inc. v. Tex. Bank & Tr. Co.*, 516 S.W.2d 138, 142 (Tex. 1974) (citation omitted). The above evidence at least rises above the minimum quantum necessary to constitute clear and specific legally sufficient evidence of falsity, and that the representation was either knowingly or recklessly asserted.

ii. Second alleged misrepresentation

Next, we consider the evidence supporting the alleged misrepresentation that the Zone 1 rate was commercially "reasonable and achievable." As Barradas said, Comcast confirmed Allen & Company's statements (on Champions' behalf) that Comcast had endorsed the business plan and had confirmed its belief that the rates and subscriber numbers built into it were "reasonable and achievable." According to Barradas, Postolos, and Crane, Litner told the due-diligence team that Comcast was "highly confident" that it could execute on the business plan and that the financial models and the assumptions and projections contained in them were both

"reasonable and achievable." Litner confirmed that Comcast "fully expected" to sign favorable affiliation agreements consistent with the Network's business plan by October 2012.

Appellants contend these assertions are opinions and not actionable fraud. Pure expressions of opinion are not representations of material fact, and thus cannot provide a basis for a fraud claim. *Italian Cowboy Partners*, 341 S.W.3d at 337-38. Champions and Allen & Company presented a possible value of the Network that was dependent upon the occurrence of certain conditions, including particularly the Network's ability to secure affiliation agreements from Comcast and others at the rates proposed in the business plan. Appellants allegedly expressed a high degree of confidence that those conditions would materialize. But, as appellants correctly observe, predictions and opinions regarding the future profitability of a business generally cannot form the basis of a fraud claim. *See Fry v. Farm & Ranch Healthcare, Inc.*, No. 07-05-00221-CV, 2007 WL 4355055, at *9 (Tex. App.—Amarillo Dec. 13, 2007, no pet.) (mem. op.). Even an assurance made with "very strong confidence" that a transaction would occur has been held to constitute an opinion. *See Absolute Res. Corp. v. Hurst Trust*, 76 F. Supp. 2d 723, 731 (N.D. Tex. 1999).

We agree with appellants that any characterizations of the Zone 1 rate underlying the Network's plan as "reasonable and achievable" in the market, even if made with "high confidence," constitute opinions. The Supreme Court of Texas, however, has recognized some exceptions to the general rule that expressions of opinion cannot support a fraud claim. For example, an opinion may support a fraud claim if the speaker knows the statement is false, or when one party has superior knowledge of underlying facts. *See Italian Cowboy Partners*, 341 S.W.3d at 338; *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); *see also Matis v.*

Golden, 228 S.W.3d 301, 307 (Tex. App.—Waco 2007, no pet.) ("When a speaker purports to have special knowledge of the facts, or does have superior knowledge of the facts—for example, when the facts underlying the opinion are not equally available to both parties—a party may maintain a fraud action."), *disapproved of on other grounds by Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385 (Tex. 2020). Also, an opinion may be treated as an actionable statement of fact when the opinion is based on or buttressed with false facts. *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 277 (Tex. 1995).

HBP presented evidence sufficient to give rise to a fraud claim under at least one of these exceptions, even assuming the alleged representations are properly considered pure expressions of opinion. During the December 2012 meeting described by Crane and Postolos, Pick said that he told the Astros in 2010 that the Network's business plan was "unrealistic and not achievable." Pick asserted that he and others at Comcast had stated in 2010 that the plan's Zone 1 rate "would not fly." In his deposition, Litner testified that Comcast considered the Zone 1 rate "aggressive" in 2010 and that he expressed his belief to Gardner of the Astros. He also told Pick that the rate was aggressive. This constitutes legally sufficient clear and specific evidence that Comcast knew the representation that the Zone 1 rate was reasonable and achievable was false when made or was based on or buttressed with false facts.[12] Further, some evidence shows that the Astros knew that Comcast's belief was something materially different than what Allen & Company expressed to HBP. The Astros made a statement that Comcast, as the expert, had assessed the rate as "reasonable and achievable," an assertion Comcast amplified

[12] On appeal, Champions and McLane contend the trial court erroneously overruled their hearsay and double-hearsay objections to Crane's, Postolos's, and Barradas's description of Pick's statements at the December 2012 meeting. We disagree. Pick is a representative of an HBP party-opponent, and his statement is not hearsay. *See* Tex. R. Evid. 801(e)(2).

despite Comcast's contrary belief expressed privately to the Astros in 2010. Comcast's true belief that the Zone 1 rate proposed by the Astros was unrealistic and "would not fly" was never disclosed to HBP before the transaction closed in November 2011.

