Opinion issued May 28, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00210-CV

ADB INTEREST, LLC AND ASHLEY BLACK, INDIVIDUALLY, Appellants

V.

KAREN WALLACE, INDIVIDUALLY AND D/B/A JOURNEYZ SPA & PRODUCTS, Appellees

---

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Case No. 2017-35441

O P I N I O N

Appellants ADB Interest, LLC (ADB) and Ashley Black, Individually (Black) are appealing the trial court's granting of Karen Wallace, Individually and d/b/a Journeyz Spa & Products' (Wallace) motion to dismiss under the Texas Citizens

Participation Act (TCPA).[1] In three issues, ADB and Black argue that the trial court erred by granting Wallace's motion to dismiss because ADB and Black proved that the commercial speech exemption applied to their claims, that ADB and Black established by clear and specific evidence a prima facie case for each essential element of their claims, and the trial court erred by awarding Wallace attorney's fees and sanctions. We affirm the trial court's judgment.

Background

Black is the Managing Member of ADB. Black invented a tool known as the FasciaBlaster, which is marketed by ADB. The original FasciaBlaster is a plastic rod that has hand grips on either end and four multi-pronged knobs in the middle, which the user rolls vigorously over his or her body. In their petition, ADB and Black assert that the FasciaBlaster is "designed for self-treatment to assist in pain reduction, improved flexibility, joint function, circulation, muscle definition and performance, nerve activity, posture, and enhanced beauty, including the virtual elimination of

[1] *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–27.011. The Texas Legislature amended certain provisions of the TCPA in 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–9, § 12, sec. 27.001, 27.003, 27.005–.007, 27.0075, 27.009–.010 (to be codified at TEX. CIV. PRAC. & REM. CODE §§ 27.001, 27.003, 27.005–.007, 27.0075, 27.009–.010). The amendments became effective September 1, 2019. *Id.* at § 11. Because suit was filed before the effective date of the amendments, this case is governed by the statute as it existed before the amendments. *See id.* All our citations and analyses are to the TCPA as it existed prior to September 1, 2019, unless otherwise noted.

cellulite." They further contend that the product works by "opening the fascia," which is a layer of tissue that encloses muscles and organs.

In February 2017, Black published a book, *The Cellulite Myth: It's Not Fat, It's Fascia*. *See* ASHLEY BLACK, THE CELLULITE MYTH: IT'S NOT FAT, IT'S FASCIA (2017). The book is "an instructional guide to 'FasciaBlasting'" as well as a biography of Black. In the book, Black identifies numerous risks associated with using the FasciaBlaster. Specifically, readers are warned that should they use the FasciaBlaster "[i]f [they] have any history of deep vein thrombosis or a blood clot, the clot could be held in place by dysfunctional fascia and if [they] open the fascia and release it, the consequences could be deadly." *Id.* at 175. Readers are also urged not to use the FasciaBlaster "[i]f [they] have a severe connective tissue problem such as fibromyalgia, Ehlers-Danlos Syndrome, or any issues that makes [their] skin sensitive." *Id.* at 176. The book further states:

> Other detox symptoms include: raised white spots, light-headedness, anger/emotion, changes in stool or urine color, soreness in the breasts and nipples, changes in menstrual cycles, spotting, swelling, strange-colored bruises, hot skin, flu-like, symptoms, and in some extreme cases, vomiting . . . . This is not an all-inclusive list, and to be honest, the product is fairly new and every day someone experiences something new . . . . Please check with your doctor for any issues that set off alarm bells. *Id.* at 181.

> We don't have a total explanation on how blasting impacts hormones but we want to make you aware that some women report spotting or period changes in the beginning . . . . If you do experience a menstrual or hormonal change, know that it's temporary while the body is balancing out. *Id.* at 185.

> We don't know the implications or extent of estrogen release or detox when blasting so if you have concerns, wait until after breast feeding. *Id*. at 193.
>
> Not only that, when you are blasting, you are going to have some inherent inflammation as part of the healing response as the fascia tissue is remodeled. *Id.* at 197.

On May 22, 2017, ADB updated the Terms of Use Agreement posted on one of its websites, www.fasciablaster.com. Prior to that date, the Terms and Conditions posted on the website included the following warnings:

> DO NOT USE the FasciaBlaster® device if you have a history of or may have blood clots also known as Deep Vein Thrombosis.
>
> DO NOT USE directly on varicose veins.
>
> DO NOT USE the FasciaBlaster® if you have recently, are currently, or will be taking blood thinners.
>
> DO NOT USE the FasciaBlaster® on the carotid artery located on both sides of the neck.
>
> If you are pregnant, DO NOT USE the FasciaBlaster® or any other Ashley Black Company product or service on the belly.
>
> WARNING: The FasciaBlaster® and other Ashley Black Company products or services can cause a release of toxins, so USE AT YOUR OWN RISK.
>
> WARNING: Toxins may be pulled out of the tissue and can cause rashes, bumps, redness, irritation, itching and other toxicity-associated symptoms.
>
> DO NOT USE the FasciaBlaster® if you are unwilling to bruise, as bruising is a part of the healing process after using the device. I acknowledge that I am responsible for the depth and pressure of the Fascia Blaster® and other Ashley Black Company products or services during SELF-USE.

The updated version also warns users that, in addition to rashes, bumps, redness, irritation, and itching, toxins pulled out of the tissue can also cause: "vomiting, hormone changes, increased sensitivity, headaches, acute inflammation, changes in cycle, reoccurrence of pre-existing condition, weight gain and other toxicity-associated symptoms."

Although Black and the FasciaBlaster developed a devoted and loyal following of supporters that Black refers to as "Blaster Sisters," they also have their detractors. Many of the FasciaBlaster critics are active members of private Facebook groups that were created to allow FasciaBlaster users to offer uncensored reviews of the product and to share their experiences, both positive and negative, with other members. These Facebook groups include "Real Talk," "Fascia: Alternative Info," "Fasciablasting Adverse Effects, Reviews and Info," "FRESH (Fascia Research, Encouragement, Support, and Health)" and "Blaster The Real Truth." Posts from these sites establish that Wallace is only one of many people claiming on social media that the FasciaBlaster causes serious, adverse side effects.

A. Wallace's Social Media Posts

Wallace owns a spa in Corpus Christi, Texas that provides a variety of skin care services to its clients, including massages. Although Wallace does not sell FasciaBlasters at her spa, she purchased several of the products for her personal use and the record reflects that she also used the FasciaBlaster on one or more of her

clients as part of her rendition of skin care services. Based on her personal experience with the product, Wallace recommended the FasciaBlaster to her friends, family, and clients.

However, on April 28, 2017, Wallace joined the ranks of FaciaBlaster's social media critics by posting a message on her business' Facebook page informing her clients that she was no longer recommending the product and warning readers against using FasciaBlasters.

> After my own experience and after seeing results from doctors and specialist[s] [and] [c]ompleting tests and extensive blood work, the tests are showing that extended use of these products can cause a chain reaction in the body that starts with inflammation. That inflammation leads to raised cortisol levels in the body. That raised cortisol causes eventual thyroid dysfunction, hormone imbalance, increased estrogen, extreme detox, and cellular shutdown in your body.
>
> In very simple terms the result of those things happening can cause (but not limited to) the following: extreme detox symptoms, feeling dizzy, sick, acne, extreme fatigue, emotional detox, headaches, pain behind the eyes, cold or flu like body aches, adrenal fatigue, weight gain that diet and exercise won't effectively get rid of, loose skin, and possible blood clots.
>
> Any recurring inflammation in the body can [affect] every person differently. If you are using these tools and experience ANY adverse symptoms please STOP and get your cortisol, hormones and "free numbers" checked by your doctor. The raised cortisol caus[es] the interruption of things your body makes naturally (i.e.: hormones and thyroid) or supplements you take orally might not be functioning or being used on a cellular level.
>
> I care about your health and well-being and only want good things for you. So any endorsements I gave this product in the past I sincerely apologize for without knowing the long term or adverse effects it may

> be causing people. As it has caused these adverse effects in myself by using it long term[,] I HAVE to warn anyone who is using it [o]r anyone who might be thinking of using it for esthetic reasons to use EXTREME caution.

Wallace also posted her message on several FasciaBlaster-focused Facebook group pages the same day, including "Fascia: Alternative Info," "Fasciablasting Adverse Effects, Reviews and Info" and "FRESH (Fascia Research, Encouragement, Support, and Health). Most of the members of these groups are current, former, or prospective FasciaBlaster users.

