

NO. 25-03-92211-D

PHI THETA KAPPA HONOR SOCIETY,

Plaintiff,

v.

TONI MAREK,

Defendant.

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IN THE DISTRICT COURT

VICTORIA COUNTY, TEXAS

377th JUDICIAL DISTRICT

**DEFENDANT’S REPLY IN SUPPORT OF MOTION TO DISMISS UNDER THE
TEXAS CITIZENS PARTICIPATION ACT AND MOTION FOR COSTS,
ATTORNEYS’ FEES, AND SANCTIONS PURSUANT TO THE TCPA**

Defendant Toni Marek files her reply in support of her Motion to Dismiss Under the Texas Citizens Participation Act (the “TCPA Motion”) and her Motion for Costs, Attorneys’ Fees, and Sanctions Pursuant to the TCPA (the “Fee Motion”).

1.0 INTRODUCTION AND BACKGROUND

Plaintiff Phi Theta Kappa Honor Society (“PTK”) either doesn’t get it, or hopes that this Court doesn’t get it. It filed a lawsuit for the purpose of blocking the publication of a book. Now it has the gall to claim that the Anti-SLAPP law does not apply because the remedy they sought in the lawsuit was to enjoin the publication of the book.

PTK didn’t want its annual convention to be marred by an embarrassing book being published, so it brought a SLAPP¹ for the specific purpose of suppressing publication of the book. It briefly accomplished this goal by misrepresenting the facts and law to this Court in an *ex parte* proceeding, inducing the Court to issue an unlawful TRO.

To call PTK’s arguments “dishonest” would insult the definition of that word. PTK claims, now, that its lawsuit was only to stop Marek from “possessing” information. That is a SLAPP in

¹ This is an acronym for “Strategic Lawsuit Against Public Participation,” which is a meritless lawsuit meant to silence a defendant or punish them for their speech.

itself. However, PTK sought a declaratory judgment that Marek was not permitted to possess *or publish*² information—information that PTK has never identified. The Opposition to Marek’s Fee Motion is filled with feigned outrage, but its legal arguments only fly if you do not read PTK’s own pleadings, which contradict its panicked arguments now.

Marek’s TCPA Motion is meritorious and the Court should grant Marek all of the attorneys’ fees, costs, and sanctions requested in the Fee Motion. To do otherwise would condone not only PTK’s attempts at censorship, but its brazen misrepresentations to this Court.

2.0 ARGUMENT AND AUTHORITIES

PTK non-suited its case against Marek, but this does not moot the TCPA Motion. Rather, the motion “survives a non-suit because a victory on the motion to dismiss, which may include attorneys’ fees and sanctions, would afford the movants more relief than a non-suit would.” *In re Diogu Law Firm PLLC*, No. 14-18-00878-CV, 2018 Tex. App. LEXIS 8391, *2 (Tex. App.—Houston [14th Dist.] Oct. 16, 2018, no pet.). It is thus necessary for the Court to determine whether to grant the Motion (failing to do so would be reversible error) and then determine a reasonable award of costs, attorneys’ fees, and sanctions.

2.1 Marek Has Shown PTK’s Claim is Based on Protected Activity

2.1.1 The TCPA Motion is Directed at PTK’s Legal Action

PTK’s first argument is perhaps its most absurd, that Marek’s TCPA motion was directed only at PTK’s request for injunctive relief and not at its *claim* for a declaratory judgment. The TCPA Motion mentions nowhere that it targets only request for injunctive relief specifically, and repeatedly argues that PTK’s claim for a declaratory judgment should be dismissed. TCPA Motion at 1, 7-12. This argument fails immediately.³

² PTK spends a lot of energy in its Opposition trying to convince the Court that PTK never sought to enjoin publication, but merely “possession” of information. PTK is not being honest. See Pet. at 8-9, ¶¶ B & C.

³ PTK’s cases in support of this argument are of no assistance. The court in *Cavin v. Abbott*, 613 S.W.3d 168, 171 (Tex. App. 2020), found that the TCPA did not apply to a request for injunctive relief based on an assault claim to which the TCPA did not apply, and noted that a request for injunctive relief cannot be challenged separately “when it is linked to a cause of action.”

2.1.2 Marek's Conduct Constitutes "Communications" Under the TCPA

Next, PTK argues that its declaratory judgment claim is based only on Marek's possession of allegedly privileged or confidential information, which does not constitute a "communication" under Tex. Civ. Prac. & Rem. Code § 27.001. Because PTK lies about the arguments in the TCPA Motion and its own Petition, it is helpful to identify the specific conduct PTK alleges:

- Marek filed an exhibit in a miscellaneous action she filed in the Southern District of Texas to quash a subpoena in the S.D. Miss. Case that "was an attorney-client privileged and/or attorney work product email communication between Lynn Tincher-Ladner, president and CEO of PTK, and members of PTK's Board of Directors, in which Tincher-Ladner discusses a deposition and deposition strategy in the S.D. Miss. Action." Pet. at ¶ 15.⁴
- Marek received the above email "and other privileged emails as part of a public records request response seeking all documents and communications related to PTK and Dr. Tincher-Ladner." Pet. at ¶ 15.
- Marek announced that she was about to publish a book that "is based in part on information that she received through records requests that she issued to PTK's community college partners." *Id.* at ¶ 21.
- "Marek has already used information obtained from those records requests in places like a Change.org petition and her website." *Id.* at ¶ 22 & *Exhibits D & H.*

Id. at 171. Here, the TCPA applies to PTK's declaratory judgment claim. *Miller v. Watkins*, 2021 WL 924843, at *24 (Tex. App. Mar. 11, 2021), is unhelpful because Marek's TCPA motion was not directed at PTK's request for injunctive relief, nor was PTK's request "ancillary" when it was the only meaningful relief PTK sought, as evidenced by the fact that it non-suited the moment the Court denied this request. *Stone v. Melillo*, 2020 WL 6143126, at *5 (Tex. App. Oct. 20, 2020),³ is directly adverse to PTK's position, as that case explains that "the TCPA does not allow a request for injunctive relief to be **separately challenged** when it is linked to a cause of action." 2020 Tex. App. LEXIS 8267, at *13 (emphasis added). Marek does not separately challenge the request for injunctive relief; the TCPA Motion, on its face, is directed at the claim for a declaratory judgment. To highlight this point, the Fee Motion seeks sanctions for PTK's misrepresentations in securing a TRO, and there is no mention of the TCPA in that discussion. Fee Motion at 17-19.

