CAUSE NO. 76357

ESSENT PRMC, L.P.,	)	
	)	
Plaintiff,	)	**IN THE 62 COURT**
	)	
v.	)	
	)	**OF**
JOHN DOES 1-10,	)	
	)	
Defendants.	)	**LAMAR COUNTY, TEXAS**
	)	
	)	

PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESPONSE TO JOHN DOE NO. 1'S OPPOSITION TO THE DISCOVERY OF HIS IDENTITY

Plaintiff Essent PRMC, L.P. ("PRMC"), in response to the Court's request for additional information, supplements its prior response to defendant John Doe No. 1's opposition to the discovery of his identity as follows:

INTRODUCTION

Despite the fact that Rule 192.3(i) of the Texas Rules of Civil Procedure provides that a "party may obtain discovery of the name, address, and telephone number of any potential party" and the fact that other Texas Courts have ordered the production of this very information in virtually identical matters, Defendant John Doe No. 1 ("the Blogger"), without filing an appearance, a motion to quash, or a motion to dismiss challenging the adequacy of PRMC's allegations, argues by letter that this Court cannot order the production of his identity. The Blogger, however, has presented absolutely no Texas authority supporting his argument notwithstanding ample opportunity to do so. The Blogger's argument is without merit and PRMC is entitled to know the Blogger's identity so it can obtain service and proceed with discovery.

ARGUMENT

I. DEFENDANTS' IDENTITIES ARE DISCOVERABLE.

A. The Identities Of Unknown Parties Are Discoverable Under Texas Law.

Rule 192.3(i) of the Texas Rules of Civil Procedure provides that a "party may obtain discovery of the name, address, and telephone number of any potential party." In Fepco, Ltda. v. Coussons, 835 S.W. 2d 251 (Tex. App. 1992), the Texas Court of Appeals held that it is an abuse of discretion to not order the disclosure of the identities of potential defendants in a defamation action and that a mandamus petition was the appropriate form of relief. More specifically, the Court found as follows:

> An appeal is not an adequate remedy where the party's ability to present a viable claim at trial is vitiated or severely compromised by the trial court's discovery error. Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992). Here, it would be impossible for relator to present a viable claim against the "several reliable sources" for defamation if relator were to choose to do so; without the names of those "sources," relator would never know against whom to *file* its claim. Relator cannot consider bringing claims against the "sources" when it does not know who they are. As the Walker court noted, "a denial of discovery going to the heart of a party's case may render the appellate remedy inadequate." Id. Here, relator will not even have the choice of whether to *bring* a case against the "sources" unless the discovery is allowed.

Fepco, 835 S.W. 2d at 253-54 (emphasis in original).

Further, as discussed in PRMC's initial brief, at least two Texas District Courts have issued orders to internet providers requiring the production of anonymous bloggers' identities. See Doe(s) v. Haddock, No. 2-06-402-CV, 2007 WL 940761 (Tex. App. Mar. 29, 2007); In re John Doe(s), No. 2-06-379-CV, 2006 WL 3114458 (Tex. App. Oct. 27, 2006); In re Feinberg, No. 14-05-01108-CV, 2005 WL 3116589 (Tex. App. Nov. 23, 2005). In both cases, the Texas Court of Appeals determined that the petitioners did not establish that they were entitled to mandamus relief from the orders. Id. Further, the Texas Supreme Court denied the Petition for

Writ of Mandamus in Feinberg. Thus, it is undisputed that the identities of potential defendants in defamation actions are discoverable under Texas law. These cases are equally compelling when the underlying claims include breach of contract and breach of duty of loyalty to an employer, claims made in the Petition in this case. Accordingly, this Court should enforce the provisions of its previous order requiring the production of the Blogger's identity.

The Blogger argues that there is no procedural mechanism under Texas law to obtain his identity. Any argument that there is no procedure in Texas law to unmask the identity of a person simply because they commit their torts, or breach their contract, anonymously on the internet is contradicted by the Texas cases cited in this and PRMC's previous brief. If the Court accepts the Blogger's argument, anyone can commit any tort or breach any contract and so long as they do so on the internet anonymously, they will never be held liable for their conduct. Texas law, and simple notions of justice, would never sanction this result.

The Blogger also takes issue with the ex parte nature of the Agreed Order. This argument is similarly flawed for a variety of reasons. First, the Agreed Order required SuddenLink to disclose the identity of the Blogger, unless the Blogger objected. SuddenLink consented to the Agreed Order and has not lodged any objection to the procedures set forth in the Agreed Order. Second, because the Blogger's identity was not known, there is no possibility of obtaining a Court order unless that order is obtained without the Blogger's participation. Finally, the Blogger has objected to the disclosure of his identity and been given an opportunity to advance whatever arguments he wants before his identity is revealed. Once again, if the Court accepts the Blogger's argument on the ex parte nature of the Order, those who hide behind anonymous internet postings can never be liable for their wrongful conduct. Justice demands otherwise.