Over the next two months Wallace became a frequent contributor to FasciaBlaster-related websites with posts that were critical of the FasciaBlaster and Black. Specifically, on May 1, 2017, Wallace posted a lengthy statement alleging, among other things, that she had just discovered on alternate Facebook groups that her negative experiences had been shared by hundreds of women, and that her negative view of the FasciaBlaster, as well as those of other women, had been blocked from the product group's main page so that only positive reviews were visible. She made claims that the product maker had lied to her by saying that her health complications had not been caused by the FasciaBlaster and that these lies had endangered her health and reputation. Wallace also claimed she had experienced

personal attacks and had been threatened by Black and ADB as result of her criticisms.[2]

On May 2, 2017, Wallace posted a message on the "Ashley Black Guru" Facebook page in which she stated that she had been diagnosed with fibromyalgia that day and had been referred to a neurologist. The post said, "I thought Ashley Black said the fascia blaster was supposed to treat fibromyalgia NOT CAUSE IT!!!!" Wallace further stated that, after using the FasciaBlaster for two years, she is in constant pain and has dizzy spells and sagging skin. Wallace also posted the same message on the Fascia Info Facebook group page.

Wallace posted on "Blaster 'The Real Story'" [3] that she had two miscarriages that she blamed on high cortisol levels caused by her use of the FasciaBlaster. Wallace also included photographs of the remains.

Wallace posted statements making similar allegations on "Blaster 'The Real Story'",[4] and on the "FasciaBlaster Negative Effects Info and Negative Reviews" page.

---

[2] It is not clear from the record where she posted the message and it may have been posted to more than one page.

[3] The copy of the post included in the record is undated.

[4] Although the post is undated, the context suggests that it might have been posted in mid-May.

In another post, Wallace contended that Black and ADB were manipulating comments left on the company's web site and Facebook pages:

> And my post about it was made to look like I was praising the outcome by the creator of the product [i.e., Black] in a final thread comment [Black] posted after she knew (because I told her) about my very unhappy progress. Before she closed the discussion on it entirely. I had to resort to putting a comment on the 1st picture in the post with directions to go to my personal page to see the real review.
>
> . . .
>
> It is NOT right to keep information that could be used to let people make informed decisions on product use a secret and only show positive stories and bully, threaten, or harass anyone who has had a negative experience and LIE about their involvement.

B. ADB's and Black's Response

ADB and Black employ a cyber-security firm that monitors social media platforms and targets people who post negative reviews of ADB's products or otherwise criticize Black or her products.

On at least one occasion, the head of the security team publicly named individuals, including Wallace, who he identified as "professional trollers" who had written "bad reviews" on Black's page and were making "false claims and [using] fake profiles."[5] He also urged these Facebook pages to block the named individuals, including Wallace, to prevent them from leaving bad reviews on their pages.

---

[5] Although it is not clear from the record, the message appears to have been sent in June 2017.

On another occasion, Black, who "operate[s] [her] company personally," left a voicemail message for one critic who had posted negative comments on the Facebook group "Master Blaster" and was a member of at least one other Facebook group, "FasciaBlaster Negative Effects Info and Negative Reviews."[6] In that voicemail, Black said:

> I am aware of the hate group. I have not only several spies with fake profiles in there, but also my attorney. And we are not—if you want to say that you hate me and I'm stupid, whatever, you can say anything that you want about me. But once you lie about me or my business, that becomes slander and it is prosecutable financially.
>
> So I just want to make you aware that I am watching that group and I hope that, you know, whatever hating that you feel you need to do, that you don't broach over into the lie. And just so you know, I already found one, and I will prosecute you if this continues.

On March 6, 2017—approximately two months before Wallace posted her allegedly defamatory and disparaging statements on Facebook—ADB and Black's attorney sent a letter to another women identified by Black's security team as a "professional troller," informing her that they were aware that she had made "certain negative statements towards the FasciaBlaster® device and [her] personal results from use of the device," and cautioning:

> In the event that you or others you may know have a complaint and feel compelled to broadcast those complaints online, we must caution you that while the company recognizes that consumers have First Amendment rights and other consumer rights provided by the Federal

[6] It is not clear from the record when the message was sent.

> Trade Commission (FTC), those rights are limited by the company's rights to not be defamed through slander or libelous actions that include actual malice or negligence regarding the truth of the statement. Ms. Black, her staff and her legal counsel take such actions very seriously.
>
> Wallace was blocked from the FasciaBlaster main page on May 1, 2017.

After Wallace began posting about the side effects she had experienced after using the FasciaBlaster, the company posted a message on May 18, 2017 on its Facebook group, "Ashley Black Guru":

> While we welcome the opportunity to hear from people who feel they have experienced negative effects from using the FasciaBlaster device, we also need our audience to be aware that knowingly making false or fraudulent injury or defect claims is illegal and may subject you to criminal and civil liability.
>
> . . . .
>
> We are issuing this statement because there is the misconception that the right to free speech is all encompassing. However, it does not protect violations of laws against internet trolling, computer intrusion, hacking, internet fraud, spam, internet harassment, internet intellectual property infringement, etc. These laws are available at Justice.gov. There are places on this website to report these trolling crimes. Ms. Black has been an ongoing victim and would appreciate your support in reporting activity that you have witnessed or been a victim of yourself.

On May 25, 2017, Black and ADB sued Wallace for business disparagement, defamation and defamation per se, invasion of privacy, intentional infliction of

emotional distress, and violations of the Lanham Act,[7] seeking damages and injunctive relief based on several of Wallace's social media posts.

Within days of filing suit against Wallace, the company sent messages to other people who had been participating in those same groups.

> It has come to our attention that you are participating in one or more Facebook groups called "Real Talk", "FRESH", "FasciaBlaster Negative Effects. Info and Negative Reviews", and "Blaster The Real Truth". We wanted to inform you that we have been forced to protect ourselves from false rhetoric as well as illegal activities in these groups, and we have taken action and will exercise our legal rights on a case by case basis.

The hyperlink "we have taken action" links to the petition filed against Wallace. ADB also posted a link to the petition on the "Legal" page of the "Ashley Black Guru" website.

C. Food and Drug Administration Inspection

The record reflects that the Food and Drug Administration (FDA) launched an investigation into ADB and the FasciaBlaster in July 2016 after the agency became aware of "over 70 [Medical Device Reporting (MDR)] reportable complaints and 04 consumer complaints, filed in the last 12 months (June 2016-June 2017), alleging injury due to your Class I medical device, FasciaBlaster." The FDA's report reveals that: (1) "Written MDR procedures have not been developed,

[7] 15 U.S.C. § 1125(a).

maintained and implemented."; (2) "Procedures for receiving, reviewing, and evaluating complaints by a formally designated unit have not been adequately established."; and (3) "Procedures for corrective and preventive action have not been established." Specifically, ADB had not "defined, documented or implemented [a corrective and preventive action procedure] to analyze, for example, processes, work operations, recurring complaints, returned product and other sources of quality data that identify existing and potential causes of nonconforming product or other quality problems."

According to the report, ADB's management had told the investigator "that they were aware that 70 MDR(s) have been filed in the last 12 months, alleging injury by your Class I medical device, FasciaBlaster, but no [corrective and preventive action procedures have] been initiated to address the issue." The report also states that ADB "has no MDR procedure or internal system in place, to provide for the timely and effective identification, communication and evaluation of events that may be subject to medical device reporting requirements." After identifying several specific complaints of serious bodily injury allegedly caused by the FasciaBlaster, the FDA investigator notes: "I found minimal evidence that an attempt was made to determine the relationship, if any, of the device to the reported incident or adverse event to evaluate if it was MDR reportable."

The report also states that at the start of the FDA inspection, ADB provided the agency with a "spreadsheet listing approximately 60 MDR(s) submitted to FDA and 01 complaint submitted directly to Ashley Diana Black (ADB) Interests LLC." According to the report, the "spreadsheet appeared to have ADOBE pdf attachments" and ADB's attorney told the inspector that these pdfs "were evidence of the 60+ investigations done by" ADB. After the inspector "requested to see a sample of the ADOBE pdf attachments, submitted as part of the firm's Complaint log," however, "[i]t was later determined that these files (investigation results) did not exist."

The report concluded that ADB had failed to develop, maintain, or implement procedures for MDR complaints by consumers and failed in every instance to initiate any corrective and preventive procedures to address them. Specifically, the report concluded that ADB was "not adequately documenting complaints, per an established complaint procedure, to include an evaluation for MDR reportability (malfunction & causing serious injury)." The FDA's report also reflects that ADB's web site "makes disease claims by asserting that the medical device can alleviate the symptoms of specific diseases," such as:

> Restores Blood flow (cardiovascular disease)
> Increases Nerve Activity (rheumatoid arthritis)
> Cardiac output is increased (cardiovascular disease)
> Better blood pressure (cardiovascular disease)

Less brain fog (Alzheimers)
Lessens stress on joints (rheumatoid arthritis)
Inflammation reduced (rheumatoid arthritis)
Loosens the Primary System that Causes Pain (fibromyalgia)

D. Procedural Background

As noted above, Black and ADB sued Wallace on May 25, 2017 for business disparagement, defamation and defamation per se, invasion of privacy, intentional infliction of emotional distress, and violations of the Lanham Act, seeking damages and injunctive relief based on several of Wallace's social media posts.

