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IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

JAMES MARCUS POWELL, *Plaintiff*, v. SARAH POWELL, *Defendant*.	§ § § § § § § § §	Case No.: 25C682

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HER RULE 12.02(6) MOTION TO DISMISS AND TENNESSEE PUBLIC PARTICIPATION ACT PETITION TO DISMISS

I. INTRODUCTION

This is a Strategic Lawsuit Against Public Participation—better known as a "SLAPP suit"[1]—filed by a criminal against his soon-to-be ex-wife, whom the Plaintiff abused for years. In June 2023, Plaintiff James Marcus Powell threatened his wife Defendant Sarah Powell, saying: "I want to kill you[.] I want to watch you die[.]"[2] A few weeks later, the Plaintiff beat and strangled her for refusing to have sex with him.[3] At that point—after years of feeling too afraid to leave her abusive husband or

[1] *See Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 657 (Tenn. Ct. App. 2021) ("The term 'SLAPP' stands for 'strategic lawsuits against public participation,' meaning lawsuits which might be viewed as 'discouraging the exercise of constitutional rights, often intended to silence speech in opposition to monied interests rather than to vindicate a plaintiff's right.'" (citing Todd Hambidge, et al., *Speak Up. Tennessee's New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights*, 55 TENN. B.J. 14, 15 (Sept. 2019))).

[2] **Ex. A**, Powell Decl., at ¶ 6.

[3] *Id.* at ¶ 7.

otherwise seek help[4]—Ms. Powell successfully obtained an order or protection against the Plaintiff, pressed criminal charges, and filed for divorce.[5]

In the months that followed, Ms. Powell filed truthful, good-faith police reports to document the Plaintiff's arguable violations of her order of protection and to encourage MNPD to investigate and take action if warranted.[6] In response, the Plaintiff has sued Ms. Powell to punish and silence her.[7]

Fortunately, the Tennessee Public Participation Act enables courts to make quick work of retaliatory lawsuits like this one. The Plaintiff's Complaint here also must be dismissed upfront on numerous grounds, including:

1. The Plaintiff's Complaint fails to state a claim upon which relief can be granted;

2. The Plaintiff's claims are precluded under Tennessee Code Annotated section 4-21-1003(a) and the qualified common interest privilege;

3. The Plaintiff's claims are precluded by the advice of counsel defense;

4. The Plaintiff's claims are precluded by the *Noerr–Pennington* doctrine; and

5. The gravamen of each of the Plaintiff's abuse of process claims is a malicious prosecution claim, and those claims fail.

For all of these reasons—or for any of them—Ms. Powell's Motion and TPPA Petition to dismiss this action should be **GRANTED**. Afterward, this Court should

[4] *Id.* at ¶ 4.
[5] *Id.* at ¶¶ 8–10.
[6] *Id.* at ¶¶ 26–28.
[7] Doc. 1, Pl.'s Compl.

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order the Plaintiff to pay her court costs, reasonable attorneys' fees, and discretionary costs. *See* Tenn. Code Ann. §§ 4-21-1003(c), 20-12-119(c), and 20-17-107(a)(1). This Court also should assess sanctions against the Plaintiff—to be quantified following further briefing—as necessary to deter repetition of his conduct. *See* § 20-17-107(a)(2).

II. LEGAL STANDARDS

A. RULE 12.02(6) MOTIONS TO DISMISS

A Rule 12.02(6) motion to dismiss a complaint for failure to state a claim "asserts that the allegations in the complaint, accepted as true, fail to establish a cause of action for which relief can be granted." *Conley v. State*, 141 S.W.3d 591, 594 (Tenn. 2004). Generally, a motion to dismiss is resolved by examining the pleadings alone. *Leggett v. Duke Energy Corp.,* 308 S.W.3d 843, 851 (Tenn. 2010) (citing *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994)). This Court, however, also may consider "items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment." *W. Exp., Inc. v. Brentwood Servs., Inc.*, No. M2008-02227-COA-R3-CV, 2009 WL 3448747, at *3 (Tenn. Ct. App. Oct. 26, 2009) (quoting *Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. Feb. 19, 2009), *app. denied* (Tenn. Aug. 24, 2009)). That includes court records, including the court records referenced in the Plaintiff's Complaint. *See State*

v. Nunley, 22 S.W.3d 282, 288 (Tenn. Crim. App. 1999) ("Court records fall within the general rubric of facts readily and accurately determined."); *Ind. State Dist. Council of Laborers v. Brukardt,* No. M2007-02271- COA-R3-CV, 2009 WL 426237, at *9 (Tenn. Ct. App. Feb. 19, 2009) ("Tennessee law allows for judicial notice (TRE 201) of public records." (citing COHEN, SHEPARD, AND PAINE, TENN. LAW OF EVID. § 2.01[4][c] (5th ed. 2005))), *app. denied* (Tenn. Aug. 24, 2009).

Further, "[a]lthough [this Court is] required to construe the factual allegations in [the Plaintiff's] favor, and therefore accept the allegations of fact as true, [this Court is] not required to give the same deference to conclusory allegations." *Kincaid v. SouthTrust Bank,* 221 S.W.3d 32, 40 (Tenn. Ct. App. 2006) (citing *Riggs v. Burson,* 941 S.W.2d 44, 48 (Tenn. 1997)). This Court also is "not required to accept as true the inferences to be drawn from conclusory allegations." *Id.* Accordingly, "[c]onclusory allegations unsupported by material facts will not be sufficient to state such a claim." *Lane v. Becker*, 334 S.W.3d 756, 763 (Tenn. Ct. App. 2010).

After applying these standards, where—as here—a plaintiff "can prove no set of facts in support of the claim that would entitle the plaintiff to relief[,]" a defendant's motion to dismiss for failure to state a claim must be granted. *See Crews v. Buckman Lab'ys Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

B. TENNESSEE PUBLIC PARTICIPATION ACT PETITIONS TO DISMISS

The TPPA—which Tennessee enacted in 2019 to deter, expediently resolve, and punish SLAPP-suits like this one—provides that "[i]f a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of

association, that party may petition the court to dismiss the legal action" subject to the specialized provisions of the TPPA. *See* §§ 20-17-104 & -105. "[T]o protect the constitutional rights of parties[,]" the TPPA "provide[s] an additional substantive remedy" that "supplement[s] any remedies which are otherwise available . . . under the Tennessee Rules of Civil Procedure." § 20-17-109. As such, nothing in the TPPA "[a]ffects, limits, or precludes the right of any party to assert any defense, remedy, immunity, or privilege otherwise authorized by law[.]" § 20-17-108(4).

In enacting the TPPA, the Tennessee General Assembly established forcefully that:

> The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury. This chapter is consistent with and necessary to implement the rights protected by the Constitution of Tennessee, Article I, §§ 19 and 23, as well as by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent.

§ 20-17-102.

Substantively, the TPPA also provides, among other things, that:

1. When a party has been sued in response to her exercise of the right of free speech or the right to petition, she "may petition the court to dismiss the legal action" under section 20-17-104(a);

2. "[a]ll discovery in the legal action is stayed" automatically by statute "until the entry of an order ruling on the petition" under section 20-17-104(d); and

3. "[t]he court's order dismissing or refusing to dismiss a legal action

pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals" under section 20-17-106.

A TPPA petition to dismiss "may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper." § 20-17-104(b). Under the TPPA, "[t]he petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association." § 20-17-105(a). Afterward, the Court "shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action." § 20-17-105(b). Separately, "[n]otwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action." § 20-17-105(c). "If the court dismisses a legal action pursuant to a petition filed under this chapter, the legal action or the challenged claim is dismissed with prejudice." § 20-17-105(e).

III. FACTS

For purposes of Ms. Powell's Motion to Dismiss only—but not for purposes of her TPPA Petition—the allegations set forth in the Plaintiff's Complaint are accepted as true. *See Conley*, 141 S.W.3d 591 at 594.

A. THE PLAINTIFF'S ALLEGATIONS

The Plaintiff and Ms. Powell are currently married, but divorce proceedings

are pending.[8] Before filing for divorce, on or about July 3, 2023, Ms. Powell sought and was granted an ex-parte order of protection against the Plaintiff.[9] Thereafter, on or about September 1, 2023, the Plaintiff sought and obtained an ex-parte order of protection against Ms. Powell.[10]

On October 23, 2023, the Fourth Circuit Court of Davidson County held a hearing on Ms. Powell's petition for an order of protection against the Plaintiff.[11] The Court granted Ms. Powell's petition and entered an order of protection against the Plaintiff.[12] The Plaintiff alleges that his petition for an order of protection against Ms. Powell was "dropped"[13] (though court records demonstrate otherwise).

