

# No. 08-0836

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**IN THE SUPREME COURT OF TEXAS**

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*IN RE WEEKLEY HOMES, L.P.*

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**Original Proceeding from the 134<sup>th</sup> Judicial District Court, Dallas County, Texas  
Trial Court Cause No. 06-07736  
Honorable Anne Ashby, Presiding**

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**REAL PARTY IN INTEREST'S RESPONSE  
TO PETITION FOR WRIT OF MANDAMUS**

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## STATEMENT OF THE CASE

**Nature of the Case**

This case involves the trial court's proper exercise of discretion in following existing Texas precedent and the Texas Rules of Civil Procedure in granting Plaintiff's Motion for Limited Access to Weekley Homes, L.P.'s Computers (the "Motion"). Given existing law and the protections provided to Weekley, the trial court's entry of the Order Establishing Procedure for Examination of Computer Hard Drive and Protective Order (the "Order") did not constitute an abuse of discretion.

**Respondent**

The Honorable Anne Ashby, Judge of the 134<sup>th</sup> District Court located in Dallas County, Texas, in Cause No. 06-07736.

**Respondent's Action**

Weekley seeks relief from the Order Establishing Procedure for Examination of Computer Hard Drive and Protective Order.

**Court of Appeals**

Weekley filed a petition requesting the same relief with the Texas Court of Appeals for the Fifth District on September 22, 2008. Justices Morris, Richter, and Mazzant participated in the decision. Justice Morris authored the opinion in Cause No. 05-08-01249-CV.

**Court of Appeals Disposition**

The Court of Appeals denied Weekley's Petition for Writ of Mandamus on September 24, 2008.

## **ISSUES PRESENTED**

**ISSUE NO. 1:** The scope of discovery is within the trial court's discretion. In this case, the trial court considered the briefing, all evidence before it, oral arguments of the parties, and existing precedent in granting HFG's Motion. This was not an abuse of discretion.

**ISSUE NO. 2:** The Order requires the forensic expert to index and search the hard drives utilizing the designated search terms. The forensic expert is performing an automated process and is not making any designations of relevance. The Order merely provides a process by which the documents are collected. Weekley then reviews those documents as it normally would. This is not an abuse of discretion.

**ISSUE NO. 3:** The Order requires Weekley to produce only relevant, responsive, non-privileged documents. There is no presumption of relevance under the Order. Weekley has the right to review the documents and to assert any applicable privilege in accordance with the Texas Rules of Civil Procedure. As a result, Weekley is not in danger of permanently losing substantial rights, and Weekley has an adequate remedy at law.

## INTRODUCTION

In Texas, the discovery system's ultimate purpose is to ensure that disputes are decided by the facts that are revealed and not by those that are concealed. To that end, the rules of discovery must be construed liberally. By filing the Motion, which sets forth a process that is hardly unique, HFG sought to obtain the documents it had been requesting for almost two years. Specifically, in a subpoena and two sets of requests for production, HFG had tried to obtain emails of Weekley employees and other documents relating to its claims against Weekley. In response, Weekley produced almost nothing from its Dallas employees who were responsible for the project in question. The evidence before the trial court established that there are documents that have not been produced and that the requested emails are still on the hard drives. HFG proposes to use the identical process that has been approved by the only Texas court to address this issue, as well as by courts from other jurisdictions. The Order specifies the process to be employed, the protections afforded to Weekley, and the manner in which relevant, responsive, non-privileged documents are to be produced.

In its Petition for Writ of Mandamus (the "Petition"), Weekley raised the same arguments that have been consistently rejected by courts across the country. The record establishes that the Order does not require the production of privileged documents, is not a fishing expedition, and follows the Texas Rules of Civil Procedure (the "TRCP"). The trial court's entry of the Order allows HFG to obtain the documents to which it is entitled, and it does not constitute an abuse of discretion.

