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CAUSE NO. 25-03-92211-D

PHI THETA KAPPA HONOR SOCIETY,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	**377th JUDICIAL DISTRICT**
v.	§	
TONI MAREK	§	**VICTORIA COUNTY, TEXAS**
Defendant.	§	

PLAINTIFF PHI THETA KAPPA HONOR SOCIETY'S RESPONSE IN OPPOSITION OF DEFENDANT'S TCPA MOTIONS

For its response in opposition to Defendant's Motion to Dismiss under the TCPA, and Defendant's Motion for Costs, Attorney Fees, and Sanctions, Plaintiff Phi Theta Kappa Honor Society states as follows— through a separate proceeding, the Phi Theta Kappa Honor Society (PTK) learned facts that supported a good-faith belief that Defendant Toni Marek had acquired an untold number of PTK's attorney-client privileged communications. PTK informally asked Marek to confirm or disconfirm what communications she had acquired; she refused to say. So, PTK filed suit. *Not* to silence Defendant Toni Marek's criticism of PTK (which she has aired freely for years before, and continues to air today); but rather to determine the scope of, and to protect, potentially privileged communications.

This Court ultimately denied PTK's injunctive relief. Conspicuously, it did not adopt the proposed order submitted by Marek, which she framed in TCPA and anti-SLAPP terms. Rather, it simply stated that the Court "is of the opinion that Plaintiff's request for Temporary Injunction should be denied." (4.9.2025 Order.) PTK chose to drop the case. Marek now asks for either $118,000 or $355,000 in fees.

While her briefing is long on overwrought stump speeches and snark directed toward counsel, her briefing is short on cogent legal analysis of the terms of the TCPA and related case law. Bluster aside, this case does not fall under the TCPA's ambit. Most importantly—but unmentioned in her briefing—Texas appellate courts unanimously hold that an ancillary request for injunctive relief does not qualify as a "legal action" for purposes of the TCPA. Second, PTK engaged in no sanctionable conduct. Third, in the alternative, even if she were entitled to fees, her request for roughly $118,000 (or $355,000) in windfall cash is grossly inflated and unreasonable.

Background

In April 2022, PTK sued an entity called Honor Society.org, Inc. (3.26.2025 TRO Memo, Ex. A ("Tincher-Ladner Decl.") ¶ 2.) PTK alleged that Honor Society had violated the Lanham Act, trading off of PTK's trade dress. The Southern District of Mississippi largely agreed, entering multiple preliminary injunctions in PTK's favor. (*Id.* ¶ 3.) Marek voluntarily inserted herself into that case, providing documents to Honor Society (despite not being subpoenaed) and submitting declarations in support of Honor Society's positions. (*Id.* ¶ 9.) Despite Marek's attempts to bolster Honor Society's litigation position, the district court agreed with PTK that Honor Society's "online behavior paints a picture of a petulant cyberbully fixated on destroying a competitor." (*Id.* ¶ 10.)

Given her substantial involvement in the Mississippi litigation, PTK sought non-party discovery from Marek; those efforts were frustrated by her physically fleeing process servers trying to hand her a subpoena. (*Id.* ¶¶ 14–21.) In connection with a lawsuit Marek filed against PTK to quash the subpoenas, Marek revealed that she had possession of a privileged and work product email between PTK's President/CEO and its Board of Directors. (*Id.* ¶ 26.) PTK learned that Marek had acquired this email through a public records request to one of PTK's community college partners. (*Id.* ¶ 27.)[1] As far as PTK knew, Marek may have obtained access to an untold number of privileged, work product, or otherwise protected information—all stemming from a piece of active, contentious litigation that was slated to proceed to trial in the near future.

[1] PTK shares information with its Board, some of whom have school-issued email addresses. All public access laws have exceptions for confidential, litigation, or privileged materials. *See* Tex. Gov. Code §§ 552.101; 552.103; 552.107; *Paxton v. City of Dallas*, 509 S.W.3d 247, 250 (Tex. 2017) (Texas's PIA "recognizes that public interests are best advanced by shielding some information from public disclosure"). PTK believes some of its partners or affiliates may have provided document dump productions without filtering them for privilege or confidentiality.

PTK's counsel asked for a call to discuss what privileged material she had; but she refused. (*Id.* ¶ 28–29.) Marek then announced that she would be distributing a free book, written in part using the information she obtained through the public records requests (the same requests through which she obtained PTK's litigation emails). (*Id.* ¶ 33.) Marek's marketing further suggested that she had induced others to breach their NDAs with PTK for purposes of that book. (*Id.* ¶ 35–36.)

PTK thus faced a conundrum. The potential publishing and widespread dissemination of privileged, work product, and other information protected through legal NDAs, represents a bell that cannot be unrung. And yet Marek refused to respond on an informal basis with respect to what potentially protected materials she had obtained (and therefore might be publishing). So, PTK filed suit.

Crucially, PTK's suit did not object to or challenge any criticism Marek sought to air. Unlike a SLAPP suit, PTK did not claim that Marek's critiques went too far to constitute defamation, or any other tort related to publishing critical commentary. PTK's claim for relief was simple: a single count filed to obtain a declaration whether PTK's communications were legally protectable (as privileged, work product, or as covered by a valid NDA). (*See* 3.26.2025 Compl. ¶¶ 26–33.) And because actual publication would moot or destroy PTK's ability to protect legally protectable information,[2] it coupled that single count with an ancillary injunctive request. (3.26.2025 TRO Memo.) PTK has never filed any legal claim related to the extensive commentary Marek regularly publishes through her social media channels, her website, or elsewhere. (*See generally,* 04.08.25 Tr. (Marek's counsel failing to challenge this claim).)

[2] Again, even if the Court ultimately decided that the materials were not legally protected, PTK could not know that pre-suit given Marek's refusal to confirm what she had obtained.

