No. ___

In the Court of Appeals for the Third Judicial District Austin, Texas

IN RE OFFICE OF THE ATTORNEY GENERAL,
Relator.

On Petition for Writ of Mandamus
to the Honorable Jan Soifer, 250th Judicial District Court, Travis County

PETITION FOR WRIT OF MANDAMUS

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"App." refers to the appendix to this petition. "MR." refers to the mandamus record filed concurrently with this petition.

Statement of the Case

Nature of the Underlying Proceeding:	Plaintiffs alleged that OAG violated the Texas Whistleblower Act, Tex. Gov't Code ch. 554, when it terminated their employment in late 2020. MR.51-52. For more than three years, the parties have engaged in protracted litigation—first over the scope of the Whistleblower Act's sovereign-immunity waiver, then over the enforceability of a mediated settlement agreement. To stop the constant drain on taxpayer and OAG resources, on January 18, 2024, OAG amended its answer and elected not to contest liability or damages on the sole claim in Plaintiffs' operative petition. MR.293-99. Over Plaintiffs' objection, OAG subsequently moved for entry of judgment in Plaintiffs' favor. MR.779-89.
Respondent:	345th Judicial District Court, Travis County The Honorable Jan Soifer
Respondent's Challenged Action:	Notwithstanding OAG's election not to contest any issue of liability or damages relating to the sole cause of action in Plaintiffs' petition, the trial court ordered four oral depositions of apex witnesses—including the duly-elected Attorney General of Texas—in a case involving no disputed issue of fact concerning liability or damages. MR.801-02. Even after OAG sought entry of a judgment giving Plaintiffs all of the relief they could have hoped to obtain at trial, the trial court refused to reconsider its order. MR.809.

Statement Regarding Oral Argument

This Court has jurisdiction to issue a writ of mandamus to any trial-court judge within this judicial district who has clearly abused his or her discretion, and for which the aggrieved party has no adequate remedy on appeal. Tex. Gov't Code § 22.221(b); *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding). Oral argument is unnecessary to see why such relief is appropriate here: Following OAG's election not to contest Plaintiffs' Whistleblower Act claim, there are no relevant facts to discover, making any further discovery—such as the depositions at issue here—improper. *Cf. In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (per curiam); Tex. R. Civ. P. 192.4(b). After all, once liability was conceded, the only theoretically open issue was how much Plaintiffs were damaged—a fact that Plaintiffs presumptively already know. But Plaintiffs certainly did not show a need for depositions of high-level executive officials. *See In re American Airlines, Inc.*, 634 S.W.3d 38, 40 (Tex. 2021) (orig. proceeding) (per curiam).

Issue Presented

Whether OAG is entitled to relief from the trial court's order compelling factual discovery, in the form of apex depositions, in a lawsuit that no longer has any disputed issues of fact.

To the Honorable Third Court of Appeals:

This case has taken an extraordinary turn since it was last before this Court. To avoid the drain on taxpayer resources and disruption to the workings of OAG, the agency filed an amended answer electing not to contest liability, damages, or reasonable attorneys' fees on Plaintiffs' sole claim under the Texas Whistleblower Act. Tex. Gov't Code ch. 554 (App. A). Accordingly, this case is effectively over.

But Plaintiffs refused to take "yes" for an answer. Remarkably, they *opposed* entry of judgment in their favor, insisting instead that they should be permitted to depose four of the senior-most officials at OAG. And even more remarkably, the trial court obliged—without explanation as to what facts remained to be proven and without affording OAG the right to respond guaranteed by its own local rules.

Apart from the procedural irregularities associated with its order's issuance, the trial court clearly abused its discretion in at least two ways.

First, the trial court lacked discretion to authorize fact discovery in a case involving no disputed issues of fact. Although the scope of discovery is broad, it is not so capacious that a trial court may order fact discovery on issues that are no longer live. Following OAG's election not to contest either liability or damages on Plaintiffs' sole claim under the Whistleblower Act, all that remained for the trial court to do was award Plaintiffs damages—based on information peculiarly within Plaintiffs' knowledge—and render judgment. Where, as here, a trial court's order exceeds the scope of discovery, it constitutes an abuse of discretion for which mandamus is the proper remedy. *In re CSX Corp.*, 124 S.W.3d at 152.

Second, and assuming the trial court maintained discretion to allow some limited discovery into Plaintiffs' damages, the trial court clearly abused that discretion in permitting Plaintiffs to compel nearly limitless depositions of high-level agency officials who fall within the "apex executive" doctrine. To the extent any further action was needed, it was to determine the extent of Plaintiffs' damages. As OAG would have explained, had it been afforded the opportunity, OAG has no unique information regarding that topic and will accept Plaintiffs' own account of their damages incurred in the three years since they left OAG. At minimum, however, the Attorney General, First Assistant Attorney General, OAG Chief of Staff, and a Senior Advisor to the Attorney General have no "unique or superior knowledge of discoverable information" to be discovered on that topic. *In re Am. Airlines, Inc.*, 634 S.W.3d at 41. Nor have Plaintiffs "attempted less intrusive means of discovery," as they must before seeking the depositions of such senior officials. *Id.*

Moreover, OAG has no adequate means for obtaining relief through the regular appellate process. It is well-established that a party has no adequate remedy by appeal where a discovery order exceeds the scope of discovery or imposes burdens on the responding party that outweigh any benefit tied to "the needs of the case" or to "resolving the issues." *In re USAA Gen. Indem. Corp.*, 624 S.W.3d 782, 788 (Tex. 2021) (quoting Tex. R. Civ. P. 192.4(b)). As the trial court's order does both, mandamus should issue.*

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* In the alternative, OAG requests a writ of prohibition or injunction. Case law is admittedly unclear which writ is the appropriate remedy in this context. *E.g.*, *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 683 (Tex. 1989) (orig. proceeding)

STATEMENT

As the Court is aware, this case began in 2020 when Plaintiffs, former high-ranking political appointees of OAG, sued the agency alleging that their termination from political posts violated the Texas Whistleblower Act. MR.1-65; *see also* App. A. The parties engaged in protracted litigation, including in this Court and the Texas Supreme Court, over the scope of the Whistleblower Act's sovereign-immunity waiver. *See OAG v. Brickman*, 636 S.W.3d 659 (Tex. App.—Austin 2021, pet. denied). On February 9, 2023, more than two years after the filing of Plaintiffs' original petition, the parties executed a mediated settlement agreement ("MSA") following a two-day mediation. MR.134-37.

As OAG explained when it sought to enforce the MSA, it began complying with the terms of the MSA in earnest. MR.278-79. By contrast, Plaintiffs unilaterally moved the Supreme Court to lift the agreed abatement of this case on March 8, 2023. MR.140-48. Plaintiffs stated that they intended to withdraw from the MSA unless OAG agreed to add a new stipulation that $3,300,000 be paid by the end of the 88th legislative session. MR.141-43.

