Affirm in part; Opinion Filed August 13, 2019.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01290-CV

FORGET ABOUT IT, INC., GUNTHER MUELLER, DANIEL D. DENEUI, TERRI J. SURESH DENEUI, DUSTIN DENEUI, MICHAEL S. COLE, JANET COLE, SUTHERLAND SOLUTIONS, LLC, MARK P. BURNS, ANDREA C. JONES, NICOLE TURCOTTE, EVEXIAS CAPITAL, LLC, EVEXIAS HEALTH SOLUTIONS, LLC, EVEXIAS HOLDING CO, LLC, EVEXIAS HRT, LLC F/K/A HORMONAL HEALTH AND WELLNESS CENTERS, LLC, EVEXIAS LORDSON, LLC, EVEXIAS LORDSON II, LLC, EVEXIAS MEDICAL CENTERS, PLLC F/K/A TERRI SURESH ANCP, PLLC A/K/A HORMONAL HEALTH WELLNESS & SKIN CENTER A/K/A HORMONAL HEALTH WELLNESS AND AESTHETICS CENTER A/K/A HORMONAL HEALTH & WELLNESS, NILUS, LLC, NORTH AMERICAN CUSTOM LABORATORIES, LLC A/K/A PHARMAKEIO A/K/A FARMAKEIO, MARK STAR AND GET WELL SCOTTSDALE, LLC, Appellants
V.
BIOTE MEDICAL, LLC, Appellee

On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-18-01784-B

OPINION

Before Justices Myers, Molberg,[1] and Carlyle
Opinion by Justice Carlyle

This is an interlocutory appeal from the trial court's order partially denying a motion to dismiss based on the Texas Citizens Participation Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011. In six issues, appellants contend the trial court erred by (1) partially denying their

[1] Justice Ken Molberg has substituted on the submission panel. Justice Molberg has reviewed the briefs and record in this case.

motion to dismiss appellee's counterclaims, because appellants established the TCPA applies and appellee failed to present clear and specific evidence supporting its causes of action, and (2) not ruling on and sustaining appellants' objections to appellee's evidence. Additionally, both sides challenge this court's jurisdiction.

We conclude (1) both sides' jurisdictional challenges lack merit and (2) appellants failed to carry their burden to establish the TCPA applies. We affirm the portion of the trial court's order partially denying appellants' TCPA motion to dismiss.[2]

I. Background

Appellee BioTE Medical, LLC markets and licenses hormone therapy products, including its "BioTE Formula" and "BioTE Software Program," to physicians and clinics and provides those licensees with training and support, including access to its online "proprietary dosing site." Physicians and clinics use BioTE's program to prescribe custom hormone "pellets," which are compounded by pharmacies and then implanted into patients' skin. BioTE's contracted physicians and clinics are "serviced" by BioTE's "physician liaisons," who are independent contractors paid commissions and bonuses based on the amount of business generated. BioTE requires its employees and independent contractors to sign nondisclosure agreements and, in some cases, non-compete agreements.

Appellant Gunther Mueller is the owner and sole employee of Forget About It, Inc. (collectively, "Mueller"). Mueller became a BioTE independent contractor in October 2012. Approximately five years later, BioTE terminated his contract. In April 2018, Mueller filed this lawsuit, asserting claims for breach of contract and fraud.

[2] Although appellee filed a "cross-notice of appeal" in this case, appellee states in a letter brief in this court that it is not attempting to appeal from the portions of the trial court's order that partially granted appellants' TCPA motion to dismiss. In this interlocutory appeal, we affirm the trial court's order only to the extent it partially denies the TCPA motion to dismiss. *See* CIV. PRAC. & REM. § 51.014(a)(12). We address no other portions of the trial court's order. *See id*.

