NO. 25-03-92211-D

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

DEFENDANT'S MOTION FOR COSTS, ATTORNEYS' FEES, AND SANCTIONS PURSUANT TO THE TCPA

TO THE HONORABLE JUDGE OF THIS COURT:

Comes now Defendant Toni Marek ("Defendant"), by and through undersigned counsel, and files her Motion for Costs, Attorneys' Fees, and Sanctions Pursuant to the TCPA, and would respectfully show the Court the following:

1.0 INTRODUCTION AND BACKGROUND

This is a SLAPP suit, prohibited by the Texas Citizens Participation Act ("TCPA"), Tex. Civ. Prac. & Rem. Code § 27.001-27.011. For that reason alone, fees are mandatory. However, the plaintiff in this action has a history of censorious actions and has litigated this case in a manner that has increased the costs and fees and which warrants not just fees, but strong sanctions. Sanctions are not mandatory, but this case cries out for this Court to exercise its discretion to impose them.

The key *factual* reason PTK claimed for needing a prior restraint was that Marek was going to publish Plaintiff's "attorney client privileged" information. The relevant information is the email attached as **Exhibit 1**. At Oral argument, PTK's counsel argued not only that it was privileged, but that this email revealed their "legal strategy." *See* Transcript of April 8, 2025, hearing on motion for temporary injunction, attached as **Exhibit 2**, at 23:19-20 ("It's PTK's legal strategy, attorney-client privileged communications"); 34:19-35:2. However, 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. The deposition took place in November. The email is merely about what was going to happen at *that* deposition, which is long in the past. And Plaintiff has a clearly-established right to publish. PTK was not candid with this court. It should not be rewarded for that by skipping out on sanctions.

Had PTK told the truth about this document in the first place, the *ex parte* TRO would have had no factual underpinning at all, but PTK certainly stretched the truth by neither disclosing these key facts, nor even presenting a copy of the email in question to the Court. With nobody there to challenge their characterization, the Court was only presented with one interpretation of the facts, a false one. PTK misled the court in its *ex parte* filings and sought to mislead the court at oral argument. Marek should not have had to defend against such fabrications, and engaging in such fabrications must be disincentivized.

Legally speaking, the petition for the TRO fared no better than it did factually. It never even *mentioned* a single case dealing with prior restraints, despite the fact that there is controlling law such as *Kinney v. Barnes*, 443 S.W.3d 87, 89 (Tex. 2014), and a legion of other case law that showed that PTK's requested relief was not available. It does not even take a Lexis or Westlaw account to learn this. A simple Google search for "Texas Prior Restraint Law" provides *Kinney v. Barnes* as the first result. Given that First Amendment cases appear uncommon in Victoria County, it is understandable why this Court might have signed an order that does not take this law into account, but that is why there is a heightened duty of candor and disclosure in *ex parte* proceedings. PTK was well aware of contrary case law and chose not to disclose it.

Let us do a Hanlon's Razor analysis before we fully condemn PTK.[2] Is it possible that PTK's counsel was unaware of contrary law, and was simply incompetent in finding it? If so, a bit of mercy might be in order. However, we have a rare situation here where we *know for a fact* that PTK was well aware of every last bit of contrary authority – all of it.

[2] Hanlon's Razor is the adage: "Never attribute to malice what can be attributed to incompetence."

The Court may recall that at the hearing, PTK chose not to disclose the fact that its *other* prior restraint case (that it argued gave some underpinning to this one) was smacked down by the Fifth Circuit. *See Phi Theta Kappa Honor Soc'y v. Honorsociety.Org, Inc.*, 2025 U.S. App. LEXIS 8090 (5th Cir. Apr. 7, 2025). PTK seemed to hope that Ms. Marek would be unaware of this development. **Exhibit 2** at 19:12-16. One has to ask why PTK did not candidly disclose, when it had the chance, that the only real authority in its motion had been vacated? It was no surprise to PTK, as PTK is a party to that very case. Certainly, PTK knew it had lost a Fifth Circuit case.

But let us continue the analysis. PTK was under no obligation to *agree* that its actions were wildly unconstitutional. Nobody is saying that. But for PTK to try to claim that it was unaware that there was contrary case law is provably and demonstrably false. PTK had read the brief of the Appellant in *HonorSociety.Org* and PTK also had, in its hands, the amicus brief of the First Amendment Lawyers' Association ("FALA") in that case. *See* FALA Amicus Brief, Dkt. No. 68, attached as **Exhibit 3**. PTK was under an obligation at an *ex parte* hearing to, at the least, state to the Court "*your honor, there is some contrary authority, we think we overcome it, but so the Court can make an informed decision, it should be advised that this case can be distinguished because ....*" But they didn't do that. They just hoped that the Court would not notice, and that perhaps Marek would not be able to hire counsel (as she has been *pro se* in all other matters involving PTK).

PTK did wrong. PTK *really* did wrong. PTK must pay the price. If it does not, this Court will be placing an imprimatur on this conduct. The honor of this Court is well above doing that.

For that misconduct in the TRO process alone, sanctions are necessary and proper, but are not mandatory. But beyond this, Marek filed a motion to dismiss under the TCPA on April 4, 2025, which, if granted, entitles her to a *mandatory* award of attorneys' fees. On April 8, 2025, after PTK's application for a temporary injunction was denied, Marek informed PTK's counsel that she would be willing to resolve the matter prior to the TCPA motion being decided. Declaration of Marc J. Randazza ("Randazza Dec."), attached as **Exhibit 4**, at ¶ 6. The next day, PTK filed a nonsuit, perhaps under the mistaken impression that this would help it evade the consequences of

the TCPA motion. It does not. The Court must grant the TCPA motion, and then hold a hearing on the amount of fees and sanctions to be awarded under Tex. Civ. Prac. & Rem. Code § 27.009.

