

CAUSE NO. D-1-GN-18-006098

TEXAS PROTAX-AUSTIN, INC.;	§	IN THE DISTRICT COURT
FIVE STONE TAX ADVISERS, LLC;	§	
46 COMMERCIAL PROPERTY OWNERS	§	
113 RESIDENTIAL PROPERTY OWNERS	§	
Plaintiffs,	§	
vs.	§	
	§	OF TRAVIS COUNTY, TX
TRAVIS APPRAISAL REVIEW BOARD;	§	
MARYA CRIGLER, CHIEF APPRAISER,	§	
(In her Official Capacity)	§	
Defendants	§	201 ST JUDICIAL DISTRICT

PLAINTIFFS' MOTION TO COMPEL
DEFENDANT TRAVIS APPRAISAL REVIEW BOARD
TO RESPOND TO DISCOVERY

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiffs, Texas Protax-Austin, Inc. (Protax) and 46 of Protax's Commercial Property customers; Five Stone Tax Advisers, LLC (Five Stone) and 99 of Five Stone's Residential Property customers, file this Motion to Compel Defendant TARB to Respond to Plaintiffs' Discovery Request notwithstanding the TCPA Motion filed by Defendant Marya Crigler and would show the court as follows:

SUMMARY

1. Plaintiffs brought suit and served discovery on the two defendants on October 9, 2018. Plaintiff property owners filed tax appraisal protests for 2018, through their tax agents, but were denied a hearing before the TARB. The Plaintiffs separately allege that Defendant Crigler actually schedules the TARB hearings, without any legal authority to do so, since that authority is vested solely in the TARB Chair (Betty Thompson). Separate discovery requests were served with the Original Petition on Defendant Travis Appraisal Review Board (TARB) and Defendant Chief

Appraiser Marya Crigler.

2. This lawsuit involves 3 distinct, stand-alone “legal actions”:

Legal Actions Against TARB

a. Two legal actions are brought against TARB: (1) as “interested persons,” all of the Plaintiffs claim TARB violated the Texas Open Meetings Act (TOMA) by voting—without public notice as required by TOMA—in a meeting on July 14, 2018 to dismiss Plaintiffs’ appraisal protests, and (2) the Plaintiff property owners bring suit against TARB pursuant to Tex. Tax Code 41.45(f) to require the TARB to give them the appraisal protest hearing.¹

Legal Action Against Crigler

b. Another separate legal action for injunction, based on *ultra vires* acts by Crigler, is brought by Plaintiff property owners to stop Crigler from deciding the schedules for the TARB hearings, a power that only the TARB Chairperson has. In appraisal protest hearings, Crigler is the opposing party to Plaintiffs in what are supposed to be neutral, independent ARB hearings. Plaintiffs allege that Crigler exceeded her authority, which is limited to merely provide clerical assistance to the ARB, and, instead, has taken charge of the scheduling and denying Plaintiffs their hearings.

c. Crigler’s TCPA Motion is frivolous because it is based on blatant misrepresentation of Plaintiffs Petition, including an alleged claim by Plaintiffs that Plaintiffs have not pled against Crigler. Crigler’s Motion is based entirely on the false premise that Plaintiffs seek to enjoin Crigler from providing *clerical assistance* to the TARB on scheduling—which is allowed by law. In fact,

¹ Tex. Tax. Code § (f) “A property owner who has been denied a hearing to which the property owner is entitled under this chapter may bring suit against the appraisal review board by filing a petition or application in district court to compel the board to provide the hearing. If the property owner is entitled to the hearing, the court shall order the hearing to be held and may award court costs and reasonable attorney fees to the property owner.”

Plaintiffs' *ultra vires* legal action against Crigler is based on Crigler taking charge of scheduling, supplanting control by the TARB, well beyond just providing clerical assistance. *COMPARE*

CRIGLER TCPA MOTION at ¶ 1:

“Plaintiffs seek prospective injunctive relief against the Chief Appraiser to prevent her from *providing assistance to TARB* in scheduling appraisal protest hearings as permitted in section 6.43(f) of the Tax Code.” (emphasis added).

