

No. 08-0477

In The Supreme Court Of Texas

In re **LAKOTA RESOURCES, INC.,**
and **GILBERT BURCIAGA**, Individually and as President of
LAKOTA RESOURCES, INC.,

Relators

Respondent: The Honorable Bill Burke,
189th Judicial District Court of Harris County, Texas
Arising out of Cause No. 2007-02397

RELATORS' REPLY BRIEF ON THE MERITS

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A REPLY REGARDING JURISDICTION

Pathex concedes that the Court has jurisdiction in this original proceeding, but argues that this jurisdiction is “undermine[d]” because “counsel for Relators asked for *in camera* review” and “the trial court agreed,” so “[n]o production may ultimately occur.”¹ However, Pathex ignores Respondent’s written order, which controls over his verbal offer (*see infra* § II.A), and which directs Relators to produce their tax returns and related documents, *instanter*, directly to Pathex.²

Moreover, Pathex ignores the context of Relators’ supposed request for review:

THE COURT: I’m not going to order the things produced wholesale. ***I order*** that part of the tax return that deals with—

[Relators’ Counsel]: ***To the extent you are going to order tax returns***, I would like an *in camera* examination first, and another hearing before we turn that over to the plaintiffs on the issue of what you found in an *in-camera* inspection that you thought was relevant and material.

THE COURT: I think it’s whatever is on the tax return may lead to the discovery of admissible evidence.

[Relators’ Counsel]: That’s not ground to order the production of tax returns, Judge, in my opinion.³

That is, Relators “asked for” review only ***after*** Respondent had made up his mind that the tax returns should be ordered produced, and even then objected to the process.

¹ Pathex Br. at viii.

² *See* Relators Br. at §§ II.D, IV.A.5.

³ R7 at 9 (emphasis added).

Regardless, *in camera* review (assuming Respondent does not rescind or forget his grudging agreement) is improper production in and of itself. As Pathex failed to meet its preliminary burden to show relevancy and materiality, Relators should not be required to produce their tax returns to anyone—***including Respondent*** and his staff.⁴ Thus, contrary to Pathex’s claim, this mandamus is not “premature.”⁵ Absent this Court’s intervention, Relators will certainly be deprived of their constitutional privacy rights.

⁴ See generally Relators Br. at § IV.A.

⁵ Pathex Br. at viii.

TO THE HONORABLE SUPREME COURT OF TEXAS:

I. INTRODUCTION AND SUMMARY OF REPLY POINTS

Despite Pathex’s failure to satisfy the heightened burden required for the inspection and production of tax returns, and based on nothing more than Pathex’s empty, unsupported “belief” as to what they would show, Respondent gave Pathex exactly what it asked for: a written order directing Lakota and Mr. Burciaga to immediately produce their returns, in their entirety, directly to Pathex. As this written order is indefensible—Pathex apparently cannot find any other case in which such an order has been upheld—Pathex tries to distract attention from it by arguing that *in camera* review is a panacea and by libeling Mr. Burciaga. To no avail.

Respondent’s written order, signed before any review took place, controls over his grudging verbal agreement to conduct *in camera* review, particularly as Respondent’s “anything goes” standard means the review (assuming it were ever to happen) would inevitably lead to wholesale production again. Moreover, Respondent was not even entitled to order *in camera* review on the showing made by Pathex.

Pathex especially has no claim to discovery of Mr. Burciaga’s personal tax returns. Recognizing as much, it now resorts to accusing him of being a fraudster and declaring that it has launched an “investigation” into him. Pathex offers no evidence to support these scurrilous charges. Nor does Pathex explain how these unfounded accusations, which it first pleaded only four days before it filed its brief on the merits

in this Court, can possibly justify Respondent's order allowing invasion of Mr. Burciaga's privacy in this dispute over Lakota's contractual liability for debts.

Pathex has failed to prove that anything on Mr. Burciaga's or Lakota's tax returns is relevant to any issue in this case and unavailable from any other source. As there is no adequate remedy by appeal from respondent's failure to protect Relators' privacy rights, Relators are entitled to extraordinary relief.