## STATEMENT OF FACTS

Enclave at Forney Branch, Ltd. ("Enclave"), which developed a subdivision in Dallas (the "Subdivision"), entered into an Agreement for the Purchase and Sale of Lots (the "Builder Contract") with Weekley under which Weekley agreed to buy lots in the Subdivision. On November 30, 2004, HFG purchased Enclave's remaining lots and received an assignment of Enclave's rights under the Builder Contract. To encourage that transaction, Weekley provided HFG with a Consent to Assignment and Estoppel Certificate (the "Estoppel Certificate") which contained representations regarding the Subdivision and Enclave's performance of its obligations; HFG claims Weekley's statements were false when they were made. HFG subpoenaed documents from Weekley prior to naming it as a party. (2 R.R. Exh. 1) After filing suit against Enclave in August 2006, HFG added Weekley as a party in June 2007. (C.R. 52) HFG then propounded two additional sets of requests for production to Weekley. (2 R.R. Exh. 3, 4) These requests for production specifically asked for emails and other documents and required that they be produced as they were stored in the ordinary course of business. *Id.* Although Weekley has produced some documents, it has not produced documents critical to HFG's claims, including emails between key Dallas executives.

On July 2, 2008, HFG filed the Motion which laid out a process that carefully follows existing Texas precedent and would allow HFG to obtain the documents which it has been seeking.<sup>1</sup> The trial court held two separate hearing sessions on August 8, 2008

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<sup>1</sup> (2 R.R. 12, 22) In the Motion, HFG limited the scope of the forensic expert's examination to five hard drives, including the hard drives of Kaye Logan, Russell Rice ("Rice"), Weekley's Division President, Joe Vastano ("Vastano"), Weekley's Area President until approximately July 2007, Biff Bailey ("Bailey") Weekley's Land

and one on August 25, 2008 during which HFG introduced evidence establishing that Weekley had produced only 30 emails to and from Rice, and a total of one email to and from Vastano, Bailey, and Thomson.<sup>2</sup> (2 R.R. 56) HFG also provided prior sworn testimony from John Burchfield ("Burchfield"), Weekley's general counsel, regarding the process employed to search for and collect documents and which established that the emails that HFG is seeking have either been deleted or were backed up on the computer hard drives. (2 R.R. 32-40) The trial court entered into evidence copies of HFG's subpoena to Weekley and the two sets of requests for production. (2 R.R. Exh. 1, 3-4) After considering the briefing, the oral arguments, and the evidence, the Court entered the Order.<sup>3</sup> (2 R.R. 61, C.R. 47)

### **ARGUMENT AND AUTHORITIES**

It is well settled that higher courts generally will not control a trial court's action in matters involving an exercise of discretion. *Womack v. Berry*, 291 S.W.2d 677, 682

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Acquisition Manager until approximately July 2007, and Scott Thomson ("Thomson"), Weekley's project manager during 2004. At the hearing, HFG orally amended the Motion to confine the examination only to the hard drives of Rice, Vastano, Bailey, and Thomson. (2 R.R. 9-10).

<sup>2</sup> HFG's counsel offered testimony during the hearing as follows:

Your honor, if the Court wants me to, I will take the stand. I will put Mr. Castle on the stand. Nobody knows the documents that were produced better than we do. We know exactly what was produced by whom.

Now, I'm an officer of the Court, and I've already represented to the Court today how many documents were produced by these parties that we're talking about. I'll do it again. Russell Rice produced 30 emails to or from him. And then we have one email in the aggregate from Mr. Vastano, Mr. Bailey, and Mr. Thomson.

(2 R.R. 56-57) HFG's counsel clearly was offering testimony regarding the paucity of Weekley's production. While the general rule is that an attorney's statements must be sworn in order to constitute evidence, such error is waived by a failure to object when the opponent knows or should have known an objection was required. *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997). The evidentiary nature of the above statements regarding the incompleteness of Weekley's production was obvious, as HFG's counsel offered to take the witness stand and made representations in his capacity as an officer of the court. *Id.*, see also *Russ v. Titus Hospital Dist.*, 128 S.W.3d 332, 338 (Tex.App. – Texarkana 2004, pet. denied). Therefore, it was proper for the trial court to consider these statements as evidence.

<sup>3</sup> The Court's entry of the Order came at the conclusion of three lengthy hearing sessions. (2 R.R., 3 R.R.)

(Tex. 1956). One exception, and the prerequisite for mandamus relief, is the situation in which the trial court has committed a clear abuse of discretion and the relator has no adequate remedy by appeal. *In re Cerebrus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005).<sup>4</sup> The party seeking the writ of mandamus must establish that the facts and law permit the trial court to make but one decision. *In re Miller*, 202 S.W.3d 922, 924 (Tex. App. – Tyler 2006, no pet.). Weekley cannot meet this high burden.