Additionally, there is evidence that Comcast and the Astros had one-sided knowledge regarding the Zone 1 rate, and the facts underlying the alleged representations were not equally available to HBP. According to Barradas, the due-diligence team told Allen & Company and Champions that they "were not experts in regional sports networks and did not have the ability, other than through confirmation from Comcast," to independently validate the reasonableness and achievability of the Network's plan or the affiliate rates built into it. Allen & Company made several representations regarding Comcast's expertise with regional sports networks: (1) that Comcast was an established and successful operating partner with experience with over ten other regional sports networks; (2) that Comcast had the expertise and experience to assess whether the rates and the number of subscribers built into the Network's business plan were reasonable and achievable; and (3) that Comcast had the market power and the sales and marketing experience necessary to bring the business plan to fruition. Also, Allen & Company told the due-diligence team that prior to entering into the October 2010 transaction with Comcast, the Network had entertained offers from other potential distribution partners that contained rates consistent with those in the Comcast affiliation agreement. HBP presented some evidence that it did not have access to this information from any market sources other than Comcast. In the circumstances presented at this stage of the litigation, appellants' one-sided

knowledge of past facts makes the alleged misrepresentations actionable in fraud. *See Italian Cowboy Partners*, 341 S.W.3d at 338; *Trenholm*, 646 S.W.2d at 930.[13]

These representations were material to HBP because the likelihood of securing affiliation agreements with non-Comcast partners at the same Zone 1 rate to which Comcast agreed would determine the Network's actual value, which in turn drove the price HBP was willing to pay and the decision to close the transaction.

Finally, the testimony of, and statements attributed to, Litner and Pick described above constitute evidence that the alleged representations were false, and that they were either knowingly or recklessly asserted.

b. Intent that the misrepresentations would be acted upon

Barradas spoke to this issue as well. She said the due-diligence team told Champions and Comcast that they needed the requested information supporting the Network's value to justify the level of investment sought from equity investors. Champions and Comcast allegedly encouraged HBP to use the information for that purpose. Barradas stated, for example, "Salima Vahabzadeh [with Allen & Company] sent us a financial analysis on March 3, 2011 (which included financial information about the Network that assumed the viability of the Comcast rate card) and stated: '[W]e put together the attached analysis showing the returns to a buyer of the team and the RSN [Network] stake. We thought it might be helpful for you in your discussions with potential investors.'" Similarly, HBP says Litner knew or

[13] Presenting evidence satisfying at least one of these exceptions is sufficient. HBP is not required to marshal all its evidence at this early stage. *See, e.g., Thang Bui v. Dangelas*, No. 01-18-01146-CV, 2019 WL 5151410, at *5 (Tex. App.—Houston [1st Dist.] Oct. 15, 2019, pet. denied) (mem. op.) (nonmovant satisfies her TCPA burden if she produces prima facie evidence of at least one factual theory underlying claim; she does not have to prove every single factual allegation).

should have known that HBP would rely on the information, since HBP reached out to Litner to verify certain information—i.e., the proponent of the Zone 1 rate—during due diligence regarding the potential acquisition of the Network.

c. Justifiable reliance

Appellants also challenge the element of justifiable reliance. A fraud claimant must show that it relied on the defendant's representation and that such reliance was justifiable. *Orca Assets*, 546 S.W.3d at 653 (citing *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010)). Justifiable reliance usually presents a fact question. *See id.* at 654; *Wyrick v. Bus. Bank of Tex., N.A.*, 577 S.W.3d 336, 348 (Tex. App.—Houston [14th Dist.] 2019, no pet.). But the element can be negated as a matter of law when circumstances exist under which reliance cannot be justified. *See Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 424 (Tex. 2015) (per curiam). In this inquiry, courts "must consider the nature of the [parties'] relationship and the contract." *AKB Hendrick, LP v. Musgrave Enters., Inc.*, 380 S.W.3d 221, 232 (Tex. App.—Dallas 2012, no pet.). In an arm's-length transaction, parties must exercise ordinary care for the protection of their own interests; a failure to do so is not excused by "mere confidence in the honesty and integrity of the other party." *Westergren*, 453 S.W.3d at 425 (internal quotation omitted). Accordingly, a party cannot "blindly rely" on another's representation when the party's knowledge, experience, and background alert it to investigate the other's representations before acting in reliance on those representations. *See Orca Assets*, 546 S.W.3d at 654.