⁴ After the Court denied PTK's request for a preliminary injunction, Marek attached that same email to her Fee Motion. Fee Motion at *Exhibit 1*. Tellingly, PTK has made no effort to strike this allegedly privileged document from the record—because it is not privileged.

- “Marek has come into possession of inadvertently⁵ produced attorney-client privileged communications [through the aforementioned public records request, meaning through communications with third parties] between PTK and its counsel, and Dr. Tincher-Ladner to the PTK board regarding advice from counsel, to Marek.” *Id.* at ¶ 23.
- In public statements “regarding her book, Marek has also indicated she intends to rely on information from former PTK employees, some of whom have signed non-disclosure agreements.” *Id.* at ¶ 24 & *Exhibits D & H*.
- Marek “intends to use the privileged communications and confidential information in her book, just as she has in her court filings and online websites.” *Id.* at ¶ 25.

PTK’s claim is thus based on three things: (1) Marek obtaining information through public records requests and communications with former PTK employees; (2) disclosing some of these communications; and (3) planning to publish these communications in her upcoming book. Category (1) consists of “communications” under the TCPA; the alleged conduct involves requesting, and then receiving, information from third parties. Category (2) unquestionably includes communications, as Marek published statements and documents to the general public, including in a court record. The only way that (3) might not constitute a communication is that PTK filed suit before Marek could publish her book, but the Court should not allow PTK to evade TCPA liability simply for being prompt in trying to censor Marek.

It simply boggles the mind how a plaintiff could file a lawsuit to try and stop publication of a book, and to try and get a court order that it should become the editor of that book, and then claim that the lawsuit had nothing to do with the defendant’s communications.

PTK is correct that the scope of the TCPA’s protections is not co-extensive with the First Amendment—it *is broader*. The TCPA “operates largely independently of and extends considerably beyond the *constitutional* ‘right of association,’ ‘speech,’ or ‘petition’ that might

⁵ While it may have been fine earlier in this case for PTK to assume that this disclosure of information to Marek was “inadvertent,” PTK has provided no evidence of the allegedly inadvertent nature of this disclosure. In opposing the TCPA Motion, PTK cannot rely on its own unsupported assertions.

otherwise have informed the meaning of those terms.” *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 294-95 (Tex. App. 2018) (emphasis in original). The *Tejas Promotions* court further found that communications between co-conspirators, rather than to third parties, constituted “communications” under the TCPA. *Id.*;⁶ see also *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 205 (Tex. App. 2017) (same); *Bagby 3015, LLC v. Bagby House, LLC*, 674 S.W.3d 609, 618 (Tex. App. 2023) (finding that scope of TCPA was broader than First Amendment and concluding that even false reports to police constituted a protected “communication”). “The ‘exercise of the right of free speech’ extends to any ‘communication made in connection with a matter of public concern.’ Almost every imaginable form of communication, in any medium, is covered.” *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018). If co-conspirators talking amongst themselves constitutes a “communication,” then certainly requesting and receiving information from third parties as part of a journalistic endeavor also counts.

PTK seems to hope that the Court will forget all about the allegations in PTK’s Petition, instead believing PTK’s belated revisionist dishonesty about what its Petition sought. PTK focuses solely on Marek’s possession of allegedly privileged and confidential information (nevermind *how* she acquired it—completely legally) and trying to analogize Marek’s alleged conduct to cases about trade secret theft and breach of contract. But these do not help PTK.⁷

⁶ The court went on to find that the plaintiff’s request for declaratory relief was not a legal action, but it did so using a version of the TCPA that pre-dated the law’s specific inclusion of requests for declaratory relief in the definition of “legal action.” *Id.* at 302-03.

⁷ *Bumjin Park v. Suk Baldwin Props., LLC*, 2018 WL 4905717, at *3-4 (Tex. App.—Austin Oct. 10, 2018, no pet.), dealt with conduct that had no expressive element and in fact was an attempt to stifle speech by blocking the plaintiff from erecting signs and obstructing the view of the plaintiff’s dental practice. That is the opposite of the facts here, where Marek was engaged in newsgathering in preparation for publishing a book. *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 829 (Tex. App. 2020), found that “[t]he act of e-mailing a document to oneself or electronically saving a document to a drive or data-storage website which no one else views or has access is not a ‘communication’” under the TCPA. The court went on to find that statements made to third parties were “communications” under the TCPA, though they were not protected because they dealt with a purely private matter (the sale of scrap metal between two private parties). *Id.* Again, the facts here are completely different, as Marek obtained the allegedly privileged or

Even if we were to change the facts completely and pretend that this was a case of corporate espionage where Marek downloaded privileged documents from PTK's servers, her conduct would *still* be protected. That is because the TCPA applies to:

a legal action against a person arising from any act of that person, whether public or private, **related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public**, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, **journalistic, or otherwise artistic work**, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, **or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution.**

Tex. Civ. Prac. & Rem. Code § 27.010(b)(1) (emphasis added). PTK alleges that Marek gathered privileged and confidential information for a book she was planning to publish to the general public. This conduct falls within § 27.010(b), and thus PTK's claim is based on protected conduct.

