NO. 08-23-00323-CV

IN THE COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

ROBERTS MARKEL WEINBERG BUTLER HAILEY PC,
APPELLANT,

v.

LYNN MADISON,
APPELLEE.

On Appeal from the 224th Judicial District Court of
Bexar County, Texas
Trial Court No. 2023-CI-09527

APPELLANT ROBERTS MARKEL WEINBERG BUTLER HAILEY, P.C.'S RESPONSE TO APPELLEE'S MOTION FOR REHEARING AND EN BANC RECONSIDERATION

GREGG WEINBERG
TBA No. 21084150
CYRA A. DUMITRU
TBA No. 24096356
JASON BAILEY
TBA No. 24104825
2800 Post Oak Blvd., 57th Floor
Houston, Texas 77056
Tel: (713) 840-1666
gweinberg@rmwbh.com
cdumitru@rmwbh.com
jbailey@rmwbh.com
ATTORNEYS FOR APPELLANT

IDENTITIES OF PARTIES AND COUNSEL

APPELLANT:

Roberts Markel Weinberg Butler Hailey, PC

Appellant's Trial Court Counsel:
GREGG WEINBERG
TBA No. 21084150
CYRA A. DUMITRU
TBA No. 24096356
2800 Post Oak Blvd., 57th Floor
Houston, Texas 77056
Tel: (713) 840-1666
gweinberg@rmwbh.com
cdumitru@rmwbh.com

Appellant's Appellate Counsel:
GREGG WEINBERG
TBA No. 21084150
CYRA A. DUMITRU
TBA No. 24096356
JASON BAILEY
TBA No. 24104825
2800 Post Oak Blvd., 57th Floor
Houston, Texas 77056
Tel: (713) 840-1666
gweinberg@rmwbh.com
cdumitru@rmwbh.com
jbailey@rmwbh.com

APPELLEE:

Lynn Madison

Appellee's Trial Court Counsel:
William M. Clanton
TBA No. 24049436
Lindsey N. Duke
TBA No. 24083489
926 Chulie Dr.
San Antonio, TX 78216
(210) 226-0800
bill@clantonlawoffice.com
lindsey@clantonlawoffice.com

Appellee's Appellate Counsel:
William M. Clanton
TBA No. 24049436
Lindsey N. Duke
TBA No. 24083489
926 Chulie Dr.
San Antonio, TX 78216
(210) 226-0800
bill@clantonlawoffice.com
lindsey@clantonlawoffice.com

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RECORD REFERENCES

Citations in this Appellant's Brief to the parties are as follows:

Appellant Roberts Markel Weinberg Butler Hailey, PC will be referred to as the "RMWBH" or "Appellant."

Appellee Lynn Madison will be referred to as "Appellee" or "Madison."

Talise de Culebra Homeowners Association will be referred to as the "Association"

Cause No. 2021CI05838, styled *Talise de Culebra Homeowners Association, Inc. v Lynn Madison*, pending in the 408th District Court of Bexar County, Texas will be referred to as the "Underlying Lawsuit."

Cause No. 2023CI09527, styled *Lynn Madison vs. Roberts Markel Weinberg Butler Hailey PC and Talise de Culebra Home Owners Association, Inc.,* pending in the 224th District Court of Bexar County, Texas will be referred to as the "Current Lawsuit."

Notice of Lis Pendens filed on December 22, 2022, and recorded as Document No. 20220292949 in the Official Public Records of Bexar County, Texas, will be referred to as "Lis Pendens."

Texas Citizens Participation Act will be referred to as "TCPA."

Texas Fair Debt Collections Practices Act will be referred to as "TDCPA"

Fair Debt Collections Practices Act will be referred to as "FDCPA"

Citations in this Appellant's Brief to the Record are as follows:

CR – Clerk's Record (i.e. CR [page]; e.g. CR 1).

RR – Reporter's Record (September 12, 2023 Hearing) (i.e. RR [page]; e.g. RR 1).

Madison BR.-Madison's Responsive Brief in this Court (e.g. Madison Br. 5)

RMWBH Br.-Appellant's original brief in this Court (e.g. RMWBH Br.6)

RMWBH Reply Br. -Appellant's reply brief in this Court (e.g. RMWBH Br. 6).

Motion for Reconsideration -Madison's Motion for Rehearing and En Banc Reconsideration (e.g. Motion for Reconsideration 3)

Judgment – Court of Appeals Eighth District of Texas Judgment (May 30, 2024) (e.g. Judgment)

RESPONSE TO APPELLEE'S STATEMENT OF REASONS WHY EN BANC IS NECESSARY

The Court did not depart from the requisite standard of review of the denial of RMWBH's motion to dismiss and did not: (1) insert its own arguments into the matter as alleged by Madison; (2) impermissibly shift RMWBH's burden under the TCPA to Madison at all, much less twice as alleged; and (3) re-write state and federal law, instead it is Madison, not this Court or RMWBH, who asks this Court to apply a fictitious legal standard to the invocation of the TCPA by attorneys who have not even been proven to be debt collectors.