Appellants present essentially two arguments why HBP's reliance was unjustified as a matter of law. First, they contend that HBP blindly relied on the representations even though its due-diligence team was experienced. Barradas testified that because Comcast confirmed that the business plan and the Network

valuation provided by Champions during due diligence were reasonable, HBP relied on affiliate rates underlying the plan in formulating the amount it was willing to pay. She stated further that HBP's "reliance on Litner's validation of the business plan was reasonable inasmuch as Comcast was described to us as the expert in regional sports networks and was as a practical matter the only place they could go to validate the Network's business plan." Further supporting the reasonableness of HBP's reliance, Barradas noted that Comcast itself had in October 2010 paid for its 22.5% interest in the Network an amount commensurate with the value that was being reported to HBP.

While this was an arm's-length transaction between sophisticated parties, HBP's evidence undermines appellants' argument that HBP relied "blindly" on Champions' or Allen & Company's representations. HBP sought verification from Comcast, which it provided.

Second, appellants say that numerous "red flags" appeared during due diligence that rendered HBP's reliance on the alleged representations unjustifiable. Most prominent among them is that the PSA contained a merger clause, through which, appellants say, HBP disclaimed reliance on any of the alleged representations. Section 14.6 of the PSA stated:

> This Agreement and the Ancillary Agreements, including any exhibits or schedules (including the Exhibits and the Disclosure Schedule) hereto or thereto constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes and is in full substitution for any and all prior agreements and understandings between them relating to such subject matter, and no party hereto shall be liable or bound to the other party hereto in any manner with respect to such subject matter by any warranties, representations, indemnities, covenants, or agreements except as specifically set forth herein or therein. The exhibits and schedules (including the Exhibits and the Disclosure Schedule) to this

> Agreement are hereby incorporated and made a part hereof and are an integral part of this Agreement.

Appellants suggest that we read this clause as a disclaimer of reliance, thus precluding HBP's fraud claims. "[A]s Texas courts have repeatedly held, a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms." *Westergren*, 453 S.W.3d at 424-25 (citing *Thigpen*, 363 S.W.2d at 251). For a contract to disclaim reliance, however, parties must use clear and unequivocal language. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60, 62 (Tex. 2008); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179-80 (Tex. 1997). This elevated requirement of precise language helps ensure that parties to a contract—even sophisticated parties represented by able attorneys—understand that the contract's terms disclaim reliance, such that the contract may be binding even if it was induced by fraud.

Standard merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement. *See, e.g.*, *Italian Cowboy Partners*, 341 S.W.3d at 334; *Dallas Farm Mach. Co. v. Reaves*, 307 S.W.2d 233, 239 (Tex. 1957). Because section 14.6 of the PSA does not disclaim reliance, the PSA does not establish that HBP's reliance on the alleged representations was unjustified as a matter of law.

Appellants point to other "red flags," such as evidence that HBP knew Comcast's projections were "estimates," that Litner told Barradas and Postolos that the Zone 1 rate was aggressive, that HBP was aware of the Most Favored Nations clause in Comcast's affiliation agreement, and that HBP was aware of a Comcast network failure in Portland. These largely go to the weight or credibility of HBP's evidence. At this stage of the proceedings, however, we view the evidence in the

light most favorable to the TCPA nonmovant. *See Enterprise Crude GP*, 614 S.W.3d at 294.

d. Injury

HBP also offered clear and specific legally sufficient evidence that it suffered damages as a result of the alleged fraud. Specifically, HBP signed the PSA and closed the transaction but, according to Barradas, Comcast was unable to obtain any affiliate agreements at the Zone 1 rate specified in Comcast's affiliation agreement. Barradas and Crane both stated in their declarations that, because of this inability to secure affiliate agreements at the same rate, the Network went bankrupt, the Astros' stake in the Network was rendered worthless, and HBP was forced to pay over $11 million in pre-bankruptcy capital calls and over $12 million in settlement costs as a result of the bankruptcy. Barradas also stated that, had HBP been aware of the true proponent of the Zone 1 rate, it never would have offered $615 million for the Astros and the team's interest in the Network.