2.1.3 Communications Were in Connection with a Matter of Public Concern

The TCPA Motion explains how Marek's conduct relates to an issue of public concern, namely criticism of PTK about its lax policy on sexual assault and trying to mislead students. TCPA Motion at 8-9. The motion provides case law about how the TCPA protects conduct closely related to what is at issue here.⁸

confidential information through communications with third parties; she did not download them from PTK's servers and send them to herself.

PTK cites *Pinghua Lei v. Nat. Polymer Int'l Corp.*, 578 S.W.3d 706, 713 (Tex. App. 2019), for the same proposition. However, that court found that "theft and electronic transfer of trade secrets, without more, is not a 'communication' under the TCPA." *Id.* at 713. The court went on to find that alleged disclosure of those trade secrets to a third party did constitute a communication under the TCPA. *Id.* at 713-14. Such communications to and from third parties make up the majority of PTK's declaratory judgment claim.

⁸ See *Perez v. Quintanilla*, No. 13-17-00143-CV, 2018 Tex. App. LEXIS 9698, at *8-9 (Tex. App.—Corpus Christi Nov. 29, 2018, no pet.) (finding that claim for declaration that defendants violated an agreement due to "unauthorized exploitation" of a book concerning the plaintiff was subject to TCPA motion); *Sunchon Yu v. Sun Joo Koo*, 633 S.W.3d 712, 722 (Tex. App.—El Paso 2021, no pet.) (finding that claims of sexual assault committed by the plaintiff were related to a matter of public concern).

PTK addresses none of these arguments. Instead, it attempts to analogize this case to *Morris v. Daniel*, 615 S.W.3d 571, 576 (Tex. App. 2020), where the court found that a private contract dispute was not connected to an issue of public interest. That is completely different from this case, where the communications at issue dealt with highly publicized litigation involving a prominent college student organization and deals with information about a huge membership organization. It is a lie to claim that the relevant dispute here is “the privileged status of PTK’s litigation emails;” this mischaracterizes the speech at issue to try to avoid TCPA scrutiny.

The conduct on which PTK’s claim is based is Marek’s newsgathering activity and her publication (both actual and intended) of information she lawfully obtained from third parties. This is not a case about “the status of [PTK’s] emails,” but rather about PTK trying to censor the publication of a book that discloses a variety of PTK’s misconduct (which, yes, would have included information derived from PTK’s emails).

2.2 PTK Has Not Provided Clear and Specific Evidence of a Prima Facie Case

PTK’s prong two arguments fare no better. At this stage, PTK must show by “clear and specific evidence a prima facie case for each essential element of” its claim. Tex. Civ. Prac. & Rem. Code § 27.005(c). While it cannot do this, even if it could, the Court must grant a TCPA motion if “the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.” Tex. Civ. Prac. & Rem. Code § 27.005(d).

According to PTK, its declaratory judgment claim has only two elements: (1) a real dispute between the parties that (2) can be determined by judicial declaration. *Nehls v. Hartman Newspapers, LP*, 522 S.W.3d 23, 29 (Tex. App. 2017). But one does not prevail on a cause of action for a declaratory judgment simply by showing there is a real controversy that the court can resolve by a declaration. Otherwise, a plaintiff would never have to demonstrate that their assertions have any factual or legal validity, but only that a resolvable dispute exists.

Think about how absurd their argument is. If PTK claimed that every word in her book was defamatory, that would be “a real dispute.” And the court could determine, by judicial declaration, that the claim was ludicrous. Presto! No Anti-SLAPP!

PTK's Opposition makes no effort to substantiate any of the factual allegations in its Petition—and PTK has had months to come up with *something*. Instead, PTK repeats the discredited claim that Marek obtained “privileged or confidential” documents through public records requests. PTK still refuses to identify these documents or how they could ever be protected by any privilege that could apply.

PTK only ever identified a single communication, the email attached as *Exhibit 1* to the Fee Motion, and disingenuously claimed it was privileged.⁹ Meanwhile, PTK seems to pretend that it does not know what “privileged” means or how evidentiary privilege works. PTK claims that Marek obtained information in violation of NDAs with former PTK employees, but does nothing to prove this: no identification of these employees,¹⁰ what information they allegedly provided, or how such disclosure constituted a breach. And while PTK alleges that Marek posted such privileged information online (Pet. at *Exhibits D & H*), PTK's exhibits do not show any privileged information or anything that could violate an NDA. More importantly, Marek was not a party to any alleged NDA and never asked anyone to breach an NDA or provide confidential information about PTK. (Marek Apr. 3, 2025, declaration at ¶¶ 19, 22). So what difference would it make even if PTK were telling the truth (which it is not)? If an employee wants to violate an NDA, the remedy is not a SLAPP to enjoin publication of a book by someone else.

Circling back to the email discussing a prior deposition, where there was no lawyer nor even a single entity on the email, there is the issue of privilege *waiver*, which renders moot any

⁹ This email is not privileged. There is no attorney involved, nor does it involve the provision of legal advice; it is about a deposition conducted last year. Fee Motion at *Exhibit 1*. PTK argues that this is not dispositive, citing Tex. R. Civ. Evid. 503(b)(1)(D), which refers to a client's privilege to refuse to disclose 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.” PTK does not explain how this matters, though, as there is no explanation of how an email between multiple parties, none of which is involved in litigation, falls within this definition. There is also no explanation as to how the substance of that email is privileged; PTK simply asserts it is because it mentions a deposition.

