APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40710
Summary Calendar

JASON LEE VAN DYKE,

Plaintiff - Appellee,

v.

THOMAS CHRISTOPHER RETZLAFF, also known as Dean Anderson, doing business as BV Files, ViaView Files, L.L.C., and ViaView Files,

Defendant - Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:18-CV-247

Filed: October 22, 2019

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM: *

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff Jason Lee Van Dyke sued Defendant Thomas Retzlaff, alleging various causes of action based upon allegedly false and harassing statements Retzlaff made about Van Dyke in state court; Retzlaff removed the case to federal court on diversity jurisdiction grounds. The district court opinion ably explains the facts of the case but, suffice it to say, Retzlaff moved to dismiss the claims based upon the Texas Citizens Participation Act (TCPA)[1], which is an "anti-SLAPP"[2] statute. The district court denied the motion to dismiss, concluding that the relevant portions of the TCPA did not apply in federal court. Retzlaff filed an interlocutory appeal to our court.

We first examine whether we have jurisdiction of this interlocutory appeal. The parties agree that the collateral order doctrine applies to this appeal. Based upon precedent, we agree that we have jurisdiction to address whether the Texas anti-SLAPP statute applies here. *Diamond Consortium, Inc. v. Hammervold*, 733 F. App'x 151, 154 (5th Cir. 2018) (per curiam); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 747-48 (5th Cir. 2014). That jurisdiction is limited; we cannot address the underlying merits of the case outside the anti-SLAPP question. *See Mauze & Bagby*, 745 F.3d at 747 ("[T]he collateral order doctrine can confer *limited* appellate jurisdiction." (emphasis added)).

The next question, then, is whether the district court correctly denied the motion to dismiss based upon the TCPA. At the time that the district court ruled, the application of the Texas anti-SLAPP statute in a federal court

---

[1] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001.

[2] "SLAPP" is short for Strategic Litigation Against Public Participation.

exercising diversity jurisdiction was an open question in our circuit. However, by the time the appeal was ripe for decision, we had decided the issue. *See Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019). We determined that "the TCPA does not apply to diversity cases in federal court." *Id.*

After allowing the parties to submit supplemental briefing on this point, we conclude that *Klocke* is dispositive. In his supplemental brief, Retzlaff tries to distinguish the two cases by pointing out lapses in the defendant's briefing in *Klocke* that are different from Retzlaff's robust briefing. But the core of *Klocke* does not rest on such lapses, so we are bound by the rule of orderliness to following its holding. *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). Retzlaff's other procedural arguments are beyond the scope of this interlocutory appeal. We express no opinion on the ultimate merits of the case; nor do we opine on the validity of a motion to dismiss or for summary judgment based on arguments other than the TCPA.

AFFIRMED; the case is REMANDED for further proceedings in the district court.

UNITED STATES DISTRICT COURT
Eastern District of Texas
Sherman Division

JASON LEE VAN DYKE,	§	
	§	Civil Action No.
	§	4:18-CV-247
v.	§	Judge Mazzant
	§	
THOMAS RETZLAFF, a/k/a	§	
DEAN ANDERSON, d/b/a VIA	§	
VIEW FILES LLC, and VIA	§	
VIEW FILES	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendant Thomas Retzlaff's Second Amended TCPA Motion to Dismiss (Dkt. #44), Defendant's Notice of Approaching TCPA Deadlines and Request for Hearing (Dkt. #59), Defendant's First Amended Notice of Approaching TCPA Deadlines and Motion to Set Hearing (Dkt. #67), and Joint Motion for Clarifying Order (Dkt. #55). After reviewing the relevant pleadings and motions, the Court finds that all the motions should be denied.

