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## **Briefing Beyond Words**

*How to use visuals to enhance your written advocacy  
and transform your briefs*

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## BRIEFING BEYOND WORDS

### I. Introduction

From the dawn of written legal advocacy until just a few decades ago, legal briefs were written by a scrivener's pen or by a typewriter or other mechanical writing device, technologies that did not permit effective use of visual images. Even as word processing technology emerged and improved in the late 20<sup>th</sup> century and early 21<sup>st</sup> century, tradition and attorney inertia has led to a significant underutilization of photos and other images in legal briefs (the same inertia that still leads some attorneys to conclude their briefs with "Wherefore, premises considered...").<sup>1</sup>

With an influx of a media-savvy generation of younger lawyers into practice, a revolution in digital technology, the enormous proliferation of photographs and images in social and traditional media, and the explosion of tablets and laptops, the age of visual advocacy has arrived. For decades, trial lawyers have understood the importance of visuals in persuading a jury. Now, appellate lawyers are learning that visuals can be just as powerful a tool for a judicial audience.

This paper's use of the word "visual" encompasses most forms of advocacy that go beyond the plain written text, including photographs, images, animations, charts, graphs, tables, maps, and the like.

Before filing any brief in the trial or appellate court, a lawyer should ask herself whether any portion of her argument could be enhanced or simplified through the use of a visual. This paper is intended to help answer this question.

### II. Why visuals are effective

The science is undeniable. Using visuals in combination with words provides the target audience with a cognitive boost that aids in the comprehension, retrieval and recollection of the presented information.<sup>2</sup> Studies show that "the average listener retains 10% of information presented in text form; 20% of information presented in audio/verbal form; and 30% of information presented in visual form. When information is presented in both a visual and audio form, the retention rate jumps to 50%."<sup>3</sup> Visually presented information is "more memorable

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<sup>1</sup> See generally Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1699-1723 (2014) (discussing a few uses of visuals in the pre-word processing era, the lingering barriers to visual use in the digital age, and the forces that are rapidly eroding those barriers).

<sup>2</sup> See Haig Kouyoumdjian, *Learning Through Visuals*, PSYCHOL. TODAY, July 20, 2012, available at <http://www.psychologytoday.com/blog/get-psyched/201207/learning-through-visuals> ("The research outcomes on visual learning make complete sense when you consider that our brain is mainly an image processor (much of our sensory cortex is devoted to vision), not a word processor."); see also *infra* note 3 at 247-64.

<sup>3</sup> Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237, 289 (2010) (internal citations omitted).

because it is vivid, defined as ‘emotionally interesting, concrete and imagery-provoking, and proximate in a sensory, temporal, or spatial way.’”<sup>4</sup>

Using visuals in briefs also is advantageous because it conforms with how we are consuming information outside the legal setting—in newspapers and magazines, through the Internet, and via social media. “By presenting legal arguments in a multimodal, multisensory format, attorneys present information in the way that we have become accustomed to receiving it.”<sup>5</sup>

That is why Judge Richard Posner has urged appellate advocates to “[w]herever possible, use pictures, props (for example, trademarked items in a trademark case), maps, diagrams, and other visual aids, in your brief or at argument. Seeing a case makes it come alive to judges.”<sup>6</sup> Legal writing guru Bryan Garner agrees, urging lawyers to “[u]se charts, diagrams, and other visual aids when you can.”<sup>7</sup>

### **III. How to use visuals effectively.**

To obtain examples of effective visuals, I surveyed my colleagues at Haynes and Boone, other Texas appellate practitioners and a few appellate judges. I also attempted to find examples via Westlaw or other search engines, with a minimal degree of success. (I would welcome any suggested examples from those reading this paper, which I could include in an “Appendix 2.0”).

This survey culminated in the attached appendix, which is organized by category of visual, as explained below. (Appendix items will be referred to by their tab numbers, from Tab A-1 though Tab H-7.) Some of the visuals are more effective than others. Most of these visuals were prepared by lawyers, most of whom lack any type of training in visual presentation or persuasion.<sup>8</sup> Appellate lawyers could learn from their trial lawyer brethren, who often hire professional consultants or companies that specialize in preparing visuals for juries.

In the sections below, I will highlight a few examples of each type of visual and offers some thoughts about in what contexts they might be most helpful. From my survey, I have identified are a few overarching lessons.

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<sup>4</sup> *Id.* at 290 (quoting Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. OF PERSONALITY ASSESSMENT 659 (1985).

<sup>5</sup> *Id.* at 291.

<sup>6</sup> Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge’s Views*, 51 DUQ. L. REV. 3, 38 (2013).

<sup>7</sup> BRYAN GARNER, *THE WINNING BRIEF* 328 (2d ed. 2004).

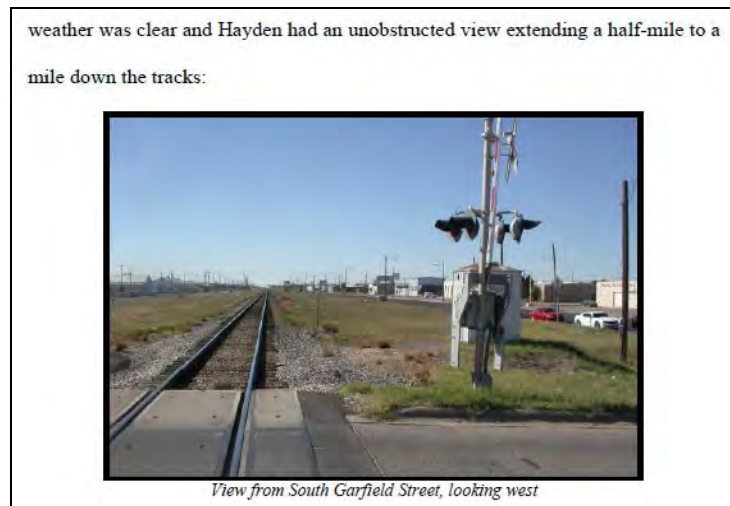
<sup>8</sup> For lawyers on a tight budget, one author recommends using TrialLine for timelines and Piktochart for other graphics. See Joseph Regalia, *An Eye for Legal Writing: Five Ways Visuals Can Transform your Briefs and Motions*, Appellate Advocacy Blog (May 25, 2019), available at [https://lawprofessors.typepad.com/appellate\\_advocacy/2019/05/developing-an-eye-for-legal-writing-five-ways-visuals-can-transform-your-briefs.html%20](https://lawprofessors.typepad.com/appellate_advocacy/2019/05/developing-an-eye-for-legal-writing-five-ways-visuals-can-transform-your-briefs.html%20).