¹⁰ At most, Tincher-Ladner speculates as to the identity of one former employee and guesses, without factual foundation, that what this employee told Marek was covered by a one-page NDA. Tincher-Ladner Dec. at ¶ 35.

question of whether the email was originally privileged. PTK did not inadvertently disclose this email to Marek. PTK disclosed it to multiple colleges. Marek received it in response to public records requests to a college (Marek Apr. 3, 2025, declaration at ¶ 20), and there is no evidence that such disclosure was inadvertent. PTK disclosed it to a third party (the college from which Marek received it), and thus even if there were privilege, PTK itself destroyed it. Tex. R. Evid. 511(a)(1). PTK seems to acknowledge this, as it makes no argument on waiver. Instead, it pivots to an argument that the email is confidential under the attorney work product doctrine. PTK ignores that it has the burden of showing that the email in question “contains the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.” *S.E.C. v. Brady*, 238 F.R.D. 429, 441 (N.D. Tex. 2006). PTK makes no attempt at this showing, and thus fails to support its argument.¹¹ But, even if it proved that, the work product doctrine does not work like a Top Secret government designation. If a confidential document falls into the hands of the press or an author, there is no censorship remedy available. PTK might be able to object to its introduction at a deposition, but its attempt to try and characterize a potential evidentiary privilege as a Top Secret government seal designation is just ridiculous.

There is the further problem of PTK not identifying a legal basis for the declaratory judgment that it sought. PTK appears to argue that a court has free-standing authority to enjoin speech if that speech has a tendency to harm the plaintiff. The argument is simply bizarre. The only source of authority PTK cites is the Texas Civil Rules of Evidence, which provide that the attorney-client privilege extends “to prevent any other person from disclosing confidential communications,” but that is in the context of litigation. PTK seems to think that the rules of evidence can then be used as a law of general applicability. If that were so, then PTK could seek a declaratory judgment stopping publication of a book if it contained information that PTK deems to be irrelevant or argumentative.

¹¹ PTK tries to mislead to this court that the court in the S.D. Miss. Case found that the email was protected attorney work product. That court did not engage in any analysis on that issue, instead granting the motion to strike that email as unopposed. Opp. at *Exhibit A*.

The Rules of Evidence do not authorize a court to enter an injunction against the public's use of information. A rule of evidence does not supplant the entirety of the First Amendment. PTK does not identify a single case where a court has granted the kind of relief it seeks here, as no such cases exist in the entire American legal system from the founding of the Republic until today,¹² and this Court has already rejected PTK's request.

Even if we accept all of PTK's prong two arguments, it still fails. This is because those arguments cover only a single email; there is no record evidence or argument about *any* of the other documents or information mentioned in the Petition. This is aside from the fact that Plaintiff makes no attempt to explain how it was wrongful for Marek to obtain such information or how it could be wrongful for her to publish it, both of which are necessary for the Court to enter a declaration that she "is not permitted to retain, publish, or disseminate the information in any manner." Pet. at 8-9, ¶ B. Without a legal basis for such a declaration, we would be left with only a determination that the information Marek obtained was privileged, which has no ability to change the legal relationship between the parties and would thus constitute an impermissible advisory opinion. *Nehls v. Hartman Newspapers, LP*, 522 S.W.3d 23, 29 (Tex. App. 2017) (an advisory opinion is "one which does not constitute specific relief to a litigant or affect legal relations").

PTK has not met its burden under prong two, and having nonsuited its case, it waived any right to do so in the first place.

¹² The closest PTK comes to this is a citation to *Kinney v. Barnes*, 443 S.W.3d 87, 95 (Tex. 2014), which noted that in rare circumstances a prior restraint on speech is permissible. *Barnes* is a peculiar authority to cite, since it was a defamation case that found prior restraints are essentially *never* permissible in defamation cases. The cases the *Barnes* court cited made it clear that prior restraints are only permissible when there has been an "abuse" of one's First Amendment rights, such that the prior restraint is an "appropriate penalt[y] for what is wrongfully spoken." *Id.* In other words, without wrongful conduct, a prior restraint is never permissible. PTK has not even argued, much less provided evidence of, any wrongful conduct by Marek that could constitute an abuse of her First Amendment rights. Without such abuse, this Court lacks a basis to issue a declaration that she has no right to possess or publish PTK's information, and thus PTK has not made a prima facie case for its declaratory judgment claim.

2.3 The Requested Fees are Reasonable

The Fee Motion discusses the seven factors for assessing reasonable fees laid out in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). PTK chooses to address none of them, and instead attempts to mock Marek with its own misunderstanding of *Kinney v. Barnes*. Opp. at 22. Its one-paragraph response to 10 pages of briefing is hardly a rebuttal of Marek's *Arthur Andersen* showing, and so PTK has admitted that Marek's counsel's \$118,350 in fees is reasonable.

PTK does limply assert that the hourly rates of Marek's counsel are excessive, citing *Mignogna v. Funimation Prods., LLC*, at *20 (Tex. App. Aug. 18, 2022), but the court there simply found that \$650 was reasonable; there is no indication that it found this was the maximum an attorney could charge.

And in a prime example of talking out of both sides of its mouth, PTK claims that the rates its counsel charges (\$690/hour for Tracy Betz and \$880/hour for Jonathan Polak) for what can only be called poor and dishonest lawyering are *reasonable*, yet slightly higher rates for lawyering that prevailed against them are not? This is to say nothing of the \$910/hour they claimed to customarily charge in the S.D. Miss. Case. *See* Fee Motion at *Exhibit 7*. They offer nothing to support this argument, while Marek supported her rates and fees with significant evidence. *See* Fee Motion at 8 (citing the Texas Lawbook); Declaration of Zach Greenberg, Fee Motion at *Exhibit 13*; Declaration of Mark Bennett, Fee Motion at *Exhibit 14*; evidence showing Marc Randazza's experience and reputation, Fee Motion at *Exhibits 8-12*. PTK also does not dispute the reasonableness of the \$20,000 in anticipated future fees requested in the Fee Motion, bringing the amount of requested fees to \$138,350.