Argument

Texas appellate courts, including the Supreme Court, have stressed that courts applying the TCPA must abide by the language and the statutory definitions enacted by the legislature. A veritable wall of unanimous authority holds that (1) a request for injunctive relief within a lawsuit *is not* a "legal action" under the TCPA, which defeats the entirety of Marek's TCPA argument; and (2) to violate the TCPA, the "legal action" (here, the declaratory judgment count) must be in retribution for a "communication made." That also defeats Marek's TCPA argument, because PTK's declaratory judgment was about Marek's *possession* of confidential information, and did not seek redress for any "communication made." Marek's TCPU motion to dismiss should be denied, and it provides no basis for fees.

Marek also requests fees as a "sanction" against PTK. But seeking a declaration about whether privileged, work product, or other protectible information can be protected is a legitimate case to bring, even if a Court ultimately denies relief. Seeking to protect potentially protectible information is not sanctionable, and again provides no basis for fees.

Finally, in the alternative that this Court awards fees, the amount Marek seeks is unreasonable, and should be greatly reduced.

I. The TCPA applies only to "legal actions" targeting "a communication made." It does not apply to injunctive remedies sought in connection with the legal action.

Marek's April 18 motion for fees acts as if this Court granted her TCPU-based motion to dismiss. The Court did not. Marek spills much ink proving that a TCPA motion survives a nonsuit (4.18.25 Mot. at 4–5); but PTK has already informed Marek that it agrees that its nonsuit does not ispo facto moot her pending TCPU motion. Marek's TCPU motion fails regardless of PTK's nonsuit.

A. The TCPA encourages free speech, while preserving all other remedies and privileges available under the law.

"Whether the TCPA applies … is an issue of statutory interpretation." *Pinghua Lei v. Nat. Polymer Int'l Corp.*, 578 S.W.3d 706, 712 (Tex. App. 2019). Given that the Texas Supreme Court "has specifically directed us to adhere to the definitions supplied by the Legislature in the TCPA," *id.*, it is worth going through the statute's definitions in detail.

"Chapter 27, also known as the Texas Citizens Participation Act, is an anti-SLAPP statute." *Serafine v. Blunt*, 466 S.W.3d 352, 356 (Tex. App. 2015). "SLAPP stands for Strategic Lawsuit Against Public Participation." *In re Lipsky*, 411 S.W.3d 530, 536 n.1 (Tex. App. 2013). The purpose of the Act 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"; importantly, however, "at the same time," the Act "protect[s] the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002. The legislature amended the act substantially in 2019, finding its initial scope had gone too far, frustrating in particular trade secret protections and other business disputes: "All agreed the language needed to be tightened so that it could no longer be used improperly as a litigation tactic to thwart its purpose … The changes to the law narrow[ed] the scope of applicability by narrowing its definitions [and] expanding its exemptions." Laura Lee Prather & Robert T. Sherwin, The Changing Landscape of the Texas Citizens Participation Act, 52 Tex. Tech L. Rev. 163, 165–66 (2020) ("*the Changing Landscape*").

Thus, while the Act is to "be construed liberally to effectuate its purpose and intent fully," it also "does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions." *Id.* § 27.011. Among the "privileges" not abrogated or lessened, of course, is the attorney-client

privilege, which in Texas includes the right "*to prevent any other person from disclosing* confidential communications made to facilitate the rendition of professional legal services …" Tex. R. Civ. Evid. 503(b)(1)(D) (emphasis added).

B. The TCPA has specific definitions for "legal action" and "right of free speech."

Section 27.003 allows a party to move for early dismissal of a "legal action" if the party can show it 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." *Id.* § 27.003(a). The only one of these Marek claims to be at issue, the right of free speech, "means a communication made in connection with a matter of public concern." *Id.* § 27.001(3). *Communication* "includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1).

Read together, these provisions are clear. To fall under the TCPA, there must a "legal action" filed based on, relating to, or in response to, "a communication made."

C. Texas appellate courts unanimously hold that a request for injunctive relief is not a "legal action" for purposes of the TCPA.

Given these statutory terms, Texas appellate courts have coalesced around a crucial—and for this case, dispositive—distinction. Given that "[a] TCPA motion to dismiss is directed to a 'legal action,' … [i]t is the consensus of the intermediate appellate courts that a request for injunctive relief is not a discrete legal action that is subject to dismissal under the TCPA." *Miller v. Watkins*, 2021 WL 924843, at *24 (Tex. App. Mar. 11, 2021) (collecting cases). This is because "[t]he express language of the TCPA contemplates that the relief sought is not a legal action but is merely a component of a legal action." *Stone v. Melillo*, 2020 WL 6143126, at *5 (Tex. App. Oct. 20, 2020).

In other words, "[h]ere, the 'legal action' is" PTK's request for declaratory judgment about whether the communications Marek acquired are privileged, work product, or otherwise protected, "which provides the basis for [PTK's] requested equitable relief in the form of temporary and permanent injunctions." *Id.* Only the declaratory request is a "legal action" under the TCPA. In contrast, an injunction is a remedy available only if a probable right to relief has been established in connection with a cause of action, *see Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002), but it is not the legal action itself. *Cavin v. Abbott*, 613 S.W.3d 168, 171 (Tex. App. 2020) (same); *Thang Bui v. Dangelas*, 2019 WL 5151410, at *6 (Tex. App. Oct. 15, 2019) (same); *Van Der Linden v. Khan*, 535 S.W.3d 179, 203 (Tex. App.—Fort Worth 2017, pet. denied) (same). This well-developed body of law appears nowhere in Marek's TCPA motion to dismiss, nor her motion for fees.[3]

D. The TCPA has a three-step burden-shifting framework.

Under the TCPA, first, the movant must show that the "legal action" (which again, means the cause of action asserted, and does not mean ancillary injunctive remedies) is based on or is in response to the movant's exercise of the right of free speech, to petition, or of association. Tex. Civ. Prac. & Rem. Code § 27.005(b). The burden then shifts to the nonmovant to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question," in which case the court may not dismiss the legal action. *Id.* § 27.005(c). The burden then shifts to the movant to establish whether an affirmative defense or other ground would entitle the movant to judgment as a matter of law. *Id.* § 27.005(d).

