

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 MOTION TO DISMISS UNDER
THE TEXAS CITIZENS PARTICIPATION ACT**

TO THE HONORABLE JUDGE OF THIS COURT:

Defendant Toni Marek moves under the Texas Citizens Participation Act, Chapter 27 of the Texas Civil Practice and Remedies Code (“TCPA”), to dismiss Plaintiff’s lawsuit and for reasonable attorney’s fees, costs, and deterrence sanctions.

1.0 INTRODUCTION

On March 26, 2025, Plaintiff Phi Theta Kappa (“PTK”) filed this lawsuit for “declaratory relief,” but what it really wanted was rank censorship. PTK petitioned this Court for an *ex parte* temporary restraining order (“TRO”) against Defendant Toni Marek—prohibiting her from publishing a book about PTK and continuing that prior restraint until she hands her manuscript over to PTK and allows PTK to tell her what she is and is not permitted to say about them. The lawsuit itself simply asks this Court to declare that Ms. Marek is not allowed to “retain, publish, or disseminate” information that PTK, in its sole discretion, claims is confidential. *See* Petition and Request for Immediate TRO, ¶ A.

This lawsuit’s entire purpose is to impose a prior restraint and to suppress Ms. Marek’s rights to free speech and expression under the First Amendment to the United States

Constitution and Article I, § 8 of the Texas Constitution. Ms. Marek has already asked the Court to dissolve the injunction, but this entire lawsuit should be dismissed pursuant to the TCPA, which forbids filing a lawsuit in Texas targeting the defendant's expressive rights.

In addition to dismissal of this case, Defendant Marek is entitled to an award of her attorneys' fees. PTK should be also sanctioned to send it, and any other censorious third parties, a message that Texas courts do not tolerate plaintiffs who file abusive lawsuits for the purpose of trampling free speech rights. Ms. Marek asks the Court to: (a) grant her TCPA motion and dismiss Plaintiffs' lawsuit against her; (b) award her reasonable attorney's fees and costs under TCPA § 27.009(a); and (c) issue written findings ordering an award of deterrence sanctions under TCPA § 27.009(a).

2.0 BACKGROUND

Plaintiff Phi Theta Kappa is an honor society for students at two-year colleges. Defendant Marek is a PTK alumna. *See* Declaration of Toni Marek ("Marek Decl."), ¶ 4.¹ She was elected as an officer in the honor society. *See id.*, ¶ 5. Her relationship with PTK soured over ten years ago at a dinner where she sat next to Rod Risley, PTK's executive director. *See id.*, ¶ 6. Risley sat between Ms. Marek and his wife, and in an act of gross moral turpitude and entitlement, he sexually assaulted Ms. Marek by reaching under the table and jamming his hand between her legs. *See id.*, ¶ 7. This was not the first time Mr. Risley had acted inappropriately towards Ms. Marek, but this was the most brazen and the most offensive example. *See id.*, ¶ 8. Marek finally had enough. However, when Ms. Marek complained, PTK retaliated by forcing *her* to resign. *See id.*, ¶ 9. She responded by filing a complaint with the EEOC, which was dismissed because she was

¹ Given that this Motion relies largely upon the same facts as the Opposition to Injunction, rather than submit a virtually identical Declaration with this Motion, Ms. Marek relies upon the Declaration that she provided in support of the Opposition. She additionally incorporates by reference the arguments made in the Opposition.

not a PTK employee. *See id.*, ¶ 10. PTK allegedly started an internal investigation, but it went nowhere. Mr. Risley’s misconduct was covered by the media and garnered negative publicity for PTK and Mr. Risley. Nevertheless, Mr. Risley was permitted to retire with an unblemished record. *See id.*, ¶¶ 11-12; Ashley Smith, “Honor Society Director Faces Allegations,” *InsideHigherEd* (March 30, 2015),² attached to the Marek Decl. as **Exhibit A**. Disillusioned by the experience, in 2015, Marek began working on a book to tell her story. *See* Marek Decl., ¶ 13.