First, craft each visual with the care you take with the text of your brief. Consider different alternatives. Ask colleagues for their opinions on which format is most effective. Continue to try to edit and improve the visual, as you would the rest of your brief. Ascertain whether the visual advances your argument or is merely decorative and thus potentially distracting. If the visual is misleading in any way, it will harm your credibility with the court, just as an improper record cite would.

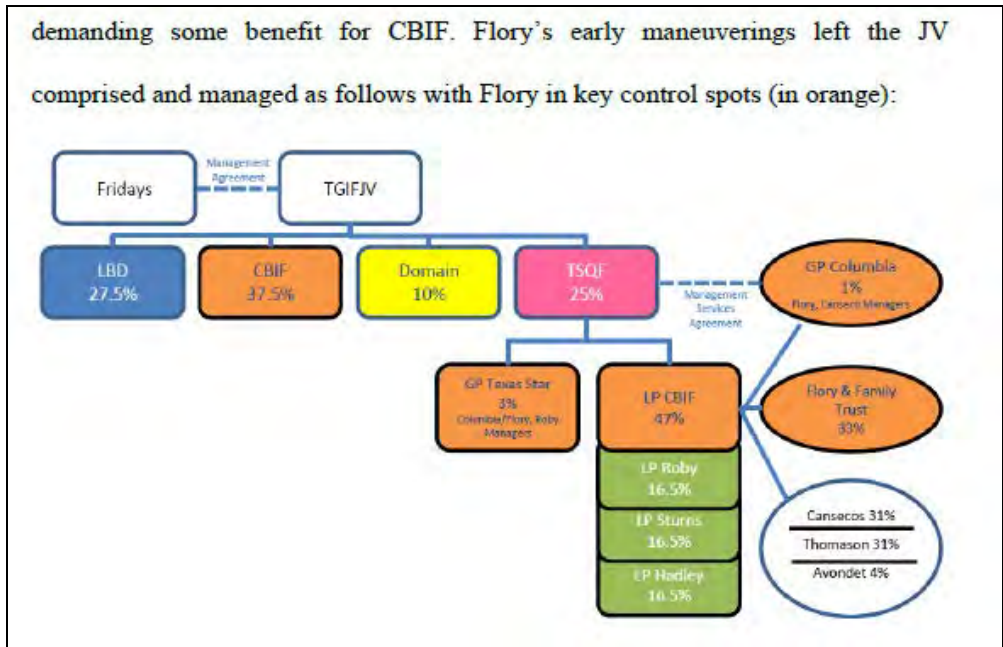
Second, as a general rule, embed the visual in the text of your brief, rather than include it in an appendix. The point is to have the visual reinforce the text and not force a judge or a clerk to toggle back and forth between the body of the brief and the appendix. While stashing a visual in an appendix may have been necessary in the era of page limits, that is not the case today.

Third, visuals should simplify your argument, not make it more complex. Visuals that have too many words or try to cram in too many concepts are often counterproductive because they distract the reader or divert attention from the flow of your argument.

Fourth, also as a general rule, you should try to frame the significance of the visual in the sentence or paragraph immediately preceding it, to give the reader a cue as to what he or she should be looking for. A good example can be found at Tab A-7, where this photo is preceded by a sentence explaining that the plaintiff truck driver had an unobstructed view extending a half-mile when he attempted to cross a train track with an approaching train.

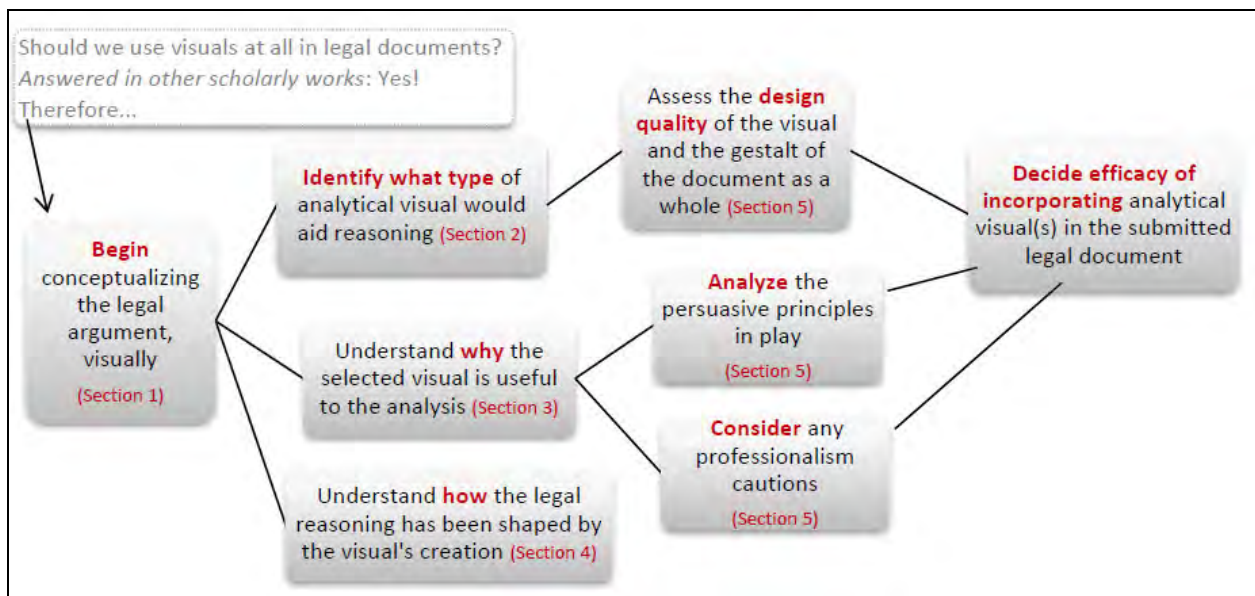


Fifth, it is particularly effective to use color in graphs, charts, etc. to help break up long, monotonous blocks of black and white text. Color can be important tool to show contrasts, similarities, or relevant groupings. In Tab G-4, for example, the author uses color to show the appellant's control of key levers of a joint venture.



Sixth, in deciding whether to include a visual, remember that you are still addressing an appellate court, not a jury. Including a picture of a deceased plaintiff to generate sympathy or outrage is the equivalent of making a jury argument to the Texas Supreme Court.