Before the hearing, on September 29, 2023, Ms. Powell filed a police report against the Plaintiff for allegedly following her around the Green Hills Mall in violation of the temporary order of protection.[14] The Plaintiff claims that he was "simply attending an appointment" and was "not attempting to make contact with" Ms. Powell.[15] Nonetheless, he was summoned regarding this First OP Violation and turned himself in.[16]

On May 23, 2024, the Parties were scheduled to exchange their children at the Midtown Police Precinct, but the children would not come to the Plaintiff's car.[17] The

[8] Doc. 1, Pl.'s Compl., at ¶¶ 5, 7–8.
[9] *Id.* at ¶¶ 6–7.
[10] *Id.* at ¶ 9.
[11] *Id.* at ¶ 10.
[12] *Id.* at ¶ 17.
[13] *Id.*
[14] *Id.* at ¶¶ 11–15.
[15] *Id.* at ¶ 16.
[16] *Id.* at ¶ 18.
[17] *Id.* at ¶ 20–21.

Plaintiff began filming the event.[18] Police stepped in to intervene and completed an incident report.[19] The Plaintiff alleges that Ms. Powell delayed reporting to police what happened at the exchange until June 4, 2024.[20] On June 17, 2024, Ms. Powell testified regarding this Second OP Violation, and an arrest warrant for the Plaintiff was issued.[21] The Plaintiff was arrested on June 19, 2024.[22]

Following his release from jail, the Plaintiff allegedly drove past Ms. Powell's residence.[23] On June 27, 2024, the Plaintiff was arrested for this Third OP Violation.[24]

All three alleged violations of the order of protection against the Plaintiff were consolidated into one preliminary hearing on October 2, 2024.[25] The Plaintiff claims that the court "Nolled" the First OP Violation;[26] dismissed the Second OP Violation, finding that it "was not a violation of the order of protection;[27] and bound over the Third OP Violation.[28] As of the filing of the Plaintiff's Complaint, the Third OP Violation remained pending,[29] though it has since been resolved as part of the Plaintiff's plea to domestic assault with bodily injury.[30]

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[18] *Id.* at ¶ 21.
[19] *Id.* at ¶ 22.
[20] *Id.* at ¶ 24.
[21] *Id.* at ¶ 28.
[22] *Id.* at ¶ 29.
[23] *Id.* at ¶ 30.
[24] *Id.* at ¶ 31.
[25] *Id.* at ¶ 32.
[26] *Id.* at ¶ 33.
[27] *Id.* at ¶ 34.
[28] *Id.* at ¶ 35.
[29] *Id.*
[30] *See* Ex. 1 to Defendant's Counter-Compl.

The Plaintiff claims that Ms. Powell "has continuously brought false charges against the Plaintiff for violations of the Order of Protection, which are either completely fabricated or not violations of the Order of Protection, to attempt to harass the Plaintiff and deter him from pursuing his rights in their divorce proceedings."[31] Accordingly, the Plaintiff has asserted claims for malicious prosecution (as to the Second OP Violation)[32] and abuse of process (as to all alleged violations).[33]

B. REALITY

During their marriage, the Plaintiff emotionally and physically abused Ms. Powell.[34] The Plaintiff—a heavy drinker with unpredictable mood swings—manipulated and controlled Ms. Powell; hit her; pushed her down the stairs; threatened her life; pressured her for sex against her will; frequently told her "it's not rape if you're married," and beat and strangled her when she refused.[35] Others had seen evidence of the abuse, but at the time, Ms. Powell explained away her injuries.[36]

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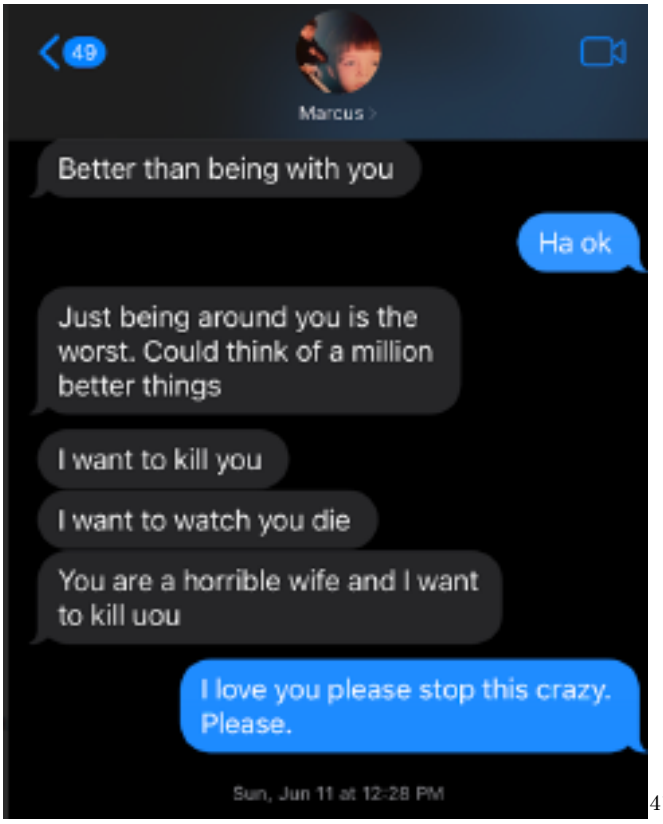
[31] Doc. 1, Pl.'s Compl., at ¶ 36.
[32] *See id.* at 6–7.
[33] *See id.* at 7–8.
[34] **Ex. A**, Powell Decl., at ¶ 3; **Ex. B**, Martin Decl., at ¶ 3.
[35] *Id.*
[36] *See, e.g.*, **Ex. B** at ¶¶ 4–6 ("At one point in 2022, I observed that Ms. Powell had a black eye. Concerned about her health and well-being, I asked her what happened, and she blamed it on her own clumsiness. Similarly, in approximately April 2023, I observed severe bruising on her skin. Again concerned about her health and well-being, I asked her what happened, and she said she fell down the stairs. I only learned of the extent of the Plaintiff's abuse when I heard Ms. Powell testify in court."). *See also* **Ex. A** at ¶ 4 ("Whenever others noticed my injuries from the Plaintiff's abuse, I lied about how they happened because I was too afraid and ashamed to confide in others, leave my husband, or otherwise seek help.").

Like so many victims of domestic abuse,[37] Ms. Powell suffered in silence, feeling too ashamed or afraid to confide in others, leave her abusive husband, or otherwise seek help.[38]

In June 2023, the Plaintiff and Ms. Powell went out to celebrate the Plaintiff's birthday.[39] Not wishing to stay out too late, Ms. Powell left and went home.[40] The Plaintiff—who continued to party and was upset that Ms. Powell had left—then threatened Ms. Powell by text, stating he wanted to kill her and watch her die:



[41]

[37] *See, e.g.*, *Why People Stay*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/support-others/why-people-stay-in-an-abusive-relationship/ (last visited April 9, 2025).
[38] **Ex. A** at ¶ 4.
[39] *Id.* at ¶ 5.
[40] *Id.*
[41] *Id.* at ¶ 6.

A few weeks later, on July 2, 2023, the Plaintiff pressured Ms. Powell for sex.[42] Ms. Powell said "no."[43] The Plaintiff became enraged, climbed on top of Ms. Powell, beat her, and then strangled her.[44] Once Ms. Powell broke free, she called 911.[45] Ms. Powell thereafter pressed criminal charges to which the Plaintiff pleaded *nolo contendere* on April 11, 2025.[46] Ms. Powell also successfully obtained an order of protection against the Plaintiff[47]—which the Fourth Circuit Court of Davidson County extended on October 4, 2024[48]—and she filed for divorce.[49]

On September 1, 2023—in a transparent attempt to retaliate against Ms. Powell for obtaining an ex-parte order of protection against him and filing for divorce—the Plaintiff sought his own order of protection against Ms. Powell.[50] The Plaintiff did not, however "drop[]" his petition for an order of protection against Ms. Powell as his Complaint represents.[51] Rather, the trial court *dismissed* it with prejudice, on the merits, after a full trial.[52]

Afterward, to encourage MNPD to investigate and take action if warranted, Ms. Powell filed truthful, good-faith police reports—on the advice of counsel after truthfully disclosing what happened[53]—reporting arguable violations of her order of

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[42] *Id.* at ¶ 7.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] **Ex. D**, Order (Apr. 11, 2025).
[47] **Ex. A** at ¶¶ 11, 20.
[48] *See id.* at Ex. 2 (Order (Oct. 4, 2024)).
[49] **Ex. A** at ¶ 10.
[50] *Id.* at ¶ 11.
[51] *See* Doc. 1 at ¶ 17.
[52] *See* **Ex. A** at Ex. 1, Order (Oct. 23, 2023).
[53] *See* **Ex. C**, Loring Decl.

protection.[54] Ms. Powell also testified about the alleged violations to encourage judicial review of her reports and to protect herself from the Plaintiff.[55]

Ms. Powell had good reasons to report each of the three violations alleged, none of which concluded with an order indicating the Plaintiff's innocence.

