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SUPREME COURT OF TEXAS
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No. 15-0903

IN THE
SUPREME COURT OF TEXAS

IN RE STATE FARM LLOYDS,
Realtor,

ORIGINAL PROCEEDINGS FROM THE
206TH JUDICIAL DISTRICT OF HIDALGO COUNTY, TEXAS
THE HONORABLE ROSE GUERRA REYNA PRESIDING
CAUSE NO. C-3828-13-D

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

J. Steve Mostyn
State Bar No. 00798389
THE MOSTYN LAW FIRM
3810 W. Alabama Street
Houston, TX 77027
Telephone: 713.714.0000
Facsimile: 713.714.1111
jsmostyn@mostynlaw.com

COUNSEL FOR REAL PARTIES IN INTEREST, ALEJOS RAMIREZ AND OFELIA RAMIREZ

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

RULES

INTRODUCTION

This is one of two essentially identical mandamus proceedings (No. 15-0903 & 15-0905) filed by Relator State Farm Lloyds (State Farm) in first-party insurance cases arising out of hailstorms that occurred in Hidalgo County in 2012. Real Parties in Interest, Alejos Ramirez and Ofelia Ramirez, are homeowners who sued State Farm over the way their claims were handled. Respondent, the Honorable Rose Guerra Reyna, is the trial judge in this case as well as the judge appointed to oversee pretrial proceedings in claims against State Farm Lloyds in MDL-14-0169. The particular discovery dispute at issue here is the manner in which electronically stored information (ESI) should be produced.

STATEMENT OF FACTS

Over the course of about a year, representatives of the parties met roughly a dozen times in an attempt to negotiate a protocol for the production of ESI. (APP_A0082) When an agreement could not be reached on the protocol, Real Parties filed a motion for entry of their ESI protocol. (APP_B0001-12).

The court held an evidentiary hearing, at which Darren Autry, a catastrophe team manager for State Farm, testified regarding State Farm's Enterprise Claim System ("ECS"). (APP_A0026) Mr. Autry testified that the ECS system basically contains the claim file, or at least significant elements of it. (APP_A0029, 33) Mr. Autry's testimony generally covered what kinds of documents are put into the ECS

system and how they are accessed, but he was a fact witness did not provide expert testimony on the burdens of producing ESI. That testimony was provided by Tim Opsitnick. Sort of.

Mr. Opsitnick opined that State Farm's proposed ESI protocol was sufficient and consistent with what a lot of courts were doing. (APP_A0060-79) However, he did not know things like where State Farm kept its documents, and he only presumed that State Farm Fire and Casualty maintained the claim adjuster documents for State Farm Lloyds. (APP_A0065) He also did not know the trial court had entered essentially the same ESI protocol in MDLs involving approximately 35 other carriers (and the same judge), and that the Texas Windstorm Insurance Association litigation, which involved 10,000 hurricane Ike cases, also involved native format production protocols. (APP_A0074) When it came to explaining exactly why Real Parties' ESI protocol was supposedly so burdensome, his testimony was, as the court of appeals put it, "conclusory." (APP_F0014) For instance, while State Farm says producing color documents in color is unreasonably burdensome, Mr. Opsitnick was unable to describe how or why it would be burdensome other than referring to the processes State Farm had already set up—he simply said "it's burdensome." (APP_A0078)

Real Parties' expert, Craig Ball, testified that the proposed ESI protocol in this case was substantially the same as those MDL protocol used in prior MDLs.

(APP_A0081). To the extent there were changes, they were made to accommodate State Farm's demands. (APP_A0081). Mr. Ball worked with Lloyds' representatives at least a dozen times over a year regarding native production in an effort to find common ground. (APP_A0082)

In describing the importance of production in native form, Mr. Ball discussed a particular database that was being shown to the court, and testified that the database on the screen before the court was in the same native form as State Farm uses everyday by its employees, which allowed them to search by fields of information. (APP_A0083) Mr. Ball testified that it was essential to have such information in native form because it enabled one to search by a field code or field value. (APP_A0083)

