

EMERGENCY RELIEF REQUESTED

NO. _____

IN THE _____ COURT OF APPEALS
AT HOUSTON, TEXAS

IN RE: ART HARRIS

RELATOR

Original Proceeding from Cause No. 2008-24181 in the
280th Judicial District Court of Harris County, Texas
(Honorable Tony Lindsay, Presiding)

PETITION FOR WRIT OF MANDAMUS

Charles L. Babcock
State Bar No. 01479500
Nancy W. Hamilton
State Bar No. 11587925
Amanda L. Bush
State Bar No. 24042161
JACKSON WALKER L.L.P.
1401 McKinney Street, Suite 1900
Houston, Texas 77010
Telephone: (713) 752-4200
Facsimile: (713) 752-4221

**ATTORNEYS FOR ART HARRIS,
RELATOR**

ORAL ARGUMENT REQUESTED

September 4, 2009

IDENTITY OF PARTIES AND COUNSEL

PARTIES

COUNSEL

Relator

Art Harris (Defendant in the Trial Court)

Charles L. Babcock
State Bar No. 01479500
Nancy W. Hamilton
State Bar No. 11587925
Amanda L. Bush
State Bar No. 24042161
JACKSON WALKER L.L.P.
1401 McKinney Street, Suite 1900
Houston, Texas 77010
Telephone: (713) 752-4200
Facsimile: (713) 752-4221

Respondent

The Honorable Tony Lindsay (Presiding Judge)
280th Judicial District Court of Harris County, Texas
201 Caroline Street, 14th Floor
Houston, Texas 77002
Telephone: (713) 368-6420

Real Parties in Interest

Virgie Arthur (Plaintiff in the Trial Court)

Neil McCabe
State Bar No. 13335300
Michael Meyer
State Bar No. 13993850
The O'Quinn Law Firm
440 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: (713) 223-1000
Facsimile: (713) 222-6903

Harvey Levin (Defendant in the Trial Court)

Harry Susman
State Bar No. 24008875
Richard Hess
State Bar No. 24046070
Susman Godfrey, LLP
1000 Louisiana, 51st Floor
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

TMZ Productions, Inc. (Defendant in the Trial Court)

Harry Susman
State Bar No. 24008875
Richard Hess
State Bar No. 24046070
Susman Godfrey, LLP
1000 Louisiana, 51st Floor
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

Larry Birkhead (Defendant in the Trial Court)

Diana Marshall
State Bar No. 13025500
Marshall & Lewis, LLP
1010 Lamar St. Suite 450
Houston, Texas 77002
Telephone: (713) 655-0300
Facsimile: (713) 655-0130

Howard K. Stern (Defendant in the Trial Court)

L. Lin Wood
Georgia Bar No. 774588
Walter A. Herring
State Bar No. 09535300
Keith Miles Aurzada
State Bar No. 24009880
Luke Lantta
Georgia Bar No. 141407
Bryan Cave LLP
2200 Ross Avenue, Suite 2300
Dallas, Texas 75201
Telephone: (214) 721-8000
Facsimile: (214) 721-8100

Bonnie Stern (Defendant in the Trial Court) *Pro Se*
269 S. Beverly Hills Drive, No. 1247
Beverly Hills, California 90212

Lyndal Harrington (Defendant in the Trial Court) *Pro Se*
8318 Buring Hills Drive
Houston, Texas 77071

Nelda Turner (Defendant in the Trial Court) *Pro Se*
13348 County Road 3111
Gladewater, Texas 75647

Teresa Stephens (Defendant in the Trial Court) *Pro Se*
5022 Cloyce Court
North Richland Hills, Texas 76118

<http://www.proseplace.com>

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STATEMENT OF THE CASE

The underlying proceeding is a suit for damages brought by Plaintiff/Real Party in Interest Virgie Arthur (“Plaintiff” or “Arthur”) regarding certain syndicated television broadcasts and Internet publications which Plaintiff alleges are defamatory. Respondent is the Honorable Tony Lindsay, Judge of the 280th District Court in and for Harris County, Texas.

Relator Art Harris (“Relator” or “Harris”) seeks relief from three Orders entered by Respondent: (1) a January 27, 2009 Order Compelling Production and Appointing an Independent Forensic Computer Examiner (the “January 27th Order”) (App. at “A”); (2) a May 11, 2009 Order Denying Harris’s Motion to Clarify Order Compelling Production and Appointing Independent Forensic Computer Examiner (the “May 11th Order”) (App. at “B”); and (3) an August 28, 2009 Order Denying Harris’s Motion to Reconsider Appointment of Special Master and Request for Protective Order and Stay of Appointment of Forensic Examination by Special Master (the “August 28th Order”) (App. at “C”) (collectively, the “Orders”).

The Orders have appointed and expanded the authority of Special Master Craig Ball (“Special Master” or “Ball”), who, before his appointment, entered into a consulting agreement regarding his work in the underlying proceeding with the Plaintiff’s law firm, which he refers to as “Client.” The consulting agreement is attached to and incorporated into the January 27th Order. Harris sought clarification of that Order, arguing that it mistakenly referred to him since no request for his hard drive had ever been made to him, neither he nor his counsel had agreed to the appointment of a special master as to his

document production, and he was not the subject of the Motion to Compel that resulted in the January 27th Order. The trial court denied Harris's motion for clarification in the May 11th Order. When the court threatened him with contempt, on May 14, 2009, Harris turned over his electronic media (a laptop, a desktop computer, and an external hard drive) containing 30-40 Gigabytes of data. The Special Master imaged the three devices, which images he has retained since May. In August, the Special Master began to demand additional information and computers, including the laptop that Harris, a free-lance journalist, uses for his day-to-day business, and which was purchased long after the events giving rise to the underlying proceeding. Also in August, Ball began to publically reveal private information about Harris (some of which, as a result, was published on the Internet). Harris moved for protection, for reconsideration of Ball's appointment, and a stay of his appointment and forensic examination, and the trial court denied Harris relief in the August 28th Order.

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to Texas Government Code § 22.221(b)(1).

ISSUES PRESENTED

1. Whether the trial court abused its discretion in ordering Relator to turn over his Electronic Media to the Special Master for computer forensic examination when there was neither a pending request for production of his electronic media or forensic examination nor any request for production of documents with which he had not complied.

2. Whether the trial court abused its discretion when it entered the August 28th Order requiring Relator and his counsel to respond to the Special Master's questions and to assess usage and contents of other electronic media listed in the Special Master's August 17th email.

3. Whether the trial court abused its discretion by refusing to apply recognized discovery procedures, specifically Texas Rule of Civil Procedure 193.3, regarding treatment of privileged documents and creation of privilege logs.

4. Whether the trial court abused its discretion by appointing a special master to conduct a computer forensic examination of Relator's electronic media with no consideration given to Texas Rule of Civil Procedure Rule 171.

5. Whether the trial court abused its discretion by appointing a special master to investigate and inquire into patterns of discovery abuse or, in the alternative, failing to remove a special master who is acting outside the limitations and specifications stated in the Order appointing him, including reading attorney-client communications.

TO THE HONORABLE COURT OF APPEALS:

Harris files this Petition for Writ of Mandamus because the Orders are in direct contravention of Texas Rule of Civil Procedure 171 (App. at “E”) and the Texas Supreme Court’s holdings in *In re Weekley Homes, L.P.*, ___ S.W.3d ___, No. 08-0836, 2009 WL 2666774 (Tex. Aug. 28, 2009) and *Simpson v. Canales*, 806 S.W.2d 802 (Tex. 1991) (App. at “F” and “G”). The Orders entered by Respondent have appointed and expanded the authority of Special Master Craig Ball, who, before his appointment, entered into a consulting agreement regarding his work in the underlying proceeding with the Plaintiff’s Law Firm, which he refers to as “Client.” The Special Master, moreover, has now demanded that certain electronic media—including the laptop that Harris, a free lance journalist, uses for his day-to-day business, and which was purchased long after the events giving rise to the underlying proceeding—be turned over to him. For these reasons, as well as the other abuses of discretion discussed below, mandamus relief is appropriate.