II. ARGUMENT AND AUTHORITIES

A. Pathex Cannot Escape Review Of This Ripe Controversy By Rewriting The Record

Pathex obviously hopes to avoid defending its discovery requests on their merits, as its first and last arguments are the same as its jurisdictional response: Respondent's verbal promise of *in camera* review, which Relators supposedly "asked for," means no production may occur so this controversy is not ripe.⁶ Again, Pathex's argument ignores Respondent's written order—which does not place any restrictions on production of Relators' tax returns, and does not order *in camera* review.⁷ The order simply grants Pathex's motion to compel and orders production directly to

⁶ See Pathex Br. at §§ III.A, III.D.

⁷ See R8.

Pathex of Relators' tax returns in their entirety.⁸ Signing the order is mandamusable by itself,⁹ and it controls over Respondent's reluctant verbal offer of protection.¹⁰

Moreover, the mere possibility of *in camera* review at some future point does not make this controversy any less ripe. Review cannot be ordered until **after** the requesting party has made "a preliminary showing that the information sought from the returns is not available from other sources" and is relevant. *In re Miller*, No. 11-07-00310-CV, 2008 WL 191960, at *2-3 (Tex. App.—Eastland, Jan. 24, 2008, orig. proceeding) (not designated for publication) (rejecting the contention that relators "have not presented an issue ripe for mandamus relief" based "on the fact that relators have only been ordered to produce the tax returns for an *in camera* inspection"). Here, Pathex made no such preliminary showing, nor did the Respondent require them to.

⁸ R8.

⁹ *See Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434, 440 (Tex. 1959) (orig. proceeding) (holding that the trial judge abused his discretion "[o]n failing to examine the income tax return and to separate the relevant and material parts from the irrelevant and immaterial parts.").

¹⁰ *See Relators Br.* at § IV.A.5; *see also In re K.M.B.*, 148 S.W.3d 618, 622 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("A written judgment or order controls over a trial court's oral pronouncement."); *In re Marriage of Ellis*, No. 06-08-00012-CV, 2008 WL 3834103, at *3 (Tex. App.—Texarkana, Aug. 19, 2008, no pet.) (not designated for publication) ("In civil cases, a written order controls over a trial court's oral pronouncement."); *Edmonds v. Gray*, Nos. 12-07-00258-CV, 12-07-00270-CV, 2008 WL 541673, at *3 n.2 (Tex. App.—Tyler Feb. 29, 2008, no pet.) (not designated for publication) ("In its oral pronouncement appointing a receiver, the trial court ordered the sale of the property in 'no more' than 180 days. However, if there is a conflict between oral pronouncements made by a trial court and its written order, the matters set forth in the written order control. Thus, the trial court's stipulation that the property be sold in 'no less' than 180 days is controlling.") (citation omitted).

Instead, Respondent improperly placed the burden on Relators to demonstrate why they ought not be required to produce their tax returns, opining that they were starting out “way behind.”¹¹ Then, before conducting any *in camera* review, Respondent signed the order compelling Relators to produce their tax returns directly to Pathex, and only later considered *in camera* review without imposing the heightened relevance and materiality burden on Pathex as required, and with the promise that Pathex would see everything on the returns that “may lead to the discovery of admissible evidence.”¹² This alone makes the controversy ripe.

Pathex argues, however, that “[w]hen Relators’ counsel successfully sought *in camera* review, the doctrine of judicial estoppel surfaced, precluding Relators’ right to seek mandamus before the *in camera* review occurs.”¹³ Pathex is playing fast and loose with the record. It was **Pathex** who sought *in camera* review in its motion to compel (as an alternative to the wholesale production it asked for in the first instance, and was granted).¹⁴ Relators’ counsel requested review only **after** Respondent had begun to

¹¹ R7 at 6, 10.

¹² R7 at 9.

¹³ Pathex Br. at 8.