PLAINTIFFS' ORIGINAL PETITION at ¶¶ 22, 23:

Injunction to Stop Chief Appraiser's Ultra Vires Scheduling and Selection of ARB Panels

22. Plaintiffs are all adversely and uniquely affected by the effective denial of their right to an ARB appraisal protest hearing by Chief Appraiser Marya Crigler's (and her Chief Deputy Lonnie Hendry's) tactic of over-scheduling hearings to get the protests dismissed when the ARB panel runs out of time to conduct the hearing as Crigler and her staff scheduled. The Chief Appraiser does not have authority to schedule ARB panel hearings or to select with protests are heard by which ARB panel (which are supposed to be assigned randomly). The Texas Tax Code, section 41.45(a) says that upon a taxpayer filing notice of protest of the appraisal, “the appraisal review board shall schedule a hearing on the protest.” (emphasis added). Section 41.66(o) says, “The chairman of an appraisal review board or a member designated by the chairman may make decisions with regard to the scheduling or postponement of a hearing....”

23. While Tex. Tax Code section 6.43(f) allows the ARB to get “clerical assistance” from the Chief Appraiser's staff including “with scheduling and arranging of hearings,” that section does not permit what has now occurred in Travis County: The complete abdication of any independence by the ARB in establishing a fair schedule of hearings and total delegation of that function to the Chief Appraiser. The Chief Appraiser herself has admitted that “she” is scheduling the hearings and selecting the panels (in a non-random way, in violation of the Texas Comptroller's rules). Injunction is appropriate to stop a government official from exercising authority she does not possess. (emphasis added)

And from Plaintiff's Prayer:

3. To grant an injunction against Marya Crigler, in her capacity as Chief Appraiser of Travis County and against her staff and successors in office, from determining the schedule or ARB panel selection by which appraisal protests in Travis County will be heard.

d. Crigler's Motion also incorrectly purports to quote Plaintiffs' legal action against Crigler as being limited to determining the selection of ARB panels hearing protests:

The only relief Plaintiffs seek against the Chief Appraiser is for this Court to "grant an injunction against Marya Crigler, in her capacity as Chief Appraiser of Travis County and against her staff and successors in office, from determining *the ARB panel selection* by which appraisal protest in Travis County will be heard." Plaintiffs' Original Petition and Discovery Requests, p. 17.

Crigler TCPA Motion at ¶ e.21, page 21-22. (emphasis added)

In fact, here is what the sentence Crigler purports to cite from the Prayer in Plaintiffs' petition actually says, with emphasis on the words Crigler omitted:

3. To grant an injunction against Marya Crigler, in her capacity as Chief Appraiser of Travis County and against her staff and successors in office, from determining the schedule or ARB panel selection by which appraisal protests in Travis County will be heard.

Plaintiffs' Original Petition at ¶ b.3 at page 17.

d. At ¶ 27, page 25 of her Motion, Crigler doubles-down in the misrepresentation of Plaintiffs' pleading—which suggests that Crigler's misrepresentation to the Court is deliberate—again omitting Plaintiffs' complaint that Crigler is scheduling the ARB hearings, which she has no authority to do:

Plaintiffs contend that the Chief Appraiser acted ultra vires because they contend that the TARB panels were not randomly assigned to hear their protests as required by section 41.66(k) of the Tax Code. Plaintiffs' Original Petition and Request for Disclosures, ¶ 11.

Crigler's Motion at ¶ 27, page 25.

But here is what Plaintiff's ¶ 11 actually says:

11. The Chief Appraiser's tactic of deliberately over-scheduling tax agents for hearings and then dismissing the unreached protests was used on residential protests as well. But the Chief Appraiser (as an opposing party in the ARB hearings) is not authorized by law to do the ARB scheduling or ARB panel assignments which are, by Comptroller rule, supposed to be randomly assigned.

Plaintiffs' Original Petition at ¶ 11, page 9.

c. Clearly, Plaintiffs' *ultra vires* legal action against Crigler is that Crigler lacks authority to determine the hearing schedule or to select the ARB panel to hear Plaintiffs' appraisal protests. Plaintiffs seek injunctive relief against Crigler acting beyond her authority, particularly as the opposing party in the supposedly neutral and independent ARB panel hearings.