BioTE filed a general denial answer and asserted multiple counterclaims against Mueller and twenty additional "counter-defendants" (collectively, the "FAI Parties" or appellants), all of whom BioTE described as "former BioTE personnel" or "companies which have been formed by the former personnel."[3] BioTE contended the FAI Parties "have misappropriated BioTE's confidential and trade secret information to actively compete against and destroy BioTE's business" and "have established and have participated in the establishment of, companies which have been unlawfully founded and operated to misappropriate BioTE's business, business model, and confidential information."[4]

On May 11, 2018, the FAI Parties filed a TCPA motion to dismiss BioTE's counterclaims. The FAI Parties asserted (1) "BioTE's legal action is based on, relate[s] to, or are [sic] in response to [the FAI Parties'] exercise of the right to speak freely and to associate freely"; (2) "[a]mong other things raised in the Counterclaims, communications and discussions with the pub[l]ic or medical physicians . . . about medical products and services is a matter of public concern for which free speech is allowed"; and (3) "the other clear thrust of the Counterclaims is to intimidate and punish the Movants for communicating with each other for pursuing and promoting a common interest, including (among other things) new businesses (and to defend themselves against BioTE) and medical products and services."

The trial court allowed limited discovery pertaining to the TCPA motion. Following that discovery, BioTE filed a response to the TCPA motion in which it asserted, among other things,

[3] BioTE's counterclaims against the FAI Parties included misappropriation of trade secrets, common law misappropriation, breach of contract, tortious interference with contracts and prospective business relations, civil conspiracy, common law fraud/fraudulent inducement, breach of fiduciary duty/disgorgement, conversion, declaratory judgment, aiding and abetting, commercial bribery, state and federal healthcare law violations, Texas Theft Liability Act violations, and unfair competition/conspiracy to violate Texas Theft Liability Act.

[4] BioTE also alleged the FAI Parties are "using BioTE's stolen confidential information for the purposes of targeting BioTE's existing customers and contracts," "using false, deceptive, and misleading advertising" to "mislead BioTE's existing contracted doctors, groups and sales personnel into breaking their contracts and joining the conspirators," soliciting and inducing current and former BioTE employees to violate their confidentiality and non-compete agreements with BioTE and misappropriate BioTE's confidential information, and "have made misrepresentations and/or material omissions about BioTE to current and prospective physicians and groups, facilities, business partners, and employees."

(1) the FAI Parties had not met their burden to show the TCPA applies; (2) dismissal is precluded by the TCPA's commercial speech exemption; and (3) BioTE met its burden to provide clear and specific evidence of its claims. The evidence attached to BioTE's response included affidavits of BioTE employees, independent contractors, and contracting physicians, excerpts from the FAI Parties' deposition testimony, and copies of various agreements signed by the parties.[5] The FAI Parties objected to portions of that evidence as hearsay, conclusory, speculative, and without foundation.

On Monday, September 10, 2018, the trial court held a hearing on the TCPA motion. The trial court partially denied and partially granted the motion in an October 10, 2018 order in which it stated it "timely heard this matter pursuant to CPRC §27.004(c)." The FAI Parties timely appealed the portion of the trial court's order regarding the motion's denial. Also, BioTE filed a "cross-notice of appeal."

II. TCPA motion to dismiss

The TCPA "protects citizens . . . from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). The stated purpose of the statute is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." CIV. PRAC. & REM. § 27.002; *see also ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam).

[5] BioTE's evidence included BioTE CEO Mark Hincher's affidavit stating that the FAI Parties "17. . . . are engaging in a conspiracy between themselves and aiding and abetting each other, the unlawful purpose of which is to convince physicians and physician groups to break their binding and valuable licensing and management contracts with BioTE and to enter into identical arrangements with companies they founded using the stolen business model, customer lists, and intellectual property of BioTE." Also, BioTE's evidence included affidavits of several physicians under contract with BioTE who testified FAI Parties approached them and told them (1) by using hormone replacement therapy companies affiliated with the FAI parties, they could make more money than they were making with BioTE and would be provided with a very similar dosing site and support system developed by persons formerly affiliated with BioTE, and (2) they could "break" or "get out of" their contracts with BioTE without negative consequences.