That now censored book is: *Saving PTK: The Whistleblower’s Fight for Truth and Change*, and it is ready for release. *See id.*, ¶ 14. Marek intended to release it on April 3, 2025. *See id.* While the TRO is unconstitutional to the extent it restrained her publication by a single minute, it is wildly unconstitutional in that she cannot publish her book until PTK acts the part of the censor, and there is not even a temporal limitation on how long PTK gets to lollygag in its review. Marek will *never* provide the transcript for her book to PTK nor anyone else for approval and will not grant PTK editorial power over what she is and is not permitted to say. *See id.*, ¶ 15. No American needs to provide a book to a third party for pre-publication review, and an Order that requires one should not only be struck down but should never have been issued in the first place.

In writing her book, Marek investigated issues with PTK and its internal governance. *See id.*, ¶ 16. The information about PTK that Ms. Marek gathered has been the result of interviewing former PTK employees and members and through public records requests. *See id.*, ¶ 17. Former PTK employees and members voluntarily provided her with information. *See id.*, ¶ 18. PTK alleges that at least some of these former employees had signed non-disclosure agreements (“NDAs”) with PTK; that is not her problem. She is not a party to the NDAs, if they even exist.

² Located at: <insidehighered.com/news/2015/03/31/students-accuse-director-community-college-honor-society-sexual-harassment>.

She never discussed these NDAs with those former employees and never asked the former employees to breach. *See id.*, ¶ 19. If these NDAs exist, and someone breached them, then PTK's remedy is to take it up with the party who signed the NDA, not to enjoin the publication of a book.

As pled by PTK, Ms. Marek issued public records requests to colleges where PTK operates. *See id.*, ¶ 20. PTK alleges that Ms. Marek received PTK's confidential and privileged information in response to these requests. *See id.*, ¶ 21. However, the internal inconsistency of this claim should jump off the page and start screaming if one evaluates it with the slightest bit of scrutiny. If a document is a public record, it is neither "confidential" nor "privileged." After all, it was already in the hands of third parties. However, just for the sake of argument, even if it could be, once it was produced to her, she had every right to publish it. She never requested confidential information about PTK from anyone. *See id.*, ¶ 22. It was simply handed over to her, raising the question of whether PTK is properly asserting that it was confidential.

While this is legally irrelevant, it will be addressed: PTK takes great offense that Ms. Marek has been a witness in a lawsuit filed by PTK in the Southern District of Mississippi against HonorSociety.org for alleged trademark infringement and other related offenses. Given that Ms. Marek's issues with PTK are public and not at all secret, HonorSociety.org contacted her and asked her to provide a declaration and supporting documentation. *See id.*, ¶ 23. She received nothing from HonorSociety.org for this and was not compensated for providing information to the company. *See id.*, ¶ 24. Despite PTK's fanciful speculation, also offered without proof or evidence, neither HonorSociety.org nor anyone affiliated with it paid for or provided any funding for her book about PTK. *See id.*, ¶ 25. Nevertheless, even if she were a paid agent embedded with PTK's enemies, that would not stop her from being permitted to publish without interference.

In January 2025, Marek started a Change.org petition regarding PTK entitled “Stand Up for Students! Stop Misleading Students & Toxic Bullying by Phi Theta Kappa HQ.” *See* Change.org Petition, attached to the Marek Decl. as **Exhibit B**; ¶ 26. The petition was started to demand PTK abide by its primary directive, to serve students honestly and transparently, and as of the date of this filing, it has been signed over 17,200 times. *See id.*, ¶ 27. PTK describes this as Ms. Marek “weaponizing” information she obtained. PTK does not otherwise explain why it entitled PTK to an *ex parte* TRO. She also does not understand what “weaponizing” information means. Does this mean publishing information that PTK finds embarrassing? Marek pleads guilty as charged—PTK *should be embarrassed* that it swept her sexual assault under the rug and that it appears to be scamming students into believing that it is far more exclusive than it really is.

