

NO. \_\_\_\_\_

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IN THE \_\_\_\_\_ COURT OF APPEALS  
AT HOUSTON, TEXAS

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**IN RE: ART HARRIS**

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

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**MOTION FOR EMERGENCY TEMPORARY RELIEF**

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**ATTORNEYS FOR ART HARRIS,  
RELATOR**

September 4, 2009

TO THE HONORABLE COURT OF APPEALS:

Relator Art Harris (“Relator” or “Harris”) files this Motion for Emergency Temporary Relief pursuant to Texas Rules of Appellate Procedure 52.10(a) and 10.3(a)(3) and would respectfully show the Court as follows:

*First*, Relator respectfully requests that the Court stay the obligations imposed by Respondent’s Orders until the Court rules on Relator’s Petition for Writ of Mandamus, which is being filed concurrently with this motion. Absent emergency relief, Relator must comply with Respondent’s August 28, 2009 Order in one instance by no later than September 11, 2009, fourteen days from the date of the Order, and in another instance, by no later than September 28, 2009, thirty days from the date of the Order.

*Second*, 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. Absent emergency relief, the Special Master—whose appointment is the subject of one of Relator’s principal grounds for mandamus relief—will continue to examine and rummage through Relator’s attorney-client communications and work-product protected documents, as well as other privileged, personal, confidential, and private information in the wake of Respondent’s total disregard of the procedures set forth in Texas Rules of Civil Procedure 171, 191, 192, 193, and 196 as well as continue to demand that Relator turn over additional electronic media to him.

## FACTUAL AND PROCEDURAL BACKGROUND

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

Relator 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.<sup>1</sup> 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”).

As more fully explained in Relator’s Petition for Writ of Mandamus, the Orders have appointed and expanded the authority of the 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. (App. at “A”). Relator sought clarification of that order, arguing

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<sup>1</sup> Citation in this Motion to the Appendix (“App. at \_\_\_”) refers to the Appendix in Support of Relator’s Petition for Writ of Mandamus attached thereto, and Citation in this Motion to the Mandamus Record (“[Vol.] MR [Page]”) refers to the Record in Support of Relator’s Petition for Writ of Mandamus filed concurrently herewith.

that it mistakenly referred to him since no request for his hard drives had ever been made nor had he or his counsel discussed the appointment of a special master with respect to his production of documents. Moreover, Relator was not the subject of the motion to compel, which resulted in the January 27th Order. (2 MR 307-362). The Court denied Relator's motion for clarification in the May 11th Order. (App. at "B"). After the Court threatened him with contempt, Relator turned over his electronic media (a laptop, a desktop computer, and an external backup hard drive) containing 30-40 Gigabytes of data to the Special Master on May 14, 2009. (3 MR 835-841; 1 MR 26 at ¶23). The Special Master forensically imaged the three devices and has retained the forensic images since May 2009.

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 provided to him. (1 MR 23, 34-36; 4 MR 1275). More importantly, 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.)," 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 investigations or to make any such findings. (App. at "A," "B," and "C").

The Special Master now wants Relator, a free-lance journalist, to turn over multiple additional electronic devices—*including the laptop that Relator uses for his day-to-day business, and which was purchased long after the events giving rise to the*

*underlying proceeding*—because, according to him, the terms of Relator’s “tender of relevant media [are] to be specified by me.” (3 MR 1144-1146). The August 28th Order requires, in part, that Relator respond to the Special Master’s e-mail inquiry of August 17th, which requires locating and evaluating whether twelve additional devices referenced in the Special Master’s August 17th e-mail contain communications from the relevant time periods, and that Relator must do so by September 11, 2009. (App. at “C”).

The August 28th Order further requires Relator to produce a privilege log pertaining to the DVD provided to Relator’s counsel by the Special Master on August 28, 2009, which contains some 30,000 emails and Word documents (many of which have attachments, resulting in far more than 30,000 documents), and to submit it along with the captured documents for in camera inspection by September 28, 2009.

## **ARGUMENT**

### **A. LEGAL STANDARD.**

The purpose of temporary relief pursuant to Texas Rule of Appellate Procedure 52.10 is to maintain the *status quo* and preserve this Court’s ability to fashion effective relief. *In re Kelleher*, 999 S.W.2d 51, 52 (Tex. App.—Amarillo 1999, orig. proceeding); *In re Reed*, 901 S.W.2d 604, 609 (Tex. App.—San Antonio 1995, orig. proceeding) (involving the predecessor to Rule 52.10). Temporary relief, moreover, should be granted in instances where a relator will suffer prejudice pending mandamus review, impairing the Court’s ability to provide full and effective relief. *Republican Party of Texas v. Dietz*, 924 S.W.2d 932, 933 (Tex. 1996).