[3] Marek is guilty of what she accuses PTK of: she "never even mentioned a single case dealing with" ancillary injunctive requests not being "legal actions," "despite the fact that there is … a legion of other case law that showed that [her] requested relief" under the TCPA "was not available … [Marek] was well aware of contrary case law and chose not to disclose it." *Cf.* 4.18.25 Mot. at 2. Accordingly, PTK is contemporaneously filing a motion for fees in having to respond to this motion. *See* Tx. Civ. Prac. & Rem. § 27.009(b).

As for the second step of "clear and specific" evidence, the nonmovant "must provide enough detail to show the factual basis for its claim" and must provide enough evidence "to support a rational inference that the allegation of fact is true." *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). On this element, the nonmovant "may rely on circumstantial evidence—indirect evidence that creates an inference to establish a central fact—unless 'the connection between the fact and the inference is too weak to be of help in deciding the case.'" *Id.* (cleaned up). The nonmovant satisfies its burden by showing "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.' " *Lipsky*, 460 S.W.3d at 590 (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004)). In this review, the court "view[s] the pleadings and evidence in the light most favorable to the nonmovant." *Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 603 (Tex. App.—San Antonio 2018, pet. denied).

II. PTK did not file a SLAPP suit against Marek, and it had a factual basis behind its declaratory judgment action.

Marek's TCPA argument fails on every prong of the burden shifting test.

A. Marek has not met her initial obligation of showing that the TCPA applies.

Step one under the § 27.005 process would involve Marek establishing that PTK's "legal action" is based on or is in response to her exercise of the right of free speech, which in turn means "a communication made" in connection with a matter of public concern. Tex. Civ. Prac. & Rem. Code § 27.001(3). Marek's motion is long on emotional, overheated rhetoric about rank censorship, trampling the constitution, abusive suits, and so on. It is short, however, on an analysis of the very TCPA statute under which she seeks relief. Marek's TCPA motion fails for the following two overarching reasons.

1. A request for injunctive relief is not a "legal action" that can trigger the TCPA.

First, Marek's entire TCPA motion, just as her motion for fees, centers on PTK's request for injunctive relief. She argues that the request for an injunction was a "prior restraint" against her book and therefore lacked merit. Her TCPA argument fails regardless. A TCPA motion to dismiss can be directed only at a "legal action," but a request for injunctive relief is not a "legal action." *Miller*, 2021 WL 924843, at *24 (collecting cases). No wonder Marek declined to cite this well-developed body of law; it forecloses her TCPA arguments and her request for fees entirely.

Every word of what Marek says about the injunction imposing a prior restraint could be true, and the Court still could not grant her TCPA motion (or award her fees) based on the clear statutory definitions in the TCPA, which the Texas Supreme Court "has specifically directed us to adhere to." *Pinghua Lei*, 578 S.W.3d at 712. The only "legal action" that could lead to a TCPA argument is PTK's request for declaratory relief (addressed below), not its request for a preliminary injunction.

No doubt, Marek (and her activist counsel) might wish the terms of the TCPA said otherwise. But courts "cannot judicially amend the Act by imposing requirements the Act does not or by narrowing or expanding its scope contrary to its terms. Nor can we substitute the words of the Act to give effect to what we think the Act should say." *Bagby 3015, LLC v. Bagby House, LLC*, 674 S.W.3d 609, 618 (Tex. App. 2023) (internal cite omitted); *see also Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 575 (Tex. App. 2019) ("the definitions of the rights set out in the TCPA are not drafted to mimic the boundaries of constitutional rights established by the First Amendment"); *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018) ("The statutory definition is not fully coextensive with the constitutional free-speech right

protected by the First Amendment to the U.S. Constitution and article I, section 8 of the Texas Constitution").

2. PTK's declaratory judgment count, the only "legal action" at issue, targeted wrongful possession, not a "communication made."

Second, the declaratory judgment "legal action" at issue did not target any "communication made" by Marek. Again, the specific definitions enacted by the legislature control. *Pinghua Lei*, 578 S.W.3d at 712. Courts have singled in on the word "communication," and routinely find that litigants have sought to stretch the TCPA beyond its proper scope, as Marek has here.

Thus, "theft and electronic transfer of trade secrets" do not constitute a "communication," and so the TCPA does not apply to a legal action seeking redress for those acts. *Id.* at 713; *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 829 (Tex. App. 2020) (same). Similarly, aiding in a violation of a securities violation does not fall under the TCPA, because that involves "actions and inactions," not "communications." *Smith v. Crestview NuV, LLC*, 565 S.W.3d 793, 798 (Tex. App.—Fort Worth 2018, pet. denied). Claims for tortious interference with contract and breach of contract similarly also turned on conduct, not communications, and so "were not within the TCPA's purview." *Bumjin Park v. Suk Baldwin Props., LLC*, No. 03-18-00025-CV, 2018 WL 4905717, at *3–4 (Tex. App.—Austin Oct. 10, 2018, no pet.). And given the definition of "communication," it likewise follows that a claim based on a failure to communicate cannot implicate the TCPA, because "the TCPA, as written, does not include the withholding of a statement or document as a communication." *Krasnicki v. Tactical Ent., LLC*, 583 S.W.3d 279, 283 (Tex. App. 2019).

PTK's declaratory judgment "legal action" did not challenge any of Marek's *communications* at all. It challenged her *possession* of materials PTK considers privileged, work

product, or otherwise confidential. The TCPA simply does not extend to legal actions "based on or … in response to" a party's alleged wrongful *possession* of materials. *Cf.* Tex. Civ. Prac. & Rem. Code § 27.005(b). It extends only to legal actions based on or in response to "a communication made in connection with a matter of public concern." *Id.* §§ 27.005(b)(1)(A); 27.001(3). Whether framed as a claim that Marek possessed something she shouldn't, *Pinghua Lei*, 578 S.W.3d at 712; or her "actions and inactions" in obtaining litigation materials and refusing to confirm what she obtained, *Smith*, 565 S.W.3d at 798; or her "withholding of [the] document[s]," *Krasnicki*, 583 S.W.3d at 283; Texas appellate courts have confirmed that the case PTK brought does not target any "communication" by Marek, as that word is defined in the TCPA.

