Cause No. D-1-GN-21-006290

Ryan, LLC, Plaintiff,	§	In the District Court
v.	§	
Glenn Hegar, in His Official Capacity as Comptroller of Public Accounts of the State of Texas, and the Office of the Comptroller of Public Accounts for the State of Texas, Defendants.	§	of Travis County, Texas 353rd Judicial District

Defendants' Response to Plaintiff's Reply

On July 8, 2022, Plaintiff filed a "Reply to Defendants' Response to Plaintiff's Motion for Summary Judgment" in which it argued entitlement to a permanent injunction. This filing is Defendants' written response to those arguments.

I. Ryan has not properly requested an injunction.

In its reply, Ryan argues that it is entitled to an automatic permanent injunction and that it has successfully proved the elements of an injunction. What Ryan's reply accomplishes, however, is to add one more item to the list of ways it has failed to properly request an injunction.

A. Ryan cannot raise new issues in its reply.

It is black-letter law that a summary-judgment movant cannot request new relief in a reply to its motion. "The grounds for a motion for summary judgment must be set out in the motion itself." *Sanders v. Capitol Area Council*, 930 S.W.2d 905, 911 (Tex. App.—Austin 1996, no pet.). "By definition, this rule means that, in the absence

of the nonmovant's consent, a movant may not raise a new ground for summary judgment in a reply to the non-movant's response." *Id.*

But that is exactly what Ryan is attempting to do here. Having failed to plead or move for an injunction, Ryan's reply is a last-minute effort to request relief that Ryan has not properly brought before the Court.

B. Ryan did not plead an injunction or move for one.

As noted in Defendants' response to Ryan's motion, Ryan did not get past square one on its injunction claim: in its petition, it did not plead the elements of an injunction or facts sufficient to be awarded an injunction. In Ryan's motion, Ryan argued only that the Court has *jurisdiction* to grant an injunction but not that the Court should actually award one. Without the proper pleading or motion, the Court should not grant Ryan an injunction.

C. Ryan is not entitled to an automatic injunction.

The opinion that Ryan relies on for the assertion that its section 2001.038 claim for declaratory relief entitles it to an automatic injunction was an opinion that addressed only the trial court's *jurisdiction* to grant an injunction. At the conclusion of that opinion, the Third Court emphasized that:

> Our holdings, of course, concern only whether the district court has *jurisdiction* to adjudicate appellees' claims, and we intend no comment on the merits of the claims themselves—let alone concerning any broader policy disputes from which those claims might arise.

Tex. Dept. of State Health Servs. v. Balquinta, 429 S.W.3d 726, 752 (Tex. App.—Austin 2014, pet. dismissed) (emphasis in original).

Throughout the opinion, the Third Court treated the appellee's claims for declaratory relief and injunctive relief as distinct claims, referring to them as different claims and separately addressing whether the trial court had jurisdiction over them. *See, e.g.*, *id.* at 743 (analyzing jurisdiction for "Declaratory relief under APA section 2001.038") and 748 (analyzing jurisdiction for "Injunctive relief"). The appellate court in no way implied that an injunction would automatically follow from a declaration that a rule was invalid and in fact disclaimed such a position. *See id.* at 752 ("[W]e intend no comment on the merits of the claims themselves.").

In any event, the Comptroller does not question the Court's *jurisdiction* to issue an injunction but instead urges the more fundamental issue that Ryan has not properly requested one.

If it was Ryan's aim to prevent enforcement of the R&D rules before they went into effect, Ryan's suit is late: the rules are already being applied to taxpayers. Moreover, Ryan did not seek a temporary injunction to enjoin enforcement of the rules during the pendency of this suit.

While injunctive relief may be "necessary" in some circumstances, the party requesting the relief must show that an injunction is indeed "necessary." And to do so, the party must satisfy the elements of an injunction, discussed next.

D. Ryan has not shown the elements of an injunction.

"To be entitled to a permanent injunction, a party must prove (1) a wrongful act, (2) imminent harm, (3) an irreparable injury, and (4) the absence of an adequate remedy at law." *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 792 (Tex. 2020).

In its reply, Ryan argues that if a section of the Comptroller's rules is invalid, then there is automatically a wrongful act. Presumably, Ryan's theory is that the Comptroller's promulgation of the rules was a wrongful act. But the relevant wrongful act is the act to be enjoined. The Comptroller has already promulgated its rules, and a ruling that any portion of them is invalid would effectively strike that portion from the books. So if a portion of a rule is declared invalid, then there is nothing for the Court to enjoin unless the Comptroller were to attempt to enforce an invalidated rule. Which, of course, the Comptroller has not done because the rules remain intact.

There is no imminent harm because the Comptroller is not threatening to enforce an invalid rule. And Ryan has presented no evidence to that effect.

Ryan's contentions in its reply regarding imminent harm and irreparable injury relate only to the alleged effect of the rules themselves on Ryan and do not stem from any unauthorized enforcement of the rules by the Comptroller. Ryan's allegations regarding harm go more toward Ryan's standing than Ryan's entitlement to a permanent injunction. Standing is the bare minimum injury needed to get into court whereas an injunction requires more—irreparably more, so to speak.

Finally, Ryan will receive an adequate remedy at law in this very lawsuit: its claim for declaratory relief under section 2001.038 of the Government Code will resolve any questions Ryan has regarding the proper scope of the Comptroller's rules implementing the R&D tax breaks. With declarations from the Court regarding the rules' validity, Ryan will not need to come back to court to relitigate the issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2022 a true and correct copy of the foregoing was served on all parties and counsel of record listed below via e-service and/or electronic mail:

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