BACKGROUND

On March 28, 2018, Plaintiff Jason Lee Van Dyke filed suit against Defendant in the 431st State District Court of Texas. On April 10, 2018, Defendant removed the case to federal court. The basis of Plaintiff's claims revolve around

numerous allegedly harassing, false, and defamatory statements and publications made by Defendant about Plaintiff. On April 11, 2018, Plaintiff filed his Second Amended Complaint asserting claims for libel per se, intrusion on seclusion, and tortious interference with an existing contract (Dkt. #7). On April 10, 2018, Defendant file a Motion to Dismiss pursuant to the Texas Citizens Participation Act ("TCPA") (Dkt. #5), which the Court denied as moot pursuant to Plaintiff's amended complaint (Dkt. #53). As a result, on May 22, 2018, Defendant filed his Second Amended TCPA Motion to Dismiss (Dkt. #44). On May 29, 2018, Plaintiff filed his response (Dkt. #48). On June 11, 2018, the parties filed a Joint Motion for Clarifying Order (Dkt. #55). Specifically, the parties request clarification as to whether discovery is stayed in this case as a result of Defendant's motion to dismiss. On July 3, 2018, Defendant filed a Notice of Approaching TCPA Deadlines and Request for Hearing (Dkt. #59). On July 20, 2018, Defendant filed a First Amended Notice of Approaching TCPA Deadlines and Motion to Set Hearing (Dkt. #67). The Court first addresses whether the TCPA applies in federal court, then discusses the requests for a hearing and clarification.

ANALYSIS

The TCPA is an anti-SLAPP ("Strategic Litigation Against Public Participation") statute that is designed 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 § 27.002. "To achieve this, the TCPA provides a means for a defendant, early in

the lawsuit, to seek dismissal of certain claims in the lawsuit." *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 746 (5th Cir. 2014).

Filing a motion to dismiss under the TCPA "stops discovery in the action until the court has ruled, save for limited discovery relevant to the motion." *Cuba v. Pylant*, 814 F.3d 701, 707 (5th Cir. 2016) (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(c), 27.006(b) (West 2011)). Moreover, the statute provides an accelerated timetable for addressing such a motion: "[t]he court must set a hearing on the motion within 60 days of service (90 or 120 days in certain exceptional cases involving crowded dockets, good cause, or TCPA-related discovery) . . . and the court must rule on the motion within 30 days after the hearing." *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.004, 27.005 (West 2011)). If a court fails to abide by such deadlines, the motion is deemed denied by operation of law and the defendants may appeal. *See* TEX. CIV. PRAC. & REM. CODE § 27.008(a).

Defendant avers that the TCPA not only applies in federal court but also requires that the Court dismiss all of Plaintiff's claims (Dkt. #44 at pp. 3; 26). Federal courts sitting in diversity[1] apply state substantive law rather than federal common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Stated differently, federal courts apply state common law but federal procedural rules. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *Foradori v. Harris*, 523 F.3d 477, 486 (5th Cir. 2008). Performing an *Erie* analysis involves a multi-step inquiry. First,

---

[1] Here, the Court's jurisdiction is based on diversity of citizenship. *See* (Dkt. #7 at ¶ 2.1).

the Court must determine whether the statute is procedural or substantive. State procedural statutes are not applied in federal courts. *Erie*, 304 U.S. at 78. Second, the Court determines whether the state substantive law conflicts with federal procedural rules; if so, then the federal rule applies. *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333 (5th Cir. 2011).

The Fifth Circuit has yet to address whether the TCPA is procedural or substantive, or whether it applies in federal court. *See Diamond Consortium, Inc. v. Hammervold*, No. 17-40582, 2018 WL 2077910, at *3 n.3 (5th Cir. May 3, 2018) ("we follow previous panels in assuming without deciding that Texas's anti-SLAPP statute applies in federal court."); *Block v. Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017) ("[t]he applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in the circuit."); *Cuba*, 814 F.3d at 706 ("we first review the TCPA framework, which we assume—without deciding—controls as the state substantive law in these diversity suits."); *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015) ("[w]e have not specifically held that the TCPA applies in federal court; at most we have assumed without deciding its applicability."). Although the Fifth Circuit has assumed that the TCPA is controlling the state substantive statute, *Cuba*, 814 F.3d at 706, the Court finds persuasive the dissent in *Cuba*. Specifically, United States Circuit Judge James E. Graves in his dissent found that

> the TCPA is procedural and must be ignored. The TCPA is codified in the Texas Civil Practice and Remedies Code, provides for a pre-trial motion to dismiss claims subject to its coverage, establishes

> time limits for consideration of such motions to dismiss, grants a right to appeal a denial of the motion, and authorizes the award of attorneys' fees if a claim is dismissed. This creates no substantive rule of Texas law; rather, the TCPA is clearly a procedural mechanism for speedy dismissal of a meritless lawsuit that infringes on certain constitutional protections. Because the TCPA is procedural, I would follow *Erie's* command apply the federal rules.