2.0 LEGAL STANDARD

Texas Courts typically apply eight factors when determining the reasonableness of an award, though not all factors will be relevant in every case:

(1) the time, labor, and skill required, novelty and difficulty of the question presented;

(2) the likelihood that acceptance of employment precluded other employment;

(3) the fee customarily charged in the locality for similar services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer performing the services; and

(8) whether the fee is fixed or contingent.

Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).

3.0 ARGUMENT

3.1 The Nonsuit Gambit Did Not Save PTK

A defendant's motion to dismiss that affords more relief than a nonsuit constitutes a claim for affirmative relief that survives nonsuit. Tex. R. Civ. P. 162; *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 300-01 (Tex. 2013); *Villafani v. Trejo*, 251 S.W.3d 468, 468-69 (Tex. 2008); *Klein v. Dooley*, 949 S.W.2d 307, 308 (Tex. 1997). Texas Courts universally hold that a nonsuit does not relieve the Plaintiff of the consequences of a TCPA motion.

Ms. Marek remains entitled to relief under the TCPA. *Rauhauser v. McGibney*, 508 S.W.3d 377, 381-382 (Tex. Ct. App. 2014) (reversed on other grounds). "A motion to dismiss under the TCPA 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.); *Abatecola v. 2 Savages Concrete Pumping, LLC*, No.

14-17-00678-CV, 2018 Tex. App. LEXIS 4653, *36 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)*; Diogu Law Firm PLLC v. Melanson*, No. 14-18-01053-CV, 2020 Tex. App. LEXIS 8260, *21 (Tex. App.—Houston [14th Dist.] pet. denied). This is consistent with other states' Anti-SLAPP laws. *See* RCW 4.105.060 (Washington law providing that dismissing without prejudice entitles moving party to ruling on Anti-SLAPP); NJ Rev Stat § 2A:53A-55(b) (New Jersey law with same provision); *eCash Techs., Inc. v. Guagliardo*, 210 F. Supp. 2d 1138, 1154-55 (C.D. Cal. Oct. 30, 2000) (noting that attempt to voluntarily dismiss claims after filing of Anti-SLAPP motion did not affect moving party's entitlement to attorneys' fees).

If PTK intended to avoid fee liability by filing its nonsuit, it was mistaken. Marek is still entitled to TCPA relief in the form of costs, fees, and sanctions. Such an award should include *all* costs and fees incurred in responding to this suit, not just those incurred directly in connection with the TCPA motion. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1) (entitling prevailing movant to an award of fees "incurred in defending against the legal action"); *Centurion Logistics LLC v. Brenner*, No. 05-23-00578-CV, 2024 Tex. App. LEXIS 9139, *55-56 (Tex. App.—Dallas Dec. 30, 2024, pet. filed) (no basis to exclude from TCPA fee award time spent on motion to transfer and motion for summary judgment that was never ruled on).[3]

3.2 The Requested Fees are Reasonable Under the *Arthur Andersen* Factors

Randazza Legal Group, PLLC ("RLG") regularly litigates Anti-SLAPP cases and has a history of having its rates upheld. *See, e.g.*, *Cheng v. Guo*, No. A-18-779172-C (Nev. Eighth Jud. Dist. Ct. June 5, 2020) (awarding hourly rates of $800 for Randazza and $550 for other partners); *Las Vegas Resort Holdings, LLC v. Roeben*, No. A-20-819171-C (Nev. Eighth Jud. Dist. Ct., Dec. 30, 2020) (same); *iQTAXX, LLC v. Boling*, No. A-15-728426-C, 2016 BL 154334 (Nev. Eighth Jud. Dist. Ct. May 10, 2016) (approving hourly rates of $650 for Randazza and $500 for other

[3] The TCPA is not the only Anti-SLAPP law that allows recovery of all fees spent on defense. *See Smith v. Zilverberg*, 481 P.3d 1222, 1231 (Nev. 2021) (prevailing Anti-SLAPP movant is entitled to an award of **all** fees incurred in defending against an action).

partners). The Court should note that these rates are, at their newest, five years old. Given inflation, from $800 per hour to $1,000 per hour is a reasonable raise over five years.

The compensable hours recorded by RLG's attorneys and paralegals, along with their hourly rates and amounts billed, are as follows:[4]

Timekeeper	Hours	Hourly Rate	Amount Sought[5]
Marc J. Randazza	75.4	$1,000	$65,500.00
Ronald D. Green	36.7	$750	$23,250.00
Alex J. Shepard	28.8	$750	$20,275.00
Cassidy Curran	17.5	$175	$2,870.00
Alison Gregoire	2.6	$175	$455.00
Totals	**161**		**$112,350.00**

Randazza Dec. at ¶ 9. Marek's local counsel, David Griffin, charged $3,000. *Id*. at ¶ 11. Marek additionally incurred $2,796.63 in costs. *Id*. at ¶ 12.

To limit additional briefing on fees incurred after the filing of this motion, RLG predicts it will incur an additional $20,000 in fees in responding to PTK's opposition to this motion, preparing a reply brief, and arguing the motion. *Id*. at ¶ 15. If PTK does not oppose this motion, however, then there would of course be no need to incur such fees.