First, on or about September 21, 2023, Ms. Powell met a friend—Marisa Martin—at Green Hills Mall to eat and shop.[56] While Ms. Powell and Ms. Martin were on the patio at Chopt, they heard a truck with a loud muffler.[57] Ms. Powell recognized it as the Plaintiff's truck.[58] Ms. Powell—visibly uncomfortable at this point—nervously put her hands in the air and waved to the Plaintiff to notify him that she was there, given the ex-parte orders of protection that were in place at the time.[59] Ms. Powell did not taunt him, nor did she make any vulgar gestures at him.[60] The Plaintiff then slammed on his brakes, revved his engine, and sped through the parking lot and around the corner.[61] Ms. Powell and her friend assumed the Plaintiff had left the mall, so they proceeded inside to shop.[62]

While in J. Crew, Ms. Powell and her friend observed the Plaintiff walk past the store approximately three times, making eye contact with Ms. Powell.[63] Ms. Martin was worried that the Plaintiff was somehow tracking Ms. Powell's

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[54] **Ex. A** at ¶¶ 29, 31–32.
[55] *Id.* at ¶ 30.
[56] *Id.* at ¶ 12; **Ex. B** at ¶ 7.
[57] *Id.*
[58] **Ex. A** at ¶ 12; **Ex. B** at ¶¶ 7–8.
[59] **Ex. A** at ¶ 13; **Ex. B** at ¶¶ 8–9.
[60] **Ex. A** at ¶ 13; **Ex. B** at ¶ 9.
[61] **Ex. A** at ¶ 14; **Ex. B** at ¶ 10.
[62] *Id.*
[63] **Ex. A** at ¶ 15; **Ex. B** at ¶ 11.

movements, so she called her husband.[64] He advised her that they should not leave the mall, so they didn't.[65] When Ms. Powell and her friend felt it was safe, they went to Nordstrom.[66] When they tried to leave the store, they saw the Plaintiff there, too, walking back and forth in front of the exit, again making eye contact with Ms. Powell.[67] The Plaintiff appeared to be following them, and Ms. Powell felt intimidated and afraid.[68] Given that Ms. Powell and Ms. Martin did not ride to the mall together, Ms. Martin was scared to leave Ms. Powell alone, because she was afraid that the Plaintiff would be outside waiting for Ms. Powell and would hurt her.[69] Ms. Powell and her friend walked around the mall until they no longer saw the Plaintiff and felt it was safe to leave.[70]

After relaying these facts in good faith to her counsel, and acting on the advice of her counsel, Ms. Powell reported the incident at the mall to the Metro Nashville Police Department.[71] When Ms. Powell made the report, she was unaware of the Plaintiff's supposed eye doctor appointment.[72]

Second, on May 23, 2024, the Plaintiff and Ms. Powell were scheduled to exchange their children at the Midtown Police Precinct.[73] While there, the children got upset, refused to get out of the car, and began pleading with Ms. Powell not to

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[64] **Ex. B** at ¶ 12.
[65] *Id.*
[66] **Ex. A** at ¶ 16; **Ex. B** at ¶ 13.
[67] *Id.*
[68] **Ex. A** at ¶ 17; **Ex. B** at ¶ 14.
[69] **Ex. B** at ¶ 15.
[70] **Ex. A** at ¶ 18; **Ex. B** at ¶ 16.
[71] **Ex. A** at ¶ 19–20; **Ex. C** at ¶ 11.
[72] **Ex. A** at ¶ 21.
[73] *Id.* at ¶ 23.

make them go with the Plaintiff.[74] The Plaintiff began video-recording the incident.[75] At the time, Ms. Powell believed he was doing so to intimidate her.[76]

Ms. Powell called her attorney's office during the exchange and told a paralegal at the office the facts of what she observed.[77] The paralegal told Ms. Powell to alert an officer about what was happening, which she did.[78] Afterward, Ms. Powell left town for the holiday weekend, and she sought further advice from her counsel after she returned.[79] In good faith, Ms. Powell truthfully relayed the facts of what she witnessed to her counsel, who advised her that: (1) the video recording constituted indirect contact, (2) she should report the incident to MNPD; and (3) she should pursue the violation.[80] As to the First and Second OP Violations, Ms. Powell's attorneys further counseled that, because there was an existing criminal case pending against the Plaintiff arising from the same incident as the order of protection, Ms. Powell should report the incident to the Assistant District Attorney assigned to the pending criminal case and "rely on the discretion of the District Attorney's office as to whether they would pursue criminal charges for violations of the order of protection based on the above-described incidents."[81]

Third, on June 19, 2024, Ms. Powell saw the Plaintiff drive past her home.[82]

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at ¶ 24.
[78] *Id.*
[79] *Id.*
[80] *Id.*; **Ex. C** at ¶ 12.
[81] **Ex. C** at ¶ 13.
[82] **Ex. A** at ¶ 25.

Counsel advised her to report the matter to MNPD.[83] Ms. Powell did not do so at the time because her children were home, and she did not want the police to come to their home while they were there or to take her children with her to the precinct to file a report.[84]

On June 27, 2024, Ms. Powell attended a scheduled meeting with Becky Bullard at the Family Safety Center to discuss the criminal case against the Plaintiff.[85] When Ms. Powell told Ms. Bullard about the Plaintiff driving past her home, Ms. Bullard encouraged Ms. Powell to speak with an officer.[86] The officer determined that the Plaintiff had violated the order of protection by driving by Ms. Powell's home and set her up with the commissioner via video conference.[87] The commissioner found probable cause to issue a warrant for the Plaintiff's arrest.[88]

When Ms. Powell made these reports to MNPD, she intended to document arguable violations of the order of protection and to encourage MNPD to investigate and take action if warranted.[89] Likewise, Ms. Powell testified before the judicial commissioner to encourage judicial review of her reports and to protect herself from the Plaintiff.[90] Ms. Powell made those reports in good faith and in connection with a matter of health or safety and community well-being, because women like Ms. Powell

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[83] *Id.*
[84] *Id.*
[85] *Id.* at ¶ 26.
[86] *Id.*
[87] *Id.* at ¶ 27.
[88] *Id.* at ¶ 28.
[89] *Id.* at ¶ 29.
[90] *Id.* at ¶ 30.

deserve to feel safe in our community.[91] Ms. Powell's reports were truthful.[92] In response, the Plaintiff has now sued Ms. Powell in a retaliatory effort to punish and silence her.[93]

IV. ARGUMENT

A. THE PLAINTIFF HAS FAILED TO STATE A COGNIZABLE MALICIOUS PROSECUTION CLAIM.

To establish the essential elements of malicious prosecution, a plaintiff must initially "prove that (1) a prior suit or judicial proceeding was instituted without probable cause, (2) defendant brought such prior action with malice, and (3) the prior action was finally terminated in plaintiff's favor." *Roberts v. Fed. Exp. Corp.*, 842 S.W.2d 246, 247–48 (Tenn. 1992) (citations omitted). Further, when a malicious prosecution claim arises from a criminal disposition, "[a] plaintiff can pursue a claim for malicious prosecution only if an objective examination, limited to the documents disposing of the proceeding or the applicable procedural rules, indicates the termination of the underlying criminal proceeding reflects on the merits of the case and was due to the innocence of the accused." *Mynatt v. Nat'l Treasury Emps. Union, Chapter 39*, 669 S.W.3d 741, 752 (Tenn. 2023).

Here, the Plaintiff cannot satisfy the elements of his malicious prosecution claim because: (1) probable cause was established as a matter of law; (2) the order disposing of the underlying criminal proceeding does not indicate that the proceeding terminated on the merits due to the Plaintiff's innocence; and (3) merely providing

[91] *Id.* at ¶ 31.
[92] *Id.* at ¶ 32.
[93] *See* Doc. 1.

truthful information to a prosecuting authority cannot form the basis of a malicious prosecution claim. As a result, the Plaintiff's malicious prosecution claim should be dismissed for failure to state a claim.

1. Probable cause was established as a matter of law.

Because Tennessee public policy dictates that "the reporting of valid complaints, if supported by probable cause to believe they are true, should not and will not be inhibited[,]" there is "a heavy burden of proof on the plaintiff in malicious prosecution actions in establishing malice and lack of probable cause." *Kauffman v. A.H. Robins Co.*, 448 S.W.2d 400, 404 (Tenn. 1969) (citing *Lipscomb v. Shofner*, 33 S.W. 818 (Tenn. 1896)); *see also Mynatt*, 669 S.W.3d at 750 (expressing concern that "the threat of a later malicious prosecution action could . . . deter citizens from good-faith reporting of potentially criminal conduct[]"). "Probable cause exists where the party that instituted the underlying proceedings had a reasonable belief in the existence of facts supporting his or her claim and a reasonable belief that those facts made out a legally valid claim." *Preston v. Blalock*, No. M2014-01739-COA-R3-CV, 2015 WL 3455384, at *4 (Tenn. Ct. App. May 29, 2015), *perm. to app. denied* (Tenn. Sept. 17, 2015).