STATEMENT OF FACTS

Plaintiff Virgie Arthur¹ filed the underlying proceeding on April 28, 2008. Arthur served Requests for Production upon Defendants Art Harris, Bonnie Stern, and Lyndal Harrington on August 1, 2008, and on Nelda “Rose” Turner on July 31, 2008. (1 MR 99-

¹ Arthur previously filed a libel suit against CBS Studios, Inc. and others regarding interviews broadcast on the CBS produced program, Entertainment Tonight (“ET”), in which Smith alleged her mother beat her. That suit was dismissed with prejudice. *Arthur v. Stern, et al.*, Cause No. 4:07-CV-03742 (S.D. Tex., Judge Rosenthal presiding). Harris is a free lance journalist who, from time to time, serves as a Special Correspondent for ET. Excerpts of Harris’s interview with Larry Dale Hart, Jr., Anna Nicole Smith’s step-brother, were broadcast on ET, and Arthur has recently been permitted to join CBS as a defendant in the underlying case.

145).² The defendants timely served objections and responses to the Request for Production on August 28, 2008. (1 MR 147-167). At that time, these defendants were represented by William Ogden of Ogden, Gibson, Brooks & Longoria, L.L.P. (the “Ogden Defendants”).

On October 12, 2008, Arthur filed a Motion to Compel as to each of the Ogden Defendants seeking production of “all communications.” (1 MR 169-277). The Ogden Defendants filed a Response to Arthur’s Motion to Compel on November 18, 2008. (1 MR 279-305). A hearing was held on November 21, 2008. (3 MR 957). Harris subsequently produced over 300 pages of documents on December 4, 2008, together with Harris’s Objections and Response to Requests for Admissions. (3 MR 961-962).

On December 8, 2008, Arthur filed a Second Motion to Compel and Request for Sanctions as to Bonnie Stern. (2 MR 364-465). Arthur did not file a second motion to compel as to Harris. The trial court held a hearing on Arthur’s Second Motion to Compel as to Bonnie Stern on December 11, 2008. (2 MR 307-362). The court gave the defendants a choice: each defendant could either produce the emails in question or agree to an examination of his or her computer by an independent forensic examiner. (2 MR 461-463; 3 MR 958 at ¶5). For those defendants who agreed to an independent examiner, the parties were directed to confer and agree on a mutually acceptable independent examiner. (*Id.*).

On December 15, 2008, Tom Gregor, a lawyer in Ogden’s firm sent an email to Arthur’s counsel attaching revisions to a proposed draft order. (3 MR 966-969). The

² Citation to the Mandamus Record filed concurrently herewith are referenced as “[Vol.] MR [Page].”

draft order compelling production and appointing an independent examiner (not a special master) *only* addresses the production ordered from Defendant Bonnie Stern. (*Id.*). Neil McCabe, Arthur's counsel, responded later in the day with another copy of a proposed "revised revised" order. (3 MR 971-975). The draft order received from McCabe also addressed production compelled *only* against Defendant Bonnie Stern. (*Id.*).

On December 17, 2008, McCabe exchanged emails with Gregor of Ogden's office concerning discovery. (3 MR 977). McCabe advised that he had been informed that Defendants Turner and Harrington "wish to have Craig Ball examine their computers instead of producing the requested discovery," consistent with the trial court's instruction at the December 11 hearing. (*Id.*). McCabe inquired further, "What is Art Harris's position?" (*Id.*). Gregor responded that Harris opted to produce non-privileged documents rather than agree to an independent forensic examination and that privileged documents would be withheld pursuant to a privilege log in accordance with TEX. R. CIV. P. 193.3. (*Id.*).

On January 2, 2009, the Ogden, Brooks, Gibson & Longoria law firm filed an Unopposed Motion for Withdrawal of Attorney. (3 MR 979-984). On January 5, 2009, Ogden received a telephone call from Michael Meyer, another attorney from the O'Quinn Firm representing Arthur. (3 MR 958-959 at ¶9). In that conversation, Meyer asked that Ogden send him a written confirmation that Craig Ball was an acceptable candidate to serve as an independent examiner for those defendants who would agree to the examination. (*Id.*). Ogden confirmed to Meyer that he had already identified Craig Ball as a potential examiner in his email to McCabe on December 15, 2008, but stated that he

would reiterate the acceptance of Ball's qualifications in a letter, and he sent Meyer an email to that effect on January 5, 2009. (*Id.*; 3 MR 988). In response to Meyer's request, Ogden sent correspondence reconfirming Ball as a potential examiner. (3 MR 990).

Consistent with the trial court's instruction on December 11, 2008, Harris had elected to produce responsive documents rather than agree to the independent examination, and Arthur's counsel was so advised. (*Id.* at ¶10). Ogden did not agree or consent to submitting Harris's computers for independent forensic examination to Ball or anyone else. (*Id.*). The sole purpose in Ogden sending the email of December 17, 2008 (3 MR 977) and the letter of January 5, 2009 (3 MR 988, 990) was to memorialize that Ball was an acceptable candidate to serve as an independent examiner for those defendants who chose examination in lieu of document production. (*Id.*).

Ogden did *not* agree to include Harris in the proposed order that Arthur filed with the trial court. (3 MR 958-959, 977). Further, the proposed order submitted by Arthur differed substantially from the rulings that the court made during the December 11, 2008 hearing. (*Compare* 2 MR 477-487 with 2 MR 363-475). Moreover, at no time did Harris or Ogden on Harris's behalf agree to Ball as an independent examiner for Harris. (3 MR 959 at ¶10). Likewise, neither Harris nor Ogden ever consented to the appointment of a special master in this case. (*Id.* at ¶11).

On January 20, 2009, Arthur submitted a proposed order to the trial court compelling Harris, as well as the other Ogden Defendants, to produce their electronic media for independent computer forensic examination and appointing Craig Ball as a special master. (2 MR 477-479). On January 27, 2009, after Ogden's Motion to

Withdraw was granted on January 21, 2009, and while Harris was temporarily without counsel, the trial court signed the January 27th Order compelling production of the Ogden Defendants' computers and hard drives and appointing Craig Ball as the independent forensic examiner and special master. (App. at "A").

The January 27th Order gives the Special Master discretion to employ or modify search terms that capture all electronic communications "including *but not limited to* emails to or from persons, entities and email addresses listed in parts 1 and 3 of Plaintiff's Requests for Production." (*Id.*). Additionally, attached to the January 27th Order, and incorporated therein, is a Consulting Agreement entered into between The O'Quinn Law Firm (counsel for Arthur), which is defined as the "Client," and Ball. (*Id.*). The Consulting Agreement, effective December 18, 2008 (more than one month before the January 27th Order), by its terms not only serves to engage Ball to conduct services for the O'Quinn Firm (with a \$10,000 *nonrefundable* retainer), but also provides that the O'Quinn Firm would pay him \$500/hour for his services and indemnify and hold Ball harmless for any claim or suit, including damages, expenses, liability, fines, and attorney's fees. (*Id.*).

The undersigned counsel filed a Notice of Appearance for Harris on February 2, 2009. (2 MR 577). Given the obvious discrepancies between the January 27th Order and the trial court's ruling during the December 11, 2008 hearing, as well as the fact that the *only* motion to compel before the trial court on that day related solely to Defendant Bonnie Stern, on February 3, 2009, Harris filed a Motion to Clarify the Order, objecting to the requirement that he turn over his computer and hard drives to the appointed Special

Master. (2 MR 579-706). Harris's Motion to Clarify was set for hearing on February 6, 2009, but was canceled by the trial court on February 4, 2009. (1 MR 25 at ¶ 20). On May 8, 2009, the trial court held a hearing and later denied Harris's Motion to Clarify. (App. at "B"). The trial court then ordered Harris to turn over his electronic media to the Special Master designated in the January 27th Order on or before May 19, 2009. (*Id.*). On May 14, 2009, the undersigned counsel delivered to the Special Master: (1) a Dell desktop computer containing an 80 GB hard-drive, (2) a Dell laptop computer containing a 160 GB hard-drive, and (3) an external 200 GB hard-drive. (3 MR 835-841). According to our records, Harris turned over in excess of 30 Gigabytes of emails alone, which according to industry publications amounts to over three (3) million pages of emails. (1 MR 26 at ¶ 23).