B. A Plaintiff's Right To Prosecute Its Claims Outweighs A Defendant's First Amendment Rights Under Texas Law.

The Blogger argues that this Court should balance his "First Amendment right to anonymity against the Plaintiff's right to fairly assert a claim against a known and discernable target" prior to ordering the production of his identity. See Letter from James R. Rodgers to the Honorable Scott McDowell (September 12, 2007). The Texas Court of Appeals, however, found that plaintiffs' right to assert a claim against a specified group of anonymous individuals outweighs those individuals' First Amendment rights. In In re Maurer, 15 S.W. 3d 256 (Tex. App. 2000), the Court found that the discovery of the identities of those individuals responsible for allegedly defamatory newspaper advertisements was a compelling interest that outweighed the individuals' First Amendment rights. The Court reasoned as follows:

> [Plaintiffs] seek the identity of only a limited group of individuals: those individuals who were responsible for the ads that appeared in the Katy Times. Without this information, [the plaintiffs] cannot prove who defamed them and cannot obtain full redress on their claims. The general purpose of discovery is to allow the parties to obtain full knowledge of the facts and issues prior to trial. [internal citation omitted] This purpose would be completely thwarted if we were to allow relator to shield her answers behind the First Amendment . . ..

Maurer, 15 S.W. 3d at 261. Further, as previously discussed, the Texas Supreme Court and the Texas Court of Appeals have recently refused to grant relief from orders to internet providers requiring the production of anonymous bloggers' identities, which enabled those plaintiffs to prosecute their claims. Thus, Texas law is clear that PRMC's right to assert a claim against the Blogger and the other anonymous defendants outweighs defendants' First Amendment rights.

C. This Court Should Not Adopt A Heightened Standard For The Discovery Of Anonymous Defendants' Identities Which The Texas Supreme Court, The Texas Court Of Appeals, And Other Courts Have Refused To Adopt.

The Blogger urges this Court hold that Texas law requires a heightened standard to weigh his First Amendment right to anonymity against PRMC's right to fairly assert a claim. The

petitioner in Feinberg, however, made the identical argument to the Texas Supreme Court, which was denied. Further, in Maurer, the Texas Court of Appeals weighed the plaintiffs' right to assert their claims through the discovery of defendants' identities against defendants' First Amendment rights without imposing any such heightened standard, and found that the identities were discoverable. Thus, Texas Appellate Courts have had the opportunity to adopt a heightened standard, but have refused to do so. Accordingly, there is no support for any argument that Texas law requires such a standard.

Further, denying PRMC access to the defendants' identities and discovery regarding the statements made would deny legal recourse to victims of defamation and other torts. As one scholar has explained, such heightened standards threaten due process, equal protection, and the right to a trial by jury:

> Though well intentioned, the rush to apply new standards [to discovery issues related to anonymous posters to the Internet] should be slowed. The threat to core First Amendment free speech rights from too readily identifying anonymous speakers is real, and should be taken seriously by the courts. At the same time, however, the new standards offer little real protection for anonymous speech beyond what the courts can provide under existing rules. In exchange for this limited benefit, however, the grafting of new tests onto existing rules threatens to compromise the values protected by other constitutional provisions, including due process, equal protection, and the right to a trial by jury. In particular, application of an out-come determinative heightened discovery standard singles out one class of plaintiffs who are systematically deprived of the litigation procedures, specifically discovery and trial, that are available to other plaintiffs, including plaintiffs with claims that are similar in all regards except that they allege harm by plaintiffs who did not act anonymously.

Michael S. Vogel, Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards, 83 Or. L. Rev. 795, 801 (2004).

In Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development, Inc., No. 0425, 2006 WL 37020, at *8-9, (Pa. Comm. Pl. Jan. 4, 2006), the Pennsylvania Court of Common

Pleas adopted the above reasoning and refused to impose heightened discovery standards. More specifically, the Court stated as follows:

> This court accepts the notion that the implementation of new standards for cases involving plaintiff's efforts to learn the identities of anonymous internet posters will likely do more harm than good. Further, this court believes that a balancing of John Doe's First Amendment rights against the plaintiff's rights to the information is built into our Commonwealth's existing civil procedure.

Klehr Harrison, 2006 WL 37020, at *9.

A finding that Texas law requires a heightened discovery standard would deny PRMC due process, equal protection, and its right to trial by jury. As the Texas Court of Appeals found in Maurer, the "general purpose of discovery is to allow the parties to obtain full knowledge of the facts and issues prior to trial. [internal citation omitted] This purpose would be completely thwarted if we were to allow relator to shield her answers behind the First Amendment . . ..." Maurer, 15 S.W. 3d at 261. Accordingly, this Court should rule consistent with established Texas precedent and find that Texas law does not require a heightened standard for the discovery of defendants' identities.[1] Furthermore, none of the Texas cases required an evidentiary hearing under similar circumstances and any further delay in PRMC's ability to prosecute its lawsuit would be unduly prejudicial.