¹⁴ R5 at 4 (“Additionally, or in the alternative, Pathex respectfully requests that the Court conduct an *in camera* inspection of the requested documents to separate the relevant and material information from any irrelevant or immaterial information in an effort to balance the privacy rights of Defendants, if any, and/or to limit disclosure solely to the discoverable information to which Pathex is entitled.”); *see also* R7 at 10 (“[Relators’ Counsel]: I think the cases require an *in camera* inspection, Judge. As a matter of fact, I think in their motion, the plaintiffs asked that the tax documents be examined *in camera*. [Pathex’s Counsel]: That was as an alternative.”).

order Relators to produce their tax returns, in an attempt to limit Respondent's error.¹⁵ There is no inconsistency in Relators' position: Respondent should not have ordered their tax returns produced, but, having made that error, he was at least required to review them *in camera* and redact all irrelevant and immaterial information. Relators are thus not estopped from complaining in advance of the review.¹⁶

Pathex asks rhetorically "How can Relators demonstrate that the prospect of disclosure is more than speculative or hypothetical?"¹⁷ But disclosure is *certain*—whether to Pathex directly under the trial court's controlling written order, or to Respondent for *in camera* review under a meaningless standard. Both invasions are improper and are subject to correction by mandamus. Pathex cannot avoid having its relevance and materiality theories dragged into the light.

B. Pathex Has Sunk To A New Low In Claiming Its Belated, Unsupported Libels Of Mr. Burciaga Justify Invasion Of His Privacy Rights In His Tax Returns

With regard to Mr. Burciaga's tax returns, Pathex has a single theory of relevancy: "Mr. Burciaga's tax returns and supporting documents are relevant because

¹⁵ R7 at 9.

¹⁶ See *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008), *cert. filed*, 77 U.S.L.W. 3282 (2008) (recognizing that judicial estoppel "precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding") (citation omitted).

¹⁷ Pathex Br. at 7.

Lakota's tax return flows through to Mr. Burciaga's tax return."¹⁸ According to Pathex, "Lakota's income and expenses are reported in schedules attached to and incorporated in Mr. Burciaga's tax returns."¹⁹ Yet Pathex asked for, and Respondent's order requires, Mr. Burciaga to produce *all* of his tax returns and supporting documents, not just these schedules.²⁰ Pathex's requests are thus indefensible even under its own theory.

Pathex apparently recognizes as much, because it resorts to smearing Mr. Burciaga with newfound accusations that would be actionable if repeated outside the confines of this proceeding:

Pathex believes Mr. Burciaga has used Lakota, his subchapter S Corporation, to commit actual fraud, and Pathex is also investigating whether Mr. Burciaga is liable (1) for violations of the Texas Uniform Fraudulent Transfer Act, and (2) in his capacity as a director, for wrongful distributions which made Lakota insolvent.²¹

Pathex's counsel did not mention either its "belief" or its supposed "investigation" to Respondent, either in its motion to compel or during the hearing. Indeed, Pathex did not plead these allegations until December 12, 2008, four days before it filed its brief on the merits in this Court. Pathex provides no evidence in support of these baseless

¹⁸ Pathex Br. at 19.

¹⁹ Pathex Br. at 19.

²⁰ *See* Relators Br. at § IV.A.4.

²¹ Pathex Br. at 19.

charges, nor even any explanation as to how a “belief”—much less an “investigation,” *i.e.*, not even a belief—regarding belatedly pleaded causes of action can possibly amount to the proof of relevancy required to support Respondent’s order.

Pathex’s counsel has conjured these libels from her overactive imagination in an effort to overcome the presumption that Mr. Burciaga is separate from Lakota, and has no place, even as a defendant, in what should be a contract action against the corporation alone. Even if they had been pleaded, there has been no effort, here or elsewhere, to demonstrate that the evidence needed to substantiate Pathex’s paranoid fantasy is unavailable from traditional discovery of ordinary financial records. Thus, tax records cannot be ordered produced to *anyone*, not even for *in camera* review.

C. Pathex Still Has No Support For Its Claim That The Tax Returns Are Discoverable In This Contractual Dispute

Nor is there any circumstance under which Lakota’s or Mr. Burciaga’s tax returns are discoverable in this plain vanilla contract case. Pathex argues the returns are relevant because they will show “deductions sworn to be reasonable and appropriate but now disputed as improper or unauthorized.”²² Pathex now states these deductions as fact,²³ but there is no evidence at all that they have been taken.²⁴

²² Pathex Br. at 14.

²³ *See also* Pathex Br. at 16 (“Here, the tax documents contain Relators’ sworn admissions that the disputed charges are legitimate and that Relators are liable to pay them.”).