On August 7, 2009, the Special Master sent an email addressed to Harris's counsel and copying all parties demanding information regarding the history of the hard drives on the Dell laptop produced to him in May and "positing" about those hard drives. (1 MR 41). On August 11, 2009, the Special Master sent another email demanding more information and the production of more electronic devices from Harris. (1 MR 34-35).

Within hours of the Special Master's August 11, 2009 email inquiring about Harris's computers, Arthur's counsel, Neil McCabe, sent an email notifying all parties that "Plaintiff is prepared to give [Relator] Mr. Harris until the close of business on Friday, August 14 to produce to Mr. Ball . . . [those laptops]. If those items are not produced to Mr. Ball by that time, or a satisfactory explanation is not given for failure to

produce, then Plaintiff intends to file a motion for contempt against Mr. Harris.” (1 MR 34). Ball responded to McCabe, noting:

My threshold focus on the integrity of the evidence and production is by no means complete. I expect to have more information on these issues and perhaps more questions shortly. . . . Perhaps it's premature to address the question of contempt without more information?

(1 MR 33).

In another email dated August 11, 2009 addressed to cajunrose (Defendant Nelda “Rose” Tuner) and copying others, the Special Master stated, “I need to give this order more careful scrutiny *when I haven't been up all night reading Mr. Harris' shorthand.*”

(1 MR 36). In another email on the same date “To All Counsel and Pro Se,” Ball stated in part:

[T]he challenge of reviewing Mr. Harris' data in that he seemed to express as a writing virtually every thought (that is lay observation only) and employs an anagrammatic, word-splitting shorthand unlike any I've seen before. It's human readable but, in large measure, not machine readable (and thus difficult to search using keywords alone). That is—and only by way of example—the phrase ‘Craig Ball was reading a book’ might be written as Caraig Blal wsa reading ga obok.

(1 MR 35). In yet another email of August 11, 2009, Ball wrote to McCabe and others, “the remark about Ms. Stern was not necessary or helpful. There is little danger I will confuse what I saw on Ms. Stern's machines with what I see on Mr. Harris' machines nor Ms. Stern's actions with Mr. Harris'.” (1 MR 32).

On at least two occasions, the Special Master's communications (regarding Harris, his computers, and his hard drives), have, in short order, been the subject of Defendant

Nelda “Rose” Turner’s blog. Turner, the trial court recently held, has colluded with Arthur “as a matter of law” with regard to the filing of motions to join responsible third parties so that McCabe could later join those parties as defendants in this case, despite limitations having run against them. (1 MR 97). For example, on August 11, 2009, Turner wrote: “You have to wonder if this has anything to do with the Court’s thoughts about what will have to become an issue at some point which is the change of hard drives by Art Harris in December 2008 after he had reasonable notice to expect to lose his computer and external hard drives one day.” (See <http://www.rosespeaks.com/rose-blog/2009/08/11/art-harris%e2%80%99-part-time-boss-cbs-added-in-texas-howard-k-stern-and-doctors-granted-post-ponement/>). On August 12, 2008, Turner wrote:

In what could be a fatal blow in the Texas State District Court for Art Harris, his counsel have not produced the missing hard drive from Art Harris’ nor a plausible excuse like a receipt for having the older laptop computer refurbished. To complicate matters worse for Art Harris the Special Master Craig Ball has now found that Harris bought a new computer in the late fall of 2008 used it up to at least February 2009 and did not disclose or turn that laptop either [sic] the forensic expert.

(See <http://www.rosespeaks.com/rose-blog/2009/08/11/art-harris%e2%80%99-part-time-boss-cbs-added-in-texas-howard-k-stern-and-doctors-granted-postponement/>). Turner posted these blogs before Harris had an opportunity to investigate, much less respond and correct many of the Special Master’s erroneous assumptions.

On August 17, 2009 (after Harris’s counsel had responded at length on August 14th to the two prior emails from the Special Master (1 MR 22-23 at ¶ 3; 4 MR 1295)), the Special Master sent Harris’s counsel another email, this time consisting of four

single-spaced pages replete with demands, questions, incriminating accusations, challenges to counsel's representations of the facts, as well as a demand for production of additional computers, twelve hard drives and flash drives, inquiries about the "potential relevance" of five other computers, and admonishments of counsel to review and assess their contents and usage to determine whether or not they fall under the Order—all of which he sought to have "responses in hand by 4:00 p.m. on Thursday, August 20, 2009," less than three business days later. (4 MR 1160-1164). On August 20, 2009, Harris's counsel sent an email asking for more time as the Special Master had given them less than three business days to respond. (4 MR 1296-1297). On August 22, 2009, Harris's counsel received another email from the Special Master demanding production of the Gateway laptop (the laptop Harris uses for his day-to-day business, which was purchased long after the events giving rise to the underlying proceeding) "*now*" after stating, "its unfortunate you had no chance to look into the matters I raised until 12 minutes before the conclusion of the time I'd afforded you to do so." (4 MR 1296).

On Sunday, August 23, 2009, Harris's counsel responded and asked for an explanation for the source of his authority to demand the information and additional electronic media. (4 MR 1146). In an email dated August 23, 2009 (11:48 p.m.), the Special Master informed Harris's counsel:

I was given discretion to employ or modify search terms. I was specifically instructed to 'capture electronic communications, including but not limited to e-mails' and to 'capture all remaining electronic communications including but not limited to e-mails to or from the persons, entities or e-mail addresses listed in parts 1 and 3 of Plaintiff's Request for Production. . . .'

The Court concluded by leaving the ‘terms’ of your client’s tender of relevant media to be specified by me. The Court further adopted language allowing me to determine the manner and means by which my services are accomplished consistent with the Court’s directive. The Court did not direct me to ignore the absence of relevant media, nor did the Court indicate a desire that I conceal evidence of possible spoliation or non-compliance with the Court’s instructions. The Court instructed me to ‘capture all remaining electronic communications’ not just those which the parties want me to see.

Finally, I note that the Court appointed me as Special Master. . . . I don’t feel I have to look to TRCP Rule 171 to justify my actions, but it serves to inform them.

(4 MR 1144-1146).

Interestingly, Ball has stated in an article on his website: “A computer forensic examiner sees it all. The internet has so broken down barriers between business and person communications that workplace computers are routinely peppered with personal, privileged and confidential communications. . . . Further, a hard drive is more like one’s office than a file drawer.” *What Judges Should Know About Computer Forensics*, Craig Ball, Workshop for District Judges II, p. 4 (July 16-18, 2008). (6 MR 2252-2270). “The intrusion attendant to forensic examination flows from the fact that such examination lays bare any and all current or prior usage of the machine, including for personal, confidential, and privileged communications, sexual misadventure, financial and medical recordkeeping, storage or proprietary data and other sensitive matters.” (*Id.* at 2266).

On August 23, 2009, Harris filed a Motion to Reconsider the Appointment of Special Master and Request for Protective Order and Stay of Appointment of and Forensic Examination by Special Master (1 MR 3 – 4 MR 1297), which the trial court denied on August 28, 2009. (App. at “C”). Respondent ordered counsel for Harris to respond to the Special Master’s August 17th four-page long inquiry, including

examination and assessment of additional electronic media within fourteen (14) days. (*Id.*). Respondent further ordered counsel for Harris to review the 30,000 documents and emails (many of which contain attachments or are email strings) on the DVD provided by the Special Master on August 28, 2009 (which the Special Master referred to as the “first tranche” (4 MR 1274-1275) and to provide a privilege log and the documents to the trial court for in camera review on or before September 28, 2009. (App. at “C”).

REQUEST FOR EMERGENCY RELIEF

As set out more fully in Harris’s Emergency Motion for Temporary Relief filed contemporaneously herewith, the Court should issue an immediate stay of the trial court’s January 27th, May 11th, and August 28th Orders. (App. at “A,” “B,” and “C”). Additionally, Relator respectfully requests that the Court enter a stay of any review or forensic examination of Relator’s electronic media by the Special Master, or the collection of the same from Relator, until the Court rules on Relator’s Petition for Writ of Mandamus.