True, PTK coupled its "legal action" with an ancillary request for provisional injunctive relief. PTK did so because, as courts often recognize, the involuntary release or dissemination of privileged material poses a risk of irreparable harm. *Cf. Waste Mgmt. of Washington, Inc. v. Kattler*, 776 F.3d 336, 342 (5th Cir. 2015) (court order to reveal potentially privileged information "could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released"); *Osborne v. Johnson*, 954 S.W.2d 180, 183 (Tex. App. 1997) (similarly finding that this scenario means "the aggrieved party has no adequate remedy at law"). The Court ultimately disagreed with PTK on that ancillary request for injunctive relief; but as shown above, Texas courts universally hold that a request for injunctive relief is not a "legal action" for purposes of the TCPA.

3. Marek's possession of PTK's litigation emails, and PTK's attempt to recover them, is not an issue of "public concern."

When focused on the declaratory judgment aspect of this case (as the Court must under the definition of "legal action), it is also clear that there is no "public concern" at issue. Section

27.001(3). That phrase also has a specified meaning. It is limited to statements or activities regarding "(A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; (B) a matter of political, social, or other interest to the community; or (C) a subject of concern to the public." Section 27.001(7). Indeed, this narrowed definition is one of the key 2019 amendments to the Act. "One of the chief complaints about the previous Anti-SLAPP law was the nonexclusive topical laundry list of what qualified as a 'matter of public concern'" which "resulted in the statute's application in what many believed to be unconventional and inappropriate settings." *The Changing Landscape*, at 167.

PTK's legal action does not concern public officials, public figures, matters of political or social interest, or any subject of concern to the community. PTK's legal action is about the status of its emails. Unlike Marek's broad commentary on the topic of sexual harassment—which PTK concedes is a matter of public concern, but which PTK has never challenged—the privileged status of PTK's litigation emails is a "[p]rivate dispute" between Marek and PTK, which the TCPA does not cover. *Morris v. Daniel*, 615 S.W.3d 571, 576 (Tex. App. 2020).

* * *

The analysis ends there for Marek's argument. For what it's worth, however, she is incorrect about the availability of "prior restraints." According to Marek, neither Texas nor federal courts ever allow for a prior restraint, and can only ever censure an improperly published matter after the fact. (4.4.2025 MTD at 10.) To be sure, prior restraints are constitutionally disfavored, and a party who seeks a prior restraint carries a heavy burden to justify it. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Injunctions remain available in limited contexts, however, including "when essential to the avoidance of an impending danger" and

"only when it is the least restrictive means of preventing that harm." *Kinney v. Barnes*, 443 S.W.3d 87, 95 (Tex. 2014).

That is precisely the context in which PTK sought an injunction related to privileged, work product, or otherwise protectable information—to avoid the impending danger of Marek disclosing privileged information, thereby ringing a bell that could never be unrung. Marek's representation that "both Texas and federal courts allow no prior restraints upon publication," (4.4.2025 MTD at 10), is yet another overstatement.

In sum, despite the overheated rhetoric of Marek's motion papers, she failed to establish her initial showing. The only "legal action" involved here is the declaratory action, not the ancillary injunctive request, and the declaratory action was based on Marek's *possession* of protectable documents. Texas appellate courts have explicitly held that such *conduct* is not a *communication* for TCPA purposes.

B. Even if she had made her initial showing, the evidence viewed in the light most favorable to PTK establishes the elements of PTK's declaratory "legal action."

Even if she could satisfy her initial burden under the TCPA, the Court still could not grant her TCPA motion because "clear and specific evidence" establishes "a prima facie case for each essential element of" PTK's declaratory judgment claim. Tex. Civ. Prac. & Rem. Code § 27.005(c). In this analysis, the court "view[s] the pleadings and evidence in the light most favorable to the nonmovant." *Robert B. James*, 553 S.W.3d at 603.

There are only two prerequisite elements to bring a declaratory judgment action: (1) there must be a real controversy between the parties and (2) the controversy can be determined by the judicial declaration. *Nehls v. Hartman Newspapers, LP*, 522 S.W.3d 23, 29 (Tex. App. 2017). Both elements are met here.

1. There was a controversy over Marek's possession of PTK's litigation emails.

PTK discovered that Marek had obtained an email sent by PTK's President/CEO to PTK's Board of Directors, about a deposition in a contentious piece of litigation. (Tincher-Ladner Decl. ¶ 26.) PTK did not voluntarily disclose that email to Marek; she obtained it through one of the many public records requests she had sent to PTK affiliates around the country. (*Id.* ¶ 27.) PTK's counsel asked Marek to let them know what all similar materials she had, but she refused. (*Id.* ¶¶ 28–29.) As far as PTK knew, Marek acquired access to untold numbers of litigation emails, which distressed PTK because it was gearing up for a trial against Honor Society. (04.08.25 Tr. 34:16–35:18.) Even if the Court ultimately ruled against PTK, this fact pattern clearly establishes a "real controversy" that the Court could determine through judicial declaration.

Marek claims the emails she obtained could not be protected because she obtained them through public records requests. That is not dispositive. All public access laws have exceptions for confidential, privileged, and other litigation-related materials. *See, e.g.*, Tex. Gov. Code §§ 552.101; 552.103; 552.107. It appears that although PTK shared communications with some partners who happen to use school-issued email addresses, those partners provided document dump responses to Marek without filtering for potentially privileged documents.

