

CAUSE NO. 2013-60479-393

CONSUMER SERVICE ALLIANCE OF
TEXAS, INC.,
Plaintiff

v.

CITY OF DENTON, TEXAS,
Defendant

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IN THE DISTRICT COURT

393RD JUDICIAL DISTRICT

DENTON COUNTY, TEXAS

**DEFENDANT'S ORIGINAL ANSWER, COUNTERCLAIM
AND REQUEST FOR DISCLOSURE**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES THE CITY OF DENTON, TEXAS, Defendant in the instant cause, by and through the undersigned counsel, and presents this, Defendant City of Denton's Original Answer, Counterclaim, and Request for Disclosure, and in support thereof, would show the Court as follows:

SPECIAL EXCEPTIONS

1. Denton specially excepts to the unsupported allegation contained within Paragraph 13 of Plaintiff's Original Petition, that "[a] justiciable controversy exists between CSAT and the City as to the rights and status of the parties", which is further stated to be resolvable by the requested declaratory judgment. Paragraph 8 of Plaintiff's Original Petition correctly states that only those credit access businesses ("CABs") operating within the city limits of Denton, Texas are subject to enforcement of the ordinance in question. Hence, only those CABs operating in the city limits of Denton, Texas (and not their parent corporations or trade associations) have standing to challenge this ordinance. However, nowhere in Plaintiff's Original Petition is Plaintiff alleged to be a CAB operating within the city limits of Denton, Texas. To the contrary, based upon paragraphs 2 and 6 of Plaintiff's Original Petition, and the Defendant's understanding that Plaintiff has filed similar litigation against other cities in Texas,

Defendant believes that Plaintiff is a trade association, comprised of member CABs operating throughout the state. Defendant, therefore, specially excepts to Paragraph 13, as well as supporting paragraphs (2, 8, and others) and to the Petition as a whole, insofar as it does not clearly show that Plaintiff has standing to bring this action. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its Petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the claims of Plaintiff will be dismissed.

1.1. Subject to further discovery, Plaintiff lacks standing to bring this action, as demonstrated by facts pleaded in its own petition. By Plaintiff's own recitation of facts, Plaintiff is an incorporated trade association, representing credit access businesses ("CABs") operating statewide,¹ but the ordinance in question regulates only credit access businesses ("CABs") that operate in the City.² The ordinance does not regulate CABs operating outside the city limits in Texas, nor does it regulate other businesses (such as trade associations). Plaintiff has nowhere alleged that CSAT, itself, is a CAB operating in Denton, Texas.

1.2. An association has standing to sue on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Texas Ass'n of Bus.*, 852 S.W.2d at 447. The test requires that the pleadings demonstrate that CSAT members have standing to sue in their own behalf, the interests Plaintiff seeks to

¹ See Plaintiff's Original Petition, paragraph 2.

² See Plaintiff's Original Petition, paragraph 8. See also Denton Ordinance 2013-073, attached to Plaintiff's Original Petition as Exhibit 1.

protect are germane to the organization's purpose, and that neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. *Id.* Plaintiff has not pleaded the requisite facts.

1.3 Although CABs operating in Denton operate within Texas, not all CABs operating in Texas operate in Denton. Plaintiff has not pleaded or shown that the interests of CABs operating in Denton are germane to the interests of a statewide trade association, whose members are CABs operating statewide. Not all cities in Texas regulate CABs, and not all municipal CAB regulatory ordinances in Texas contain the same provisions.

1.4 Upon information and belief, CSAT has filed similar actions against the cities of Dallas, San Antonio, and Austin, each of which has populations far exceeding that of Denton. Presumably, most of CSAT's members – certainly those member CABs doing business in those three cities, as well as member CABs doing business elsewhere in the State – would see no impact upon their businesses, either as a result of Denton's ordinance, or this action. Plaintiff has made no showing that its statewide interests are aligned with those CABs doing business in Texas. Plaintiff has not pleaded or shown that CABs operating in Denton even *care about* the ordinance. Plaintiffs have not pleaded or shown that the CABs operating in Denton (which presumably would comprise only the tiniest minority of CSAT members) can provide any meaningful direction or input into this case. Correlatively, CSAT has not pleaded any facts to justify why this litigation should be spearheaded by Plaintiff, when the majority of its members are presumably not located in Denton. To accept without any such showing that CSAT has standing to seek declaration and injunction on Denton's ordinance makes no more sense

than to accept that the Texas Municipal League could represent all Texas municipalities with ordinances regulating CABs.