3.2.1 Time and Labor Required

The work in this case has primarily consisted of opposing PTK's motion for a temporary injunction and filing the TCPA motion, both of which were necessary and both of which required a substantial amount of work to be performed in a very short period of time. The work related to both motions required thorough factual investigation, providing supporting evidence and declarations, and substantial briefing on First Amendment case law generally and the particulars

[4] Other attorneys and paralegals worked on this matter, but their time has been excluded from this Motion as a matter of billing discipline.

[5] The amount sought for each timekeeper is not simply a matter of multiplying the hourly rates by the hours worked. As shown in the billing records attached as **Exhibit 5**, some time entries were either written off or charged at a reduced rate.

of the TCPA. As TCPA motions require both the moving and responding parties to provide evidence supporting their claims and defenses, it is no exaggeration to say that the amount of work involved in preparing one is comparable to a motion for summary judgment. *See* Frazier v. Maxwell, No. 02-23-00103-CV, 2025 Tex. App. LEXIS 891, *18-21 (Tex. App.—Fort Worth Feb. 13, 2025, no pet. h.) (noting similarities between TCPA procedure and summary judgment motions). Given the amount of work that necessarily went into this motion briefing and the hearing on the temporary injunction motion, the requested fees are reasonable.

3.2.2 Likelihood of Preclusion of Other Employment

Marek's counsel is a small law firm that can only take a limited number of cases. Randazza Dec. at ¶ 16. Taking this case precluded the firm from accepting other work which would have filled the gap. *Id*. This factor thus weighs in favor of the reasonableness of the requested fee award.

3.2.3 Fee Customarily Charged

The Adjusted Laffey Matrix, attached as **Exhibit 6**,[6] provides some guidance as to customary rates for attorneys of comparable experience to Defendants' counsel. Mr. Randazza bills at a rate of $1,000 per hour and has 23 years of experience as an attorney. Randazza Dec. at ¶¶ 2, 9. According to the Adjusted Laffey Matrix, an attorney of Mr. Randazza's experience is able to bill at a rate of $1,141 per hour, which is higher than his hourly rate. **Exhibit 6**.

[6] The Laffey Matrix has been used by courts as a guidepost in determining the reasonableness of attorneys' fees. *See, e.g., Vasquez v. Libre by Nexus, Inc.*, No. 17-cv-00755 CW, 2022 U.S. Dist. LEXIS 180791, at *46 n.11 (N.D. Cal. Oct. 3, 2022) ("The Laffey Matrix is 'a widely recognized compilation of attorney and paralegal rates based on various levels of experience' upon which courts, including those in this district, routinely rely to determine the reasonableness of attorney hourly rates.") (quoting *Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc*., 731 F. Supp. 2d 937, 948 (N.D. Cal. 2010)); *Rivera v. Rivera*, No. 5:10-CV-01345-LHK, 2011 U.S. Dist. LEXIS 93704, at *5-6 (N.D. Cal. Aug. 22, 2011); *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269, *20 (N.D. Cal. Mar. 28, 2007) (noting that "[o]ne reliable source for rates that vary by experience levels is the *Laffey* matrix used in the District of Columbia"); *In re HPL tech., Inc., Secs. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005) (finding that Laffey Matrix is a "well-established objective source for rates that vary by experience"); *Recouvreur v. Carreon*, 940 F. Supp. 2d 1063, 1070 (N.D. Cal. 2013). However, the Fifth Circuit has not adopted it and the Southern District of Texas has explicitly rejected it. *Novick v. Shipcom Wireless, Inc.*, No. 4:16-CV-00730, 2018 U.S. Dist. LEXIS 198446, *4-5 (S.D. Tex. 2018).

Attorney Ronald D. Green's customary hourly rate is $750 per hour and he has 24 years of experience as an attorney. Randazza Dec. at ¶¶ 9, 29. According to the Adjusted Laffey matrix, an attorney of Mr. Green's experience is able to bill at a rate of $1,141 per hour, which is significantly higher than his hourly rate. **Exhibit 6**.

Attorney Alex J. Shepard's customary hourly rate is $750 per hour and he has over ten years of experience as an attorney. Randazza Dec. at ¶¶ 9, 30. According to the Adjusted Laffey matrix, an attorney of Mr. Shepard's experience is able to bill at a rate of $839 per hour, which is higher than his hourly rate. **Exhibit 6**.

If the Court is disinclined to use the Laffey Matrix, these billing rates are in line with hourly rates approved of by other Texas courts. *See ABD Interests, LLC, v. Wallace,* Cause No. 2017-35441 (334th Dist. Ct., Harris County, Tex. Dec. 12, 2017) (awarding attorney's fees at rates of $1,100 per hour and $650 per hour), *attorney fee award affirmed on appeal, ABD Interests, LLC, v. Wallace,* 606 S.W.3d 413 (Tex. App. – Houston [1st Dist.] 2020, pet. filed); *Granbury SNF LLC v. Jackson*, No. 02-24-00248-CV, 2025 Tex. App. LEXIS 1711, *38-39 (Tex. App.—Fort Worth Mar. 13, 2025, no pet. h.) (finding hourly rate of $1,000 reasonable in contingent appellate case); *Baltasar D. Cruz v. James Van Sickle, et al*., Cause No. DC-12-09275 (160th Dist. Ct., Dallas County, Tex. March 22, 2013), *reversed on other grounds* (approving rate of $835 for partner). In 2023, the *Texas Lawbook* reported that Texas lawyers were billing up to $2,000 per hour for some specialties. Mark Curriden, "Texas Lawyers hit $2,000 an Hour," THE TEXAS LAWBOOK (Sept. 25, 2023).[7] As far back as 2012, some Texas lawyers were billing $1,000 per hour. Mark Curriden, "Texas Lawyers Charging $1,000 an Hour Rare, but Not Much Longer," THE TEXAS LAWBOOK (Mar. 1, 2012).[8] In 2017, the *Houston Chronicle* reported that rates were rising to $1,000 per hour.