Respondent has cloaked a computer forensic examiner with the authority of a special master and given Ball unfettered and highly intrusive access into all data and communications stored on Harris’s computers and other electronic media. The August 28, 2009 Texas Supreme Court opinion in *In re Weekley Homes, L.P.* (App. at “F”), which held that the trial court abused its discretion by ordering defendant’s employees to turn over their computer hard drive to forensic experts, is dispositive of the error committed by the trial court here when it ordered Harris to turn over his computer, hard drives, external jump drives, and other such repositories of electronic communications

(collectively, “electronic media”) for forensic examination by a special master (who is retained by Plaintiff) without applying the procedures set forth in Texas Rules of Civil Procedure 191, 192, 193, and 196 and without regard for the privileged, private, or confidential nature of the information, or the subject matter.

Further, the appointment of a special master is frequently the subject of mandamus proceedings, where, as here, the case does not meet the standard of Texas Rule of Civil Procedure Rule 171, which permits appointment of a master only “in exceptional cases, for good cause.” Rule 171 is the “exclusive authority for appointment of masters in our state courts.” *Simpson*, 806 S.W.2d at 810 (App. at “G”); *In re Coastal Nejapa, Ltd.*, No. 14-09-00239-CV, 2009 WL 2476555, at *3 (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet. h.) (not designated for publication).

During the week of August 23-August 27, 2009, it became apparent that the Special Master is likely reading attorney-client communications and other privileged communications from the material already provided to him. (1 MR 23, 34-36; 4 MR 1275). Now he wants Harris to turn over additional laptops and electronic devices because, according to him, the terms of Harris’s “tender of relevant media [are] to be specified by me.” (4 MR 1144-1146). He has previously stated that any machine that has “been used as a conduit through which potentially relevant email passed or to generate any potentially responsive document (whether stored on the local drive or on external media connected via USB, FireWire, or a network connection), the machine has the potential to hold responsive material.” (1 MR 37). He has taken it upon himself to “routinely look for evidence of anti-forensic activity (e.g., file wiping, deletion, drive

swap, clock manipulations, etc.),” and to “look for evidence of media that exists but which was not furnished for examination (e.g., external hard drives, thumb drives, etc.)” (1 MR 69). Nowhere in the Orders is the Special Master instructed to undertake such examinations or make any such findings.

Perhaps most disturbing is the fact that the Special Master, who is under contract with Arthur’s counsel, is actively investigating perceived discovery abuses against defendants, and therefore, is impermissibly acting as an advocate and adversary rather than a neutral referee. If Respondent’s Orders are not stayed, the Special Master will continue to examine and rummage through Harris’s attorney-client communications and work product protected documents, as well as other privileged, personal, confidential and private information. Moreover, under the scope of his authority, as the Special Master sees it, he is predisposed to find anti-forensic activity everywhere he looks. “There is simply no authorization in the law for the [special] master to take an adversary position . . . which would place him outside the role of a master in chancery.” *AIU Ins. Co. v. Mehaffey*, 942 S.W.2d 796, 802 (Tex. App.—Beaumont 1997, no writ)

Here, as the Court found in *In re Weekley*, the harm Harris will suffer from the continued forensic examination of all electronic communications and misuse of his electronic media by the Special Master, and the harm that will result from the Special Master’s review of attorney-client communications, private conversations, journalist’s notes, interviews, and projects, as well as privileged and otherwise confidential communications cannot be remedied on appeal. Harris will be irreparably harmed if this

Court does not stay Respondent's Orders pending its consideration of the issues raised in this petition.

On May 19, 2009, Justice Jane Bland of the First District Court of Appeals granted emergency relief and a stay to Defendant Howard K. Stern on a similar order compelling him to turn over his computers for forensic examination by the *same* special master. See *In re Stern*, Cause No. 01-09-00438-CV. (App. at "D").

ARGUMENT

I. MANDAMUS IS THE APPROPRIATE REMEDY.

Mandamus is a proper remedy when the trial court has abused its discretion and the relator has no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). "A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* at 839. Because Harris will have no adequate remedy by appeal if the Orders are allowed to stand, mandamus is the appropriate and necessary remedy.

Mandamus is appropriate to review trial court discovery errors that cannot be remedied by appeal. *Walker*, 827 S.W.2d at 843; *In re Weekley Homes, L.P.*, 2009 WL 2666774 at *11 (App. at "F"); *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004) (orig. proceeding) (per curiam) ("If an appellate court cannot remedy a trial court's discovery error, then an adequate appellate remedy does not exist."). Further, mandamus is appropriate to review a trial court's order appointing a special master. *Simpson*, 806 S.W.2d at 812. (App. at "G").

II. THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION.

A. **The Trial Court Abused its Discretion by *Sua Sponte* Ordering Production of Harris’s Electronic Media for Computer Forensic Examination When Plaintiff Had Made No Request for the Electronic Hardware or a Showing that the Benefits of Production Outweigh the Costs.**

Mandamus relief will issue where a trial court orders compliance with discovery mechanisms or discovery tools that are not recognized by the Texas Rules of Civil Procedure. *In re Does 1-10*, 242 S.W.3d 805, 818 (Tex. App.—Texarkana 2007, orig. proceeding). Further, a discovery order that entirely disregards the Texas Rules of Civil Procedure is an abuse of discretion. *Id.* at 812, 818.

Texas Rule of Civil Procedure 196.4 provides that “[t]o obtain discovery of data and information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced.” TEX. R. CIV. P. 196.4; *In Re Weekley Homes, L.P.*, 2009 WL 2666774 at *10. (App. at “F”).

Although the requests for production here asked for emails, there was no specification as to “the form in which the requesting party wants it produced.” TEX. R. CIV. P. 196.4. The purpose of Rule 196.4’s specificity requirement is to ensure that requests for electronic information are clearly understood. *Id.* Once a specific request is made, Rule 196.4 requires the responding party to either produce responsive electronic information that is “reasonably available to the responding party in its ordinary course of business,” or object on grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested. *Id.* Here, Harris produced documents (in

paper form), but asserted a number of objections to the requests. (1 MR 147-152; 3 MR 961-962).

“Should the responding party fail to meet its burden, the trial court may order production subject to the discovery limitations imposed by Rule 192.4. If the responding party meets its burden by demonstrating that retrieval and production of the requested information would be overly burdensome, the trial court may nevertheless order targeted production upon a showing by the requesting party that the benefits of ordering production outweigh the costs.” *Id.* In determining whether the burden or expense of the proposed discovery outweighs its likely benefit, the trial court should take 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. TEX. R. CIV. P. 192.4(b).

But here, there was *no* outstanding request for examination or production of computers or the hard drives from any of the defendants, let alone Harris. The Court will recall that the December 11, 2008 hearing related *only* to Defendant Bonnie Stern, who had received the same requests for production as Harris. (2 MR 307-362, 364-475). At that time, both Bonnie Stern and Harris were represented by Ogden. At the Bonnie Stern hearing, the following colloquy among the trial court and counsel occurred:

The Court: (to Mr. McCabe) Okay. So your request for production does not include her hard drive but that’s what you’re asking for right now. Is that right?

Mr. McCabe: Yes, Your Honor.

Mr. Ogden: We have never been served with the request, discovery request to scan her hard drive which we oppose.

(2 MR 374 at lines 16-22).

The Court: I understand that you object to producing the hard drive and to having somebody fish through it.

Mr. Ogden: Correct.

The Court: But do you object to having the Court rule one way or the other on it today even though there's no actual request for production of that?

Mr. Ogden: I do respectfully because I'd like the opportunity to brief that and file a response.

The Court: you've already filed a, what an inch or two of stuff?...Is the answer different with regard to the hard drive?

Mr. Ogden: It is, Your Honor...

(2 MR 376 at line 17 – 2 MR 377 at line 8). The hearing continued:

Mr. Ogden: Isn't it incumbent upon Mr. McCabe to come forward with some colorable cause of action?

The Court: Actually, I kind of think he has but, anyway, I think that should not be too hard for you all as far as her records go, her hard drive, her whatever it is one has on a computer and I would suggest the same thing that I suggested already.