1.5 Even if unanimity of interest could be shown between CSAT and CABs operating in Denton, then what purpose could be shown in allowing CSAT to pursue separate legal actions against individual Texas municipalities with different regulatory ordinances? Either the cases have to be different enough to justify separate actions, in which case CSAT may have conflicting interests in serving as plaintiff in each case, or they are similar enough that judicial economy would suggest that they should be consolidated. Dallas has already been awarded summary judgment in its case.

1.6 Defendant therefore believes that in order to plead and prove elements such as, without limitation, a vested property right to conduct activities, irreparable deprivation of vested property rights, the participation of CABs operating in Denton would be required.

2. Defendant specially excepts to the Petition on the grounds that it does not allege jurisdictional facts demonstrating a valid cause of action failing within a constitutional or legislative waiver of Defendant's governmental immunity from suit. Neither the Declaratory Judgment Act nor the injunctive provisions pleaded by Plaintiff waive immunity with respect to such matters, if brought by associations lacking any justiciable interest in the matters to be declared or enjoined. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its Petition to plead sufficient facts to demonstrate that each of its claims falls within a constitutional or legislative waiver of immunity on or before a specific future date, and providing that if and to the extent that it fails or refuses to so amend, this action will be dismissed.

2.1. Defendant specially excepts to Plaintiff's first cause of action for a declaratory judgment that requests a determination of the rights and status of the parties (Pet. at 5), as well as the request for attorney fees pursuant to Tex. Civ. Prac. & Rem. Code §37.009 (Pet. at 7-8), because the purported cause of action and request for attorney fees do not include an allegation of the waiver of immunity for declaratory relief, particularly in relation to an action brought by a party with no apparent justiciable interest. The Uniform Declaratory Judgments Act (the "UDJA") does not extend a trial court's jurisdiction, and a litigant's request for declaratory relief does not confer jurisdiction on a court or change a suit's underlying nature. *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). The UDJA does not waive immunity to determine the rights of parties. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011). Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its Petition to plead sufficient facts and legal basis for a waiver of immunity for its request for declaratory relief on or before a specific future date, and providing that if and to the extent that it fails or refuses to so amend, this action will be dismissed.

2.2. Defendant specially excepts to Plaintiff's request for injunctive relief against Defendant (Pet. at 6-7) because it does not include an allegation of any waiver of immunity for the injunctive relief or facts sufficient to show that any such waiver applies, particularly in relation to an action brought by a party with no apparent justiciable interest. The Supreme Court has held that sovereign immunity applies to suits for injunctive relief. *See, e.g., Dir. of Dep't of Agric. & Env't v. Printing Inuds. Ass'n*, 600 S.W.2d 264, 270 (Tex. 1980) (holding that the State was immune from a suit for

injunctive relief). Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its Petition to cure this defect on or before a specific future date, and providing that if and to the extent that it fails or refuses to so amend, this action will be dismissed.