In sum, HBP produced clear and specific evidence of a prima facie case for each essential element of its claims for fraud and fraudulent inducement against all appellants.

2. *Fraud by nondisclosure*

The elements of fraud by nondisclosure are (1) the defendant deliberately failed to disclose material facts to the plaintiff that the defendant had a duty to disclose, (2) the defendant knew the plaintiff was ignorant of the facts and that the plaintiff did not have an equal opportunity to discover them, (3) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting, and (4) the plaintiff relied on the nondisclosure and suffered injury as a result of that reliance. *Adiuku v. Ikemenefuna*, No. 14-13-00722-CV,

2015 WL 778487, at *9 (Tex. App.—Houston [14th Dist.] Feb. 24, 2015, no pet.) (mem. op.); *Horizon Shipbuilding, Inc. v. BLyn II Holding, LLC*, 324 S.W.3d 840, 850 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

HBP's fraud by nondisclosure claim is essentially an extension of its fraud and fraudulent inducement claim: that not only did appellants affirmatively misrepresent the original proponent of the Zone 1 rate, but appellants also failed to disclose the correct information.

HBP submitted evidence that appellants failed to disclose the true identity of the original proponent of the Zone 1 rate.[14] Additionally, though Comcast allegedly represented to HBP's due-diligence team that it was highly confident the rates in the Network's business plan were reasonable and achievable, neither Comcast nor the Astros disclosed to HBP prior to closing that Comcast had in the preceding year expressed a completely different expectation directly to the Astros—that the Zone 1 rate upon which the Astros allegedly insisted "would not fly" and was "unrealistic and not achievable." HBP also submitted evidence that appellants knew or should have known that HBP was ignorant of the facts and that HBP did not have an equal opportunity to discover the facts. Barradas stated in her declaration that Allen & Company told her the false information during due diligence and that Barradas asked to verify that information with Comcast, again during due diligence. Barradas told Allen & Company and Champions that HBP lacked the ability to independently validate the reasonableness of the Network's

[14] Appellants argue that they were not in a confidential or fiduciary relationship with HBP and thus owed no duty of disclosure to HBP. But a duty to disclose may arise when the defendant: (1) discovered new information that made its earlier representation untrue or misleading; (2) made a partial disclosure that created a false impression; or (3) voluntarily disclosed some information, creating a duty to disclose the whole truth. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 220 (Tex. 2019). As set forth above, HBP presented some evidence that appellants' representations during due diligence created a false impression or an incomplete picture of the truth.

business plan other than through confirmation with Comcast. This evidence supports an inference that appellants knew that HBP was ignorant of the facts and did not have an opportunity to discover them. The fact that HBP sought this information during due diligence also supports an inference that appellants intended HBP to rely on the false or misleading information in deciding whether to purchase the Network and at what price. Finally, HBP's evidence of damages as discussed above is likewise sufficient for its fraud by nondisclosure claim.

HBP provided clear and specific legally sufficient evidence in support of this claim.

3. *Negligent misrepresentation*

The essential elements of a negligent misrepresentation claim are: (1) the defendant made a representation in the course of the defendant's business, or in a transaction in which the defendant had a pecuniary interest; (2) the defendant supplied "false information" for the guidance of others; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

Like with its fraud claims, HBP similarly relies on appellants' misrepresentations regarding the identity of the original proponent of the Zone 1 rate. As discussed above, there is prima facie evidence that appellants made the alleged statements, that they were false, that HBP relied on the statements in deciding to purchase the Network, and that HBP was injured accordingly. HBP's evidence further establishes that appellants failed to use reasonable care when communicating the information to HBP. *E.g.*, *First Interstate Bank of Tex., N.A. v. S.B.F.I., Inc.*, 830 S.W.2d 239, 246 (Tex. App.—Dallas 1992, no writ) (when

speaker had access to correct information that recipient did not, and speaker supplied false information, that is some evidence that speaker failed to use reasonable care in obtaining or communicating information).