**I. ISSUE NO. 1: The scope of discovery is within the trial court's discretion. In this case, the trial court considered the briefing, all evidence before it, oral arguments of the parties, and existing precedent in granting HFG's Motion. This was not an abuse of discretion.**

**A. The Trial Court Did Not Abuse its Discretion by Granting the Motion**

The TRCP require a person to produce a document or tangible thing that is within a person's "possession, custody, or control." TEX. R. CIV. P. 192.3(b). HFG requested, in accordance with Rule 196.1 of the TRCP, multiple categories of documents, including emails from Rice, Bailey, Thomson, and Vastano, yet the evidence establishes that HFG has not received all of the documents requested.

When explaining how Weekley's email system worked, Burchfield testified that due to the constraints of the Weekley email system, employees, after approximately 30

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<sup>4</sup> The reviewing court cannot disturb the trial court's discretionary decision unless it is shown to be arbitrary and unreasonable. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, (Tex. 1985)

days, would either delete emails from their "full" accounts or archive them to their hard drives. (2 R.R. 39-40) This does not mean, however, that the deleted materials are irretrievable. Courts from multiple jurisdictions have recognized that merely "deleting" an electronic record does not actually result in the instant erasure of the item, but instead designates the file as "not used."<sup>5</sup> The deleted and archived emails and other documents are within Weekley's possession, custody, or control, and courts have found such documents to be discoverable. *Id.* The Order provides a safeguarded process that allows for the retrieval and production of any such deleted or archived documents. The trial court followed the TRCP and numerous cited case authorities in entering the Order. This is not an abuse of discretion.

**B. The Order Comports with Texas and Other Precedent**

In *Honza*, the Waco Court of Appeals upheld a trial court's order that permitted the process of imaging and searching an opposing party's hard drive. *In re Honza*, 242 S.W.3d 578 (Tex.App. - Waco 2008, pet. denied). HFG, in drafting the proposed Order, ensured that it contained the same language, the same process, and the same protections that the *Honza* court adopted. (2 R.R. 12, 22)

In accordance with the Order, HFG selected a forensic expert to make a mirror image of the hard drives at issue, subject to the terms of a protective order. Once

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<sup>5</sup> See *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003) (deleted data may be recovered by searching the disk itself rather than the disk directory, and many files are recoverable long after they are deleted even if neither the user nor the computer, itself, is aware of their existence); see also *Playboy Enterprises, Inc. v. Wells*, 60 F.Supp.2d 1050, 1053 (S.D.Cal. 1999) (allowing discovery of computer hard drive to obtain deleted email), *rev'd in part on other grounds at* 279 F.3d 796; *Simon Property Group v. Simon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (computer records, including records that have been deleted are discoverable documents); *In the Matter of the Estate of John B. Maura*, 842 N.Y.S.2d 851, 17 Misc. 3d 237 (N.Y.Supr.Ct. 2007)

completed, the mirror images are to be searched using twenty one terms that directly tie back to HFG's claims against Weekley. Any 2004 document containing the search terms would be extracted and provided to Weekley's counsel. Weekley then would have the right to review those documents so that it could identify any documents that are not relevant or subject to a claim of privilege or confidentiality. If Weekley concludes that the documents contain privileged information, it then would produce a privilege log in accordance with Rule 193.3 of the TRCP. A comparison of the contents of the Order to the process and protections approved by the *Honza* court reveals that they are virtually identical. *Compare* (C.R. 42-45) with *Honza*, 242 S.W.3d at 582.

Weekley attempts to distinguish *Honza* by claiming that the defendant in that case was not "burdened with the requirement of...searching through every document that mention[s] generic words...." (Pet. at 8) Although the scope of the discovery may be slightly different – the use of twenty one search terms here as compared to an undisclosed search process in *Honza* designed to locate two documents, their various iterations, and the accompanying metadata – the underlying methodology is the same; the forensic expert first indexes and searches the hard drives and then provides the responsive documents to the opposing party's counsel for review.<sup>6</sup> *Honza* fully supports the Order.

