

Affirm and Opinion Filed July 28, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00482-CV

**PALLADIUM METAL RECYCLING, LLC, Appellant
V.
5G METALS, INC. AND 4G METALS, INC., Appellees**

**On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-18472**

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Partida-Kipness¹
Opinion by Justice Molberg

Appellant Palladium Metal Recycling, LLC (Palladium) appeals the trial court's denial of its motion to dismiss 5G Metals, Inc. and 4G Metals, Inc.'s (appellees') claims pursuant to the Texas Citizens Participation Act, TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011 (the TCPA).²

¹ The Honorable David Bridges, Justice, participated in the submission of this case. However, he did not participate in the issuance of this opinion due to his death on July 25, 2020.

² The Texas Legislature amended the TCPA effective September 1, 2019. Those amendments apply to "an action filed on or after" that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. Because the underlying lawsuit was filed before September 1, 2019, the law in effect before September 1, 2019 applies. See Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen.

In six issues, Palladium asserts the trial court erred in denying its TCPA motion because appellees' claims are based on, relate to, or are in response to its exercise of the right of association and free speech; appellees failed to show the commercial speech exemption³ applies to their claims; appellees failed to present clear and specific evidence on each element of their claims against Palladium; and the trial court failed to rule on and sustain Palladium's objections to appellees' evidence.⁴ We disagree and conclude Palladium failed to meet its burden of establishing the TCPA applies to appellees' claims because Palladium's communications did not (1) involve public or citizen participation as required for the exercise of the right of association or (2) relate to a matter of public concern as required for the exercise of the right of free speech. Accordingly, we affirm the trial court's order denying Palladium's motion to dismiss.

BACKGROUND

This case arises from a private business dispute relating to the termination of an oral joint venture agreement formed to acquire and resell scrap metals. Under the

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.

³ The TCPA exempts certain legal actions, including those “brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services . . . or a commercial transaction in which the intended audience is an actual or potential buyer or customer.” TEX. CIV. PRAC. & REM. CODE § 27.010(b); *Collaborative Imaging, LLC v. Zotec Ptrs., LLC*, No. 05-19-01256-CV, 2020 WL 3118614, at *3 n.4 (Tex. App.—Dallas June 12, 2020, no pet. h.) (mem. op.).

⁴ Palladium's six issues are structured as follows: (1) right of association, (2) right of free speech, (3) commercial speech exemption, (4) and (5) appellees' alleged failure to prove elements of their claims, and (6) Palladium's objections to appellees' evidence.

agreement, Palladium contracted for and acquired the scrap through various demolition projects, and once trucking services were arranged, the scrap would be delivered to appellees' yard. Appellees would then pay Palladium a premium over market price for the scrap.

According to appellees' pleadings, this oral joint venture partnership began in August 2009 and concluded in November 2018, when Palladium sent appellees a notice to dissolve the business. The lawsuit involves actions alleged to have been taken by Palladium and two individuals, Jason Riley⁵ and Connor St. Charles, in the time leading up to or following the partnership dissolution, which appellees allege interfered with or deprived them of certain business opportunities.

Generally, appellees allege that in January 2017, 4G Metals and Riley executed a written employment agreement under which Riley worked for 4G Metals as a manager and under which Riley agreed to protect 4G Metals' proprietary information and avoid directly competing with 4G Metals post-employment. Appellees allege that Palladium had them hire St. Charles, the son of Palladium's principal, and that from May 2018 to October 2018, St. Charles worked in appellees' scrap yard and learned appellees' "entire business end-to-end."