2.4 The Court Should Award Significant Sanctions

Tex. Civ. Prac. & Rem. Code § 27.009 authorizes additional sanctions "as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." The Fee Motion details both PTK's meritless litigation against Honor Society in the S.D. Miss. Case, as well as its campaign of legal intimidation against both Marek

and other alumni. Fee Motion at 15-17. In its Opposition, PTK ignores its intimidation campaign (though it claims, without elaboration, that the evidence showing this campaign is unauthenticated hearsays), and instead insists that its suit against Honor Society was not a SLAPP. But in doing so, it openly lies to this Court about the S.D. Miss. Case, claiming that the court there found PTK was likely to succeed on its claims. Opp. at 20. Meanwhile, PTK *lost that case*.

As noted in the Fee Motion, the Fifth Circuit Court of Appeals overturned the district court's preliminary injunction order in which it made all the findings upon which PTK seeks to rely. PTK acknowledges the Fifth Circuit's order in a footnote, but pretends this does not affect its argument about how its suit against Honor Society was meritorious. 2025 U.S. App. LEXIS 8090. The Fifth Circuit vacated the district court's order in its entirety. *Id.* at *8. Then on remand, the district court partially granted Honor Society's motion for summary judgment, dismissing PTK's false designation of origin, common law trade dress infringement, common law unfair competition, and tortious interference with contract claims. Summary Judgment order in D. Miss. Case, ECF No. 543, attached as **Exhibit 1**, at 2-4, 5 n.1, 8-9, 11. With their attempt at obtaining an unconstitutional prior restraint foiled and seeing the writing on the wall as to its surviving claims, PTK then followed the same playbook as here—it gave up. *See* Order of Dismissal in D. Miss. case, ECF No. 563, attached as **Exhibit 2**. The district court never made any ultimate findings that Honor Society engaged in wrongdoing, but it did find most of PTK's claims meritless.¹³

While PTK's record of SLAPP litigation may be new,¹⁴ two cases starts a pattern, and PTK will be emboldened to file more SLAPPs if it is not sufficiently sanctioned here. And while PTK complains about the size of the requested sanctions, it does not claim that it would have any difficulty paying those sanctions.

¹³ PTK has since filed a motion to enforce its settlement with Honor Society, but this does not change that it never proved any of its claims against that Honor Society.

¹⁴ The explanation for the lack of PTK's lawsuits being labeled as SLAPPs is simple; Mississippi, where PTK is incorporated and has its principal place of business, does not have an anti-SLAPP law. Pet. at ¶ 4.

As for the sanctions Marek requests in relation to the TRO proceeding, PTK makes no attempt to justify its lies to the Court, instead declaring that these specific examples of misconduct are baseless. Opp. at 21. It then argues that Marek was not harmed by the “brief” period she was enjoined from publishing her book, as though that has anything to do with the requested sanctions. PTK should be separately sanctioned for misleading the Court, not because it harmed Marek.

3.0 CONCLUSION

For the foregoing reasons, the Court should grant the Fee Motion in its entirety and award Marek: (1) \$138,350 in attorneys’ fees; (2) \$2,796.63 in costs; and (3) \$415,050 (three times the amount of fees) in sanctions, for a total award of **\$556,196.63**.

Dated: July 16, 2025.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I 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 16, 2025

/s/ Marc J. Randazza

Marc J. Randazza

EXHIBIT 1

*District of Mississippi Motion for Summary
Judgement Order*

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

PHI THETA KAPPA HONOR SOCIETY,

Plaintiff / Counter-Defendant,

v.

HONORSOCIETY.ORG, INC., ET AL.,

Defendants / Counter-Plaintiffs,

v.

DR. LYNN TINCHER-LADNER,

Third-Party Defendant.

CAUSE NO. 3:22-CV-208-CWR-RPM

ORDER

Before the Court is HonorSociety.org, Inc. and Honor Society Foundation's (together, "Honor Society") motion for summary judgment against Phi Theta Kappa Honor Society ("PTK") and Dr. Lynn Tinchler-Ladner. Docket No. 442. Upon review, the motion will be granted in part and denied in part.

I. Factual and Procedural History

PTK and Honor Society offer "competing membership-based academic and professional" services to community college students in the United States. Docket No. 138 at 2. Their legal dispute began in 2022 when PTK sued Honor Society for false designation of origin (Count I), federal trade dress infringement and false advertising (Count II), common law trade dress infringement (Count III), and common law unfair competition (Count IV). PTK filed a second amended complaint in 2024 to include claims for tortious interference

with contract (Count V) and tortious interference with prospective business relations (Count VI). Docket No. 136. Honor Society responded with counterclaims, which have now been dismissed. Docket No. 393.

Honor Society now moves for summary judgment. Its arguments and PTK's responses are addressed below.

II. Legal Standard

The legal standard is well-established. Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if the evidence could lead a "reasonable jury [to] return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Id.*

"Once a summary judgment motion is made and properly supported, the nonmovant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. Neither conclusory allegations nor unsubstantiated assertions will satisfy the nonmovant's burden." *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (quotation marks and citations omitted).

The Court views the evidence and draws all reasonable inferences "in the light most favorable to the nonmoving party." *Ryder v. Union Pac. R.R. Co.*, 945 F.3d 194 (5th Cir. 2019).