You're going to---if you comply with what I'm telling you to comply with, you're going to give us a bunch of stuff. They're going to say it's not enough and there's some missing and then we're still going to have to go back and get a forensic examiner to examine everything and I don't know why we don't just do it to start with... .

(2 MR 422 at lines 8-23) (emphasis added).

Thus, in a drastic departure from the established rules of discovery, and absent a specific request for production from Arthur, the trial court created its own discovery request – a mechanism and discovery device that is not found in the Texas Rules of Civil

Procedure. The trial court denied Bonnie Stern, and certainly Harris who was not even the subject of the Motion to Compel, the right to brief and file a response to assert objections to the suggested highly intrusive search of the hard drives that had not previously been requested, and there was no showing by Arthur to justify the trial court's Order. Moreover, Arthur did not produce any evidence of good cause, spoliation, or bad faith by Harris that would justify the trial court ordering the production of all of Harris's electronic media. There was no weighing of the benefits versus the burdens of this highly intrusive discovery as required by Rule 192.4(b).

Thus, the production that was ordered (*e.g.*, Harris's electronic media) was not specifically targeted and no consideration was given to the highly intrusive nature of the forensic examination or Harris's personal privacy, privileges, or the confidentiality of the information contained in the electronic media that he uses on a daily basis in connection with his work as a journalist. No safeguards were put in place pursuant to Rule 192.6, despite Harris's many requests, including but not limited to the Motion to Reconsider that was heard and denied on August 28, 2009. (2 MR 579-706; 1 MR 3 – 4 MR 1297). This is in stark contrast to the restrictions put in place as to the forensic examination in *In re Honza*, 242 S.W.3d 578 (Tex. App.—Waco 2008, pet. denied).

Further, discovery requests that are unlimited in time, place, or subject matter are overly broad as a matter of law. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998); *Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). Discovery requests must be tailored to include only matters relevant to the case. *In re Am. Optical Corp.*, 988 S.W.2d at 713;

Sanderson, 898 S.W.2d at 814. Moreover, the requesting party, *not* the trial court, has the sole responsibility to craft its discovery requests. See *In re TIG Ins. Co.*, 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, orig. proceeding); *In re Sears, Roebuck & Co.*, 146 S.W.3d 328, 333 (Tex. App.—Beaumont 2004, orig. proceeding). Further, “consistent with standard prohibitions against ‘fishing expeditions,’ a court may not give the expert carte blanche authorization to sort through the responding party’s electronic storage device.” *In re Weekley Homes*, 2009 WL 2666774 at *7. (App. at “F”).

In determining whether discovery of hard drives is warranted, courts must address privilege, privacy, and confidentiality concerns, and if discovery is ordered, it must establish protocols for the forensic search of a party’s hard drives, such as designating search terms to restrict the search. *Id.* Whether there is a direct relationship between the electronic storage device and the claim itself is also a factor trial courts should consider. *Id.* For example, cases involving claims of theft of trade secrets, confidential information, or improper use of a company’s computers to sabotage a business may warrant limited access to an expert to search a mirror image of the responding party’s hard drives. *Id.*

In *In re Weekley Homes*, the requesting party’s motion relied primarily upon discrepancies and inconsistencies in Weekley’s production as well as Weekley’s meager document production. *In re Weekley Homes*, 2009 WL 2666774 at *8. (App. at “F”). The Court, however, held that “HFG’s conclusory statements that the deleted emails it seeks ‘must exist’ and that deleted emails are in some cases recoverable is not enough to justify the highly intrusive method of discovery the trial court ordered, which afforded

the forensic experts ‘complete access to all data stored on [the Employees’] computers.’” *Id.* The Court carefully distinguished *In re Honza*, noting that in that case, A&W sought metadata associated with two documents that had already been shown to exist and there was a direct relationship between the hard drives sought and A&W’s claims, as identification of the points in time when the partial assignment draft was modified directly concerned “the issue of whether [the Honzas] altered the partial assignment after the parties concluded their agreement but before the document was presented for execution.” *Id.* (citing *In re Honza*, 242 S.W.3d 578-80). The Court also noted that nothing was presented to show that the experts were qualified to perform the search given the particularities of the specific storage devices at issue, or that the search methodology would likely allow retrieval of relevant deleted emails. Accordingly, the Court concluded that by ordering a forensic examination of Weekley’s hard drives without such information, the trial court abused its discretion. *Id.*

Here, not only did Respondent order production of electronic media that had not been requested by Arthur, but the January 27th Order and May 11th Order in fact give the Special Master free rein to:

conduct an independent forensic examination of the relevant computer hard drives, external hard drives, jump drives, and other such repositories of electronic communications in the possession or control of . . . HARRIS . . . for the purpose of locating documents responsive to Plaintiff’s Request for Production. The Special Master shall have discretion to employ or to modify search terms, and he is specifically instructed to . . . capture all . . . electronic communications, including but not limited to emails to or from the persons, entities and email addresses listed in parts 1 and 3 of Plaintiff’s Requests For Production.

(App. at “A” and “B”).

Hence, the Special Master has been given *carte blanche* to wander and rummage through Harris’s electronic media at will without consideration for privilege, privacy, confidentiality, or even subject matter. There are *no* restrictions on search terms, and there is *no* relationship whatsoever between a search of Harris’s electronic media and Arthur’s claims of defamation and conspiracy, which traditionally are proven by documents and testimony.

To further illustrate the overreaching and invasiveness occasioned by the Orders and the Special Master’s examination, in his communication dated August 27, 2009 transmitting the “first tranche of e-mail tendered for privilege review,” the Special Master states that the DVD he was transmitting “is initially divided into folders identified as ‘Responsive’ and ‘Segregated Attorney Messages.’” (4 MR 1275). He goes on to state that the “‘Segregated Attorney Messages’ reflects an effort to capture electronic communications from Howard K. Stern’s attorneys as described in the January 27th Order, and further that most have been identified by, *inter alia*, searching for attorney names and firm domains within the To, From, CC and BCC fields of messages. This will not capture every instance where an attorney communication is embedded in a string or forwarded to a third person.” (*Id.*).

Moreover, based upon communications with the Special Master, it appears that the Special Master may be qualitatively analyzing attorney-client communications regardless of privilege, including the common defense privilege, TEX. R. EVID. 503(b)(1)(C) (1 MR 22-23 at ¶10; 1 MR 26; 4 MR 1275, which must, according to the January 27th Order

become part of a privilege log submitted to Respondent. (App. at “A”). So apparently Respondent contemplates reviewing, in camera, privileged communications in the absence of any motion or hearing that privileged communications should be produced.

It goes without saying that the subject matter of this case—Arthur’s reputation and the allegedly defamatory statements about her relationship with her late daughter Anna Nicole Smith and other relatives—is *not* highly technical or complex. (1 MR 77-95).³ Further, examination of emails by bloggers regarding Arthur’s ability to have a relationship with her granddaughter does not call for examination of highly technical and complex documents by a person having both a technical and a legal background. *See e.g., Transamerican Natural Gas Corp. v. Mancias*, 877 S.W.2d 840, 843 (Tex.App.—Corpus Christi 1994, no pet.) (noting that the need for technical expertise and appointment of a special master may be considered in determining whether exceptional circumstances exist to justify the appointment of a master). To the contrary, the requests for production that are the subject of the Orders seek communications among various bloggers and other individuals, which are routinely capable of being produced in hard copy form.

Since there was no showing that the Special Master was qualified to perform the search given the particularities of the specific storage devices at issue, or that the search methodology would likely allow retrieval of relevant emails, the Respondent abused her

³ At the time of the December 11, 2008 hearing, Arthur’s live pleading was her Second Amended Original Petition. (6 MR 2223-2251).

discretion. Indeed, computer forensic examination has no place here other than for purposes of intimidation, harassment, unnecessary burden, and expense.

In sum, Respondent abused her discretion when she entered the Orders without following even the most fundamental tenants of Texas discovery practice or the limitations on such highly intrusive discovery as articulated in *In re Weekley Homes*.