To effectuate the statute's purpose, the Legislature has provided a procedure to expedite dismissing claims brought to intimidate or to silence a defendant's exercise of the rights protected by the statute. *Coleman*, 512 S.W.3d at 898; *see also* CIV. PRAC. & REM. §§ 27.003(a), 27.005(b); *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). The movant bears the initial burden of showing by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the movant's exercise of the right of free speech, the right of association, or the right to petition. CIV. PRAC. & REM. § 27.005(b); *see also S&S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). If the movant makes this showing, the burden shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of its claims. CIV. PRAC. & REM. § 27.005(c); *see Elliott*, 564 S.W.3d at 847. Circumstantial evidence is proper for us to consider in a TCPA review. *See Lipsky*, 460 S.W.3d at 591.

We review de novo the trial court's ruling on a motion to dismiss under the TCPA. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). "In conducting this review, we consider, in the light most favorable to the nonmovant, the pleadings and any supporting and opposing affidavits stating the facts on which the claim or defense is based." *Dyer*, 573 S.W.3d at 424; *see also* CIV. PRAC. & REM. § 27.006(a). Also, the trial court may allow specified and limited discovery relevant to the motion. CIV. PRAC. & REM. § 27.006(b).

Generally, a hearing on a TCPA motion must be set not later than the 60th day after the date the motion is served. *Id.* § 27.004(a). "If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion." *Id.* § 27.004(c). The trial court must rule on a TCPA motion not later than the 30th day following the hearing date. *Id.* § 27.005(a). If the trial court does not rule on a TCPA motion in the time prescribed by section

27.005, the motion is considered to have been denied by operation of law and the moving party may appeal. *Id*. § 27.008(a); *see also id*. § 51.014(a)(12) (allowing appeal from interlocutory order that "denies a motion to dismiss filed under [TCPA]").

The TCPA "does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions." *Id*. § 27.011(a). Also, the TCPA "shall be construed liberally to effectuate its purpose and intent fully." *Id*. § 27.011(b).

A. Jurisdictional challenges

As a threshold matter, we begin by addressing the parties' separate, but related, challenges to this court's jurisdiction. BioTE has filed a "Motion to Dismiss Appeal" in which it contends this court lacks jurisdiction over this appeal because "the trial court did not conduct a hearing on the TCPA motion to dismiss within the 120-day mandatory time frame." According to BioTE, (1) section 27.004(c)'s language stating "in no event" demonstrates the legislature intended to preclude application of "any time extension rules, cause, discretion, or agreement"; (2) the TCPA's provisions "operate as an exception to the Code Construction Act's time-extension provisions" because the two statutes conflict and the TCPA is more recent and more specific; and (3) because the September 10, 2018 hearing occurred 122 days after the TCPA motion was filed, "the subsequent order issued by the trial court is null and void" and "interlocutory appeal is not available for movant." Additionally, BioTE asserts it "filed its Cross-Notice of Appeal to preserve appellate review of the trial court's ruling that the hearing on the Motion to Dismiss was timely heard" because in the absence of a timely hearing, "the trial court's Order is a nullity and no jurisdiction exists over this appeal."

The FAI Parties argue this court has jurisdiction over this appeal because both the Texas Code Construction Act and Texas Rule of Civil Procedure 4 allow for extending a prescribed time

period if, as here, the time period's final day falls on a Saturday. Also, the FAI Parties contend there is no jurisdictional basis for BioTE's cross-appeal because "[BioTE] acknowledges it is not seeking to alter the trial court's judgment or other appealable order."

The Code Construction Act provides that "[i]f the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday." TEX. GOV'T CODE § 311.014(b). Texas Rule of Civil Procedure 4 states that "[i]n computing any period of time prescribed or allowed by . . . any applicable statute," "[t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday." TEX. R. CIV. P. 4. If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both. GOV'T § 311.026(a). If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevails. *Id.* § 311.026(b).

As to BioTE's "Cross-Notice of Appeal," we conclude this court has jurisdiction to review whether the trial court's hearing on the TCPA motion to dismiss was timely, which BioTE contends is determinative as to whether we have jurisdiction over this interlocutory appeal. *See, e.g.*, *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 751 (Tex. 2017) (explaining that subject-matter jurisdiction may be raised at any time in a proceeding). Further, the TCPA hearing's timeliness is likewise determinative as to BioTE's motion to dismiss this appeal. Therefore, we address together the merits of BioTE's "cross-appeal" and its motion to dismiss this appeal.