On December 18, 2018, following Palladium's notice of dissolution, appellees sued Palladium, Riley, and St. Charles. Appellees alleged Palladium breached the

⁵ The petition identifies Riley as Jason Riley Kendrick a/k/a Jason Riley. We refer to him as Riley, as appellees do.

partnership agreement, breached its fiduciary duties, tortiously interfered with an existing contract or, alternatively, with prospective business relations, engaged in common law misappropriation, and aided and abetted Riley's and St. Charles's wrongdoing. As to Riley and St. Charles, appellees alleged Riley and St. Charles tortiously interfered with an existing contract or, alternatively, with prospective business relations and aided and abetted Palladium's wrongdoing. As to Riley, appellee 4G Metals also alleged Riley breached his employment agreement and his fiduciary duties.⁶

On February 18, 2019, Palladium and St. Charles filed a TCPA motion to dismiss, seeking to have the trial court dismiss appellees' claims against them and asserting that appellees' legal action is based on, relates to, or is in response to their exercise of their rights of association and free speech. With their motion, Palladium and St. Charles included affidavits from St. Charles and his father, Peter, who serves as Palladium's President. Appellees filed a response to the motion on March 19, 2019, and included all of the items previously attached to their petition,⁷ as well as an unsworn declaration of Prateek Desai, an affidavit of Peter Bausone, and additional emails.

⁶ Appellee 4G Metals also alleged Riley breached his employment agreement while he was in the scope of his employment with Palladium and that Palladium was therefore vicariously liable for his breach.

⁷ These attachments included an affidavit from Prateek Desai, certain emails and correspondence, the employment agreement between Riley and 4G Metals, and an affidavit and attachments from Gittar Calderon.

Palladium and St. Charles then filed a reply in support of their motion and filed objections to appellees' evidence, objecting to certain portions of Desai's affidavit, unsworn declaration, and attachments and to Peter Bausone's affidavit.

The trial court heard the motion and objections on March 22, 2019, and continuing on March 25, 2019. The trial judge did not make any rulings at the hearing. On April 4, 2019, the trial judge signed a written order granting the TCPA motion as to St. Charles and denying it as to Palladium. The order did not address Palladium's objections to appellees' evidence.

Palladium timely appealed.

STANDARD OF REVIEW

The TCPA is meant "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. The TCPA "protects citizens . . . from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). Section 27.005(b) of the TCPA provides:

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.

See TEX. CIV. PRAC. & REM. CODE § 27.005(b). Thus, the TCPA permits a defendant to move for dismissal of a legal action that 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.” TEX. CIV. PRAC. & REM. CODE § 27.003(a).

As a matter of statutory construction, we review de novo the trial court’s ruling on a TCPA motion to dismiss. See *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 833 (Tex. App.—Dallas 2020, pet. filed) (op. on reh’g) (citing *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018)). In conducting that review, we consider, in the light most favorable to the non-movant, the pleadings and any supporting and opposing affidavits stating the facts on which the claim or defense is based.⁸ *Dyer v. Medoc Health Services, LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). We also ascertain and give effect to the legislature’s intent as expressed in the language of the statute, considering the specific statutory language at issue and the TCPA as a whole, and construing the statute’s words according to their plain and common meaning, unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results. *Id.* at 424–

⁸ In deciding a TCPA motion to dismiss, the trial court may consider “the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *Goldberg*, 594 S.W.3d at 824 (quoting TEX. CIV. PRAC. & REM. CODE § 27.006(a)). “However, the plaintiff’s pleadings are usually ‘the best and all-sufficient evidence of the nature of the action.’” *Id.* (quoting *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017)).

25. We construe the TCPA “liberally to effectuate its purpose and intent fully.” TEX. CIV. PRAC. & REM. CODE § 27.011(b); *see State ex rel. Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018).

Our review of a TCPA ruling involves three steps. *Creative Oil*, 591 S.W.3d at 132; *Youngkin*, 546 S.W.3d at 679–80; *Goldberg*, 594 S.W.3d at 824. At step one, the party moving for dismissal has the burden to show 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 the right of association, right of free speech, or the right to petition. *See Creative Oil*, 546 S.W.3d at 132 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(b)); *Youngkin*, 546 S.W.3d at 679; *Goldberg*, 594 S.W.3d at 824.⁹ If the movant does so, the analysis proceeds to step two, where the burden of proof shifts to the non-movant to establish by clear and specific evidence a prima facie case for each essential element of the claim. *See Creative Oil*, 546 S.W.3d at 132 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(c)); *Youngkin*, 546 S.W.3d at 679; *Goldberg*, 594 S.W.3d at 824.