A Lis Pendens is not "an act of debt collection" as pronounced by Madison and there is no legal authority supporting this pronouncement. All a Lis Pendens is/does is place the world on notice that there is a dispute involving in the real property in question, here the Madison Property. The filing of a Lis Pendens is a constitutionally protected act (specifically a communication) and therefore falls under the protective umbrella of the TCPA. Despite Madison's unsubstantiated pronouncements to the contrary, there is simply no legal authority that says attorneys who are also debt collectors may not invoke the TCPA, or must comply with a heighted or different legal standard when invoking the TCPA, when they are sued for the filing of a Lis Pendens.

There was no requirement that RMWBH request findings of fact and conclusions of law from the Trial Court and the discussion of this issue is a complete red herring.

The status, or lack thereof, of RMWBH as a debt collector has no relevance to the Court's reversal of the Trial Court's denial of RMWBH's TCPA Motion to Dismiss and this Court has already found that Madison did not provide any real evidence that RMWBH was/is a debt collector and as discussed below, RMWBH is not actually a debt collector in this context.

Regardless of RMWBH's status, or lack thereof, as a debt collector, HOA assessments (which is the alleged debt at issue in the Underlying Lawsuit and where the Lis Pendens was filed)

do not qualify as consumer debt under the TDCPA, and RMWBH is still protected by attorney immunity and entitled to dismissal under the FDCPA, even if it is a debt collector under the FDCPA, which the case law cited below will establish that it is not, in the context of the issue before the Court.

Finally, the Court did not create new law, but correctly applied long standing legal principles regarding a Lis Pendens and protected RMWBH from a suit that sought to chill its constitutionally protected right to petition and Madison's Motion for Reconsideration should be denied.

STATEMENT OF THE CASE

This case arises from Madison's attempt to retaliate against RMWBH for filing the Underlying Lawsuit and corresponding Lis Pendens on December 22, 2022 (the "Underlying Lawsuit") —items which it had the absolute right and privilege to file. Retaliation is clear because Counsel in the Underlying Lawsuit are the same as counsel in the Current Lawsuit (William N. Clanton and Lindsey Duke of the Law Office of Bill Clanton, P.C.,) and, clearly lacking the temerity to fight the Underlying Lawsuit on its merits, said Counsel proceeded to impermissibly file frivolous claims with the Court to distract from the real issue at hand—their client's historical failure to pay assessments when due and owing—and to attempt to impermissibly drive a wedge between RBWBH and its client, the Association. All of the causes of action in the Current Lawsuit arise solely from the Lis Pendens filed in the Underlying Lawsuit and the Court found as much in its Memorandum Opinion dated May 30, 2024 (the "Memorandum Opinion").

The Trial Court denied RMWBH's Motion to Dismiss Under the TCPA and an interlocutory appeal followed.

By Judgment dated May 30, 2024, this Court reversed the Trial Court's order, rendered judgment granting RMWBH's TCPA Motion to Dismiss and remanded the case to the trial court for further proceedings consistent with its opinion.

On June 13, 2024, Madison filed her Motion for Rehearing and En Banc Reconsideration ("Motion for Reconsideration").

STATEMENT OF PROCEDURAL HISTORY

- The Court's Memorandum Opinion correctly found that all of Appellee's claims arose solely from RMWBH's filing of a Lis Pendens (including the alleged violations of the FDCPA, the TDCA, and Violations of Chapter 12 of the Tex. CIV. PRAC. & REM. CODE);
- The Court's Memorandum Opinion correctly found that the filing of a Lis Pendens is part of the judicial process and is therefore a constitutionally protected right and Madison provided no legal authority to the contrary in its Motion for Reconsideration.
- The Court's Memorandum Opinion correctly found that attorneys, such as RMWBH, are immune from suit while performing acts on behalf of their clients that fall within the judicial process (such as filing a Lis Pendens) and Madison provided no legal authority to the contrary in its Motion for Reconsideration; and
- The Court's Memorandum Opinion correctly found that the Underlying Lawsuit and accompanying Lis Pendens fall under the protections of the TCPA and therefore the Current Lawsuit is groundless and must be dismissed and Madison provided no legal authority to the contrary in its Motion for Reconsideration.

Madison says countless times in the Motion for Reconsideration that the Lis Pendens is "fraudulent" despite the fact that the Court stated in its Memorandum Opinion that no such determination has been made and despite the fact that the Trial Court made no such determination. Madison then attempts to use this unsupported allegation of a "fraudulent" Lis Pendens to convince the Court that the act of filing a Lis Pendens is an impermissible act of debt collection on the part of RMWBH which a Lis Pendens unequivocally is not. Madison provides the Court no legal authority to support her pronouncement that a Lis Pendens is an act of debt collection. Madison then goes a step further and pronounces (again without any supporting legal authority) that the

Court applied the wrong legal standard when it reversed the Trial Court's decision and stated that RMWBH was required to meet a heightened (and nonexistent) legal standard due to its purported status as a debt collector before it was entitled to invoke the TCPA. This is simply not the law.