Wallace moved to dismiss ADB and Black's claims based on the TCPA. The trial court granted the motion and awarded Wallace attorney's fees and imposed sanctions against ADB and Black. This appeal followed.

TCPA

In their first two issues, ADB and Black argue that the trial court erred by granting Wallace's motion to dismiss based on the TCPA because: (1) ADB and Black proved that the commercial speech exemption applied to their claims, and (2) ADB and Black established by clear and specific evidence a prima facie case for each essential element of their claims.

A. Standard of Review

We review de novo the denial of a TCPA motion to dismiss. *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 470 (Tex. App.—Houston [1st Dist.] 2020, pet. filed);

Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). In determining whether to grant or deny a motion to dismiss, the court must consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. TEX. CIV. PRAC. & REM. CODE § 27.006(a). We view the pleadings and evidence in the light most favorable to the nonmovant. *Gaskamp*, 596 S.W.3d at 470; *N. Cypress Med. Ctr. Operating Co. GP, LLC v. Norvil*, 580 S.W.3d 280, 284–85 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

To the extent that our resolution of this case requires us to address issues of statutory construction, we review such issues de novo. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (per curiam). The TCPA should be construed "liberally to effectuate its purpose and intent fully." TEX. CIV. PRAC. & REM. CODE § 27.011; *see also Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).

B. Texas Citizens Participation Act

Chapter 27 of the Texas Civil Practice & Remedies Code, also known as the Texas Citizens Participation Act, is a "bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern." *See Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019); *see also In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). The act is intended to identify and summarily dispose

of lawsuits "designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *Lipsky*, 460 S.W.3d at 589.

The purpose of the TCPA, as stated in Civil Practice and Remedies Code chapter 27, "is to 'encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.'" *Coleman*, 512 S.W.3d at 898 (quoting TEX. CIV. PRAC. & REM. CODE § 27.002). The TCPA's primary vehicle for accomplishing its stated purpose is a motion-to-dismiss procedure that allows the defendant to seek dismissal of the underlying action, attorney's fees, and sanctions at an early stage in the litigation. *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a); *Norvil*, 580 S.W.3d at 284. When considering the motion to dismiss, the court considers both the pleadings and any supporting and opposing affidavits. TEX. CIV. PRAC. & REM. CODE § 27.006(a); *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018).

A defendant invoking the TCPA's protections by filing a motion to dismiss must show first, by a preponderance of the evidence, that the plaintiff's legal action is "based on, relates to, or is in response to" the defendant's exercise of one or more of the enumerated rights. *Lipsky*, 460 S.W.3d at 586 (internal quotation omitted). If the defendant makes the initial showing, the burden shifts to the plaintiff to

"establish [ ] by clear and specific evidence a prima facie case for each essential element of the claim in question." *See id.* at 587 (quoting TEX. CIV. PRAC. & REM. CODE § 27.005(c)). If the plaintiff establishes a prima facie case for each element of its claim, the burden shifts back to the movant to establish, by a preponderance of the evidence, each essential element of a valid defense. TEX. CIV. PRAC. & REM. CODE § 27.005(d). A plaintiff can avoid the act's burden-shifting requirements, however, by showing that one of the TCPA's exemptions applies. *See id.* § 27.010.

If the trial court grants the motion to dismiss, it must award costs, reasonable attorney's fees, and other expenses of defending against the action "as justice and equity may require." *Id.* § 27.009(a). The trial court must sanction the plaintiff in an amount "sufficient to deter the party who brought the legal action from bringing similar actions." *Id.*

ADB and Black do not dispute that Wallace proved by a preponderance of the evidence that the TCPA applies to their claims. Therefore, we will begin by addressing whether ADB and Black met their burden to prove that Wallace's statements constituted "commercial speech" that is exempted from the TCPA's protection.

Commercial Speech Exemption

Under the commercial speech exemption, the TCPA does not apply:

> to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or

> conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

TEX. CIV. PRAC. & REM. CODE § 27.010(b). The supreme court has recently explained that "[c]onstruing the TCPA liberally means construing its exemptions narrowly," in part because of "the legislature's clear instruction to construe the TCPA liberally to protect citizens' rights to participate in government." *State ex rel. Best v. Harper*, 562 S.W.3d 1, 14 (Tex. 2018).

ADB and Black bear the initial burden of demonstrating that the commercial speech exemption applies. *See Gaskamp*, 596 S.W.3d at 479; *Norvil*, 580 S.W.3d at 285.

The Texas Supreme Court established a four-part test for application of the commercial speech exemption. *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018) (per curiam). Under *Castleman*, the commercial-speech exemption applies when:

> (1) the defendant was primarily engaged in the business of selling or leasing goods, (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant's capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides.

Id. The commercial speech exemption's reference to "the sale or lease of goods or services" refers "to the *defendant*'s sale or lease of goods or services." *Id.* In contrast,

the exemption does not apply, and a defendant may avail himself of the TCPA's protections, "when he speaks of *other* goods or services in the marketplace," i.e., goods or services that the speaker does not sell or lease. *Id.* at 689 (emphasis added); *see also Dickens v. Jason C. Webster, P.C.*, No. 05-17-00423-CV, 2018 WL 6839568, at *5 (Tex. App.—Dallas Dec. 31, 2018, no pet.) (mem. op.).

In holding that the TCPA's commercial-speech exemption was inapplicable in that case, *Castleman* noted that the challenged statements "constituted protected speech warning [the plaintiff's] customers about the quality of [the plaintiff's] services, not pursuing business for [the defendant]." *Castleman*, 546 S.W.3d at 691. The court noted that "[n]either [the defendant] nor his business stood to profit from the statements at issue, and although [the defendant] might have been personally gratified by the damage the statements might make to [plaintiff's] business, the statements do not fall within the TCPA's commercial-speech exemption." *Id.*

The record reflects that Wallace's statements were primarily intended for two audiences: ADB's and Wallace's actual or potential customers. Statements targeted to ADB's customers are not covered by the commercial speech exemption that concerns goods or services sold by the *defendant*. *See id.* at 688–89; *see generally Toth*, 557 S.W.3d at 153 (stating commercial speech exemption may be established as to some statements but not others). Although there may be some overlap between these audiences, they are by no means identical. While ADB serves an international

market and derives most of its sales from the internet, the services that Wallace provides are only available in her limited geographic region to people who patronize her spa in Corpus Christi, Texas.[8]

To the extent that Wallace's statements were directed at her clients, these statements are subject to exemption from the TCPA if the other *Castleman* requirements are met.

We consider the Fourteenth Court of Appeals' opinion in *Toth v. Sears Home Improvement Products, Inc.* as instructive on the application of the commercial speech exemption to Wallace's statements. 557 S.W.3d 142 (Tex. App.—Houston [14th Dist.] 2018, no pet.). In that case, Sears had hired Toth to inspect moisture damage to wood flooring that Sears had sold to Langham and installed in her home. Toth, who owned his own flooring business at the time, recommended to Sears that Langham's wood flooring needed to be reinstalled and that Bostik, a membrane sealant, should be used as part of the reinstallation to prevent moisture damage. *Toth*, 557 S.W.3d at 147. Sears, who chose not to reinstall the flooring, was sued by Langham. During the course of that litigation, Sears learned that Toth had recommended Bostik to Langham and told her that he believed it would prevent

[8] Even if Wallace sold skincare products at her spa, there is nothing in the record indicating that any such products were for sale over the internet or by mail order. Thus, there is no indication that anyone outside of Wallace's geographic region would be able to purchase such products.

moisture damage. Sears sued Toth for breaching its agreement with Sears by recommending a non-authorized product, Bostik, to Langham. Toth moved to dismiss under the TCPA.

Citing to *Castleman*, the *Toth* court stated that "the mere fact that a person sells goods or services does not deny him the TCPA's protections when he speaks of 'other goods' in the marketplace." *Toth*, 557 S.W.3d at 154 (citing *Castleman*, 546 S.W.3d at 688). The court held that because Toth did not sell Bostik, his recommendation of the product to Langham was not a statement "about" Toth's particular goods or services, i.e., flooring services, but rather it was a statement about a generally available product, Bostik. *See Toth*, 557 S.W.3d at 154. The court reasoned that, therefore, Toth's recommendation was "akin to expressing an opinion or evaluation about another's product in the marketplace, which is ordinarily protected speech." *Id.* (citing *John Moore Servs.*, 441 S.W.3d at 353–54). This distinction between comments about goods and services available in the marketplace and those sold by the person making the statements is consistent with the Supreme Court's instruction that the TCPA's exemptions must be construed narrowly. *Harper*, 562 S.W.3d at 14.