⁹ Because section 27.005(b) requires the moving party to show 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, showing that the legal action is based on, related to, or in response to *another party’s* exercise of those rights is insufficient. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b); *Encore Enters., Inc. v. Shetty*, No. 05-18-00511-CV, 2019 WL 1894316, at *3 (Tex. App.—Dallas Apr. 29, 2019, pet. denied) (mem. op.) (stating that “the TCPA applies only if the plaintiff’s lawsuit is based on, relates to, or is in response to the defendant’s . . . exercise of one of the protected rights”). Thus, for purposes of this appeal, we focus only on Palladium’s exercise of TCPA-protected rights, if any.

If the non-movant satisfies that burden at step two, the analysis proceeds to step three, where the burden of proof shifts back to the movant to establish by a preponderance of the evidence each essential element of a valid defense to the non-movant's claim, which results in dismissal under the statute if the movant does so. *See Creative Oil*, 546 S.W.3d at 132 (citing TEX. CIV. PRAC. & REM. CODE § 27.005(d)); *Youngkin*, 546 S.W.3d at 679–80; *Goldberg*, 594 S.W.3d at 824.¹⁰

ANALYSIS

1. *Step One Analysis: TCPA Application*

In its first two issues, Palladium contends the trial court erred in denying its TCPA motion because it proved by a preponderance of the evidence that appellees' claims were based on its exercise of its rights of association and free speech.

a. Palladium's Exercise of its Right of Association

Under the TCPA, the “exercise of the right of association” is defined as “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” TEX. CIV. PRAC. & REM. CODE § 27.001(2). “‘Communication’ includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or

¹⁰ If a TCPA motion is granted at the third step, one might question whether section 27.005(d) operates as an unconstitutional deprivation of a claimant's right to trial by jury. *See* TEX. CONST. art. V, § 10 (right to have a jury resolve fact questions); *Bass v. United Dev. Funding, L.P.*, No. 05-18-00752-CV, 2019 WL 3940976, at *16 n.19 (Tex. App.—Dallas Aug. 21, 2019, pet. denied). However, we are not presented with that question here, as Palladium's arguments for dismissal are not based on the third step of the TCPA analysis.

electronic.” *Id.* § 27.001(1). In *Dyer*, we held that the exercise of the right of association requires that the “nature of the communication between individuals who join together must involve public or citizen’s participation.” *Dyer*, 573 S.W.3d at 426. Then, in *Erdner*, we applied that principle again in a case involving the establishment of a freestanding emergency room and claims of breach of fiduciary duty and aiding and abetting the breach, claims similar to those involved here. *Erdner*, 580 S.W.3d at 271–72, 275. We concluded in *Erdner* that the TCPA movants failed to satisfy their initial TCPA burden regarding their right of association because the communications they relied upon were “private communications relating to establishing a business to open a [freestanding emergency room]” and “did not involve public or citizen’s participation.” *Erdner*, 580 S.W.3d at 275 (citations omitted).

We reach a similar conclusion here. In its brief, Palladium argues that appellees’ claims “implicate the right of association because they are dependent upon communications made in furtherance of a common purpose” on the theory that appellees’ allegations depend on communications between Riley, Connor St. Charles, and Peter St. Charles (on behalf of Palladium), and on communications between them and trucking vendors to exclude appellees from participation in certain contracts, including a public highway demolition project in Dallas. Palladium cites paragraphs eighteen, twenty-two, thirty-five, forty-two, and sixty-three of appellee’s petition and paragraph six of Desai’s affidavit in its argument,

but most of these paragraphs lack any communications at all, and none refer to any public or citizen participation.¹¹

¹¹ The cited paragraphs in appellees' petition state:

18. At the time Palladium served its notice, at least one project was existing and outstanding within the joint venture partnership, a demolition project at the Pegasus Demolition site off of I-35 and Illinois in Dallas, Texas.

22. On or about November 10, 2018, Riley voluntarily resigned his employment with 4G. Upon information and belief, Riley is violating the protective covenants of his Employment Agreement by engaging the scrap metal business within the protected territory. (Exhibit A & F).