While *Honza* was a case of first impression in Texas, this issue has arisen in other state and federal courts, and they have ruled in the same fashion as the *Honza* court and

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("Deleted" material is not expunged from a computer's hard drive. "Deleted" material can be retrieved by a person with sufficient computer savvy ...")

<sup>6</sup> Weekley argues that in *Honza*, the requesting party first sent a request for electronic and magnetic data before filing its motion. However, the *Honza* opinion is silent as to the wording of the discovery requests.

the trial court. In *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), plaintiffs sought access to certain emails, and defendants objected on multiple grounds, including privilege and the privacy of their employees. The *Rowe* court reasoned that any concerns about the defendants' privacy were adequately addressed by the confidentiality order covering the case. *Id.* at 428. The court also affirmed that "an employee who uses his or her employer's computer for personal communications assumes some risk that they will be accessed by the employer or others." *Id.* The court further rejected the idea that any privilege would be waived. *Id.* at 432.<sup>7</sup> As a consequence, the *Rowe* court ordered the implementation of a protocol similar to that set forth in the Order and in *Honza*.

Other state courts have reached similar conclusions.<sup>8</sup> For example, in *In the Matter of the Estate of John B. Maura*, 842 N.Y.S.2d 851, 17 Misc. 3d 237 (N.Y. Surr. Ct. 2007), a party demanded access to the computers of a third-party law firm. The court, in allowing such access, explained that raw computer data and electronic documents are discoverable and that electronic discovery raises issues not presented in traditional paper discovery given that "[r]etrieving computer based records or data is not the equivalent of getting the file from a file cabinet or archives." *Id.* at 246 (citations omitted). The *Maura* court explained the difference: "[o]nce a paper document has been destroyed, it cannot be produced. 'Deleted' material is not expunged from a computer's hard drive. 'Deleted'

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<sup>7</sup> The *Rowe* court recognized that it could not compel the production of privileged documents; however, the court determined that the sanctity of any privilege could be preserved by enforcing the confidentiality order already in place, by allowing the producing party to review, prior to production, the documents, and by ordering that any review of privileged documents would not effect a waiver of the privilege. *Id.* at 432.

<sup>8</sup> See, e.g., *Etzion v. Etzion*, 7 Misc. 3d 940, 796 N.Y.S.2d 844, 847 (N.Y. Sup. Ct. 2005).

material can be retrieved by a person with sufficient computer savvy...." *Id.* The New York court entered a protocol whereby an expert was retained to make a mirror image of the hard drive. Once the responsive documents were identified, the opposing party's counsel could review the documents for privilege and confidentiality.

**C. Texas Law Did Not Require HFG to Provide Evidence, and the Evidence it Presented was Sufficient to Support its Motion**

Although Weekley erroneously contends that HFG did not provide evidence to support the Motion, there is no requirement for the introduction of evidence at the hearing under Texas law. It is well recognized that in similar hearings (such as on a motion to compel), a court may base its decision solely on lawyer arguments.<sup>9</sup> Nevertheless, HFG presented more than sufficient evidence to the Court. *See* p. 3, *supra*.

**D. HFG Used Permissible Discovery Forms in Attempting to Uncover the Facts of This Case**

Weekley contends that HFG is employing a form of discovery not contemplated or allowed by the TRCP; this argument ignores the TRCP and the evidence presented to the trial court. That is, in its three sets of production requests, HFG specifically sought documents, including emails, to and from certain Weekley employees, including the four individuals identified in the Motion. (2 R.R. Exh. 1, 3-4). HFG is trying to obtain the documents it has repeatedly requested by utilizing the discovery tools in the TRCP.

HFG, in accordance with Rule 196.1, requested that Weekley produce the

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<sup>9</sup> *El Centro Del Barrio, Inc. v. Barlow*, 894 S.W.2d 775 (Tex. App.--San Antonio 1994) (noting that no evidence was presented by either side at the motion to compel hearing and denying petition for mandamus)

documents as they are maintained in the ordinary course of business.<sup>10</sup> (2 R.R. Exhs. 1, 3-4) HFG also expressly included "emails" within its definition of "Document." *Id.* At the time it served its requests, HFG had no way of knowing how Weekley stored its emails – whether they were archived, on back up tapes, or printed out – and drafted its instructions and definitions accordingly. Weekley did produce a smattering of emails from a few employees, and prior testimony from Burchfield establishes that he worked with Weekley's IS group to search for the requested emails. (2 R.R. 40). Still, huge gaps remained; hence the filing of the Motion.