II. THE CABLE COMMUNICATIONS ACT DOES NOT PREVENT THE DISCOVERY OF DEFENDANTS' IDENTITES.

The Blogger argues that the Cable Communications Act, 47 U.S.C. § 551, et seq., (the "Act") forbids this Court from ordering the production of his identity. More specifically, the Blogger argues that the Act provides a cable internet subscriber protections beyond the requirement that the cable company notify the subscriber of a court order requiring the

[1] PRMC's Petition, standing alone, demonstrates that it is entitled to the requested information under any of the standards imposed in cases outside Texas. If the Court decides to impose some heightened standard and does not believe that PRMC has met that standard with the detailed allegations in the Petition, PRMC requests an opportunity to supplement its filings with the Court.

production of the subscriber's personally identifiable information.[2] The Act, however, does not contain any additional standards or requirements for private litigants in civil actions beyond the notification requirement, which has been satisfied in this matter. While the Blogger argues that the Act's language requiring the government to produce "clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity" to obtain identifying information under the Act, this provision is irrelevant. Congress chose to apply this standard to only the government in criminal proceedings, and not to private litigants in civil proceedings.

The Blogger received notice of the Court's Order as required by the Act and has lodged an informal objection to the production of his identity. He has presented no authority, however, supporting his argument that the Act somehow provides protections beyond those set forth in the Act and PRMC is aware of no such authority. Further, this Court's Order requiring the production of the Blogger's identity is a valid order under Texas law. In fact, as previously discussed, the Texas Court of Appeals has found that it is an abuse of discretion under Texas law to not order the disclosure of the identities of potential defendants in a defamation action. Fepco, 835 S.W. 2d at 253-54. Thus, the notice requirement in the Act has been satisfied and the Court should enforce the provisions of its Order requiring the production of the Blogger's identity.

CONCLUSION

Texas law clearly provides that defendants' identities are discoverable. The Blogger has presented no authority to the contrary. Thus, this Court should enforce the provisions of its prior

[2] The Act provides in pertinent part as follows: "A cable operator may disclose [personally identifiable] information if the disclosure is . . . made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed." 47 U.S.C. § 551(c)(2).

Order requiring the production of the Blogger's identity so that PRMC can serve the Petition on the Blogger and the other defendants and finally proceed with discovery in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Plaintiff's Supplemental Brief in Response to John Doe No. 1's Opposition to Discovery of His Identity on the following parties in accordance with the Texas Rules of Civil Procedure this 12th day of September, 2007.

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15 S.W.3d 256
(Cite as: 15 S.W.3d 256)

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In re Maurer
Tex.App.-Houston [14 Dist.].2000.

Court of Appeals of Texas.Houston (14th Dist.).
In re Jill MAURER, Relator.
No. 14-00-00007-CV.

March 15, 2000.

Relator who was president of citizens' group filed petition for writ of mandamus, claiming that contempt order requiring her to answer certain discovery questions and produce certain documents concerning group members in underlying defamation action violated her First Amendment right to freedom of association. The Court of Appeals, Fowler, J., held that: (1) request for names of members involved in conduct forming basis of defamation action did not seek information protected by First Amendment, but (2) request for all documents concerning group and its members violated First Amendment, warranting partial mandamus relief.

Conditionally granted in part and denied in part.

Edelman, J., concurred in part and dissented in part by separate opinion.

West Headnotes

[1] Mandamus 250 ⚿32

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in Civil Actions in General. Most Cited Cases
Relator's claim that trial court's contempt order in defamation action erroneously required disclosure of information privileged under First Amendment was proper complaint for mandamus review. U.S.C.A. Const.Amend. 1.

[2] Mandamus 250 ⚿3(3)

250 Mandamus
250I Nature and Grounds in General
250k3 Existence and Adequacy of Other Remedy in General
250k3(2) Remedy at Law
250k3(3) k. Acts and Proceedings of Courts, Judges, and Judicial Officers. Most Cited Cases

Mandamus 250 ⚿28

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k28 k. Matters of Discretion. Most Cited Cases
Generally, mandamus relief is available if the trial court violates a duty imposed by law or clearly abuses its discretion, either in resolving factual issues or in determining legal issues, when there is no adequate remedy at law.

[3] Mandamus 250 ⚿4(4)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(4) k. Modification or Vacation of Judgment or Order. Most Cited Cases
When a discovery order potentially violates First Amendment rights, there is no adequate remedy by appeal and mandamus is appropriate. U.S.C.A. Const.Amend. 1.

[4] Mandamus 250 ⚿32

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in Civil Actions in

General. Most Cited Cases
Mandamus is proper when the trial court erroneously orders the disclosure of privileged information which will materially affect the rights of the aggrieved party.

[5] Constitutional Law 92 ⚿1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases
(Formerly 92k91)
Freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚿1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases
(Formerly 92k91)
Compelled disclosure of the identities of an organization's members or contributors may have a chilling effect on the organization's contributors as well as on the organization's own activities, and thus First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases
(Formerly 92k91)
Party seeking to compel disclosure of membership in an organization engaged in the advocacy of particular beliefs must show more than mere relevance, it must show convincingly a substantial relation between the information sought and a subject of overriding and compelling state interest. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases
(Formerly 92k91)

Constitutional Law 92 ⚿1460

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1460 k. In General. Most Cited Cases
(Formerly 92k91)
In determining whether First Amendment precludes disclosure of membership in an association, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to closest scrutiny. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⚿1454

92 Constitutional Law
92XVI Freedom of Association
92k1454 k. Discovery Requests and Subpoenas. Most Cited Cases
(Formerly 92k91)

Pretrial Procedure 307A ⚿40

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak36 Particular Subjects of Disclosure
307Ak40 k. Identity and Location of Witnesses and Others. Most Cited Cases
Discovery request for disclosure of identities of certain members of citizens' group did not seek information protected by First Amendment right to freedom of association, in sheriff's defamation action arising from group's placement of advertisements that brought attention to alleged abuses by sheriff's department, to extent that sheriff sought only names of members who placed advertisements, rather than entire membership of group. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚿1061

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1061 k. Applicability to Governmental or Private Action; State Action. Most Cited Cases
(Formerly 92k82(5))
Court order which compels or restricts pretrial discovery constitutes state action which is subject to constitutional limitations.