Two scholars offer this helpful roadmap, linked to the sections of their article, for deciding whether to use a visual in a brief:<sup>9</sup>



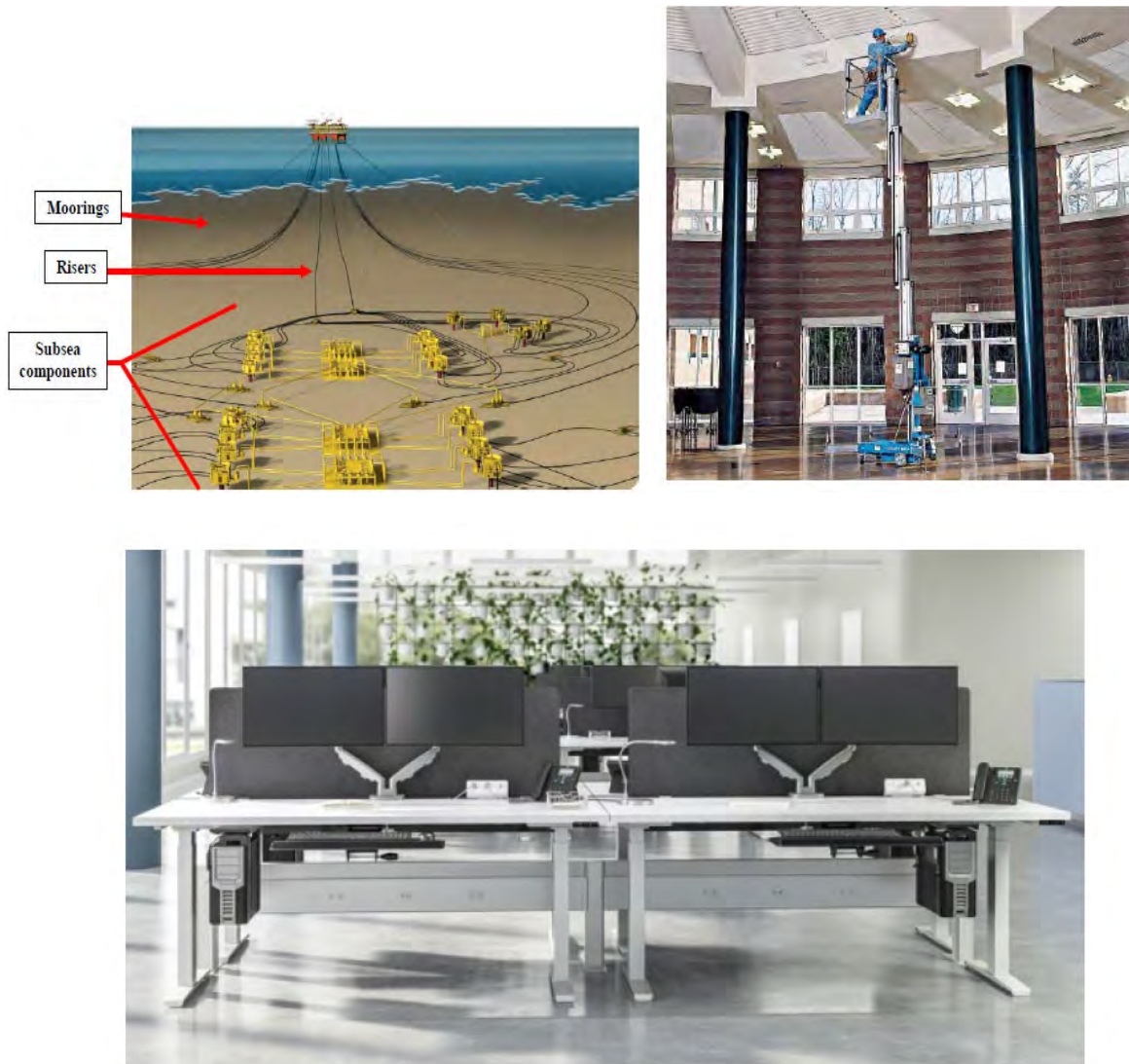
<sup>9</sup> See Steve Johansen & Ruth A. Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 J. OF THE LEG. WRITING INST. 57, 66 (2015), available at <https://rucore.libraries.rutgers.edu/rutgers-lib/51109/PDF/1/play/>.

Below, I explore how to effectively use visuals by category.

**A. Photos, images, animations and other recreations**

Photographs, images, and animations can help orient the reader to the matter in issue, to visualize an accident scene, to make a key comparison, or to understand the factual narrative in a more memorable or powerful way.

In any case involving a complex product or piece of machinery, photographs can provide needed context to the readers, as can be seen in the examples in Tab A-1 (offshore drilling platform), Tab A-2 (aerial work platform)<sup>10</sup>, or Tab A-6 (power beam for desks).



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<sup>10</sup> The Texas Supreme Court included one such image of the aerial work platform in its opinion. (Tab A-2.)

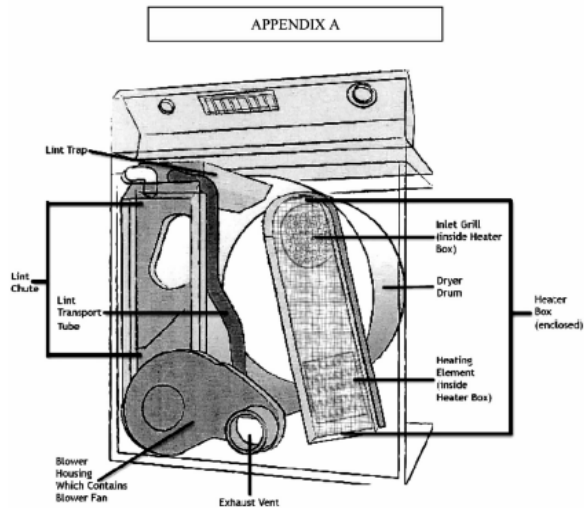
This visual context is particularly important in products liability and negligent design cases. (See, e.g., Tabs A-2, A-3 & A-5.) More than a decade ago, I was one of the lawyers representing Whirlpool in a products liability case, *Whirlpool v. Camacho*, 298 S.W.3d 631 (Tex. 2009), in which the plaintiff claimed that a design defect in a dryer caused a fatal fire. A crucial piece of evidence at trial was an exemplar version of the dryer, but the dryer could not exactly be shipped to the Texas Supreme Court for review and inspection. Even more problematically, the trial lawyers repeatedly pointed to parts of the exemplar dryer during the expert-centered trial, but the testimony was impossible to decipher based on a cold read of the record. Our solution was to hire a company to develop interactive animations of the dryer—one that showed all the parts of the dryer and another that showed how air flowed through the dryer (a showing critical to our defensive theory). We sought and were granted leave to include these animations in an e-brief that followed our paper submission. Below are a few still photos taken from these animations (Tab A-5).



We knew the animation was effective when the Texas Supreme Court included the following image in its unanimous opinion in Whirlpool's favor (Tab A-5).<sup>11</sup>

<sup>11</sup> 298 S.W.3d at 644.