Rule 191.1 of the TRCP allows a trial court to modify the procedures in the TRCP and states in part, "[e]xcept where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit...by court order for good cause." TEX. R. CIV. P. 191.1. Comment 1 to Rule 191 provides:

Rule 191.1 preserves the abilities of parties by agreement and trial courts by order to adapt discovery to different circumstances....In individual instances, courts may order, or parties may agree, to use discovery methods other than those prescribed in these rules if appropriate. Because the general rule is stated here, it is not repeated in each context in which it applies.<sup>11</sup>

The record supports a finding of good cause. HFG had been seeking the requested discovery for more than twenty one months at the time of the August 8 hearing. Prior to that hearing, HFG had filed a Motion to Compel and for the Imposition of Sanctions (the

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<sup>10</sup> Weekley argues, mistakenly, that HFG failed to comply with Rule 196.4 of the TRCP. (Pet. at 5-6). This was not, however, an effort by HFG to obtain electronic data and compilations, such as spreadsheets or statistics; instead, the Motion sought the ultimate production of documents, including emails. There is no reference to Rule 196.4 in *Honza*. See generally, *Honza*, 242 S.W.3d 578.

<sup>11</sup> While Rule 191.1 does not define "good cause" and no decisions have interpreted the "good cause" provision, other rules, including Rule 193.6, use a similar standard (albeit more stringent in that Rule 193.6 requires a finding by the court). Courts have held that that an implicit finding of good cause is sufficient under Rule 193.6 if the record supports it. See *Wal-Mart Stores, Inc. v. Tinsley*, 998 S.W.2d 664, 671 (Tex.App. – Texarkana 1999, pet.

"Motion to Compel") which identified several categories of documents that it had not received, including missing emails.<sup>12</sup> (C.R. 304) During the Motion to Compel hearings, Burchfield testified that the emails HFG was seeking had been deleted or stored to individual hard drives and that there were no back up tapes containing this information. (2 R.R. 39-40) After the court denied the Motion to Compel, HFG filed the Motion, and part of Burchfield's testimony was read into the record at the hearing on the Motion. *Id.*

HFG provided the trial court with good cause to enter the Order by showing that it had requested documents critical to its claims against Weekley, that essential documents had not been produced, that documents had been deleted or stored to the hard drives, that there were no back up tapes available, and that the only place where these documents could be located is on the individual hard drives. (2 R.R. 41) HFG made the point that the emails and other documents are critical to its claims of fraud, statutory fraud, and negligent misrepresentation as they directly relate to Weekley's knowledge at the time it made the representations in the Estoppel Certificate to HFG. (2 R.R. 42-44) When HFG previously had attempted to compel the production of these same documents, testimony from Burchfield revealed that he believed that deleted emails were not "saved." (2 R.R. 39-40) However, as the courts have repeatedly recognized, such a belief is incorrect as information remains on a hard drive after its deletion. *See* n. 5, *supra*. Thus, the documents HFG is seeking are still on the hard drives, are discoverable, and can be retrieved by forensic computing experts by employing the process outlined in the Order.

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denied) (holding that while trial court's ruling did not expressly state that the party offering evidence demonstrated good cause, record supported an implicit finding of good cause).

<sup>12</sup> Weekley erroneously contends that HFG had not prosecuted any motion to compel. (Pet. at 2)

To allow the outcome of a lawsuit to hinge on the deletion of emails, allegedly making them forever unavailable, would turn litigation into a game of cat-and-computer mouse where the evidence at trial is dictated by a person's willingness to press a delete button. That is not consistent with the TRCP's aims of allowing a case to be decided on what is revealed rather than what is concealed. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998). There was good cause for the trial court's entry of the Order.

**E. The Order Does Not Constitute a Fishing Expedition or Cause a Waiver of Privilege**

The process set forth in the Order does not constitute a fishing expedition as Weekley claims. HFG has limited the number of search terms to twenty one, has confined any searches to a single calendar year, and has limited the examination to four individual's hard drives. HFG connected the search terms to the corresponding allegations in its petition and to its requests for production. (2 R.R., 42-44, Exh. 5) Thus, HFG established that the information it is seeking is relevant and critical to the litigation.