On September 25, 2023, following the full acquittal of the Attorney General, Plaintiffs again asked the Texas Supreme Court to lift the abatement because the

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(injunction), *with Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988) (per curiam) (prohibition). Regardless, "incorrect identity of the writ sought is of no significance." *City of Dallas v. Dixon*, 365 S.W.2d 919, 922 (Tex. 1963) (orig. proceeding), *rev'd on other grounds sub nom. Donovan v. City of Dallas*, 377 U.S. 408 (1964). The writs are generally considered "similar" except for the identity of the recipient. O'Connor's *Texas Civil Appeals* ch. 10-D § 2 (2020 ed.) (citing, *inter alia*, *Holloway*, 767 S.W.2d 683).

MSA had not yet been funded and a final settlement agreement had not yet been signed. MR.162-66. The Supreme Court did so on September 29, 2023, denying OAG's then-pending petition for review regarding the trial court's denial of a plea to the jurisdiction. MR.166. The Court did not indicate whether it denied the petition based on the mootness of the question in the light of the parties' MSA.

On October 26, 2023, the case was returned to the trial court. MR.169. On November 3, 2023, Plaintiffs served notices for the oral depositions of Attorney General Paxton, Lesley French Henneke, Michelle Smith, and Brent Webster—two of whom are executive officials at OAG. MR.179. Over OAG's objections, the trial court ordered the depositions to occur by February 9, 2024. MR.288. This Court declined to disturb the trial court's ruling, MR.290, as did a divided Supreme Court, MR.291.

Rather than continue to allow this case to drain taxpayer resources and distract from the work of the office, on January 18, 2024, OAG filed an amended answer in which it affirmatively elected not to contest any factual allegation in Plaintiffs' operative petition and consented to entry of judgment against it to the full extent permitted by the Texas Whistleblower Act. MR.293-299. But shortly thereafter, in response to e-mail correspondence from Plaintiffs' counsel—and without either affording OAG an opportunity to respond or considering the legal effect of OAG's amended answer—the trial court summarily re-set the depositions of the Attorney General, First Assistant Attorney General, OAG's Chief of Staff, and a Senior Advisor to the Attorney General for February 1, 2, 7, and 9, respectively. MR.769-70.

Consistent with its efforts to bring this case to a close, OAG thereafter filed a motion requesting that the trial court actually "order[]," "adjudge[]," and

"decree[]" a judgment of liability in favor of Plaintiffs, including damages and attorneys' fees. MR.779-89. As both damages and fees fall peculiarly within the knowledge of Plaintiffs, OAG's proposed judgment could not provide precise numbers, but OAG agreed not to contest the figures offered by Plaintiffs. MR.806. Because no factual dispute as to liability remained live, OAG also asked the trial court to reconsider its orders compelling the requested depositions. MR.783-85. Given the impending deposition dates, OAG requested that the trial court rule on its motion by no later than the close of business on January 25, 2024, to allow time for OAG to seek relief from this Court and, if necessary, the Texas Supreme Court. MR.814.

Remarkably, Plaintiffs stated that they *opposed* entry of judgment in their favor and insisted on continuing to trial on facts that OAG no longer contests. *See* MR.771. The trial court initially refused to consider OAG's motion on the ground that it was not "titled an emergency" and did not "reflect[] an emergency," and the court further indicated that OAG would need to wait at least three days to obtain a hearing. MR.812. But after OAG's counsel indicated that OAG would, if necessary, amend the caption of the motion to reflect the emergency—assuming that the court chose not to avert the emergency altogether by ordering a brief continuance of the depositions to consider the effect of OAG's amended answer in the ordinary course, MR.812—the court stated that "[t]he request for an emergency hearing is denied, and the request that the supplemental order be vacated is also denied." MR.809.

Summary of the Argument

Mandamus relief is available where the trial court's error "constitute[s] a clear abuse of discretion" and the relator lacks "an adequate remedy by appeal." *Walker*, 827 S.W.2d at 839. Both elements are satisfied here under these extraordinary facts.

First, the trial court abused its discretion by authorizing Plaintiffs to take fact discovery in a case that no longer involves any disputed issues of fact. Following OAG's election not to contest liability or damages on the sole claim presented in Plaintiffs' petition, any previously extant factual disputes over liability or damages are no longer "live," and the trial court's "action on the merits cannot affect the parties' rights or interests" with regard to that issue. *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012). The trial court's decision to nevertheless order factual discovery in the face of these changed circumstances without so much as a response from the party against whom discovery was sought was an abuse of discretion—both in denying OAG an opportunity to be meaningfully heard and in permitting fact discovery to take place in a case that has nothing left for the trial court to do but enter judgment and calculate damages.

The court further erred by ordering depositions of apex executive officials because they are unwarranted here as a matter of law. Because "[h]igh ranking government officials have greater duties and time constraints than other witnesses," and because their "time is very valuable," *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993), they are shielded from this type of discovery. The Texas Supreme Court has held that the apex doctrine applies not only to the principal executive—here the Attorney General—but also to "other official[s] at the highest level of [government]

management," including the Attorney General's First Assistant and Chief of Staff. *See Crown Cent. Petrol. Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (orig. proceeding); *accord In re Miscavige*, 436 S.W.3d 430 (Tex. App.—Austin 2014) (orig. proceeding). Because Plaintiffs have failed to show that the proposed deponents have *any* knowledge—much less unique knowledge—unavailable through other witnesses or by written discovery, regarding the only issue that theoretically remains open in this case—the calculation of damages and attorneys' fees—the district court clearly abused its discretion in requiring the depositions to proceed.

Second, mandamus relief is necessary because OAG has no effective remedy by appeal. A party lacks an "adequate remedy by appeal" where an "order 'imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party,'" *In re CSX Corp.*, 124 S.W.3d at 153, or "compels production beyond the permissible bounds of discovery," *In re Weekley Homes LP*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding). That is demonstrably the case here: authorizing fact discovery in a case involving no disputed issues of fact far exceeds the scope of discovery—indeed, it turns the very purpose of discovery on its head because it bears *no* relationship to "the needs of the case" or to "resolving the issues," *In re USAA Gen. Indem. Corp.*, 624 S.W.3d at 788 (quoting Tex. R. Civ. P. 192.4(b)). Taking such discovery could serve only the impermissible purposes of harassing the witnesses and running up Plaintiffs' attorneys' fees. And OAG will lose the money, time, and resources that would be devoted to responding to this improper discovery. Once that damage is inflicted, it cannot be undone. *See, e.g.*, *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015); *see also In re Millwork*, 631 S.W.3d 706,

714 (Tex. 2021) (orig. proceeding) (per curiam). Under these circumstances, mandamus relief is warranted.