It is an unfortunate reality of modern life that a privileged document might inadvertently escape the strict confines of confidentiality. *See, e.g.*, *Myers v. City of Highland Vill., Texas*, 212 F.R.D. 324, 328 (E.D. Tex. 2003) ("In determining whether an inadvertent production of a privileged document amounts to a waiver, the importance of the attorney-client privilege must not be ignored"). Marek suggests that any harm was already done by her ability to see the emails, but "[t]his argument rests on a narrow conception of the interests protected by the privilege." *Id.* "The privilege protects both disclosure and use. Although the harm that the City has suffered due

to its inadvertent disclosure cannot entirely be undone, *that is not an adequate reason why the Court should refrain from doing what it can to limit its use*." *Id.* (emphasis added). In short, seeking a declaration about whether certain materials are privileged is a legitimate case to file.

2. A communication can be privileged, even without an attorney present.

Marek accuses PTK of "not [being] candid" and not telling the truth about the emails; Marek argues "clearly the email is *not* attorney-client privileged at all. It is not *from* an attorney, it is *not* to an attorney, it is simply from one person to three other people, none of them attorneys about a deposition." (4.18.2025 Mot. at 1–2.) If Marek meant to suggest that the lack of an attorney on an email ispo facto defeats any claim of privilege, then perhaps she has not reviewed Texas law on this point.

In Texas's rule on lawyer-client privilege, for instance, an email can be privileged even with no attorney on that particular email. "A client has a privilege to refuse to disclose *and to prevent any other person from disclosing* confidential communications made to facilitate the rendition of professional legal services to the client … *between the client's representatives or between the client and the client's representative*." Tex. R. Civ. Evid. 503(b)(1)(D) (emphasis added). An email can be privileged if it is between client representatives, or between the client and its representatives. The email PTK discovered to be in Marek's possession is a communication meant to facilitate the rendition of legal services, between PTK representatives; Texas law protects such communications even with no lawyer cc'd.

Even if the emails lost their status as attorney-client privileged (through waiver or otherwise), they remain protected by the work-product doctrine. Materials qualify as work product if they (1) are documents, (2) prepared in anticipation of litigation; and (3) were prepared by or for a party's representative. *S.E.C. v. Brady*, 238 F.R.D. 429, 441 (N.D. Tex. 2006). The email Marek obtained—a document, created only because of ongoing litigation, by a

PTK representative—is protectable work product. The waiver rules differ between the rules of privilege versus work product. While disclosure to a third party generally waives attorney-client privilege, *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App. 1997), disclosure of work product to a third party does not automatically waive protection unless the disclosure substantially increased the opportunity for an adversary to obtain the information. *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 315 F.R.D. 460, 467 (N.D. Tex. 2016). PTK did not waive privilege, but it certainly did not waive work product protection.

Indeed, in the federal case where Marek sought to avoid third-party discovery, she attached the email the Court has seen to a response brief. PTK moved to strike it on the grounds that it "is protected under the attorney-client privilege," and the Southern District of Mississippi agreed, striking it from the docket. *Marek v. Phi Theta Kappa Honor Soc'y*, No. 3:25-mc-00209-CWR-RPM (S.D. Miss. Apr. 30, 2025) ECF No. 25 (attached as exhibit A.) Despite having the opportunity, Marek did not even respond, or attempt to argue that the email was not privileged. Her new position—that the email is not privileged on its face—conflicts with this court order, as well as her previous refusal to defend her attempt to file it publicly. And it further ignores that PTK could not know how many other emails she had, which were potentially even more sensitive.

3. Texas law explicitly authorizes litigants to seek to prevent another from disclosing privileged materials.

Finally, Marek has at times argued that once she got ahold of PTK's privileged emails—even if PTK were blameless—that PTK lost any right to protect them. That position conflicts with Texas law, which explicitly says the privilege extends "to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services." Tex. R. Civ. Evid. 503(b)(1)(D). As noted, the TCPA clarifies that it does not abrogate

or lessen this privilege. Tex. Civ. Prac. & Rem. Code § 27.011. Marek says PTK has no right to protect against "any other person from disclosing confidential communications," but Texas law says the opposite.

* * *

Even if Marek disagreed with all of the above, it would not defeat PTK's prima facie showing. Indeed, it would only highlight that a controversy existed between the parties. Particularly given her refusal to confirm what other litigation materials she obtained, PTK's "legal action" involved a controversy between the parties, which a declaratory judgment could have resolved. That establishes both prerequisites to filing a declaratory judgment action, a separate independent basis to deny Marek's TCPA motion and request for fees. Tex. Civ. Prac. & Rem. Code § 27.005(c).

C. The Court should reject Marek's repeated mischaracterizations of PTK's lawsuit.

Both the evidence and the face of PTK's "legal action" demonstrate that PTK had legitimate concerns after it learned that Marek had obtained PTK's litigation emails, and Marek refused to informally confirm the scope of what she had obtained. As part of protecting legally-protectable information, PTK sought injunctive relief tailored to prevent Marek from unilaterally mooting PTK's ability to protect protectable information.

Marek has repeatedly sought to recharacterize PTK's lawsuit as requests PTK has never made. Her briefs say things like, "This lawsuit was filed to stop Toni Marek from criticizing PTK, to prevent her book about it from being published, and to give PTK editorial control over what she is permitted to say about it," (4.4.2025 MTD at 6); or, "The sole purposes of the suit were to stop Ms. Marek's speech, prevent her from publishing her book, and take editorial control of the book," (*id.* at 8); or, "In this case, PTK seeks a prior restraint simply because it does not like what Marek plans to say." (*Id.* at 11.)