State Farm's proposed ESI protocol would essentially allow it to not produce anything in native form if they chose not to and allowed it to substitute severely downgraded forms of documents. (APP_A0082-83) It would take all such fielding functionality away, which is the structure of the data that allows one to find only those types of matters that have a particular characteristic, and would "flatten," or destroy, all of this ability by producing instead what is the electronic equivalent of a print out. (APP_A0083) Such flattened production is not searchable or sortable by field, and is a much more expensive form to use, and the downgrading and flattening of the information impairs its searchability.. (APP_A0083)

Went through various forms of ESI, explaining for each how production in non-native form degrades their function. For instance, using an Excel spreadsheet as an example, Mr. Ball explained how the heart of the spreadsheet is the formula behind the cells, and when the spreadsheet is reduced to a TIFF, even a TIFF image that has a searchable load file will not contain the formulas, nor can the structure and relationship of the data or hidden rows or hidden fields be observed. (APP_A0084) Similarly, Word documents include track changes, red lined versions and comments, functionality that people often use in working with Word documents. (APP_A0084) Such editing and commentary is common in preparing corporate directives and training materials, and people reviewing such documents will often comment to one another and add and delete language. (APP_A0084) Regarding Powerpoints, there are animations and information off screen and layers of dynamic information that are not depicted in a static printout of a slide, and static printouts of slides will not contain speaker notes. (APP_A0085) Mr. Ball testified that it is State Farm's practice to remove this type of information as if it never existed and instead produce a flattened version preventing such information from being seen. (APP_A0085)

With regard to the production of documents in color, Mr. Ball described the difficulty in determining from a black and white version whether the original document was in color. (APP_A0084) For instance, it is difficult to ascertain whether an original document contained highlighting or red text to show that some text may have a different meaning than blue text. (APP_A0084-85) Mr. Ball stated that Real Parties requested documents in color in circumstances in which color is used to communicate information, and not for things like State Farm's red logo. (APP_A0085) Mr. Ball explained that State Farm did not have to do anything extra to produce a document in color due to it already being in color because it is intrinsic to the document, meaning, the cost of production is less. (APP_A0085)

Mr. Ball also testified about why converting a document to TIFF is more expensive than native production, about the information lost in such a transfer, and about why non-native production costs many times more for a plaintiff to use than it costs State Farm. (APP_A0084-86) Mr. Ball testified that the process to downgrade the information into a non-native form is what is expensive. (APP_A0088)

Mr. Ball also observed that State Farm Lloyds failed to present the court with any evidence or information concerning what the expense would be to produce information in native format. (APP_A0089) Mr. Ball testified that it would not be more expensive for State Farm to produce information in native format because that

is the form in which they keep the information in their usual course of business. (APP_A0089) Mr. Ball also noted that the defense lawyers for State Farm use of the program Casecentral, indicating that they had gone to native production for their review of documents, while when State Farm produces information to a plaintiff it changes the form to a much less utile form, stripping out a lot of information making it significantly less searchable. (APP_A0084, 87)

By requesting production in native form, Mr. Ball explained that Real Parties are only asking State Farm to produce the materials as they are kept which does not require State Farm to process the documents for Real Parties. (APP_A0086) This native production could be accomplished simply by downloading the information to a thumb drive or external hard drive, so the request for native format does not impose any additional duties on State Farm; it simply asks it not to dumb down or downgrade the data for production. (APP_A0086) Mr. Ball testified that requiring State Farm to produce materials in native form requires fewer steps and would not require any of the extraordinary steps State Farm is currently suggesting would be required. (APP_A0087)

Mr. Ball also testified that TIFF documents are inherently unsearchable, so, under State Farm's proposal, inherently searchable native

materials would be transferred into an inherently unsearchable TIFF format. (APP_A0087) In such situations, a method must be created in order to conduct searches, a process which injects significant error into the searchability process. (APP_A0087)

Mr. Ball could not recall anything from his review State Farm's witness testimony and other evidence that demonstrated extraordinary steps, significant cost or process burden that would prevent State Farm from producing its materials in native form. (APP_A0087) Mr. Ball explained to the court that Real Parties simply want the relevant documents in the same form as used by State Farm yet State Farm seeks to produce the materials in a form that it does not even use. (APP_A0087) Thus, if State Farm has a PDF document in their file, Real Parties are not asking State Farm to conduct any kind of digital analysis to determine the documents' electronic counterpart, just to provide the information in the form in which it exists at State Farm. (APP_A0088)