ARGUMENT

I. The Trial Court Clearly Abused its Discretion by Ordering Apex-Level Discovery in an Uncontested Case Involving No Live Factual Dispute.

The trial court's order meets the first mandamus element—a clear abuse of discretion—twice over. *First*, the trial court had no discretion to order fact discovery in a case that involves no live factual dispute as to either liability or damages. *Second*, the trial court abused its discretion by ordering oral depositions of four of the highest-ranking officers in the agency—including Texas's duly elected Attorney General—without requiring that Plaintiffs show either that they possess *any* knowledge—let alone unique knowledge—regarding damages or that they are unable to seek the same information through less intrusive means.

A. The trial court had no discretion to order discovery in a case involving no live factual dispute.

Although "[g]enerally, the scope of discovery is within the trial court's discretion," "[a] trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure." *In re CSX Corp.*, 124 S.W.3d at 152. "Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Id.* Put another way, the Texas Rules of Civil Procedure permit only depositions "calculated to lead to the

discovery of admissible evidence." *In re Daisy Mfg. Co., Inc.*, 17 S.W.3d 654, 657 (Tex. 2000).

"The scope of discovery is also limited by the legitimate interests of the opposing party to avoid overly broad requests, harassment, or disclosure of privileged information." *In re Nolle*, 265 S.W.3d 487, 491 (Tex. App.—Houston [1st Dist.] 2008). And such discovery must "not exceed the bounds of the claims at issue." *In re USAA Gen. Indem. Corp.*, 624 S.W.3d at 791. Accordingly, "[t]he trial court 'should' limit otherwise permissible discovery" if "the burden or expense of the proposed discovery outweighs its likely benefit"—a "proportionality" determination that turns on "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Id.* at 788 (quoting Tex. R. Civ. P. 192.4(b)). Such "[p]roportionality determinations are made on a case-by-case basis." *Id.* at 792.

Here, following OAG's election not to contest liability, damages, or reasonable attorneys' fees on the sole claim in Plaintiffs' operative petition, MR.293-99, there is no case left to try. After all, to have a trial, there must be at least one "disputed issue of material fact." *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). Here, there are *no* disputed facts. By extension, any previously extant dispute over factual discovery is "no longer 'live'" because "the parties lack a legally cognizable interest in the outcome." *Abbott v. Mexican-Am. Legis. Caucus*, 647 S.W.3d 681, 689 (Tex. 2022) (quoting *Heckman*, 369 S.W.3d at 162). "Put simply," an issue becomes moot when "the court's action on the merits cannot affect the parties' rights or interests" regarding that issue. *Heckman*, 369 S.W.3d at 162. Although

mootness is normally judged on a claim-by-claim basis, a case can become "procedurally moot" when developments in a case preclude particular procedural relief *even if* the "parties' controversy over the substantive issue remained live." *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund., LLC*, 619 S.W.3d 628, 636-37 (Tex. 2021).

Because no live or disputed issues of fact remain as to Plaintiffs' claim, Plaintiffs' demands for fact discovery are procedurally moot. That is, the depositions that were ordered certainly cannot be used in "obtaining information that will aid the dispute's resolution," *In re CSX Corp.*, 124 S.W.3d at 152, because there is no factual dispute left to resolve. OAG's amended answer and subsequent motion for entry of judgment make crystal clear that the agency does not contest liability, damages, or reasonable attorneys' fees. MR.293-99, 779-89. As a consequence, any discovery ordered far exceeds what is permitted under the Rules of Civil Procedure: Because there is no longer any "claim[] *at issue*" that needs to be resolved, *In re USAA Gen. Indem. Corp.*, 624 S.W.3d at 791 (emphasis added), the contemplated discovery is completely untethered to "the needs of the case" or to "resolving the issues," *id.* at 788 (quoting Tex. R. Civ. P. 192.4(b)). Here, the rights of the litigants could not be adjudicated at all because they are not contested.

The only apparent purpose of such depositions would be to drive up Plaintiffs' counsel's attorneys' fees or to harass or embarrass witnesses against whom Plaintiffs bear a personal grudge. *See, e.g.*, Kevin Baskar, *'My fight will continue': Paxton whistleblower ready for lawsuit to move forward*, KXAN Austin (Sept. 29, 2023), http://tinyurl.com/4yv4k9yu. Indeed, at least one of the Plaintiffs has openly stated that the

true purpose of pressing forward with this lawsuit is to utilize judicial resources to build a "record" that will aid their efforts to lobby the Legislature to fund this lawsuit in 2025. *See* Karina Kling, *Whistleblower discusses Ag Ken Paxton's push to end lawsuit*, Spectrum News 1 (Jan. 23, 2024), http://tinyurl.com/4jb4dk78. Needless to say, expending judicial and party resources to facilitate Plaintiffs future lobbying efforts bears no relationship to "the needs of *the case*" or "resolving the issues" presented therein. *In re USAA Gen. Indem. Corp.*, 624 S.W.3d at 788 (quoting Tex. R. Civ. P. 192.4(b))

By contrast, the discovery will have a severe impact on OAG, which must prepare for and defend the depositions of four individuals whose day jobs include managing 4,200 employees and overseeing more-than 30,000 active cases on behalf of the State of Texas, its officers, and its agencies. MR.784. That can hardly be said to serve the purposes of the Rules of Civil Procedure—that is, to "obtain a just, fair, equitable, and impartial adjudication of the rights of litigants . . . with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable." Tex. R. Civ. P. 1. Because its order compelling depositions disregarded the bounds of permissible discovery, the trial court abused its discretion. *In re CSX Corp.*, 124 S.W.3d at 152.

B. The Attorney General and high-level agency officers are apex executives not subject to deposition on the question of damages.

The trial court's order was conspicuously flawed because the only theoretically open issue is the precise amount of damages and fees. As OAG would have explained at a hearing, if one had been afforded to it, discovery should not have been needed

on that point either. OAG has elected not to contest Plaintiffs' evidence—whether in the form of affidavits, declarations, or live testimony. MR.293-99. Nevertheless, the trial court ordered the depositions of the Attorney General and three of his most senior aides without so much as a chance to explain the effect of their amended answer. That was a clear abuse of discretion in the light of well-established case law.