2.3. Under *Morales*, a civil plaintiff seeking a construction through declaratory or injunctive relief of a criminal law must challenge both the constitutionality of the law and prove irreparable injury to a vested property right. *State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994). The Petition must allege facts demonstrating a constitutional violation and allege additional facts, showing how Plaintiff's constitutional rights would be violated and allege additional facts showing how enforcement would deprive CSAT members (the majority of whom are likely not even operating CABs in Denton or subject to the ordinance in question) of *vested property rights*. See *Id.*; *City of Beaumont v. Starvin Marvin's Bar & Grill, L.L.C.*, 09-11-00229-CV, 2011 WL 6748506, at *3 (Tex. App. – Beaumont Dec. 22, 2011, pet. pending) (mem. op.); *City of LaMarque v. Braskey*, 216 S.W.3d 861, 863 (Tex. App. – Houston [1st Dist.] 2007, pet. denied). Plaintiff would have had to plead a constitutional violation and plead specific facts demonstrating first that there is a vested property right to conduct each activity in Denton that belongs to Plaintiff and to each credit access business (“CAB”) that belongs to CSAT that Plaintiff asserts City of Denton Ordinance No. 2013-073 (the “Ordinance”) (Pet. Exhibit 1) would prevent, and second that enforcement of the Ordinance would threaten to irreparably deprive Plaintiff and every other CAB member of CSAT of their respective vested property rights. No facts establishing vested property rights in Denton are pleaded. No facts demonstrating how enforcement of the Ordinance would irrevocably deprive

Plaintiff or any other CSAT member of any vested property rights in Denton are pleaded. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect as to each CAB as to each activity in Denton that it asserts is a vested property right and as to each claim on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

3. Defendant specially excepts to the description of Defendant in paragraph 3 of the Petition for omitting to state that Defendant is a home-rule city, *see Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993); Charter, City of Denton, Texas, Art. I, §1.05 (2010 printing).³ This additional fact is crucial to Defendant's authority to promulgate the ordinance in question. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

4. Defendant specially excepts to paragraphs 14 through 16 of the Petition and to paragraph 1 of the Prayer portion of the Petition on the ground that the Petition seeks declaratory judgment that a municipal ordinance is unconstitutional because it has allegedly been preempted by statutes, but does not plead that Plaintiff has served the Texas Attorney General with the Petition. Tex. Civ. Prac. & Rem. Code §37.006(b). This is a mandatory

³ "The City of Denton shall have and may exercise all the powers granted to cities by the Constitution or laws of Texas including specifically those powers made available to cities of more than five thousand (5,000) inhabitants by what is known as the Home Rule Amendment to the Constitution of Texas (Article XI, Section 5 and the Home Rule Enabling Act (Vernon's Texas Codes Annotated, Texas Local Government Code Section 5.004, Chapter 9, Chapter 26 and Subchapter E of Chapter 51), as these laws now read or may hereafter be amended." DENTON, TEX. CHARTER art. I, §1.05 (2010), available at <http://library.municode.com/index.aspx?clientId=10644>.

jurisdictional requirement.⁴ Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

5. Defendant specially excepts to the entire Petition and particularly to paragraphs 6, 16, 19, 20, and 21 of the Petition for failing to specify any CAB operating in Denton, Texas, to which the Ordinance would apply contrary to state law or which would suffer any concrete injury under the allegations in the Petition. *See Texas Ass'n of Bus.*, 852 S.W.2d at 447. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

6. Defendant specially excepts to the entire Petition for failing to specify any set of facts under which the Ordinance would apply to any CAB operating in Denton, Texas contrary to state law. A Plaintiff must allege "facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Texas Ass'n of Bus.*, 852 S.W.2d at 446. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

7. Defendant specially excepts to paragraphs 12 through 25 of the Petition, and to the Prayer portion of the Petition in that these segments fail to give notice of any entitlement to seek injunctive and declaratory relief respecting a penal law. The Petition admits that the Ordinance is a penal law (Pet. ¶11). The proper and "adequate" remedy at law is for CABs

⁴ See *Comm'rs Ct. Harris Co. v. Peoples Nat. Utility Co.*, 538 SW2d 228 (Tex. Civ. App. – Houston [14th Dist] 1976, writ ref'd n.r.e.); *Commerce ISD v. Hampton*, 577 SW2d 740 (Tex. Civ. App. – Eastland, 1979, no writ).

operating in Denton to defend against prosecution on grounds of preemption, if they are ever prosecuted under the Ordinance, not by seeking injunctive or declaratory relief from a civil court. *See Morales*, 869 S.W.2d at 942. In the alternative, Plaintiff should be required to plead any special facts justifying the unusual intervention of a civil court in enjoining or declaring rights under a penal law, such as facts showing irreparable injury and the specific noncriminal means by which specific provisions of the Ordinance are being applied to deprive specified CSAT members of specific property rights. *Id.* Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