**B. EMERGENCY RELIEF IS APPROPRIATE AND NECESSARY.**

Relator will be irreparably harmed if this Court does not stay Respondent's Orders pending its consideration of the issues raised in the Petition for Writ of Mandamus. In the underlying proceeding, Respondent has cloaked a computer forensic examiner with the authority of a special master (without giving any consideration to Texas Rule of Civil Procedure 171—the sole authority for appointing a special master) and given the Special Master unfettered and highly intrusive access into all data and communications stored on Relator's computers and other electronic media and allowed the Special Master to propound inquires and discovery to Relator's counsel. If Respondent's Orders are not stayed, the Special Master will continue to examine and rummage through Relator's attorney-client communications and work product protected documents, as well as other privileged, personal, confidential, and private information.

The Texas Supreme Court's recent opinion in *In re Weekley Homes, L.P.*, \_\_\_ S.W.3d \_\_\_, No. 08-0836, 2009 WL 2666774, at \*10 (Tex. Aug. 28, 2009) (orig. proceeding) (App. at "F"), which held that 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 Relator to turn over his electronic media for forensic examination by the Special Master (who is retained by Plaintiff's Law Firm) without applying the procedures set forth in Texas Rules of Civil Procedure 171, 191, 192, 193, and 196 and without regard for the privileged, private, and confidential nature of the information, or the subject matter.

Here, just as the Court found in *In re Weekley*, the harm Relator 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. Accordingly, mandamus relief is appropriate.

Further, the appointment of a special master is frequently the subject of mandamus proceedings, where, as here, the underlying proceeding does not meet the standard of Texas Rule of Civil Procedure Rule 171, which permits appointment of a special master only "in exceptional cases, for good cause." (App. at "E"). Rule 171 is the "exclusive authority for appointment of masters in our state." *Simpson v. Canales*, 806 S.W.2d 802, 810 (Tex. 1991) (App. at "G"); *In re Coastal Nejava, Ltd.*, No. 14-09-00239-CV, 2009 WL 2476555, at \*3-5 (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, orig. proceeding). Accordingly, mandamus relief is appropriate here as well because Respondent abused her discretion by appointing the Special Master in the first instance.

Finally, in further support of this Motion, Relator refers the Court to his Petition for Writ of Mandamus filed contemporaneously herewith.

**C. THE FIRST COURT OF APPEALS GRANTED A STAY IN A RELATED MANDAMUS PROCEEDING.**

This is the second mandamus proceeding arising from the underlying proceeding relating to the appointment of the Special Master and examination of a defendant's

electronic media. On May 19, 2009, Justice Jane Bland of the First 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 to the *same* Special Master. *See In re Stern*, Cause No. 01-09-00438-CV. (App. at “D”).

### **PRAYER**

WHEREFORE, PREMISED CONSIDERED, Relator respectfully prays that the Court grant temporary relief staying Relator’s obligations under the Orders until the Court rules on Relator’s Petition for Writ of Mandamus. Further, Relator respectfully requests that the Court grant temporary relief staying any review or forensic examination of Relator’s electronic media by the Special Master, or the collection of the same, until the Court rules on Relator’s Petition for Writ of Mandamus. Finally, Relator prays for such other and further relief to which he may be lawfully entitled.

Respectfully submitted,

By: Amanda Bush

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Nancy W. Hamilton  
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ATTORNEYS FOR RELATOR,  
ART HARRIS

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## CERTIFICATE OF CONFERENCE

I hereby certify that, on September 3, 2009, I contacted counsel for Real Party in Interest Virgie Arthur, counsel for the co-defendants, and the *pro se* defendants pursuant to Texas Rule of Appellate Procedure 10.1(a)(5) regarding the foregoing Motion, who indicated as follows:

Neil McCabe, counsel for Plaintiff/Real Party Interest Virgie Arthur is opposed.

Lin Wood, counsel for Defendant/Real Party in Interest Howard K. Stern is unopposed.

Harry Susman, counsel for Defendants/Real Parties in Interest TMZ Productions, Inc. and Harvey Levin in unopposed.


Bonnie Stern, *Pro Se* Defendant/Real Party in Interest, is unopposed.

Nelda "Rose" Turner, *Pro Se* Defendant/Real Party in Interest, is opposed.

Teresa Stephens, *Pro Se* Defendant/Real Party in Interest, is agreed.

Lyndal Harrington, *Pro Se* Defendant/Real Party in Interest, is unopposed.

As of the time of filing, I have not received a response from Diana Marshall, counsel for Defendant/Real Party in Interest Larry Birkhead.

  
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Amanda L. Bush

**CERTIFICATE OF COMPLIANCE**

I hereby certify that, on September 4, 2009, pursuant to Texas Rule of Appellate Procedure 52.10(a), I contacted counsel for Real Party in Interest Virgie Arthur, counsel for the co-defendants, and *pro se* defendants by expedited means (via e-mail) to notify them that Relator is filing the foregoing Motion today.

  
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Amanda L. Bush

<http://www.apralsplace.com>

## CERTIFICATE OF SERVICE

I hereby certify that, on the 4<sup>th</sup> day of September 2009, a true and correct copy of the foregoing *Motion for Emergency Temporary Relief* were served upon the following counsel and *pro se* defendants as indicated below.

### **Respondent:**

The Honorable Tony Lindsay  
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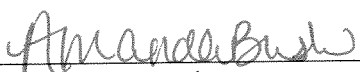
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