35. Palladium breached the partnership agreement by intentionally and wantonly diverting existing partnership business away from Plaintiffs for its sole benefit. Palladium further breached the partnership agreement through its actions with respect to Riley and [INSERT PETE'S SON] [sic], as well as with respect to the other factual circumstances and claims set forth herein. Palladium further breach the partnership agreement by refusing to conduct proper winding up procedures under the TEXAS BUSINESS ORGANIZATIONS CODE.

42. Here, there were two contracts existing at the time Palladium voluntary resigned from the partnership. Thereafter, Palladium has excluded Plaintiffs from participation in these contracts. Upon information and belief, Riley and St. Charles are participating in the exclusion and further excluding Plaintiffs from the existing contracts.

63. Defendants' actions mandate that temporary restraining order be issued, without full notice, which restrains and enjoins Defendants and their agents, officers, directors, representatives, servants, employees, attorneys and those acting in concert with Defendants, or with Defendants' participation, who received actual notice of the order by personal service or otherwise, from directly or indirectly engaging in the following acts:

i. Conducting, arranging, managing, participating in, or otherwise continuing with the Pegasus Demolition project located at I-35 and Illinois in Dallas, Texas.

ii. Operating, managing, running, participating in, or otherwise continuing with any business venture that competes with Plaintiffs within the State of Texas.

iii. Use of any information, plans, bid sheets, standard operating procedures, client lists, or other intellectual property or trade secrets obtained in the course of the partnership with Plaintiffs.

iv. Contacting or communicating with, in any fashion, the clients, vendors, and customers of Plaintiffs

v. Specifically to Riley, acting in violation of the terms of his Employment Agreement, including but not limited to, his covenants of non-disclosure, non-competition, and non-solicitation.

Paragraph 6 of Desai's affidavit stated:

6. On November 7, 2018, Peter St. Charles, on behalf of Palladium, emailed Plaintiffs a notice to dissolve the partnership. Since that time, it has come to the attention of Plaintiffs that Palladium, Riley, and Connor St. Charles are working on projects that were supposed to go to Plaintiffs prior to the notice from Palladium. I believe that there was an intentional plan by Palladium, Riley, and Connor St. Charles to learn as much as they could about the business from Plaintiffs under the scope of the partnership and then go into direct competition with Plaintiffs.

At oral argument, we questioned Palladium about any public or citizen participation in its communications as required by *Dyer* and *Erdner*, and Palladium failed to identify any, focusing its answer instead on the alleged commonality of interest between Palladium, Riley, St. Charles, and trucking vendors in participating in the public highway demolition project.

The TCPA’s purpose of curbing strategic lawsuits against public participation is not furthered by a construction finding a right of association based simply on communications between parties with a shared interest in a private business transaction. *BusPatrol Am., LLC v. Am. Traffic Solutions, Inc.*, No. 05-18-00920-CV, 2020 WL 1430357, at *8 (Tex. App.—Dallas March 24, 2020, no pet. h.). Because Palladium has not shown appellees’ claims are based on any communications involving public or citizen participation, we conclude that Palladium has not satisfied its initial burden of establishing that appellees’ claims are covered by the TCPA’s protections regarding the right of association. *See id.*; *Erdner*, 580 S.W.3d at 275; *Dyer*, 573 S.W.3d at 426.

b. Palladium’s Exercise of its Right of Free Speech

For purposes of the TCPA, the “exercise of free speech” means a communication made in connection with a matter of public concern. TEX. CIV. PRAC. & REM. CODE at § 27.001(3). The TCPA defines a “matter of public concern” to include an issue related to “health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good,

product, or service in the marketplace.” *Id.* at § 27.001(7). “The phrase ‘matter of public concern’ commonly refers to matters ‘of political, social, or other concern to the community,’ as opposed to purely private matters.” *Creative Oil*, 591 S.W.3d at 135 (quoting *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017)); *see also Lei v. Nat. Polymer Int’l Corp.*, 578 S.W.3d 706, 715 (Tex. App.—Dallas 2019, no pet.) (private communications relating to a business dispute do not involve matters of public concern when they address only private economic interests and do not mention health or safety). In *Creative Oil*, the court stated, “A private contract dispute affecting only the fortunes of the private parties involved is simply not a ‘matter of public concern’ under any tenable understanding of those words.” *Creative Oil*, 591 S.W.2d at 135.