"The reasonableness of the party's belief is an objective determination made in light of the facts and circumstances at the time the underlying proceedings were initiated." *Id.* (citing *Roberts*, 842 S.W.2d at 248). Further, probable cause can be established as a matter of law based on an interim adverse judgment. *See, e.g.*, *Crowe v. Bradley Equip. Rentals & Sales, Inc.*, No. E2008-02744-COA-R3-CV, 2010 WL

1241550, at *5 (Tenn. Ct. App. Mar. 31, 2010) ("Regarding the malicious prosecution claim, an indictment by a grand jury equates to a finding of probable cause." (citing *Parks v. City of Chattanooga*, No. 1:02-CV-116, 2003 WL 23717092, at *4 (E.D. Tenn. Dec. 15, 2003), *aff'd*, 121 F. App'x 123 (6th Cir. 2005))).

Under the interim adverse judgment rule, "'a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court.'" *Parrish v. Latham & Watkins*, 3 Cal. 5th 767, 776 (2017) (citation omitted). "This rule reflects a recognition that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.'" *Id.* (citation omitted). "That is to say, if a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.'" *Id.* (citation omitted).

The Plaintiff's own Complaint negates the probable cause element of his malicious prosecution claim. As the Plaintiff himself concedes and pleads: "On June 17, 2024, . . . the Defendant gave her statement to the Judge/Commission regarding the Second Alleged OP Violation and an arrest warrant was issued for the Plaintiff."[94] The Plaintiff does not allege that Ms. Powell's statements to the commissioner were

[94] *Id.* at ¶ 28.

false.[95] In fact, the Plaintiff's Complaint acknowledges that Ms. Powell's report was *true*: He himself admits that—as Ms. Powell reported—he "recorded the interaction" giving rise to Ms. Powell's report.[96] The commissioner's interim adverse judgment thus is conclusive of the fact that probable cause existed. *See id.*; *Crowe*, 2010 WL 1241550, at *5. As a result, the Plaintiff's malicious prosecution claim fails at the probable cause element.

2. <u>The order disposing of the underlying criminal proceeding does not indicate the proceeding terminated on the merits due to the Plaintiff's innocence.</u>

As to the favorable termination element: "[A] judgment that terminates a lawsuit in favor of one of the parties must address the merits of the suit rather than terminating the suit on procedural or technical grounds." *Himmelfarb v. Allain*, 380 S.W.3d 35, 38 (Tenn. 2012) (emphasis added). The documents disposing of the proceeding also must reflect that it terminated on the merits *due to the Plaintiff's innocence*, rather than for some other reason. *See Mynatt*, 669 S.W.3d at 752 ("A plaintiff can pursue a claim for malicious prosecution only if an objective examination, limited to the documents disposing of the proceeding or the applicable procedural rules, indicates the termination of the underlying criminal proceeding reflects on the merits of the case and was due to the innocence of the accused.").

"'It is well-settled that a trial court speaks through its written orders—not through oral statements contained in the transcripts[.]'" *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015) (collecting cases). Thus, the Plaintiff may not rely

[95] *See generally id.*
[96] *Id.* at ¶¶ 21, 24

on anything but the trial court's written order to support his malicious prosecution claim. *See id.* That rule presents a fatal problem for the Plaintiff, though, because the trial court's written order reflects only that the charge was dismissed, and it lacks the necessary finding that the dismissal was "due to the innocence of the accused[,]" *Mynatt*, 669 S.W.3d at 752:

DISPOSITION

[ ] Pled Guilty	[ ] Found Guilty	[ ] Not Guilty	[ ] 40-35-313	
[X] Dismissed	[ ] Dismissed on Costs	[ ] Dismissed ROS	[ ] Dismissed, Cost to Pros	
[ ] Nolled	[ ] Nolo Contendere	[ ] Forfeiture Judgment	[ ] Retired on Costs	[ ] Retired

97

In fact, that order does not even reflect that the court's dismissal was on the merits at all, as opposed to having been dismissed on a procedural ground.[98] As a result, the Plaintiff cannot satisfy the favorable termination element of his malicious prosecution claim. *See id.*

3. Merely providing truthful information cannot form the basis of a malicious prosecution action.

For purposes of the Plaintiff's malicious prosecution claim, all that Ms. Powell is alleged to have done is provide truthful information about the exchange incident.[99] But merely providing truthful information to a prosecuting authority cannot give rise to a malicious prosecution claim. *Wykle v. Valley Fidelity Bank & Trust Co.*, 658 S.W.2d 96, 99 (Tenn. Ct. App. 1983) ("[B]efore one can be liable for malicious prosecution, he must do something more than merely give information."), *perm. app. denied* (Tenn. Aug. 1, 1983). Further, the "giving of information or the making of the

[97] *Id.* at Ex. 3 (Order (Oct. 2, 2024)).
[98] *See id.*
[99] *Id.* at ¶¶ 24, 28.

accusation . . . does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit." *Cohen v. Ferguson*, 336 S.W.2d 949, 954 (Tenn. Ct. App. 1959) (citing RESTATEMENT (FIRST) OF TORTS § 653 cmt. b (1938)). That is necessarily the case here, where the Plaintiff has alleged that the reported violations were consolidated into one hearing and then prosecuted by a district attorney who exercised independent judgment in prosecuting them, including the charge that culminated in a dismissal order.

Numerous cases instruct that the Plaintiff's malicious prosecution claim fails under these circumstances. For example, in *Thompson v. Hamm*, the defendant to a malicious prosecution action had filed an affidavit with the city, accusing the plaintiff of racial discrimination. *Thompson v. Hamm*, No. W2015-00004-COA-R3-CV, 2015 WL 7234539, at *1 (Tenn. Ct. App. Nov. 17, 2015). The city's investigation into the report resulted in the plaintiff being terminated from his job. *Id.* Afterward, the Plaintiff filed a malicious prosecution lawsuit against the person who made the initial report. *Id.*

Upon review, the Tennessee Court of Appeals concluded that the defendant's "mere provision of information to the City, without more, [was] insufficient to render him liable for malicious prosecution[.]" *Id.* at *6. In reaching this holding, the Court of Appeals emphasized that "the City ultimately controlled the choice of whether to institute proceedings against [the Plaintiff]." *Id.* (citing *Smith v. Kwik Fuel Ctr.*, No. E2005–00741–COA–R3CV, 2006 WL 770469, at *6 (Tenn. Ct. App. Mar. 27, 2006)).

The same reasoning is dispositive here, where the Plaintiff's malicious prosecution claim is premised—in its entirety—on Ms. Powell's truthful reporting of the exchange recording to the police and commissioner. Following that report, a prosecuting authority determined, independently, that a criminal charge should be brought against the Plaintiff and then pursued prosecution. Accordingly, Ms. Powell's mere provision of uncontestedly truthful information to law enforcement cannot support a malicious prosecution claim.

B. THE PLAINTIFF HAS FAILED TO STATE COGNIZABLE ABUSE OF PROCESS CLAIMS.

The Plaintiff's Complaint fails to state any abuse of process claims because (1) the gravamen of the claims is malicious prosecution, and all of the claims fail; (2) even if the claims are construed as abuse of process claims, at least one claim is time-barred; and (3) the Plaintiff has failed to allege any abuse of judicial power. Thus, the Plaintiff's abuse of process claims should be dismissed.

1. <u>The gravamen of the Plaintiff's abuse of process claims is malicious prosecution, and all of the claims fail.</u>

The Plaintiff has alleged abuse of process here because he knows that none of his claims can survive as malicious prosecution claims. The gravamen rule requires this Court to treat the Plaintiff's claims according to their actual nature no matter the Plaintiff's preferred designation, though. *See Jacobi v. VendEngine Inc.*, No. M2023-01459-COA-R3-CV, 2025 WL 400697, at *3 (Tenn. Ct. App. Feb. 5, 2025). As the Court of Appeals recently explained:

> The analysis followed by courts when ascertaining the gravamen of a claim "is not dependent upon the 'designation' or 'form' litigants ascribe

> to an action." *Benz-Elliott*, 456 S.W.3d at 148 (quoting *Redwing*, 363 S.W.3d at 457). Instead, "a court must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought." *Id.* at 151. In other words, courts first look to the cause of the damages, *Resol. Tr. Corp. v. Wood*, 870 F. Supp. 797, 807 (W.D. Tenn. 1994), cited with approval in *Benz-Elliott*, 456 S.W.3d at 150, and then they look at the type of damages. *Benz-Elliott*, 456 S.W.3d at 151.