²⁴ Pathex’s bald assertion of its supposition as fact is ironic given that it has moved to strike Relators’ brief for allegedly making unverified statements of fact. If Pathex were held to the standard it advocates, its entire theory of relevancy would have to be stricken.

To the contrary, that these “sworn admissions”²⁵ exist is merely Pathex’s “belief,” which it “seeks the tax documents to prove.”²⁶ Pathex’s fishing expedition is not limited to just these hypothetical deductions. Regardless, Pathex’s own guesswork cannot establish that the tax returns are relevant to Lakota’s contractual liability for the unpaid charges at issue.

Pathex has not cited (and cannot cite) even a single case in which tax returns were held discoverable based on the requesting party’s unsupported assertion as to what it hoped to find in them. In a vain attempt to cover this failure, Pathex provides a catalogue of various cases in which tax returns were held *admissible*, and cites the general rule that “[d]iscovery is broader than admissibility.”²⁷

But that is precisely the error committed by Respondent and urged here again by Pathex. Tax returns are not governed by the general rule of discoverability. They are *not* discoverable if they will “lead to the discovery of admissible evidence,” the very standard Respondent proposed to use in conducting his begrudging review. On the contrary, they are presumptively *off limits*. They may only be reviewed *in camera*

²⁵ Even assuming the deductions were taken, they would still not be the sworn admissions Pathex claims. *See* Relators Br. at § IV.A.2.

²⁶ Pathex Br. at 17.

²⁷ Pathex Br. at 10.

and then later ordered produced if, *unlike here*, the requesting party, *i.e.*, Pathex, *establishes relevancy and materiality*.²⁸

Moreover, none of Pathex's admissibility cases concerns the adjudication of the constitutional right to privacy in tax returns, none consider the propriety of an order granting a motion to compel wholesale production of tax returns, and none indicate that the taxpayers objected to discovery of their returns on the basis of their right to privacy²⁹—in three of the cases, the taxpayers introduced their returns into evidence

²⁸ See *Maresca v. Marks*, 362 S.W.2d 299, 300 (Tex. 1962) (orig. proceeding); *In re Patel*, 218 S.W.3d 911, 918 (Tex. App.—Corpus Christi 2007, orig. proceeding); *In re Brewer Leasing, Inc.*, 255 S.W.3d 708, 714 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding); *In re Miller*, 2008 WL 191960, at *2.

²⁹ See *Relators Reply In Support Of Petition For Writ Of Mandamus* at 5 & n.13-14 (discussing *Curran v. Unis*, 711 S.W.2d 290 (Tex. App.—Dallas 1986, no writ); *Womack v. First Nat'l Bank of San Augustine*, 613 S.W.2d 548 (Tex. App.—Tyler 1981, no writ); *Sherwin-Williams Co. v. Perry Co.*, 424 S.W.2d 940 (Tex. Civ. App.—Austin 1968, writ re'f'd n.r.e.); *Am. Mfg. Co. of Tex. v. Witter*, 343 S.W.2d 943 (Tex. Civ. App.—Fort Worth 1961, no writ); *City of Houston v. Priester*, 302 S.W.2d 948 (Tex. Civ. App.—Galveston 1957, no writ); *Miller v. Gann*, No. 01-86-00905-CV, 1988 WL 3984 (Tex. App.—Houston [1st Dist.] Jan. 21, 1988, writ denied) (not designated for publication)).

Pathex has added three Texas cases to its laundry list, but they are no better. See *Combs v. Gent*, 181 S.W.3d 378, 385 (Tex. App.—Dallas 2006, no pet.) (holding that “the error, if any, in overruling [trustee’s] objection” to admission of her tax returns was cured when the trustee “herself raised the issue of her signing tax returns taking a deduction for [the attorney’s] fees”); *El Paso Dev. Co. v. Berryman*, 769 S.W.2d 584, 589 (Tex. App.—Corpus Christi 1989, writ denied) (holding that trial court did not err in excluding partnership tax return); *Letsos v. H.S.H., Inc.*, 592 S.W.2d 665, 668-69 (Tex. Civ. App.—Waco 1980, writ re'f'd n.r.e.) (holding that tax renditions were admissible against the plaintiff, who sought to admit them into evidence, but “were hearsay evidence when offered to prove the truth of the evaluations asserted by them,” and were thus not admissions of the defendants).