[11] Mandamus 250 ⚿168(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 Evidence
250k168(2) k. Presumptions and Burden of Proof. Most Cited Cases
Relator seeking mandamus relief made a prima facie showing that disclosure of citizens' group's membership pursuant to trial court's order would burden her First Amendment rights and those of other members, though relator did not offer any specific evidence of harassment, where members could be subject to subpoena in underlying defamation action arising from group's advertisements, which brought attention to alleged abuses by sheriff's department. U.S.C.A. Const.Amend. 1.

[12] Pretrial Procedure 307A ⚿15

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak14 Nature and Purpose
307Ak15 k. Discovering Truth, Narrowing Issues, and Eliminating Surprise. Most Cited Cases
General purpose of discovery is to allow the parties to obtain full knowledge of the facts and issues prior to trial.

[13] Mandamus 250 ⚿32

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in Civil Actions in General. Most Cited Cases
Discovery request seeking all documents that in any way related to citizens' group and its members sought information protected by First Amendment right to freedom of association, and thus relator was entitled to mandamus relief from contempt order requiring her to comply with that request in sheriff's defamation action arising from group's placement of advertisements bringing attention to alleged abuses by sheriff's department, where sheriff failed to show compelling state interest justifying production of those documents. U.S.C.A. Const.Amend. 1.

***258** Rebecca E. Hamilton, Rockwall, Steven S. Newsom, Houston, for relators.
Tom Alexander, Houston, Hal S. Sumner, Dallas, for respondents.

Panel consists of Justices YATES, FOWLER, and EDELMAN.

MAJORITY OPINION

WANDA McKEE FOWLER, Justice.
This mandamus proceeding arises out of a defamation suit filed by Vonessa and John Beaird against the Harris County Sheriff, Tommy Thomas. Relator, Jill Maurer, a non-party witness in the defamation suit, complains of the trial court's contempt judgment ordering her to answer certain questions and produce certain documents at her deposition. Specifically, she contends that the court's order violates her First Amendment right to freedom of association because it forces her to disclose the identity of members of an organization known as the "Citizens for Oversight Committee" (" the COC"). Because almost all of the answers and documents subject to the court's order do not violate relator's First Amendment rights, we deny mandamus relief in part.

I. BACKGROUND

In March 1999, Vonessa Beaird was arrested by Harris County Deputy Sheriff, John Burton, for driving while intoxicated in the subdivision where she lived. Two months later, the Harris County District Attorney dropped the charges against Mrs.

Beaird on insufficient evidence grounds. During a three-month period following Mrs. Beaird's arrest, the Katy Times published a series of ads run by the COC. Some of these ads solicited information from citizens on alleged incidents of abuse by the Harris County Sheriff's Department (HCSD). Other ads described specific incidents of alleged abuse by the HCSD against unidentified individuals, including individuals later identified as Mrs. Beaird and relator. In response to an ad describing one alleged incident, Sheriff Thomas wrote a letter to the editor of the Katy Times, apparently claiming that the HCSD's investigation revealed no wrongdoing.[FN1] The COC replied with an ad addressing alleged falsehoods in the Thomas letter and identifying Mrs. Beaird and Deputy Burton as the parties involved in the alleged incident. Based on the Thomas letter, the Beairds filed a defamation suit in the 61st Judicial District Court of Harris County against Sheriff Thomas, in his individual capacity. Sheriff Thomas counterclaimed for defamation against the Beairds, and Deputy Burton intervened, also asserting defamation against the *259 Beairds. The Beairds eventually nonsuited their claims against Sheriff Thomas, but not before giving their deposition.

FN1. Although the Thomas letter is not part of the mandamus record, other documents in the record refer to the content of that letter.

When questioned during their depositions, the Beairds professed little knowledge of the COC or the ads. Aside from identifying relator as the President of the COC, the Beairds could not identify any other members of the COC or anyone who supplied information for the ads, wrote the ads, delivered the ads to the Katy Times, or paid for the ads. At her own deposition taken in the presence of the trial court,[FN2] relator refused to answer these same questions or to produce documents under a subpoena *duces tecum* on grounds that they would require her to disclose members of the COC in violation of her First Amendment right to freedom of association.

FN2. Because of notice and discovery disputes, relator's deposition was taken in the courtroom.