Here, the record reflects that Wallace owns a spa in Corpus Christi, Texas that provides a variety of skin care services to its clients, including massages. Wallace, who does not sell FasciaBlasters at her spa, purchased several of the products for her

personal use. Just as Toth's recommendation of someone else's flooring product was not a statement "about" the services that Toth provides, i.e., flooring services, Wallace's statements about ADB's product, the FasciaBlaster, cannot reasonably be considered statements about the services that Wallace provides. *See Toth*, 557 S.W.3d at 154; *cf. Harper*, 562 S.W.3d at 14 (stating TCPA's exemptions should be construed narrowly). Furthermore, although Wallace directed readers to her business Facebook page to read her statements about the FasciaBlaster and mentioned that she provides skincare services in some of her posts, it is not reasonable to infer from the record that Wallace was intending to promote her services or enhance her business by making the allegedly defamatory and disparaging statements about FasciaBlaster. The statement or conduct at issue must arise out of a commercial transaction involving the kind of goods or services the defendant provides. *Castleman*, 546 S.W 3d at 688–89. There is no evidence of a commercial purpose or motive behind Wallace's posts. *See id.* at 691 (noting that "[n]either [the defendant] nor his business stood to profit from the statements at issue, and although [the defendant] might have been personally gratified by the damage the statements might make to [plaintiff's] business, the statements do not fall within the TCPA's commercial-speech exemption").

We overrule ADB's and Black's first issue.

Because we conclude the TCPA applies to Wallace's statements, we must next consider whether ADB and Black met their burden of establishing, by "clear and specific evidence," a prima facie case on their causes of action for defamation and business disparagement and their Lanham Act claim. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c).

ADB's and Black's Prima Facie Case[9]

In their second issue, ADB and Black argue that the trial court erred by granting Wallace's motion to dismiss because they established by clear and specific evidence a prima facie case for each essential element of their defamation, business disparagement, and Lanham Act claims.

A. Prima Facie Case

To avoid dismissal, the plaintiff must establish a prima facie case for each element of the asserted claims by clear and specific evidence. *Id*. The term "prima facie case," as used in the TCPA, "means evidence that is legally sufficient to establish a claim as factually true if it is not countered." *S & S Emergency Training Sols.*, 564 S.W.3d at 847. In other words, a prima facie case is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Lipsky*, 460 S.W.3d at 590. Direct evidence of damages is not required,

[9] ADB and Black are not challenging the dismissal of their claims for intentional infliction of emotional distress, invasion of privacy, and injunctive relief.

but the evidence must be sufficient to allow a rational inference that some damages naturally flowed from the defendant's conduct. *See id.* at 591–92.

The TCPA, however, does not "require direct evidence of each essential element of the underlying claim to avoid dismissal." *Id.* at 591. On the contrary, pleadings and evidence that establish "the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Id.* at 591.

When conducting our review, we review the pleadings and evidence in a light favorable to the nonmovant. *See Gaskamp*, 596 S.W.3d at 470; *Norvil*, 580 S.W.3d at 284–85.

B. Defamation Claim

ADB[10] and Black argue that Wallace published dozens of defamatory statements on Wallace's business-related Facebook page, her personal pages, and various internet group pages in April and May 2017.

To prevail on a claim for defamation, a limited-purpose public figure must establish: (1) the publication of a false statement of fact to a third party; (2) that was defamatory concerning the plaintiff; (3) that the defendant acted with actual malice;

---

[10] Corporations may also bring defamation claims, since "corporations, like people, have reputations and may recover for harm inflicted on them." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 149 (Tex. 2014).

and (4) damages, in some cases. *See Lipsky*, 460 S.W.3d at 593.[11] A plaintiff must "plead and prove damages, unless the defamatory statements are defamatory per se." *Id.* Defamatory statements are those that tend to (1) "injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury" or (2) "impeach any person's honesty, integrity, virtue, or reputation." TEX. CIV. PRAC. & REM. CODE § 73.001. "To qualify as defamation, a statement should be derogatory, degrading, somewhat shocking, and contain elements of disgrace. By contrast, a communication that is merely unflattering, abusive, annoying, irksome, or embarrassing," in light of the circumstances, "or that only hurts a person's feelings, is not actionable." *MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, 545 S.W.3d 180, 202 (Tex. App.—El Paso 2017, no pet.) (citation omitted). Whether a statement is capable of a defamatory meaning is initially a question of law.

"Actual malice," with respect to defamation claims, means that the statement was made with knowledge of its falsity or with reckless disregard for its truth. *Lipsky*, 460 S.W.3d at 592 (citing *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000)); *see also Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002). Evidence that the statement is false is not enough. *See Turner v. KTRK Television,*

[11] ADB concedes that it and Ashley Black are limited-purpose public figures for purposes of this appeal.

Inc., 38 S.W.3d 103, 120 (Tex. 2000) (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 681 (1989)); *see also Steinhaus v. Beachside Envtl., LLC*, 590 S.W.3d 672, 679 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (stating that "the falsity of the statement itself cannot prove actual malice").

Reckless disregard is a subjective standard focusing on the defendant's conduct and state of mind and it requires a showing that the statements were made by a person who "entertained serious doubts as to the truth of his [statement]." *Bentley*, 94 S.W.3d at 591 (citations omitted). "A plaintiff may rely on circumstantial evidence—indirect evidence that creates an inference to establish a central fact—unless 'the connection between the fact and the inference is too weak to be of help in deciding the case.'" *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019) (quoting *Lipsky*, 460 S.W.3d at 589). The inference, however, must be reasonable and an inference is not reasonable if it is "premised on mere suspicion—'some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence.'" *Suarez v. City of Tex. City*, 465 S.W.3d 623, 634 (Tex. 2015) (quoting *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727–28 (Tex. 2003) (per curiam)).

With regard to what constitutes actual malice, the Texas Supreme Court has stated: "A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is. Imagining that something may be true is not the same as

belief." *Bentley*, 94 S.W.3d at 596. "[A]ctual malice in defamation is a term of art that does not include ill will, evil motive, or spite." *Associated Press v. Cook*, 17 S.W.3d 447, 458 (Tex. App.—Houston [1st Dist.] 2000, no pet.). "Because 'the constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff,' . . . proof of bad motive or ill will is not enough." *Brady v. Klentzman*, 515 S.W.3d 878, 883 (Tex. 2017) (quoting *Greer v. Abraham*, 489 S.W.3d 440, 444 (Tex. 2016)). The purpose of the actual malice standard is to protect innocent but erroneous speech on public issues, while deterring "calculated falsehoods." *Turner*, 38 S.W.3d at 120 (citing *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)). ADB must prove not that Wallace's statements were untrue, or that Wallace harbored animus toward ADB, but that Wallace made her statements knowing they were false or with reckless disregard of the truth.

In order to meet their burden, ADB and Black were required to bring forward the minimum quantum of evidence necessary to support a rational inference that Wallace had serious doubts about the truth of her statements, or stated differently, that she had a high degree of awareness of the probable falsity of her statements when she made her allegations against ADB and Black. *See Lipsky*, 460 S.W.3d at 590; *Bentley*, 94 S.W.3d at 591.

ADB and Black argue that the evidence establishes that Wallace knew that her claims that the FasciaBlaster caused her alleged injuries were false when she

made them. *See generally Bentley*, 94 S.W.3d at 591 ("Knowledge of falsehood is a relatively clear standard; reckless disregard is much less so.").

ADB and Black argue that Dr. Zizic's report, which is the only medical evidence in the record, establishes that there is no biological mechanism by which the FasciaBlaster could have caused Wallace's medical issues, and the only rational inference from this evidence is that no medical professional would have told Wallace that the FasciaBlaster caused her to have two miscarriages and led to the onset of lupus and fibromyalgia. According to ADB and Black, one can rationally infer from this that Wallace knew that her statements were false because her claims are based on medical evidence that she "fabricated." They further contend that the fact that Wallace got "the biology exactly backwards further supports the inference that no actual medical professional told her what she claims." ADB and Black also argue that one can infer that Wallace lied when she claimed that Dr. Feste told her to stop using the FasciaBlaster in December 2016 because Wallace admitted that she used the FasciaBlaster in April 2017.

The facts upon which ADB and Black rely, essentially that Wallace had to have known better and that her grasp on biology is tenuous, do not support, by clear and specific evidence, the inference that Wallace made her statements with knowledge of their falsity or with reckless disregard to the truth. *See Dall. Morning News*, 579 S.W.3d at 377; *see also Porter-Garcia v. Travis Law Firm, P.C.*, 564

S.W.3d 75, 86 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (stating "'clear and specific evidence' refers to the quality of evidence required to establish a prima facie case"). The inference that Wallace knew that her claims were false is premised on ADB's and Black's presumption that there is no medical justification for Wallace to believe that the FasciaBlaster caused her medical problems and, therefore, Wallace cannot have any medical proof and she fabricated her claims. However, an inference is not reasonable if it is based on "mere suspicion." *Suarez*, 465 S.W.3d at 634 (stating inference is not reasonable if it is based on "mere suspicion"). There is nothing in the record which demonstrates that there was an established body of scientific or medical evidence about the FasciaBlaster which Wallace could ignore or proceed in reckless disregard of. ADB's proof that the FasciaBlaster could not cause Wallace's ailments is based on evidence, Zizic's affidavit, that was not available until after the litigation was initiated. Wallace could not have known about it when she made her statements because it, and Dr. Zizic's research that it records, had not occurred.