Photographs and images are particularly important in all types of intellectual property disputes—patent, copyright, and trademark—to compare or contrast the litigants’ products, marks, or other IP. (See, e.g., Tabs A-10, A-11, A-12 and A-13.) Below are key trial demonstratives from the *Apple, Inc. v. Samsung* dispute that Apple repurposed for its U.S. Supreme Court brief, making the visual case that Samsung copied Apple’s iPhone (Tab A-12):

Rather than innovate, Samsung copied. *E.g.*, CA-JA25487, 41414-41416. Before the iPhone, Samsung’s mobile phones resembled walkie-talkie-like boxes with bulky antennas and keyboards, as the following trial demonstrative showed:



CAJA24679. After Apple announced the iPhone, Samsung’s phones transformed—in only “three months” of design, CAJA42538-42539—into sleek, streamlined, narrow rectangles that mimicked the iPhone’s distinctive appearance:



CAJA24681.

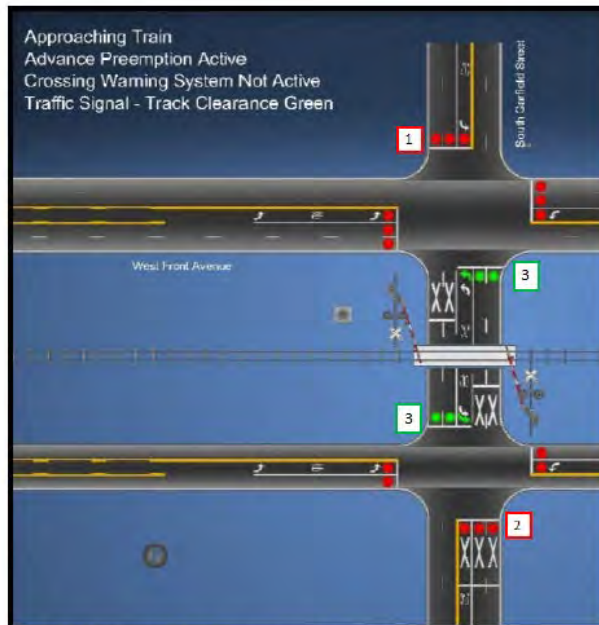


CAJA90143. As Apple’s design expert testified, these similarities were “beyond coincidental,” CAJA41409—they were intentional copying. This was confirmed at

Courts have been known to use photographs for similar effect. Seventh Circuit Judge Richard Posner included these photos side-by-side in affirming the district court's rejection of the plaintiff's trademark infringement claim.<sup>12</sup>



Photographs, images, and animations can also be used to reconstruct important events, like accidents, as in the picture on page 3 describing the truck driver's view of a rail crossing, or in the image below describing the safety features in place at the same rail crossing (Tab A-7).



*Garfield crossing, showing traffic signals as a train approaches*

Finally, photographs and images can be powerful rebuttals to an opponent's factual narrative. In Tab A-9, a series of photographs from a surveillance video played at trial showed the plaintiff operating heavy equipment despite his claims that his injuries had left him too disabled to work.

<sup>12</sup> *Baig v. Coca-Cola Co.*, 607 Fed. App'x 557, 559 (7th Cir. 2015).



In another case (Tab A-8), the photo of the plaintiff's clean boots was shown to undercut the theory that the plaintiff's fall was caused by an abundance of mud at his worksite.



Photographs were also used to great rhetorical effect in an amicus brief defending a display of a monument of the Ten Commandments at the Texas State Capitol, by depicting other prominent displays of the Decalogue (Tab A-15):

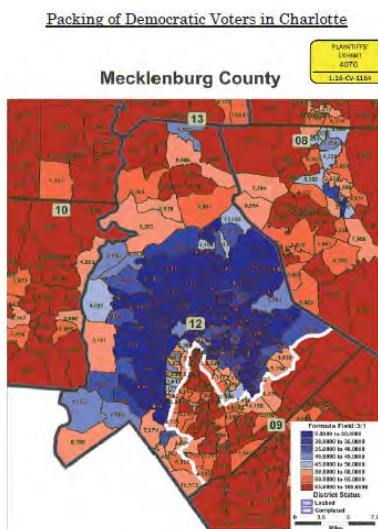
Indeed, Decalogue imagery graces the homes of all three Branches of our federal government. Moses and the Ten Commandments appear on both the south frieze of the courtroom in which this Court sits and the pediment of the Court's building:

For example, in the Main Reading Room of the Library of Congress stands a large bronze statue of Moses holding the Ten Commandments:



## B. Maps

The insertion of maps in a brief can be indispensable if you need to convey spatial or locational points. The Appendix contains examples of maps being used in boundary or title disputes (Tabs B-1, B-6), property tax disputes (Tabs B-2, B-3), a dispute over whether a lease agreement was maritime in nature (Tab B-4), challenges to the drawing of political districts (Tab B-5), a nuisance case (Tab B-7), and a fiduciary duty dispute arising out of several real estate transactions (Tab B-8). Maps are also particularly helpful in oil and gas litigation to show location of wells in relation to lease lines, boundaries of pooling units, and the like (Tab B-9.) Examples from Tabs B-4 and B-5 are depicted below:



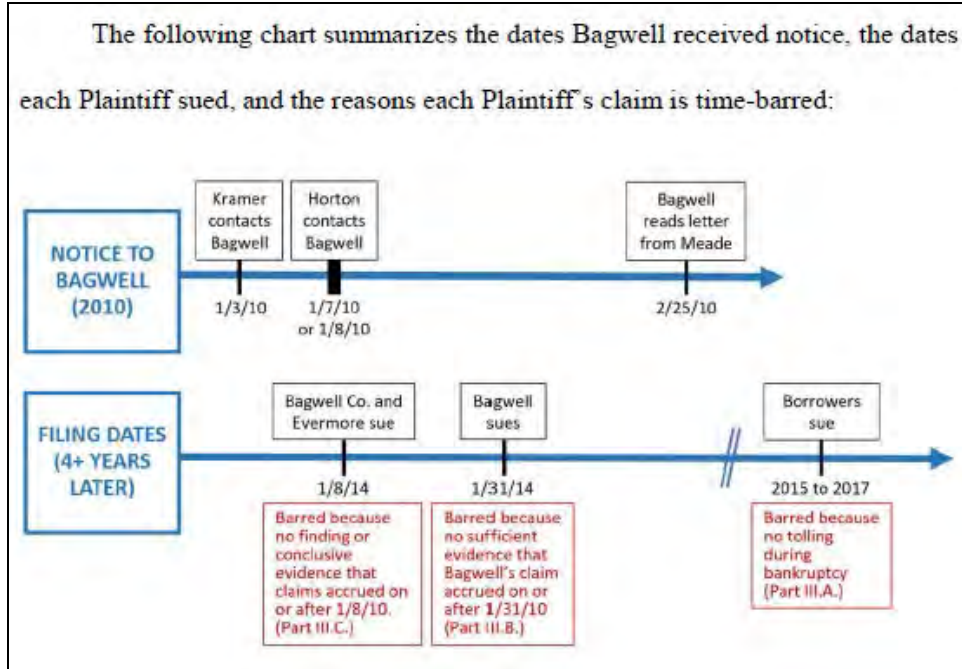
North Carolina's second-largest city, Raleigh, is another model of packing. As displayed below, virtually every Democratic precinct in Wake County is wedged into District 4. District 2's portion of Wake County is composed almost exclusively of Republican precincts. J.A. 302. Hofeller thus expected District 4 to