The Court's Memorandum Opinion expressly found that Madison failed to provide the Court with any evidence that RMWBH was a debt collector. Regardless, RMWBH cannot be a debt collector under the TDCPA because unpaid HOA 'assessments' which is the debt at issue here, do not qualify as "consumer" debt as defined by the Act. If there is no consumer debt, then RMWBH cannot be a debt collector.

Regarding the FDCPA, even if RMWBH is a debt collector, which again there is no evidence that it is, it is protected by attorney immunity and still entitled to dismissal under the TCPA for engaging in the protected act of filing a Lis Pendens. Notwithstanding, the applicable case law makes it clear that moving to foreclose on a property (which RMWBH on behalf of its client, the Association, seek to do in the Underlying Lawsuit) is not the collection of consumer debt within the meaning of the FDCPA and therefore RMWBH cannot have been acting as a debt collector in this context either.

STATEMENT REGARDING ORAL ARGUMENT

RMWBH objects to Madison's request for oral argument and en banc rehearing because such will only fuel Madison's complete misunderstanding of the TCPA, and the Court did not expand the application of the TCPA. The Court correctly followed long standing Texas law and it is Madison, not this Court, who seeks to apply a fictitious legal standard to RMWBH and there is nothing in the record that supports oral argument.

I. ARGUMENTS AND AUTHORITIES

1. THE COURT APPLIED THE APPROPRIATE STANDARD OF REVIEW IN CONSIDERING THE TRIAL COURT'S DENIAL OF RMWBH'S MOTION TO DISMISS UNDER THE TCPA.

While rather hard to follow, Madison appears to claim that the Court applied the wrong standard of review to its reversal of the Trial Court's denial of RMWBH's TCPA Motion to Dismiss. Notably, Madison provides no examples, evidence, or clear statements that indicate when or how the Court applied the wrong standard of review.

RMWBH agrees that Madison cites to the correct legal standard Courts must apply when reviewing a decision under the TCPA. Such decisions are reviewed de novo. *See Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Whataburger Restaurants LLC v. Fuentes*, No. 08-23-00017-CV, 2023 WL 5808849, at *4 (Tex. App.—El Paso Sept. 7, 2023, no pet.) (mem. op.) ("Whether the TCPA applies to a legal action is an issue of statutory interpretation that we review de novo."). When reviewing such decisions the Court considered the pleadings and the affidavits and other supporting evidence attached to the TCPA Motion and any responses. Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a); *Whataburger Restaurants*, 2023 WL 5808849, at *4 (holding same); Tex. R. Civ. P. 166a(c) (stating evidence trial court may consider in summary judgment proceeding). Furthermore, the Court "must view the pleadings and the evidence in the light most favorable to the nonmovant." Tex. R. Civ. P. 166a(a). Here there is no reason to believe the Court did anything but apply this standard, and once it did so, the Court found that Madison's claims should be dismissed.

Here, the Court's Memorandum Opinion clearly states that it conducted a de novo review as required. Memorandum Opinion Page 4. The Court's Memorandum Opinion clearly states that "the Court considered the pleadings, evidence, and supporting and opposing affidavits stating the facts on which the liability or defense is based. Memorandum Opinion Page 4. RMWBH has no

reason to doubt the Court's veracity regarding the standard of review it applied, and Madison has provided the Court with no evidence to the contrary.

Regarding Madison's statements about RMWBH's failure to request findings of fact and conclusions of law, there is no requirement to request such findings and RMWBH does not understand why this has even been presented to the Court.

Quite frankly, it seems that Madison is simply telling the Court that it applied the wrong standard because the Court ultimately found that Madison's claims should be dismissed.

2. THE COURT CORRECTLY APPLIED THE TCPA'S BURDEN SHIFTING ANALYSIS AND NO SUCH BURDEN WAS SHIFTED TO MADISON.

As stated in the Court's Memorandum Opinion, the purpose of the TCPA "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." Tex. Civ. Prac. & Rem. Code Ann. § 27.002. The Court further stated "We construe the TCPA "liberally to effectuate its purpose and intent fully." Memorandum Opinion Pages 3-4; Id. § 27.011(b); *State ex rel. Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018). Under the TCPA, a party may file a motion to dismiss a legal action if the "legal action is based on or is in response to [that] party's exercise of the right of free speech, right to petition, or right of association[.]" Memorandum Opinion Page 4; Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a). The filing of a TCPA motion to dismiss triggers a three-step resolution process, with shifting burdens. In the first step, the movant has the burden to show the TCPA applies. Memorandum Opinion Page 4; *See id.* § 27.005(b). To meet this burden, the movant must demonstrate that the nonmovant's legal action is based on or is in response to the movant's exercise of a right to associate, speak freely, or petition. Memorandum Opinion Page 4; *Id.* § 27.005(b)(1). If the movant meets its initial burden, the second step next