Cuba, 814 F.3d at 720 (citations omitted). The dissent continued to explain that even if the TCPA were substantive, it is inapplicable in federal court because it conflicts with Federal Rules of Civil Procedure 12 and 56. *Id.* at 719–720. As such, the dissent concluded that

> the TCPA is procedural and we may not apply it when sitting in diversity. Even if, however, it could be said the the TCPA is substantive, then there is no doubt that it must yield to the Federal Rules of Civil Procedure because it directly conflicts with the pretrial dismissal mechanisms of Rules 12 and 56.

Id. at 721.

Agreeing with the dissent in *Cuba*, United States Magistrate Judge Andrew W. Austin in the Western District of Texas denied a motion to dismiss pursuant to the TCPA. *Rudkin v. Roger Beasley Imports, Inc.*, No. 1:17-CV-849, 2017 WL 6622561, at *1–*3 (W.D. Tex. Dec. 28, 2017), *report and recommendation adopted*, 2018 WL 2122896.[2] Specifically, Magistrate Judge Austin found that

---

[2] The Court notes that although *Rudkin* is currently on appeal to the Fifth Circuit, a ruling has not yet been issued.

> the TCPA contains procedural provisions setting forth deadlines to seek dismissal, deadlines to respond, and even deadlines for the court to rule, as well as appellate rights, and the recovery of attorney's fees. It is a procedural statute and thus not applicable in federal court. Even if the statute is viewed to be somehow substantive, it still cannot be applied in federal court, as its provisions conflict with Rules 12 and 56, rules well within Congress's rulemaking authority.

Id. at *3.

Adopting the reasoning of the dissent in *Cuba* and the District Court in the Western District of Texas, the Court finds that the TCPA, regardless if classified as procedural or substantive, does not apply in federal court. Accordingly, the Court finds that Defendants' motion to dismiss should be denied. Consequently, the Court further finds that Defendant's requests for a hearing on his motion to dismiss should be denied as moot. Finally, the Court clarifies that discovery is not stayed in this case. Instead, the deadlines as set out in the Court's Scheduling Order (Dkt. #54) are to remain in effect.

CONCLUSION

It is therefore **ORDERED** that Defendant's Second Amended TCPA Motion to Dismiss (Dkt. #44) is hereby **DENIED**. It is further **ORDERED** that Defendant's Notice of Approaching TCPA Deadlines and Request for Hearing (Dkt. #59) and First Amended Notice of Approaching TCPA Deadlines and Motion to Set Hearing (Dkt. #67) are hereby **DENIED as moot**. Regarding the parties' Joint

Motion for Clarifying Order (Dkt. #55), the parties are **ORDERED** to abide by the deadlines as set out in the Court's Scheduling Order (Dkt. #54).

SIGNED this 24th day of July, 2018.

/s/
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40710

JASON LEE VAN DYKE,

Plaintiff - Appellee

v.

THOMAS CHRISTOPHER RETZLAFF, also known as Dean Anderson, doing business as BV Files, ViaView Files, L.L.C., and ViaView Files,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion October 22, 2019, 5 Cir., ___, __ F.3d __)

Before WIENER, HAYNES and COSTA, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Dated 12-5-2019

ENTERED FOR THE COURT:

/s/ [Carlton Haynes]
UNITED STATES CIRCUIT JUDGE

Vernon's
TEXAS CODES
ANNOTATED (2015)

CIVIL PRACTICE AND REMEDIES CODE

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

§ 27.001. Definitions

In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

§ 27.002. Purpose

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.

§ 27.003. Motion to Dismiss

(a) If a legal action is based on, relates to, or is in response to a party's exercise of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

§ 27.004. Hearing

(a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require

a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) 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 under Section 27.003.

§ 27.005. Ruling

(a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;
(2) the right to petition; or
(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by

clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

§ 27.006. Evidence

(a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

§ 27.007. Additional Findings

(a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

§ 27.008. Appeal

(a) If a court does not rule on a motion to dismiss under Section 27.003 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.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

* * *

§ 27.009. Damages and Costs

(a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

§ 27.010. Exemptions

(a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political

subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engage 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.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

§ 27.011. Construction

(a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.