Ms. Marek understands that PTK has attempted to subpoena her in a separate case between PTK and a competitor, HonorSociety.org. PTK claims that she avoided service of that subpoena. Ms. Marek disputes that she avoided service. *See id.*, ¶ 28. PTK alleges that she “physically [fled] from a process server . . . in violation of Texas law.” *See* Petition and Request for Immediate TRO, ¶ 13. However, the process server never identified himself. *See* Marek Decl., ¶ 29. He was a stranger running after her moving truck and throwing paper at her. *See id.*, ¶ 30. Ms. Marek drove away from him because she had no idea who he was, what he was doing, or what was going on. *See id.* From her perspective, she was a woman fleeing from a lunatic. *See id.*

When PTK learned that Ms. Marek intended to release her book on April 3, 2025, it filed this lawsuit. PTK knew that the relief it requested was offensive to the Texas and U.S. Constitutions. So, it only asserted one claim, for declaratory relief, and did not request any damages.

In addition to the declaratory relief claim helping PTK appear reasonable to this Court, it was also PTK's only open avenue for filing a lawsuit at all. The book would not defame PTK or fall under any other theory entitling PTK to file a tort claim. Ms. Marek had no contract with PTK that it could accuse her of breaching, though it does irrelevantly accuse third parties of breaching their NDAs with PTK by giving Ms. Marek information for her book. The publication of the book would not violate any statutory or common law. So, PTK just asked the Court to declare that Ms. Marek was not allowed to possess information about PTK or publish a book about PTK without its explicit approval. Incredibly, at the TRO stage, the Court agreed. However, it provided no analysis regarding its reasoning.

PTK filed this lawsuit to punish Ms. Marek for publicly criticizing it and to attempt to quash the publication of her book. It managed to convince the Court to grant it an unconstitutional TRO that Ms. Marek is moving to dissolve and to prevent from being converted into a temporary injunction. However, this entire case should be dismissed pursuant to the TCPA, necessitating the instant Motion. In addition to dismissal, Ms. Marek respectfully requests that the Court award her reasonable attorneys' fees and deterrence sanctions pursuant to TCPA § 27.001(a).

3.0 ARGUMENT AND AUTHORITIES

This lawsuit was filed to stop Toni Marek from criticizing PTK, to prevent her book about it from being published, and to give PTK editorial control over what she is permitted to say about it. In other words, it was filed to trample Ms. Marek's right to free expression protected by the Texas and United States Constitutions.

3.1 THE TCPA FRAMEWORK

The TCPA safeguards the right to freely speak on matters of public concern. TCPA § 27.002. To that end, the TCPA provides a three-prong burden shifting process to dismiss a lawsuit targeting the defendant's exercise of expressive rights. First, the movant must show the

plaintiff's legal action "is based on or is in response to the [movant's] exercise right of free speech, the right to petition, or the right of association." *Id.* § 27.005(b).

If the movant can make this showing, the court must dismiss the legal action unless the plaintiff (i) establishes by clear and specific evidence a *prima facie* case for each essential element of the alleged claim or (ii) shows a TCPA exemption applies. *Id.* §§ 27.005(c), 27.010. Under the TCPA, "clear and specific" means "for the former, 'unambiguous,' 'sure,' or 'free from doubt' and, for the latter, 'explicit' or 'relating to a particular named thing.'" *In re Lipsky*, 460 S.W.3d 579, 597 (Tex. 2015) (citation omitted).

But even if the plaintiff meets its burden, a court still must dismiss the legal action if the movant establishes an affirmative defense or other grounds on which it is entitled to judgment as a matter of law. TCPA § 27.005(d). And if TCPA dismissal is warranted, a court must award the movant costs and attorney's fees incurred in defending against the action. *Id.* § 27.009(a)(1). A court may also, upon written findings, award sanctions "sufficient to deter the party who brought the legal action from bringing similar actions." *Id.* §§ 27.007, 27.009(a)(2).

3.2 TCPA APPLIES: PLAINTIFFS SUED MAREK FOR EXERCISING FREE SPEECH RIGHTS

The TCPA applies to any legal action that is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association. The TCPA defines legal action to mean a lawsuit, cause of action, petition, complaint, crossclaim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. Tex. Civ. Prac. & Rem. Code § 27.003(a), § 27.001(6). Plaintiff's suit is thus a legal action.