provides that the burden shifts to the party bringing the legal action to establish by clear and specific evidence a prima facie case for each essential element of its claim. Memorandum Opinion Page 4; *Id.* § 27.005(c). If the nonmovant satisfies its burden, the third and final step provides that the burden shifts back to the movant to establish a valid affirmative defense or other ground on which the movant is entitled to judgment as a matter of law. Memorandum Opinion Page 4; *Id.* § 27.005(d).

In Madison's Response Brief, she attempted to distinguish between the conduct of filing a Lis Pendens and the content of the Lis Pendens itself however provided no legal authority for this alleged difference. Madison BR Pages 16-17. This Court evaluated Madison's argument and expressly found that the Lis Pendens filed by RMWBH "did qualify as a 'communication' within the scope of the TCPA and relied on *Ireland Fam. Ltd. P'ship v. Soloway*, No. 09-22-00192-CV, 2023 WL 2534062, at *7 (Tex. App.—Beaumont Mar. 16, 2023, pet. denied) (mem. op.) (holding the allegations in plaintiff's live pleading showed their breach of contract and fraudulent lien claims were actually based on or in response to defendant's filing of its lawsuit and Lis Pendens); *Smith v. Arrington*, No. 07-19-00393-CV, 2021 WL 476339, at *4 (Tex. App.—Amarillo Feb. 9, 2021, pet. denied) (mem. op.) (concluding Lis Pendens was a "communication related to a judicial proceeding" and implicated movant's right to petition); *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App.—Austin 2015, no pet.) (concluding nonmovants' tortious-interference counterclaim was in part based on, related to, or in response to movant's filing of the suit and their fraudulent-lien counterclaim was based on, related to, or in response to movant's filing of the Lis Pendens, both of which filings are exercises of movant's "right to petition" as the TCPA defines the term.); *James v. Calkins*, 446 S.W.3d 135, 147 (Tex. App.—Houston [1st Dist.] 2014, pet. denied), abrogated on other grounds, Montelongo v. Abrea, 622 S.W.3d 290 (Tex. 2021) (holding TCPA

applied to suit between family members over Lis Pendens clouding title to property within their mother's estate), to support its findings. Memorandum Opinion Page 8.

Madison tells the Court that it erred because "First, the purpose of a Lis Pendens is "twofold: (1) to protect the filing party's alleged rights to the property at issue in the lawsuit and (2) to put those interested in the property on notice of the lawsuit." Madison Motion for Reconsideration Page 9.

To support her proposition that the Court erred, Madison again relies on *Campbell v. Martell,* No. 05-19-01413-CV, 2021 WL 1731754 (Tex. App.—Dallas May 3, 2021, no pet.). This was the same case Madison relied on in the Madison Response Brief and the Court was not persuaded by this argument or authority. Madisons Motion for Reconsideration Page 10. Madison provides the Court with no new arguments or legal authorities on this issue in her Motion for Reconsideration.

Notwithstanding, *Campbell* does not support Madison's position. As discussed in RMWBH Reply Brief, *Campbell* is sort of an outlier in Texas jurisprudence because it involves a situation where the other side *admitted* that the Lis Pendens was fraudulent. *Campbell v. Martell*, No. 05-19-01413-CV, 2021 Tex. App. LEXIS 3375, at *10 (Tex. App.—Dallas May 3, 2021, no pet. h.) *See also* RMWBH Reply BR. Page 21. Here, there has been no admission that the Lis Pendens is fraudulent (because it is not and Madison has even judicially admitted that it is valid), and as such *Campbell's* analysis of attorney immunity is inapplicable to the case at hand. Again, as Madison has acknowledged, the Lis Pendens arises from the lien (encumbrance) created on the Madison Property in favor of RMWBH's client, the Association. CR Page 7. Unquestionably, a lien constitutes an interest in real property and therefore the Lis Pendens is proper pursuant to the plain language of Tex. Pro. Code 12.007. Madison wholly fails to address this issue in its Motion

for Reconsideration and continues to point to *Campbell* as support even after RMWBH thoroughly debunked its relevance and application to the issue before the Court.

As such, Madison has presented the Court with no legal basis to reconsider its ruling that the Lis Pendens constitutes a communication as defined by the TCPA and is therefore protected.

A. RMWBH WAS NOT REQUIRED TO ESTABLISH THAT THE TCPA APPLIES TO A DEBT COLLECTOR FOR DEBT COLLECTION CONDUCT PROHIBITED BY STATE AND FEDERAL STATUTE BEFORE THE TCPA COULD BE INVOKED.