The trial court found Real Parties' arguments and evidence more persuasive, and ordered that production of ESI be conducted in accordance with Real Parties' requested protocol. (APP_D00001-06) State Farm filed a mandamus petition in the Corpus Christi Court of Appeals, asserting that the Texas rules gave it the option to produce ESI in what it considered "reasonably usable forms" regardless of the form requested by Real Parties, and that the district court abused its discretion in adopting

Real Parties ESI protocol. The court of appeals issued a well-reasoned memorandum opinion denying mandamus relief (APP_F0001-15)

ARGUMENT

I. LEGAL STANDARD APPLICABLE TO MANDAMUS ACTIONS

Because mandamus is an "extraordinary remedy," it is available only in limited circumstances when necessary to "correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law." *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996). The burden of establishing an abuse of discretion is placed on the relator, and the burden is a heavy one. *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994).

A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable that amounts to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). The reviewing court may not substitute its judgment for that of the lower court—even if the reviewing court would have decided the matter differently—unless the lower court's decision is arbitrary and unreasonable. *Id.* at 840.

An appellate court may not resolve factual disputes in a mandamus proceeding. *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006). If the relator seeks to overrule a court's decision based on factual issues or matters committed to the trial

court's discretion, the relator must show the trial judge could have reached only one decision under the facts. *Walker*, 827 S.W.2d at 839–840.

II. PROPRIETY OF DISTRICT COURT'S ACTIONS

A. The district court's order is consistent with Rule 196.4 and this Court's precedent.

Rule 196.4 provides:

> To obtain discovery of data or 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. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business.* If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. *If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.*

TEX. R. V. P. 196.4 (emphasis added). Thus, if the requesting party seeks ESI in its native form, the responding party is to produce the ESI in native format. If the responding party objects because it is unable, through reasonable efforts to retrieve the information or produce it in the form requested, the rule does not give the responding party a pass on an adequate response in the form requested. The rule merely provides a cost shifting provision to the requesting party.

State Farm asserts that Rule 196.4 does not mean what the plain language says, and that the district court's order conflicts with the 1999 Rulemaking History,

which says that the requesting party must specify the form in which it wants the data produced, "[o]therwise, the responding party need only produce the data available in the ordinary course of business in reasonably usable form" (APP_H0006) State Farm's suggestion that the responding party's desire to produce in what it deems "reasonably usable form" trumps the requesting party's right to specify the form of production is exactly the opposite of what the history, and the plain language of Rule, say. The word "otherwise" means that what follows comes into play only where the requesting party fails to specify the form in which it wants the data produced. Where, as here, the requesting party has specified the desired form of production, there is no "otherwise."

State Farm's view of Federal Rule 34(b) and its rulemaking process are similarly divorced from reality. State Farm asserts that Rule 34(b) was modified in the rule-making process "to ensure it could not be used as a 'cudgel' to require 'native' filed production." The legislative history included in the appendix (APP_J0008-09) doesn't quite say that. What it actually says is that some commentators "expressed concern that 'a form ordinarily maintained' required 'native format ' production," which might be undesirable as the default form of production for a number of reasons, none of which involved cudgels, and that the alternative of "electronically searchable form" might also exert pressure for native format. In the final version, the default was "in a form or forms in which it is

ordinarily maintained or in a reasonably usable form or forms" which includes the provision that the concerned commentators worried would mean "native format." *See* FED. R. CIV. P. 34(b)(2)(E)(ii). But that is just the default rule, applicable where the requesting party fails to specify the form in which the ESI should be produced. The rule expressly allows the requesting party to "specify the form or forms in which electronically stored information is to be produced." FED. R. CIV. P. 34(b)(1)(C). The responding party can object to the requested form, *see* FED. R. CIV. P. 34(b)(2)(D), but there is nothing in the rule that expresses any hostility to production in native format.