B. The Trial Court Abused its Discretion When it Entered the August 28th Order Requiring Harris and His Counsel to Respond to the Special Master's Questions and to Assess Usage and Contents of Other Electronic Media Listed in His August 17th Email.

As stated above, discovery requests must be tailored to include only matters relevant to the case. *In re Am. Optical Corp.*, 988 S.W.2d at 713; *Sanderson*, 898 S.W.2d at 814. Moreover, the requesting party not the trial court has the sole responsibility to craft its discovery requests. *See In re TIG Ins. Co.*, 172 S.W.3d at 168; *In re Sears Roebuck & Co.*, 146 S.W.3d at 333. Respondent again abused her discretion when, in her August 28th Order, Harris's counsel was ordered to respond to the Special Master's email of August 17, 2009 and further to assess the contents and usage of five (5) other computers "used on Mr. Harris's network." (App. at "C"; 4 MR 1152-1155).

Once again, Respondent, without a pending discovery request from Arthur, has *sua sponte* ordered discovery responses from Harris and his counsel to questions and demands of the Special Master. As will be discussed below, we do not believe that the appointment of the Special Master in this case can withstand scrutiny and should in fact be vacated because it is without authority under Texas law. Regardless, the information ordered by the trial court violates the attorney-client privilege and is invasive of work

product. It is also unfairly prejudicial and lacks any relevance to the subject matter of this case. For example, in the August 17, 2009 email, the Special Master requests, in part:

1. Respecting any of the media holding data subject to the Court's examination orders, can you please advise what course of action was agreed upon between Mr. Harris and Mr. Jeffrey Lee in any late night call on December 11 or the early hours of December 12, 2008? This is the call sought by an email from Mr. Harris titled, 'got a minute to talk off record?' on or about 8:56 PM on December 11.

2. After many hours of painstaking review of the data, I stand by my focus on December 16, 2008 as a significant date respecting the Dell laptop hard drive furnished to me for examination. . . . Is it your client's position that there was no installation or re-imaging of a hard drive on December 16, 2008, and that any seeming indication of same resulted instead from, e.g., someone's installation of XP Service Pak 3 on the machine on December 16? Or do you or Mr. Harris have another explanation to share?

* * *

Likewise, . . if you would clarify why the following listed electronic storage media were not furnished or examination and what investigation was undertaken to support the decision not to tender these items? I am not seeking their tender for examination if you determine, after an actual assessment of their contents and usage, that they do not fall under the ambit of the Court's order:

1. Western Digital "My book" external hard drive disk drive. . . ;
2. Western digital 5000AAV External USB Hard Drive (500 GB);
3. Western digital 2500JB External USB Hard Drive (250GB);
4. Verbatim Store'n' Go USB Flash Drive;

[12 devices in all are listed]

Additionally, what is the status on the WD 1200BEVE? Was it wiped? Re-tasked? Can you confirm that it was actually shipped back to Western digital?

Finally, please account for the status and as above, the potential relevance of the following computers used on Mr. Harris' network

CNN-HCGHD11

DELLLAPTOP (as distinguished from the Dell laptop called Art Harris)

TOSHIBALAPTOP

TAILBABY

D4KBJ5D1.

(*Id.*).

There is absolutely no relationship, indirect or otherwise, between the information sought and the subject matter of this defamation case. The requests are overly burdensome, accusatory, highly prejudicial, and harassing. Finally, they are improper for the additional reason that, in posing such questions and demands, both the trial court and the Special Master are acting in an adversarial manner, not as neutrals. There is no place in the discovery rules or case law for a trial court or a special master to propound—let alone compel—discovery for the benefit of one party against the other, especially when such discovery has not even been requested by a party.

C. The Trial Court Abused its Discretion by Refusing to Apply Recognized Discovery Procedures, Specifically Texas Rule of Civil Procedure Rule 193.3, Regarding Treatment of Privileged Documents and Creation of Privilege Logs.

Texas courts are strictly required to apply the rules regarding privilege logs, and a trial court cannot order a party to create one in excess of that required by the Texas Rules of Civil Procedure. *See In re TIG Ins. Co.*, 172 S.W.3d at 169-70 (strictly construing privilege log rules). Pursuant to Rule 193.3, a party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response and state that responsive material has been

withheld, the request to which the material relates, and the privilege or privileges asserted. TEX. R. CIV. P. 193.3. After receiving a response that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the material withheld, and within fifteen (15) days of service of that request the withholding party must serve a response that describes the information and materials withheld and assert a specific privilege. *Id.*

Paragraph (4) of the January 27th Order states: “Within 14 days after receipt of the captured documents from Special Master . . . Harris . . . shall produce a privilege log and submit it along with the captured documents to the Court for in camera inspection.” (App. at “A”). Thus, the trial court bypassed the requirements of Rule 193.3 and, instead, ordered Harris to not only produce electronic media without the benefit of reviewing it first for privilege, but also to create a privilege log without the necessity of a request by Arthur and further to produce all captured documents to the trial court for in camera inspection. *No* authority exists for this procedure with respect to the creation of a privilege log; nor is there authority to require a party to submit all “captured documents” regardless of relevance to the subject matter of the litigation to the trial court for in camera review. Accordingly, the trial court abused its discretion in ordering Harris to create a privilege log and to submit all documents received from the Special Master to the trial court for in camera review.

D. The Trial Court Abused its Discretion When it Appointed a Special Master to Conduct a Computer Forensic Examination of Relator's Electronic Media Where *No* Consideration Was Given to Texas Rule of Civil Procedure Rule 171.

1. The Court's Appointment of the Special Master Was Improper Because This is Not an "Exceptional Case" Nor Was There Good Cause for the Appointment Under Texas Rule of Civil Procedure 171.

The trial court's appointment of the Special Master was improper because this is not an "exceptional case," nor was there good cause for such an appointment. Notably, in an email dated August 23, 2009, the Special Master wrote, "I don't feel I have to look to TRCP Rule 171 to justify my actions, but it serves to inform them." (4 MR 1144-1146). In *Simpson v. Canales*, Justice Hecht wrote for the Court:

[W]e hold that Rule 171 is the exclusive authority for appointment of masters in our state courts. Were it otherwise, the important purposes for the restrictions imposed by the rule on the power to appoint masters would be thwarted. Centuries of experience counsel against the use of masters except in limited circumstances. We therefore conclude that every referral to a master, unless authorized by statute or consented to by the parties, must comply with Rule 171.

Simpson, 806 S.W.2d at 810. (App. at "G").

Texas Rule of Civil Procedure Rule 171 states in pertinent part:

The court may, in exceptional cases, for good cause appoint a master in chancery, who shall...not [be] an attorney for either party to the action...who shall perform all the duties required of him by the court, and shall be under orders of the court, and shall have such power as the master of chancery has in a court of equity.

TEX. R. CIV. P. 171. (App. at "E").

Because Rule 171 permits appointment of a master *only* “in exceptional cases, for good cause,” this requirement cannot be met merely by showing that a case is complicated, time-consuming, or that the court is busy. *Simpson*, 806 S.W.2d. at 811-12 (holding that the trial court abused its discretion in appointing a special master because the case was not exceptional and there was not good cause to refer the discovery matters to a special master). (App. at “G”). For example, the Court in *Simpson* explained that even though the plaintiff had sued 18 defendants in a toxic tort case, the motions before the court were not especially complex and it did not appear that the Court had heard the merits of any pending discovery disputes before appointing a special master. *Id.*

Likewise, in *Owens-Corning Fiberglas Corp. v. Caldwell*, 830 S.W.2d 622, 626-27 (Tex. App.—Houston [1st Dist.] 1991, no writ), the First Court of Appeals Court held that a case involving five defendants and in which seven requests for production, one request for admission, and one set of interrogatories were propounded, which led to two motions to compel, was not an “exceptional case” under Rule 171. The Court concluded that the trial judge had abused his discretion, holding, “If *Simpson* was not an exceptional case justifying a blanket order of discovery, neither is the underlying [*Caldwell*] litigation.” *Id.* at 626-27. Absent such a showing, parties are being ordered to pay a special master by the hour for resolution of the same kinds of issues that litigants in other

cases can obtain from the Court without such expense.⁴ *See Simpson*, 806 S.W.2d at 812. (App. at “G”).