Madison claims that the Court erred in reversing the Trial Court's denial of RMWBH's TCPA Motion to Dismiss and the primary basis for such claim appears to focus on RMWBH's alleged status as a debt collector. Sprinkled throughout the Motion for Reconsideration, Madison also accuses RMWBH of being unethical, specifically in making "false statements of material law to the court." See Madison Motion for Reconsideration Page 20. Nothing could be farther from the truth, and the only party who is making "false statements of material law to the court" is Madison. As discussed below, Madison is asking this Court to invent new law, hold attorneys who also engage in debt collections to a non-existent legal standard, and tries to convince the Court that debt collectors have no right to invoke the TCPA. Interestingly, Madison makes these allegations and arguments without citing any (relevant) legal authority and without bothering to even full justify margins making the Motion for Reconsideration hard to follow both legally and visually.

First and foremost, Madison has provided the Court with absolutely no authority that supports her position that RMWBH was required to show that debt collectors are entitled to dismissal under the TCPA. Secondly, Madison is asking this Court to create a different, and heightened, legal standard for attorney debt collectors when such engage in the right to petition as RMWBH unequivocally did. As discussed in the Memorandum Opinion, Madison did not even

provide the Court with proper evidence that RMWBH is a debt collector, so RMWBH is now in the difficult position of having to prove a negative as it responds to the Motion for Reconsideration.

The TCPA protects the right to petition period, regardless of someone's status, or lack thereof, as a debt collector. Tex. Civ. Prac. & Rem. Code Ann. § 27.002. Furthermore, the TCPA provides express carve outs for the causes of action that do not trigger TCPA protections—notably, alleged violations of the TDCPA and the FDCPA are NOT included in these carve outs and Madison's arguments are the very definition of irrelevant. Tex. Civ. Prac. & Rem. Code 27.010.

Likewise, the filing of a Lis Pendens, regardless of who does it, qualifies as a communication that is protected as part of the right to petition and therefore is protected under the TCPA. *Smith v. Arrington*, No. 07-19-00393-CV, 2021 WL 476339, at *4 (Tex. App.—Amarillo Feb. 9, 2021, pet. denied) (mem. op.) This is a long-standing principle of Texas law and one that Madison clearly does not understand and now seeks to confuse the Court into applying a non-existent legal standard.

Madison's entire Motion for Reconsideration completely ignores the fact that all of her claims, including her alleged violations of Chap. 12 of the Civ. Prac. & Rem. Code arise from RMWBH's filing of the Lis Pendens which is a protected act. Madison does not dispute that a Lis Pendens cannot exist without a lawsuit. *See Madison* Motion for Reconsideration Page 9. This Court has found that a Lis Pendens cannot exist without a lawsuit. Memorandum Opinion Page 9. As such, and as appellate courts have consistently found, the filing of a Lis Pendens implicates the right to petition and therefore the TCPA applies. *Id.*

Additionally, Madison's arguments in the Motion for Reconsideration assume facts not in evidence. Specifically, Madison continues to allege that the Lis Pendens was fraudulent and

therefore violated Tex. Civ. Prac. Rem Code. 12.; Motion for Reconsideration pages 4, 9. There is absolutely no evidence that the Lis Pendens was fraudulent. Furthermore, Madison's sole basis for the allegation that the Lis Pendens was fraudulent are her claims that it does not arise from an interest in Madison's Property. Madison BR Pages 29-30.

Again, a review of Madison's own petition clearly disproves this argument and she admits the Association has an interest in her property via Section G (3) of the Declaration which Madison cites in her petition, in the Current Lawsuit is as follows:

> 3. Creation of Lien. Assessments are secured by a continuing vendor's lien and contractual lien on each Lot, which lien is hereby granted and reserved by the Declarant and hereby assigned to the Association. By acceptance of a deed to a Lot, each Owner grants and conveys the lien, together with the power of sale, to the Association to secure Assessments and fines, late charges, interest, attorney's fees and other costs and expenses incurred by the Association with respect to the Assessment, subject to the provisions of the Texas Property Code and any other applicable law. The Board (on behalf of the Association) has sole authority to exercise rights regarding such liens.

As such, RMWBH does not understand the basis for Madison's continued insistence that the Lis Pendens was fraudulent (and Madison has wholly failed to address the fact that she has judicially admitted that the Lis Pendens was legally proper), but regardless, there has been no determination on this issue, and it is not even before the Court and cannot form the basis of granting Madison's Motion for Rehearing.

For clarity, the Lis Pendens simply says:

NOTICE OF LIS PENDENS

THE STATE OF TEXAS §
§
COUNTY OF BEXAR §

NOTICE IS HEREBY GIVEN that Cause No. 2021CI05838; *Talise De Culebra Home Owners Association, Inc. v. Lynn Madison;* In the District Court of Bexar County, Texas, 408th Judicial District, and is now pending in such Court.

