AFFIRMED and Opinion Filed October 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01076-CV

GN VENTURES, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF HUNTINGTON CREEK CAPITAL IV, LLC, ET AL., Appellants
V.
DAVID MATTHEW STANLEY, STEVE H. STANLEY, WCP FUND GP, LLC AND TWIN VILLAGE MANAGEMENT, LLC, Appellees

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-10297

MEMORANDUM OPINION

Before Justices Partida-Kipness, Nowell, and Evans
Opinion by Justice Evans

In six issues, appellants[1] appeal the trial court's denial of their Texas Citizens Participation Act ("TCPA") motion to dismiss the application for temporary

[1] The appellants are GN Ventures, Ltd., Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Larry and Jana Long, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Bruce Mills, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; G.B. Howard IV, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; John Ryan, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Clinton R. Strong, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; David Brown, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Donald Haley, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Jimmy Dean, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC, Len Mazur, Individually and for the Benefit of Len Mazur IRA and Derivatively on Behalf of Huntington Creek Capital IV, LLC, Chris

injunction filed by appellees WCP Fund GP, LLC ("WCP Fund") and Twin Village Management, LLC ("Twin Village"). We affirm for the reasons that follow.

I.
BACKGROUND

The three Huntington Creek Capital ("HCC") entities[2] own three senior memory care facilities in various locations in Texas.[3] Appellees Matt Stanley, Steve Stanley, and WCP Fund constructed and developed the senior memory care facilities. WCP Fund manages each LLC entity and Twin Village manages each senior care facility.[4] WCP Fund receives a monthly manager fee and Twin Village

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Cowman, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC ("HCC IV"); Larry and Jana Long, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; G.B. Howard IV, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; John Ryan, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Clinton R. Strong, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; David Brown, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Donald Haley, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Jimmy Dean, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Len Mazur, Individually and on behalf of Len Mazur IRA and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Chris Cowman, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC ("HCC VI"); Bruce Mills, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; John Ryan, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Len Mazur, Individually and on behalf of Len Mazur IRA and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Larry Gekiere, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Kim Gekiere, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC, KRK Family Investments, L.P., Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Jeremy Bradley Clark, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; and Blackstone Family Partnership, LTD., Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC ("HCC VII").

[2] The three HCC limited liability companies at issue in this litigation consist of: (1) Huntington Creek Capital IV, LLC ("HCC IV"); (2) Huntington Creek Capital LLC VI, LLC ("HCC VI"); and (3) Huntington Creek Capital VII, LLC ("HCC VII") (collectively, the "HCC entities").

[3] HCC IV owns Sundance at Woodcreek Reserve in Katy, Texas. HCC VI owns Sundance at Brushy Creek in Cedar Park, Texas. HCC VII owns Sundance at Town Lake in Cypress, Texas.

[4] WCP Fund is an affiliate of Matt Stanley and Steve Stanley. In addition, the managers of Twin Village are Matt Stanley and Steve Stanley.

receives a facilities management fee from each senior care facility based on a percentage of the gross cash receipts generated. Appellants contend the business model represented to them by appellees involved (1) constructing and developing a facility, (2) building the occupancy at the facility, and (3) selling the facility for a profitable return.

On July 22, 2019, appellants filed a statutory derivative proceeding against appellees alleging they had, among other things, increased the facilities management fee without disclosure to members, refused opportunities to sell the facilities, failed to secure member approval of preliminary operating budgets, failed to provide transparent entity finances, transferred funds between entitles without notice or approval, and demanded unsupported capital calls. Appellants filed claims against appellees for breach of contract, equitable disgorgement, breach of fiduciary duty, and declaratory judgment. The petition also included a demand for arbitration.

On July 29, 2019, the members of the HCC entities conducted a vote among the known Class "A" members to remove WCP Fund as manager of each of the three HCC entities. A majority of the Class "A" members of HCC VI voted to remove WCP Fund as the manager of the entity, but a majority of the members of HCC IV and HCC VII did not vote for removal of WCP Fund. The vote did not call for the removal of Twin Village as facility manager of the senior care facilities.

On July 30, 2019, appellees filed a motion to compel arbitration and dismiss or stay litigation.

