CAUSE NO. D-1-GN-24-001276

PFLAG, INC., *Plaintiff,*	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
OFFICE OF THE ATTORNEY GENERAL OF TEXAS, and WARREN KENNETH PAXTON, JR., In his official capacity as Attorney General of Texas, *Defendants.*	§	**261ST JUDICIAL DISTRICT**

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1. This case is about a Civil Investigative Demand (CID) and Demand for Sworn Written Statement (DSWS) served by Defendants on Plaintiff PFLAG on February 5, 2024. Under the Deceptive Trade Practices Act (DTPA), a CID and DSWS are pre-suit investigative demands seeking documents and certain other information. *See* Bus. & Com. Code § 17.60-61. Defendants have already comprehensively briefed at earlier stages of this litigation why PFLAG should be ordered to respond to those demands, and why PFLAG's requests for relief from the CID and DSWS should be denied.[1] *See* The Office of the Attorney General's Response to Plaintiff's Application for Temporary Restraining Order (2/29/24) ("Defendant's Response to TRO"); The Office of the Attorney General's Motion to Modify and Clarify the Court's March 1, 2024, Temporary Restraining Order (3/19/24) ("Defendant's Motion to Modify"); The Office of the Attorney General's Plea to the Jurisdiction (3/22/24) ("Defendant's Plea to the Jurisdiction"); Counterclaim for Enforcement for Sworn Written Statement and Civil Investigative Demand

[1] Defendants' Counterclaim for Enforcement of Demand for Sworn Written Statement and Civil Investigative Demand specified that Defendants seek enforcement of only a portion of the CID and DSWS. Specifically, to the extent the CID and DSWS are read to require PFLAG to identify its members, Defendants have formally represented that they are not seeking such information and that the CID and DSWS should not be enforced in a way that requires PFLAG to produce such information.

(4/12/24) ("Defendant's Counterclaim for Enforcement"); Protective Motion for Summary Judgment (5/17/24).

2. Defendants will not re-hash those arguments in detail here. Indeed, those arguments should have been ruled on in a final manner at an earlier stage of this proceeding. Instead, however, PFLAG has unnecessarily elongated the proceedings here and needlessly expended valuable judicial resources. That is because challenges to these pre-suit investigative tools are meant to be "handled ***summarily*** and with dispatch." *In re Off. of Inspector Gen. R.R. Ret. Bd.*, 933 F.2d 276, 277 (5th Cir. 1991) (emphasis added) (explaining how analogous federal tools work). They are not supposed to be litigated as if part of a substantive case with summary judgment motions or a trial. The DTPA makes that explicit because it provides that if a recipient of a CID wants a judicial order confirming that it need not comply with the CID, its only remedy is to file a "petition to . . . modify or set aside the demand," Bus. & Com. Code § 17.61(g)—*not* to initiate, as PFLAG has here, a traditional lawsuit replete with applications for a TRO, temporary injunction, and declaratory judgment. That is particularly obvious because the Legislature expressly indicated that the Rules of Civil Procedure do not apply to CIDs; rather, CIDs may seek information "which *would be* discoverable under the Texas Rules of Civil Procedure." Bus. & Com. Code § 17.61(c). The necessary upshot is that a CID and the forms of relief available to a CID recipient are not directly governed by the ordinary Rules of Civil Procedure.

3. None of this is noteworthy or exceptional when compared to how the federal government or other States use these tools. When a challenge is litigated to one of the Federal Trade Commission's pre-suit investigative tools, for instance, the "court's role" is "a strictly limited one" designed to further the "important governmental interest in the expeditious investigation of possible unlawful activity." *FTC v. Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1977).

And the DTPA was itself modeled after the "Federal Trade Commission Act." Bus. & Com. Code § 17.46(c). That means that here, as there, the ordinary rules of procedure "are simply inapplicable." *United States v. Markwood*, 48 F.3d 969, 982 (6th Cir. 1995). Treating this action as a traditional litigation "destroy[s] the summary nature of [the] proceeding." *Id.* at 983; *see also, e.g.*, *Kohn v. State by Humphrey*, 336 N.W.2d 292, 295 (Minn. 1983) (State issued administrative subpoena to target on June 29, and by September 8 the District Court had granted motion to compel compliance).[2]

4. For these reasons, and as Defendants explained in their Protective Motion for Summary Judgment filed May 17, 2024, this case should have been resolved in a final form at an earlier stage of proceedings (there have already been three hearings), not on summary judgment, and certainly not at trial. PFLAG's motion for summary judgment is an inapplicable mechanism to resolve this proceeding. PFLAG already filed a petition accompanied by substantive briefing arguing it should not be required to comply with the CID or DSWS, and Defendants already substantively responded to those filings.