Because the trial court "allow[ed] discovery," section 27.004(c) allowed the trial court to "extend the hearing date." Although BioTE contends section 27.004(c) "must be invoked at the time the trial court authorizes limited discovery under Section 27.006(b), which the trial court did not do in this instance," BioTE cites no authority for that position and we have found none. We decline to impose that requirement on the trial courts. We will construe a deadline statute differently than our default rules[6] prescribe when the legislature clearly tells us to do so, such as by telling us that the default rules do not apply to the particular deadline statute. Instead of that, though, the TCPA itself tells us it does "not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions." CIV. PRAC. & REM. § 27.011(a); *see also id.* § 27.011(b) (TCPA "shall be construed liberally to effectuate its purpose and intent fully").

After the FAI Parties filed the TCPA motion to dismiss, both sides filed other motions and vacation requests that resulted in docketing challenges. Also, the trial court allowed limited discovery. The 120th day after the motion's filing was a Saturday, and the trial court held the hearing on the Monday following that Saturday. We conclude the trial court's TCPA hearing was timely. *See id.* § 27.004(c); GOV'T § 311.014(b); TEX. R. CIV. P. 4. We decide against BioTE on its cross-issue and deny its motion to dismiss this appeal.

B. TCPA applicability

In their first issue, the FAI Parties assert they met their initial burden of establishing by a preponderance of the evidence that BioTE's counterclaims are based on, related to, or in response to their exercise of their right of association or right of free speech. Each of those protected rights requires a "communication," which "includes the making or submitting of a statement or document

[6] *See, e.g.*, GOV'T § 311.014(b); TEX. R. CIV. P. 4.

in any form or medium, including oral, visual, written, audiovisual, or electronic." *See* CIV. PRAC. & REM. § 27.001(1)–(3).

The FAI Parties asserted in their TCPA motion to dismiss (1) BioTE's legal action is based on, related to, or in response to their exercise of the right to associate freely because the "clear thrust" of BioTE's counterclaims "is to intimidate and punish the Movants for communicating with each other for pursuing and promoting a common interest," and (2) "communications and discussions with the pub[l]ic or medical physicians . . . about medical products and services is a matter of public concern for which free speech is allowed." We limit our appellate analysis to those two asserted bases for TCPA applicability. *See Cavin v. Abbott*, 545 S.W.3d 47, 67 & n.80 (Tex. App.—Austin 2017, no pet.) (concluding TCPA appeal is confined to conduct described in TCPA motion as basis for TCPA applicability, citing *Long Canyon Phase II & III Homeowners Ass'n v. Cashion*, 517 S.W.3d 212, 219 & n.23 (Tex. App.—Austin 2017, no pet.), and *Serafine v. Blunt*, 466 S.W.3d 352, 359–60 (Tex. App.—Austin 2015, no pet.)); *cf. Adams*, 547 S.W.3d at 896–97 (although appellate court does not consider "issues" not raised below, TCPA movant preserved for appeal an "argument" raised for first time at TCPA hearing regarding additional reason why complained-of communication described in TCPA motion was matter of public concern).

1. Right of association

"Exercise of the right of association" means "a communication between individuals who join together to collectively express, promote, pursue or defend common interests." CIV. PRAC. & REM. § 27.001(2). This court has interpreted the TCPA's definition of "right of association" in light of the purpose of the statute and concluded "it would be illogical for the [TCPA] to apply to situations in which there is no element of public participation." *Dyer*, 573 S.W.3d at 426. Further, we concluded that to constitute an exercise of the right of association under the TCPA, the nature

of the "communication between individuals who join together" must involve public or citizen's participation. *Id*.

Because the FAI Parties' communications "with each other" were private communications related to an alleged conspiracy among them and "did not involve public or citizen's participation," it would be "illogical" to apply the TCPA to those communications. *Id*. Further, construing the statute such that the FAI Parties would have a "right of association" based solely on their private communications allegedly pertaining to the misappropriation and use of BioTE's trade secrets and confidential business information "is an absurd result that would not further the purpose of the TCPA to curb strategic lawsuits against public participation." *Id*. at 426–27.