Under the TCPA, a defendant exercises her right of free speech through a "communication . . . in connection with a matter of public concern." TCPA § 27.001(3). In turn, the TCPA defines "matter of public concern" to include "a matter of political, social, or

other interest to the community.” TCPA § 27.001(7)(A)-(B). A matter of public concern is one that has “relevance beyond the interests of the parties.” *Creative Oils & Gas LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019). A communication must refer to matters of “political, social, or other concern to the community,” as opposed to purely private matters, to qualify. *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017). Matters of public concern include the “commission of crime” and “issues related to health, safety, or community well-being.” *Montano v. Cronan*, No. 09-20-00232-CV, 2021 Tex. App. LEXIS 5654, *12 (Tex. App.—Beaumont July 15, 2021, no pet.). A statement only needs to have a tangential relationship to a matter of public concern to be protected. *Id.* An action also implicates the TCPA if it is based on a defendant’s exercise of their right to petition. TCPA § 27.003(a).

In this case, Ms. Marek was writing a book that exposed how PTK swept sexual assault and sexual harassment claims under the rug and was not abiding by its stated goal of serving students. The book contained information that PTK would rather the public not know. So, it sued her, asserting a claim for declaratory as a censorship tool. PTK sought a constitutionally offensive temporary injunction prohibiting Marek’s book from being published.

The sole purposes of the suit were to stop Ms. Marek’s speech, prevent her from publishing her book, and take editorial control of the book. This is intolerable under the U.S. and Texas Constitutions, and this Court should dismiss this suit pursuant to the TCPA, which applies because Plaintiffs’ lawsuit “is based on or is in response to” Ms. Marek’s speech concerning PTK and the actions of the people that run it. TCPA § 27.001(7)(A)-(B); §27.005(b). Her book, criticizing a college honor society about its lax policy on sexual assault and misleading students, unquestionably constitutes speech on a matter of public concern. *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). Plaintiff’s misleading of students obviously implicates more than a private dispute between Plaintiff and Ms. Marek. And her allegations of sexual assault are specifically protected under the TCPA. *See 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); *Cronan*, 2021 Tex. App. LEXIS 5654 at *13-14 (finding that accusations of plaintiff being a pedophile at rowing club were on a matter of public concern).

The fact that the book has not yet been published is of no significance, as the TCPA applies to statements that have not yet been publicly communicated. *See Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509-10 (Tex. 2015) (in finding that TCPA applied to defamation claims based on hospital employee’s emails discussing a nurse anesthetist’s allegedly substandard medical services, noting that the TCPA broadly defines “communication” to include any medium, regardless of whether it takes place in a public or private form). Plaintiff’s suit is based at least in part, however, on information that Ms. Marek has already published. *See* Petition and Request for Immediate TRO, ¶¶ 10(c)-(e) & (g), 22, 25. Plaintiff’s claim is also explicitly based on at least one incident of petitioning activity, namely filing documents in response to a motion to compel Plaintiff filed. *See* Petition and Request for Immediate TRO, ¶ 15.

3.3 PLAINTIFF CANNOT MAKE A PRIMA FACIE SHOWING OF ENTITLEMENT TO DECLARATORY RELIEF

Plaintiff PTK does not have a valid cause of action and is not entitled to the relief it seeks at trial because both are unconstitutional. PTK seeks a declaratory judgment that Ms.

Marek “is not entitled to . . . publish PTK’s confidential and privileged information.” *See* Petition and Request for Immediate TRO, ¶ 32. PTK additionally seeks “temporary, preliminary and permanent injunctive relief” prohibiting “any past, present, and future publication of the confidential and privileged information that is the subject of this claim.” *See id.*, ¶ 33. It finally seeks an order “preventing publication of [Marek’s] book until such time as its content may be properly vetted and reviewed by PTK to confirm it does not include any offending confidential or privileged communications or information.” *See id.* Everything that PTK requests is prohibited by decades of federal and Texas jurisprudence. It isn’t even a close call.