This Exhibit shows that the clear majority of the real property used by OSG (about 74%) was for outside storage, parking, office, and warehouse space. OSG

**C. Timelines**

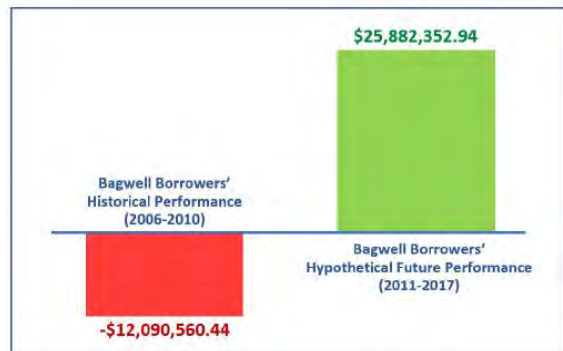
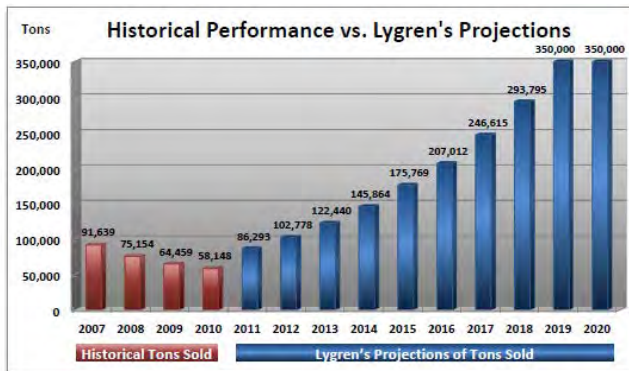
Timelines—a favorite tool of trial lawyers—can be a helpful visual device to explain a complex chronology of events. The examples in the appendix were used to bolster statute of limitations arguments (Tabs C-1, C-2) and to argue that a party’s extensive litigation conduct waived its right to arbitrate (Tab C-3). The Tab C-1 timeline is reproduced below:



**D. Graphs and Charts**

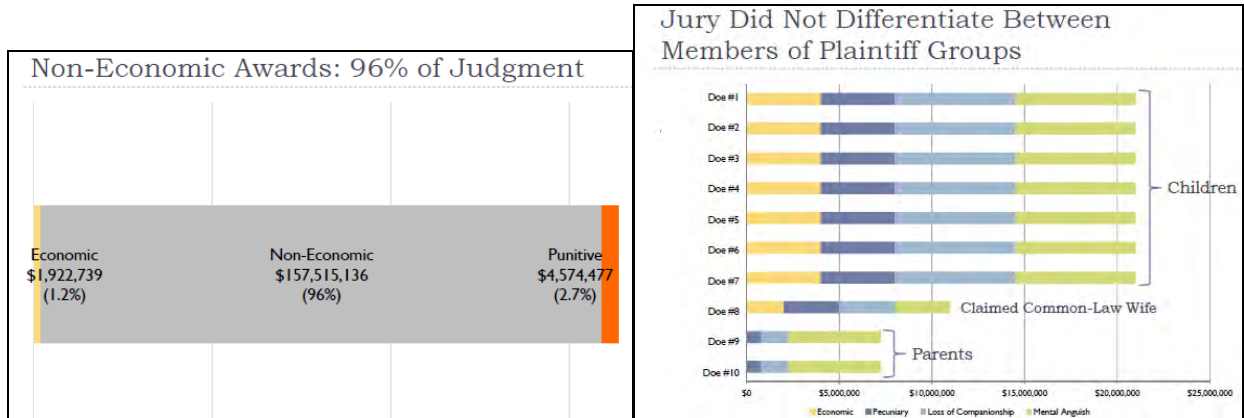
Graphs and charts are invaluable tools to organize information and show patterns and relationships between variables over space and time.

These tools are particularly useful in the damages context. (*See, e.g.*, Tabs D-1, D-2, D-6, D-9). The following examples (Tabs D-1, D-9) attempt to show that a damages expert’s factual assumptions are at odds with historical reality:

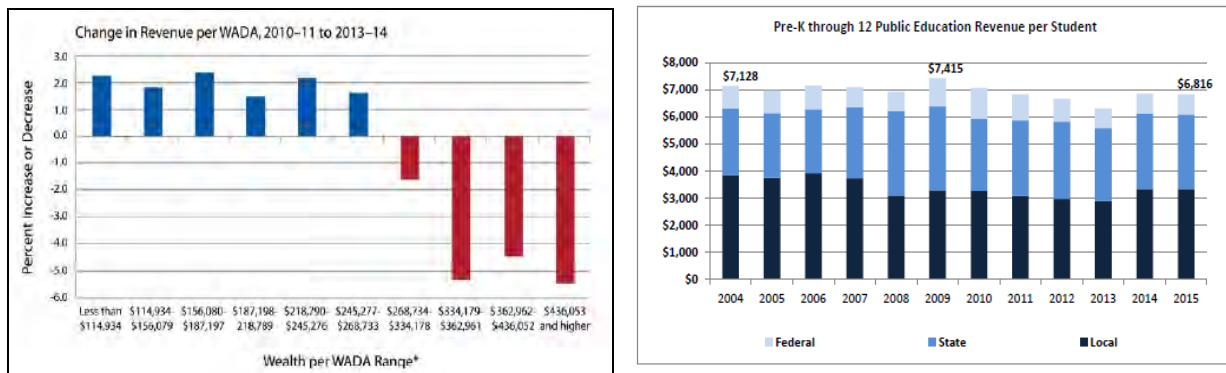


It is true that a litigant could explain these discrepancies between an expert’s assumptions and the historical facts in written text. But graphs allow a reader to visualize and understand the data in a much more visceral way.

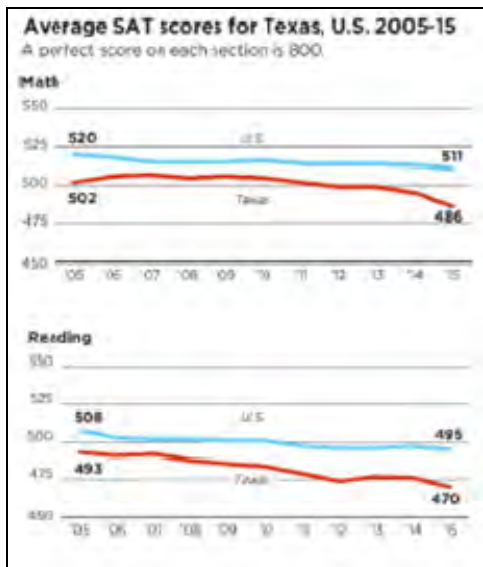
The following graphs were used to urge a reduction in the jury damages awards in a post-trial hearing, but certainly would have featured prominently in an appellate brief had the case not settled. (Tab D-6).