[7] Available at: https://texaslawbook.net/texas-lawyers-hit-2000-an-hour/ (archived version at https://archive.is/lOGRp) (last accessed Apr. 16, 2025).

[8] Available at: https://texaslawbook.net/texas-lawyers-charging-1000-an-hour-rare-but-not-much-longer/ (last accessed Apr. 16, 2025).

Mark Curriden, "Texas legal rates soar as national firms rush in," THE HOUSTON CHRONICLE (Mar. 24, 2017).[9]

However, an accurate measure of what fees are reasonable for *this case* is to examine both sides' fees in similar cases. PTK's Counsel, Jonathan Polak, filed a fee motion under Nevada's Anti-SLAPP law in *Banerjee v. Continental Incorporated, Inc.*, No. 2:17-cv-00466-APG-GWF, Dkt. No. 60 (D. Nev. Feb. 27, 2018). There, he sought an overall fee award of **$143,760**. This reflected approximately 350 hours of attorney time, though he voluntarily disclaimed 125 hours of additional time on the erroneous belief that Nevada's Anti-SLAPP law only allowed recovery of fees directly connected to an Anti-SLAPP motion. With all respect to Judge Gordon's position in that case, he was wrong and Polak was entitled to all of his fees. *See Zilverberg*, 481 P.3d at 1231. Texas follows Nevada in this respect. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1) (entitling prevailing movant to an award of fees "incurred in defending against the legal action"); *Brenner*, 2024 Tex. App. LEXIS 9139 at *55-56. But suffice to say that RLG's bill so far is much less than what PTK's counsel has charged for less work at a lower rate. Here, RLG spent 161 hours on both an opposition to a motion for an injunction, oral argument, an Anti-SLAPP motion, and this instant motion. That is much more work in 161 hours than the large firm billed for, doing less work.

To pre-emptively disarm any claims that the hourly rates sought here are unreasonable, Mr. Polak and Tracy Betz, the very attorneys in this case, representing the very plaintiff in this case, sought an award of fees in *PTK v. HonorSociety.org, Inc.*, No. 3:22-cv-00208-CWR-RPM, Dkt. No. 274 (S.D. Miss. Oct. 14, 2024). In that motion, they represented the same client in a related case, where they represented a customary hourly rate of $910. They claimed there to have racked up over $400,000 in fees on two preliminary injunction motions and over $60,000 on a contempt motion. The records of these fee motions, with documents unrelated to hours or amounts billed removed, are attached as **Exhibit 7**. RLG's billing represents greater billing efficiency and lower costs, despite marginally higher hourly rates. Certainly Randazza may reasonably charge 10%

[9] Available at: https://www.houstonchronicle.com/business/article/Texas-legal-rates-soar-as-national-firms-rush-in-11025525.php (last accessed Apr. 16, 2025).

more than Mr. Polak where billing records reflect nearly twice the work produced in half the amount of time, as the prevailing attorney. And if two injunction motions plus a motion for contempt is $460,000 from PTK's counsel, the billing here is not just reasonable, but a bargain.

3.2.4 Amount Involved and Results Obtained

The results were resoundingly in Marek's favor. Following a TRO granted *ex parte* due to PTK's misrepresentations, Marek defeated PTK's attempt at censoring her speech, the principal (and perhaps only) goal of this litigation. PTK's arguments were so thoroughly trounced that they almost immediately surrendered in the face of the well-drafted Anti-SLAPP motion. Marek filed her Anti-SLAPP motion seeking a quick end to this case. Mission accomplished. This factor weighs heavily in favor of the reasonableness of the requested fees.

3.2.5 Time Limitations Imposed by the Client or Circumstances

There were time restraints in this matter that required RLG to perform a lot of work in a few days. PTK opened this case on March 26, 2025, by filing its Petition and *ex parte* motion for a TRO. RLG was retained the following day (Randazza Dec. at ¶ 17), and immediately had to begin the substantial work of opposing PTK's motion for a temporary injunction. RLG also, within the same time frame, had to draft and file a TCPA motion. Given that a TCPA motion involves roughly the amount of work required for a summary judgment motion, RLG had to perform the majority of work that would be required in a case before trial, minus discovery, in just over one week. This factor weighs heavily in favor of the reasonableness of the requested fees.

3.2.6 Nature and Length of Relationship with Client

RLG does not have a pre-existing relationship with Marek; this case is the first time the firm has represented her. Randazza Dec. at ¶ 18. To the extent this factor is relevant, it weighs in favor of the reasonableness of the requested fees, as RLG had to spend some time becoming familiar with Marek and her ongoing dispute with PTK that pre-dates this case. *Id*.

3.2.7 Experience, Reputation, and Ability of the Lawyer

Marc Randazza's hourly rate is justified, as he is an experienced attorney who specializes in First Amendment litigation and is licensed to practice in the states of Nevada, California,

Arizona, Florida, and Massachusetts. *See* Randazza Dec. at ¶ 20. Mr. Randazza was instrumental in the passage of Nevada's 2013 Anti-SLAPP legislation and played a significant role in shaping the statute's 2015 amendments. *See id*. at ¶ 21; *see also* Senate Committee on Judiciary Hearing on Nev. SB 286 (May 6, 2013), attached as **Exhibit 8**. When Nevada's Anti-SLAPP statute was amended in 2015, Mr. Randazza successfully led the lobbying effort to save the statute from repeal and was instrumental in crafting the language in the statute today. *See* Randazza Dec. at ¶ 22; *see also* Minutes of Assembly Committee on Judiciary Hearing on SB 444, April 24, 2015, attached as **Exhibit 9**, at 35-38.