In a footnote, Champions suggests that the economic loss rule bars HBP's negligent misrepresentation claim. But the economic loss rule—which, in broad terms, "addresses efforts to use negligence and product liability claims as vehicles for recovery of economic losses," *Barzoukas v. Found. Design, Ltd.*, 363 S.W.3d 829, 834 (Tex. App.—Houston [14th Dist.] 2012, pet. denied)—does not categorically preclude HBP's negligent misrepresentation claim. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 418 (Tex. 2011). Because HBP alleges that appellants breached a duty that exists independently of the PSA—i.e., the common-law duty of care in supplying commercial information—the economic loss rule does not categorically bar HBP's negligent misrepresentation claim. *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998) (required inquiry is whether source of the duty arises from the contract or from common law, along with analysis of remedy sought by plaintiff).

Moreover, HBP presented some evidence of the relevant measure of damages, which includes: (a) the difference between the value a buyer has paid and the value of what the buyer has received; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation; but which does not include the benefit of the plaintiff's contract with the defendant. *See D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 664 (Tex. 1998) (citing Restatement (Second) of Torts § 552B (1977)). As noted, HBP's evidence constitutes at least prima facie proof that the value of what HBP received was less than the purchase price paid. HBP does not have to prove the precise amount of

damages at this stage of the proceedings. *See S&S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 848 (Tex. 2018) (nonmovant is "not required to provide evidence sufficient to allow an exact calculation" of its actual damages to meet its burden under the TCPA).

We conclude that HBP satisfied its burden regarding its negligent misrepresentation claim.

4. *Civil conspiracy*

Civil conspiracy is a theory to secure joint and several liability against members of a conspiracy for the harm caused by any one member of the conspiracy. *Enterprise Crude GP*, 614 S.W.3d at 308; *Cooper v. Trent*, 551 S.W.3d 325, 335 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). Defined as a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means, civil conspiracy is not a "stand alone" tort but rather derives from independent, underlying tortious conduct. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). A defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable. *Cooper*, 551 S.W.3d at 335. To hold a defendant liable under a conspiracy theory, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *PAS, Inc. v. Engel*, 350 S.W.3d 602, 616 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005)). In making a prima facie showing under the TCPA, the plaintiff may rely on circumstantial evidence—indirect evidence that creates an inference to establish 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 *In re Lipsky*, 460 S.W.3d at 589).

Appellants argue that HBP did not adduce evidence in support of the essential elements of its conspiracy theory.[15] HBP's evidence identifies two or more persons allegedly involved in a conspiracy to defraud. These include the appellants. The object to be accomplished, according to HBP's petition, was to obtain a buyer for the Network at an inflated value. While appellants repeatedly represented to HBP during the due-diligence phase that the Zone 1 rate to which Comcast agreed was Comcast's proposal and was a rate in which Comcast had a high degree of confidence would be achieved for the Network, there is evidence that Comcast in fact believed the rate was unrealistic and "would not fly" and expressed this belief to Champions in 2010. The evidence presented allows a reasonable inference that the objective was to secure a Network buyer willing to pay a certain value when appellants knew or seriously doubted that the Network would generate revenue at the represented rates sufficient to justify the value paid.

We have already decided that HBP provided evidence that appellants committed an underlying tort, whether fraud, fraudulent inducement, or fraudulent

[15] Appellants note that HBP did not specifically address conspiracy in the body of its TCPA opposition, though appellants do not argue that HBP waived its conspiracy allegation. HBP, however, specifically addressed the torts from which the conspiracy allegation derives—fraudulent misrepresentation, inducement, and omission—and we may look to that evidence in determining whether a trial court erred in failing to dismiss a conspiracy allegation that is dependent on the evidence in support of those claims. *See Warner Bros. Entm't, Inc. v. Jones*, 538 S.W.3d 781, 813-14 (Tex. App.—Austin 2017) (because conspiracy claim is a derivative tort, trial court does not err by refusing to analyze conspiracy claim separate from defamation claim in connection with TCPA dismissal motion), *aff'd*, 611 S.W.3d 1 (Tex. 2020). The issue under the TCPA's second step is whether the nonmovant established a prima facie case by clear and specific evidence with regard to each element of its claims. *See* Tex. Civ. Prac. & Rem. Code § 27.005(c); *Coleman*, 512 S.W.3d at 899; *In re Lipsky*, 460 S.W.3d at 587. A plaintiff can meet this burden based on the petition and any evidence attached thereto or attached to the TCPA response.