Graphs and charts are indispensable in any data-intensive case. One such case I was involved in was the school finance lawsuit,<sup>13</sup> which involved an overwhelming amount of data about student test scores, school district and state-level academic performance, levels of district and state funding, and the impact of budget cuts on different categories of districts. The charts and graphs in Tabs D-4, D-7, and D-8 come from the Texas Supreme Court briefing in that case, with a few selections below.



<sup>13</sup> *Morath v. Texas Taxpayer, et al.*, No. 14-0776 (Tex. 2016).



**E. Tables**

Tables, while less visually alluring than graphics, can be effective and flexible tools for appellate advocates in a wide variety of contexts.

They can be used to summarize or contrast the relevant caselaw, as in the examples at Tabs E-2 and E-9 (the latter depicted below):

The two courts reached conflicting decisions in interpreting substantively identical retained acreage clauses, as the following chart makes clear.<sup>15</sup>

	<i>Endeavor v. Discovery Operating</i>	<i>XOG v. Chesapeake</i>
<b>Key language in retained acreage clause</b>	“lease shall automatically terminate as to all lands... save and except those lands ... located within a governmental proration unit assigned to a well”	“Said lease shall revert to Assignor, save and except that portion of said lease <i>included within</i> the proration or pooled unit of each well”
<b>Court Holding</b>	The leases terminated as to all acreage that was not included in certified proration plats (P-15) filed with the Commission.	The majority concluded that Chesapeake retained the maximum acreage allowed to be included within proration units (320 acres per well), irrespective of what Chesapeake actually designated on its P-15 filings.

They can be used to guide a court’s decision-making in a complex appeal (Tab E-1):

**Pathways to Reversal and Rendition (R/R)**

<i>VHSC/Pike Appellate Arguments</i> ↓	Claim: Breach of Management Agreement against Pike \$1M	Claim: Tortious Interference with Management Agreement against VHSC \$ 7M	Claim: Trade Secret Misappropriation against VHSC/Pike \$ 1.5M	Permanent Injunction
No standing (Part I.A)	R/R	R/R		
Acquired rights (Part I.A-B)	R/R	R/R	R/R	R/R
No competent evidence of damages <sup>1</sup> (Part II.A)	R/R	R/R	R/R	
No evidence of causation (Part II.B)	R/R	R/R	R/R	R/R
Failure to appeal trade secret damage ruling (Part II.C)			R/R	
One-Satisfaction Rule <sup>2</sup> (Part II.D)	R/R	R/R	R/R	
No protectable trade secret (Part III.A)			R/R	R/R
Dispositive trial court findings: of no imminent harm/cannot presume harm (Part III.B)				R/R
Adequate remedy at law (Part III.C)				R/R



**BRIEFING BEYOND WORDS**

They can be used to explain a complicated judgment (Tab E-7):

	<b>Actual Damages</b>	<b>Represents</b>	<b>Prejudgment Interest</b>	<b>Punitive Damages</b>	<b>TOTAL</b>
<b>Broughton</b> (Bagwell Borrower)	\$ 2,149,671 <u>\$ 439,994</u> <b>\$ 2,589,665</b>	Lost profits on sale of 22 lots Bankruptcy expenses	\$322,259	\$1,784,000	<b>\$4,695,924</b>
<b>Broadland</b> (Bagwell Borrower)	\$ 2,604,503 <u>\$ 481,841</u> <b>\$ 3,086,344</b>	Lost profits on sale of 36 lots Bankruptcy expenses	\$138,674	\$2,128,000	<b>\$5,353,018</b>
<b>Old Grove</b> (Bagwell Borrower)	\$ 3,263,658 <u>\$ 400,000</u> <b>\$ 3,663,658</b>	Lost profits on sale of 48 lots Bankruptcy expenses	\$206,770	\$2,524,000	<b>\$6,394,428</b>
<b>David Bagwell</b> (individually)	\$ 2,482,243 \$ 1,039,720 \$ 167,000 \$ 132,000 \$ 130,000 \$ 11,000,000 <u>\$ 10,000,000</u> <b>\$ 24,950,963</b>	Net worth of Bagwell Trust as of July 2009 Unpaid loan from a Bagwell entity to Bagwell RAAV litigation expenses Bankruptcy litigation expenses Lost management fees Future lost profits on 4 never-developed projects Mental anguish	\$5,496,047	\$22,368,000	<b>\$52,815,010</b>
<b>David Bagwell</b> (Bagwell Guarantor)	\$ 1,614,005 \$ 501,577 <u>\$ 3,296,910</u> <b>\$ 5,412,492</b>	Deficiency owed after property sale Attorneys' fees 18% interest since 4/19/2012	\$523,158	\$3,732,000	<b>\$9,667,650</b>
<b>Evermore</b> (Bagwell Guarantor)	\$ 1,614,005 \$ 501,577 <u>\$ 3,296,910</u> <b>\$ 5,412,492</b>	Deficiency owed after property sale Attorneys' fees 18% interest since 4/19/2012	\$523,158	\$3,732,000	<b>\$9,667,650</b>
<b>David Bagwell Co.</b> (Bagwell Guarantor)	\$ 1,614,005 \$ 501,577 <u>\$ 3,296,910</u> <b>\$ 5,412,492</b>	Deficiency owed after property sale Attorneys' fees 18% interest since 4/19/2012	\$523,158	\$3,732,000	<b>\$9,667,650</b>
	<b>\$ 50,528,106</b>		<b>\$7,733,224</b>	<b>\$40,000,000</b>	<b>\$98,261,330</b>

They can be used to make a substantive argument, for example, to demonstrate that the appellant misappropriated the appellee’s trade secrets (Tab E-3), or to undercut an adversary’s statutory construction (Tab E-10):

Feature	Arrows Up’s pre-NDA Jumbo BTS bin	SandBox	Arrows Up’s post-Settlement Agreement Jumbo bin
<i>Dimensions</i>	96” cube	117.75” x 96” x 114”	117.75” x 100” x 114”
<i>Weight Capacity</i>	16,000 lbs.	48,000 lbs.	48,000 lbs.
<i>Roof Hatch</i>	2’ x 4’	91” x 19”	84” x 20”
<i>Gasket Material</i>	Plastic brush	Felt	Felt
<i>Stacking Cones</i>	None	Welded to ISO Corners	Welded to Corner with ISO Spacing
<i>Tubular Forklift Pocket</i>	No	Yes	Yes
<i>Funnel Angles</i>	30° x 30° or 50° x 50°	31° x 37°	30° x 36°
<i>Detachable Ladder</i>	No	Yes	Yes