5. Nevertheless, Defendants submit this abbreviated response to PFLAG's motion for summary judgment to summarily address PFLAG's erroneous legal arguments and to ensure all of its arguments are properly preserved for appeal.

6. PFLAG's lead argument is that the CID and DSWS are not authorized under the DTPA. PFLAG Motion for Summary Judgment at 12-21 ("PFLAG Motion"). That is wrong.

7. ***First***, PFLAG is wrong (at 13) that the demands "fail to provide sufficient clarity regarding either the statutory basis for or the general subject matter of the investigation to which

[2] Another way to think about these tools is by analogy to a request for production in a traditional litigation, followed by a motion to compel and/or motion to quash. The motion to compel or motion to quash would not give rise to injunctions, summary judgment briefing, and a trial. Instead, they would be ruled on summarily.

they relate." The DTPA requires, as relevant here, only that a CID "state the statute and section under which the alleged violation is being investigated, and the general subject matter of the investigation." Bus. & Com. Code § 17.61(b)(1). (There is no comparable requirement for a DSWS. *Id.* 17.60(1).). The CID plainly did that; it specified that Defendants were investigating "actual or possible violations of DTPA section 17.46" (the statute and section), regarding the comprehensively defined term "Gender Transitioning and Reassignment Treatments and Procedures" (the general subject matter). *See* PFLAG Motion, Ex. A. PFLAG complains (at 13) that this lacks "sufficient clarity." But the DTPA does not impose a requirement that Defendants give CID recipients "sufficient clarity" of what is being investigated—indeed, such a requirement, in the form advanced by PFLAG, might undermine the investigation to begin with. *See, e.g.*, *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 677-78 (Tex. 1995) (explaining that such information is protected law enforcement material). Instead, the DTPA says that Defendants had to provide the "statute and section" and "the ***general*** subject matter of the investigation." Bus. & Com. Code § 17.61(b)(1) (emphasis added). Defendants quite obviously did that.

8. ***Second***, PFLAG is wrong (at 14) that the demands are defective on the grounds that "PFLAG does not engage in trade or commerce or sell or lease goods or services that relate in any way to the Demands." Even if PFLAG's factual assertion is true, it is irrelevant. Defendants have assessed that PFLAG is in possession of material highly relevant to investigations involving trade or commerce. As PFLAG admits (at 16), "the DTPA allows Defendants to send a CID to ***any*** person they believe may be in possession of documents relevant to their investigation"—not just persons engaged in trade or commerce. (emphasis added). Moreover, under the Business Organizations Code, PFLAG—as an entity registered to do business in Texas—"shall permit the attorney general to inspect, examine, and make copies, as the attorney general considers necessary

in the performance of a power or duty of the attorney general, of any record of the entity." Bus. Org. Code § 12.151. So, one way or another, PFLAG cannot hide its relevant material behind the assertion that it does not engage in any related trade or commerce. And PFLAG's related argument (at 16-18) that the evidence sought is somehow irrelevant to Defendants' investigation has been comprehensively addressed in prior briefing and borders on frivolous. *See* Defendant's Response to TRO at 3-6.

9. ***Third***, PFLAG is wrong that the DTPA does not authorize a DSWS to a third-party. The issuance of a DSWS is governed by DTPA Section 17.60, subsection (1). That Section of the DTPA is not a model of clarity, but it shows that this DSWS was properly issued. The prefatory clause in that Section indicates that Defendants may investigate "***a*** person" or "***any*** person"; then its operative text in subsection (1) specifies that Defendants can issue a DSWS to "require ***the*** person" to provide a statement or report. Bus. & Com. Code § 17.60(1) (emphases added). PFLAG's premise appears to be that "the person" in subsection (1) must be a person who could be held liable for a DTPA violation; not a third-party. *See* PFLAG Motion at 19 (arguing that "the DTPA does not authorize [the] DSWS to PFLAG" because "PFLAG is not the target of [an] investigation"). But the prefatory clause contradicts that premise because it speaks of "***any*** person." Moreover, PFLAG's first-party vs. third-party distinction carries little weight in this pre-suit, investigative context because this DTPA Section expressly authorizes Defendants to issue a DSWS "when it reasonably believes" a violation might occur, even if that violation will only be in the future (investigation proper as to target "about to engage in any such act or practice"). Bus. & Com. Code § 17.60. In that context the first-party/third-party distinction collapses—a third-party today could become a first-party tomorrow. Whether a DSWS may be issued does not turn on this flimsy distinction.