Mr. Randazza is a nationally recognized expert on Anti-SLAPP legislation, defamation, and free speech issues, and has assisted the legislatures in in Nevada, Pennsylvania, Ohio, New York, Massachusetts, New Hampshire, and Wyoming on Anti-SLAPP legislation. Randazza Dec. at ¶ 23. He is the author of Nevada Lawyer articles on the Anti-SLAPP statute. *See* Marc Randazza, "Nevada's New Anti-SLAPP Law: The Silver State Sets the Gold Standard," NEVADA LAWYER (Oct. 2013), attached as **Exhibit 10**; Marc Randazza, "Nevada's Anti-SLAPP Law Update," NEVADA LAWYER (Sept. 2016) attached as **Exhibit 11**. He has also published numerous other law review articles on free speech issues. *See curriculum vitae* of Marc Randazza, attached as **Exhibit 12**.

Randazza has been a commentator for both Fox News and CNN on Free Speech issues. *See* Randazza Dec. at ¶ 24. Randazza holds a JD from Georgetown University Law Center, a Master's in Mass Communications from the University of Florida (with a media/First Amendment law focus), and an international degree in the form of an LL.M. from the University of Turin, Italy, where he wrote and published a thesis on freedom of expression issues. *See* **Exhibit 12**; *see also* Marc J. Randazza, "Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights," 16 Nev. L.J., 107 (Jan. 15, 2016). Randazza has been a practicing attorney for over 23 years. *See* Randazza Dec. at ¶ 2. Randazza has taught First Amendment law at the law school level. *See* **Exhibit 12**. And, he gives presentations to attorneys in CLE courses on how to handle Anti-SLAPP litigation and publishes on this issue as well. *See id.* Former senator

Justin Jones described Mr. Randazza as "one of the preeminent experts on the issue" of Anti-SLAPP litigation. *See* **Exhibit 9** at 3.

Experienced litigators within and without Texas, including the president of the First Amendment Lawyers Association ("FALA"), are familiar with Randazza's ability and experience and have testified that his hourly rate here is justified, particularly in the absence of local litigators with comparable experience in First Amendment cases. *See* Declaration of Zach Greenberg ("Greenberg Dec."), attached as **Exhibit 13**; Declaration of Mark Bennett ("Bennett Dec."), attached as **Exhibit 14**.

Attorney Ronald D. Green has a JD from University of Pittsburgh School of Law and is a Nevada-licensed attorney with over 24 years of litigation experience. Randazza Dec. at ¶ 29. He has several years of experience with defamation and First Amendment cases. *Id*.

Attorney Alex J. Shepard earned his JD from Washington University School of Law, is licensed to practice in Nevada, California, and Washington, and has over 10 years of experience, having spent almost his entire career working on First Amendment, defamation, and Anti-SLAPP cases. Randazza Dec. at ¶ 30. He has also been interviewed on issues of defamation and Anti-SLAPP law. *Id*.; Spencer Cornelia, "I'm Being Sued By a Fake Guru for $2 MILLION," Youtube (May 15, 2023).[10]

Cassidy Curran and Ali Gregoire are paralegals with varying experience. Randazza Dec. at ¶¶ 31-32.

The experience, skill, and ability of Marek's counsel directly led to a resounding success for Mark, namely, denial of PTK's attempt to obtain a temporary injunction, PTK's primary goal in filing suit, and nonsuit immediately thereafter. Accordingly, the experience, reputation, and ability of Mark's attorneys weigh in favor of the reasonableness of the requested fees.

[10] Available at: https://www.youtube.com/watch?v=EkrwBYl2hiI

3.3 The Fee Arrangement is Irrelevant

Defendant Marek does not have the funds necessary to hire her counsel at their customary hourly rates. Instead, fundraising for her defense. Randazza Dec. at ¶ 19. In negotiations, PTK took the position that the amount fundraised should offset the amount paid by PTK. Incorrect. The issue of third party payors has been addressed by multiple courts, all holding that the purpose of Anti-SLAPP laws would be frustrated by reductions in fee awards due to the existence of third party payors.

With respect to Anti-SLAPP jurisprudence across the country the majority view is that the existence of third-party payors has no influence on anti-slapp fee awards. *See, e.g.*, *Macias v. Hartwell*, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222, 226 (Ct. App. 1997) ("Appellant cites no authority, and we have found none, that a defendant who successfully brings an anti-SLAPP motion is barred from recovering fees if the fees were paid by a third party"); *Cornelius v. Chronicle, Inc.*, 209 Vt. 405, 406-407 (2019) (Anti-SLAPP laws do not "limit recovery to those fees that are not reimbursed by insurance. The plain language of the statute does not support this construction. The statute contains no provision limiting the recovery of attorney's fees to those amounts that were incurred directly by the defendant as opposed to by a third party. Moreover, this construction is at odds with the remedial purpose of the statute"); *Polay v. McMahon*, 468 Mass. 379, 10 N.E.3d 1122 (Mass. 2014) (rejected SLAPP plaintiff's argument that fees should be reduced due to payment by insurance reasoning that the fee-shifting provision "furthers the statute's underlying purposes of broadly protecting petitioning activity and promoting resolution of 'SLAPP' litigation 'quickly with minimum cost'"); *Poulard v. Lauth*, 793 N.E.2d 1120, 1124-25 (Ind. Ct. App. 2003) ("We believe the legislative purpose of the attorney's fees provision of the anti-SLAPP statute is not advanced by allowing the award of attorney's fees to only those parties who have directly incurred that expense and are obliged to pay it, and by denying the award of fees to those litigants whose fees are paid by insurers or other non-parties").