non-disclosure. There exists evidence of one or more unlawful, overt acts in furtherance of the alleged conspiracy, including at least the following. HBP presented some evidence that all appellants misrepresented the source of the Zone 1 rate; that Champions and/or McLane knew that Comcast believed the Zone 1 rate (on which the Astros insisted) was not realistic or achievable, but did not disclose the fact that Comcast expressly stated as much in 2010; and that Comcast represented it was "highly confident" that the Zone 1 rate was reasonable and achievable when in truth it thought otherwise and failed to disclose to HBP that it had informed Champions in 2010 that it thought otherwise.

Finally, viewing all the evidence in the light most favorable to HBP, we conclude that a factfinder could reasonably infer from the circumstances that appellants had a meeting of the minds on the object or course of action. *See Wooters v. Unitech Int'l, Inc.*, 513 S.W.3d 754, 761-62 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (explaining that "[f]or conspiracy claims, the proof is often based on circumstantial evidence"; in reviewing circumstantial evidence, courts "review the totality of the known circumstances"; and "[a] conspiracy finding depends on the reasonableness of the inferences drawn from these circumstances"). The evidence permits a reasonable inference that at least two members of the alleged conspiracy had a specific intent to agree "to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). Appellants repeated the same misrepresentations to HBP after Comcast told the Astros that the Zone 1 rate upon which the Astros insisted was unrealistic and "would not fly" and did so when HBP made clear that it was seeking the information for purposes of due diligence prior to agreeing to the purchase. This is sufficient circumstantial evidence from which a common plan and intent may be reasonably inferred based on the nature of

the representations and their timing. *See Straehla v. AL Glob. Servs., LLC*, 619 S.W.3d 795, 812 (Tex. App.—San Antonio 2020, pet. denied) ("suspicious circumstances" surrounding the formation of a contract gave rise to inference of common plan among alleged co-conspirators).

Moreover, all of the appellants potentially stood to gain from HBP's purchase of the Astros' stake in the Network at an allegedly inflated price: Champions, as the direct beneficiary of the purchase price, and Comcast, as another stakeholder in the Network. *See Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 582 (Tex. 1963) ("Inferences of concerted action may be drawn from joint participation in the transactions and from enjoyment of the fruits of the transactions[.]"). Comcast argues that it makes "no economic sense for the Comcast Appellants to engage in a purported 'scheme' that would knowingly lead to the destruction in value of its own investment." This argument may ultimately sway a jury, but it does not negate HBP's prima facie evidence at this stage of the proceedings as a matter of law.

On this record, we hold that HBP established by clear and specific evidence a prima facie case for the essential elements of its conspiracy theory. *See Westergren v. Jennings*, 441 S.W.3d 670, 683-84 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (holding that "[w]hile no one piece of this evidence . . . shows a conspiracy to use Westergren's plans and cut him out of the development, . . . these circumstances and the potential inferences arising therefrom provide a sufficient factual basis for his allegation of a conspiracy").

5. *Breach of contract*

HBP asserted a breach of contract claim against Champions. To establish a claim for breach of contract, a plaintiff must prove the following elements: (1) a valid contract; (2) the plaintiff performed or tendered performance; (3) the

defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach. *Arshad v. Am. Express Bank, FSB*, 580 S.W.3d 798, 804 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Smith v. Smith*, 541 S.W.3d 251, 259 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

No party disputes that the PSA is a valid contract. HBP also produced evidence that it performed by tendering its share of the purchase price agreed to by the parties.