On January 12, 2000, based on relator's refusal to answer questions or comply with the subpoena, the trial court entered a "judgment of contempt and order of commitment." The court ordered relator " to appear in the jury deliberation room of the 61st Judicial District Court on Friday, January 14, 2000 at 9:00 a.m." and ordered the Sheriff of Harris County to take custody of relator and hold her in the jury deliberation room until she (1) answered the questions propounded to her during her deposition, and (2) produced documents responsive to the subpoena *duces tecum*. The following day, relator filed this petition for writ of mandamus and motion for emergency relief. Because the court's order does not require relator to appear in the event that she sought mandamus relief, we denied relator's request for emergency relief. Responses filed solely by the respondent, the presiding judge of the 61st District Court of Harris County, request sanctions against relator. Because this proceeding does not warrant sanctions, we now deny the respondent's request.

II. MANDAMUS

[1] At the outset, we note that relator raises two issues: (1) "whether the identity of members of the [COC] is privileged information protected from discovery," and (2) "whether a party can be confined in the custody of an adverse party." Because relator does not brief this second issue, we need not address it.[FN3] In fact, while relator was found in contempt, she does not seek relief by writ of habeas corpus. Instead, characterizing the underlying matter as a discovery dispute, relator seeks relief solely by writ of mandamus.

FN3. At oral argument, relator's counsel stated there was no time to brief this issue because the petition for writ of mandamus had to be filed "literally overnight." This proceeding has been pending for more than one month and submitted on oral

argument. Although relator filed a supplemental petition, she has yet to address the "confinement" issue.

[2][3][4] Generally, mandamus relief is available if the trial court violates a duty imposed by law or clearly abuses its discretion, either in resolving factual issues or in determining legal issues, when there is no adequate remedy at law. *See Walker v. Packer,* 827 S.W.2d 833, 839-40 (Tex.1992). When, as here, a discovery order potentially violates First Amendment rights, there is no adequate remedy by appeal and mandamus is appropriate. *See In re Bay Area Citizens Against Lawsuit Abuse,* 982 S.W.2d 371, 375 (Tex.1998). Mandamus is also proper when the trial court erroneously orders the disclosure of privileged information which will materially affect the rights of the aggrieved party. *See Walker,* 827 S.W.2d at 843. Here, relator complains that the trial court's order erroneously compels her to disclose information privileged under the First Amendment. This is a proper complaint for mandamus review.

III. FIRST AMENDMENT CLAIM

A. Standard of Review

*260 [5][6][7][8] Relator contends that the information sought at her deposition by Sheriff Thomas and Deputy Burton required her to disclose the identity of members of the COC in violation of her First Amendment right to freedom of association. Freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. *See Bay Area Citizens,* 982 S.W.2d at 375 (citing *NAACP v. Alabama,* 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)). Compelled disclosure of the identities of an organization's members or contributors may have a chilling effect on the organization's contributors as well as on the organization's own activities. *See id.* at 375. For this reason, the First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs. *See id.; see also Tilton v. Moye,* 869 S.W.2d 955, 956 (Tex.1994). The party seeking to compel disclosure must show more than mere relevance, it "must show convincingly a substantial relation between the information sought and a subject of overriding and compelling state interest." *See Bay Area Citizens,* 982 S.W.2d at 381 n. 10 (quoting *Ex parte Lowe,* 887 S.W.2d 1, 3 (Tex.1994)). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to closest scrutiny." *Bay Area Citizens,* 982 S.W.2d at 375-76 (quoting *NAACP,* 357 U.S. at 460-61, 78 S.Ct at 1171).

B. The Discovery Order

[9][10][11] Turning to the discovery order, we first observe that "a court order which compels or restricts pretrial discovery constitutes state action which is subject to constitutional limitations." *See Kessell v. Bridewell,* 872 S.W.2d 837, 841 (Tex.App.-Waco 1994, orig. proceeding). We also observe that relator has made a prima facie showing that disclosure of the COC's membership pursuant to the trial court's order will burden her First Amendment rights and those of other members. *See Bay Area Citizens,* 982 S.W.2d at 376.[FN4] This prima facie showing ordinarily would shift the burden of proof to Sheriff Thomas and Deputy Burton to demonstrate that the information they seek is substantially related to a compelling state interest. *See id.* at 378. However, the respondent has not briefed the issue of whether a compelling state interest justifies the discovery sought in the underlying case. More importantly, save for one exception discussed below, we find that the discovery sought ***261** by Sheriff Thomas and Deputy Burton does not violate relator's First Amendment rights.

FN4. In *Bay Area Citizens,* the Texas Supreme Court noted that the burden of showing harm to First Amendment associational rights must be light and that "

> the evidence offered need show only a reasonable probability that the compelled disclosure of [members'] names will subject them to threats, harassment, or reprisals from either government officials or private parties." *Bay Area Citizens,* 982 S.W.2d at 376 (quoting *Buckley v. Valeo,* 424 U.S. 1, 74, 96 S.Ct. 612, 661, 46 L.Ed.2d 659 (1976)). "The proof may include specific evidence of past or present harassment of members due to their associational ties or of harassment directed against the organization itself." *Id.* Although relator has not offered any specific evidence of harassment, *Bay Area Citizens* recognizes that potential infringement on an association's First Amendment rights may exist even in the absence of a factual record of harassment. *See id.* at 377. The court cited cases holding that the mere potential for reprisals, even if only perceived by the party seeking protection, may be sufficient to show an infringement on First Amendment rights and that it is the task of the court to evaluate the likelihood of any chilling effect. *See id.* Because the ads taken out by the COC in the Katy Times brought public attention to alleged abuses by the HCSD, relator concludes that disclosure of the identity of the COC members will subject them to subpoena in the underlying lawsuit and to fear of potential retaliation by the very law enforcement agency they claim is abusive. *See Tilton,* 869 S.W.2d at 956 (ministry claimed that court order requiring it to produce list of contributors would infringe on contributors First Amendment rights by subjecting them to threat of subpoena for questioning).