A trial court examining a request to depose an executive or other "high-level" officer "'should first determine whether the party seeking the deposition has arguably shown that the official has any unique or superior personal knowledge of discoverable information'" *and* has made "a good-faith effort to secure discovery through less intrusive methods." *In re Am. Airlines*, 634 S.W.3d at 40 (quoting *Crown Cent.*, 904 S.W.2d at 128); *see also, e.g.*, *Freedom From Religion Found., Inc. v. Abbott*, No. A-16-CA-00233, 2017 WL 4582804, at *11 (W.D. Tex. Oct. 13, 2017). If such a showing is not made, "the trial court must grant a protective order and 'first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods.'" *In re Am. Airlines*, 634 S.W.3d at 40. And when apex depositions are requested to resolve the question of damages, the testimony cannot be merely "tangential"; it must be "uniquely relevant." *Wilco Marsh Buggies & Draglines, Inc. v. Weeks Marine, Inc.*, 2022 WL 742443, at *4-5 (E.D. La. March 11, 2022) (citing *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)).

Limitations on apex depositions are critical because they "seek to strike a balance between a party's right to discovery 'that is relevant to the subject matter of the claim, and which appears reasonably calculated to lead to the discovery of admissible evidence' and the right of a person whose deposition is noticed to protection 'from

undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights.'" *In re CP Dreamworks Pizza, LLC*, No. 03-22-00693-CV, 2023 WL 403098, at *2 (Tex. App.—Austin Jan. 26, 2023). That is particularly true for "[h]igh ranking government officials," whose job is to serve the public interest and who "have greater duties and time constraints than other witnesses." *In re United States*, 985 F.2d at 512. Good "public policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases." *Monti v. Vermont*, 563 A.2d 629, 631 (Vt. 1989) (quoting *Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983)). Without limiting the circumstances in which they can be required to testify, such officials could spend an "inordinate amount of time tending to pending litigation." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). "In short, the executive branch's execution of the laws can be crippled if courts can unnecessarily burden [officials] with compelled depositions." *In re U.S. Dep't of Educ.*, 25 F.4th 692, 701 (9th Cir. 2022).

Plaintiffs' efforts to compel the depositions of four of the highest-ranking members of OAG underscore why such limitations are necessary. For a year, OAG attempted to settle and then enforce the settlement of Plaintiffs' claim, MR.277-81, which Plaintiffs initially agreed was in their best interest, MR.134-37. When those efforts ultimately proved unsuccessful, OAG again sought to avoid frittering away public resources by filing an amended answer electing not to contest Plaintiffs' liability or damages and then moved for entry of judgment in Plaintiffs' favor. MR.134-37, 783-85. Effectively the death penalty in civil litigation, such judgment is typically

reserved for litigants who have repeatedly flouted court orders—something that OAG has never done and indeed files this petition to avoid any accusation of doing. *See Cire v. Cummings*, 134 S.W.3d 835, 839-40 (Tex. 2004); Tex. R. Civ. P. 215.2(b)(5). Nevertheless, Plaintiffs continue to insist on taking the depositions of four individuals—who without doubt include "official[s] at the highest level of [government] management" of OAG, *Crown Cent.*, 904 S.W.2d at 128; *see also In re Miscavige*, 436 S.W.3d 430—even though the depositions could never be used at any trial because there is no disputed issue of material fact to be tried. *See supra* pp. 8-11. There is no other plausible explanation than that Plaintiffs intend to abuse the civil litigation process to harass OAG witnesses—a plan confirmed by Plaintiffs' objection to entry of a judgment that would be favorable to them in every respect.

Indeed, Plaintiffs have made no showing that these four proposed deponents possess *any* knowledge of Plaintiffs' damages, much less "unique or superior personal knowledge," *In re Am. Airlines*, 634 S.W.3d at 40; *cf. Univ. Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 580 (Tex. App.—Austin 2000, no pet.), or that they might provide "uniquely relevant testimony," *Wilco Marsh Buggies & Draglines, Inc.*, 2022 WL 742443, at *5. Nor could they. Plaintiffs know more about how they have been damaged than do the proposed deponents, whose sole insight into the question could extend at most to Plaintiffs' salaries while employed by the agency. Plaintiffs do not even need "written discovery" or non-apex witness testimony to obtain that information. *In re CP Dreamworks*, 2023 WL 403098, at *5. The salaries of public employees are public information, available under the Texas Public Information Act. Tex. Gov't Code § 552.022(a)(2). The first element of the mandamus test was thus

easily met: even assuming discovery were appropriate, it was a clear abuse of discretion for the trial court to order four apex depositions so that Plaintiffs can obtain information they already have or could easily obtain.

II. Mandamus Relief is Appropriate Because No Effective Remedy is Available by Appeal.

OAG also meets the second requirement of mandamus relief: Because the harm here is the continuation of litigation itself, there is no adequate remedy for the trial court's unlawful action by ordinary appeal following final judgment. "The operative word, 'adequate,' has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential concerns" that "depend[] heavily on the circumstances" of the case. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136-37 (Tex. 2004) (orig. proceeding). Courts have also recognized that mandamus is an appropriate remedy when a party is "in danger of permanently losing substantial rights." *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 927 (Tex. App.—Dallas 2014) (orig. proceeding) (citing *In re Van Waters & Rogers*, 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding) (per curiam)). Moreover, "[w]hile mandamus 'is not an equitable remedy, its issuance is largely controlled by equitable principles'" that work to preserve a party's rights. *In re Am. Airlines*, 634 S.W.3d at 42 (quoting *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding)).

Relevant here, the Supreme Court has repeatedly held that a producing party lacks an "adequate remedy by appeal" where an "order 'imposes a burden on [it] far out of proportion to any benefit that may obtain to the requesting party,'" *In re CSX Corp.*, 124 S.W.3d at 153, or "compels production beyond the permissible

bounds of discovery," *In re Weekley Homes LP*, 295 S.W.3d at 322; *see also, e.g.*, *In re Contract Freighters, Inc.*, 646 S.W.3d 810, 815 (Tex. 2022) (orig. proceeding) (per curiam).

Both transgressions are evident here. As described above, because it is improper to order fact discovery in a case involving no factual disputes over liability or damages, the trial court's order far exceeds the scope of discovery permitted under the Rules of Civil Procedure and is grossly disproportionate to the needs of this case. *See supra* pp. 8-15. Put simply, "[r]equests must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *Contract Freighters*, 646 S.W.3d at 814. But these discovery requests presumably relate to whether the Plaintiffs were fired in violation of the Whistleblower Act. MR.51-52; *see also* App. A. That dispute no longer needs to be resolved, since OAG has now conceded liability on that very question. Moreover, the nature of the discovery makes the error particularly burdensome for the reasons that OAG has already explained at length in attempting to enforce the MSA. MR.277-81. And it will be impossible to obtain relief on appeal because OAG would have no appellate standing to appeal a judgment that it requested.