Weekley contends that the Order allows HFG to uncover confidential and proprietary business information that has no connection to this matter, as well as communications protected by the attorney-client privilege. This is not true, as the Order preserves any privileged or confidential information. Specifically, the Order provides:

- Weekley, not HFG or the forensic expert, will be able to review any extracted documents and make any assertions of privilege; (C.R. 44)
- Weekley has a fourteen day period to provide a privilege log after receiving the documents from the forensic expert; (*Id.*)
- any observation of information that is privileged or confidential is not a waiver of an otherwise valid privilege or right of confidentiality (C.R. 45); and

- the forensic expert shall not disclose or reveal to anyone the nature or content of any documents or information observed during the process of examining the hard drives, and all persons participating in the review process must execute a copy of an acknowledgment prohibiting the unauthorized disclosure of information. (*Id.* 45-46)

These same protections have been found to be sufficient to prohibit the unauthorized disclosure of protected information. *Honza*, 242 S.W.3d at 583. As such, the trial court's ordering of this procedure was not an abuse of discretion. *Id.*

**F. HFG Established That There was Good Cause to Enter the Order, and There is No Requirement of Bad Faith Required**

The only court in Texas and several courts from other jurisdictions facing the issue of granting limited access to an opponent's hard drives have not required a finding of bad faith or intentional destruction of evidence to grant such access.<sup>13</sup> Instead, these courts have focused on the importance of the information requested to the issues in those cases. Furthermore, HFG did establish that there was good cause supporting the trial court's entry of the Order. *See* section I.D., *supra*.

Weekley's contention that HFG's position is based on unfounded skepticism ignores Burchfield's testimony regarding the deletion and archiving of emails and the realities of computer memory that the courts have recognized. The evidence in this case is clear – Weekley employees sent and received email, Weekley employees have limited computer storage space, and Weekley employees constantly delete or archive their email. Even if the emails or other documents have been deleted, they remain on the hard drives, and HFG is entitled to the discovery of those vital documents.

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<sup>13</sup> *See generally, Honza*, 242 S.W.3d 578, *Rowe*, 205 F.R.D. 421, *Simon Property Group v. my Simon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000).

**G. Weekley Mischaracterizes the Process Implemented by the Order**

Weekley attempts to analogize the process called for in the Order to allowing a requesting party to "rummage" through an opposing party's file cabinet. That is not the case, and the Order utilizes a protocol that protects Weekley. Nevertheless, Weekley would have the Court believe that the forensic expert (from one of the world's leading consulting firms) is going to open every document contained on the four hard drives, read every word, and then provide HFG with either copies or a detailed report on what was uncovered. This depiction distorts the very nature of the Order. *See* sections I.B. and I.D., *supra*. In fact, the Order expressly precludes the production of documents by the forensic expert to HFG and eliminates the concern the court of appeals raised in *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 455-56 (Tex.App. – San Antonio 1991, no writ). HFG will never see the documents extracted from the hard drives, other than those Weekley decides to produce.

**II. ISSUE NO. 2: The Order requires the forensic expert to index and search the hard drives utilizing the designated search terms. The forensic expert is performing an automated process and is not making any designations of relevance. The Order merely provides a process by which the documents are collected. Weekley then reviews those documents as it normally would. This is not an abuse of discretion.**

**A. No Production of Irrelevant and Privileged Material is Required**

The Order does not require the production of irrelevant or privileged material; the opposite is true as the Order only requires Weekley to produce relevant, non-privileged documents. The Order provides several protections against any disclosure of protected information and merely provides a process to allow the documents on the hard drives to be collected, reviewed, and produced by Weekley. *See* section I.E, *supra*.

**B. The Privilege Log Procedure is Proper and References Rule 193.3**

Weekley has mischaracterized the nature of the privilege log required under the Order. Paragraph 5 of the Order states in part:

[Weekley] shall have the right to review the Extracted Data and designate which documents or information such party claims are not relevant, not discoverable, or subject to any claim of privilege or immunity from which they are withheld under such claims, identifying such withheld documents by page identification number, directory and subdirectory identification, statement of claimed privilege or immunity from discovery, and brief description of the information in question as is required by the Tex. R. Civ. P. 193.3.