10. ***Fourth***, PFLAG is wrong (at 19-21) that Defendants seek information that would not be discoverable under the Texas Rules of Civil Procedure. This is a particularly bizarre argument for PFLAG to make because Defendants seek information regarding materials that PFLAG put *at issue in another litigation*! In earlier stages of these proceedings, PFLAG made the argument that Defendants could not obtain that material here precisely *because* it was at issue in other litigation. Plaintiff's Original Verified Petition to Set Aside Civil Investigative Demands, for Declaratory Judgment, and Application for a Temporary Restraining Order and Temporary and Permanent Injunctive Relief at 27-29 ("Plaintiff's Original Petition"). They have rightly abandoned that argument here; but that now-abandoned argument underscores why PFLAG's new argument is obviously wrong.

11. PFLAG also argues (at 21-25) that the demands violate their First and Fourth Amendment rights. That is wrong, as Defendants have explained many times previously. Defendant's Response to TRO at ¶ 29; Defendant's Motion to Modify at 5-7; Defendant's Plea to the Jurisdiction at 15-17.

12. In this context, the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be" produced. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946); *Schade v. Texas Workers' Compensation Com'n*, 150 S.W.3d 542, 550 (Tex.App.—Austin 2004) (materially similar). It cannot credibly be argued that the CID or DSWS are indefinite or broad; they refer directly to highly specific information that PFLAG put at issue in separate litigation.

13. And the First Amendment, as relevant here, protects only membership lists—something that Defendants conceded in their Counterclaim are not being sought. *See* Defendant's Counterclaim for Enforcement at ¶¶ 18-20. PFLAG's argument (at 22) that, in addition to

membership identities, it should be permitted to withhold "deeply personal communications or other information shared as part of PFLAG's core expressive activities" is wrong as a matter of law—a point underscored by PFLAG's complete lack of case law supporting extension of the First Amendment disclosure protection beyond membership lists. *Accord, e.g.*, *Anderson v. United States*, 298 F.3d 804, 811 (9th Cir. 2002) (Reinhardt, J., dissenting) ("Membership lists have a long and unique history in our constitutional jurisprudence."). That is most obvious here because PFLAG identifies only one case—*In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998) ("*BACALA*")—that it claims supports its attempt to withhold personal communications. *See* PFLAG Motion at 23 (claiming "[t]his is precisely" like "*BACALA*"). But in *BACALA*, the court only addressed claims to withhold "the identities [of an association's] contributors"—the functional equivalent of members. 982 S.W.2d at 372. Moreover, it is not apparent how sharing "personal communications" would reveal anything sensitive given that Defendants have conceded that they do not seek "information that would reveal the identities of PFLAG members" and have explicitly advised that PFLAG may redact communications in order to protect such identities. Defendant's Counterclaim for Enforcement at ¶ 24. So, if PFLAG produces a communication to Defendants and redacts the identities of the individuals communicating, it is not apparent how any truly sensitive information would be revealed.

14. Finally, PFLAG offers (at 26-28) a lengthy explanation, based on its own affidavit, about what modifications would need to be made to make the demands proper, in PFLAG's view. It is not clear what legal relevance this exposition has to the resolution of the underlying matter. Moreover, OAG is not obligated to uncritically accept PFLAG's affiants' self-serving representations—the DTPA clearly permits OAG to issue pre-suit investigative demands.

CONCLUSION

PFLAG's Motion for Summary Judgment should be denied.

Dated: June 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd of June, 2024, a copy of the foregoing document was served via the Court's electronic filing system to all counsel of record.

/s/ David Shatto
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