Id.; *see also Rubbermaid-Maryville, Inc. v. Barber & McMurry, Inc.*, No. 03A01-9309-CV-00327, 1994 WL 45315, at *2 (Tenn. Ct. App. Feb. 15, 1994) (noting "the rule that, regardless of the allegations of the complaint, the Court looks to the factual basis for the cause of action to determine the complaint's gravamen"); *cf. Deposit Recovery Corp. v. Santini*, 765 S.W.2d 764, 770 (Tenn. Ct. App. 1988) ("It is obvious that the gravamen of the counterclaim is the alleged institution and prosecution of a groundless civil suit, which is commonly denominated 'malicious prosecution'.").

The gravamen of a plaintiff's claim is a question of law. *See Gunter v. Lab'y Corp. of Am.*, 121 S.W.3d 636, 638 (Tenn. 2003) ("The determination of the gravamen of the complaint is a question of law which may be appropriately addressed in a motion to dismiss under Rule 12.02(6) of the Tennessee Rules of Civil Procedure."). The gravamen rule also applies on a per-claim basis. *See Benz-Elliott v. Barrett Enterprises, LP*, 456 S.W.3d 140, 149 (Tenn. 2015). Here, as in other cases, the gravamen of the Plaintiff's claims are "dispositive" of them. *Cf. Nichols v. Metro. Nashville Airport Auth.*, No. M2020-00593-COA-R3-CV, 2021 WL 1426992, at *2 (Tenn. Ct. App. Apr. 15, 2021) ("[T]he dispositive issue in this case is whether the gravamen of Plaintiff's claim is a civil rights claim for excessive use of force or 'simple negligence.'")

The gravamen of the Plaintiff's abuse of process claims is malicious prosecution.[100] It is easy to tell, because the Plaintiff's abuse of process claims are premised on the theory that Ms. Powell tortiously "filed reports of the Alleged OP Violations,"[101] and claim premised on the initiation of process necessarily cannot be an abuse of process claim. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 555 (Tenn. 1999) ("Mere initiation of a law suit, though accompanied by a malicious ulterior motive, is not abuse of process.") (citing extensive authority). Thus, the Plaintiff's claims—which are expressly premised on the theory that Ms. Powell initiated process with malicious motives—are malicious prosecution claims.

The Plaintiff cannot establish favorable termination as to any of his claims, however. A "nolle" disposition does not do. *See Mynatt*, 669 S.W.3d at 752. Nor does a dismissal that is unaccompanied by a dismissal document indicating that the disposition "reflects on the merits of the case and was due to the innocence of the accused." *Id.* A dismissal obtained as part of a plea agreement does not suffice, either. *See Roberts v. Hogan*, 1993 WL 298911, at *2–3 (Tenn. Ct. App. Aug. 6, 1993) ("'A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if . . . (a) the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused[.]'") (quoting Restatement (Second) of Torts § 660 (1977)); *Christian v. Lapidus*, 833 S.W.2d 71, 74

[100] *Id.* at ¶¶ 52–55.
[101] *Id.* at ¶ 54.

(Tenn. 1992) ("a compromise or settlement" precludes a malicious prosecution claim); *Cannon v. Peninsula Hosp.*, No. E2003-00200-COA-R3-CV, 2003 WL 22335087, at *2 (Tenn. Ct. App. Sept. 25, 2003) (a disposition obtained "with agreement or consent of the accused" cannot support a malicious prosecution claim).

Here, as with the Second OP Violation, *see supra*, the Plaintiff cannot satisfy the favorable termination element as to the First OP Violation or Third OP Violation. That is because those cases were "Nolled"[102] without an order indicating the Plaintiff's innocence and "Dismissed" as part of a plea agreement,[103] respectively. *See Mynatt*, 669 S.W.3d at 752. Thus, the Plaintiff cannot prevail as a matter of law. *Id.*

2. <u>The Plaintiff's first abuse of process claim is time-barred.</u>

"[A]buse of process and malicious prosecution are subject to different accrual rules[.]" *Cordova v. Martin*, 677 S.W.3d 654, 660 (Tenn. Ct. App. 2023), *app. denied* (Oct. 11, 2023). Thus, "'[u]nlike an action for malicious prosecution where a legal termination of the prosecution complained of is essential, in an action for abuse of process it is not necessary, ordinarily, to establish that the action in which the process issued has terminated unsuccessfully.'" *Id.* (quoting *Blalock*, 2012 WL 4503187, at *7). "'For this reason, a cause of action for abuse of process has been generally held to accrue, and the statute of limitations to commence to run, **from the termination of the acts which constitute the abuse complained of**, and not from the completion of the action which the process issued.'" *Id.* (quoting *Blalock*, 2012 WL 4503187, at *7) (emphasis added).

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[102] *Id.* at ¶ 33; *id.* at Ex. 2 (Order (Oct. 2, 2024)).
[103] **Ex. D**; *see also* **Ex. E**, Order (Apr. 11, 2025).

The significance of this distinction is that a litigant's decision "to continue" litigating a matter that a plaintiff contends is an abuse of process does not toll the statute of limitations through final termination of the proceedings. The Court of Appeals considered and rejected exactly that claim in *Blalock*, 2012 WL 4503187, at *7. There, the Court of Appeals explained:

> Dr. Blalock argues that his complaint for abuse of process is timely, even under the one year statute of limitations, because the general rule is that the statute begins to run against a claim of abuse of process "from the termination of the acts which constitute the abuse complained of." 1 AM.JUR.2D, *Abuse of Process*, § 27 (1994). He reasons that it is an abuse of process for Preston to continue to prosecute Landlord's claim for money he has already paid, and that the abuse has not terminated, for it continues so long as Landlord's suit against him remains unresolved. He has not offered any authority that specifically endorses this suggested interpretation of the general rule.
>
> To the contrary, it is generally held that while a cause of action for abuse of process accrues from the termination of the acts complained of, it does not await completion of the case in which the wrongful use of process occurred[.]

Id.

Here, Ms. Powell's September 29, 2023 report to MNPD is the act at issue in the Plaintiff's first abuse of process claim.[104] This lawsuit was not filed until March 13, 2025, however.[105] Thus, the Plaintiff's abuse of process claim premised on Ms. Powell's September 2023 report is time-barred. *See Cordova*, 677 S.W.3d at 660.

3. <u>The Plaintiff has failed to allege any abuse of judicial power.</u>

"The gist of the tort of abuse of process is the misuse of **the court's** power."

[104] Doc. 1 at ¶ 15 (asserting that "[o]n September 29, 2023, the Defendant filed a police report[,]" which the Plaintiff refers to as the "'*First Alleged OP Violation*'").
[105] *See id.*

Warwick v. Warwick, No. E2011-01969-COA-R3CV, 2012 WL 5960850, at *10 (Tenn. Ct. App. Nov. 29, 2012) (emphasis added). As such, some misuse "involv[ing] the authority of the court" is required. *Id.* at *11 ("[F]ailing to disclose assets during the marital property division is not abuse of process because it does not involve the authority of the court. We therefore conclude that the complaint fails to state a cause of action for abuse of process."). This essential requirement has been emphasized by Tennessee's appellate courts over and over again. *See, e.g.*, *Montpelier v. Moncier*, No. E2016-00246-COA-R3-CV, 2017 WL 2378301, at *5 (Tenn. Ct. App. June 1, 2017) ("Abuse of process 'only deals with perversions of the tools of litigation occurring after a lawsuit has commenced.'"), *app. denied* (Tenn. Dec. 13, 2017); *Blalock*, 2012 WL 4503187, at *4 ("[A] claim for abuse of process 'normally rests on some writ, order, or command of the court in the course of a judicial proceeding.' . . . Such a claim, therefore, refers to times when the authority of the court is used for some improper purpose." (quoting *Rentea v. Rose*, No. M2006-02076-COA-R3-CV, 2008 WL 1850911, at *4 (Tenn. Ct. App. Apr. 25, 2008)); *Maize v. Friendship Cmty. Church, Inc.*, No. E2019-00183-COA-R3-CV, 2020 WL 6130918, at *3–4 (Tenn. Ct. App. Oct. 19, 2020).