III. Discussion

A. Count I: False Designation of Origin: The Edge Mark

Honor Society first argues that PTK's false designation claim fails because Honor Society began using "Career Edge" three years before PTK began using "PTK Edge." Docket

No. 443 at 1. PTK disagrees. It says it has priority in the “Edge” mark and maintains that Honor Society’s “superficial use” of Career Edge infringes on its use of PTK Edge. Docket No. 497 at 2. At the same time, however, PTK also claims that Honor Society cannot establish priority in the Edge mark because “[t]here is little evidence” that Honor Society used Career Edge “in commerce.” Docket No. 497 at 2. A false designation claim is premised on trademark infringement that occurs “in commerce.” If Honor Society did not use Career Edge in commerce, then it could not have infringed on PTK’s use of the mark. *See* 15 U.S.C. § 1125(a).

To establish a false designation of origin claim, the plaintiff must first show that the defendant used the mark at issue in commerce. *Id.* A service mark is used in commerce when it is (1) “used or displayed in the sale or advertising of services and the services are rendered in commerce” or (2) “the services are rendered in more than one State or in the United States and a foreign country” by a person “engaged in commerce in connection with the services.” *Id.* § 1127.

A party renders its service in commerce when it makes “an open and notorious rendering, or offering, of [its] service to the public.” *Aycock Eng’g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1360 (Fed. Cir. 2009). Mere advertising of the mark is insufficient to prove that the service was rendered in commerce. *Action Ink, Inc. v. New York Jets, LLC*, No. CV 12-46, 2013 WL 12106878, at *6 (E.D. La. June 20, 2013). “[A]ctual use of the mark in commerce [is] required; mere preparations to use that mark sometime in the future will not do.” *Aycock Eng’g*, 560 F.3d at 1360.

Here, neither party has provided the Court with evidence showing that Honor Society rendered its services in commerce. Indeed, Honor Society appears to concede that it did not. *See* Docket No. 510 at 2; *see also* *Action Ink, Inc. v. New York Jets, L.L.C.*, 576 F. App’x 321, 323

(5th Cir. 2014) (“Unlike Action Ink, the *Allard* defendant rendered services to at least one client, arranging for that client to interview a job applicant. . . . In contrast, Action Ink has nothing to show for its years of soliciting clients.”). Since there is no evidence in the record establishing that Honor Society rendered Career Edge in commerce, PTK’s false designation of origin claim must fail. Accordingly, Honor Society is entitled to summary judgment on this claim.

B. Counts II, III, and IV: Federal Trade Dress Infringement and False Advertising, Common Law Trade Dress Infringement, and Common Law Unfair Competition

Honor Society presents two arguments against Counts II, III, and IV. It says these claims fail because (1) they are barred by the equitable defense of laches and by Mississippi’s statute of limitations, and (2) because PTK’s trade dress does not qualify for protection. The Court will address each argument in turn.

Laches and Mississippi Statute of Limitations

Honor Society contends that PTK’s claims are time-barred because “PTK delayed asserting its rights for over five years.” Docket No. 443 at 14. In its view, PTK should have brought its claims by 2020 because it “knew or should have known of HonorSociety’s alleged false advertising and trade-dress infringement” as early as 2016 or 2017. *Id.*

“The Lanham Act does not contain a statute of limitations[,] . . . [so] federal courts refer to analogous state statutes of limitations to aid in determining what length of delay is excusable.” *Louis Vuitton Malletier, S.A.S. v. Keep it Gypsy, Inc.*, No. 3:23-CV-2569-L, 2024 WL 3927819, at *3 (N.D. Tex. Aug. 8, 2024) (quotation marks omitted). In Mississippi, the analogous statute of limitations is three years. *See* Miss. Code Ann. § 15-1-49; *McGee v. Jackson State Univ.*, 282 So. 3d 678, 681 (Miss. Ct. App. 2019).

“Laches is an inexcusable delay that results in prejudice to the defendant. It comprises three elements: (1) delay in asserting one’s trademark rights, (2) lack of excuse for the delay, and (3) undue prejudice to the alleged infringer caused by the delay.” *Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 489–90 (5th Cir. 2008) (quotation marks omitted).

Here, the Court finds that PTK delayed asserting its trademark rights because it and Dr. Tincher-Ladner had “actual or constructive knowledge of the” alleged infringement.¹ *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1082 (5th Cir. 1997); *see also Armco, Inc. v. Armco Burglar Alarm Co.*, 693 F.2d 1155, 1161 (5th Cir. 1982) (explaining that the laches period begins when the plaintiff “knew or should have known” about the alleged infringement). Its analysis will therefore focus on the second element of laches—whether PTK lacked a valid excuse for the delay in filing suit.²

Honor Society argues that PTK has no excuse for its delay because “[b]y 2017, Tincher-Ladner and PTK employees communicated amongst themselves, as well as with PTK advisors, that HonorSociety’s colors, website, and regalia were mimicking or very similar to those of PTK.” Docket No. 443 at 15. It explains that “[a]t that time, PTK was actively tracking student and advisor reports of confusion between PTK and HonorSociety.” *Id.* at 14.

¹ Because PTK delayed filing suit until 2022, its common law claims for trade dress infringement and unfair competition are barred by the statute of limitations. *See Bailey v. Est. of Kemp*, 955 So. 2d 777, 783–84 (Miss. 2007).

² PTK argues that Honor Society cannot assert the defense of laches because “[e]vidence of Honor Society’s unclean hands is replete in the record, ranging from intentional infringement to its litigation conduct in this matter.” Docket No. 497 at 16. Honor Society responds by claiming that PTK has not provided evidence that it “was passing off its goods and services with subjective and knowing intent to confuse consumers.” Docket No. 510 at 10. This is not so. But since, there is a genuine dispute as to whether Honor Society had unclean hands, the Court will proceed with its analysis on laches.