Prayer

The Court should grant the petition and order the trial court to vacate its challenged order.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Austin Kinghorn
Associate Deputy Attorney General
for Legal Counsel

/s/ Lanora C. Pettit
Lanora C. Pettit
Principal Deputy Solicitor General
State Bar No. 24076720
Lanora.Pettit@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Relator

Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Service

On January 25, 2024, this document was served electronically on Thomas A. Nesbitt, lead counsel for Plaintiff James Blake Brickman, via tnesbitt@dnaustin.com; Don Tittle, lead counsel for Plaintiff J. Mark Penley, via don@dontittlelaw.com; T.J. Turner, lead counsel for Plaintiff David Maxwell, via tturner@cstrial.com; and Joseph R. Knight, lead counsel for Plaintiff Ryan M. Vassar, via jknight@ebbklaw.com.

/s/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Compliance

Microsoft Word reports that this brief contains 4,543 words, excluding exempted text.

/s/ Lanora C. Pettit
Lanora C. Pettit

No.___

In the Court of Appeals for the Third Judicial District Austin, Texas

IN RE OFFICE OF THE ATTORNEY GENERAL,

Relator.

On Petition for Writ of Mandamus
to the Honorable Jan Soifer, 250th Judicial District Court, Travis County

RELATOR'S APPENDIX

TAB A: TEXAS WHISTLEBLOWER ACT, TEX. GOV'T CODE CH. 554

GOVERNMENT CODE

TITLE 5. OPEN GOVERNMENT; ETHICS

SUBTITLE A. OPEN GOVERNMENT

CHAPTER 554. PROTECTION FOR REPORTING VIOLATIONS OF LAW

Sec. 554.001. DEFINITIONS. In this chapter:

(1) "Law" means:

(A) a state or federal statute;

(B) an ordinance of a local governmental entity; or

(C) a rule adopted under a statute or ordinance.

(2) "Local governmental entity" means a political subdivision of the state, including a:

(A) county;

(B) municipality;

(C) public school district; or

(D) special-purpose district or authority.

(3) "Personnel action" means an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.

(4) "Public employee" means an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity.

(5) "State governmental entity" means:

(A) a board, commission, department, office, or other agency in the executive branch of state government, created under the constitution or a statute of the state, including an institution of higher education, as defined by Section 61.003, Education Code;

(B) the legislature or a legislative agency; or

(C) the Texas Supreme Court, the Texas Court of Criminal Appeals, a court of appeals, a state judicial agency, or the State Bar of Texas.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 721, Sec. 1, eff. June 15, 1995.

Sec. 554.002. RETALIATION PROHIBITED FOR REPORTING VIOLATION OF LAW. (a) A state or local governmental entity may not suspend or terminate the

employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.

(b) In this section, a report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:

(1) regulate under or enforce the law alleged to be violated in the report; or

(2) investigate or prosecute a violation of criminal law.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, Sec. 2, eff. June 15, 1995.

Sec. 554.003. RELIEF AVAILABLE TO PUBLIC EMPLOYEE. (a) A public employee whose employment is suspended or terminated or who is subjected to an adverse personnel action in violation of Section 554.002 is entitled to sue for:

(1) injunctive relief;

(2) actual damages;

(3) court costs; and

(4) reasonable attorney fees.

(b) In addition to relief under Subsection (a), a public employee whose employment is suspended or terminated in violation of this chapter is entitled to:

(1) reinstatement to the employee's former position or an equivalent position;

(2) compensation for wages lost during the period of suspension or termination; and

(3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination.

(c) In a suit under this chapter against an employing state or local governmental entity, a public employee may not recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount that exceeds:

(1) $50,000, if the employing state or local governmental entity has fewer than 101 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;

(2) $100,000, if the employing state or local governmental entity has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;

(3) $200,000, if the employing state or local governmental entity has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year; and

(4) $250,000, if the employing state or local governmental entity has more than 500 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year.

(d) If more than one subdivision of Subsection (c) applies to an employing state or local governmental entity, the amount of monetary damages that may be recovered from the entity in a suit brought under this chapter is governed by the applicable provision that provides the highest damage award.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 721, Sec. 3, eff. June 15, 1995.

Sec. 554.0035. WAIVER OF IMMUNITY. A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter.

Added by Acts 1995, 74th Leg., ch. 721, Sec. 4, eff. June 15, 1995.

Sec. 554.004. BURDEN OF PROOF; PRESUMPTION; AFFIRMATIVE DEFENSE. (a) A public employee who sues under this chapter has the burden of proof, except that if the suspension or termination of, or adverse personnel action against, a public employee occurs not later than the 90th day after the date on which the employee reports a violation of law, the suspension, termination, or adverse personnel action is presumed, subject to rebuttal, to be because the employee made the report.

(b) It is an affirmative defense to a suit under this chapter that the employing state or local governmental entity would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under this chapter of a violation of law.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 721, Sec. 5, eff. June 15, 1995.

Sec. 554.005. LIMITATION PERIOD. Except as provided by Section 554.006, a public employee who seeks relief under this chapter must sue not later than the 90th day after the date on which the alleged violation of this chapter:

(1) occurred; or

(2) was discovered by the employee through reasonable diligence.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Sec. 554.006. USE OF GRIEVANCE OR APPEAL PROCEDURES. (a) A public employee must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action before suing under this chapter.

(b) The employee must invoke the applicable grievance or appeal procedures not later than the 90th day after the date on which the alleged violation of this chapter:

(1) occurred; or

(2) was discovered by the employee through reasonable diligence.

(c) Time used by the employee in acting under the grievance or appeal procedures is excluded, except as provided by Subsection (d), from the period established by Section 554.005.

(d) If a final decision is not rendered before the 61st day after the date procedures are initiated under Subsection (a), the employee may elect to:

(1) exhaust the applicable procedures under Subsection (a), in which event the employee must sue not later than the 30th day after the date those procedures are exhausted to obtain relief under this chapter; or

(2) terminate procedures under Subsection (a), in which event the employee must sue within the time remaining under Section 554.005 to obtain relief under this chapter.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 721, Sec. 6, eff. June 15, 1995.

Sec. 554.007. WHERE SUIT BROUGHT. (a) A public employee of a state governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of Travis County.

(b) A public employee of a local governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of any county in the same geographic area that has established with the county in which the cause of action arises a council of governments or other regional commission under Chapter 391, Local Government Code.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 721, Sec. 7, eff. June 15, 1995.

Sec. 554.008. CIVIL PENALTY. (a) A supervisor who in violation of this chapter suspends or terminates the employment of a public employee or takes an adverse personnel action against the employee is liable for a civil penalty not to exceed $15,000.

(b) The attorney general or appropriate prosecuting attorney may sue to collect a civil penalty under this section.

(c) A civil penalty collected under this section shall be deposited in the state treasury.