Given the clarity of Tennessee law on the point, federal courts that have applied Tennessee's abuse of process jurisprudence have had no difficulty understanding it. *See, e.g.*, *Amodio v. Ocwen Loan Servicing, LLC*, No. 3:18-CV-00811, 2018 WL 6727106, at *5–6 (M.D. Tenn. Dec. 21, 2018) ("Tennessee courts have made clear that the tort of abuse of process is grounded in misuse of judicial power. . . . The court does not find that the facts as alleged demonstrate a perversion

of the tools of litigation."). Further, "'[b]ecause of its potential chilling effect on the right of access to the courts, the tort of abuse of process is disfavored and must be narrowly or strictly construed to insure the individual a fair opportunity to present the claim.'" *Id.* at *5 (quoting 1 AM. JUR. 2D ABUSE OF PROCESS § 1).

Here, the Plaintiff's abuse of process claims are not based on any alleged misuse of judicial power. To the contrary, the Plaintiff's abuse of process claims are based entirely on Ms. Powell's mere *reports* of alleged order of protection violations.[106]

Lodging a report with law enforcement does not involve "*the court's* power" or "authority[.]" *Montpelier*, 2017 WL 2378301, at *6–8 (emphasis added). The Plaintiff himself recognizes as much. *See* Doc. 1 at ¶ 51 ("Abuse of process is for the improper use of process after it has been issued, not for maliciously causing process to issue (citing *Warwick*, 2012 WL 5960850, at *11)). Abundant authority supports the concession. *See, e.g., Bell ex rel. Snyder*, 986 S.W.2d at 555–56 ("Mere initiation of a law suit, though accompanied by a malicious ulterior motive, is not abuse of process." (citing *Priest v. Union Agency*, 125 S.W.2d 142, 144 (Tenn. 1939) ("If the execution had been lawfully issued, no action for abuse of process would lie because it was used in a regular and legitimate manner; and this is true even though the user was actuated by a wrongful motive."); *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.,* 728 P.2d 1202, 1208 (Cal. 1986) ("[T]he mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action."); *Joseph v. Markovitz,* 551 P.2d 571, 575 (Ariz. App. 1976)

[106] *See id.* at ¶ 52 (complaining about what "[t]he Defendant reported"); *id.* at ¶ 54 (complaining that "[t]he Defendant filed reports").

("[P]roof of abuse of process requires some act beyond the initiation of a lawsuit."); *Hall v. Hollywood Credit Clothing Co.,* 147 A.2d 866, 868 (D.C. Mun. App. 1959) ("The mere issuance of the process is not actionable, no matter what ulterior motive may have prompted it; the gist of the action lies in the improper use after issuance."); *Yoder v. Adriatico,* 459 So.2d 449, 450 (Fla. App. 1984) ("[T]he tort of abuse of process is concerned with the improper use of process after it issues."); *Brown v. Robertson,* 92 N.E.2d 856, 858 (Ind. App. 1950); *Brody v. Ruby,* 267 N.W.2d 902, 905–06 (Iowa 1978); *Friedman v. Dozorc,* 312 N.W.2d 585, 594–95 (Mich. 1981); *Edmonds v. Delta Democrat Publ'g Co.,* 3 So.2d 171, 174 (Miss. 1957); *Hauser v. Bartow,* 7 N.E.2d 268, 269 (N.Y. 1937) ("There must be a further act done outside the use of process—a perversion of the process."); *Clermont Environmental Reclamation Co. v. Hancock,* 474 N.E.2d 357, 361 (Ohio App. 1984) ("[I]f one uses process properly, but with a malicious motive, there is no abuse of process. . . ."); *Ann–Margret v. High Soc'y Magazine, Inc.,* 498 F. Supp. 401, 407 (S.D.N.Y.1980) ("[A] summons and complaint are not process capable of being abused."); *Manufacturers & Jobbers Fin. Corp. v. Lane,* 19 S.E.2d 849, 853 (N.C. 1942) ("The gist of an action for abuse of process is the improper use of the process after it has been issued."); *Snyder v. Byrne,* 770 S.W.2d 65, 67 (Tex. App. 1989); *Mullins v. Sanders,* 54 S.E.2d 116, 121 (Va. 1949); *Batten v. Abrams,* 626 P.2d 984, 990 (Wash. App. 1981) ("[T]here must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit."); PROSSER AND KEETON ON THE LAW OF TORTS § 121 at 898 (5th ed. 1984) ("[T]here is no liability where the defendant has done nothing more than

carry out the process to its authorized conclusion, even though with bad intentions."); Annotation, 80 A.L.R. 580 (1932)).

Put another way: To be liable for abuse of process, Ms. Powell must have misused *the court's* power. *Warwick*, 2012 WL 5960850, at *10. The Plaintiff does not allege Ms. Powell misused the court's power, though; instead, the Plaintiff complains that her "reports" themselves constituted an abuse of process.[107] As a matter of law, though, they did not and cannot. Thus, on their face, the Plaintiff's abuse of process claims fail to state a claim upon which relief can be granted, because the Plaintiff has failed to allege any "perversion of the tools of litigation." *Amodio*, 2018 WL 6727106, at *7 ("The court does not find that the facts as alleged demonstrate a perversion of the tools of litigation."); *Warwick*, 2012 WL 5960850, at *11 ("[F]ailing to disclose assets during the marital property division is not abuse of process because it does not involve the authority of the court. We therefore conclude that the complaint fails to state a cause of action for abuse of process.").

C. THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER THE TENNESSEE PUBLIC PARTICIPATION ACT.

The Tennessee Public Participation Act governs the Plaintiff's claims in this case. Further, as detailed below, the TPPA mandates that the Plaintiff's claims against Ms. Powell be dismissed with prejudice on several grounds.

1. The Tennessee Public Participation Act applies to this action, which the Plaintiff filed in response to Ms. Powell's exercise of her rights of free speech and to petition.

The TPPA provides that "[i]f a legal action is filed in response to a party's

[107] *See id.*

exercise of the right of **free speech**, **right to petition**, or right of association, that party may petition the court to dismiss the legal action" subject to the TPPA's specialized provisions. § 20-17-104(a) (emphasis added). Under section 20-17-103(3) of the TPPA, "'[e]xercise of the right of free speech' means a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution." In turn, section 20-17-103(6) provides that:

> "Matter of public concern" includes an issue related to:
>
> (A) **Health or safety**;
>
> (B) Environmental, economic, or **community well-being**;
>
> (C) **The government;**
>
> (D) A public official or public figure;
>
> (E) A good, product, or service in the marketplace;
>
> (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or
>
> (G) **Any other matter deemed by a court to involve a matter of public concern**[.]

Id. (emphases added).

Here, Ms. Powell has been sued in response to both her exercise of the right of free speech and the right of petition. The Plaintiff alleges that his claims arise from Ms. Powell's "report[s]" of three alleged order of protection violations.[108] Ms. Powell also has submitted admissible testimony that she made her reports in good faith and

[108] *See id.* at ¶¶ 41, 44, 52.

in connection with a matter of health or safety and community well-being "because women like [her] deserve to feel safe in our community."[109] Thus, the reports over which the Plaintiff has sued Ms. Powell qualify as "a communication made in connection with a matter of public concern" under several independent TPPA criteria. *See* § 20-17-103(6)(A), (B), (C), (G).

Ms. Powell also has been sued in response to her exercise of the right to petition. Under the TPPA:

> "Exercise of the right to petition" means a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and:
>
> (A) Is intended to encourage consideration or review of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body[.]

§ 20-17-103(4)(A).

This definition is broad. *See Doe v. Roe*, 638 S.W.3d 614, 623 (Tenn. Ct. App. 2021) ("[B]ased on our plain reading of the TPPA, the right to petition merely requires there to be a communication that is either intended to elicit consideration or review by a governmental body or intended to 'enlist public participation' to effectuate such consideration."). Section 20-17-103(4) also explicitly recognizes that a communication to a judicial body (like a judicial commissioner or court) or a governmental body (like the police) is a "petition" within the meaning of the TPPA. *Id.*

Ms. Powell has submitted admissible testimony that she reported the alleged order of protection violations to MNPD "to document the Plaintiff's arguable

[109] **Ex. A** at ¶ 31.

violations of the order of protection and to encourage MNPD to investigate and take action if warranted"[110] and testified before the judicial commissioner and court "to encourage judicial review of [her] reports and to protect [her]self from the Plaintiff."[111] Ms. Powell also has submitted admissible evidence explaining that she communicated the reports "in good faith, on advice of counsel, and in connection with a matter of health or safety and community well-being because women like [her] deserve to feel safe in our community."[112]

For these reasons, the reports over which the Plaintiff has sued Ms. Powell qualify as communications "intended to encourage consideration or review of an issue by a . . . state[] or local . . . judicial[] or other governmental body[.]" *See* § 20-17-103(4)(A). Thus, the Plaintiff's Complaint is subject to the TPPA because it is a response to Ms. Powell's exercise of the right to petition, too. *See* § 20-17-104(a). And having established that the TPPA applies to this action, the burden shifts to the Plaintiff to "establish[] a prima facie case for each essential element of the claim in the legal action." § 20-17-105(b).