“Mere neglect to challenge action,” however, “is not sufficient to establish laches in any case.” *Env’t Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 479 (5th Cir. 1980). Dr. Tincher-Ladner testified that she was not aware of Honor Society’s impact or “the level of student confusion” it was causing until “2020 when people began questioning whether PTK was a scam.” Docket No. 497 at 16–17. Dr. Tincher-Ladner explained that because she “had never heard [these complaints] before,” she “undertook an effort to collect and review[] the mounting instances of confusion, and in making that review she determined that the infringements had reached an intolerable level.” *Id.*

The Fifth Circuit recognizes that *de minimis* infringement may excuse a delay in asserting trademark rights. *See Abraham v. Alpha Chi Omega*, 708 F.3d 614, 623 (5th Cir. 2013). Since there is a genuine dispute as to whether PTK’s delay is excusable, summary judgment is not warranted on Honor Society’s defense of laches. *See id.*

Trade Dress Protection

Honor Society’s main argument is that “PTK’s purported trade dress is unprotectable because it is generic.” Docket No. 443 at 9. PTK disagrees, arguing that “the greater weight of the evidence supports a finding of acquired distinctiveness in PTK’s trade dress.” Docket No. 497 at 9. The Court agrees with PTK.

Generic trademarks are “invalid” and cannot be protected. *Appliance Liquidation Outlet, L.L.C. v. Axis Supply Corp.*, 105 F.4th 362, 375 (5th Cir. 2024). If a mark is descriptive, however, “it may or may not be valid.” *Id.* “[T]he court must determine whether it has acquired secondary meaning in the minds of consumers. If so, it has acquired distinctiveness and is valid; if not, it is invalid.” *Id.*

“Whether a mark has acquired secondary meaning is a question of fact.” *Id.* at 376–77 (quotation marks omitted).

To determine whether a mark has acquired secondary meaning, courts consider the following seven factors: (1) length and manner of use of the mark or trade dress, (2) volume of sales, (3) amount and manner of advertising, (4) nature of use of the mark or trade dress in newspapers and magazines, (5) consumer-survey evidence, (6) direct consumer testimony, and (7) the defendant’s intent in copying the mark.

Id. (quotation marks omitted).

“[T]he primary element of secondary meaning is a mental association in the buyers’ minds between the alleged mark and a single source of the product.” *Beatriz Ball, L.L.C. v. Barbagallo Co.*, 40 F.4th 308, 317 (5th Cir. 2022).

Here, PTK’s use of its trade dress dates back to 1929. “[B]etween 2015 and June 30, 2024, PTK spent over \$61M on advertising and promoting [its organization] through use of its trade dress, including membership regalia, email campaigns, managing and updating its website, goods for the PTK website, and its regional and national convention programming.” Docket No. 497 at 10. PTK has presented evidence of press association with its trade dress and has identified at least three “students who mistakenly joined Honor Society . . . because of its use of PTK’s blue and gold coloring.” *Id.* at 11–12. PTK has also presented consumer survey evidence supporting its claim for secondary meaning.

This is enough evidence to create a genuine dispute on whether PTK’s trade dress acquired secondary meaning. Accordingly, summary judgment will be denied on PTK’s federal trade dress infringement claim.³

³ The Court will also deny summary judgment on PTK’s federal false advertising claim because it finds a genuine dispute as to whether the statements at issue are true and actionable.

C. Count V: Tortious Interference with Contract

To prevail on its interference with contract claim, PTK must prove that Honor Society “maliciously interfere[d] with a valid and enforceable contract.” *Gulf Coast Hospice LLC v. LHC Grp. Inc.*, 273 So. 3d 721, 745 (Miss. 2019) (quotation marks omitted).

Honor Society says summary judgment is appropriate because PTK has “no evidence of a lost contract or sale.” Docket No. 443 at 1. In response, PTK claims that it “specifically identified contracts that were either canceled or declined to renew because of Honor Society’s misconduct.” Docket No. 497 at 39 (citing PTK’s response to interrogatory 39); *see* Docket No. 496-1 at Ex. A-22-7. Rather than direct the Court to the where it “specifically identified [the] contracts,” PTK cites to an interrogatory response. But this citation does not support PTK’s position. If anything, it suggests that no such contracts exist at all.⁴

It is not the Court’s “[d]uty to sift through the record in search of evidence to support a party’s opposition to summary judgment.” *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). PTK has not shown “that an enforceable obligation existed between” it “and another party.” *Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 48 (Miss. 1998). It therefore cannot prove that any such contracts “would have been performed but for [Honor Society’s] alleged interference.” *Id.*; *see also Alfonso v. Gulf Publ. Co.*, 87 So. 3d 1055, 1060 (Miss. 2012). Since there is no evidence of a “breach of contract,” there is “no tortious breach of contract.” *JLS Farm P’ship v. ‘27 Break Hunting Club, Inc.*, No. 2023-CA-434-COA, 2025 WL 312500, at *6 (Miss. Ct. App. Jan. 28, 2025).

⁴ In its interrogatory, Honor Society’s requested that PTK “[i]dentify every contract which PTK claim[s] a third party did not perform because of Honor Society’s actions.” Docket No. 496-1 at Ex. A-22-7. PTK did not produce the contracts. Instead, it claimed that it “has never argued or alleged that any third-parties failed to ‘perform.’ Third parties have instead cancelled existing agreements, contracts, declined to renew contracts, or declined to enter contracts with PTK.” *Id.*

Accordingly, Honor Society is entitled to summary judgment on this claim.