On August 14, 2019, some of the appellees, WCP Fund and Twin Village (collectively, the "Stanley affiliates"), filed an application for injunctive relief including a temporary restraining order and temporary injunction. The application sought temporary equitable relief to maintain the status quo of the management of the entities when the litigation commenced, as follows:

> Movants pray that a temporary restraining order be granted and, after hearing, that a temporary injunction be granted; that the arbitrator or, alternatively, the Court enter a permanent injunction, restraining and enjoining GN Ventures, Ltd.; LLC Larry Long; Jana Long; Bruce Mills; G. B. Howard IV, Trustee; John Ryan; Clinton R. Strong; David Brown, Trustee; Donald Haley; Jimmy Dean; Len Mazur; Chris Cowman; Larry Gekiere; Kim Gekiere; KRK Family Investments, L.P.; Jeremy Bradley Clark; and Blackstone Family Partnership, Ltd. and their respective agents, servants, employees, attorneys (including but not limited to Charles W. Kelly), and all those persons acting in concert or participation with any of them who receive actual notice of this order by personal service or otherwise, from removing or attempting to remove [WCP Fund] as Manager of HCC IV, HCC VI and/or HCC VII; from proposing or engaging a replacement Manager for HCC IV, HCC VI and/or HCC VII; from removing or attempting to remove [Twin Village] as Facilities Manager of HCC IV, HCC VI and/or HCC VII; from proposing or engaging a replacement Facilities Manager for HCC IV, HCC VI and/or HCC VII; from interfering with [WCP Fund's] functioning as Manager of HCC IV, HCC VI and/or HCC VII; and from interfering with [Twin Villages'] functioning as Facilities Manager of HCC IV, HCC VI and/or HCC VII; that Movants recover court costs; and for such other relief to which they are entitled.

By agreed order dated August 14, 2019, the parties agreed, and the trial court ordered them, to maintain the status quo[5] until the later of September 5, 2019 or the trial court's ruling on the application for temporary injunction.

On August 28, 2019 before either development of the temporary equitable relief or hearing on the cross-applications for arbitration, appellants filed their response to the application for injunctive relief in which they included their TCPA motion to dismiss the application for injunctive relief. In their motion to dismiss, appellants alleged that their claims are based upon and are in response to their right to association and their right to free speech.

On September 4, 2019, the trial court entered an order denying the appellants' motion to dismiss appellees' application for injunctive relief. That same day, appellants appealed the order denying the motion to dismiss thereby staying all further proceedings in the trial court, even the hearing on the cross-applications for arbitration. *See* TEX. CIV. PRAC. & REM. CODE 51.014(b); *In re Geomet Recycling LLC*, 578 S.W.3d 82, 87 (Tex. 2019) ("The stay is of '*all* other proceedings in the trial court,' and the text dictates that the stay lasts until 'resolution of th[e] appeal,' not until the court of appeals lifts the stay.").

[5] To maintain the status quo, the members agreed not to (1) take any action to implement the July 29, 2019 ballot on the proposal to remove WCP Fund as manager of HCC VI; (2) conduct any elections or procedures to remove WCP Fund as manager of HCC IV, HCC VI, or HCC VII; and (3) conduct any elections or procedures to approve a replacement manager in lieu of WCP Fund as manager of any of the HCC entities.

II.
SCOPE OF APPEAL

The scope of this appeal is limited to the trial court's denial of appellants' TCPA motion to dismiss the Stanley affiliates' application for pre-arbitration, temporary, equitable, injunctive relief. Appellants and appellees agree that if the claims asserted by appellants are encompassed by the mandatory arbitration provisions of the company agreements for the HCC entities, then such claims shall be submitted to arbitration.[6] In accordance with this intent, the Stanley affiliates limited their application for injunctive relief to interim relief—a temporary restraining order and a temporary injunction. The Texas Arbitration Act allows a party to seek interim relief from a court before arbitration proceedings begin. *See* TEX. CIV. PRAC. & REM. CODE §171.086(a); *Frontera Generation Ltd. P'ship v. Mission Pipeline Co.*, 400 S.W.3d 102, 109–10 (Tex. App.—Corpus Christi–Edinburg 2012, no pet.) (trial court may enter injunctive relief to preserve the status quo pending arbitration).