ADB and Black also argue that, even if Wallace did not know that her statements were false, the evidence demonstrates that Wallace acted with reckless disregard for the truth when she claimed that the FasciaBlaster caused her medical symptoms and ailments. Specifically, ADB and Black contend that the clear and specific evidence in this case "established that Wallace reached her conclusion

regarding the source of her medical complaints [i.e., the FasciaBlaster] based on self-administered tests she is not qualified to perform, and then, armed with that false narrative, contrived a factual basis for her claims while ignoring contrary evidence." ADB and Black also contend that "Wallace's assumption that a simple massage tool was medically responsible for her array of symptoms was nothing more than an 'inherently improbable assertion[]' based 'on information that is obviously dubious'—her own inexpert 'tests.'" *See Bentley*, 94 S.W.3d at 596 (stating "inherently improbable assertions and statements made on information that is obviously dubious may show actual malice").

However, this is not a case in which someone is purposefully disregarding a wealth of scientific literature that is widely available to the medical community, much less the general public. The evidence demonstrates that when Wallace made the allegedly defamatory statements, there were no scientific studies addressing whether there was a link between FasciaBlasting and any of Wallace's illnesses or symptoms. Indeed, Dr. Zizic's affidavit appears to be the first attempt by a physician to study the medical literature to evaluate the physical effects of FasciaBlaster use. The FasciaBlaster had not been reviewed or tested by any physician and, based on ADB's terms and conditions, ADB and Black had no intention at that time to subject their product to meaningful scientific or medical review. At most, the evidence reflects that, while Wallace held a firm belief that the FasciaBlaster caused her

medical problems, there was a possibility of a difference of opinion among medical professionals about her condition which she may or may not have been aware of. *See generally id.* (stating "understandable misinterpretation of ambiguous facts does not show actual malice"). Although Wallace expressed animosity towards Black, as well as towards some of the doctors who dismissed her concerns out of hand ("[D]on't tell a doctor about the fascia stuff BEFORE you tell them about your side effects apparently because they treated me like a nut job seeking pain meds."), the focus of our inquiry is on Wallace's "attitude toward the truth," not her feelings about her doctors or Black. *See Brady*, 515 S.W.3d at 883; *see also Cook*, 17 S.W.3d at 458 (stating actual malice does not mean "ill will, evil motive, or spite").

We further note that Wallace's claim that the FasciaBlaster, which ADB and Black describe as a "simple massage tool," caused her medical ailments is not "inherently improbable" considering the fact that ADB acknowledges that the FasciaBlaster's effects are more than skin deep. According to ADB's website, the FasciaBlaster is "designed for self-treatment to assist in pain reduction, improved flexibility, joint function, circulation, muscle definition and performance, [and] nerve activity." ADB and Black also warned readers—before Wallace made any allegedly defamatory statements—that FasciaBlasting could cause some of the same symptoms identified by Wallace. ("We don't have a total explanation on how blasting impacts hormones but we want to make you aware that some women report

spotting or period changes in the beginning . . .”). Black also warned her book readers that FasciaBlasting could pull “toxins” out of body tissue and release these “toxins” into the body. *Id.* at 193, 197.[12]

Viewing the record in the light most favorable to ADB and Black, any connection between the facts presented and the inference that Wallace acted with reckless disregard of the truth is too attenuated to establish a prima facie case that Wallace acted with actual malice. *See Dall. Morning News*, 579 S.W.3d at 377; *see also Porter-Garcia*, 564 S.W.3d at 86 (stating “‘clear and specific evidence’ refers to the quality of evidence required to establish a prima facie case”). Therefore, we conclude that ADB and Black failed to adduce clear and specific evidence that Wallace acted with actual malice when she made the allegedly defamatory statements. *See Lipsky*, 460 S.W.3d at 590 (prima facie case is “minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true”). Because ADB and Black failed to meet their burden of proof on this element of their claim, the trial court did not err by granting Wallace’s motion to dismiss ADB’s and Black’s defamation claims.

---

[12] We further note that Wallace did what Black advised her book readers to do if they experienced any alarming symptoms while using the FasciaBlaster—consult a physician. (“This is not an all-inclusive list [of detox symptoms that can be caused by FasciaBlasting], and to be honest, the product is fairly new and every day someone experiences something new . . . . Please check with your doctor for any issues that set off alarm bells.”).

Having determined that ADB and Black failed to adduce clear and specific evidence that Wallace acted with actual malice when she made the allegedly defamatory statements, we need not consider whether they adduced evidence that damages were incurred as a result of these statements.

We overrule ADB's and Black's second issue.

Business Disparagement

ADB argues that the trial court erred by dismissing its business disparagement claim against Wallace because it made a prima facie case as to each element of its claim. Wallace contends that ADB failed to produce evidence of two elements of its business disparagement claim: malice and special damages.

To show business disparagement, ADB was required to bring forth clear and specific evidence that (1) Wallace published false and disparaging information about ADB, (2) with malice, (3) without privilege, and (4) that resulted in special damages to ADB. *Lipsky*, 460 S.W.3d at 592 (internal quotation marks and footnotes omitted); *see also Mem'l Hermann Health Sys. v. Gomez*, 584 S.W.3d 590, 610 (Tex. App.—Houston [1st Dist.] 2019, pet. filed).[13] "Special damages are synonymous with

[13] Malice in business disparagement differs from the actual malice discussed above in the defamation context in that it can be proved by demonstrating "ill will, evil motive, gross indifference, or reckless disregard, of the rights of others." *Thrift v. Hubbard*, 974 S.W.2d 70, 80 (Tex. App.—San Antonio 1998, pet. denied).

economic damages . . . ." *Lipsky*, 460 S.W.3d at 592 n.11; *see also Gomez*, 584 S.W.3d at 613.

To survive a TCPA motion, ADB must show evidence of economic damages and that evidence must be more than "general averments of direct economic losses and lost profits." *Lipsky*, 460 S.W.3d at 593. Rather, the evidence must "illustrat[e] how [Wallace's] alleged remarks about [ADB's] activities actually caused such losses." *Id.*

In its efforts to establish special damages, ADB argues that there are at least two instances in the record where women stated that they were going to return their products in response to Wallace's posts, along with numerous other instances in which women promised to quit using the FasciaBlaster products they had already purchased. Ashley Black avers in her affidavit that Wallace's statements and the women's comments coincided with a decline in ADB's sales that began in April 2017.

Specifically, on May 21, 2017, Wallace posted a video on the Fasciablasting Adverse Effects, Reviews and Info group page.[14] Wallace posted that she is

[14] ADB alleges in its amended petition that Wallace "published a defamatory and disparaging video on 'FRESH,'" a different Facebook group page, in which she claimed, "that the loose skin of her midsection was caused by 'two years of faciablasting.'" ADB does not specifically refer to any video that Wallace posted on the Fasciablasting Adverse Effects, Reviews and Info group's page and it is not clear from the voluminous record if these are the same videos.

discussing the "skin issues" she experienced after using the FasciaBlaster in the video. "I don't talk a lot about the medical side effects here because I'm still waiting on more testing to confirm results so that information can be shared with medical proof and not speculation." The same day, one woman posted on the group's page:

> "Karen: Thank you for sharing your story. I just got my [FasciaBlaster] in the mail Friday and that same day I saw the video of you telling your story in your vehicle. I am so sorry for everything that you have gone through, but I truly thank you for sharing your story and helping others to not make the same mistake. Shortly after watching that video I initiated the process for a full return."

A second woman posted a similar message on the same page: "I watched your videos and heard your story and it convinced me to send mine back and not let this thing ever touch my body because of what you are going through."

Evidence of damages must be sufficient to allow a rational inference that some damages naturally flowed from the defendant's conduct. *See S & S Emergency Training Sols.*, 564 S.W.3d at 847 (citing *Lipsky*, 460 S.W.3d at 591–92). The evidence must also be "clear and specific," regardless of whether it is direct or circumstantial.[15] *See Lipsky*, 460 S.W.3d at 590 (stating that "clear" evidence is "unambiguous," "sure," or "free from doubt," and "specific" evidence is "explicit" or "relating to a particular named thing"). The movant "cannot rely on speculation

[15] Circumstantial evidence is admissible unless the connection between the fact and the inference is too weak to be of help in deciding the case. *Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (citing TEX. R. EVID. 401–02).

to satisfy its burden of proof" of establishing a prima facie case for each element of its claim. *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 63 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).

