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

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

PLAINTIFF PFLAG, INC.'S OPPOSITION TO DEFENDANTS' PROTECTIVE MOTION FOR SUMMARY JUDGMENT

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Pursuant to Texas Rule of Civil Procedure 166a, Plaintiff PFLAG, Inc. ("PFLAG") files this Opposition to Defendants' Protective Motion for Summary Judgment ("Defs.' Mot."). In support, PFLAG respectfully offers the following for consideration by the Court:

I. Defendants Have Failed to Articulate Any Argument as to Their Entitlement to Judgment as a Matter of Law.

Throughout the course of this matter, Defendants consistently attempted to dispense with the statutory requirements of the Deceptive Trade Practices Act ("DTPA"). In filing a two-page document styled as a Protective Motion for Summary Judgment, the OAG requests a "judgment granting the State's Counterclaim for Enforcement of Demand for Sworn Written Statement and Civil Investigative Demand" pursuant to Tex. R. Civ. P. 166a. Yet, Defendants make no effort to demonstrate that Defendants are entitled to judgment as a matter of law. Rather, Defendants simply assert in a conclusory manner that the upcoming trial "does not present any triable issues of fact." Defs.' Mot. ¶ 1.

Texas Rule of Civil Procedure 166a(c) requires that a "motion for summary judgment shall state the specific grounds therefor." Defendants have failed to provide *any* grounds for their so-called motion. Defendants' filing merely complains about prior developments in the litigation, asserts that a motion for summary judgment is unnecessary, then attempts to incorporate by reference their Plea to the Jurisdiction on Plaintiff's underlying Petition, which they never properly set for hearing. Characterizing their motion as "protective" does not relieve Defendants of their duty to comply with the requirements of Texas Rule of Civil Procedure 166a.

"Summary judgment is proper when no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law." *Tex. Workforce Comm'n v. Wichita Cnty.*, 548 S.W.3d 489, 492 (Tex. 2018). Though they assert that there are no triable issues of fact for the Court to determine, Defendants have neither articulated what facts are material nor set forth any argument regarding why they are entitled to judgment as a matter of law on their Counterclaim. That alone is sufficient to deny Defendants' Motion.

As set forth in Plaintiff's Motion for Partial Summary Judgment on Plaintiff's Claims and Motion for Summary Judgment on Defendants' Counterclaim ("PFLAG MSJ"), incorporated herein by reference, Defendants are not entitled to judgment on their Counterclaim because they cannot satisfy the statutory requirements under the DTPA for bringing a petition to enforce the Demands. Specifically, Defendants cannot meet the requirements of Tex. Bus. & Com. Code § 17.62(b) for enforcement of the Demands because PFLAG has not "fail[ed] to comply" with them. Defendants have not proffered any evidence of PFLAG's noncompliance with the Demands, choosing instead to insist that the Court simply rule on their Counterclaim without any recognition of the pendency of PFLAG's underlying petition. Defs.' Mot. ¶ 2. PFLAG availed itself of the procedure provided by the Legislature under the DTPA, which expressly authorizes such actions seeking judicial relief from civil investigative demands, including interim relief. *See* Tex. Bus. & Com. Code § 17.61(g). Defendants have not and cannot cite authority which supports their goal of evading the Court's consideration of the Demands' legality. Successive court orders from this Court and the Third Court of Appeals have temporarily shielded PFLAG from having to respond to the Demands and extended the return date for them until the end of this litigation. PFLAG cannot "fail" to comply with an

obligation that has been suspended. PFLAG MSJ at 6-9, 29-31; *see also* Tex. Bus. & Com. Code § 17.61(h) ("A person on whom a demand is served under this second shall comply with the terms of the demand *unless otherwise provided by a court order*.").

As set forth in the PFLAG MSJ, the Demands exceed Defendants' authority under the DTPA because they fail to meet the statutory requirements that they clearly identify both the statutory basis for and general topic of any investigation, that they only be sent to parties actually engaged in trade or commerce or to those for whom there is a reasonable basis to believe they have information or documents regarding a deceptive trade practice, that they are relevant to the investigation to which they allegedly relate, and that they seek materials appropriately discoverable under the Texas Rules of Civil Procedure. PFLAG MSJ at 12-21. PFLAG has further raised significant constitutional infirmities in both the original demands and Defendants' proposed modifications. PFLAG MSJ at 21-25. For these reasons, PFLAG has not only sought relief through the DTPA itself, Tex. Bus. & Com. Code § 17.61(g), but also via the Uniform Declaratory Judgment Act (UDJA). These causes of action ensure that the lawfulness of the Demands is determined *before* Defendants are permitted to enforce them.