The FAI Parties argue in their appellate reply brief (1) *Dyer* is distinguishable because that case "held that the right of association's 'common interests' must be shared by a group of more than two," and (2) BioTE's counterclaims "implicate the communications of at least ten (10) individuals," thus meeting Dyer's "'group' requirement to implicate the right of association." But nothing in *Dyer* precludes the application of that case's principles to an alleged conspiracy by more than two people. We conclude the FAI Parties failed to establish by a preponderance of the evidence that BioTE's claims are based on, related to, or in response to the FAI Parties' exercise of a right of association as defined by the TCPA. *Id*. at 427 ("[A]bsent an intervening change in law, we follow our own precedent.").

2. Right of free speech

"Exercise of the right of free speech" means "a communication made in connection with a matter of public concern." *See* CIV. PRAC. & REM. § 27.001(3). A "matter of public concern" includes an issue related to health or safety; environmental, economic, or community well-being; the government, a public official or public figure; or a good, product, or service in the marketplace. *Id*. § 27.001(7). Private communications made in connection with a matter of public concern fall

within the definition of the exercise of the right of free speech under the TCPA. *Dyer*, 573 S.W.3d at 427–28 (citing *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam)).

Although the FAI Parties asserted in their TCPA motion that their right of free speech was implicated by "communications and discussions with the pub[l]ic or medical physicians," the FAI Parties do not describe, and the record does not show, BioTE counterclaims based on, relating to, or in response to "public" communications.[7] Therefore, we focus our right-of-free-speech analysis solely on communications with "medical physicians" about medical products and services. *See Long Canyon*, 517 S.W.3d at 219 & n.23.

To the extent the FAI Parties allegedly communicated about breaking existing BioTE contracts, we "cannot conclude communications discussing allegedly tortious conduct are tangentially related to a matter of public concern" simply because the contracts in question "belonged to a company in the healthcare industry or because the alleged tortfeasors hoped to profit from their conduct." *Dyer*, 573 S.W.3d at 428; *see In re IntelliCentrics, Inc.*, No. 02-18-00280-CV, 2018 WL 5289379, at *4 (Tex. App.—Fort Worth Oct. 25, 2018, orig. proceeding) (mem. op.) (concluding TCPA "has its limits" and not every communication falls under protection of statute). Further, a private communication made in connection with a business dispute is not a matter of public concern under the TCPA. *See Staff Care, Inc. v. Eskridge Enters., LLC*, No. 05-18-00732-CV, 2019 WL 2121116, at *5 (Tex. App.—Dallas May 15, 2019, no pet.) (mem. op.); *Brugger v. Swinford*, No. 14-16-00069-CV, 2016 WL 4444036, at *3 (Tex. App.—Houston [14th Dist.] Aug. 23, 2016, no pet.) (mem. op.). "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 or is related to health or safety is a potentially absurd result that was

[7] Although the FAI Parties' appellate brief contains a purported quote from BioTE's counterclaims regarding soliciting "the general public," that language does not appear in BioTE's live counterclaims.

not contemplated by the Legislature." *Erdner v. Highland Park Emergency Ctr., LLC*, No. 05-18-00654-CV, 2019 WL 2211091, at *5 (Tex. App.—Dallas May 22, 2019, no pet.).

Additionally, the TCPA "does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer." CIV. PRAC. & REM. § 27.010(b). This commercial speech exemption applies when (1) the TCPA movant was primarily engaged in the business of selling or leasing goods or services, (2) the movant made the statement or engaged in the conduct on which the claim is based in the movant's capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the movant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the movant for the kind of goods or services the movant provides. *Castleman v. Internet Money Ltd*., 546 S.W.3d 684, 688 (Tex. 2018) (per curiam). The exemption applies only to certain communications made not as a protected exercise of free speech by an individual, but as "commercial speech which does no more than propose a commercial transaction." *Id*. at 690. The party seeking to rely on the commercial speech exemption has the burden to prove its applicability by a preponderance of the evidence. *Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at *10 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op).