Neither appellants nor the Stanley affiliates assert that the Stanley affiliates' request for pre-arbitration, temporary, equitable, injunctive relief is not a "legal

[6] Appellants' petition contains the following demand for arbitration: "To the extent that arbitration be required for any claim or issue arbitrable under the Company Agreements of the HCC Entities, each Entity demands that Defendants submit to arbitration, if so required and not waived. To the extent any claim or issue is not arbitrable under the Company Agreements, including but not limited to the extracontractual claims alleged above, arbitration is neither required nor does any arbitrator have jurisdiction." Appellees also sought to compel arbitration and dismiss or stay the litigation.

action" within the meaning of section 27.001(6).[7] *See* TEX. CIV. PRAC. & REM. CODE § 27.001(6). But in appellees' argument that they have clear and specific evidence of a prima facie case, they assert that the requested injunctive relief is not the "claim" that should be analyzed pursuant to section 27.005(c). They argue, "A temporary injunction is an interim remedy to preserve the status quo. The claim is the underlying cause of action – not the Injunction itself." In support of this assertion, appellees cite to *Morgan v. Clements Fluids S. Texas, Ltd.*, 589 S.W.3d 177 (Tex. App.—Tyler 2018, no pet.)[8] and *Goldberg v. EMR (USA Holdings) Inc.*, No. 05-18-00261-CV, 2019 WL 3955771, at *11-12 (Tex. App.—Dallas Aug. 22, 2019, no pet. h.).[9] We note, however, that these cases are distinguishable because

[7] In 2019, the legislature amended the TCPA including adding exclusions to the definition of "legal action" in section 27.001(6). Those amendments apply to "an action filed on or after" the effective date of September 1, 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. Because this lawsuit was filed before September 1, 2019, the law in effect before September 1 applies. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500. All citations to the TCPA are to the version before the 2019 amendments took effect. We express no opinion about whether a request for temporary, equitable, injunctive relief unsupported by a cause of action is within the ambit of section 27.001(6) as amended.

[8] In this case, employer asserted claims for breach of contract and misappropriation of trade secrets against former employees and sought monetary damages and injunctive relief. *Id.* at 182-183. The requested injunctive relief was based on employer's claims. *Id.* at 193. Employees filed a motion to dismiss the misappropriation of trade secrets claim pursuant to the TCPA. *Id.* at 183. The analysis under the TCPA was limited to the underlying claim – misappropriation of trade secrets. *Id.* at 186–192.

[9] We note that the *Goldberg* opinion cited by the Stanley affiliates has been withdrawn and superseded by 594 S.W.3d 818 (Tex. App.—Dallas 2020, pet. denied). In *Goldberg*, plaintiffs sued defendants for violations of the Texas Uniform Trade Secrets Act, breach of contract, breach of fiduciary duty, tortious interference with contract, and conspiracy for which they sought monetary and injunctive relief. *Id.* at 823. Defendants moved for dismissal of the suit under the TCPA. *Id.*at 823–24. The trial court denied the motion to dismiss and entered a temporary restraining order prohibiting defendants from using, disclosing or otherwise misappropriating any of plaintiffs' trade secrets or confidential information. *Id.* at 824.

those plaintiffs were requesting injunctive relief in conjunction with their underlying claims asserted in their petitions and the TCPA motions in those cases sought to dismiss the underlying claims.[10] In this case, however, the injunctive relief is not associated with an underlying claim by the Stanley affiliates. In fact, the Stanley affiliates do not have any underlying claims in this case, just an answer asserting a general denial subject to several pending motions including their motion to compel arbitration. Instead, their request for injunctive relief is merely to maintain the status quo pending arbitration in which all parties will seek their permanent relief. *See* TEX. CIV. PRAC. & REM. CODE §171.086(a); *Frontera Generation Ltd. P'ship*, 400 S.W.3d at 109–10.

The plain language of the TCPA governs the Stanley affiliates' argument. A party may file a motion to dismiss if a "legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a). The TCPA broadly defines a "legal action" as a "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *See id.* § 27.001(6). So, a "legal action" is a "filing that requests . . . equitable relief." A temporary restraining order and temporary

[10] *See also Bui v. Dangelas*, No. 01-18-00146-CV, 2019 WL 5151410, at * (Tex. App.—Houston [1st Dist.] Oct. 15, 2019, pet. denied) (injunctive relief sought in connection with defamation suit was not separately challengeable apart from the cause of action to which it was linked); *Cavin v. Abbott*, Cause No. 03-19-00168-CV, 2020 WL 3481149, at *2 (Tex. App.—Austin June 26, 2020, no pet. h.) (TCPA does to apply to appellee's request for an injunction that is dependent on her claim for the wrongful act of assault).