8. Defendant specially excepts to the Petition in its entirety for failing to allege whether the participation of individual members in this litigation will be necessary, particularly in light of the allegation in paragraph 20 of the Petition, which necessitates the participation of individual CSAT members by alleging that some CSAT members' "will suffer irreparable harm, including having to (i) reinvent their business plans, (ii) restructure loans, (iii) re-format and re-print loan documents, (iv) re-format and re-write websites, and (v) forego arranging credit for customers who otherwise would have sought out the CAB's services." Only those CABs operating in Denton and alleging such harm, if there are any, will be able to provide evidence establishing or refuting that allegation. "...an organization should not be allowed to sue on behalf of its members when the claim asserted requires the participation of the members individually rather than as an association..." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. Moreover, if CSAT were allowed to proceed as plaintiff, it would effectively shield individual CABs operating in Denton from those discovery tools which could otherwise be employed against

individual parties. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

9. Defendant specially excepts to paragraph 17 of the Petition on the ground that by incorporating paragraphs 12 through 16 of the Petition (which allege Count One) into Count Two of the Petition, paragraph 17 renders Count Two (including paragraphs 18 through 23 of the Petition) duplicative of Count One (including paragraphs 12 through 16 of the Petition). Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

10. Defendant specially excepts to the absence from the Petition of specific allegations of what specific provisions of the Ordinance cannot be performed without violating what specified provisions of the CSO Act (*see* Pet. ¶5), and how, in each such instance, compliance with the Ordinance would prevent compliance with the CSO Act; or how any specific provision of the Ordinance deprives any specified CSAT member of any right under any specified provision of the CSO Act. *See In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002). Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

11. Defendant specially excepts to the entire Petition and particularly to paragraphs 18, 20, 23, and Prayer portion paragraph 2, for failure to specify the portions of the Ordinance that the Plaintiff seeks to have declared invalid or enjoined. Defendant requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its petition to

cure this defect on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the action will be dismissed.

GENERAL DENIAL

12. Defendant enters a General Denial.

13. Defendant denies each and every, all and singular, the material allegations of fact and law contained in Plaintiff's Original Petition and Application for Temporary Injunction, and demands strict proof thereof.

AFFIRMATIVE DEFENSES

14. Plaintiff lacks standing to bring this action for reasons including the fact that the participation of its individual members will be necessary to litigate Plaintiff's contention that enforcement of the Ordinance will cause CSAT members to suffer "significant and irreparable harm" (Pet. ¶13). Defendant will need to obtain and adduce evidence of which members claim they will suffer significant and irreparable harm by which provisions of the Ordinance, whether those businesses were economically viable before the Ordinance or already unprofitable, and precisely how the Ordinance would render significant and irreparable harm to each of them. That evidence will be impossible to obtain without affected individual CABs operating in Denton as parties.

15. Subject to discovery, Plaintiff lacks any formal board or membership authorization to bring this action.

16. Plaintiff's claims are unripe.

17. Defendant is a home-rule municipal corporation. Defendant's home-rule powers authorize adoption and enforcement of the provisions of the Ordinance.

18. The Ordinance is penal and therefore its enforcement cannot be enjoined under the facts of this case by a civil court, nor may a civil court issue declaratory judgment construing the Ordinance. *See Morales*, 869 S.W.2d at 942.

19. Plaintiff should not be granted temporary or permanent injunctive relief because the public interest would not be served by granting such relief to Plaintiff, and because any harm to Plaintiff from denying such injunctive relief would be outweighed by harm to the public if such relief were granted, in that credit to "unbanked" individuals needing credit is readily available to such potential borrowers in Denton on terms less onerous than provided by Plaintiff. Among the public interests that would be hurt by issuance of injunctive relief are financial stability and welfare of neighborhoods because injunction would encourage imposition of inequitable and often unrepayable debt loads on residence, adverse impact of credit access businesses on crime rates and other adverse consequences in communities, including a disproportionately heavy adverse impact on minority communities, and imposition of effectively usurious interest rates. The public interest would be better served if low-income Denton residents used other available, less predatory sources of credit.