Neither Wallace's video nor a transcript of the video is included in the record. As a result, we do not know what specific statements Wallace made about the FasciaBlaster in the video, much less if any of these statements were defamatory or disparaging. The two women who vowed to return their FasciaBlasters state that they did so after watching Wallace's video and hearing her story. They did not indicate which aspect of Wallace's story they found compelling. ADB has not produced clear and specific evidence establishing a prima facie case for economic damages based on these two lost sales, i.e., that the two products were in fact returned or that the allegedly lost sales flowed from Wallace's disparaging remarks, as opposed to other statements. *See Lipsky*, 460 S.W.3d at 593 (requiring evidence of specific facts illustrating how defendant's alleged disparaging statement "actually caused such losses"); *see also Landry's*, 566 S.W.3d at 63 (holding plaintiff did not establish prima facie case for business disparagement damages; stating "even if it had been shown that a potential customer decided not to book the venue after reading one of the statements at issue in this case, Landry's still would have to show *which* statement the prospective customer read").

Further, the record does not establish, or estimate, any measure of economic damage resulting from returned or lost sales. ADB sells an array of FasciaBlaster products, including different types of massage wands at different prices. Some FasciaBlaster wands are also sold as part of a package, such as starter-kits, while others are sold individually. The record also indicates that FasciaBlasters are not sold exclusively online or from ADB's website. Without evidence of the cost to ADB of the two returned products, we cannot say that ADB has proven economic loss by clear and specific evidence. *See S & S Emergency Training Sols.*, 564 S.W.3d at 848–49 (stating "record demonstrates that [non-movant's] lost revenues were susceptible to calculation with reasonable certainty based on data" provided).

ADB also cites posts from other women announcing that they would no longer use their FasciaBlasters because of Wallace's statements as evidence of economic damages. According to ADB, these posts provide some evidence of economic damages because these women's decisions to stop using their FasciaBlaster "means they would also not be purchasing the specialty massage creams and ointments sold by ADB." There is nothing in the record, however, indicating that any of these women had even purchased ADB's other products, or that they would have purchased these related products in the future. Based on the record before us, we conclude that ADB failed to produce clear and specific evidence establishing a prima facie case that any of Wallace's allegedly disparaging statements caused ADB to

suffer economic damages based on other people's plans to stop using their FasciaBlasters. *See Lipsky*, 460 S.W.3d at 593 (stating that to establish damages in TCPA case, non-movant must present evidence of specific facts illustrating how movant's disparaging comments "actually caused such losses").

ADB also argues that it produced proof of a substantial decline in sales that is linked to Wallace's disparaging and defamatory statements that were circulated online, and that this link, coupled with ADB's reliance on internet sales and marketing, supports an inference that the decline in ADB's sales was a consequence of Wallace's conduct. In her affidavit, attached to ADB's response to Wallace's motion to dismiss, Black averred:

> Ms. Wallace's defamatory actions have damaged ADB's business and business reputation. ADB identified multiple posts where other persons indicated they believed Ms. Wallace, or state they are not going to purchase ADB's products, or discontinue the use of the FasciaBlaster®. ADB suffered pecuniary losses resulting from Ms. Wallace's actions. ADB's sales have dropped and ADB experienced decline in its sales, constituting a negative sales trend, which correlates precisely with the dates of Ms. Wallace's actions. Likewise, ADB cannot identify any other cause for this drop in sales and related trend. ADB's sales consistently increased on a month-to-month basis from December 2016 through March of 2017.
>
> Starting with April 2017, which correlates exactly with Ms. Wallace's defamatory statements, ADB's sales dropped and have dropped every month through July 2017. July 2017's sales figures were very similar to January 2017 figures, meaning the sales growth increase experienced by ADB, from December 2016 through March 2017 dissolved as a result of Ms. Wallace's actions.

The record makes clear that Wallace's statements were not made in a vacuum. There are numerous websites and posts on the internet devoted to comments, pro and con, about the FasciaBlaster. There is no clear or specific evidence which supports the inference that Wallace's posts were solely, or even principally, responsible for decreased sales of the FasciaBlaster. In *Landry's*, Landry's sued the Animal Legal Defense Fund for slander and business disparagement based on statements made in a pre-suit notice letter related to treatment of tigers kept at a restaurant location. *Landry's*, 566 S.W.3d at 51–52. It claimed loss resulting from the cancellation of two bookings at the restaurant. *Id.* at 62. The court found that Landry's was unable to demonstrate any distinction between economic losses caused by bad publicity in general and losses caused by plaintiff's activities, noting that, "Statements by the Conley Parties were not the only source of 'recent' publicity and controversy regarding the way in which Landry's treated the tigers." *Id.* at 63. Similarly, in the case before us, the record merely establishes a temporal correlation between Wallace's posts and a general decline in revenue and this is insufficient to establish damages for purposes of the TCPA. *See John Moore Servs.*, 441 S.W.3d at 361 (holding evidence of business's declining general revenue in wake of negative online review insufficient to establish damages element of tortious interference claim in TCPA case).

Accordingly, we hold that the trial court did not err by dismissing ADB's business disparagement claim against Wallace because ADB failed to make its prima facie case as to special damages.

We overrule ADB's third issue.

Lanham Act

ADB argues that the trial court erred by granting the motion to dismiss because it established by clear and specific evidence a prima facie case for each essential element of its Lanham Act claim for false advertising.

The relevant portion of the Lanham Act states:

> Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities . . . of his or her or another person's goods, services, or commercial activities . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B).

A plaintiff must show the following to establish a prima facie case of liability for false advertising under the Lanham Act:

> (1) the defendant made a false statement of fact about its product in a commercial advertisement; (2) the statement actually deceived or has a tendency to deceive a substantial segment of its audience; (3) the deception is likely to influence a purchasing decision; (4) the defendant caused the false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result.

Astoria Indus. of Iowa, Inc. v. SNF, Inc., 223 S.W.3d 616, 629–30 (Tex. App.—Fort Worth 2007, pet. denied) (citing *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 462 (5th Cir. 2001)).

Although the Lanham Act does not define the term "commercial advertising or promotion," the Fifth Circuit Court of Appeals has held that a representation constitutes "commercial advertising or promotion" for purposes of the act if the representation is:

> (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services[; and] (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Seven–Up Co. v. Coca–Cola Co., 86 F.3d 1379, 1383–84 (5th Cir. 1996) (quoting *Gordon & Breach Sci. Publishers v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1535–36 (S.D.N.Y. 1994)).

As discussed with respect to the applicability of the commercial speech exemption, ADB sells a variety of massage tools to an international market and derives most of its sales via the internet. Wallace, on the other hand, is a small business owner who runs a spa in Corpus Christi, Texas that provides a variety of skin care services to its clients, including massages. The services that Wallace provides are only available in her limited geographic region to people who patronize her spa. It is undisputed that Wallace does not sell FasciaBlasters or other similar

massage tools. Given these distinctions between the two businesses, we conclude that ADB did not establish that Wallace is in "commercial competition" with ADB, and therefore, ADB did not meet its burden to establish that Wallace made a false statement of fact about the FasciaBlaster in a commercial advertisement. *See Seven-Up Co.*, 86 F.3d at 1383–84 (stating defendant must be in commercial competition with plaintiff for defendant's representation to constitute "commercial advertising or promotion" for purposes of Lanham Act).

We overrule ADB's fourth issue.

Discovery

ADB and Black argue that if we determine that they did not make their prima facie case for falsity or actual malice with respect to their defamation claims, then we should remand because the trial court improperly denied them discovery into Wallace's medical history. The TCPA generally suspends discovery until the court rules on a TCPA motion to dismiss. TEX. CIV. PRAC. & REM. CODE § 27.003(c). However, section 27.003(b) provides a limited exception to the mandatory stay for "specified and limited discovery relevant to the motion" and on a showing of good cause. *Id.* § 27.003(b). Texas courts have allowed non-movants to conduct limited discovery, such as a short deposition of the TCPA movant or a very abbreviated document production. *See, e.g.*, *In re IntelliCentrics, Inc.*, No. 02-18-00280-CV, 2018 WL 5289379, at *5–7 (Tex. App.—Fort Worth Oct. 25, 2018, orig.

proceeding) (mem. op.) (allowing non-movant to serve eleven document requests); *In re Bandin*, 556 S.W.3d 891, 895 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (allowing two, two–hour depositions); *Lane v. Phares*, 544 S.W.3d 881, 889 n.1 (Tex. App.—Fort Worth 2018, no pet.) (allowing three-hour deposition of TCPA movant). The trial court's decisions on discovery are reviewed under an abuse of discretion standard. *Walker v. Schion*, 420 S.W.3d 454, 458 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

The trial court permitted limited discovery when it allowed ADB and Black to take Wallace's deposition. In a deposition focused on the commercial speech exemption, Wallace was also questioned about some aspects of her medical history and the impact FasciaBlaster had on her body. Specifically, Wallace testified that she went to her doctor in September 2016 because she had gained a significant amount of weight that she believed "was not scientifically possible" based on her daily caloric intake. According to Wallace, this was the first time that she noticed that the FasciaBlaster's impact on her body was not limited to the physical signs that she had observed, such as bruising, and she suspected that the massage tool was responsible for her unexplained weight gain. Wallace testified that her health deteriorated rapidly between September 2016 and December 2016. She began to experience dizzy spells and flu-like symptoms that her doctor could not explain, including debilitating fatigue. She testified that she saw a handful of different

doctors who "led [her] to believe that the FasciaBlaster was the cause" of her health problems. Wallace testified that Dr. Feste, a gynecologist and hormone specialist in San Antonio, told her in December 2016 that her "increased cortisol levels" and "chronic inflammation" were being caused by her use of the FasciaBlaster. Wallace testified that Dr. Feste did not provide her with a "written report that says that the cortisol was being caused by—the high cortisol levels were being caused by [her] use of the FasciaBlaster."