injunction are equitable relief. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011) (distinguishing remedies at law, like money damages, from equitable relief, like an injunction or specific performance). So the Stanley affiliates request filed with the district clerk was a filing that sought equitable relief. "This undeniably 'broad' definition appears to encompass any 'procedural vehicle for the vindication of a legal claim.'" *State ex rel. Best v. Harper*, 562 S.W.3d 1, 8 (Tex. 2018) (quoting *Paulsen v. Yarrell*, 537 S.W.3d 224, 233 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)). In *Best*, the state argued a petition to remove a public official from office was only a remedy, not a legal or equitable relief and so, the state's argument concluded, it was not a legal action under section 27.001(6). *Id.* at 9. In rejecting this argument, the court reasoned that a remedy is a synonym for relief and therefore was a legal action under section 27.001(6):

> A court order requiring the defendant's removal or ouster from office is undoubtedly a "remedy." . . . And "remedy" is another word for "relief." . . . Because a removal petition seeks legal relief in the form of a statutory remedy, the pleading is a "legal action" under the TCPA."

Id. (citations omitted). So here, even though a request for a pre-arbitration temporary restraining order and temporary injunction merely seeks equitable remedies, and is not an independent cause of action, such a request is a "filing that requests . . . equitable relief" and, therefore, a "legal action" as defined by section 27.001(6). *See id*. And because in this case, there is no underlying cause of action and appellants' TCPA motion solely sought dismissal of the request for temporary restraining order and temporary injunction, that requested injunctive relief is the "claim" the elements

of which the Stanley affiliates must demonstrate a prima facie case by clear and specific evidence in the second step of the TCPA analysis we discuss below.

Accordingly, the scope of this interlocutory appeal is a TCPA motion that sought to dismiss a pre-arbitration request for temporary restraining order and temporary injunction, not permanent dismissal of a cause of action or entire lawsuit. Accordingly, we proceed with our analysis.

III.
ANALYSIS

A. TCPA

Chapter 27 of the Texas Civil Practice & Remedies Code, also known as the TCPA, is an anti-SLAPP statute. *See id.* §§ 27.001-.011; *Serafine v. Blunt*, 466 S.W.3d 352, 356 (Tex. App.—Austin 2015, no pet.). "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *Serafine*, 466 S.W.3d at 356. The purpose of this chapter 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." *See* TEX. CIV. PRAC. & REM. CODE § 27.002. In other words, the TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits. *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding). The legislature has instructed that the TCPA "shall be

construed liberally to effectuate its purpose and intent fully." *See* TEX. CIV. PRAC. & REM. CODE § 27.011(b).

To effectuate the statute's purpose, "the Legislature has provided a two-step procedure to expedite the dismissal of claims brought to intimidate or to silence a defendant's exercise of these First Amendment rights." *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017). First, the moving party must show by a preponderance of the evidence that the non-movant's claim is based on or, relates to or is in response to the movant's exercise of the right of free speech, the right to petition, or the right of association. *Id.*, TEX. CIV. PRAC. & REM. CODE § 27.005(b). The burden then shifts to the non-movant to establish by clear and specific evidence a prima facie case for each element of the claim in question. *Id.* § 27.005(c). If the non-movant fails to meet this burden, the trial court must dismiss the action. *Id.* § 27.005(b). However, even if the non-movant satisfies the second step, the court will dismiss the action if the "moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *Id.* § 27.005(d). In determining whether a legal action is subject to or should be dismissed under the TCPA, the court shall consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a).

B. Order Denying Motion to Dismiss

i) Standard of review

In reviewing a trial court's ruling on a motion to dismiss under the TCPA, we apply a de novo standard of review. *See Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865 (Tex. App.—Austin 2018, pet. denied).

ii) Step One: Did appellants show that the TCPA applied?