Simply put, this case does not meet the Rule 171 requirements of an “exceptional case.” Harris’s prior counsel, Bill Ogden, pointed this out in the December 11, 2008 hearing when he objected to the suggestion of the appointment of a Special Master in the first place, stating, “There hasn’t been another motion filed on Art Harris.” (2 MR 408 at lines 4-16; 2 MR 456 at line 17 – 2 MR 457 at line 5). Only one Request for Production, consisting of three requests, has been served on Harris, and he produced responsive documents to Arthur on December 4, 2008. (1 MR 147-152; 3 MR 961-962). Moreover, this is a defamation case, the merits of which do not make it exceptional or complex, and certainly do not require the defendants to turn over their computers. *See In re Does 1-10*, 242 S.W.3d at 819 (holding that a trial court has no authority to create new discovery procedures and is limited by those specifically provided by the Texas Rules of Civil Procedure).

Nor was there good cause to appoint the Special Master. The Second Motion to Compel against Defendant Bonnie Stern, which was the *only motion pending* and set for hearing on December 11, 2008, was *only against Ms. Stern*. (2 MR 307-326, 363-475). As the trial court and counsel at the hearing acknowledged, there was no outstanding request for production of computers or hard-drives from any of the defendants, let alone Harris. As Harris noted in his Reply to Plaintiff’s Response to Motion to Clarify Order

⁴ The Special Master in this case is charging \$500/hour for his services. (*See Consulting Agreement attached to the January 27th Order: 2 MR 574*). While the Consulting Agreement states that The O’Quinn firm is responsible for paying Ball’s fees for now, the Order and email chatter by McCabe clearly contemplate that these fees will ultimately be ordered and taxed against the Defendants.

Compelling Production and Appointing Independent Computer Forensic Examiner, the order submitted by Plaintiff to the trial court and signed on January 27, 2009 *for the first time, inexplicably, included Harris as a defendant compelled to produce his hard drive* to the Special Master. (3 MR 843-849). Consequently, not only is this *not* an “exceptional case” but there was no good cause to appoint a special master under Rule 171.

2. The Special Master is Under Contract With, Paid For, and Indemnified by Plaintiff Under a Consulting Agreement Attached to and Incorporated in the January 27th Order.

Ball’s Consulting Agreement is incorporated into the January 27th Order, evidencing, at a minimum, an appearance of impropriety if not outright bias in favor of Arthur. The Consulting Agreement states that it is entered into, effective December 18, 2008 (more than one month before the January 27th Order), by and between “*The O’Quinn Law Firm (“Client”), as counsel for Virgie Arthur, and Craig D. Ball, P.C., a Texas professional Corporation (“Ball”).* (Consulting Agreement attached to the January 27th Order: App. at “A”) (emphasis added). It provides in part:

- CLIENT DESIRES TO ENGAGE BALL.
- CLIENT HEREBY ENGAGES BALL TO RENDER SERVICES
- BALL HEREBY ACCEPTS THE ENGAGEMENT
- CLIENT AGREES TO PAY BALL AND BALL AGREES TO ACCEPT FOR BALL’S SERVICES FEES UNDER THIS AGREEMENT.
- CLIENT REMAINS SOLELY RESPONSIBLE FOR PAYING BALL ALL FEES AND EXPENSES DUE UNDER THIS AGREEMENT AND BALL SHALL NOT BE OBLIGATED TO RECOVER ANY OUTSTANDING FEES OR EXPENSES FROM THIRD PARTIES.
- CLIENT AGREES TO REIMBURSE BALL ALL COSTS AND EXPENSES
- CLIENT AGREES TO INDEMNIFY AND HOLD BALL HARMLESS FROM ANY CLAIM OR SUIT ALLEGING UNAUTHORIZED OR

UNLAWFUL ACCESS TO ANY INFORMATION, MEDIA, SYSTEM OR NETWORK INCLUDING ALL DAMAGES, EXPENSES, LIABILITY, FINES AND ATTORNEY FEES.

(App. at “A”).

Thus, there is an irreconcilable conflict, and Ball cannot possibly be “neutral” since he has been retained by Arthur and *she is his client*, not to mention the fact that Arthur paid Ball a nonrefundable \$10,000 “engagement fee” retainer. (2 MR 574). Further, the Consulting Agreement states that Ball is “a computer forensic examiner as well as an attorney licensed in Texas and admitted to practice before all Texas courts” who, by his own Consulting Agreement, has been “engaged” by Arthur to render services. (2 MR 570). This agreement is therefore in direct violation of Rule 171, which expressly states that a special master may not be an attorney for either party. In further illustration of Ball’s connection to Arthur and her counsel, he stated in an email dated June 11, 2009, “As your firm is responsible for my charges, I naturally don’t want to reach a point where the charges outstrip your firm’s willingness to pay them in a timely manner.” (4 MR 1202).

E. The Trial Court Abused its Discretion When it Appointed the Special Master to Investigate or, in the Alternative, When it Failed to Remove the Special Master Who is Acting Outside the Limitations and Specifications Stated in the Order Appointing Him, Including Reading Attorney-Client Communications.

1. The Special Master is Investigating and Inquiring Into Perceived Discovery Abuses and is Therefore in an Impermissible Adversarial Position.

A special master who investigates and inquires into any patterns of discovery abuse rather than just take evidence on the matter, is in an adversarial position. *AIU Ins.*

Co., 942 S.W.2d at 802 (holding that the trial court abused its discretion in appointing an auditor to investigate and inquire into alleged discovery allegations). In *AIU Ins. Co.*, the Court held:

An argument can be made that the role of this particular master was outside of the traditional role since the auditor was to investigate and inquire into any patterns of discovery abuse by defendants, rather than just take evidence on the matter. This placed the auditor in an adversarial position.

AIU Ins. Co., 942 S.W.2d at 802. “There is simply no authorization in the law for the [special] master to take an adversary position . . . which would place him outside the role of a master in chancery.” *AIU Ins. Co.*, 942 S.W.2d at 802. In *Caldwell*, 830 S.W.2d at 626, the First Court of Appeals similarly disapproved of an order appointing a special master because it granted him authority “to ‘require’ a party to produce evidence irrespective of whether an opposing party has made a request; therefore, it allows the master to become an ‘advocate’ in a proceeding, not merely a ‘referee’ in the proceeding.”

Here, the Special Master is playing the role of an advocate and adversary, not merely a referee, which is improper under Rule 171. The Special Master has taken it upon himself to “routinely look for evidence of anti-forensic activity (*e.g.*, file wiping, deletion, drive swap, clock manipulations, etc.)” (1 MR 69). He also “look[s] for evidence of media that exists but which was not furnished for examination (*e.g.*, external hard drives, thumb drives, etc.)” which he says “is not outside the scope of [his] work in this action.” (*Id.*). Nowhere in any of the Orders is the Special Master instructed to undertake such investigations, nor is there any relationship between these actions and the

subject matter of the litigation. Even if that were the case, under well-settled Texas law, a special master who investigates and inquires into patterns of discovery abuse is in an improper adversarial position. See *AIU Ins. Co.*, 942 S.W.2d at 802; *TransAmerican Natural Gas Corp*, 877 S.W.2d at 843.

Further, the Special Master's communications to the parties have hardly been neutral or non-adversarial. Rather, they have been contentious, judgmental, arrogant, accusatory, and argumentative. (See 1 MR 28-70; 3 MR 992-1062; 4 MR 1065-1297). By way of example, on January 29, 2009, Ball informed all parties: "There is unlikely to be any innocent alteration or destruction of data at this juncture." (1 MR 72). This presumption of spoliation came *before* the Special Master had even received, much less had the opportunity to review, any of the defendants' (not just Harris's) hard-drives, and is one of predisposition and expectation, not of neutrality.