*Third*, if “admitted” were redefined to mean “admitted as an inpatient,” the incongruous result would be that a lien would be available to every medical-care provider from the EMT to follow-up physicians—but *not* the hospital that provided the emergency care:

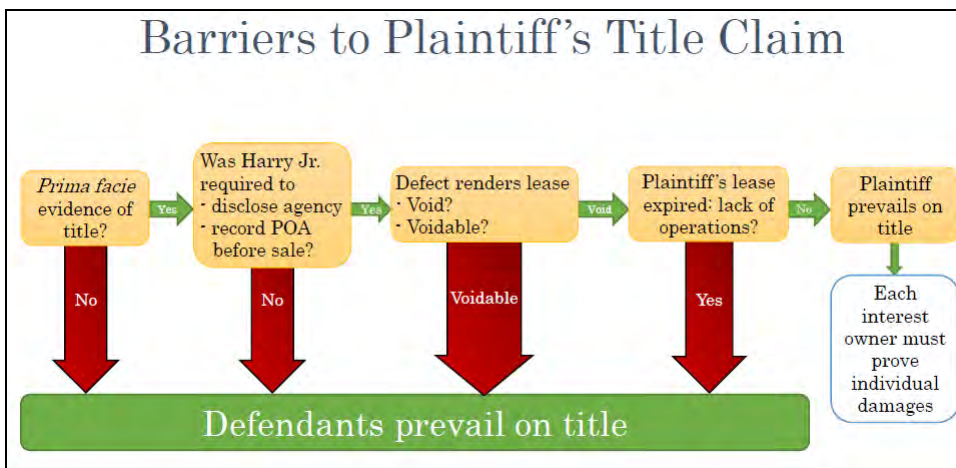
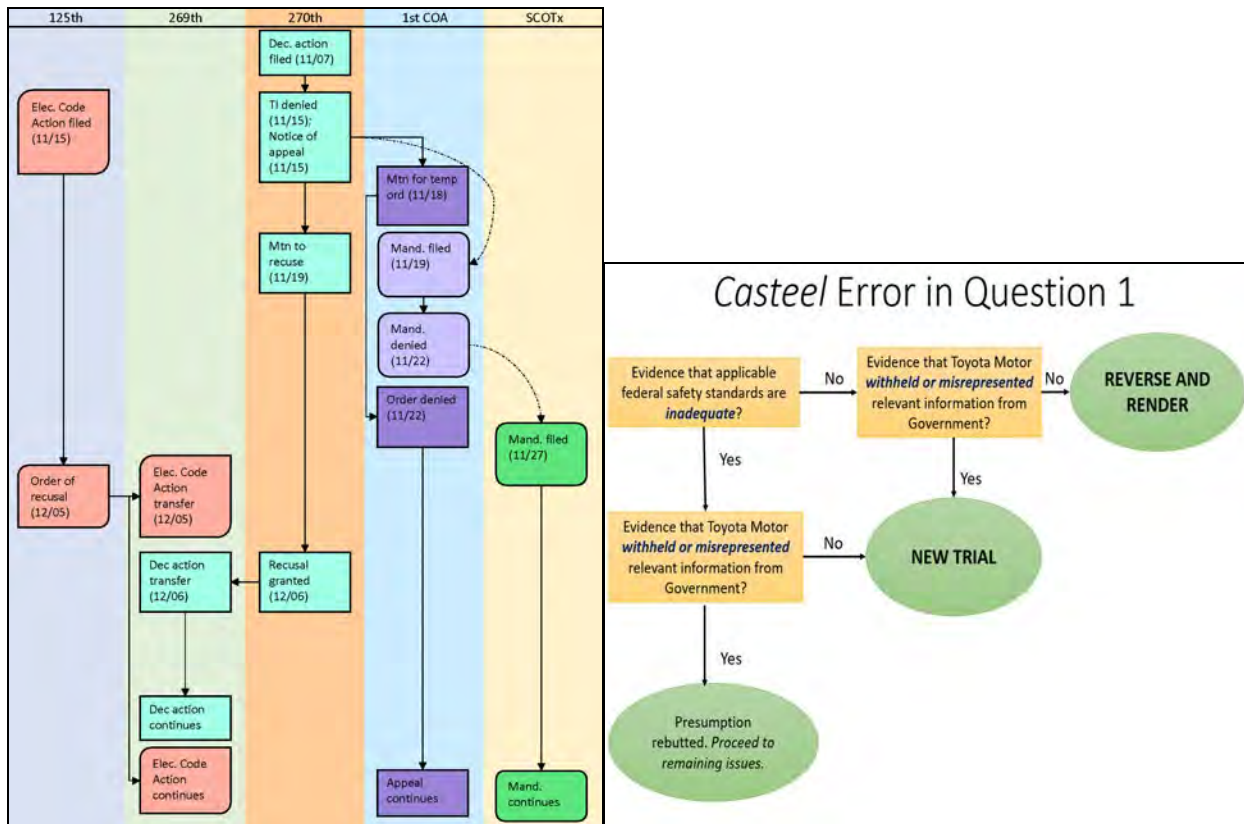
Provider/Stage of Care	Lien	Property Code Provision
EMT services and ambulance ride	✓	§§ 55.002(c), 55.004(f)-(g) <sup>7</sup>
Physicians’ charges for emergency hospital care	✓	§ 55.004(c)
Hospital providing emergency care only	✗	No lien, according to Plaintiffs
Hospital providing inpatient care	✓	§ 55.002(a)
Transfer-destination hospitals	✓	§ 55.002(b)

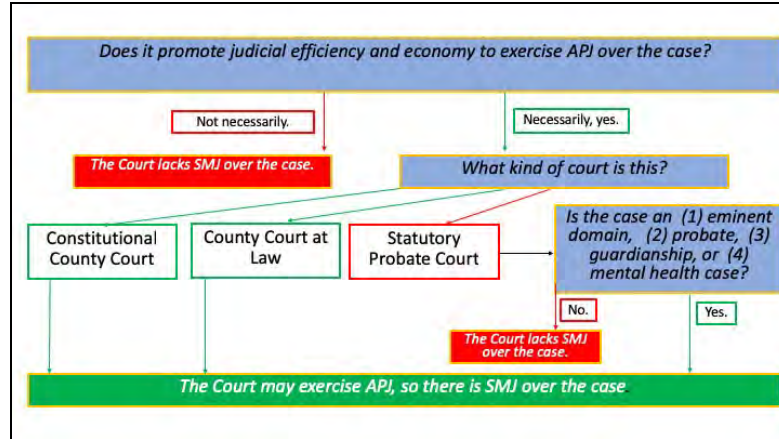
Finally, tables are the most effective means to present large amounts of data by category, as was necessary in the school finance litigation (Tabs E-4, E-5, and E-6).