Rather than grapple with the requirements of the DTPA itself or cite a single Texas case, Defendants instead seek to import federal case law regarding administrative subpoenas from other contexts in an attempt to short circuit the Court's consideration of PFLAG's challenge to the Demands. *See* Defs.' Mot. ¶ 1 (citing *In re Off. of Inspector Gen. R.R. Ret. Bd.*, 933 F.2d 276, 277 (5th Cir. 1991) (concerning subpoena brought by the federal Inspector General of Railroad Retirement Board); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (involving subpoena

from the Federal Trade Commission); *United States v. Markwood*, 48 F.3d 969, 982 (6th Cir. 1995) (considering civil investigative demand from U.S. Department of Justice)). But the DTPA provides no mechanism by which the Court can simply "summarily rule on its Counterclaim," Defs.' Mot. ¶ 2, when a petition to set aside or modify the Demands is pending before the Court. The Court must "take statutes as we find them and refrain from rewriting the Legislature's text." *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 326 (Tex. 2017). Regardless of the frameworks applicable to demands issued by other entities, the DTPA grants the recipients of Demands from Defendants a process by which to challenge them, and Defendants should be precluded from attempting to evade or upend that process.

Moreover, even if the Court were to apply the frameworks articulated in these cases, Defendants have still failed to meet their burden for purposes of a summary judgment motion. *See In re E.E.O.C.*, 709 F.2d 392, 400 (5th Cir. 1983) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)). Defendants failed to adduce evidence, by affidavit or otherwise, that the Demands directed to PFLAG are conducted pursuant to a legitimate purpose; that the inquiry is relevant to the purpose; that the administrative steps required by the DTPA have been followed; or that the information sought is not already within the agency's possession. Therefore, Defendants have not carried their burden to establish the propriety of the Demands or that they are entitled to enforce them as a matter of law. In short, Defendants are precluded from seeking to enforce the Demands for the same reasons the Demands exceed their authority under the DTPA.

II. Defendants' Incorporation of their Plea to the Jurisdiction Does Not Support their Motion for Summary Judgment.

Defendants' incorporation of their Plea to the Jurisdiction (PTJ) cannot support their argument that they are entitled to enforce the Demands as a matter of law. The PTJ challenges PFLAG's ability to pursue its affirmative claims in the underlying Petition; it does not offer the factual or legal support Defendants are obligated to bring forward to meet the statutory requirements for pursuing their own petition to enforce. Defendants' disagreement with the issuance of injunctive relief to shield PFLAG from having to respond during the pendency of this litigation is a matter that they can and have raised with the Court of Appeals. But with the issuance of those injunctions, Defendants cannot succeed on their claim that PFLAG "failed to comply."

Regardless, none of the arguments set forth in the Plea to the Jurisdiction even levy legitimate challenges against PFLAG's affirmative claims. PFLAG's Petition was timely, Defendants' proposed modifications to the Demands do not cure their legal deficiencies or render the original Demands moot, and sovereign immunity in no way bars PFLAG's challenge to Defendants' *ultra vires* use of the DTPA or its claims under the UDJA.

A. PFLAG's Challenge to the Demands Is Not Jurisdictionally Time-barred.

PFLAG filed its petition within the timeframe set forth by the statute. *See* Tex. Bus. & Com. Code § 17.61(g) (requiring filing "[a]t any time before the return date specified in the demand, or within 20 days after the demand has been served, whichever period is shorter"). The Demands were served on PFLAG on February 9, 2024 and the Petition was filed within 20 days of service, on February 28, 2024. Defendants' make the outrageous claim that the petition was untimely because it

was not served prior to the February 26, 2024 return date listed in the Demands, which is shorter than the period of 20 days after service of the Demands. asks In putting forth this argument, Defendants ignore the fact that ***they granted an extension of the return date to March 4, 2024***. *See* Exhibit C to Plaintiff's Original Verified Petition (David Shatto email to Allissa Pollard, dated February 20, 2024, 11:16 AM) ("Our office grants a one-week extension to the Civil Investigative Demand and the Sworn Written Statement issued to PFLAG on February 5, and originally due on February 26, 2024. The new deadline is March 4, 2024."). Defendants' claim that their extension of the return date has no bearing on the time for filing is wholly unsupported by case law. While Defendants cannot waive the statute's parameters for when the clock runs, *Lindsay v. Sterling*, 690 S.W.2d 560, 563 (1985), setting Demands' return dates is entirely within their power. *See* Tex. Bus. & Com. Code § 17.61(a), (b)(3). Having extended the return date, Defendants should be estopped from arguing that the petition is time barred. *See Kramer v. Kastleman*, 508 S.W.3d 211, 217 (Tex. 2017) ("Estoppel prevents litigants from taking contradictory positions as a means of gaining an unfair advantage from the inconsistency.") Defendants cannot be permitted to interfere with a party's due process rights by granting extensions and then pleading untimeliness.[1]