(d) A civil penalty assessed under this section shall be paid by the supervisor and may not be paid by the employing governmental entity.

(e) The personal liability of a supervisor or other individual under this chapter is limited to the civil penalty that may be assessed under this section.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 721, Sec. 8, eff. June 15, 1995.

Sec. 554.009. NOTICE TO EMPLOYEES. (a) A state or local governmental entity shall inform its employees of their rights under this chapter by posting a sign in a prominent location in the workplace.

(b) The attorney general shall prescribe the design and content of the sign required by this section.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 721, Sec. 9, eff. June 15, 1995.

Sec. 554.010. AUDIT OF STATE GOVERNMENTAL ENTITY AFTER SUIT. (a) At the conclusion of a suit that is brought under this chapter against a state governmental entity subject to audit under Section 321.013 and in which the entity is required to pay $10,000 or more under the terms of a settlement agreement or final judgment, the attorney general shall provide to the state auditor's office a brief memorandum describing the facts and disposition of the suit.

(b) Not later than the 90th day after the date on which the state auditor's office receives the memorandum required by Subsection (a), the auditor may audit or investigate the state governmental entity to determine any changes necessary to correct the problems that gave rise to the whistleblower suit and shall recommend such changes to the Legislative Audit Committee, the Legislative Budget Board, and the governing board or chief executive officer of the entity involved. In conducting the audit or investigation, the auditor shall have access to all records pertaining to the suit.

Added by Acts 1995, 74th Leg., ch. 721, Sec. 10, eff. June 15, 1995.

Tab B: Tex. R. Civ. P. 1

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part I. General Rules (Refs & Annos)

TX Rules of Civil Procedure, Rule 1

Rule 1. Objective of Rules

Currentness

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

Credits
Oct. 29, 1940, eff. Sept. 1, 1941.

Notes of Decisions (67)

O'CONNOR'S CROSS REFERENCES
See also ***O'Connor's Texas Rules,*** "Introduction to the Texas Rules," ch. 1-A, §1 et seq.

Vernon's Ann. Texas Rules Civ. Proc., Rule 1, TX R RCP Rule 1
- Current with amendments received through January 1, 2024. Some rules may be more current, see credits for details.

Tab C: Tex. R. Civ. P. 192.4

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 192. Permissible Discovery: Forms and Scope; Work Product; Protective Orders; Definitions (Refs & Annos)

TX Rules of Civil Procedure, Rule 192.4

192.4. Limitations on Scope of Discovery

Effective: June 1, 2020
Currentness

The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Credits
Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Editors' Notes

COMMENT--1999
See comments following Rule 192.7.

Notes of Decisions (87)

Vernon's Ann. Texas Rules Civ. Proc., Rule 192.4, TX R RCP Rule 192.4
- Current with amendments received through January 1, 2024. Some rules may be more current, see credits for details.

End of Document

Tab D: Tex. R. Civ. P. 215.2

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 215. Abuse of Discovery; Sanctions (Refs & Annos)

TX Rules of Civil Procedure, Rule 215.2

215.2. Failure to Comply with Order or with Discovery Request

Effective: June 1, 2020
Currentness

(a) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 [1] or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney

fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

(c) *Sanction Against Nonparty For Violation of Rules 196.7 or 205.3.* If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.

Credits

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of Aug. 5, 1998, and Nov. 9, 1998, eff. Jan. 1, 1999.

Editors' Notes

COMMENT--1999

See comments following Rule 215.6.

Notes of Decisions (278)

Footnotes

1 Vernon's Ann.Rules Civ.Proc., rule 204.1 et seq.

Vernon's Ann. Texas Rules Civ. Proc., Rule 215.2, TX R RCP Rule 215.2
- Current with amendments received through January 1, 2024. Some rules may be more current, see credits for details.

Tab E: Order Granting Plaintiffs' Motion to Compel Depositions of Ken Paxton, Brent Webster, Lesley French Henneke, and Michelle Smith, No. D-1-GN-20-006861 (Dec. 22, 2023)

Cause No. D-1-GN-20-006861

JAMES BLAKE BRICKMAN,	§	IN THE DISTRICT COURT
DAVID MAXWELL,	§	
J. MARK PENLEY, and	§	
RYAN M. VASSAR	§	
Plaintiffs,	§	
	§	TRAVIS COUNTY, TEXAS
vs.	§	
	§	
OFFICE OF THE ATTORNEY GENERAL	§	
OF THE STATE OF TEXAS	§	
Defendant	§	250th JUDICIAL DISTRICT

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DEPOSITIONS OF KEN PAXTON, BRENT WEBSTER, LESLEY FRENCH HENNEKE AND MICHELLE SMITH

December 20, 2023,

On ~~this day~~ the Court considered Plaintiffs' Motion to Compel Depositions of Ken Paxton, Brent Webster, Lesley French Henneke and Michelle Smith ("Motion to Compel").

Having conducted a hearing and having considered the Motion to Compel and any responses on file, and having considered the Motion to Quash Plaintiffs' Notices of Oral Depositions and for Protective Order ("Motion to Quash"), the Court is of the opinion that the Motion to Compel should be GRANTED.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Compel Depositions of Ken Paxton, Brent Webster, Lesley French Henneke and Michelle Smith is hereby GRANTED.

IT IS FURTHER ORDERED that Warren Kenneth Paxton, Brent Webster, Lesley French Henneke and Michelle Smith appear for oral deposition no later than February 9, 2024.

IT IS FURTHER ORDERED that the parties promptly negotiate in good faith to schedule these depositions consistent with this order, but that none of these depositions may be scheduled prior to January 16, 2024.

If the parties are unable to promptly reach agreement on scheduling these depositions, any party may notify the Court of the impasse and request a supplemental order setting specific dates and times for these depositions consistent with this order.