[12] In *Tilton,* the Texas Supreme Court recognized the importance of open discovery even in the face of a claim of First Amendment associational rights. *See* 869 S.W.2d at 957. While the court never stated that the interest in open discovery is a compelling one, it concluded that such an interest might justify disclosure of narrow limited groups of individuals based on a particularized showing of need. *See id.* Here, Sheriff Thomas and Deputy Burton do not seek the membership or contributor list of the COC nor are they otherwise attempting to discover the identity of members or contributors of that organization. Instead, they seek the identity of only a limited group of individuals: those individuals who were responsible for the ads that appeared in the Katy Times.[FN5] Without this information, Sheriff Thomas and Deputy Burton cannot prove who defamed them and cannot obtain full redress on their claims. The general purpose of discovery is to allow the parties to obtain full knowledge of the facts and issues prior to trial. *See id.* This purpose would be completely thwarted if we were to allow relator to shield her answers behind the First Amendment when the information now sought does not inquire about membership in the COC and thus, does not violate relator's right to freedom of association. Accordingly, in this proceeding, to the extent that Sheriff Thomas and Deputy Burton seek answers to specific deposition questions about the composition and placement of the ads rather than membership in the COC, we hold they are entitled to those answers. That includes answers on who wrote, or collaborated in writing, the ads, where the collaborators met, who supplied information for the ads, who paid for the ads, and who delivered the ads to the Katy Times.

> FN5. A review of relator's deposition confirms that while initial questions inquired about the the formation and membership of the COC, counsel for Sheriff Thomas and Deputy Burton, for the most part, abandoned that inquiry and focused solely on the ads.

[13] Except for request number four of the subpoena *duces tecum,* we find that the requests seek information that relates to either the "Beaird incident," the subsequent investigation, or the placement of the ads and therefore, are not protected by the First Amendment.[FN6] Sheriff Thomas and Deputy Burton are not, however, entitled to any documents that relate to the COC or its members as sought in request number four because this request seeks membership information

protected by the First Amendment and Sheriff Thomas and Deputy Burton have failed to show a compelling state interest justifying production ***262** of these documents.[FN7] Accordingly, we conditionally grant the writ of mandamus to the extent the trial court's order requires relator to produce the documents in request number four.[FN8] In this regard, the writ will issue only if the trial court does not comply. To the extent the trial court's order requires relator to answer deposition questions concerning the identity of those individuals responsible for the ads, we hold that such information is not protected by the First Amendment and deny mandamus relief.

FN6. The subpoena *duces tecum* requested:
1. Any and all documents, photographs, and audio or videotapes that show, depict, refer or pertain to Tommy Thomas and/or Deputy John Burton.
2. Any and all reports, writings, correspondence, and/or documents provided to or forwarded to any agency, entity or organization that in any way relate to or pertain to Tommy Thomas, Deputy John Burton or the arrest of Vonessa Beaird on March 17/18 , 1999.
3. Any and all reports, writings, correspondence, and/or documents received from any agency, entity, or organization that in any way relate or pertain to Tommy Thomas, Deputy John Burton or the arrest of Vanessa Beaird on March 17/18 , 1999.
4. Any and all documents that in any way relate to the [COC] and/or its members.
5. Any and all documents supplied to the governor's office or in any used to compile or create the documents supplied to the governor's office referred to in the advertisement in the Katy Times on July 25, 1999, by the [COC] as the *Special Report to the Governor's Office on Police Corruption.*
6. Any documents in any way relating to Department of Public Safety (DPS) review of the incident as alleged in the July 25, 1999, [COC] advertisement in the Katy Times.
7. Any documents that show which individuals supplied money for the placement of or which individuals paid for the placement of advertisements in the Katy Times by the [COC].

FN7. As we noted, the respondent does not brief this issue, but instead argues only that the First Amendment does not protect defamatory speech. Because the merits of the underlying defamation action are not before us in this mandamus proceeding, we need not address this issue. For the same reason, we need not address relator's contention that the Noerr-Pennington doctrine bars the underlying defamation action. *See generally RRR Farms, Ltd. v. American Horse Protection Ass'n, Inc.*, 957 S.W.2d 121, 126-29 (Tex.App.-Houston [14th Dist.] 1997, writ denied).

FN8. Contrary to the dissent's conclusion, Sheriff Thomas and Deputy Burton have not abandoned all of their discovery requests. Even if they had, there remains a valid court order requiring relator to comply with discovery, including request number four.RICHARD H. EDELMAN, Justice, concurring and dissenting.