BioTE asserts "the evidence shows the speech in question clearly meets the *Castleman* test and is thus exempted from the scope of the TCPA." The FAI Parties argue (1) BioTE "failed to offer any evidence that the intended audience of any alleged communications made by [the FAI Parties] was an actual or prospective customer of BioTE"; (2) "the commercial speech exemption

does not apply to statements by independent contractors who are not promoting their own personal business at the time of the statement, and does not apply if the statements or conduct were not made to actual or potential customers"; (3) BioTE "wholly failed" to "establish each person who made a challenged statement is primarily engaged in either the business of selling hormone pellets, or in training medical providers in the field of hormone therapy"; (4) "the commercial speech exemption does not apply to statements about another company's product in the marketplace"; and (5) "[BioTE's] limited factual allegations are too conclusory to satisfy its burden by a preponderance of the evidence."

In support of their position, the FAI Parties cite *Toth v. Sears Home Improvement Products, Inc*., 557 S.W.3d 142, 153–56 (Tex. App.—Houston [14th Dist.] 2018, no pet.). In that case, Toth owned a flooring services company, Artistic Flooring. *Id*. at 146. In 2013, Toth entered into an "Independent Contractor Agreement" with a flooring business, Sears, under which he agreed to provide flooring services and install flooring on Sears's behalf. *Id*. at 147. Sears was contacted by a customer, Langham, about problems with wood flooring installed by a different Sears independent contractor. Pursuant to its contract with Toth, Sears assigned Toth to inspect Langham's flooring, determine the cause of the problem, and recommend a solution to Sears. *Id*. Toth recommended that Langham's floor be reinstalled using Bostik, a membrane sealant product that reduces moisture emissions. In early 2014, Toth terminated his contract with Sears. Sears ultimately refused to replace Langham's flooring and was sued by Langham in 2015. More than a year later, Langham hired Toth to replace her flooring. Subsequently, Sears joined Toth as a third-party defendant in Langham's lawsuit, alleging Toth's communications with Langham regarding Bostik violated his agreement with Sears. Toth filed a TCPA motion to dismiss Sears's breach of contract claim. *Id*. at 148. The trial court denied Toth's TCPA motion and he appealed. On appeal, Toth contended Sears failed to establish the commercial speech exemption applied to Toth's

communications with Langham regarding Bostik. *Id*. at 149. The court of appeals agreed. The court concluded the record did not show Toth was a seller of Bostik and thus his statement was not about "the speaker's particular goods or services," but rather "other goods" in the marketplace. *Id*. at 154. Also, the court stated (1) "Toth proposed a commercial transaction to Sears—not to Langham—by recommending that Sears purchase the product and use it to repair Langham's damaged floor"; (2) "Sears does not identify any statement or conduct by Toth that described or promoted his business, goods, or services—or 'propose[d] a commercial transaction'—to Langham"; and (3) because "[t]he record contains no evidence showing that when Toth made the identified statements to Langham he was promoting his personal business by proposing to replace the floor himself instead of replacing the floor on Sears's behalf," the record "does not show that Toth made his Bostik statement to Langham in an individual capacity as a seller of goods or services." *Id*. at 154–55.

The FAI Parties contend *Toth* precludes application of the commercial speech exemption in this case. Unlike this case, *Toth* involved a TCPA nonmovant, Sears, on whose behalf the movant proposed a commercial transaction. In the case before us, the parties on whose behalf the complained-of commercial transactions were proposed are TCPA movants and are not alleged to have been acting on behalf of the nonmovant. We do not find *Toth* instructive.

The evidence shows BioTE markets and licenses a hormone therapy program to doctors and clinics. In its petition, BioTE contended the FAI Parties "have misappropriated BioTE's confidential and trade secret information to actively compete against and destroy BioTE's business" and "have established and have participated in the establishment of, companies which have been unlawfully founded and operated to misappropriate BioTE's business, business model, and confidential information." In a paragraph of Hincher's affidavit that was not objected to, he stated the FAI Parties "are engaging in a conspiracy between themselves and aiding and abetting

each other, the unlawful purpose of which is to convince physicians and physician groups to break their binding and valuable licensing and management contracts with BioTE and to enter into identical arrangements with companies they founded using the stolen business model, customer lists, and intellectual property of BioTE." Also, BioTE's evidence included affidavits of several physicians under contract with BioTE who testified FAI Parties approached them and told them (1) by using hormone replacement therapy companies affiliated with the FAI parties, they could make more money than they were making with BioTE and would be provided with a very similar dosing site and support system developed by persons formerly affiliated with BioTE, and (2) they could "break" or "get out of" their contracts with BioTE without negative consequences.[8]