Signed this 22nd day of December, 2023

Jan Soifer
District Judge

Approved as to Form Only:

/s/

Joe Knight
Attorney for Plaintiff Ryan Vassar

Tom Nesbitt
Attorney for Plaintiff James Blake Brickman

/s/

T.J. Turner
Attorney for Plaintiff David Maxwell

Don Tittle
Attorney for Plaintiff Mark Penley

Approved as to form, but not substance

William S. Helfand
Attorney for Defendant Office of the Attorney General

Tab F: Supplemental Order Setting Time and Place of Depositions of Ken Paxton, Brent Webster, Lesley French Henneke, and Michelle Smith, No. D-1-GN-20-006861 (Jan. 19, 2024)

01/19/2024 10:01:50 AM
Velva L. Price
District Clerk
Travis County
D-1-GN-20-006861

Cause No. D-1-GN-20-006861

JAMES BLAKE BRICKMAN,	§	IN THE DISTRICT COURT
DAVID MAXWELL,	§	
J. MARK PENLEY, and	§	
RYAN M. VASSAR	§	
Plaintiffs,	§	
	§	TRAVIS COUNTY, TEXAS
vs.	§	
	§	
OFFICE OF THE ATTORNEY GENERAL	§	
OF THE STATE OF TEXAS	§	
Defendant	§	250th JUDICIAL DISTRICT

SUPPLEMENTAL ORDER SETTING TIME AND PLACE OF DEPOSITIOS OF KEN PAXTON, BRENT WEBSTER, LESLEY FRENCH HENEKE AND MICHELLE SMITH

On December 22, 2023, the Court ordered that Warren Kenneth Paxton, Brent Webster, Lesley French Henneke, and Michelle Smith appear for oral depositions no later than February 9, 2024, and ordered the parties to negotiate in good faith to schedule these depositions consistent with this Order. OAG failed to negotiate in good faith to schedule these depositions. This Court's December 22, 2023, Order is hereby supplemented as follows:

Warren Kenneth Paxton is ORDERED to appear for and answer questions in his oral deposition on February 1, 2024, at 9:00 a.m. at Cain & Skarnulis, PLLC, 303 Colorado Street, Suite 2850, Austin, Texas 78701.

Brent Webster is ORDERED to appear for and answer questions in his oral deposition on February 2, 2024, at 9:00 a.m. at Cain & Skarnulis, PLLC, 303 Colorado Street, Suite 2850, Austin, Texas 78701.

Lesley French Henneke is ORDERED to appear for and answer questions in her oral deposition on February 7, 2024, at 9:00 a.m. at Cain & Skarnulis, PLLC, 303 Colorado Street, Suite 2850, Austin, Texas 78701.

Michelle Smith is ORDERED to appear for and answer questions in her oral deposition on February 9, 2024, at 9:00 a.m. at Cain & Skarnulis, PLLC, 303 Colorado Street, Suite 2850, Austin, Texas 78701.

SIGNED on January 19, 2024.

Jan Soifer, Judge Presiding

Tab G: Order Denying OAG's Motion to Vacate the January 19, 2024 and December 22, 2023 Orders, No. D-1-GN-20-006861 (Jan. 24, 2024)

Daniel Smith

Subject: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Emergency Request

---

From: Elliott Beck <Elliott.Beck2@traviscountytx.gov>
Sent: Wednesday, January 24, 2024 5:07 PM
To: Helfand, Bill <Bill.Helfand@lewisbrisbois.com>; 345 Submission <345.Submission@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: RE: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Emergency Request

Counsel:

On December 20, 2023, the Court granted Plaintiffs' motion to compel depositions of Paxton, Webster, French, and Smith, and ordered that those depositions take place no later than February 9, 2024. The order further stated that if the parties were unable to promptly reach an agreement on scheduling the depositions, any party could notify the Court of the impasse and request a supplemental order setting specific dates and times for the depositions. The order did not contemplate an additional hearing, as no additional evidence or arguments were necessary.

On December 20, 2023, all parties were on notice that the relevant depositions were ordered to take place no later than February 9, 2024. Accordingly, any argument that the timing of the depositions now creates an emergency is without merit. The request for an emergency hearing is denied, and the request that the supplemental order be vacated is also denied.

Best,
R. Elliott Beck, Jr. (he/him)
Staff Attorney for The Honorable Jan Soifer
345th District Court of Travis County, TX
P: (512) 854-9892

Travis County Civil and Family Court Facility
1700 Guadalupe St., Courtroom 10.C
Austin, Texas 78701

P.O. Box 1748
Austin, Texas 78767

From: Helfand, Bill <Bill.Helfand@lewisbrisbois.com>
Sent: Wednesday, January 24, 2024 4:48 PM
To: Elliott Beck <Elliott.Beck2@traviscountytx.gov>; 345 Submission <345.Submission@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: [CAUTION EXTERNAL] RE: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Emergency Request

Thank you, Mr. Beck.

Bill Helfand
Partner
Lewis, Brisbois, Bisgaard & Smith
Houston and Salt Lake City
832.460.4614 Direct

From: Elliott Beck <Elliott.Beck2@traviscountytx.gov>
Sent: Wednesday, January 24, 2024 4:46 PM
To: Helfand, Bill <Bill.Helfand@lewisbrisbois.com>; 345 Submission <345.Submission@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: [EXT] RE: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Emergency Request

Mr. Helfand:

The Court received both of your emails. Once I have had an opportunity to address them with Judge Soifer I will reach out to all of you.

Best,

R. Elliott Beck, Jr. (he/him)
Staff Attorney for The Honorable Jan Soifer
345th District Court of Travis County, TX
P: (512) 854-9892

Travis County Civil and Family Court Facility
1700 Guadalupe St., Courtroom 10.C
Austin, Texas 78701

P.O. Box 1748
Austin, Texas 78767

From: Helfand, Bill <Bill.Helfand@lewisbrisbois.com>
Sent: Wednesday, January 24, 2024 4:43 PM
To: Elliott Beck <Elliott.Beck2@traviscountytx.gov>; 345 Submission <345.Submission@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: [CAUTION EXTERNAL] RE: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Emergency Request

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Mr. Beck,

Consistent with my understanding of the Court's local rules and procedures, I called you a few minutes ago to ask for the Court's availability to hold a 15-minute hearing on the emergency request I detailed in my first email, yesterday, under Local Rule 7.5 and in the longer email I sent at 3:46 p.m. (CST) today (below).

Before I called you, I called the number listed (512-854-9374) on the "Emergency Hearings" notification sheet from the Court. That number answers with a Cisco Unity message that permits entry of an extension number. Since I don't have – the one-page document does not list – an extension (only that number), I was disconnected after I did not enter an extension.

I would appreciate it if you could please provide me with a time or times for such a conference and hearing. If I need to make this request of the Court's clerk instead of you, please let me know to whom I should make such a request by phone and a number, and if necessary an extension, at which I can reach them.

Thank you for your prompt assistance,

Bill

Bill Helfand
Partner
Lewis, Brisbois, Bisgaard & Smith
Houston and Salt Lake City
832.460.4614 Direct

From: Helfand, Bill
Sent: Wednesday, January 24, 2024 3:46 PM
To: Elliott Beck <Elliott.Beck2@traviscountytx.gov>; 345 Submission <345.Submission@traviscountytx.gov>; 419 Submission <419.Submission@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: RE: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Emergency Motion request

Mr. Beck,

While I am confused by your email, since the Court responded it was considering my "emergency motion," above all my goal is to do whatever the Court requires – in form or substance – to have the issue of Judge Soifer's order of January 19, 2024, addressed without further delay.