The action seeks to establish and enforce a right in real property situated in Bexar County, Texas, legally described as:

> *Lot 2, Block 163, Talise De Culebra Unit-1, Bexar County, Texas, according to plat recorded in Volume 9641, Page(s) 12-13, Deed and Plat Records of Bexar County, Texas, and which property is commonly known as 7950 Cenote Drive, San Antonio, TX 78254.*

This action seeks: (a) recovery of delinquent assessments, interest and other charges authorized by the applicable restrictive covenants and/or state law; and (b) an order foreclosing plaintiff's lien for all such delinquent charges that are secured by the plaintiff's lien on the property per the applicable restrictive covenants.

SIGNED this the 22 day of December, 2022.

Again, the Lis Pendens is simply a notice to the world that there is a dispute regarding and involving Madison's Property which is a communication protected by the TCPA. RMWBH Br. 14.

B. Other than Filing a Lis Pendens, Madison has not Alleged that RMWBH has violated either the State or Federal debt Collections Statute.

Madison falsely claims that "RMWBH refused to address its invocation of the TCPA as a debt collector." Madison Motion for Reconsideration Page 11. This is patently false because RMWBH's status as a debt collector, or lack thereof, has no legal relevance to whether or not Madison's lawsuit was properly dismissed under the TCPA. Again, Madison's petition, and therefore the issue before the Court, was simply that the Lis Pendens did not relate to an interest in real property as required by Tex. Prop. Code Ann. § 12.007. No other violations of either TDCPA or the FDCPA were alleged.

Notwithstanding, RMWBH will now address its status as a debt collector and the effect, or lack thereof, of attorney immunity on such a status.

i. HOA ASSESSMENTS DO NOT QUALIFY AS CONSUMER DEBT UNDER THE TEXAS FAIR DEBT COLLECTION PRACTICES ACT

Madison tells the Court that RMWBH is a debt collector and has violated the TDCPA and the FDCPA on no fewer than five occasions. *See* Madison BR; *See also* Madison Motion for Reconsideration. These pronouncements are problematic for Madison because she fails to establish that RMWBH is even a debt collector. Memorandum Opinion Pages 11-12. Madison also claims that "RMWBH does not challenge that the conduct of filing a Lis Pendens is an act of debt collection." Madison Motion for Reconsideration Page 8; *See also* Madison BR Page 52. This is also problematic for Madison because she fails to establish that a Lis Pendens is an act of debt collection. Legally speaking, all the filing of a Lis Pendens does is place the world on notice of a dispute regarding an interest in real property. *Sommers for Alabama & Dunlavy, Ltd. v. Sandcastle Homes, Inc.*, 521 S.W.3d 749, 761 (Tex. 2017); *Jetall Cos., Inc. v. Van Dyke*, No. 14-19-00104-CV, 2019 WL 2097540, at *5 (Tex. App.—Houston [14th Dist.] May 14, 2019, no pet.) (mem. op.) (citing *In re Miller*, 433 S.W.3d 82, 84 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding). This is because "(1) a Lis Pendens ... has no existence separate from the litigation of which it gives notice ... and (2) the open courts guarantee of the Texas Constitution ensures litigants access to the courts without fear of defamation actions." *Cty. Inv., LP v. Royal W. Inv., LLC*, 513 S.W.3d 575, 579 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). There is no legal authority that Madison points to, or otherwise, that establishes that the filing of a Lis Pendens is an act of debt collection (because it is not) and the Court should disregard this argument.

Regarding the TDCPA, RMWBH does not even qualify as a debt collector under the Act in

the situation before the Court. Specifically, "Assessments, dues, fees, charges, interest, late fees, fines, collection costs, and attorney's fees assessed by a homeowners' association pursuant to declarations governing the association or state law do not 'arise from a transaction' and thus do not constitute 'consumer debt.'" *Green v. Port of Call Homeowners Ass'n, No.* 03-18-00264-CV, 2018 WL 4100855, at *10 (Tex. App.—Austin Aug. 29, 2018, no pet.). The Act only applies to consumer debt. *Id.* As such, RMWBH is not a debt collector and cannot violate the Act as a matter of law for filing a Lis Pendens in a case where it (on behalf of its client) seeks foreclosure of a lien (secured by real property) that arose from unpaid HOA assessments.

ii. MADISON IMPERMISSIBLY RAISED NEW ARGUMENTS REGARDING RMWBH'S EVIDENCE FOR THE FIRST TIME IN ITS MOTION FOR RECONSIDERATION.

Madison failed to object to RMWBH's evidence at both the Trial Court level, and in her Response Brief, when RMWBH initially appealed the Lower Court's denial of the TCPA Motion to Dismiss. As such, any discussion of RMWBH's evidence as "insufficient" conclusory" or "hearsay" is simply not before the Court and must be disregarded. *Superbash 2017, LLC v. Fun Fest Ent.*, 634 S.W.3d 471 (Tex. App. - Houston [14th Dist.] 2021, no pet.)