Pathex's non-Texas additions to its list are similarly irrelevant. See *United States v. Solomon*, 825 F.2d 1292, 1299 (9th Cir. 1987) (finding that personal tax returns filed by participants in defendants' tax shelter scheme were admissible as they allowed the government to establish an element of the statutory section prohibiting aiding and abetting the presentation of false income tax returns); *Murdock v. United States*, 160 F.2d 358, 362 (8th Cir. 1947) (holding in condemnation action that letters by owner's agent to tax assessor as to market value of minerals on land were admissible

themselves.³⁰ All Pathex’s list illustrates is that tax returns may be admissible in some circumstances (particularly where the existence of a partnership is denied) after they have been produced. The question here, however, is whether Pathex has met its burden to show that they are relevant and so should be produced in the first place. It has not.

Likewise, Pathex has failed to meet its materiality burden to show that the relevant information on the tax returns needed to prove Pathex’s contract case, assuming there is any, cannot be obtained from another source. Again, Pathex insists that only the tax returns contain Relators’ “sworn admissions.”³¹ But this is an argument of form, not substance. Obviously, the form of the physical returns themselves cannot be obtained from another source. The test, however, is whether the returns’ **substance**—the relevant information on them, if any, regarding the

as an admission against interest); *Hynes v. Needleman (In re Needleman)*, 204 B.R. 524, 527 (Bankr. S.D. Ohio 1997) (observing that the nature of tax returns filed by a business entity is a non-conclusive fact to be considered in determining whether the entity is a partnership, but concluding that entity was a partnership despite plaintiff filing tax returns indicating he was its sole proprietor); *C-4 Corp v. E.G. Smith Constr. Prods.*, 894 S.W.2d 242, 245 (Mo. Ct. App. 1995) (finding that tax returns were additional support for determination that partnership was modified, not dissolved); *Reddington v. Thomas*, 262 S.E.2d 841, 843 (N.C. Ct. App. 1980) (holding that partnership tax returns prepared by defendant were admissible as an admission against interest in denying the existence of the partnership); *Puzich v. Pappas*, 314 N.E.2d 795, 796-97 (Ind. Ct. App. 1974) (holding that partnership’s tax returns constituted an admission against interest and created a presumption of partnership); *Haseltine v. Haseltine*, 21 Cal. Rptr. 238, 245-46 (Cal. Ct. App. 1962) (holding that husband’s tax returns were competent to support wife’s argument that property should be treated as community).

³⁰ See *Curran*, 711 S.W.2d at 292-93; *Miller*, 1988 WL 3984, at *1; *In re Needleman*, 204 B.R at 528.

³¹ Pathex Br. at 16.

disputed charges—is not available through other discovery methods. Pathex has not established this; it has not even tried to.³² Snooping through Relators’ tax returns is Pathex’s first resort rather than its last. Respondent has thus clearly ordered discovery to which Pathex is not entitled.

III. CONCLUSION AND PRAYER

Relators therefore request that the Court conditionally grant their writ of mandamus, and grant the writ unconditionally should Respondent decline to withdraw his order.

³² See Relators Br. at § IV.A.3.

Respectfully submitted

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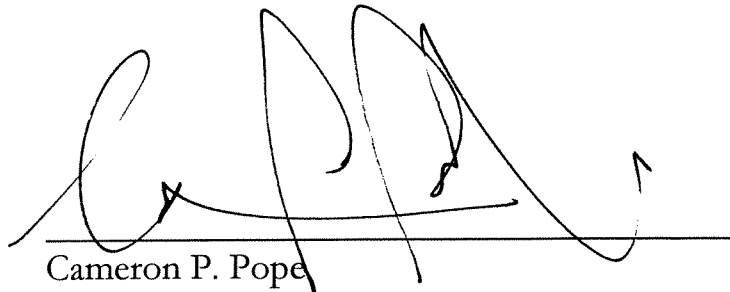
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document were served on all counsel of record by hand delivery on this 6th day of January, 2009.

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