In their first issue, appellants assert that the Stanley affiliates' application for injunctive relief is based upon the HCC members' right to associate. Specifically, appellants contend the following actions arise out of or are based on the HCC members' right to associate: (1) removing or attempting to remove WCP Fund as the manager of any of the HCC entities; and (2) proposing or engaging a successor manager for any of the HCC entities. In their fourth issue, appellants assert that the Stanley affiliates' application for injunctive relief is based on the HCC members' right to free speech because it seeks to enjoin the HCC members from "proposing or engaging" a replacement manager of the HCC entities or a replacement facilities manager for the HCC entities. Solely for purposes of our appellate analysis, we will assume, without deciding, that the requested legal action—the application for injunctive relief—satisfies the first step because it is based on, relates to, or is in response to an exercise of the right of association and/or based upon a right to free speech.

iii) Step Two: Did the Stanley affiliates establish a prima facie case?

Accordingly, we proceed to the second step to determine if the Stanley affiliates established a prima facie case for their claim. At step two, the clear and specific evidence requirement requires more than mere notice pleading. *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (per curiam). The nonmovant must provide enough detail to show his claim's factual basis. *Id.* However, the TCPA "does not impose an elevated evidentiary standard or categorically reject circumstantial evidence." *Lipsky*, 460 S.W.3d at 591. We consider only the pleadings and evidence favoring the nonmovant when determining whether he established the required prima facie proof. *Apple Tree Café Touring, Inc. v. Levatino*, No. 05-16-01380-CV, 2017 WL 3304641, at *2 (Tex. App.—Dallas Aug. 3, 2017, pet. denied) (mem. op.).

In their second and fifth issues, appellants assert that the Stanley affiliates failed to prove each element of their application for injunctive relief by clear and specific evidence.[11] A temporary injunction is an extraordinary remedy that does not issue unless the party seeking relief pleads and proves three specific elements: (1) a cause of action; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84

[11] In their third issue, appellants assert that the Stanley affiliates failed to prove that they would be irreparably injured with no adequate remedy at law. Because demonstrating irreparable injury is an element of a temporary injunction, we consider appellant's second and third issues together.

S.W.3d 198, 204 (Tex. 2002). We explained in section II above the Stanley affiliates' application for injunctive relief is a "judicial . . . filing that requests . . . equitable relief" for which reason it is a "legal action" under section 27.001(6). As such, the Stanley affiliates' request for pre-arbitration, temporary, equitable injunctive relief is the claim we analyze. *See* TEX. CIV. PRAC. & REM. CODE §171.086(a); *Frontera Generation Ltd. P'ship*, 400 S.W.3d at 109–10 (trial court may enter injunctive relief to preserve the status quo pending arbitration). The Stanley affiliates, therefore, satisfied the first element.

The second element for temporary injunctive relief requires the Stanley affiliates to demonstrate a probable right to the relief sought. *Butnaru*, 84 S.W.3d at 204. The phrase "probable right of recovery" is a term of art in the injunction context. *Intercontinental Terminals Co., LLC v. Vopak N. Am. Inc.*, 354 S.W.3d 887, 897 (Tex. App.—Houston [1st Dist.] 2011, no pet.). To show a probable right to recover, an applicant need not show that it will prevail at trial. *Id.* Instead, the applicant must plead a cause of action and present some evidence that tends to sustain it. *Id.* The evidence must be sufficient to raise a bona fide issue as to the applicant's right to ultimate relief. *Id.*

Here, in the Stanley affiliates' application for injunctive relief, they assert a claim that, "Appellants were attempting to improperly remove [WCP Fund] and [Twin Village] in violation of the governing company agreements." Thus, the Stanley affiliates sought to maintain the status quo and prevent appellants from

removing WCP Fund as the manager of the HCC entities and Twin Village as the facilities manager of the senior care facilities and replacing them with new managers.

In support of this assertion, the Stanley affiliates assert that the vote to remove WCP Fund as the manager of HCC VI was "flawed and ineffective because the vote was limited to Class A Members, and did not account for Class B Members." The Company Agreement of HCC VI provides as follows:

> Section 8.02 Removal of Manager. The Manager may not be removed except for cause, and then, only with the prior Approval of the Members. For purposes of this Agreement, "cause" shall mean and be limited to gross negligence, fraud, willful misconduct, material breach of this Agreement, material mismanagement of the assets of the Company (including, without limitation, the Property), or chronic dereliction, neglect or disregard of the Manager's duties and obligations under this Agreement.