Additionally, this entire section is based off of the false premise that RMWBH has additional "duties or potential liability as a debt collector under the TDCA or FDCPA" which it absolutely does not as discussed in section B (i) above. Madison Motion for Reconsideration Page 4. As such, Madison's newly lodged complaints regarding this fictitious and heightened evidentiary standard RMWBH was somehow required to meet before it could invoke the TCPA is a red herring. For the Court to even entertain this would be to go against the decades of clear and unequivocal precedent and completely eviscerate the purpose of the TCPA.

Importantly, the Court did not flip the burden onto Madison. Rather the Court correctly followed and applied that TCPA three step burden shifting analysis: (1) the Court found that

RMWBH met its burden to show that the TCPA applied; (2) the burden then shifted to Madison to show—by clear and specific evidence—a prima facie case for each essential element of her various claims and the Court decided to assume "but not decide that Madison met her second step burden" and went straight to the third step; (3) the third step then places the burden back on RMWBH to establish an affirmative defense which here was attorney immunity and the Court found that RMWBH met its burden. Memorandum Opinion Page 9. The Court could not have followed the law any more precisely—Madison simply misunderstands the TCPA and continues to present a false narrative of the legal landscape to the Court as she did first in the Trial Court and again in her Motion for Rehearing and En Banc Reconsideration.

3. THE COURT CORRECTLY FOUND THAT RMWBH IS PROTECTED BY ATTORNEY IMMUNITY FOR ITS ACTIONS TAKEN ON BEHALF OF ITS CLIENT, THE ASSOCIATION, WHEN RMWBH FILED THE LIS PENDENS.

The Court correctly found that RMWBH was/is protected by attorney immunity for the filing of a Lis Pendens on behalf of its client, the Association. Madison complains about the Court's finding and the basis of her complaint is her pronouncement that "during the first step of the TCPA analysis, RMWBH had to show it was not a debt collector." Madison Motion for Reconsideration Page 16. This is not the law. As an initial matter, the Court should note that Madison provided no legal authority in support of this pronouncement. Secondly, as established in Section B (i) above, regarding the TDCPA, RMWBH is not, and cannot be, a debt collector in this instance because HOA assessments are not considered consumer debt and therefore the Act does not apply.

Madison's next complaint involves the application of attorney immunity to alleged violations of the FDCPA. Specifically, Madison states "as fully briefed by Madison, attorney immunity is not a recognized defense under the FDCPA." Madison Motion for Reconsideration Page 19. Madison cites three cases in support of this pronouncement; however, it appears that

Madison has both misread these cases and has overlooked 5th circuit case law that is directly on point.

Madison's Inapplicable Case Law

- *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 1490, 131 L. Ed. 2d 395 (1995), does not even discuss attorney immunity—the word immunity is nowhere to be found in this case and as such it is wholly inapplicable.
- *Foster v. Zientz*, 2021 Tex. App. LEXIS 2307, at *11 (Tex. App.—Fort Worth 2021, no pet) does discuss attorney immunity and it does discuss the TDCPA but that is where the relevance stops. Foster involved consumer debt which the instant case does not and as such this case is not applicable.
- *Lombardi v. Bank of Am.*, Civil Action No. 3:13-cv-1464-o, 2014 U.S. Dist. LEXIS 32858, at *13 (N. D. Tex. 2014) does not even discuss attorney immunity—the word immunity is nowhere to be found in this case and as such it is wholly inapplicable.

RMWBH's Case Law

RMWBH has conducted a diligent search and could not find even a single case that discussed TCPA, attorney immunity, and debt collectors at the same time. However, *Daniels v. Saucedo*, No. MO: 21-CV-101-DC, 2021 WL 6495244 (W.D. Tex. Nov. 17, 2021), aff'd, No. 21-51193, 2022 WL 6943343 (5th Cir. Oct. 12, 2022) is instructive and is directly on point regarding the FDCPA and the application of attorney immunity. *Daniels* found that an attorney was entitled to dismiss a case that involved allegations of violations of the FDCPA under the affirmative defense of attorney immunity. This is exactly what RMWBH seeks to do here. The context in *Daniels* is even directly on point. *Daniels* involved an attorney who was sued regarding the

foreclosure on real property secured by a deed of trust. The Court expressly found that "The activity of foreclosing on a property pursuant to a deed of trust is not the collection of debt within the meaning of the FDCPA." *Daniels v. Saucedo*, No. MO: 21-CV-101-DC, 2021 WL 6495244 (W.D. Tex. Nov. 17, 2021), aff'd, No. 21-51193, 2022 WL 6943343 (5th Cir. Oct. 12, 2022) ; *see also Bittinger, 744 F. Supp.2d at 626 (citing Williams v. Countrywide Home Loans, Inc., 504 F. Supp.2d 176, 190 (S.D. Tex. 2007), aff'd, 269 F. App'x 523 (5th Cir. 2008)).*The Court went on to state, "Because Plaintiff fails to specify a section of the FDCPA that Defendants allegedly violated and under which he brings his claim, and Plaintiff fails to state any facts that could give rise to such a claim, Plaintiff's allegations under the FDCPA fail to state a plausible claim for relief and shall be dismissed. *Id.*