I concur with the majority opinion that disclosure of the identity of the individuals who were involved in placing the allegedly defamatory ad does not violate First Amendment rights. However, contrary to the majority opinion, I do not believe that relator made a prima facie showing that disclosure of COC membership information will burden First Amendment rights. In particular, as in *Buckley,*[FN1] and as distinguished from the facts of *Bay Area Citizens,*[FN2] relator has offered no factual, non-speculative evidence of a reasonable probability of reprisal (other than that those who were involved in placing the ad will be made parties to the lawsuit). Therefore, relator has not demonstrated an abuse of discretion by the trial court and is not entitled to mandamus relief.

FN1. *See Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

FN2. *See In re Bay Area Citizens Against Lawsuit Abuse,* 982 S.W.2d 371, 376-78 (Tex.1998).

Nevertheless, respondent's brief states clearly that disclosure of COC membership information, as such, is no longer sought by Thomas and Burton:
This case [*N.A.A.C.P. v. Alabama*] is not applicable to the case at bar where the identity of members will not be asked for.... Here, respondents merely want to know the identity of those persons who were involved in fabricating and publishing defamatory statements about them so they can be made parties prior to the running of the statute of limitations.... Here, Thomas and Burton need to know only the identity of those persons, be they members or not, who contributed to the defamatory publications.... The government is not attempting to compel the identity of members of an organization, individuals are trying to find out who defamed them.
[T]he identities of the members of the [COC] will not be sought.... This is all Thomas and Burton seek, the identity of the persons who participated in the conduct complained of. Whether or not they were members of the [COC] doesn't matter, and won't be inquired about.

Because these statements effectively abandon any request for membership information, as such, there is no longer any live controversy concerning disclosure of that information, and the issue concerning it is now moot. Thus, rather than include an advisory and, I believe, questionable, analysis of that issue, I would simply hold that no issue remains as to disclosure of the membership information and advise the trial court that the portion of the order compelling compliance with document request***263** number four should be withdrawn accordingly.

Tex.App.-Houston [14 Dist.],2000.
In re Maurer
15 S.W.3d 256

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(Cite as: 835 S.W.2d 251)

C

Fepco, LTDA., v. Coussons
Tex.App.-Hous. [1 Dist.],1992.

Court of Appeals of Texas,Houston (1st Dist.).
FEPCO, LTDA., Relator,
v.
The Honorable Charles COUSSONS, Judge of County Civil Court at Law Number 4 of Harris County, Texas, Respondent.
No. 01-92-00753-CV.

July 28, 1992.

Plaintiff in defamation action sought writ of mandamus with respect to discovery. The Court of Appeals, First District, held that plaintiff was entitled to require defendants to divulge identity and location of all persons having knowledge of relevant facts and potential parties, including names of "reliable sources" from whom defendant who authored allegedly defamatory memorandum claimed to have obtained allegedly defamatory information.

Ordered accordingly.

West Headnotes

[1] Mandamus 250 ⚿32

250 Mandamus
250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in Civil Actions in General. Most Cited Cases

Court of Appeals may direct writ of mandamus to issue against trial court to correct clear abuse of discretion in discovery proceedings; this is true not only where trial court order improperly grants discovery, but also where trial court improperly limits or denies discovery.

[2] Pretrial Procedure 307A ⚿40

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak36 Particular Subjects of Disclosure
307Ak40 k. Identity and Location of Witnesses and Others. Most Cited Cases

Plaintiff in defamation action was entitled to require defendants to divulge identity and location of all persons having knowledge of relevant facts and potential parties, including names of "reliable sources" from whom defendant who authored allegedly defamatory memorandum claimed to have obtained allegedly defamatory information. Vernon's Ann.Texas Rules Civ.Proc., Rule 166b, subds. 2, par. d, 3, par. e.

[3] Mandamus 250 ⚿4(1)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(1) k. In General. Most Cited Cases

For purposes of rule that mandamus will not lie when there is adequate remedy by appeal, appeal is not adequate remedy where party's ability to present viable claim at trial is vitiated or severely compromised by trial court's discovery error.

[4] Mandamus 250 ⚿4(4)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(4) k. Modification or Vacation of Judgment or Order. Most Cited Cases

Plaintiff in defamation action did not have adequate remedy by appeal from trial court's refusal to require defendants to divulge identity and location of all persons having knowledge of relevant facts and potential parties, including names of "reliable sources" from whom one defendant claimed to have obtained allegedly defamatory information, and therefore was entitled to seek mandamus relief; plaintiff would not have option of bringing case

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against these "sources" unless discovery was allowed.

*252 Yocel Alonso, Houston, for relator.
William W. Ogden, Houston, for respondent.

Before OLIVER-PARROTT, C.J., and MIRABAL and JONES, JJ.

OPINION

PER CURIAM.

This motion for leave to file petition for writ of mandamus concerns the discoverability of the names of individuals with knowledge of facts relevant to the underlying lawsuit who may also be potential parties in that lawsuit.