2. Valid defenses preclude the Plaintiff's claims.

Separately, "the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action." § 20-17-105(c). Here, several valid defenses preclude liability.

[110] *Id.* at ¶ 29.
[111] *Id.* at ¶ 30.
[112] *Id.* at ¶ 31.

a. ***The Plaintiff's Complaint fails to state a claim upon which relief can be granted.***

The TPPA "is intended to provide an additional substantive remedy to protect the constitutional rights of parties and to supplement any remedies which are otherwise available to those parties . . . under the Tennessee Rules of Civil Procedure." *See* § 20-17-109. "[U]nder the Tennessee Rules of Civil Procedure," defendants may raise a plaintiff's "failure to state a claim upon which relief can be granted" as a defense to liability. *See* Tenn. R. Civ. P. 12.02(6). Thus, in support of her TPPA petition, Ms. Powell incorporates here her valid 12.02(6) defenses set forth above.

b. ***All of the Plaintiff's claims are precluded by statutory and common law immunity doctrines.***

i. Ms. Powell is immune from liability under Tennessee Code Annotated section 4-21-1003(a).

Tennessee Code Annotated section 4-21-1003(a) provides that:

> Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.

The immunity that section 4-21-1003(a) confers "shall not attach" if the person communicating it "[k]new the information to be false[,]" communicated it "in reckless disregard of its falsity[,]" or "[a]cted negligently in failing to ascertain the falsity of the information[.]" *See* Tenn. Code Ann. § 4-21-1003(b). The import of the statute, though, is that a person who communicates truthful information to the government—

or who communicates information to the government non-negligently—"shall be immune from civil liability on claims based upon the communication to the agency." *See* § 4-21-1003(a). Ms. Powell's communications meet this standard.

Here, when Ms. Powell reported the Plaintiff's alleged violations of the order of protection, she "intended to document the Plaintiff's arguable violations of the order of protection and to encourage MNPD to investigate and take action if warranted."[113] Similarly, Ms. Powell testified before the judicial commissioner to encourage judicial review of [her] reports and to protect [her]self from the Plaintiff."[114] Ms. Powell's reports were: (1) made in good faith, (2) made on advice of counsel, and (3) truthful.[115] Moreover, the Plaintiff concedes that Ms. Powell's reports were of concern to the police and the judicial commissioner, given that he has judicially admitted that a summons or warrant issued based on them.[116]

For these reasons, Ms. Powell is "immune from civil liability on claims" arising out of her truthful reports to the MNPD and court. *See id.* The Plaintiff's claims must therefore be dismissed based on Ms. Powell's statutory immunity from civil liability under section 4-21-1003(a).

ii. The qualified common interest privilege precludes the Plaintiff's claims.

Ms. Powell's statements and reports are protected by the qualified common interest privilege. *See McGuffey v. Belmont Weekday School,* No. M2019-01413-COA-

[113] *Id.* at ¶ 29.
[114] *Id.* at ¶ 30.
[115] *Id.* at ¶ 31–32.
[116] *See* Doc. 1 at ¶¶ 18, 28, 31.

R3-CV, 2020 WL 2754896, at *15 (Tenn. Ct. App. May 27, 2020), *app. denied* (Tenn. Sept. 16, 2020). Our Supreme Court has described the communications the privilege covers as follows:

> Qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. . . . The rule announced is necessary in order that full and unrestricted communication concerning a matter in which the parties have an interest or a duty may be had. It is grounded in public policy as well as reason.

Id. (quoting *S. Ice Co. v. Black*, 189 S.W. 861, 863 (Tenn. 1916)); *see also Trotter v. Grand Lodge F. & A.M. of Tenn.,* No. E2005-00416-COA-R3-CV, 2006 WL 538946, at *7 (Tenn. Ct. App. Mar. 6, 2006); *Pate v. Serv. Merch. Co.*, 959 S.W.2d 569, 576 (Tenn. Ct. App. 1996).

Here, Ms. Powell made all the reports and statements at issue here in good faith.[117] She did so not only in furtherance of her own health, safety, and well-being, but also "because women like [her] deserve to feel safe in our community."[118] Increased awareness of crimes against women, like those Ms. Powell has experienced, can encourage others to come forward as well. *See e.g.*, Anna North, *Study: more people reported sex crime around the world in the wake of Me Too*, VOX (Dec. 11, 2019), https://www.vox.com/2019/12/11/21003592/me-too-movement-sexual-assault-crimes-reporting. In other words, there is a common moral and social benefit to women like Ms. Powell reporting abuse and seeking accountability for the misconduct the

[117] **Ex. A** at ¶ 31.
[118] *Id.*

EFILED 04/18/25 08:51 PM CASE NO. 25C682 Joseph P. Day, Clerk

Plaintiff perpetrated here. *Cf. McGuffey*, 2020 WL 2754896, at *15.

For these reasons, even if the Plaintiff were able to establish every element of his claims, the qualified common interest privilege would nevertheless foreclose them.

c. *The Plaintiff's claims are precluded because Ms. Powell relied on the advice of counsel.*

After truthfully disclosing what she witnessed, Ms. Powell relied on the advice of competent counsel in making her reports.[119] "[T]hat a prior lawsuit or judicial proceeding was instituted without probable cause" is an essential element of a malicious prosecution claim. *Blalock*, 2015 WL 3455384, at *4. "Probable cause exists where the party that instituted the underlying proceedings had a reasonable belief in the existence of facts supporting his or her claim and a reasonable belief that those facts made out a legally valid claim." *Id.*

"The defendant in a malicious prosecution lawsuit may establish the existence of probable cause by demonstrating that he or she relied on the advice of counsel in initiating the underlying proceedings." *Id.* at *5 (citing *Sullivan v. Young*, 678 S.W.2d 906, 911 (Tenn. Ct. App. 1984); *Cooper v. Flemming*, 84 S.W. 801, 802 (Tenn. 1904) ("stating that the purpose of the advice of counsel defense is to 'establish the existence of probable cause'")). Further, "[t]he defense [of advice of counsel] may serve to rebut the scienter element of a . . . civil charge requiring a wilful or intentional violation of the law[,]" *see DiLiddo v. Oxford St. Realty, Inc.*, 450 Mass. 66, 79–80, 876 N.E.2d 421, 431 (2007) (collecting cases), so it applies to all of the Plaintiff's intent-based

[119] *See generally* **Ex. C.**

claims here.

> To establish probable cause through reliance on the advice of counsel, the defendant must prove three elements: (1) that the attorney's advice was sought in good faith, (2) that the defendant disclosed all material facts relating to the case in his possession and all facts that could have been ascertained by reasonable diligence, and (3) that the case was commenced pursuant to the attorney's advice.

Blalock, 2015 WL 3455384, at *5. (citing *Abernethy v. Brandt*, 120 S.W.3d 310, 314 (Tenn. Ct. App. 2002) (in turn citing *Cooper*, 84 S.W. at 802). These elements are established here.

According to the Plaintiff, on May 23, 2024, the Parties were scheduled to exchange their children at the Midtown Police Precinct, but the children would not come to the Plaintiff's car.[120] Ms. Powell says the same.[121] Both Parties agree that the Plaintiff video-recorded the incident.[122] At the time, Ms. Powell reasonably believed he was doing so to intimidate her.[123]

Ms. Powell called her attorney's office during the exchange and told a paralegal at the office these facts.[124] The paralegal told Ms. Powell to alert an officer about what was happening, which she did.[125] Afterward, Ms. Powell had to leave town for the holiday weekend and sought further advice of counsel when she returned.[126] She

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[120] Doc. 1 at ¶ 20–21.
[121] **Ex. A** at ¶ 23 ("On May 23, 2024, the Plaintiff and I were scheduled to exchange our children at the Midtown Police Precinct. While there, my children got upset, refused to get out of the car, and began pleading not to make them go with the Plaintiff.").
[122] Doc. 1 at ¶ 21; **Ex. A** at ¶ 213
[123] **Ex. A** at ¶ 23.
[124] **Ex. A** at ¶ 24; **Ex. C** at ¶
[125] **Ex. A** at ¶ 24.
[126] *Id.*

relayed these facts to counsel, who advised her that the video recording constituted indirect contact in contravention of her order of protection, that she should report the incident to MNPD, and that she should pursue the violation.[127]

Ms. Powell's attorneys further counseled that, because there was an existing criminal case pending against the Plaintiff arising from the same incident as the order of protection, Ms. Powell should report the incident to the Assistant District Attorney assigned to the pending criminal case and "rely on the discretion of the District Attorney's office as to whether they would pursue criminal charges for violations of the order of protection based on the above-described incidents."[128] Ms. Powell did so.[129]