Within hours of Ball's August 11, 2009 email inquiring about the history and location of more of Harris's computers (1 MR 34-35), Arthur's counsel, Neil McCabe, sent an email notifying all parties that "Plaintiff is prepared to give Mr. Harris until the close of business on Friday, August 14 to produce to Mr. Ball . . . [those laptops]. If those items are not produced to Mr. Ball by that time, or a satisfactory explanation is not given for failure to produce, then Plaintiff intends to file a motion for contempt against Mr. Harris." (1 MR 34). Ball responded to McCabe, noting:

My threshold focus on the integrity of the evidence and production is by no means complete. I expect to have more information on these issues and perhaps more questions shortly. . . . ***Perhaps it's premature to address the question of contempt without more information?***

(1 MR 33).

Not only is the Special Master acting as McCabe's foil, he has placed himself in the position of an adversary, for which there is no authority under the law. *See AIU Ins. Co.*, 942 S.W.2d at 802; *TransAmerican Natural Gas Corp.*, 877 S.W.2d at 843 (holding that it was "clearly improper . . . to cast the master in the role of advocate rather than merely referee in the underlying proceeding"). Accordingly, either the trial court itself has cast the Special Master in an adversarial role or he is acting outside the scope of his appointment; regardless, it is clearly improper and the trial court has abused its discretion by condoning this conduct. "It is well settled . . . that a special master in chancery has no power or authority except that which is derived from the order of the court making the appointment. If he goes beyond this, his action has no official weight, and should be set aside." *Ballard v. McMillan*, 25 S.W. 327, 329 (1893).

F. The Special Master is Exhibiting Bias, Lack of Impartiality, and Making Highly Prejudicial Statements.

The Special Master's communications to the parties at large regarding Harris's style of writing, his erroneous "posits" as to when Harris's hard-drive was replaced, as well as his commentary and personal observations of his review of Harris's personal electronic files are invasive of Harris's (a credentialed, frequently published journalist and reporter) privacy rights, as well as harassing and embarrassing. In his email dated August 17, 2009, Ball wrote the undersigned counsel, "I don't share your belief that it [another laptop purchased in November 2008] is entirely duplicative of materials already

tendered, and I would ask on what facts you relied in coming to that conclusion.” (4 MR 1282).

In an email dated August 11, 2009 addressed to cajunrose (Defendant Nelda “Rose” Tuner) and copying others, the special master stated, “I need to give this order more careful scrutiny when I haven’t been up all night reading Mr. Harris’ shorthand.” (1 MR 36). In another email on the same date “To All Counsel and Pro Se,” Ball stated in part:

I commiserated with Ms. Flynn-DuPart about the challenge of reviewing Mr. Harris’ data in that he seemed to express as a writing virtually every thought (that is lay observation only) and employs an anagrammatic, word-splitting shorthand unlike any I’ve seen before. It’s human readable but, in large measure, not machine readable (and thus difficult to use keywords alone). That is—and only by way of example—the phrase “Craig Ball was reading a book” might be written as Caraig Blal wsa reading ga obok.

(1 MR 35). In yet another email of August 11, 2009, Ball wrote to McCabe and others, “the remark about Ms. Stern was not necessary or helpful. There is little danger I will confuse what I saw on Ms. Stern’s machines with what I see on Mr. Harris’ machines nor Ms. Stern’s actions with Mr. Harris.” (1 MR 32). Not only is the Special Master apparently “up all night” wandering around Harris’s personal, sensitive, confidential, and privileged information without any legal right or authority, he is publically commenting about it. Indeed, as explained above, on at least two occasions, the Special Master’s communications (regarding Mr. Harris, his computers, and his hard drives), were the subject of Defendant Nelda “Rose” Turner’s Internet blog before Harris had an

opportunity to investigate, much less respond and correct, many of the Special Master's erroneous assumptions.

Additionally, while the Special Master is "staying up all night reading Mr. Harris' shorthand" (1 MR 36) or otherwise rummaging through Harris's hard-drives and other electronic media, he is charging \$500/hour to Arthur (which we have no doubt Arthur will seek to tax against Harris), and Harris is incurring his own extraordinary costs associated with this "forensic examination"—costs which we believe are excessive and unnecessary under the circumstances.

PRAYER

For the reasons set forth herein, Relator Art Harris asks the Court to grant his Petition for Writ of Mandamus and direct the trial court to withdraw its Orders of January 27th, 2009, May 11th, 2009, and August 28, 2009. In the alternative, Relator requests that the Court direct the trial court to institute a protocol or select a new neutral forensic examiner.

Respectfully submitted,

By: Amanda Bush

Charles L. Babcock

State Bar No. 01479500

Nancy W. Hamilton

State Bar No. 11587925

Amanda L. Bush

State Bar No. 24042161

JACKSON WALKER L.L.P.

1401 McKinney Street, Suite 1900

Houston, Texas 77010

Telephone: (713) 752-4200

Facsimile: (713) 752-4221

ATTORNEYS FOR RELATOR
ART HARRIS

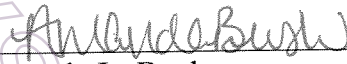
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CERTIFICATION

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

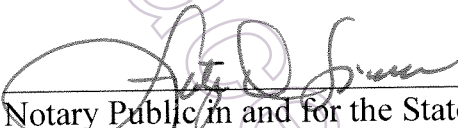
BEFORE ME, the undersigned authority, on this day personally appeared Amanda L. Bush, who being by me first duly sworn, stated on his oath the following:

“My name is Amanda L. Bush. I am over twenty-one years of age, am of sound mind, and am competent to make this affidavit and to testify to the facts stated herein. I am one of the attorneys for Relator Art Harris. I certify that I have reviewed the Petition for Writ of Mandamus and conclude that every factual statement therein is supported by competent evidence included in the appendix or record.”



Amanda L. Bush

SUBSCRIBED AND SWORN TO BEFORE ME on September 3, 2009, to certify which witness my hand and official seal.



Notary Public/in and for the State of Texas

VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

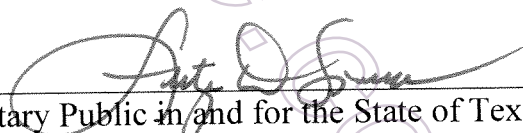
BEFORE ME, the undersigned authority, on this day personally appeared Amanda L. Bush, who being by me first duly sworn, stated on his oath the following:

“My name is Amanda L. Bush. I am over twenty-one years of age, am of sound mind, and competent to make this affidavit and to testify to the facts stated herein. I am one of the attorneys for Relator Art Harris. True and correct copies of the transcripts of the December 11, 2008, May 8, 2009, August 28, 2009 hearings are included in the Record in Support of Petition for Writ of Mandamus. The Appendix and Record in Support of Petition for Writ of Mandamus contain true and correct copies of documents filed in the district court, which are material to Relator’s claim for relief in this proceeding.”



Amanda L. Bush

SUBSCRIBED AND SWORN TO BEFORE ME on September 3, 2009, to certify which witness my hand and official seal.



Notary Public in and for the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that, on the 4th day of September 2009, a true and correct copy of the foregoing *Petition for Writ of Mandamus* were served upon the following counsel and *pro se* defendants as indicated below.

Respondent:

The Honorable Tony Lindsay
280th Judicial District Court of Harris County, Texas
201 Caroline Street, 14th Floor
Houston, Texas 77002
Telephone: (713) 368-6420

Real Parties in Interest:

Via Certified Mail:

Neil McCabe
Michael Meyer
The O'Quinn Law Firm
440 Louisiana, Suite 2300
Houston, Texas 77002

Via First Class Mail:

L. Lin Wood
Luke Lantta
Bryan Cave LLP

Via First Class Mail:

Bonnie Stern
269 S. Beverly Hills Drive, No. 1247
Beverly Hills, California 90212

Via First Class Mail:

Nelda Turner
13348 County Road 3111
Gladewater, Texas 75647

Via First Class Mail:

Harry Susman
Richard Hess
Susman Godfrey, LLP
1000 Louisiana, 51st Floor
Houston, Texas 77002

Via First Class Mail:


Diana Marshall
Marshall & Lewis, LLP
1010 Lamar St. Suite 450
Houston, Texas 77002

Via First Class Mail:

Lyndal Harrington
8318 Buring Hills Drive
Houston, Texas 77071

Via First Class Mail:

Teresa Stephens
5022 Cloyce Court
North Richland Hills, Texas 76118



Amanda L. Bush