While there may be cases where federal courts have declined to require the production of ESI in native or near native format, there are also a great many cases where courts have required production in native format. *E.g.*, *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 279 F.R.D. 447, 449-50 (S.D. Ohio 2012); *Linnebur v. United Tel. Ass'n*, No. 10-1379-RDR, 2011 U.S. Dist. LEXIS 88456, at *4-7 (D. Kan. 2011); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 108 (E.D. Pa. 2010); *Dahl v. Bain Capital Partners, Inc.*, 655 F. Supp. 2d 146, 150 (D. Mass. 2009); *In re Netbank, Inc. Secs. Litig.*, 259 F.R.D. 656, 681-82 (N.D. Ga. 2009); *Covad Communs. Co. v. Revonet, Inc.*, 254 F.R.D. 147, 151 (D.D.C. 2008); *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, 586 F. Supp. 2d 1250, 1264 (D. Kan. 2008); *see also Bray & Gillespie Mgmt. LLC v. Lexington*

Ins. Co., 259 F.R.D. 568, 585-86 (M.D. Fla. 2009) (finding that ESI converted to TIFF images and made searchable through OCR was not a reasonably usable format under Rule 34); *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 655 (M.D. Fla. 2007) (highlighting the importance of searching functions and the utility of native formats); *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No. 04 C 3109, 2006 U.S. Dist. LEXIS 10838, at *8-9 (N.D. Ill. 2006) (finding TIFF images inadequate); *In re Verisign Sec. Litig.*, No. C 02-02270 JW, 2004 U.S. Dist. LEXIS 22467, at *1 (N.D. Cal. 2004) (defendants required to produce documents in native format despite protestation that they were prepared to produce the documents in TIFF format, and claimed that it would be unduly burdensome to convert them back).

Real Parties would also point out that *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350 (S.D.N.Y. 2008), which State Farm relies on for the proposition that native files need not be produced, does not support the relief sought in State Farm's prayer. Specifically, State Farm asks the Court to direct the district court to enter an order providing that text-searchable static images constitute a reasonably usable format. While the court in *Aguilar* declined to require production of some documents in native format, the court was quite clear that static image files alone were not sufficient, and that they had to be produced with the appropriate metadata. *See id*. at 353-364. Also, in *Aguilar*, the plaintiff failed to request native

format in its initial document request, and only made the request after the defendants had substantially completed their document collection efforts. *See id*. at 352-53. That makes a difference. *See id.* at 357-58 (observing that courts generally require production of metadata when it is sought in the initial document request, and citing cases where production in native for was required when included in the initial request). And that is not the case here.

State Farm's reliance on *Covad Communs. Co. v. Revonet, Inc.*, 267 F.R.D. 14, 20 (D.D.C. 2010), is similarly misplaced. The court merely said that native format is not "absolutely obligatory," and under the circumstances of that case--where the plaintiff sought metadata for documents that had been produced years before, and there had been a change in defendant's counsel in the meantime, and the original files had not been saved as an aggregate; and tracking back the originals would be time-consuming, if not impossible, and the plaintiff offered *no* explanation for why it needed the metadata to analyze the documents it already had—and in view of the requirements of Rule 1, the court declined to compel require the defendant to attempt to reconstruct the files. Again, the authority relied upon by State Farm bears no resemblance to the situation presented in this case.

That leaves *Dizdar v. State Farm Lloyds*, No. 7:14-CV-523 (S.D. Tex. Jan. 7, 2015) (APP_K0001-28), in which Judge Alvarez declined to adopt an ESI protocol like the one Judge Reyna entered in this case. With all due respect to Judge Alvarez,

there is no reason to suppose that she has a better grasp on what sort if discovery is relevant in a case of this nature than a judge who has presided over literally thousands of these cases in multiple MDLs, or that Judge Alvarez's resolution of any conflicts in the evidence somehow trumps Judge Reyna's, or that Judge Alvarez's three page analysis of the issue is superior to the analysis of the three justices of the court of appeals.