Regarding the third element, HBP alleged that Champions breached various representations, warranties, conditions, and/or covenants within the PSA. HBP also invoked its indemnity rights under the contract. HBP argues that the financial statements and disclosures that were part of the agreement did not fairly and accurately set forth the Network's financial condition, and that Champions failed to disclose facts, events, or changes in circumstances, that were reasonably likely to have a material adverse effect on the Network. Champions' purported failure to disclose the Network's true financial condition and facts or circumstances that would reasonably be expected to result in the Network's inability to generate revenue or satisfy liabilities allegedly violated, among other provisions, warranties and covenants contained in Articles 5 and 8 of the PSA. We need not quote those sections in detail here, but in general Champions warranted and represented in section 5.5, for example, that the financial statements attached to the PSA Disclosure Schedule "present fairly in all material aspects the financial position" of the Network. The financial statements showed that the Astros' stake in the Network was valued at over $300 million. Champions also warranted and represented that there was no existing condition or set of circumstances that would reasonably be expected to result in a material liability of the Network, except for those reflected in the transaction documents, and that there had not occurred any

events, developments, circumstances, or facts that "has had or would reasonably be expected to have" a material adverse effect on the Network. *See* PSA sections 5.22(d) and (e).

According to HBP, these warranties and representations were false. As discussed, HBP presented evidence that Comcast told Champions, prior to HBP's purchase of the Network, that the Zone 1 rate was unrealistic and not attainable. The Network's failure to enter into affiliation agreements with non-Comcast providers at the Zone 1 rate specified in Comcast's affiliation agreement was likely to result in an inability to generate revenue and assets sufficient to satisfy the Network's liabilities, thereby jeopardizing the Network's survival as a going concern. We conclude HBP presented clear and specific legally sufficient evidence necessary to support a rational inference that Champions breached one or more provisions of the PSA.

HBP relied on Barradas's and Crane's declarations as evidence of contract damages. Barradas and Crane stated that HBP suffered the following injuries as a result of Champions' asserted breaches: the loss of 100% of HBP's equity in the Network; over $11 million in capital calls funded by the Astros before the Network was put into involuntary bankruptcy; the loss of over $85 million in fees due under a media rights agreement; and $12,816,198 in bankruptcy settlement costs under the plan of reorganization. Barradas also stated "with 100% certainty" that, had HBP been given the correct information before closing, it would not have offered $615 million for the Astros and the team's interest in the Network.

We conclude that HBP provided clear and specific legally sufficient evidence for each element of its breach of contract claim against Champions.

6. *Declaratory judgment*

The Declaratory Judgment Act is a procedural device available as a remedy. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (per curiam) (orig. proceeding). The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Tex. Civ. Prac. & Rem. Code § 37.002(b). Thus, a declaratory judgment is appropriate when a justiciable controversy exists concerning the rights and status of the parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). A justiciable controversy is one in which a real and substantial controversy exists involving a genuine conflict of tangible interest and not merely a theoretical dispute. *Id.*

HBP's pleading and the evidence attached to its response establish that a justiciable controversy exists as to whether Champions owes any duty of indemnification to HBP under the PSA. In its petition, HBP requested a declaratory judgment "with respect to the indemnification obligations McLane Champions owes to [HBP] for harm resulting from breaches of covenants, representations, warranties, or other obligations contained in the Purchase Agreement," and HBP specifically cited section 13.1 of the PSA as the source of that obligation, which we excerpted above. Further, the dispute about the PSA's validity and enforceability could be resolved by a declaration construing the PSA's indemnification provisions. Thus, HBP has established a prima facie case for its declaratory judgment claim. *See Choudhri v. Lee*, No. 01-20-00098-CV, 2020 WL 4689204, at *4 (Tex. App.—Houston [1st Dist.] Aug. 13, 2020, pet. denied) (mem. op.); *Cosmopolitan Condo. Owners Ass'n v. Class A Inv'rs Post Oak, LP*, No. 01-16-00769-CV, 2017 WL 1520448, at *4-5 (Tex. App.—Houston [1st Dist.] Apr. 27, 2017, pet. denied) (mem. op.).

Conclusion

HBP established a prima facie case for each of its asserted claims. The trial court did not err in denying appellants' TCPA motion to dismiss. We affirm the court's order.

/s/ Kevin Jewell
Justice

Panel consists of Chief Justice Christopher and Justices Jewell and Poissant.