If the Court refuses to have the conference contemplated by Rule 7.5 and provide an emergency hearing because of the caption of the motion, please let me know and I will file the same exact motion with a new caption. If the Court refuses to have the conference contemplated by Rule 7.5 and provide an emergency hearing because of the body of the motion, I would respectfully submit such a refusal is not consistent with the express local rule on the issue of an emergency motion. *Yet,* if that is truly the reason the Court refuses to have the conference, please let me know that I will expand the motion to address that hesitation by the Court.

To be quite clear, the emergency is that the Court's January 19, 2024 order compels depositions on a schedule which does not allow sufficient time for review under the Court's local rules without prejudicing the Defendants' rights to seek further review should it become necessary. Specifically, the Court entered an order without providing the OAG any opportunity to be heard regarding the propriety of the ordered depositions in the light of OAG's amended answer—or even the dates on which they would be held. As your own email points out, an order issued without compliance with Rule 21 (let alone the Court's local rules) must be based on an assertion and then a judicial finding of an "emergency" that would authorize the Court to "suspend the three days' notice required under TRCP 21." Indeed, no emergency was urged let alone found in the issuance of that the Court's January 19, 2024 order because no such emergency existed.

If the Court is willing to vacate or suspend the order entering the depositions without a hearing, my client would be happy to proceed under the ordinary course. But given that the Court issued its order without an expression, let alone a finding, of grounds to suspend the three-day notice requirement under Rule 21, I have requested the conference contemplated by Local Rule 7.5 and have explained this very emergency, to seek an emergency hearing.

As I previously expressed, my client would like – but is not required – to give Judge Soifer the opportunity to vacate the Court's order entered without affording OAG any due process before seeking review form an appellate court. I have done what I understand the local rules require to have a conference to allow the Court to determine whether the request should be handled on an emergency basis. If, however, there is some form (or even substance) the Court requires to address this threshold question, please let me know immediately, and I will fix it.

In the interim, while I fix whatever paperwork error the court deems necessary, I would ask the Court to set a 15-minute emergency hearing on this issue and provide a ruling no later than the close of business on January 25, 2024 so my client can seek further review should it become necessary on January 26. If the Court will not take up this matter on an emergency basis by that time, we will be forced to treat your such refusal as a constructive denial of the request to vacate or at least suspend the Order and I will be forced to seek review accordingly.

Respectfully,

Bill

Bill Helfand
Partner
Lewis, Brisbois, Bisgaard & Smith
Houston and Salt Lake City
832.460.4614 Direct

From: Elliott Beck <Elliott.Beck2@traviscountytx.gov>
Sent: Wednesday, January 24, 2024 1:09 PM
To: 345 Submission <345.Submission@traviscountytx.gov>; Helfand, Bill <Bill.Helfand@lewisbrisbois.com>; 419 Submission <419.Submission@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: [EXT] RE: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Request to schedule appointment for emergency motion

Counsel:

This Court is the proper court to consider the requests to vacate its prior orders under Local Rule 1.5. Defendant indicated in its counsel's email that it filed an emergency motion, but has neither filed nor forwarded a motion titled an emergency motion nor reflecting an emergency. Instead, it filed a Motion for a Protective Order on January 19, and forwarded to the Court a Motion for Entry of Judgment and to Vacate the Court's January 19, 2024, Order. Neither motion includes grounds to suspend the three days' notice required under TRCP 21.

Best,
R. Elliott Beck, Jr. (he/him)
Staff Attorney for The Honorable Jan Soifer
345th District Court of Travis County, TX
P: (512) 854-9892

Travis County Civil and Family Court Facility
1700 Guadalupe St., Courtroom 10.C
Austin, Texas 78701

P.O. Box 1748
Austin, Texas 78767

From: 345 Submission <345.Submission@traviscountytx.gov>
Sent: Tuesday, January 23, 2024 4:15 PM
To: Helfand, Bill <Bill.Helfand@lewisbrisbois.com>; 419 Submission <419.Submission@traviscountytx.gov>; Elliott Beck <Elliott.Beck2@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: RE: D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Request to schedule appointment for emergency motion

Counsel:

Your emergency request has been received and is under review.

Best,
Batool Fatima
Judicial Executive Assistant
345th Judicial District Court - The Honorable Jan Soifer
P.O. Box 1748
Austin, Texas 78767
(512) 854-9712

From: Helfand, Bill <Bill.Helfand@lewisbrisbois.com>
Sent: Tuesday, January 23, 2024 3:49 PM
To: 419 Submission <419.Submission@traviscountytx.gov>; 345 Submission <345.Submission@traviscountytx.gov>
Cc: Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Joe Knight (jknight@ebbklaw.com) <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>
Subject: [CAUTION EXTERNAL] D-1-GN-20-006861 Brickman, et al. v. Office of the Attorney General of TX - Request to schedule appointment for emergency motion
Importance: High

Good day,

Consistent with Rule 7.5 of the Local Rules of Civil Procedure and Rules of Decorum, I am writing to request to schedule an appointment for consideration of an emergency motion, which I have filed today with the Clerk and a copy of which I have attached to this email for the Court's convenience.

In addition to sending this email to staff for Judge Soifer as the emergency judge this week, I am also submitting this request to Judge Mauzy's staff because I honestly do not know how the Court wishes that I make this request considering the Chief Judge's special assignment of this case to Judge Mauzy earlier today.

As you can see from the attached email exchange, I have conferred with opposing counsel in an effort to resolve both issues presented by the motion or to at least reach an agreement that would alleviate the emergency nature of the request to vacate the Court's orders of December 20, 2023 and January 19, 2024 setting depositions in this case in light of the OAG's answer filed on January 18, 2024 in which the OAG has made clear it does not intend to defend any issue of liability or damages in this case. Unfortunately, as you can also see from the email exchange, all Plaintiffs are unwilling to make any agreement – even temporarily – necessitating the Court's consideration of these issues on an emergency basis.

Notably, if either judge elects to vacate the Court's order of January 19, 2024 to allow Judge Mauzy to take up the question of whether any discovery, let alone apex depositions, may be appropriate under these changed circumstances, there is no need for emergency consideration and we will work with Judge Mauzy's clerk to set a hearing on the then-non-emergency motion to enter a judgment on liability.

I would appreciate it if you could please bring this emergency matter to the attention of the appropriate judge(s), so that, if necessary, we may schedule a hearing that allows for resolution of these issues on an expedited basis.

Respectfully, the OAG requests that either judge vacate the Court's January 19, 2024 order or otherwise rule on the emergency motion to vacate the Court's January 19, 2024 order by no later than the close of business on Thursday, January 25, 2024.

Thank you for your prompt attention to this important matter. I look forward to hearing from you soon.

Respectfully,

Bill

Bill Helfand
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832.460.4614 Direct
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