Here, RMWBH filed a Lis Pendens to protect its client's interest in the Madison Property that arises by operation of law through Section G (3) of the Declaration which gave the Association a lien on the Madison Property. RMWBH seeks foreclosure of said lien as outlined in the petition of the Underlying Lawsuit.

> 4. The Plaintiff have foreclosure of its lien created by the provisions of the Restrictions on the amounts awarded for numbers 2 and 3 above on the following described Property owned by the Defendant:
>
> *Lot 2, Block 163, Talise De Culebra Unit-1, Bexar County, Texas, according to plat recorded in Volume 9641, Page(s) 12-13, Deed and Plat Records of Bexar County, Texas more commonly known as 7950 Cenote Drive, San Antonio, TX 78254;*

As outlined in Daniels, the foreclosure of a secured lien is not the collection of consumer debt and therefore RMWBH cannot be a debt collector in this instance either. Again, the only basis for Madison's claim that RMWBH violated the FDCPA is the filing of a Lis Pendens which is not

in and of itself an act of debt collection. Finally, Madison failed to provide the Court with sufficient evidence to even establish RMWBH was/is a debt collector.

II. CONCLUSION

As evidenced above, there is neither evidence nor legal authority which supports Madison's Motion for Reconsideration. Madison simply misunderstands the TCPA and asks the Court to apply a fictitious legal standard regarding the invocation of the TCPA to RMWBH. Furthermore, there is no evidence that RMWBH is even a debt collector, but even if it is for other purposes, the legal authority demonstrates that: (1) HOA assessments are not consumer debt under the TDCPA; (2) the filing of a Lis Pendens is not an act of debt collection under either the TDCPA and the FDCPA; and (3) seeking to foreclose on secured debt provides an attorney with a defense of immunity and furthermore, that such debt is not considered consumer debt under the FDCPA. The Court should deny the Motion for Reconsideration and uphold its decision in the Memorandum Opinion and remand this matter for further proceedings in the Trial Court on the issue of sanctions and attorney's fees.

PRAYER

For the reasons stated above, RMWBH respectfully asks that Madison's Motion for Rehearing and En Banc Reconsideration be denied.

Respectfully submitted,

ROBERTS MARKEL WEINBERG BUTLER HAILEY PC

GREGG WEINBERG
TBA No. 21084150
CYRA A. DUMITRU
TBA No. 24096356
JASON BAILEY
TBA No. 24104825
2800 Post Oak Blvd., 57th Floor
Houston, Texas 77056
Tel: (713) 840-1666
gweinberg@rmwbh.com
cdumitru@rmwbh.com
jbailey@rmwbh.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4 i(3) of the Texas Rules of Appellate Procedure, I certify that the word count in this Appellant's Brief is 6679 words.

GREGG WEINBERG

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the parties listed below by fax, delivery service, messenger, mail, and/or through the serving party's electronic filing service provider in accordance with the Texas Rules of Appellate Procedure on this 5th day of July 2024.

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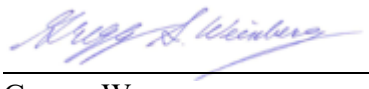
William M. Clanton
Lindsey N. Duke
926 Chulie Dr.
San Antonio, TX 78216
ATTORNEYS FOR APPELLEE



GREGG WEINBERG

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Stefanie Martinez on behalf of Gregg Weinberg
Bar No. 21084150
smmartinez@rmwbh.com
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Associated Case Party: LynnMadison

Name	BarNumber	Email	TimestampSubmitted	Status
William Clanton	24049436	bill@clantonlawoffice.com	7/5/2024 8:01:02 PM	SENT
Lindsey Duke	24083489	lindsey@clantonlawoffice.com	7/5/2024 8:01:02 PM	SENT

Associated Case Party: Roberts Markel Weinberg Butler Hailey PC

Name	BarNumber	Email	TimestampSubmitted	Status
Gregg Weinberg		gweinberg@rmwbh.com	7/5/2024 8:01:02 PM	SENT
Cyra A.Dumitru		cdumitru@rmwbh.com	7/5/2024 8:01:02 PM	SENT
Jason MBailey		jbailey@rmwbh.com	7/5/2024 8:01:02 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Rachel Valdez		rvaldez@rmwbh.com	7/5/2024 8:01:02 PM	SENT