At oral argument, Palladium based its free speech argument, in part, on a prior restraint theory not raised in its briefs, arguing that certain relief appellees requested and obtained through a temporary restraining order operated as a prior restraint on speech which thus implicated its exercise of the right of free speech under the TCPA. However, as Palladium’s counsel conceded, the prior restraint issue was not included in its briefs, and as a result, we conclude the prior restraint issue was inadequately briefed and was waived on appeal. *See* TEX. R. APP. P. 38.1(f), (i) (appellant’s brief “must state concisely all issues or points presented for review” and “must contain a clear and concise argument for the contentions made, with appropriate citation to authorities and to the record”); *see Water Expl. Co. v. Bexar Metro. Water Dist.*, 345

S.W.3d 492, 494 n.2 (Tex. App.—San Antonio 2011, no pet.) (concluding issue raised in oral argument was inadequately briefed and waived on appeal).

In its briefs, Palladium argues that appellees' claims involve communications between Riley, Connor St. Charles, and Peter St. Charles (on behalf of Palladium) and trucking vendors who were transporting scrap metal on public highways for a highway demolition project. As it did on its right to association argument, Palladium cites paragraphs eighteen, twenty-two, thirty-five, forty-two, and sixty-three of appellee's petition and paragraph six of Desai's affidavit, but these paragraphs lack any communications regarding matters of public concern as opposed to private pecuniary interests and thus do not implicate the TCPA's protection of Palladium's exercise of the right of free speech. *See Creative Oil*, 591 S.W.2d at 135–37 (communications involving a single well's production concerned only private contract dispute and not a matter of public concern).

In *Goldberg*, another TCPA case involving scrap metal recycling, we stated:

Even though Defendants' business of purchasing and selling scrap metal may have many beneficial effects and involve matters of health or safety, and environmental, economic, or community well-being, the communications in this case did not involve those matters. Instead, they concerned Defendants' offers to buy or sell scrap metal. The communications did not discuss the benefits of recycling, nor did the communications seek to promote health or safety, or environmental, economic, or community wellbeing. Instead, they were private communications regarding private commercial transactions for the purchase and sale of a commodity, scrap metal. Plaintiffs' claims are related to Defendants' use of Plaintiffs' confidential information to make purchases and sales. Plaintiffs' claims are not related to any

communications by Defendants concerning the beneficial effects of recycling provided by the scrap-metal industry.

Goldberg, 594 S.W.3d at 830. Like the communications in *Goldberg*, the communications here do not concern the benefits of recycling or seek to promote health, safety, or environmental, economic, or community well-being. As we did in *Goldberg*, we conclude here that Palladium has failed to prove by a preponderance of the evidence that appellees' claims are based on, relate to, or are in response to its exercise of the right of free speech. *Id.*

We overrule Palladium's first and second issues.

2. *Palladium's Remaining Issues*

Palladium's remaining issues all depend on its satisfaction of its step one burden of showing that the TCPA applies. In light of our conclusion that it has not done so, we need not reach those issues. *See BusPatrol America, LLC v. Am. Traffic Solutions, Inc.*, No. 05-18-00920-CV, 2020 WL 1430357, at *8 (Tex. App.—Dallas Mar. 24, 2020, no pet. h.) (mem. op.) (citing *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 287 (Tex. App.—Dallas 2015, pet. denied)); *Goldberg*, 594 S.W.3d at 833.

With regard to Palladium's sixth issue regarding its objections to appellees' evidence, we note, however, that Palladium failed to preserve error. While Palladium objected to certain portions of that evidence, there is no indication in the record before us that Palladium obtained a ruling on its objections or that it objected to the trial court's refusal to rule on them. *See* TEX. R. APP. P. 33.1(a)(2); *Robins v.*

Clinkenbeard, No. 01-19-00059-CV, 2020 WL 237943, at *8 (Tex. App.—Houston Jan. 16, 2020, no pet.) (noting that appellant’s objections to conclusory statements and hearsay in affidavit were objections to affidavit’s form, not substance, and had to be preserved below by an objection to the court’s refusal to rule when the trial court made no ruling).¹²