3. Discovery responses were due on November 28, 2018, 50 days after service. On November 21, 2018, Defendant Crigler filed a motion to dismiss the injunction legal action against her under the Texas Citizens Participation Act (TCPA).² Crigler claims that the injunction legal action against her implicates her free speech rights and right to petition even though she is sued solely in her official capacity. TCPA section 27.003(a) grants authority, if the TCPA is applicable, for the party to "file a motion to dismiss *the legal action*." (emphasis added). TCPA section 27.003(c) says, "Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery *in the legal action* is suspended until the court has ruled on the motion to dismiss." (emphasis added). TCPA section 27.006(b) permits the Court *sua sponte* or by motion showing good cause, to "allow specified and limited discovery *relevant to the motion*."

4. Promptly after Crigler filed her TCPA motion, TARB announced, based on Crigler's motion, that it would not respond to any of Plaintiffs' discovery related to the separate legal actions brought against TARB and cancelled plans for a deposition of TARB Chair Betty Thompson. TARB also filed objections to some of the previously served discovery requests.

RELIEF SOUGHT

5. Plaintiffs ask the Court to hold that Crigler's TCPA Motion regarding the legal action

² Tex. Civ. Prac. & Rem. Code ch. 27.

(injunction) against Crigler does not suspend discovery between Plaintiffs and TARB regarding the 2 separate legal actions against the TARB (Open Meetings and Section 41.45(f) hearing order). In the alternative, Plaintiffs ask that the Court, pursuant to TCPA section 27.006(b), order TARB to respond to the discovery requests that were served with lawsuit petition and to make the TARB Chair available for deposition.³

ARGUMENT & AUTHORITIES

TCPA Discovery Suspension Does Not Apply to TARB Legal Actions

6. a. As a matter of statutory construction, the “legal action” on which Crigler bases her TCPA motion is solely the injunction sought against Crigler; not the two separate legal actions brought against TARB. TCPA section 27.003(c) only suspends discovery “*in the legal action*” that is the subject of the TCPA motion. The TCPA motion is solely about the injunction against Crigler. And TCPA section 27.006(b) permits the Court “to allow specified and limited discovery *relevant to the motion.*” Discovery with TARB about the separate claims against TARB is not “relevant to the [Crigler] motion.” Read together, these two TCPA sections mean:
- (1). The TCPA motion relates solely to the “legal action” against the movant (Crigler);
 - (2). Only discovery related to the “legal action” against the movant (Crigler) is suspended;
 - (3). Even discovery “relevant to the motion,” *i.e.*, discovery *relevant to the legal action against the movant*, can be allowed for good cause for specified and limited discovery;
 - (4). Nothing in the TCPA calls for suspension of all discovery, including suspension of discovery regarding other legal actions involving nonmovants.

³ Plaintiffs are filing a separate motion under TCPA section 27.006(b) asking the Court to allow specified and limited discovery *with Crigler* that is relevant to Crigler’s TCPA motion. Plaintiffs will, after the Court’s decision on discovery, separately respond on the merits to Crigler’s TCPA Motion.

b. No matter what happens with Crigler's TCPA motion, it will have no effect on the legal actions against the TARB. There is no reason to suspend discovery regarding the separate legal actions against the separate defendant TARB. The plain wording of TCPA section 27.003(c) suspending discovery applies only to discovery regarding the legal action complained of in the Crigler motion, *i.e.*, the injunction against Crigler. Section 27.003(c) does not apply to the separate, stand-alone legal claims against TARB. *Suspending discovery between Plaintiffs and TARB does not serve the purpose of the TCPA.*

7. It should be noted that in an email to Plaintiffs' counsel from Crigler's counsel, Andrea Chan, on December 4, 2018 at 4:58 p.m., Ms. Chan indicated that "Crigler does not have a position on [this motion] Plaintiff's motion with respect to their discovery request to TARB; we [Crigler] will not file an opposition to that motion."

8. While there is case authority upholding TCPA's limitation on discovery involving discovery *with the TCPA movant*, barring discovery against other parties and other legal actions outside the scope of the TCPA motion has constitutional implications. Such unnecessary and unauthorized restriction on discovery can violate the Texas open-courts provision of the Texas Constitution (Tex. Const. art. V, § 13) and due process. One case has noted that filing a TCPA Motion does not stay all underlying proceedings. *See In re SPEX Group US LLC*, 05-18-00208-CV, 2018 WL 1312407, at *4 (Tex. App.—Dallas Mar. 14, 2018, no pet.), mandamus dismissed (Mar. 16, 2018) (holding that injunction could be issued during pendency of TCPA motion, noting "Further, and critically, the TCPA is silent regarding whether all underlying proceedings must be stayed pending determination of a motion to dismiss filed under the TCPA.").