D. Count VII: Tortious Interference with Prospective Business Advantage

Tortious interference with business relations, also known as tortious interference with prospective advantage, “occurs when [a defendant] unlawfully diverts prospective customers away from [the plaintiff’s] business.” *MBF Corp. v. Century Bus. Commc’ns, Inc.*, 663 So. 2d 595, 598 (Miss. 1995). To prevail on this tort, the plaintiff must prove that the defendant’s acts were (1) “intentional and willful,” (2) “calculated to cause damage” to the plaintiff’s lawful business, (3) committed “with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice),” and (4) that “actual damage and loss resulted.” *McBride Consulting Serv., LLC v. Waste Mgmt. of Miss., Inc.*, 949 So. 2d 52, 55–56 (Miss. Ct. App. 2006).

“[T]o establish a prima facie case for damages, the plaintiff must prove (1) that [its] business experienced a loss, and (2) that the defendant was the [proximate] cause of that loss.” *McBride Consulting Serv.*, 949 So. 2d at 56; *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So. 2d 1093, 1099 (Miss. 2005) (explaining that proximate cause is an “additional element . . . imply[ci]tly required by Mississippi courts.”).⁵

Here, Honor Society does not dispute the “malicious intent” element. *Gulf Coast Hospice*, 273 So. 3d at 747. Instead, it argues that PTK cannot establish that Honor Society’s actions are the proximate cause of PTK’s alleged harm. The Court disagrees.⁶

⁵ The fact that *Scruggs* involved interference with a contract, rather than interfere with business relations, does not affect the analysis. See *Hegman v. Adcock*, 377 So. 3d 1020, 1026–27 (Miss. Ct. App. 2024) (explaining that “the same” elements are required to prove tortious interference with business relations and tortious interference with contract).

⁶ Honor Society also argues that PTK cannot prove actual damages. The Court disagrees for the same reasons provided in its proximate cause analysis. See *Silver Dollar Sales, Inc. v. Battah*, 391 So. 3d 845, 852 (Miss. Ct. App. 2024) (explaining that “an exact dollar amount” is not required to prove actual damages).

When viewed in the light most favorable to PTK, the record shows that in March 2024, Honor Society distributed surveys to community college students, PTK's target audience and members, "containing questions that were designed to bias survey takers against PTK." Docket No. 497 at 38. A few months later, Honor Society published thousands of webpages containing disparaging statements about PTK and its CEO. *Id.* These webpages "contained language urging prospective members [not to] join PTK." *Id.* They also urged "existing PTK members to terminate their memberships" and encouraged "colleges to [stop] doing business with [the organization]." *Id.*

Around the time Honor Society published the surveys and statements, PTK "received an[] unprecedented number of requests for membership cancellations from both current members and alumni." Docket No. 221-48 at 30. These members requested cancellations even though they had lifetime memberships. *Id.* PTK "also experienced an unprecedented number of college and corporate partners declining to renew their [membership] with PTK Connect." *Id.* at 32. At least 15% of PTK's partners declined to renew their memberships. *Id.* It lost about \$81,595 in membership revenue and \$100,000 in sales between March 2024 and June 2024. *Id.* PTK identified 20 students who cancelled their membership and 35 institutions that stopped doing business with it during this period. Docket No. 497 at 39-40. PTK also identified prospective members that declined its membership invitations after they completed Honor Society's survey.⁷ *Id.* at 40.

⁷ PTK also claims that Honor Society, through its CEO, recruited Toni Marek, a former PTK member "to push the same deceptive and misleading statements concerning PTK and its leadership." Docket No. 497 at 39. It contends that Marek "contacted PTK's largest grantor, in an attempt to interfere with PTK student assistance programs and payroll." *Id.* at 40. PTK has "disclosed Marek as a witness" and "has been attempting to serve and depose her since September 2024." *Id.* at 39 n.37. This issue is pending before the Magistrate Judge. See *Marek v. Phi Theta Kappa Honor Soc'y*, 3:25-MC-209-CWR-RPM (S.D. Miss. Feb. 26, 2025).

This evidence is more than enough to raise a genuine dispute of material fact on proximate cause. While other factors may have contributed to PTK's loss, the record contains sufficient evidence to allow a jury to consider whether Honor Society is liable for the alleged harm. "The question as to the exact cause and the extent of damage is for the finder of fact to determine after a trial on the merits." *Gasparri v. Bredemeier*, 802 So. 2d 1062, 1068 (Miss. Ct. App. 2001); *see also Alfonso*, 87 So. 3d at 1062. Accordingly, the Court denies summary judgment on this claim.

IV. Conclusion

The motion is granted in part and denied in part. Counts I, III, IV, and V are dismissed. Any arguments not addressed in this Order would not have impacted the Court's decision.

SO ORDERED, this the 26th day of April, 2025.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

District of Mississippi Order of Dismissal

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

PHI THETA KAPPA HONOR SOCIETY,

Plaintiff / Counter-Defendant,

v.

CAUSE NO. 3:22-CV-208-CWR-RPM

HONORSOCIETY.ORG, INC., ET AL.,

Defendants/ Counter-Plaintiffs,

v.

DR. LYNN TINCHER-LADNER,

Third-Party Defendant.

ORDER OF DISMISSAL

The parties have announced to the Court a settlement of this case, and the Court desires that this matter be finally closed on its docket.

IT IS, THEREFORE, ORDERED that this case is hereby dismissed with prejudice as to all parties. If any party fails to execute or comply with the settlement agreement, an aggrieved party or parties may reopen the case to enforce the settlement agreement. If successful, all additional attorney's fees and costs from this date shall be awarded to such aggrieved party or parties against the party failing to execute or comply with the settlement agreement. The Court specifically retains jurisdiction to enforce the settlement agreement.

SO ORDERED, this the 20th day of May, 2025.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

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