We conclude BioTE established by a preponderance of the evidence that the FAI Parties are primarily engaged in the business of selling or leasing goods or services. *See Giri v. Estep*, No. 03-17-00759-CV, 2018 WL 2074652, at *4 (Tex. App.—Austin May 4, 2018, pet. denied) (mem. op.) (concluding factual allegations in plaintiff's petition alone were sufficient to meet commercial speech exemption's elements); *Abatecola*, 2018 WL 3118601, at *9 (concluding inference from evidence satisfied "primarily engaged" requirement of commercial speech exemption). Thus, the first *Castleman* prong was met. *See Castleman*, 546 S.W.3d at 688. Additionally, that evidence shows the complained-of communications with "medical physicians" were made by the FAI Parties to actual or potential customers of the FAI Parties for the kinds of goods or services the FAI Parties provide, were made in the FAI Parties' capacity as sellers of those goods or services, and proposed commercial transactions involving those goods or services. We conclude BioTE established by a preponderance of the evidence that the commercial speech exemption applies to the complained-of communications with "medical physicians." *See id*.

[8] Although the FAI Parties asserted hearsay objections to the physicians' affidavit testimony in the trial court, that testimony is not among the portions of evidence addressed in the FAI Parties' appellate evidentiary complaints. *See* TEX. R. APP. P. 38.1.

III. Conclusion

We conclude this court has jurisdiction over this appeal. Therefore, we deny BioTE's motion to dismiss this appeal and decide BioTE's cross-issue against it.

Additionally, we conclude the FAI Parties did not meet their burden to establish the TCPA applies to BioTE's counterclaims. Therefore, the trial court did not err by denying the portions of the FAI's Parties' TCPA motion that are before us on appeal. We decide against the FAI Parties on their first issue. We need not reach their remaining issues.

We affirm the portion of the trial court's order denying the FAI Parties' TCPA motion to dismiss.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

181290F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FORGET ABOUT IT, INC., GUNTHER MUELLER, DANIEL D. DENEUI, TERRI J. SURESH DENEUI, DUSTIN DENEUI, MICHAEL S. COLE, JANET COLE, SUTHERLAND SOLUTIONS, LLC, MARK P. BURNS, ANDREA C. JONES, NICOLE TURCOTTE, EVEXIAS CAPITAL, LLC, EVEXIAS HEALTH SOLUTIONS, LLC, EVEXIAS HOLDING CO, LLC, EVEXIAS HRT, LLC F/K/A HORMONAL HEALTH AND WELLNESS CENTERS, LLC, EVEXIAS LORDSON, LLC, EVEXIAS LORDSON II, LLC, EVEXIAS MEDICAL CENTERS, PLLC F/K/A TERRI SURESH ANCP, PLLC A/K/A HORMONAL HEALTH WELLNESS & SKIN CENTER A/K/A HORMONAL HEALTH WELLNESS AND AESTHETICS CENTER A/K/A HORMONAL HEALTH & WELLNESS, NILUS, LLC, NORTH AMERICAN CUSTOM LABORATORIES, LLC A/K/A PHARMAKEIO A/K/A FARMAKEIO, MARK STAR AND GET WELL SCOTTSDALE, LLC, Appellants

No. 05-18-01290-CV V.

BIOTE MEDICAL, LLC, Appellee

On Appeal from the County Court at Law No. 2, Dallas County, Texas
Trial Court Cause No. CC-18-01784-B.
Opinion delivered by Justice Carlyle.
Justices Myers and Molberg participating.

In accordance with this Court's opinion of this date, we **AFFIRM** the portion of the trial court's order denying appellants' motion to dismiss under Chapter 27 of the Texas Civil Practice and Remedies Code.

It is **ORDERED** that appellee BioTE Medical, LLC recover its costs of this appeal from appellants.

Judgment entered this 13th day of August, 2019.