The term "Approval of the Members" is defined as "the written approval of the Required Interest . . . ." The company agreement for HCC VI defines the "Required Interest" as:

> a majority of the aggregate interests of the then current Members based upon their respective Membership Interests but shall not include (i) the interests of any Members who are Non-Contributing Members (as such term is defined in Article III) or (ii) the interest of any Member which pursuant to the provisions of this Agreement is expressly excluded from such determination.

Based on these definitions in the company agreement, the Stanley affiliates asserted that "Class A, standing alone, has no right to effect a removal of the manager" and,

accordingly, the vote to remove WCP Fund as the manager of HCC VI was ineffective because it failed to include the Class B members.

Although the voting to remove WCP Fund as manager of HCC IV and HCC VII was unsuccessful, the Stanley affiliates also sought to prevent future activity by the appellants regarding HCC IV and HCC VII in their motion for injunctive relief as described below:

> from removing or attempting to remove [WCP Fund] as Manager of *HCC IV*, HCC VI and/or *HCC VII*; from proposing or engaging a replacement Manager for *HCC IV*, HCC VI and/or *HCC VII*; from removing or attempting to remove [Twin Village] as Facilities Manager of *HCC IV*, HCC VI and/or *HCC VII*; from proposing or engaging a replacement Facilities Manager for *HCC IV*, HCC VI and/or *HCC VII*; from interfering with [WCP Fund's] functioning as Manager of *HCC IV*, HCC VI and/or *HCC VII*; and from interfering with [Twin Villages'] functioning as Facilities Manager of *HCC IV*, HCC VI and/or *HCC VII*; that Movants recover court costs; and for such other relief to which they are entitled.

(emphasis added). The Stanley affiliates wanted to include all HCC entities in the injunctive relief based upon their assertion that "unless restrained, [appellants] will continue their efforts to remove [WCP Fund] as the Manager of each of the entities" and will continue their "efforts until they finally wear down additional Members into changing their votes." In addition to the HCC entities, the Stanley affiliates also included Twin Village in the requested injunctive relief described above asserting appellants stated their intent to remove Twin Village as the facilities manager once WCP Fund is removed as manager.

In addition to the assertions described above, the Stanley affiliates made general assertions in their application for injunctive relief about the "misleading and incomplete information" put forth by appellants prior to the vote. The application stated that the "vote solicited by [appellants' counsel] was supported by a campaign punctuated by false, inaccurate, misleading and incomplete information, coupled with pressure tactics in an effort to bend Class A members to his will and the will of the dissident minority he represents." The Stanley affiliates also alleged "the tactics used by the proponents of the removal vote were inappropriate, all the more so given the refusal to consent to review by an independent third party."[12] Thus, the Stanley affiliates assert that injunctive relief is necessary based upon inaccurate voting for HCC VI and the assertion that appellants will continue their efforts to remove WCP Fund as manager of all HCC entities in additional voting and based on "misleading and incomplete information."

For all of these reasons, the Stanley affiliates sought to maintain the status quo by seeking immediate interim relief that would allow WCP Fund to remain as the manager of all HCC entities and Twin Village as the facilities manager for all entities until a final determination of this dispute.[13] For the reasons stated above, we

[12] The Stanley affiliates note that they attempted to invoke the procedure described in section 101.454 of the Texas Business Organizations Code when a derivative proceeding is filed. *See* TEX. BUS. ORG. CODE § 101.454. The Stanley affiliates proposed having Stephen R. Robinson appointed as an independent third party to investigate the claims made by appellants and appellants opposed such an action.

[13] In their application for injunctive relief the Stanley affiliates state: "Movants also seek a permanent injunction upon final determination of this dispute. Movants submit that the proper forum for resolution of such disputes and granting of permanent injunctive relief on the merits is arbitration."

conclude that the Stanley affiliates have demonstrated a probable right to recovery because they have presented "some evidence" in support of their requested injunctive relief and such evidence raises a bona fide issue as to the applicant's right to ultimate relief. *See Intercontinental Terminals Co.,* 354 S.W.3d at 897.

The third element for temporary injunctive relief requires the Stanley affiliates to demonstrate a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204. A party proves irreparable injury for injunction purposes by proving damages would not adequately compensate the injured party or cannot be measured by any certain proper pecuniary standard. *Lifeguard Benefit Servs., Inc. v. Direct Med. Network Sols., Inc.*, 308 S.W.3d 102, 111 (Tex. App.—Fort Worth 2010, no pet.).