In its Issue 1, State Farm complains that the district court's order "mandates specific forms of production absent a novel showing of 'infeasibility,'" or that it "eliminates all other objections under the civil rules." These complaints are not addressed in the court of appeals opinion because State Farm did not raise them there. Since State Farm has not offered any compelling reason for its failure to include them in its petition in the court of appeals, Real Parties submit that the Court should not consider them now. *See* TEX. R. APP. P. 52.3(e). That said, there is really nothing to them.

First, there is nothing novel in talking about feasibility in connection with Rule 194.6. Rule 196.4 provides: "If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules." *Id*. In *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009), this Court expressed the "reasonable efforts" requirement in terms of "feasibility." *See id.* at

415-15. In view of the fact that this Court equated "feasibility" with what can be accomplished through reasonable efforts, it could hardly be a clear abuse of discretion for the district court to do likewise.

Second, State Farm claims in its Statement of Facts that the ESI protocol allowed for production in near native format if native production is infeasible, but "barred all other objections under the civil rules." While the ESI protocol does not contemplate repeated relitigation of the form of production of ESI, there is nothing in the ESI protocol about "barr[ing] all other objections under the civil rules." (*See* APP_D0002-06)

State Farm also complains that the ESI protocol requires database information be produced in "delimited electronic format," which, State Farm asserts, is a bad thing. However, the only evidence State Farm cites in its Petition regarding the merits or lack thereof of production in delimited electronic format is a reference to Mr. Ball's testimony giving his " views on the theoretical benefits of 'native' and 'delimited electronic format' file productions." (Petition at 6)

Finally, State Farm asserts that its "proactive" efforts to convert potential litigation materials in its preferred format for production should preclude Real Parties from obtaining the documents in the form requested. These are not documents as kept in the regular course of State Farm's business; they are litigation documents prepared on State Farm's own initiative and not in response to any

document request by Real Parties. The fact that it chose to prepare documents in a form not requested by Real Parties is no basis for denying Real Parties the right to have the ESI produced in the form they specify. *See ISK Biotech Corp. v. Lindsay*, 933 S.W.2d 565, 569 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) (discovery request will not result in an undue burden when the burden of responding to it is the result of the responding party's own "conscious, discretionary decisions"). Simply because State Farm might have produced ESI in a static format in other cases does not dictate how ESI should be produced in this case on the present record. After all, other carriers in similar litigation produce ESI in native format when requested. State Farm's antiquated production methods of the past should not hold hostage the more efficient and usable processes adopted by the trial court in the present case particularly in light of technological advances that have made native production ubiquitous.

B. State Farm has not demonstrated any undue burden.

State Farm asserts that the trial court's order violates the proportionality requirement of Texas Rule of Civil Procedure TEX. R. CIV. P. 192.4 because it supposedly proved that the mere entry of the ESI protocol somehow imposed some huge burden and expense on it. Never mind the fact that the district court had experience with essentially the same ESI protocols with other insurers in other cases,

and would surely have known if those protocols were really as burdensome as State Farm claimed.

Furthermore, as the court of appeals correctly observed, State Farm did not present any actual evidence of the cost of complying with the ESI protocol, and only offered conclusory assertions regarding the burdens. (APP_F0013-15) On the other hand, as detailed in the statement of facts and in the court of appeals' opinion, Real Parties did provide evidence, in the form of Mr. Ball's expert testimony, regarding Real Parties need to have ESI produced in the form requested and the that complying with the ESI protocol would not be unreasonably burdensome. (*See* APP_F0011-12, 15)

While State Farm now claims Mr. Ball's testimony lacked an evidentiary foundation (a claim that is not supported by the record), Mr. Ball testified without any objection either to his qualifications or the basis for his opinions. (APP_A0081-94) State Farm's counsel stipulated to his qualifications and even said that he "give[s] referrals to Craig—for work on this stuff." (APP_A0090) State Farm's expert also acknowledged that Mr. Ball is an "accomplished author and lawyer" who has spent years focusing on discovery of ESI. (APP_A0061) If State Farm thought there was a problem with Mr. Ball's testimony, it had an obligation to lodge a timely objection. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998); *In re HEB Grocery Co., L.P.*, 375 S.W.3d 497, 501 (Tex. App.—Houston [14th Dist.]