These are misrepresentations of the record. PTK's complaint was tailored to Marek's possession of, and promised willingness to distribute, PTK's legally protectable materials. Marek also has freely engaged in all manner of negative speech about PTK, and PTK has not challenged her ability to air her views.[4] In any event, Marek's attempt to recharacterize and contort this lawsuit as PTK trying to "stop Toni Marek from criticizing PTK"—when there is no record evidence supporting that characterization—sidesteps the requirement to view the facts in the light most favorable to the TCPA non-movant, PTK. *Robert B. James*, 553 S.W.3d at 603; *see also* 4.18.2025 Mot. at 2 (stating that parties "should not have had to defend against such fabrications, and engaging in such fabrications must be disincentivized"). To the extent the parties have conflicting views of PTK's motivations behind the suit, the TCPA *requires* this Court to view the evidence in the light most favorable to PTK, which means rejecting Marek's attempt to ascribe the worst possible motivations to PTK. *See Youngblood v. Zaccaria*, 608 S.W.3d 134, 140 (Tex. App. 2020) ("viewing the pleadings and evidence in the light favorable to" the non-movants, to find declaratory judgment was not based on prior statements, but was "based on the allegation that the settlement agreement from the first mediation is void and unenforceable").

Beyond all that, Marek's position as of April 8 was "There is a book being suppressed from publication right now." (04.08.25 Tr. 37:1–2.) Marek and her counsel repeatedly represented that she had the book lined up for publication as of April 3, that publication was imminent, and that PTK's lawsuit stood in the way. And yet three months after the Court lifted

[4] Marek cites letters she has received from PTK's counsel. To be clear, those did not challenge her commentary on harassment, or any of her personal experiences. The letters were about her repeating statements litigated in the Honor Society case, in which the Southern District of Mississippi confirmed that PTK brought meritorious claims to protect itself against tortious conduct. In any event, demand letters are not "legal actions" under the TCPA.

the initial TRO, there is no book. Marek is not in a strong position to be accusing PTK of "fabricating" anything.

This Court should reject the tactic of seeking to win hundreds of thousands of dollars in attorney fees through mischaracterizations of the record.

III. PTK did not engage in sanctionable conduct.

Marek also argues for attorney fees as a sanction under Tex. Civ. Prac. & Rem. Code § 27.009(a)(2). Given that PTK did not violate the TCPA in the first place (as argued above), her request to multiply her fees as a sanction is moot. Putting that aside, however, the TCPA sanction provision applies only if needed "to deter the party who brought the legal action from bringing similar actions described in this chapter." Marek fails to demonstrate any history of PTK bringing "similar actions" in the past.

A. Marek points to no evidence showing that PTK has filed any SLAPP suit before.

PTK was "[f]ounded in 1918." *Phi Theta Kappa Honor Soc'y v. HonorSociety.Org, Inc.*, 2023 WL 2531731, at *1 (S.D. Miss. Mar. 15, 2023). If PTK were truly a "[c]ensorious compan[y]" as Marek claims (04.04.25 MTD at 12), she should be able to point to some evidence in the past century backing up that claim; and yet she can't. The best she can muster is that (1) counsel for PTK informed her via letter that some of her statements about PTK—notably, *not* those about sexual harassment or assault—appeared to parrot statements made by Honor Society, which the Southern District of Mississippi found unlawful and enjoined; and (2) five anonymous, unauthenticated, hearsay texts. Their anonymity makes it difficult to respond; some, however, appear to be PTK employees. If they fear "retribution" in the form of potentially losing their job, that is not a First Amendment issue; there is no First Amendment right to leak confidential and sensitive internal information about your employer, and keep your job. By its terms, the sanctions provision applies only to deter "bringing similar actions" as described in the

TCPA—none of these anonymous, hearsay texts claim that PTK filed a SLAPP suit against them.

Indeed, this Court can judge the credibility of Marek's position by her statement, "the abusive tactics and frivolous actions in this case are not just something PTK has done recently, but something PTK is doing now in the Southern District of Mississippi case against Honorsociety.org." (04.18.25 Mot. at 17.) In that Mississippi case, the court found "that Honor Society was engaging with PTK's members and collegiate partners in misleading ways" and that "PTK was substantially likely to prevail on its tortious interference with contractual relations claim" against Honor Society. *Phi Theta Kappa Honor Soc'y v. HonorSociety.Org, Inc.*, 2025 WL 904703, at *1 (S.D. Miss. Mar. 25, 2025). Earlier this year, that court found that Honor Society's CEO perjured himself repeatedly and destroyed evidence, and so dismissed all of Honor Society's counterclaims and third-party claims. *Id.* at *1–4. The notion that this represents *PTK* engaging in frivolous litigation against Honor Society beggars belief.[5]

She similarly accused PTK of wrongdoing in seeking basic discovery from her; the Southern District of Mississippi rejected the claim. "Marek has not presented this Court with evidence demonstrating harassment or intimidation by PTK in its efforts to have her served with the subpoenas." *Marek v. Phi Theta Kappa Honor Soc'y*, No. 3:25-mc-00209-CWR-RPM (S.D. Miss. Apr. 30, 2025) ECF No. 26 (attached as exhibit B). Marek's descriptions of PTK's litigation history lack credibility.

The only litigation Marek can point to (other than its successful defense against Honor Society's tortious interference with contract) is the instant case—but it arose in the unique

[5] Marek cites a second injunctive order the Southern District of Mississippi entered, which the Fifth Circuit reversed. To be clear, PTK did not seek an overbroad injunction. It filed a motion based on Honor Society's seeming attempt to evade the scope of the first injunction, and the district court entered a broad ruling aimed at stopping Honor Society's conduct.

circumstances of PTK's litigation emails leaking without its knowledge. PTK did not violate the TCPA by filing suit in those circumstances, as argued above, but regardless, there is no reason to think this unique set of circumstances will play out again. Marek has provided no reason to think sanctions are needed as a deterrent. (*See also* 04.18.25 Mot. at 15 (Marek conceding that the Court should "consider whether the plaintiff has filed similar actions in the past").)

B. Marek faced *de minimis* prejudice from the quickly-dissolved TRO.

Marek has faced *de minimis* prejudice as a result of these proceedings. Her central argument has centered on the image of a book that would be in the hands of readers but for PTK's injunction. Although she told the Court that her book was set to be published but for the TRO, that was not true; her book (if it exists at all) remains unpublished three months later. Rather than being prejudiced, Marek has leveraged these proceedings into a marketing campaign to support her organization And Then She Spoke Up as well as market her alleged book. *See* https://www.andthenshespokeup.com/. She crowdsourced her fees in connection with these marketing efforts, meaning she is not out even a dollar of her own money.