9. TARB has not filed a TCPA motion, and the 60-deadline for it to do so has passed. TARB was served on October 9, 2018, making the deadline to file a TCPA regarding the legal actions Plaintiffs filed against TARB December 8, 2018. Tex. Civ. Prac. & Rem. Code section 27.003(b). Since TARB has not filed a TCPA motion, and the legal action involved in Crigler’s TCPA motion are separate, there is no legal reason to suspend discovery between the Plaintiffs and TARB. As the Texas Supreme Court has explained:

Affording parties fully discovery promotes fair resolution of disputes by the judiciary. This court has vigorously sought to ensure that lawsuits are “decided by what the facts reveal, not by what facts are concealed. Discovery is thus the linchpin of the search for the truth, as it makes “a trial less of a game of blind man’s bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent.”

State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (citations omitted). As the Texas Supreme Court also said in *Lowry*:

Only in certain narrow circumstances is it appropriate to obstruct the search for truth by delaying discovery. Very limited exceptions to the strongly preferred policy of openness are recognized in our state procedural rules and statutes. The burden is on the party seeking to avoid discovery to plead the basis for exemption of immunity and to produce evidence supporting that claim.” *Id.*

TARB’s Objections to Plaintiffs’ Discovery Should be Denied

10. TARB filed 2 objections to certain discovery requests from Plaintiffs. Exhibit P-1 (Plaintiffs’ Discovery Requests to TARB); Exhibit P-2 (TARB’s Objections to Plaintiffs’ Discovery Requests).

a. TARB objected to the highlighted part of Plaintiffs’ definition of “You,” claiming the phrase “is ambiguous”:

3. “You” or “Your” means Defendant Travis Appraisal Review Board and its Chair, Betty Thompson, acting or purporting to act on Your behalf, *whether individually or collectively*.

In response, Plaintiffs’ counsel stipulated that TARB could disregard the phrase “whether individually or collectively.”

b. TARB objected to Interrogatory No. 8 and 10; Request for Production 1, 2, 3, 5, and 12; and Request for Admission 1 and 2 (see Exhibit P-1 and quoted below). TARB claims that “the properties identified by account number in the "Party Plaintiffs' List" attached to the Plaintiffs original petition does not correspond to the list of property owners previously submitted to Defendant as having made a request for rescheduling.” TARB asserts that until the list of Plaintiffs (seeking ARB hearings) is reconciled with list of Plaintiff/property owners for whom rehearings were requested, TARB should not have to respond to the discovery. TARB’s objection said, “Until such a supplement has been filed, Defendant cannot determine which Plaintiffs are properly before the Court.”

c. Plaintiffs are filing the Notices of Nonsuit and Supplemental Petition necessary to make sure that each named Plaintiff property owner was one who has been denied a hearing by having their protest dismissed based on alleged “no-show” by the tax agent representing them. TARB has not identified any reconciliation issue with the Protax client-Plaintiffs. So no excuse exists at all for TARB not to respond to the discovery requests as to Protax client-Plaintiffs. The reconciliation issues with the Five Stone client-Plaintiffs will be resolved with the new filings prior to the hearing on this Motion.

d. Regardless of whether the Plaintiffs list is reconciled with the list on rehearing requests, that would not preclude or excuse TARB from responding to the discovery requests. Even if it were later determined that some of the Plaintiffs were not “properly before the Court,”

that is not a valid objection to responding to the discovery requests that would demonstrate what records and actions TARB took regarding the hearing dismissals that did occur to the other Plaintiffs not challenged by TARB. In fact, even if there are Plaintiffs who lack standing, such discovery would be permitted as relevant to any jurisdictional claim TARB might make about those Plaintiffs' standing. *See Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 233 (Tex. 2004) (noting that in the determination of a plea to the jurisdiction, the Court may also “require consideration of extrinsic facts after reasonable opportunity for targeted discovery.”). So even if it were determined that some of the Plaintiffs do not have standing—which Plaintiffs do not concede—it would not preclude discovery regarding their standing ... exactly what TARB erroneously objects to.

e. The discovery requests that are the subject of TARB's objections are as follows:

TARB INTERROGATORY NO. 8: In 2018, were all protests dismissed if the protest was not heard on the date/time shown on the ARB panel hearing schedule? If not, then explain why Plaintiffs' protests were dismissed but protests by other property owners, or their agents, were not dismissed. If hearings on protests on PIDs, other than the PIDs of Plaintiffs in this case, were rescheduled instead of being dismissed, explain why those protests were rescheduled instead of being dismissed.