B. Defendants' Modified Demands Do Not Moot PFLAG's Lawsuit.

Defendants' claim that their proposed modifications to the Demands moot PFLAG's challenge overestimates both the proposed modifications' implications for PFLAG's petition and the

[1] Even if the Court were to find that PFLAG's DTPA petition is jurisdictionally time barred, PFLAG raised the same statutory and constitutional deficiencies as affirmative defenses to Defendants' Counterclaim. *See* Plaintiff PFLAG, Inc.'s Answer to Defendants' Counterclaim for Enforcement of Demand for Sworn Written Statement and Civil Investigative Demand ¶¶ 3, 4. Furthermore, Defendants certainly cannot claim that PFLAG's UDJA claims are time barred. *See* Tex. Civ. Prac. & Rem. Code § 16.051.

extent to which they cure the legal infirmities the petition challenges. First, by attempting to withdraw the original Demands and issue modified versions free from the Court's review, Defendants have refused to voluntarily end the challenged conduct and demonstrated their intent to persist with their unlawful actions until they achieve their unlawful ends. The entire point of PFLAG's petition is to shield PFLAG from unlawful Demands, and while modifications are an anticipated part of the process to establish what aspects of the Demands are lawful, if any, Defendants' proposed modifications cannot provide the basis for barring the Court's review in the first instance.

Second, as set forth in the PFLAG MSJ, even the proposed modifications fail to remedy the statutory and constitutional concerns PFLAG has identified. PFLAG MSJ at 26-28. Defendants seemingly concede the Demands as issued are constitutionally suspect, asserting that their proposed modifications "remedy" that infringement. Plea to the Juris. ¶¶ 51-54. But the modifications simply do not go far enough. They still exceed Defendants' authority under the DTPA in myriad ways and infringe upon the constitutional rights of PFLAG by seeking internal and deeply private communications of PFLAG members and by failing to sufficiently narrow their scope to cure their overbreadth. *See generally* PFLAG MSJ. Defendants cannot use their proposed modifications to insulate the Demands from review. Their attempt to "control jurisdiction of the courts" by substituting their revisions for the original Demands does not make a case moot because it leaves

Defendants "free to return to their old ways." *Matthews, on behalf of M.M. v. Kountze Indep. Sch. Dist*., 484 S.W.3d 416, 418 (Tex. 2016).[2]

C. Sovereign Immunity Does Not Preclude PFLAG's Lawsuit.

Not a single aspect of PFLAG's Petition is barred by sovereign immunity. The DTPA expressly authorizes a party to file a petition seeking to set aside or modify Demands issued by Defendants for good cause. *See* Tex. Bus. & Com. Code § 17.61(g). PFLAG's petition centers on Defendants' use of the DTPA in an *ultra vires* manner that falls outside the bounds of its authority. "[A]n action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars." *City of El Paso v. Heinrich*, 284 S.W. 3d 366, 370 (Tex. 2009). State action is without legal authority if it exceeds the bounds of authority granted to the actor or conflicts with the law itself. *Matzen v. McLane*, 659 S.W.3d 381, 388 (Tex. 2021). As PFLAG's motion for summary judgment explained, Defendants are acting outside the bounds of their authority for multiple reasons, both statutory, PFLAG MSJ at 12-21, and constitutional. *Id*. at 21-25. Because "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, *Heinrich*, 284 S.W.3d at 372, the Court has jurisdiction to consider PFLAG's petition.

Finally, the Uniform Declaratory Judgment Act (UDJA) provides an explicit waiver of sovereign immunity. Tex. Civ. Prac. & Rem. Code § 37.001, *et seq.*; *Klumb v. Houston Mun. Emps.*

[2] Even if the Court were to determine the challenge was moot (which it is not), Plaintiff's claims fall squarely within the "capable of repetition" and "public interest" exceptions to mootness. *Tex. A&M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011); *see also City of Georgetown v. Putnam*, 646 S.W.3d 61, 71 (Tex. App.—El Paso 2022, pet. denied).

Pension Sys., 458 S.W. 3d 1, 13 (Tex. 2015) (citing *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011) ("sovereign immunity does not bar a suit to vindicate constitutional rights" that are facially valid). Because PFLAG has asserted facially valid constitutional claims, *see* PFLAG MSJ at 21-25, their claims under the UDJA are not barred.

CONCLUSION

Defendants' Protective Motion for Summary Judgment is a brazen effort to avoid oversight and short-circuit the duty of this Court to evaluate whether the agency has met the statutory requirements pertaining to the issuance and enforcement of the Demands. Defendants have not demonstrated that they have satisfied or complied with the requirements for a petition to enforce under the DTPA, and the Court should deny the motion.

Dated: June 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2024, I electronically filed the foregoing Motion For Summary Judgment with the Clerk of Court using the File & Serve Texas system which will send notices to all counsel of record.

/s/ Allissa Pollard
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