The trial court rejected ADB and Black's requests for further discovery which included 62 requests for admissions, 24 interrogatory requests containing subparts, and 39 requests for production. These discovery requests sought information on, among other things, Wallace's criminal record and her contacts with the media, government agencies, and consumer reporting groups. The non-movant's burden is merely to make a prima facie case for each element of its claims and "[a] party would, therefore, not need multiple or lengthy depositions or voluminous written discovery in order to meet the low threshold to present a prima facie case." *In re SPEX Grp. US LLC*, No. 05-18-00208-CV, 2018 WL 1312407, at *4 (Tex. App.—Dallas Mar. 14, 2018, no pet.) (mem. op.). On this record, we cannot find that the trial court abused its discretion by limiting the discovery as it did. *See id.* (granting mandamus relief overruling trial court order permitting broad discovery including

two sets of requests for production and two sets of interrogatories with 46 interrogatories, as well as subparts, and 197 requests for production).

We overrule ADB's and Black's fifth issue.

Attorney's Fees and Sanctions

In its third issue, ADB argues that the trial court abused its discretion by awarding Wallace $125,000 in attorney's fees, $110,000 in conditional appellate fees, and $125,000 in sanctions.

A. Attorney's Fees

1. Standard of Review and Applicable Law

We review a trial court's award of attorney's fees under Civil Practice and Remedies Code section 27.009(a)(1) for abuse of discretion. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016); *McGibney v. Rauhauser*, 549 S.W.3d 816, 820 (Tex. App.—Fort Worth 2018, pet. denied). A trial court does not abuse its discretion merely because the appellate court would have ruled differently in the same circumstance. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see also Low v. Henry*, 221 S.W.3d 609, 620 (Tex. 2007). Instead, the appropriate inquiry is whether the court acted without reference to any guiding rules or principles, that is, whether the court's act was arbitrary or unreasonable. *Low*, 221 S.W.3d at 614.

A successful motion to dismiss under the TCPA entitles the moving party to an award of "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1); *see also Urquhart v. Calkins*, No. 01-17-00256-CV, 2018 WL 3352919, at *2 (Tex. App.—Houston [1st Dist.] July 10, 2018, no pet.) (mem. op.).

A party seeking attorney's fees must prove the amount and reasonableness of the fees sought. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762–63 (Tex. 2012). Such proof "includes, at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id.* at 764. The proof must be sufficient to permit a court "to perform a meaningful review of their fee application." *Id.*

In analyzing fees, courts consider the following non-exclusive list of factors: (1) the time and labor required, novelty and difficulty of the question presented, and the skill required; (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); *Urquhart*, 2018 WL 3352919, at *3.

A "reasonable" attorney's fee "is not excessive or extreme, but rather moderate or fair." *Sullivan*, 488 S.W.3d at 299. The reasonableness of a fee award rests within the trial court's discretion. *Id.* Whether attorney's fees are reasonable is generally a question of fact. *See Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010); *Urquhart*, 2018 WL 3352919, at *2. A trial court does not abuse its discretion when its ruling is based on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009). An abuse of discretion does occur, however, when the trial court's ruling is not supported by any evidence. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012).

2. Analysis

The parties submitted conflicting evidence regarding the amount of reasonable fees that Wallace incurred during the trial phase. In support of her request for $125,487.50, Wallace provided two affidavits from her expert, Joe Roden, and invoices showing hours billed, billing rates, and task descriptions. Roden testified that although 356.25 hours were expended from June 6, 2017 through November 16, 2017 on legal tasks to defend against ADB's legal action, Wallace was only requesting fees for 235.50 of those hours. Most of the discounted time was for work

performed by two summer law clerks. Roden opined that "235.50 hours were reasonably expended from June 6, 2017 through November 16, 2017 on legal tasks that were necessary to defend against [ADB's] legal action." Roden further opined that the billing rates of Wallace's lawyers and paralegals are reasonable based on the experience, reputation, and ability of the lawyers and paralegals and their rates are consistent with the hourly fees customarily charged by attorneys and paralegals for the type of work performed in this case. Based on his experience as an appellate attorney and prior work on appeals, Roden also offered similar testimony regarding Wallace's estimated appellate attorney's fees. Roden testified the amount of reasonable appellate attorney's fees in this case was $110,050.00, i.e., $44,300.00 for appeal to the court of appeals, $18,950.00 for the petition for review stage in the Texas Supreme Court, $26,000.00 for the merits briefing stage in the Texas Supreme Court, and $20,800.00 for oral argument and completion of Texas Supreme Court proceedings.

Wallace contends that although the billing invoices she submitted were redacted in order to avoid disclosing privileged material, work product, and legal strategy, the invoices, nevertheless, provided the court and ADB's expert with a record of the work performed by counsel, the type of work, and the hours expended, and therefore, included sufficient information from which the court and ADB's expert could evaluate the reasonableness of the fees.

ADB objected to Wallace's request for attorney's fees and sanctions and provided supporting documentation, including the affidavit of its attorney's fees expert, Daniel J. Kasprzak. Kasprzak opined that Wallace's counsel's rates exceeded the rates customarily charged for similar services in Houston in defamation cases and that some of the work that Wallace was billed for was unnecessary, including time spent by her counsel resisting court-ordered discovery and pursuing a confidentiality agreement, even though Wallace only produced a few hundred pages of documents, which included no confidential information. Kasprzak concluded that the court should reduce the total billing time by approximately 16%, given the time invoiced for unnecessary work, and reduce Wallace's counsel's billing rates to a maximum of $500.00 per hour, which would be more in line with the rates customarily charged for similar services. According to Kasprzak, these reductions result in approximately 200 mixed man-hours and approximately $78,321.50 in reasonable attorney fees.

After considering the conflicting evidence and arguments of counsel, the trial court awarded Wallace $125,487.50 in attorney's fees for the trial phase, which is the amount she requested, and $110,000.00 in conditional appellate fees, which is $50.00 less than the amount she requested.[16]

---

[16] The affidavit provided by Wallace's counsel states that the total amount of reasonable attorney's fees through the completion of trial court proceedings is

On appeal, ADB argues that the trial court erred by awarding Wallace $125,487.50 in trial-phase attorney's fees because the fees were excessive, unreasonable, and based on time entries that were so heavily redacted that "the trial court could not possibly have had sufficient evidence to determine that the entire amount requested was 'not excessive or extreme, but rather moderate or fair.'" *McGibney*, 549 S.W.3d at 821 (quoting *Sullivan*, 488 S.W.3d at 299). ADB further contends that, "[i]n spite of inflated rates and hours—not to mention billing records so heavily redacted as to be useless—the trial court rubber-stamped Wallace's request, awarding her every dollar she requested." According to ADB, the amount of fees awarded in this case is "far out of line with community standards, especially for a simple defamation matter."

Despite the redactions and claims to the contrary, ADB and its expert were able to challenge the reasonableness of Wallace's requested fees. Kasprzak averred in his affidavit that he reviewed the affidavits provided by Wallace's expert, invoices, and the charts and ancillary material attached to the affidavits. Kasprzak opined, "And while much of this evidence appears in order, the activity descriptions often conflate activities hampering [an] analysis of reasonableness, making at least

---

$125,487.50 and the total amount of reasonable appellate attorney's fees is $110,050.00, i.e., $44,300.00 (through appeal to the court of appeals), $18.950.00 (through the petition for review stage in the Texas Supreme Court), $26,000.00 (through the merits briefing stage in the Texas Supreme Court), and $20,800.00 (through oral argument completion of Texas Supreme Court proceedings).

part of the asserted proof not clear and positive." He does not suggest that he was unable to evaluate the reasonableness of the total amount requested. Furthermore, it is apparent from the record that the redacted invoices were not "useless," as ADB contends, because ADB was able to discern enough relevant information from the invoices to challenge the reasonableness of the fees. For example, relying on Wallace's billing invoices, ADB asserted in its objections and response to Wallace's request for attorney's fees that Wallace's counsel charged her $4,550.00 for 7 hours spent in November 2017 preparing for and attending Wallace's deposition, and another $27,712.50 for time spent preparing for and attending the final hearing. ADB was also able to parse out the amount Wallace was charged for time spent "resisting production of documents, . . . resisting discovery ordered by the Court, [and] seeking a confidentiality agreement."