Texas appellate courts have not explicitly addressed this issue in the SLAPP context. However, it is a certainty that if it ever were to reach a Texas appellate court, that court would not deviate from Texas's sister states, given the statutory construction of the TCPA and analogous

Texas case law. As with all other states' Anti-SLAPP laws, the TCPA contains no limitation on recovery if the fees are partially paid by donations, insurers, employers, or any other third parties.

With respect to Texas case law on fees and donations or other third party payors like insurers, the law is clear: There is no "donor offset" in Texas. In *Aviles v. Aguirre*, the Texas Supreme Court held that a defendant "incurred" the fees expended on his defense despite the fact that the fees were paid by an insurer. 292 S.W.3d 648, 649 (Tex. 2009). In *McRay v. Dow Golub Remels & Gilbreath PLLC*, No. 01-21-00032-CV, 2022 Tex. App. LEXIS 9569, *21-23 (Tex. App.--Houston [1st Dist.] Dec. 29, 2022), the Texas Court of Appeals invoked *Aviles* in an analogous case, again discussing insurance. "Under *Aviles*, whether Dow Golub paid its counsel's invoices directly or its insurer paid them does not alter the fact that Dow Golub incurred the fees." *Id*. The Texas Court of Appeals also applied the "collateral source rule" in rejecting a party's attempt to reduce their own liability on the basis that their adversary was insured. "We further note that McRay's effort to reduce its own liability by the amount of Dow Golub's insurance benefits is barred by the collateral source rule which holds that a wrongdoer cannot offset its liability by insurance benefits independently procured by the injured party." *Id*. (citing *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999); *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980)). The Court held "McRay cannot rely on Dow Golub's separate decision to 'purchase[] insurance' as a basis to avoid that liability." *Id*. (citing *Graco, Inc. v. CRC, Inc. of Tex.*, 47 S.W.3d 742, 744-46 (Tex. App.—Dallas 2001, pet. denied). If a party deserves a fee award, Texas courts appear to universally hold that payment by a third party does not provide any basis to exclude those payments from the deserving party's fee award. *Id*.

Accordingly, although Marek does not have insurance, she did make a decision to seek donations to help defray the costs of her defense. Just like seeking insurance, that is for her benefit–not for the benefit of PTK. And while it should be irrelevant to the legal analysis, it is at least worth mentioning that should Marek recover all of her fees in this case, money she has fundraised will still be needed to fight PTK–because PTK and Marek are still involved in collateral legal proceedings in the U.S. District Court for the Southern District of Mississippi. Marek requires

counsel in that matter, but again cannot afford it. Every penny recovered will be spent on legal fees fending off PTK's continued bullying.

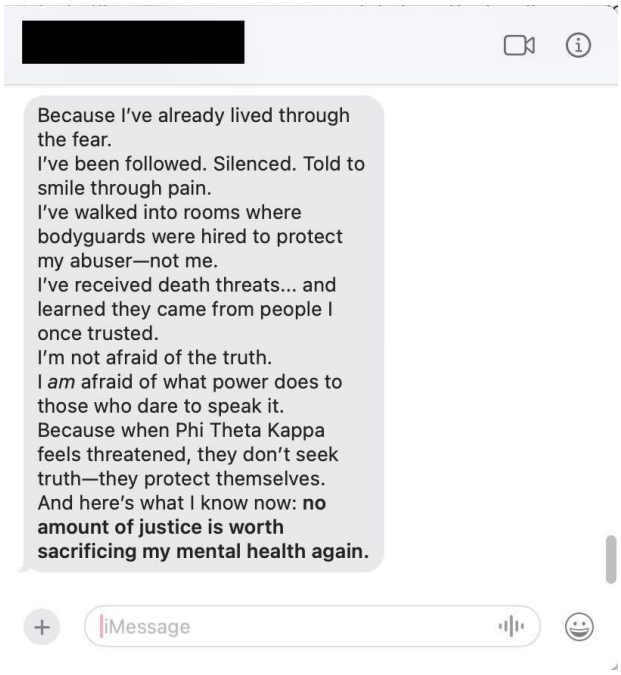
3.4 Sanctions on Plaintiff in Excess of Fees are Warranted

Texas law requires an award of all fees expended in this proceeding. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1) (entitling prevailing movant to an award of fees "incurred in defending against the legal action"); *Brenner*, 2024 Tex. App. LEXIS 9139 at *55-56 (TCPA fee award applied to all motions and work in case). This is consistent with other states' Anti-SLAPP laws. *See, e.g*, *Zilverberg*, 481 P.3d at 1231 (prevailing Anti-SLAPP party is entitled to an award of **all** fees incurred in defending against an action). However, the TCPA also provides for discretionary sanctions, which are warranted here. Tex. Civ. Prac. & Rem. Code § 27.009 (permitting court to award sanctions "as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter").

3.4.1 Censorship is a Pattern With PTK and Deterrence is Necessary

In determining whether to award a sanction, and how much it should be, the Court should consider whether the plaintiff has filed similar actions in the past. *1st & Trinity Super Majority, LLC v. Milligan*, 657 S.W.3d 349, 379 (Tex. App.—El Paso 2022, no pet.) (collecting cases). PTK has engaged in a campaign of censorship, not just in court but through baseless threats as well.