TARB INTERROGATORY NO. 10: State the date & time and describe the content (with as much particularity as You reasonably recall) of any oral conversation You (including ARB Chair Betty Thompson) had since May 1, 2018 with Marya Crigler or Lonnie Hendry regarding rescheduling ARB hearings or dismissing protests made by property owners (or their agents) who are Plaintiffs in this lawsuit. If You (including ARB Chair Betty Thompson) assert there were no such conversations, please so state under oath in answering this Interrogatory.

TARB REQUEST FOR PRODUCTION 1: Produce any document or recording that shows that a 2018 ARB panel hearing was commenced, *i.e.*, that the hearing was called to order, for each of the protests by the Plaintiff Property Owners and PIDs that are the subject of this lawsuit.

TARB REQUEST FOR PRODUCTION 2: Produce any document that shows the disposition of any 2018 ARB panel hearing that was commenced for each of the protests by Plaintiff Property Owners and PIDs that are the subject of this lawsuit. This request includes any affidavit or Panel Recommendation signed by ARB panel members regarding disposition of

Plaintiffs Property Owners' protests on the PIDs that are the subject of this lawsuit. This request includes a copy of any notice You sent to each Plaintiff Property Owners or their agents regarding disposition of their protest.

TARB REQUEST FOR PRODUCTION 3: Produce a copy of any computer log, such as a Log History Data File, that shows each change made, after the 2018 Notice of Appraised Value was sent, to the hearing/appraisal protest status or value of each PID listed as the subject of this lawsuit, showing who made each change and the date/time the change in the hearing schedule or protest status was made. If the Log uses codes to indicate the hearing/protest status, provide a legend explaining what each code means.

TARB REQUEST FOR PRODUCTION 5: Produce a copy of any Meeting Notice of any ARB Board meeting in 2018, and a copy of the minutes of such meetings, at which the ARB Board took action regarding dismissal of protests made by the property owners (or their agents) who are Plaintiffs in this lawsuit.

TARB REQUEST FOR PRODUCTION 12: Produce a copy of any request You (including Chair Betty Thompson) received in 2018 from or on behalf of Plaintiffs, and any written response You (including Chair Betty Thompson) made, for postponement of an ARB hearing or request for rehearing pursuant to Tex. Tax. Code section 41.45.

TARB REQUEST FOR ADMISSION 1: A timely Notice of Protest for 2018 was filed, pursuant to Tex. Tax Code section 41.44 for each PID listed in Plaintiffs' Original Petition in this lawsuit.

TARB REQUEST FOR ADMISSION 2: You did not send any written notice to each property owner (or their agent) who are Plaintiffs in this lawsuit that their 2018 protest of value, for the PIDs involved in this lawsuit, had been dismissed.

PRAYER

For these reasons, Plaintiffs ask the Court to enter an Order holding that the TCPA section 27.003(c) suspension of discovery does not apply to discovery between Plaintiffs and Defendant TARB; or in the alternative, enter an Order compelling TARB to respond to Plaintiffs' discovery requests and request to depose TARB Chair Betty Thompson pursuant to TCPA section 27.006(b). Plaintiffs' also ask the Court to deny all of TARB's objections to Plaintiffs' discovery requests and order TARB to produce the records and respond to interrogatories and admissions within 10 days of the Court's Order.

Respectfully submitted,



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CERTIFICATE OF CONFERENCE

I certify that I conferred with opposing Counsel, Julia Armstrong, via email regarding this motion, and we were unable to resolve the conflict over discovery without intervention by the Court.



Bill Aleshire

NOTICE OF HEARING

Notice is hereby given that the above matter is set for hearing for 1 ½ hours on December 20, 2018 at 2:00 p.m. on the Travis County District Court central docket.



Bill Aleshire

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded via electronic filing/service on December 12, 2018 to:

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