Since PTK’s claim and the injunctive relief it requests prohibit Ms. Marek’s speech before it happens, they are prior restraints. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 918 (2002) (“The clearest definition of prior restraint is . . . a judicial order that prevents speech from occurring”). Because prior restraints suppress communication “before an adequate determination that it is unprotected by the First Amendment,” the bar that a plaintiff must cross prior to being awarded an injunction prohibiting speech is almost impossibly high. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973). The “liberty of the press is essential to a free state,” and both Texas and federal courts allow “no prior restraints upon publication, rather than freedom from censure when what is published is improper.” *Corpus Christi Caller-Times v. Mancias*, 794 S.W.2d 852, 854 (Tex. App. 13th 1990), citing *Near v. Minnesota*, 2083 U.S. 697 (1931).

Here, PTK does not seek a prior restraint because it alleges that her anticipated speech is defamatory. If that was its allegation, it would still not be entitled to a prior restraint or permitted to stop her from publishing her book, but at least its ire towards her would be more

understandable. See *Kinney v. Barnes*, 443 S.W.3d 87, 92 (Tex. 2014), citing *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (“We have squarely held that a temporary injunction prohibiting allegedly defamatory speech is an unconstitutional prior restraint”). In this case, PTK seeks a prior restraint simply because it does not like what Marek plans to say. This is not permissible and is not a valid claim for relief. The First Amendment to the U.S. Constitution and Article I, § 8 of the Texas Constitution bar PTK from meeting their burden. It cannot make a *prima facie* showing that it has a valid claim for relief.

3.4 PTK DOES NOT ACCUSE MAREK OF VIOLATING ANY LAW OR REQUEST ANY RELIEF APPROPRIATE TO A DECLARATORY RELIEF ACTION

Even if the Court finds Plaintiffs meet their TCPA burden, it should still dismiss their lawsuit because PTK’s requested relief is not appropriate pursuant to the Texas Uniform Declaratory Judgments Act (the “Act”). The Act allows a court to “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Civ. Prac. & Rem. Code § 37.003(a).

The relief Plaintiff seeks under the Act is unconstitutional. Moreover, PTK acknowledges that Ms. Marek legally obtained the information it does not want her to have. PTK presents no argument, or even any theory, about why she should not be permitted to have it or publish it. Instead, Plaintiff only says that the information is “confidential” or “privileged” with no further explanation. The party opposing a TCPA motion must provide *evidence*, not mere allegations, for their claims to go forward. *Sunchon*, 633 S.W.3d at 728. PTK has not provided the Court with any facts, law, or argument that would give the Court sufficient grounds to ultimately rule in its favor. It is obvious on the face of the Original Petition that none of the information at issue is actually confidential or privileged, as Plaintiff admits that Ms. Marek obtained such information through public records requests. See Petition and

Request for Immediate TRO, ¶ 1, 15. PTK’s claim fails and, as a matter of law, must be dismissed.

3.5 DEFENDANT MAREK IS ENTITLED TO AN AWARD OF FEES AND COSTS

Pursuant to TCPA § 27.009(a)(1), if the Court grants this Motion, it “shall award . . . court costs and reasonable attorney’s fees incurred in defending against the legal action.” Given that this action is unconstitutional and Plaintiff cannot succeed on the merits, the Motion must be granted. The case must be dismissed. Ms. Marek requests an award of her reasonable attorney’s fees and costs.

3.6 THE COURT SHOULD AWARD SANCTIONS

TCPA § 27.009(a)(2) provides that the court may award “sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.” A court awarding sanctions must issue written findings about whether “the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.” *Id.* § 27.007.

And Plaintiff requires deterrence. Censorious companies like PTK should not abuse the courts to silence and retaliate against critics exercising their First Amendment rights and their rights under Article I, § 8 of the Texas Constitution. To that end, sanctions will serve the public interest by deterring future speech-chilling lawsuits from Plaintiff.

4.0 CONCLUSION

TCPA dismissal will preserve Defendants’ First Amendment rights and deter Plaintiff PTK from chilling essential speech. Ms. Marek asks the Court to: (a) grant her TCPA motion

and dismiss Plaintiff's lawsuit; (b) award Doe her reasonable attorney's fees and costs under TCPA § 27.009(a); and (c) issue written findings ordering an award of deterrence sanctions of \$1,000,000 under TCPA § 27.009(a).

Dated: April 4, 2025

Respectfully submitted,

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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 4, 2025

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