Not only has PTK harassed Marek to try and silence her, but uses censorship as a cornerstone of its business model. Marek has reached out to other current and former members of PTK in an attempt to show how it is not the reliable "honor society" it purports to be. Declaration of Toni Marek ("Marek Dec."), attached as **Exhibit 15**, at ¶ 17. These members universally refused to publicly speak out against PTK, not because they disagree that it has serious problems, but because they are *terrified* of retaliation from it, particularly its President and CEO, Dr. Lynn Tincher-Ladner, who is a plaintiff in the Southern District of Mississippi case. *Id*. Below are a few examples of people Marek reached out to, but who refused to go on record due to fear of retaliation:



Id. at *Exhibit I*. When former senior staffer Wendy Flores tried to expose workplace toxicity, financial irregularities, and unethical conduct at PTK, PTK's counsel threatened her with litigation. *Id*. at ¶ 15 & *Exhibit G*.

With respect to Toni Marek herself, PTK has engaged in multiple efforts to shut down her speech, including quite recently. *Id*. at ¶ 10 & *Exhibit A* (threatening litigation over statements made regarding Marek's resignation from PTK); *id*. at ¶ 11 & *Exhibits B-C* (threatening litigation over allegedly defamatory statements, with no reference to allegedly confidential or privileged information); *id*. at ¶ 12 & *Exhibit D* (requesting that colleges blacklist Marek's email accounts); *id*. at ¶ 13 & *Exhibit E* (sending email to students attempting to discredit Marek); *id*. at ¶ 14 & *Exhibit F* (same, and additionally threatening litigation over information Marek obtained through public records requests not mentioned in PTK's Petition here); *id*. at ¶ 16 & *Exhibit H* (sent after PTK filed its Petition, and threatening litigation over allegedly false statements about PTK). For over a decade, PTK has threatened Marek with litigation based on her criticism of PTK, based on statements completely unrelated to issues of confidentiality or privilege. Meanwhile, PTK argued

at the hearing *that this was their first time trying to silence Marek herself*.[12] The mere fact that they have been engaged in a pattern of censorship against her should be enough to warrant sanctions. This departure from candor at oral argument should provide additional grounds for the necessity of sanctions. However, PTK is not only engaged in a campaign of censorship against Marek, but against anyone who might speak out against abuses and problems involved in the organization. Marek Dec. at ¶¶ 10-18.

With respect to litigation, 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. However, unfortunately, for the defendant in that case, there is no Anti-Slapp Law in the federal court in Mississippi. Nevertheless, the Fifth Circuit recently ruled that a preliminary injunction PTK obtained against a competing honor society constituted a grossly overbroad prior restraint on protected speech. *See Honorsociety.Org, Inc.*, 2025 U.S. App. LEXIS 8090.[13]

PTK has a pattern of intimidation against speech and seeking unwarranted injunctive relief against protected speech, and thus sanctions are necessary to deter it from doing so in the future.

3.4.2 The TRO Process Was Independently Sanctionable

PTK not only filed a frivolous claim in violation of the TCPA, but it also wrongfully applied for and was issued an *ex parte* temporary restraining order (the "TRO") that acted as a prior restraint. Even if it had a shred of validity, it was clearly presented in bad faith, in violation of PTK's duty of candor to the tribunal.[14] This TRO was written by Plaintiff. But in the *ex parte* proceeding, Plaintiff failed to disclose contrary authority and contrary facts. This was wrong, and

[12] **Exhibit 2** at 11:2-4. Marek's Declaration and the exhibits thereto demonstrate that this argument, like others made that day, was not entirely candid.

[13] As PTK notes in its Petition, Marek was involved in this litigation, which gave her access to the documents that formed the alleged basis of PTK's claims in this action. Pet. at ¶¶ 1, 10.

[14] Marek specifically waives any argument that Attorney Cullen should be blamed here. It does not appear that there is any reason to believe that Attorney Cullen authored the brief, nor did he clearly have possession of the contrary authority discussed above. The presumption is that PTK itself drove the litigation, and likely did not share the contrary information with any of its attorneys.

the costs and fees incurred because PTK did wrong should be visited upon PTK, not Ms. Marek, who simply wanted to live her life as a free born American.

A party seeking an ex parte temporary restraining order has a *duty* to disclose all material facts and contrary legal authority to the court. This duty stems from the ethical obligations of candor toward the tribunal and the unique nature of *ex parte* proceedings, where the opposing party is not present to provide a counterargument. Plaintiff did not abide this duty – it wanted a quick TRO so that it could suppress the publication of a book so that its national convention could go off without the embarrassment that might come from the issues the book would disclose.

In its zeal to have a secret proceeding, with no notice to Defendant, for no other purpose than rank censorship, PTK declined to disclose key material facts and declined to share obviously controlling authority to the Court. It then presented a pre-written order to the Court which, not having the benefit of this required disclosure, signed it – necessitating emergency measures on Defendant's part in order to restore her Constitutional rights. The Court was misled into signing the TRO, which it clearly would not have done had it been exposed to even a weakly-presented helping of the contrary facts and law.