Ms. Powell's attorneys were competent to advise her, too. Ms. Powell is represented in her divorce by attorneys Larry Hayes Jr., Rachel Thomas, and C. Taylor Loring of Hayes Thomas, PLC, a Nashville law firm focusing exclusively on family law, with a focus on complicated divorces.[130] Her divorce attorneys—all of whom are attorneys in good standing—have more than 60 years of experience in the practice of law, the vast majority of which is concentrated in family law with a focus on divorce.[131] Their legal bona fides are detailed Ms. Loring's Declaration,[132] which addresses the legal advice Ms. Powell relied on in pursuing charges for the alleged

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[127] *Id.*
[128] **Ex. C** at ¶ 13.
[129] **Ex. A** at ¶ 24.
[130] **Ex. C** at ¶ 3 (citing *Practice Areas–Our Services*, Hayes Thomas, https://hayesthomas.law/our-services (last visited April 11, 2025)).
[131] *Id.* at ¶ 5.
[132] *See id.* at ¶¶ 6–8.

violations.[133]

Based on the material facts involved, which Ms. Powell disclosed to her counsel, Ms. Powell's counsel advised that she should report the alleged violation.[134] *Cf. Abernethy*, 120 S.W.3d at 313 ("[T]he advice of counsel must be based upon 'ample evidence at the time [of filing suit] for the [attorney] to conclude that [the client] had a reasonable chance of recovery in the prior action.'" (quoting *Morat v. State Farm Mut. Auto. Ins. Co.*, 949 S.W.2d 692, 696 (Tenn. Ct. App. 1997))). Thus, Ms. Powell followed her counsel's advice.[135] Thereafter, the issue of probable cause apparently was a close enough call that—as the Plaintiff pleads himself—the judicial commissioner found probable cause[136] while the General Sessions Court allegedly did not.[137] This concession further supports that Ms. Powell and her counsel acted reasonably. The additional order of protection violations that Ms. Powell reported were premised on her disclosure of the underlying material facts and her attorney's advice, too.[138] Under these circumstances, the advice of the Ms. Powell's counsel "entitles [her] to complete immunity from damages." *Cooper*, 84 S.W. at 802.

d. *The Noerr–Pennington doctrine precludes the Plaintiff's malicious prosecution claim.*

"[T]he Petition Clause places limits on liability for the commission of a range of common law torts." *Scott v. Hern*, 216 F.3d 897, 914 (10th Cir. 2000) (citing

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[133] *See generally id.*
[134] **Ex. A** at ¶ 24; **Ex. C** at ¶ 12.
[135] **Ex. A** at ¶ 24.
[136] Doc. 1 at ¶ 28.
[137] *Id.* at ¶ 42.
[138] *See generally* **Ex. C** at ¶¶ 10–15; **Ex. A** at ¶¶ 20, 24, 31.

Cheminor Drugs, Ltd. v. Ethyl, Corp., 168 F.3d 119, 128 (3d Cir.) (malicious prosecution, tortious interference with contract, tortious interference with prospective economic advantage, and unfair competition), *cert. denied*, 528 U.S. 871, 120 S.Ct. 173, 145 L.Ed.2d 146 (1999); *State of South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40, 50 & n. 24, 53–55 (8th Cir.1989) (tortious interference with contract); *Video Int'l Prod., Inc. v. Warner–Amex Cable Communications*, 858 F.2d 1075, 1084 (5th Cir.1988) (tortious interference with contractual relations); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649–50 (7th Cir.1983) (tortious interference with business relationships); *Suburban Restoration Co. v. ACMAT Corp.*, 700 F.2d 98, 101–02 (2d Cir.1983) (tortious interference with a business expectancy); *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 831 F.Supp. 1516, 1523 (D.Colo.1993) (unfair competition); *Pennwalt Corp. v. Zenith Lab., Inc.*, 472 F.Supp. 413, 424 (E.D.Mich.1979) (tortious interference with business relationships and abuse of process), appeal dismissed, 615 F.2d 1362 (6th Cir.1980); *Sierra Club v. Butz*, 349 F.Supp. 934, 937–39 (N.D.Cal.1972) (tortious interference with advantageous relationship); *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1133–38, 270 Cal.Rptr. 1, 9–12, 791 P.2d 587, 595–98 (Cal.1990) (intentional interference with contract and intentional interference with prospective economic advantage)).

Thus, the *Noerr-Pennington* doctrine limits a plaintiff's ability to recover for malicious prosecution or abuse of prosecution when a plaintiff's claim is premised on a petition to the government. *See, e.g, Pound Hill Corp. v. Perl*, 668 A.2d 1260, 1264 (R.I. 1996) ("the *Noerr–Pennington* doctrine, resting as it does upon the First

Amendment right to petition, does add a constitutional gloss to civil actions for abuse of process"); *E. Sav. Bank, FSB v. Papageorge*, 31 F. Supp. 3d 1, 19 (D.D.C. 2014) (citations omitted), *aff'd*, 629 F. App'x 1 (D.C. Cir. 2015) ("Under the *Noerr–Pennington* doctrine, the First Amendment generally immunizes the filing of good-faith lawsuits from liability.").

"Although the *Noerr–Pennington* doctrine was initially recognized in the antitrust field, the federal courts have by analogy applied it to claims brought under both state and federal laws[.]" *Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 790 (6th Cir. 2007) (collecting cases). That is because "[t]he doctrine is, at bottom, founded upon a concern for the First Amendment right to petition and, therefore, has been applied to claims implicating that right." (collecting cases); *see also Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) ("There is simply no reason that a common-law tort can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust."); *Braintree Lab., Inc. v. Schwarz Pharm., Inc.*, 568 F. Supp. 2d 487, 494–95 (D. Del. 2008) (citing Third and Fourth Circuit cases extending the doctrine).

Here, all of the Plaintiff's claims are premised on Ms. Powell's petitions to the government. The Plaintiff also concedes that interim probable cause determinations were made as to each charge and that a prosecuting authority opted to pursue criminal charges based on Ms. Powell's reports afterward.[139] Such objective determinations of merit alone preclude liability under the *Noerr–*

[139] Doc. 1 at ¶ 32.

Pennington doctrine. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002); *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) ("We now outline a two-part definition of 'sham' litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*"). And apart from that defect, Ms. Powell's reports were made in subjective good faith. *Cf. BE & K Const. Co.*, 536 U.S. at 526 (petitioning activity must "be a sham *both* objectively and subjectively" to overcome *Noerr–Pennington* defense).

For all of these reasons, Ms. Powell's petitioning activity is immunized under *Noerr*—and the First Amendment—from state tort liability. *Id.*

3. <u>Costs, Attorneys' Fees, & Sanctions</u>

Tennessee Code Annotated section 20-17-107(a) provides that:

> If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party:
>
> (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition; and
>
> (2) Any additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.

Here, the Plaintiff's prosecution of this transparently retaliatory—and facially baseless—action merits costs, fees, and severe sanctions. No litigant acting in good faith could reasonably believe that any claim in this lawsuit had merit. Instead, this lawsuit is a naked attempt by the Plaintiff "to intimidate [his wife] into silence

regarding an issue of public concern"—intentional misbehavior that Tennessee's judiciary properly characterizes as "evil[.]" *See Residents Against Indus. Landfill Expansion, Inc. (RAILE) v. Diversified Sys., Inc.*, No. 03A01-9703-CV-00102, 1998 WL 18201, at *3 & n.6 (Tenn. Ct. App. Jan. 21, 1998).

A host of considerations—including the length of time the Plaintiff maintains this lawsuit and its ultimate cost—factor into the sanctions calculus, though. *See* **Ex. F**, Order, *Foreman v. Rosenberg*, No. 23C891 (Davidson Cty. Cir. Ct. Dec. 4, 2023) (citing *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 71–72 (Tex. App. 2018), *aff'd in part, rev'd in part on other grounds*, 631 S.W.3d 40 (Tex. 2021)). Thus, after this Court grants Ms. Powell's TPPA Petition, she requests the opportunity to submit supplemental briefing detailing the appropriate sanctions to issue.

V. CONCLUSION

For these reasons, Ms. Powell's Motion and TPPA Petition to dismiss this action should be **GRANTED**. Afterward, this Court should order the Plaintiff to pay her court costs, reasonable attorney's fees, and discretionary costs pursuant to Tennessee Code Annotated sections 20-12-119(c), 4-21-1003(c), and 20-17-107(a)(1). Under section 20-17-107(a)(2), this Court also should assess sanctions against the Plaintiff—to be quantified following further briefing after the conclusion of TPPA proceedings—as necessary to deter repetition of his conduct.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2025, a copy of the foregoing was sent via the Court's e-filing system, via USPS mail, postage prepaid, or via email to the following parties:

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