(C.R. at 43)<sup>14</sup> The Order calls for the production of a privilege log in accordance with Rule 193.3 of the TRCP, and, consistent with that rule, it requires Weekley to identify the privilege or immunity that is claimed. Any determination that a document is not relevant or responsive is not an assertion of privilege or immunity, and the plain language of the Order contemplated only the listing of privileged materials on the privilege log. Likewise, the Order's requirement that the privilege log comply with Rule 193.3 undercuts Weekley's misguided argument regarding its having to disclose documents on a log in contravention of Rule 193.3(c).<sup>15</sup> The Order merely requires that any privilege log be created in accordance with Rule 193.3...nothing more, nothing less.

**III. ISSUE NO. 3: The Order requires Weekley to produce only relevant, responsive, non-privileged documents. There is no presumption of relevance under the Order. Weekley has the right to review the documents and to assert any applicable privilege in accordance with the TRCP. As a result, Weekley is not in danger of permanently losing substantial rights, and**

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<sup>14</sup> The *Honza* court interpreted an identical provision to require the producing party to provide a privilege log covering the items it claimed to be privileged. *Honza*, 242 S.W.3d at 583.

<sup>15</sup> HFG's search terms will be applied only to calendar year 2004. HFG did not file suit until 2006, and did not name Weekley as a party until 2007. The protections of Rule 193.3(c) extend only to communications to or from a lawyer or lawyer's representative if they relate to the litigation in which the discovery is requested. TEX. R. CIV. P. 193.3(c) (1),(2). Here, there should be no privileged documents that would require the protections of Rule 193.3(c). Therefore, any purported concerns relating to Rule 193.3(c) are unfounded.

**Weekley has an adequate remedy at law.**

To prove that its existing remedies are inadequate, a relator must establish that it is "in danger of permanently losing substantial rights." *Canadian Helicopters, Ltd. V. Wittig*, 876 S.W.2d 304, 306 (Tex. 1991). Weekley attempts to meet this burden by alleging an imminent deprivation of its right to refuse to disclose information protected by the attorney-client and confidential communications privileges. There is nothing in the Order, however, preventing Weekley from exercising that very right. Indeed, the Order contains detailed protections designed to prohibit any unauthorized disclosure of privileged or confidential information. *See* section I.E., *supra*.

Furthermore, Weekley's alleged fear that it will be injured because it will have to review documents that turn out to be irrelevant is unfounded; a producing party always has the responsibility to review a given universe of documents and to make the determinations of privilege, responsiveness, and relevance. That is how discovery always works, and having to engage in that process does not constitute a loss of any permanent rights. Weekley has failed to show that any substantial right will be lost if mandamus review is denied; thus, Weekley has not proved that it has no adequate remedy at law.

**CONCLUSION AND PRAYER**

The trial court did not abuse its discretion by entering the Order. HFG respectfully requests that this Court deny Relator's Petition for Writ of Mandamus, and it additionally prays for all further and other relief, in law or in equity, to which it may be justly entitled.

Respectfully submitted,

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**VERIFICATION**

STATE OF TEXAS                   §  
   §  
COUNTY OF DALLAS           §

Before me, the undersigned authority, on this day personally appeared Christopher H. Rentzel, the person whose name is subscribed below and who, upon his oath and based on personal knowledge stated (i) he is the attorney of record for the Real Party in Interest in this proceeding and in the underlying case; (ii) as a result of his position as counsel for the Real Party in Interest in the underlying case and through his participation in the proceedings leading to the signing of the order at issue in this proceeding, he is personally familiar with the facts giving rise to this proceeding; (iii) the facts stated in this Response to Relator's Petition for Writ of Mandamus (the "Response") are true and correct; and (iv) the documents in both the appendix and the record submitted with this Response are true and correct copies of the original documents.

s/Christopher H. Rentzel  
Christopher H. Rentzel

SUBSCRIBED AND SWORN TO BEFORE ME by Christopher H. Rentzel, on this 16th day of October, 2008, to certify which, witness my hand and seal of office.

\_\_\_\_\_  
Notary Public, State of Texas

**CERTIFICATE OF SERVICE**

Pursuant to the Texas Rules of Appellant Procedure, the undersigned hereby certifies that on the 16<sup>th</sup> day of October , 2008, a true and correct copy of the foregoing is being served via Federal Express on"

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