2012, orig. proceeding) ("The failure of the trial court to sustain an objection not made could not provide a basis for mandamus relief.").

Also, Real Parties would point out that the ESI protocol only says how ESI is to be produced when requested. And when information subject to the ESI protocol is requested, the parties are required to confer and make reasonable efforts to resolve disputes. (APP_D0003) If Real Parties were to insist on something that really did require exceptional steps, State Farm could ask the trial court to require Real Parties to pick up the tab under Rule 196.4.

III. STATE FARM HAS AN ADEQUATE REMEDY.

Finally, mandamus is not available where there is an adequate remedy at law. *In re Dallas Morning News*, 10 S.W.3d 298, 307 (Tex. 1999). "Mandamus will issue only in situations involving manifest and urgent necessity and not for grievances that may be resolved by other remedies." *Id.* The burden of establishing the inadequacy of a remedy at law is placed on the relator, and it is "'a heavy one.'" *Canadian Helicopters*, 876 S.W.2d at 305.

State Farm says it has no adequate remedy based on the alleged burden of providing ESI in the form requested by Real Parties. It does not, however, address the remedy set out in Rule 196.4. Unlike other discovery rules, Rule 196.4 incorporates a cost-shifting provision, which provides for an order "that the requesting party pay the reasonable expenses of any extraordinary steps required to

retrieve and produce the information." Nothing in the ESI Protocol purports to deprive State Farm of its ability to come to the court and seek costs under Rule 196.4 if they actually demonstrated extraordinary steps were necessary. As Mr. Ball pointed out at the hearing, Rule 196.4 would give the producing party would have the right to seek cost-shifting under *any* protocol. (APP_A0089) That is an adequate remedy. *See In re Waste Mgmt. of Tex., Inc.*, 392 S.W.3d 861, 877 (Tex. App.—Texarkana 2013, orig. proceeding).

CONCLUSION AND PRAYER

On the present record, it is not plausible that the trial court clearly abused its discretion in entering the ESI protocol. Real Parties therefore respectfully request that State Farm's mandamus petition be denied.

Respectfully submitted,

/s/ J. Steve Mostyn___
J. Steve Mostyn
State Bar No. 00798389
jsmostyn@mostynlaw.com
THE MOSTYN LAW FIRM
3810 W. Alabama Street
Houston, TX 77027
Telephone: 713.714.0000
Facsimile: 713.714.1111

COUNSEL FOR REAL PARTIES IN INTEREST, ALEJOS RAMIREZ AND OFELIA RAMIREZ

CERTIFICATION

I certify that I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ J. Steve Mostyn___
J. Steve Mostyn

CERTIFICATE OF COMPLIANCE

I certify that this Response to Petition for Writ of Mandamus complies with the typeface and word-count requirements set forth in the Rules of Appellate Procedure. This Response to Petition for Writ of Mandamus has been prepared using Microsoft Word, in 14-point Times New Roman font for the text and 12-point Times New Roman font for any footnotes. This response contains 4487 words, as determined by the word count feature of the word processing program used to prepare this document (Microsoft Word), excluding those portions of the petition exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ J. Steve Mostyn___
J. Steve Mostyn

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded to all counsel of record via hand delivery, USPS, CMRR, electronic service, and/or facsimile on this the 8th day of February, 2016.

The Honorable Rose Guerra Reyna
Hidalgo County Courthouse
206th Judicial District Court
100 N. Closner
Edinburg, Texas 78539

Respondent

Brian M. Chandler
RAMEY, CHANDLER, QUINN & ZITO, P.C.
750 Bering Drive, Suite 600
Houston, Texas 77057

David R. Stephens
LINDOW STEPHENS TREAT L.L.P.
One Riverwalk Place
700 N. St. Mary's St., Suite 1700
San Antonio, Texas 78205

Mollie C. Nichols
REDGRAVE LLP
601 Pennsylvania Avenue, NW
Suite 900 - South Building
Washington, D.C. 20004

Counsel for Petitioner

/s/ J. Steve Mostyn___
J. Steve Mostyn