Marek's only other argument for sanctions involves a lengthy attack on counsel, and baseless claims of a lack of candor. (04.18.25 Mot. at 17–18.) To the extent there is a legal argument buried in those several pages of personal attacks, it appears to stem from Marek's earlier claim that federal and Texas law forbid prior restraints in all cases. As noted above, prior restraints are disfavored, but Marek's statement that they are forbidden is false.

There is no basis to award sanctions. There is certainly no basis to *triple* Marek's claimed attorney fees, and award her $355,000 from PTK, which Marek concedes is over a third of PTK's entire annual scholarship distribution. (04.18.25 Mot. at 19.)

IV. Marek's requested fees are unreasonable.

There is no basis to award any fees. In the alternative, Marek's request is unreasonable and must be reduced substantially.

Marek suggests that $118,350.00 is a reasonable amount of attorney fees to defend this case. And yet her brief says, "it does not even take a Lexis or Westlaw account to learn" "that PTK's requested relief was not available," and "a simple Google search for 'Texas Prior Restraint Law' provides *Kinney v. Barnes* as the first result." (4.18.2025 Mt. at 2.) As it happens, Marek is wrong about what *Kinney* said (*Kinney* confirms that prior restraints are constitutionally disfavored, but also confirms the narrow circumstances in which they are available — to avoid impending dangers). But taking Marek at her word, she represented to this Court that a simple Google search was enough to end the case. Marek does not explain how it took $118,350.00 in fees to present the results of this "simple Google search."

There is no basis to award fees under the TCPA. Even if there were, Marek's request for $118,350 (or $355,000)—when she crowdfunded her defense, does not appear to be out of pocket even a dime, and so is seeking a pure cash windfall (04.18.25 Mot. at 13)—is manifestly unreasonable.[6]

V. CONCLUSION

For these reasons, PTK respectfully requests that the Court deny Marek's TCPA Motion, and her Motion for Fees. In the alternative, at a minimum, her fee request must be substantially reduced.

[6] Marek's counsel's rates are unreasonable as well. *Mignogna v. Funimation Prods.*, LLC, No. 02-19-00394-CV, 2022 WL 3486234, at *20 (Tex. App. Aug. 18, 2022) (reasonable rate of $650 for an attorney with "23 years' experience" and who was "one of the foremost people in terms of arguing Texas anti-SLAPP cases at the Court of Appeals").

Dated: July 11, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tracy Betz, do hereby certify that a true and correct copy of the foregoing document has been electronically filed with the Clerk of the Court using the court filing system, and served electronically to the following:

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Dated: July 11, 2025

/s/ Tracy Betz
Tracy Betz

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

TONI MAREK	PLAINTIFF
VERSUS	CIVIL ACTION NO. 3:25-MC-209-CWR-RPM
PHI THETA KAPPA HONOR SOCIETY	DEFENDANT

ORDER GRANTING UNOPPOSED MOTION TO STRIKE OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER

Before the Court is Phi Theta Kappa Honor Society's ("PTK") [15] Motion to Strike or, in the Alternative, for a Protective Order. PTK moves this Court to strike the following: (1) Exhibit D to Toni Marek's Response in Opposition to PTK's Motion to Compel Subpoena Compliance; and (2) the references to Exhibit D in Toni Marek's Response in Opposition to PTK's Motion to Compel Subpoena Compliance. PTK claims this information is protected under the attorney-client privilege. Alternatively, PTK moves this Court for a protective order to prevent disclosure of the privileged information. No party has filed a response in opposition to the motion. Therefore, the Court grants the motion as unopposed. L.U. Civ. R. 7(b)(3)(E) ("If a party fails to respond to any motion, other than a dispositive motion, within the time allotted, the court may grant the motion as unopposed.").

IT IS THEREFORE ORDERED AND ADJUDGED that Phi Theta Kappa Honor Society's [15] Motion to Strike, or in the Alternative, for a Protective Order is GRANTED. The Court strikes [14-4] Exhibit D to Toni Marek's Response in Opposition to Phi Theta Kappa Honor Society's Motion to Compel Subpoena Compliance. The Court also strikes any references to Exhibit D in Toni Marek's Response in Opposition to Phi Theta Kappa Honor Society's Motion to Compel Subpoena Compliance. The Court shall disregard Exhibit D and references to Exhibit D in ruling on the Motion to Compel Subpoena Compliance.

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk of Court is directed to remove from the docket [14-4] Exhibit D to Toni Marek's Response in Opposition to Phi Theta Kappa Honor Society's Motion to Compel Subpoena Compliance.

SO ORDERED AND ADJUDGED, this the 23rd day of April 2025.

/s/ *Robert P. Myers, Jr.*
ROBERT P. MYERS, JR.
UNITED STATES MAGISTRATE JUDGE

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

TONI MAREK	PLAINTIFF
VERSUS	CIVIL ACTION NO. 3:25-MC-209-CWR-RPM
PHI THETA KAPPA HONOR SOCIETY	DEFENDANT

ORDER DENYING AS MOOT MOTION TO QUASH SUBPOENAS; GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL SUBPOENA COMPLIANCE

Before the Court is Toni Marek's [1] Motion to Quash Subpoena, for Protective Order, and to Prevent Harassment and Intimidation; Defendant Phi Theta Kappa Honor Society's ("PTK") [10] Motion to Compel Subpoena Compliance or for Leave for Alternative Service, Including Service by Federal Marshal. These motions were originally filed in the Southern District of Texas; under Federal Rule of Civil Procedure 45(f), however, the matter was transferred to this Court on March 25, 2025.[1] Doc. [16]. Thereafter, the Court held a telephonic conference with the parties in an attempt to resolve or narrow the issues. Minute Entry (04/21/2025).