The trial court considered and resolved this conflicting evidence in determining a reasonable award for fees during the trial phase. We find no abuse of discretion. *See Unifund CCR Partners*, 299 S.W.3d at 97 (holding no abuse of discretion occurs when trial court's ruling is based on conflicting evidence and some evidence of substantive and probative character supports its decision).[17]

[17] Although ADB challenged the award of conditional appellate attorney's fees at the trial court level, ADB does not appear to be challenging the award on appeal, other than asserting that Wallace's motion to dismiss should have been denied and therefore, she is not entitled to any attorney's fees.

We overrule ADB's challenge to the award of $125,000 in attorney's fees.

B. Sanctions

We review sanctions awards in TCPA cases for abuse of discretion. *See Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam); *see also Landry's*, 566 S.W.3d at 70. A trial court abuses its discretion if the sanctions awarded are greater than necessary to promote compliance. *See Low*, 221 S.W.3d at 614. A trial court does not abuse its discretion, however, when its sanctions award is based on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners*, 299 S.W.3d at 97; *see also Rich v. Range Res. Corp.*, 535 S.W.3d 610, 614 (Tex. App.—Fort Worth 2017, pet. denied).

The TCPA states that if a court grants a motion to dismiss, the court shall award to the moving party "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." TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2) (emphasis added). Although the award of sanctions is mandatory, the trial court has broad discretion with respect to the amount of sanctions awarded. *See Rich*, 535 S.W.3d at 612–13 ("[T]he trial court possesses discretion to determine the sanction amount that is required to deter the party who brought the legal action from bringing similar actions in the future.") (quoting

Rauhauser v. McGibney, 508 S.W.3d 377, 389 (Tex. App.—Fort Worth 2014, no pet.)); *see also Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 881 (Tex. App.—Dallas 2014, no pet.) (stating that it was trial judge's prerogative to weigh evidence "in determining, as a matter of discretion, how large the sanction needed to be to accomplish its statutory purpose"). Factors relevant when assessing the appropriate amount of sanctions in a TCPA case include: (1) the plaintiff's annual net profits; (2) the amount of attorney's fees incurred; (3) the plaintiff's history of filing similar suits; and (4) any aggravating misconduct, among other factors. *See Am. Heritage Capital*, 436 S.W.3d at 881.

Here, Wallace argued that a large sanctions award was necessary to deter ADB and Black from bringing similar actions in the future because both parties were self-described millionaires who have taken aggressive responses to quiet their online critics. According to Wallace, ADB and Black are actively chilling free speech on the internet and using their lawsuit against Wallace "to advertise what happens when you criticize Ms. Black or her product."

Specifically, ADB and Black employ a cyber-security firm that monitors social media platforms and targets people who post negative reviews of ADB's products or otherwise criticize Black or her products. On at least one occasion, the head of the security team publicly named individuals, including Wallace, who he identified as "professional trollers" who had written "bad reviews" on Black's page

and were making "false claims and [using] fake profiles." He also urged readers to block the named individuals, including Wallace, to prevent them from leaving bad reviews on their pages.

On one occasion, Black, who "operate[s] [her] company personally," left a voicemail message for one critic who had posted negative comments on the Facebook group "Master Blaster":

> I am aware of the hate group. I have not only several spies with fake profiles in there, but also my attorney. And we are not—if you want to say that you hate me and I'm stupid, whatever, you can say anything that you want about me. But once you lie about me or my business, that becomes slander and it is prosecutable financially.
>
> So I just want to make you aware that I am watching that group and I hope that, you know, whatever hating that you feel you need to do, that you don't broach over into the lie. And just so you know, I already found one, and I will prosecute you if this continues.

On March 6, 2017—approximately two months before Wallace posted her allegedly defamatory and disparaging statements on Facebook—ADB's and Black's attorney sent a letter to one of the other women included on the list of "professional trollers," informing her that they were aware that she had made "certain negative statements towards the FasciaBlaster® device and [her] personal results from use of the device," and cautioning:

> ln the event that you or others you may know have a complaint and feel compelled to broadcast those complaints online, we must caution you that while the company recognizes that consumers have First Amendment rights and other consumer rights provided by the Federal Trade Commission (FTC), those rights are limited by the company's

> rights to not be defamed through slander or libelous actions that include actual malice or negligence regarding the truth of the statement. Ms. Black, her staff and her legal counsel take such actions very seriously.

On May 18, 2017, the company posted a message on its Facebook group "Ashley Black Guru":

> While we welcome the opportunity to hear from people who feel they have experienced negative effects from using the FasciaBlaster device, we also need our audience to be aware that knowingly making false or fraudulent injury or defect claims is illegal and may subject you to criminal and civil liability.
> . . . .
>
> We are issuing this statement because there is the misconception that the right to free speech is all encompassing. However, it does not protect violations of laws against internet trolling, computer intrusion, hacking, internet fraud, spam, internet harassment, internet intellectual property infringement, etc. These laws are available at Justice.gov. There are places on this website to report these trolling crimes. Ms. Black has been an ongoing victim and would appreciate your support in reporting activity that you have witnessed or been a victim of yourself.

ADB and Black sued Wallace on May 25, 2017 based on statements she posted in various Facebook groups. Within days of filing suit against Wallace, the company sent messages to other people who had been participating in those same groups.

> "It has come to our attention that you are participating in one or more Facebook groups called "Real Talk", "FRESH", "FasciaBlaster Negative Effects, Info and Negative Reviews", and "Blaster The Real Truth". We wanted to inform you that we have been forced to protect ourselves from false rhetoric as well as illegal activities in these groups,

> and we have taken action and will exercise our legal rights on a case by case basis."

The hyperlink "we have taken action" links to the petition filed against Wallace. ADB also posted a link to the petition on the "Legal" page of the "Ashley Black Guru" website.

ADB subsequently sued at least two other critics in addition to Wallace. Specifically, ADB sued Tilly Dorenkamp and Michelle Lanum for business disparagement in Harris County District Court in July 2017. Dorenkamp and Lanum had posted negative comments about the FasciaBlaster on the same Facebook group that Wallace had used, i.e., Blaster "THE REAL STORY." ADB was seeking between $2,000,000 and $5,000,000, plus injunctive relief requiring both women to "remove disparaging and defamatory comments about Ashley Black, ADB and FasciaBlaster from any and all websites, message boards, and social media websites." ADB ultimately dismissed its suits against Dorenkamp and Lanum.

ADB and Black argue that there is no evidence that they need to be deterred from bringing future unmeritorious lawsuits covered by the TCPA, "much less sufficient evidence to justify sanctions of more than $100,000" because Black was not party to either of these suits and Wallace did not prove that ADB's claims against

Dorenkamp and Lanum were legally unsound.[18] ADB further contends that the fact that ADB non-suited its claims against Dorenkamp and Lanum further highlights that sanctions are unnecessary.

ADB's and Black's arguments, however, do not consider the additional evidence Wallace submitted indicating that both ADB and Black have engaged in a deliberate plan to discredit and quiet their detractors, prevent or remove negative reviews of ADB's products, and threaten those who made negative comments, e.g., Black and her "spies" were watching them. "So I just want to make you aware that I am watching that group and I hope that, you know, whatever hating that you feel you need to do, that you don't broach over into the lie. And just so you know, I already found one, and I will prosecute you if this continues." ADB also posted the lawsuit against Wallace on one of its websites and notified other Facebook users that it had "been forced to protect [itself] from false rhetoric as well as illegal activities in these [Facebook] groups," and posted a link to the Wallace petition, which could arguably be construed as a warning to other Facebook posters about the consequences of publicly criticizing Black, ADB, and its products. We also note that

[18] ADB and Black point out that, unlike Wallace, both Dorenkamp and Lanum had voluntarily participated in ADB-sponsored studies, signed contracts that included non-disclosure agreements, and then breached those agreements by publicly complaining about ADB's products.

the trial court awarded a sanction that was substantially smaller than the one that Wallace sought.[19]

In light of the broad discretion provided to the trial court by section 27.009 and conflicting evidence about potential deterrence, we conclude that the trial court did not abuse its discretion by determining that a $125,487.50 sanction was required to deter further actions by ADB or Black. *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2); *Am. Heritage Capital*, 436 S.W.3d at 881 (stating trial court has discretion to determine how large sanction must be to accomplish its statutory purpose).

We overrule ADB's and Black's third issue.

Conclusion

We affirm the trial court's judgment.[20]

Russell Lloyd
Justice

---

19 Wallace suggested to the trial court "that a conservative sanction [in this case would be] at least three (3) times the amount awarded in attorney's fees." The court awarded Wallace $125,487.50 in sanctions, the same amount the court awarded in trial-phase attorney's fees. Wallace is not challenging the sanctions award on appeal.

20 Any pending motions are dismissed as moot, including Wallace's motion to strike portions of ADB's and Black's brief.

Panel consists of Justices Lloyd, Kelly, and Hightower.