Plaintiff should not be able to evade any of the costs and fees here, but should be sanctioned, as authorized by the TCPA, to disincentivize it and other parties from conducting themselves in a similar manner. Otherwise, plaintiffs in similar situations will actually be *incentivized* to comport themselves similarly. After all, PTK "won" here despite losing. It had its national conference on April 3, 2025, where Marek intended to release her book. While PTK claimed this was merely coincidental, that claim's credibility should be evaluated under the light that PTK has shone upon itself with its lack of factual and legal candor. However, let us be generous and take PTK at its tarnished word – even if it was merely coincidental, the incentive has been laid out for other predatory plaintiffs to snack on. If PTK is allowed to rush into court, violate its duty of candor in an *ex parte* proceeding, to suppress publication of a book until (coincidentally) the event it wants to go off without embarrassment is over, then why wouldn't companies all across Texas (at least) do the same? If a damaging news article is to come out the day before an earnings

report, get an ex parte TRO to keep the article off the front page. Why wouldn't corrupt politicians do the same before an election? The negative examples are many. The solution is solitary – let it be known that the price of such conduct shall be visited upon the wrongdoer, not the innocent. This justifies sanctions, in addition to the TCPA mandatory imposition of prevailing party fees.

3.4.3 Sanctions Should be Deterrent-Sized

The sanctions should be significant. The amount of sanctions under the TCPA is reviewed for abuse of discretion, and a trial court need not consider any specific factors in fashioning an amount; the sole required consideration is an amount large enough "to deter a party from engaging in similar conduct . . . the mere fact that an award is large does not in itself render an award excessive." *Milligan*, 657 S.W.3d at 380. The trial court may consider the effect of a sanction on the offender, including the offender's ability to pay. *Id*. at 380-81 (upholding sanctions award of $150,000). While PTK may not be a multinational corporation, it has funds to spare that could be used to satisfy a meaningful sanction. PTK advertises on its website that the organization itself distributes over $1 million annually in competitive scholarships, to say nothing of millions of dollars in partner transfer scholarships, strongly suggesting it has adequate funds to pay such a sanction. "How our Scholarships Work," Phi Theta Kappa Honor Society, attached as **Exhibit 16**.[15] The Court should thus impose a sanction equal to triple the attorneys' fees and costs requested here, or $355,050.00.

4.0 REQUEST FOR RELIEF

WHEREFORE, Defendant respectfully requests that this Court:

A. Award Toni Marek $118,350.00 in attorneys' fees;

B. Award Toni Marek $2,796.63 in costs;

C. Impose a sanction of $355,050.00 on PTK, to be paid to Toni Marek; and,

D. Award Defendant such other relief as the Court deems just and proper.

[15] Available at: https://www.ptk.org/scholarships/how-our-scholarships-work/ (last accessed Apr. 16, 2025).

Dated: April 18, 2025.

Respectfully submitted,

/s/ Marc J. Randazza

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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: April 18, 2025

/s/ Marc J. Randazza
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NO. 25-03-92211-D

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

NOTICE OF ERRATA

Defendant's counsel is mindful of his obligations to correct errors, and does so here.[1] The Defendant erred in citing the FALA brief as the source of the contrary authority that PTK should have been aware of. (*See* Motion for Fees at P.3).

That contrary authority was *actually* contained in briefing and an order in Phi Theta Kappa's Mississippi censorship case. *Phi Theta Kappa Honor Soc'y v. Honorsociety.Org, Inc.*, No. 3:22-CV-208-CWR-RPM (ECF 241 at 9) and (ECF 420 at 23).

An Order in that case denied PTK's attempt at securing a prior restraint and also cited the relevant supreme court case law. *Phi Theta Kappa Honor Soc'y v. HonorSociety.Org, Inc*., No. 3:22-CV-208-CWR-RPM, 2024 U.S. Dist. LEXIS 150396, at *29 (S.D. Miss. Aug. 22, 2024);

While all those sources contained the contrary Supreme Court authority, which PTK should have informed this court of, none actually cite *Kinney v. Barnes*. Accordingly, the timeline of PTK's actual knowledge of contrary Supreme Court authority remains intact. PTK was well aware of relevant Supreme Court case law.

However, in contrast, the timeline of PTK's actual knowledge of *Kinney v. Barnes* is not conclusively proven, and any arguments supporting that sub-point in Marek's briefing are

[1] The error was entirely Marc Randazza's error, and David Griffin had no part in the error.

withdrawn. We simply cannot prove beyond a shadow of a doubt that PTK knowingly chose to fail to refer to *Kinney v. Barnes* on March 26, when it applied for the TRO.

Nevertheless, Marek stands firm on her arguments that PTK had actual knowledge of controlling contrary Supreme Court authority, and PTK would seemingly need to engage in willful blindness to avoid knowing about *Kinney*. It certainly knew about *Kinney* when Defendant filed her opposition to the injunction on April 4, yet did not see fit to take responsibility and stipulate to dissolve the injunction, instead running up the bill further. Of course, even if *Kinney* never existed, *New York Times Co. v. United States*,[2] *Organization for a Better Austin v. Keefe*,[3] and *Bantam Books, Inc. v. Sullivan*[4] are what *Kinney* relies upon. 443 S.W.3d at 90-91, 94 & n. 3. Thus, to seek a TRO against speech without so much as citing, mentioning, or trying to distinguish that well-known series of cases shows a willful disregard for the obligations of a party seeking an ex parte TRO.

While the error is immaterial, Defendant's counsel will not let it stand uncorrected. Counsel takes responsibility for the error; we write a lot of briefs citing *Kinney*, and the memories sometimes blur as to which one relied on it. Dated: April 21, 2025 and respectfully submitted.

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[2] 403 U.S. 713 (1971).
[3] 402 U.S. 415 (1971).
[4] 372 U.S. 58 (1963).

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: April 21, 2025

/s/ Marc J. Randazza
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