3. *Appellees’ Request that We Reverse Ruling as to Connor St. Charles*

Finally, although we have already addressed every issue Palladium raised that is necessary to final disposition of the appeal, *see* TEX. R. APP. P. 47.1, we also briefly address a request appellees raised at the conclusion of their brief. Specifically, appellees request us to reverse the trial court’s April 9, 2019 order granting the TCPA motion as to St. Charles. Palladium does not address that request in its reply, but in arguing its own issues, Palladium asserts that because St. Charles’s TCPA motion was based on the same allegations and facts, “there is no basis to dispute the trial court’s application of the TCPA to the communications at issue.”

As we explained above, we disagree with that assertion as to Palladium. As to the trial court’s ruling regarding St. Charles, despite appellees’ apparent disagreement with the ruling and their request that we reverse it, appellees’ request

¹² *Robins*, a TCPA case, cites *Seim v. Allstate Texas Lloyds*, 551 S.W.3d 161, 166 (Tex. 2018) for the proposition that objections to conclusory statements and hearsay are objections to form, not substance, and thus must be preserved in the trial court. As support for its conclusion that an appellant failed to preserve error by not obtaining a ruling and not objecting below to the trial court’s refusal to rule, *Robins* cites two other TCPA cases, *Deuell v. Texas Right to Life Committee, Inc.*, 508 S.W.3d 679, 688 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) and *Schmitz v. Cox*, No. 01-15-00199-CV, 2015 WL 6755427, at *3 (Tex. App.—Houston [1st Dist.] Nov. 5, 2015, no pet.) (mem. op.)

is not properly before us. Interlocutory appeals are only available from orders denying TCPA motions, not from orders granting them. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (allowing person to appeal from an interlocutory order that *denies* a TCPA motion) (emphasis added); *Creative Oil*, 591 S.W.3d at 132 (“An order denying a TCPA motion to dismiss is subject to interlocutory appeal.”); *El Saleh v. Aldirawi*, No. 10-19-00316-CV, 2020 WL 240850, at *1 (Tex. App.—Waco Jan. 15, 2020, pet. denied) (rejecting arguments regarding an order granting a TCPA motion and dismissing the appeal for want of jurisdiction). Additionally, even if their request could be raised here, our consideration of it would remain improper under the circumstances, as appellees did not file a notice of appeal. *See* TEX. R. APP. P. 25.1(c) (“A party who seeks to alter the trial court’s judgment or other appealable order must file a notice of appeal.”).

Thus, we do not consider and express no opinion on the trial court’s decision to grant St. Charles’s TCPA motion.¹³

CONCLUSION

For the foregoing reasons, we conclude that Palladium has failed to show that appellees’ claims are based on, relate to, or are in response to Palladium’s exercise of the right of association or free speech as those rights are defined in the TCPA and

¹³ Notably, in the event the trial court’s ruling has not become final and appealable, the trial court retains jurisdiction to vacate its order regarding St. Charles should it decide to do so. *See In re Panchakarla*, No. 19-0585, 2020 WL 2312204, at *2, 4 (Tex. May 8, 2020) (concluding trial court acted within its discretion to vacate its dismissal order).

interpreted by the supreme court and this Court. We therefore overrule Palladium's first and second issues and do not address its remaining issues. Accordingly, we affirm the portion of the trial court's order denying Palladium's TCPA motion to dismiss.

/Ken Molberg/
KEN MOLBERG
JUSTICE

190482f.p05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

PALLADIUM METAL
RECYCLING, LLC, Appellant

No. 05-19-00482-CV V.

5G METALS, INC. AND 4G
METALS, INC., Appellees

On Appeal from the 116th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-18-18472.
Opinion delivered by Justice
Molberg. Justices Bridges and
Partida-Kipness participating.

In accordance with this Court's opinion of this date, the portion of the trial court's April 4, 2019 order denying appellant's motion to dismiss is **AFFIRMED**.

It is **ORDERED** that appellees 5G METALS, INC. AND 4G METALS, INC. recover their costs of this appeal from appellant PALLADIUM METAL RECYCLING, LLC.

Judgment entered this 28th day of July, 2020.