Relator is the plaintiff in a defamation action against W.F. "Bill" Joyce (Joyce) and Masx Energy Services Group, Incorporated (Masx). The action arose from the discovery of an allegedly defamatory memorandum authored by Joyce. In the memorandum, Joyce refers to "several reliable sources" from whom he obtained the allegedly defamatory information used to compose the memorandum. Relator has made several attempts to obtain the names of the "several reliable sources," who presumably will have knowledge of facts relevant to relator's claims against Joyce and Masx and who may also be future defendants in the case. Joyce and Masx have successfully resisted relator's attempts to obtain the names, culminating in the respondent's denial of relator's motion to compel disclosure.

Relator asks us to command respondent to do the following: (1) rescind his order denying the motion to compel disclosure; (2) order Joyce and Masx to immediately disclose the identity and location of those persons having knowledge of the relevant facts and potential parties; (3) order Joyce and Masx to re-answer certain interrogatories; and (4) order Joyce and Masx to immediately produce documents described in certain requests for production.

*253 [1] We may direct a writ of mandamus to issue against a trial court to correct a clear abuse of discretion in a discovery proceeding. *Barker v. Dunham,* 551 S.W.2d 41, 42 (Tex.1977). This is true not only where a trial court order improperly grants discovery, but also where a trial court improperly *limits* or *denies* discovery. *Lindsey v. O'Neill,* 689 S.W.2d 400, 402 (Tex.1985).

Tex.R.Civ.P. 166b(2)(d) states in relevant part as follows:

A party may obtain discovery of the identity and location (name, address and telephone number) of any potential party and of persons having knowledge of relevant facts. A person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter.

Tex.R.Civ.P. 166b(3)(e), which concerns any matter protected from disclosure by any privilege other than work product, expert, witness statement, or party communication, states that nothing in it " shall be construed to render non-discoverable the identity and location of any potential party [or of] any person having knowledge of relevant facts."

[2] The effects of these two rules were summed up by the Texas Supreme Court in *Giffin v. Smith,* 688 S.W.2d 112, 113 (Tex.1985):

Rule 166b, subd. 2 d specifically makes discoverable the identity and location of persons having knowledge of relevant facts. The final paragraph of Rule 166, subd. 3 expressly states that none of the exemptions from discovery contained in that division of Rule 166b shall be construed to render nondiscoverable the identity and location of any person having knowledge of relevant facts. The exemptions from discovery recognized in Rule 166b, subd. 3 include any matter protected from disclosure by privilege. *The plain language of Rule 166b thus makes it clear that information concerning the identity and location of persons having knowledge of relevant facts can never be protected from discovery.*

(emphasis added.)

Giffin, in fact, is a case on point. There, the plaintiff in a slander action sought a writ of mandamus directing the trial court to vacate its order overruling his motion to compel answers to

deposition questions and to enter an order compelling answers to those questions. *Id.* The plaintiff had deposed the vice-president of a corporate defendant concerning his knowledge of certain allegedly slanderous statements. *Id.* The vice-president refused to answer the questions, including two questions requesting the identities and locations of persons having knowledge of relevant facts regarding the plaintiff's alleged acceptance of kickbacks. *Id.* This allegation was the subject of the slander action. *Id.* The basis of the vice-president's refusal to answer the questions was that the information sought was privileged. *Id.*

After discussing the applicability of the above-mentioned rules, the court held as follows:
The [two] questions at issue herein requested only the names and addresses of all persons having knowledge of relevant facts regarding Giffin's alleged receipt of kickbacks. *The trial court clearly abused its discretion in refusing to compel answers to these two questions.*

Id. (emphasis added.)

Although this case concerns interrogatories and requests for production instead of deposition questions, we hold likewise. We can conceive of no rationale for a different holding in a case involving discovery that is written rather than oral, when a party is entitled to discover evidence through any proper means that it chooses.

Finding *Giffin* and the above-quoted rules on point, we hold that the trial court abused its discretion in not ordering Joyce and Masx to divulge the identity and location of all persons having knowledge of relevant facts and potential parties.

[3][4] We also hold that relator does not have an adequate remedy by appeal. An appeal is not an adequate remedy where ***254** the party's ability to present a viable claim at trial is vitiated or severely compromised by the trial court's discovery error. *Walker v. Packer,* 827 S.W.2d 833, 843 (Tex.1992) . Here, it would be impossible for relator to present a viable claim against the "several reliable sources" for defamation if relator were to choose to do so; without the names of those "sources," relator would never know against whom to *file* its claim. Relator cannot consider bringing claims against the "sources" when it does not know who they are. As the *Walker* court noted, "a denial of discovery going to the heart of a party's case may render the appellate remedy inadequate." *Id.* Here, relator will not even have the choice of whether to *bring* a case against the "sources" unless the discovery is allowed.

We conditionally order respondent to order Joyce and Masx to immediately disclose the identity and location of all persons having knowledge of the relevant facts and potential parties. We are confident that respondent will comply with this order, and a writ of mandamus will issue only if he fails to do so.

We decline to order respondent to order Joyce and Masx to otherwise re-answer any interrogatories or comply with any requests for production. However, we urge the respondent to reconsider his ruling on these matters in light of this opinion.

Tex.App.-Hous. [1 Dist.],1992.
Fepco, LTDA. v. Coussons
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