20. Temporary and permanent injunctive relief should be denied because Plaintiff cannot show irreparable harm to a vested property interest.

21. Temporary and permanent injunctive relief should be denied because Plaintiff has no vested property right to use any specific location as a credit access business.

COUNTERCLAIMS

22. Defendant seeks recovery of its reasonable and necessary attorney fees, costs, and expenses through trial and all appeals under Tex. Civ. Prac. & Rem. Code §37.009.

23. In the event that injunctive relief is ordered against enforcement of the Ordinance or any provision(s) of the Ordinance, bond should be set in an amount that is at least sufficient to repay the customers of CSAT's members for interest the customers pay on loans or credit extensions that said customers would not have obtained from CSAT's members but for the injunction. The amount would closely approximate the amount of lost profits that CSAT's members may contend would be imposed on them by enforcement of the Ordinance (*see* Pet. ¶19).

REQUEST FOR DISCLOSURE

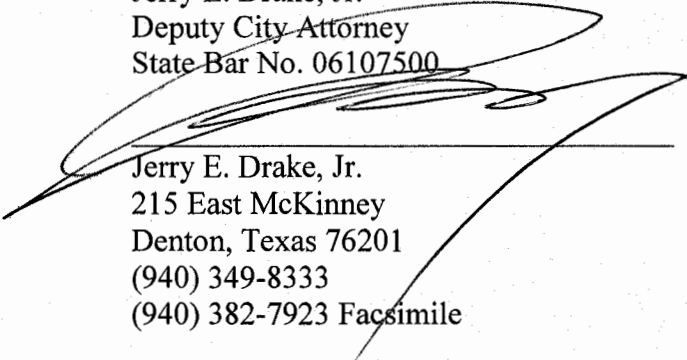
24. Defendant hereby requests disclosure in writing within 30 days after service of this request of all information listed in Tex. R. Civ. P. 194.2(a) through (i), and (l).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that its special exceptions be granted and the Petition should be dismissed with prejudice or, in the alternative, upon final trial on the merits, if same be necessary, that Plaintiff take nothing and that Defendant be awarded its costs, together with such other general and special relief as it may show itself to be justly entitled.

RESPECTFULLY SUBMITTED,
Anita Burgess
City Attorney
State Bar No. 03379600

Jerry E. Drake, Jr.
Deputy City Attorney
State Bar No. 06107500

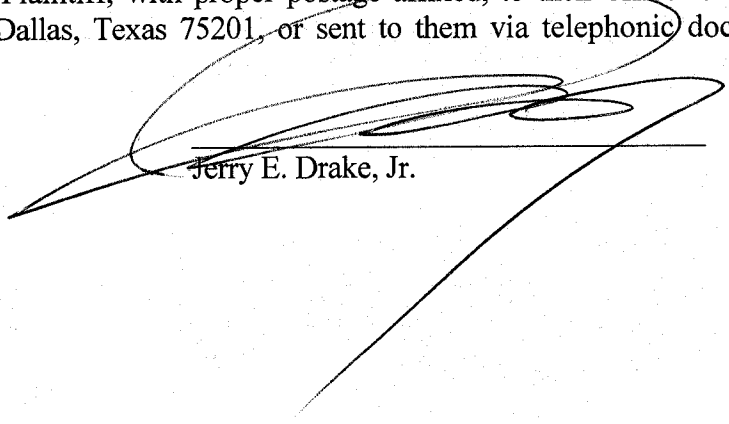


Jerry E. Drake, Jr.
215 East McKinney
Denton, Texas 76201
(940) 349-8333
(940) 382-7923 Facsimile

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of May, 2013, a true and correct copy of the above was mailed to Michael P. Lynn, Richard A. Smith, and Kent D. Krabill, Attorneys of record for Plaintiff, with proper postage affixed, to their office located at 2100 Ross Avenue, Suite 2700, Dallas, Texas 75201, or sent to them via telephonic document transfer at (214) 981-3839.



Jerry E. Drake, Jr.