Here, the Stanley affiliates assert that they would suffer an imminent harm because appellants' counsel sent an email dated August 9, 2019 stating:

> WCP Fund GP has been removed as the Manager of the HCC VI Entity. The ballot stated that the removal was effective on the later of August 15, 2019 or the approval of a Replacement Manager. It is anticipated that a Replacement Manager will be proposed in the near future.

Again, by email dated August 12, 2019, counsel for appellants stated that a "proposal for a Replacement Manager will be circulated shortly." Further, as stated above, the Stanley affiliates have alleged that appellants will continue in their efforts to remove WCP Fund as manager and, subsequently, Twin Village as facilities manager unless restrained from such actions.

In regard to irreparable injury, the Stanley affiliates assert that appellants are seeking to remove WCP Fund for "cause" which is defined as:

> gross negligence, fraud, willful misconduct, material breach of this Agreement, material mismanagement of the assets of the Company (including, without limitation, the Property), or chronic dereliction, neglect, or disregard of the Manager's duties and obligations under this Agreement.

Such an assertion threatens damage to WCP Fund's reputation. Texas courts have held that loss of goodwill and reputation can be irreparable harm. *Intercontinental Terminals Co., LLC*, 354 S.W.3d at 895–96 ("The harm found by the trial court includes loss of goodwill and reputation in the marketplace. Threatened injury to a business's reputation and good will with customers is frequently the basis for temporary injunctive relief."); *Frequent Flyer Depot, Inc. v. American Airlines, Inc.*, 281 S.W.3d 215, 228 (Tex. App.—Fort Worth 2009, pet. denied); *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 WL 836775, at *6 (Tex. App.—Dallas Mar. 3, 2016, no pet.). While injuries such as damage to a business's reputation and good will are not categorically irreparable, the irreparable injury requirement is satisfied when injuries of this nature are difficult to calculate or monetize. *Intercontinental Terminals Co.,* 354 S.W.3d at 895–96. As applicable in this case, courts have further held that assigning a dollar amount to such intangibles as a company's loss of clientele, goodwill, marketing techniques, and office stability, among others, is not easy. *Id.*; *Frequent Flyer Depot*, 281 S.W.3d at 228. For all

these reasons, we conclude that the WCP Fund presented some evidence of an irreparable injury.

In regard to Twin Village, appellants alleged that Twin Village "receives a percentage of the Total Gross Revenues from each Facility it manages" so if it were wrongfully terminated, Twin Village would be able to calculate the percentage of total gross revenues from the date of wrongful termination or removal until the expiration of the relevant facilities management agreement. In response, Twin Village argues that if WCP Fund is wrongfully removed, then its percentage of gross revenues would be impacted because then "operations would be conducted by another entity, and it would be pure speculation that any new manager would or could generate the same level of gross revenues." Essentially, if the actions taken by appellants result in a loss of good will and reputation, both WCP Fund and Twin Village are impacted in ways that are difficult to calculate or monetize. *Intercontinental Terminals Co.*, 354 S.W.3d at 895–96.

In conclusion, as we only consider the pleadings and evidence favoring the nonmovants when determining whether they established the required prima facie proof, we need not consider the appellants' evidence rebutting the Stanley affiliates' allegations. *See Apple Tree Café Touring, Inc.*, 2017 WL 3304641, at *2. Indeed, our compliance with the standards for review of a non-movant's clear and specific evidence of its challenged claim should not be construed as our decision that the trial court should grant the injunctive relief—that decision is for the trial court to make

in the first instance. Rather, we conclude only that the Stanley affiliates established a prima facie case for their request for injunctive relief because they established clear and specific evidence for each essential element. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c). Accordingly, the Stanley affiliates have satisfied the second step of the TCPA analysis.

iii) Did appellant establish an affirmative defense or other grounds?

If the non-movant satisfies the second step, the court will dismiss the action if the moving party establishes an affirmative defense.[14] Here, appellants allege that the "threatened injunction is impermissibly broad" and fails to satisfy the "clarity and notice requirements set out in Rule 683."[15] The purpose of rule 683 is to adequately inform a party of what he is enjoined from doing and the reason why he is so enjoined. *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 744 (Tex. App.—

[14] In their motion to dismiss, appellants appear to assert the affirmative defenses of unclean hands, exercise of business rights, exercise of constitutional rights, waiver and ratification. However, as appellants do not raise these affirmative defenses in their appellate briefing, we do not address them here. There may be constitutional infirmities with pre-amendment section 27.005(c)'s authorization for the trial judge without a jury to decide by a preponderance of the evidence, rather than as a matter of law, that an affirmative defense has merit and precludes the non-movant's claim. Because in this case we affirm the trial court's decision that as a matter of law there is no merit in the affirmative defense, we need not resolve this difficulty with the statute.