Pursuant to Rule 45(d)(3), Marek, who is proceeding *pro se*, asks this Court to quash the subpoenas issued to her by PTK and to enter a protective order and prevent further alleged harassment and intimidation against her. Doc. [1] at 2. Marek argues she was improperly served with the subpoenas and the subpoenas are untimely and violate the Court's scheduling order. *Id.* at 3–4. She also contends PTK's conduct constitutes harassment and an abuse of process. *Id.* at 4. PTK opposes the motion. Doc. [9]. Additionally, PTK filed a Motion to Compel Subpoena Compliance or for Leave for Alternative Service, Including Service by Federal Marshal. Doc.

[1] Marek originally filed a Motion to Quash Subpoena in the underlying action on December 27, 2024, but this Court denied the motion without prejudice to refile before the appropriate court, i.e., the compliance court. *See Phi Theta Kappa Honor Society v. Honor Society.Org., Inc.*, No. 3:22-CV-208, Doc. [371]; [402].

[10]. Marek opposes PTK's motion. Doc. [14]. HonorSociety.org, Inc. and Honor Society Foundation, Inc. (collectively, "Honor Society") also oppose the motion. Doc. [13].

The discovery deadline in the underlying action, No. 3:22-CV-208-CWR-RPM, expired on December 19, 2024. While this Court allowed some discovery to be conducted beyond that deadline, it was limited. PTK admits it has known of Marek's likely involvement in the underlying action for some time. "Within the confines of this lawsuit, PTK first became aware of Marek's likely involvement on or around July 22, 2023." Doc. [10-1] at 2. During that time, PTK says Honor Society produced documents, which included multiple documents Marek purportedly provided to Honor Society. Honor Society then submitted a Declaration of Marek on July 9, 2024. Further, Honor Society has disclosed Marek as a witness it may call in support of its claims and defenses.

On October 21, 2024, PTK filed a Notice of Intent to Serve Subpoena on Marek. In its attempt to serve Marek with the subpoenas, PTK engaged Cleveland Service Agency, Inc., the Victoria County Sheriff's Department, and Veracity IIR. But after at least 11 attempts, efforts to serve Marek were unsuccessful. Ultimately, the subpoenas were taped to the door of Marek's residence. During one of the attempts, there is evidence Marek physically evaded service of the subpoenas by getting in a vehicle, exceeding the speed limit, and making an illegal U-turn. The Court does not condone Marek's actions if true.

PTK did not bring this issue to the Court's attention prior to the discovery deadline, nor did PTK file an appropriate motion in this Court or the Southern District of Texas prior to the discovery deadline. As far as the Court is aware, this was not an issue until Marek brought it to the Court's attention when filing her first motion to quash in the underlying action on December 27, 2024. Regardless, PTK made numerous efforts to serve Marek with the subpoenas in the two-month

period prior to the discovery deadline; and the circumstances here might be different if, in accordance with the Federal Rules of Civil Procedure, Marek had simply accepted service of the subpoena and then provided PTK with any objections she might have had. While the Court does not go so far as to say that Marek evaded service of the subpoenas, the Court finds Marek has not presented this Court with evidence demonstrating harassment or intimidation by PTK in its efforts to have her served with the subpoenas.

After considering the parties arguments and the impending trial date, the Court finds that PTK's motion is granted in part and denied in part and that Marek's motion is denied as moot. The Court compels Marek to provide communications or documents evidencing communications with HonorSociety.Org, Inc., Honor Society Foundation, Inc., Michael Moradian, or David Asari—or any attorney working with any of them—for the period of April 20, 2022, to the present. This information is relevant to PTK's claim of Tortious Interference with Prospective Business Advantage against Honor Society and is proportional to the needs of the case.[2] Doc. [136] at 41–43. However, PTK's remaining requests for documents from Marek are overly broad as written, thus subjecting Marek to undue burden. *See* Fed. R. Civ. P. 45(d)(3)(A)(iv) (providing that the court must quash or modify a subpoena that subjects a person to undue burden). PTK's separate request for leave for alternative service is therefore moot.[3]

Furthermore, the Court finds that it is simply out of time to permit a deposition of Marek at this stage in the litigation. *See Spencer v. FEI, Inc.*, 725 F. App'x 263, 266 (5th Cir. 2018) (finding that the district court did not abuse its discretion in denying a motion to compel in light of the district court's broad discretion to preserve the integrity and purpose of the scheduling order and

[2] And this claim has survived Honor Society's summary judgment motion. Doc. [543] at 9–11.
[3] In any event, the parties represented to the Court at the conference on April 21, 2025, that Marek has since been served with the subpoenas through her attorney.

the imminence of trial).

IT IS THEREFORE ORDERED AND ADJUDGED that Phi Theta Kappa Honor Society's [10] Motion to Compel Subpoena Compliance or for Leave for Alternative Service, Including Service by Federal Marshal is GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED AND ADJUDGED that, **on or before May 9, 2025**, Toni Marek shall provide any communications or documents evidencing her communications with HonorSociety.Org, Inc., Honor Society Foundation, Inc., Michael Moradian, or David Asari—or any attorney working with any of them—for the period of April 20, 2022, to the present.

IT IS FURTHER ORDERED AND ADJUDGED that Toni Marek's [1] Motion to Quash Subpoena, for Protective Order, and to Prevent Harassment and Intimidation is DENIED AS MOOT.

IT IS FURTHER ORDERED AND ADJUDGED that this miscellaneous matter shall be closed upon Phi Theta Kappa Honor Society's confirmation of Toni Marek's compliance with this Order.

SO ORDERED AND ADJUDGED, this the 30th day of April 2025.

/s/ *Robert P. Myers, Jr.*
ROBERT P. MYERS, JR.
UNITED STATES MAGISTRATE JUDGE

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Filing Code Description: Motion (No Fee)
Filing Description: Plaintiff Phi Theta Kappa Honor Society's Response in Opposition of Defendant's TCPA Motions w/ Exhibits
Status as of 7/11/2025 12:04 PM CST

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