[15] Texas Rule of Civil Procedure 683 provides: "Every order granting an injunction and every restraining order shall set for the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial."

Dallas 2011, no pet.). Here, however, the trial court did not rule on the Stanley affiliates' request for interim injunctive relief.[16] Rather, the trial court entered the order that restricts activity in this case pursuant to the agreement of the parties. In the August 14, 2019 agreed order, the trial court ordered the parties agreed pursuant to their agreement to maintain the status quo until the later of September 5, 2019 or the trial court's ruling on the application for temporary injunction. As such, any objection based on rule 683 is premature at this time.

As a matter of law, at this stage of proceedings appellants have not established an affirmative defense, so we affirm the trial court's denial of appellant's TCPA motion to dismiss the Stanley affiliates' application for injunctive relief.

D. Motion to Strike

In the first section of their brief, appellees assert that "Appellants seek to dismiss Appellees' Application with prejudice, which is a ruling on the merits. Determinations on the merits are reserved for arbitration." This section of the brief argues that this Court should affirm the trial court's denial of the motion to dismiss so that final rulings on the merits are left to the arbitrator.

On October 31, 2019, appellants filed a motion to strike point one of appellees' brief. By letter dated November 19, 2019, this Court advised that the

[16] In their brief, the Stanley affiliates allege as follows: "Appellants [sic] last point, arguing the breadth of an injunction not yet entered by the court (as well as arguments interspersed in their brief), confuses the scope of review where a temporary injunction has been granted. The only interim relief in effect is an Agreed Order, to which Appellants agreed. Once the stay is lifted, there will be ample time to address the scope of an injunction including an appeal if necessary."

motion and response would be deferred to the submission panel. As we have affirmed the trial court's denial of appellant's TCPA motion to dismiss and all decisions on the merits remain for resolution in the trial court or arbitration, we dismiss appellants' appellate motion as moot.

IV.
CONCLUSION

We affirm the trial court's denial of the motion to dismiss the application for temporary injunction.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GN VENTURES, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF HUNTINGTON CREEK CAPITAL IV, LLC, ET AL., Appellants

No. 05-19-01076-CV V.

DAVID MATTHEW STANLEY, STEVE H. STANLEY, WCP FUND GP, LLC AND TWIN VILLAGE MANAGEMENT, LLC, Appellees

On Appeal from the 44th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-19-10297. Opinion delivered by Justice Evans. Justices Partida-Kipness and Nowell participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees David Matthew Stanley, Steve H. Stanley, WCP Fund GP, LLC AND Twin Village Management, LLC recover their costs of this appeal from appellants GN Ventures, Ltd., Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Larry and Jana Long, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Bruce Mills, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; G.B. Howard IV, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; John Ryan, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Clinton R. Strong, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; David Brown, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Donald Haley, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC;

Jimmy Dean, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC, Len Mazur, Individually and for the Benefit of Len Mazur IRA and Derivatively on Behalf of Huntington Creek Capital IV, LLC, Chris Cowman, Individually and Derivatively on Behalf of Huntington Creek Capital IV, LLC; Larry and Jana Long, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; G.B. Howard IV, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; John Ryan, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Clinton R. Strong, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; David Brown, Trustee, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Donald Haley, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Jimmy Dean, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Len Mazur, Individually and on behalf of Len Mazur IRA and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Chris Cowman, Individually and Derivatively on Behalf of Huntington Creek Capital VI, LLC; Bruce Mills, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; John Ryan, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Len Mazur, Individually and on behalf of Len Mazur IRA and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Larry Gekiere, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Kim Gekiere, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC, KRK Family Investments, L.P., Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; Jeremy Bradley Clark, Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC; and Blackstone Family Partnership, LTD., Individually and Derivatively on Behalf of Huntington Creek Capital VII, LLC.

Judgment entered October 2, 2020.