STAAR EOC tests for typical 9th grade courses	Below Level II phase-in 1 standard		Below final Level II standard		Below Level III standard	
	ED	Non-ED	ED	Non-ED	ED	Non-ED
English I Reading	43%	19%	67%	39%	96%	87%
English I Writing	59%	30%	79%	50%	99%	94%
Algebra I	23%	10%	72%	48%	91%	75%
Biology	19%	7%	72%	44%	97%	85%
World Geography	28%	10%	74%	44%	95%	77%
All Tests Taken (9th grade only)	67%	37%	91%	69%	99.6%	97.6%

## F. Flowcharts

Flowcharts can be effective to illustrate a complicated procedural history (Tabs F-1, F-2), to explain the workings of a complicated statute or regulation (Tab F-3), to provide a decision tree to help a court work through your arguments (Tab F-4), or to illustrate a chain of title in a title dispute. The examples from Tabs F-1 and F-4, as well as other examples from recent cases handled by my firm, are depicted below.

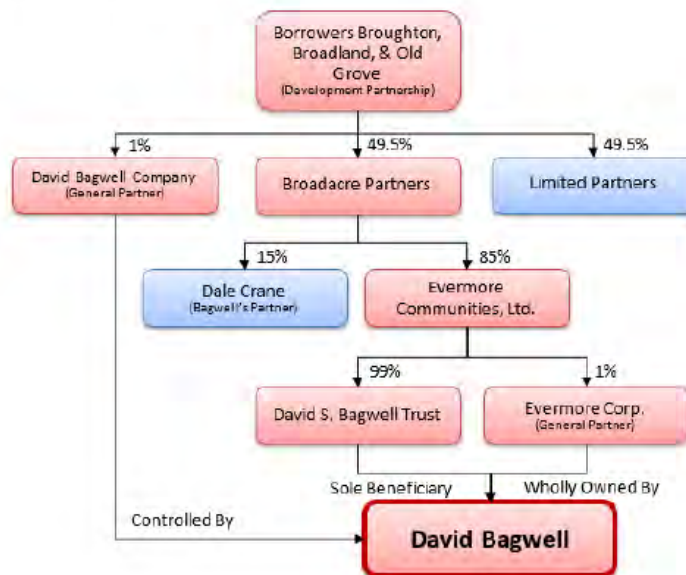




**G. Diagrams explaining the relationship between and among the parties**

Lawsuits often are factually complex and involve a lot of parties. Diagrams can help a reader understand the relationship between parties in a much faster and more intuitive way, saving many words in the process. Diagrams are particularly helpful to depict a corporate structure, the relationship between entities or people, or the effects of a particular transaction. Tabs G-1 through G-4 provide illustrative examples. The diagram from Tab G-2 is depicted on page 4. The diagram from Tab G-3 is depicted below.

25(DX15), 232-47(DX16), 302-17(DX18).) The corporate structure of Bagwell's borrowing and guaranteeing entities is complicated, but all these entities were created and controlled by David Bagwell. (RR4:288-89.)<sup>1</sup> Other than Bagwell's investors, the only other person involved was Bagwell's friend Dale Crane, who held a 15% share in the developments. (RR8:8-15.) The following chart reflects this relationship:



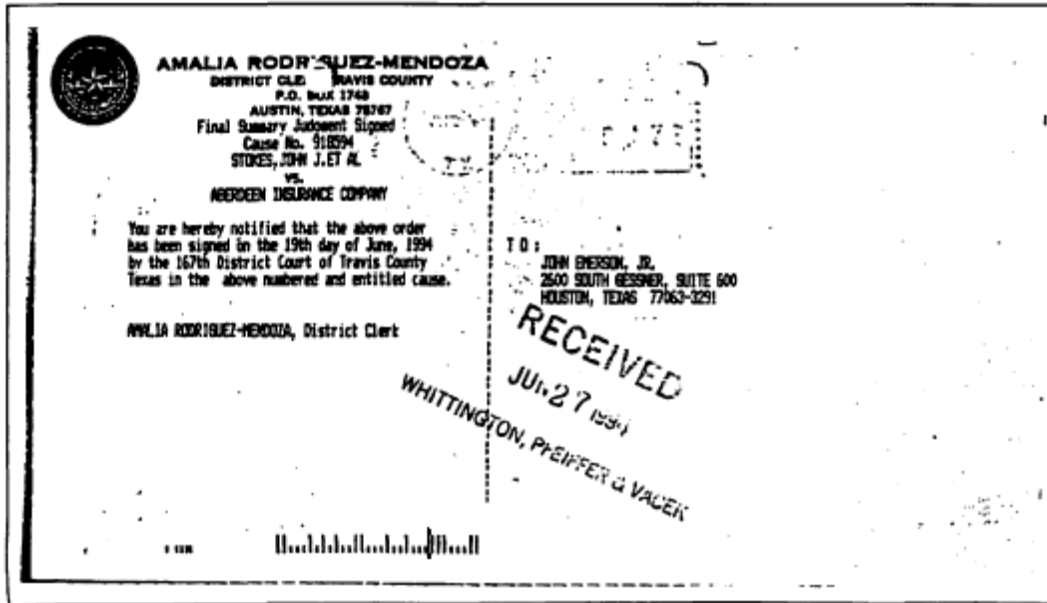
## H. Images of documentary evidence

Tab H-1 through Tab H-8 offer examples of litigants embedding images of documentary evidence—emails (Tabs H-5, H-7), contracts (Tabs H-2, H-3), plats (Tab H-6), accident reports (Tab H-4), and the like—directly into a brief, often with relevant phrases or passages highlighted. Whether this technique is more effective than just typing the relevant portions of the text and using emphasis is up for debate, but there certainly some cases in which including the document itself enhances the argument.

A favorite example comes from Pam Baron, who in the pre-pdf era (1995) taped a postcard from the trial court to the first page of her brief and xeroxed it to show that the postcard's erroneous identification of the date of the final judgment was to blame for a belated notice of appeal (Tab E-1).

TO THE HONORABLE SUPREME COURT OF TEXAS:

Because of this postcard, Petitioners lost their right to appeal:



An even more famous example comes from Justice John Paul Stevens' replication of the back of a cruise ship ticket in his dissent in *Carnival Cruise Lines, Inc. v. Shute*, which he used to argue that the purchaser of the ticket should not have been bound by the extremely inconspicuous forum selection clause.<sup>14</sup>

<sup>14</sup> 499 U.S. 585, 597 & app. (1991) (Stevens, J., dissenting)

**TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET**

1. (a) Whenever the word "Carrier" is used in this Contract it shall mean and include, jointly and severally, the Vessel, its owners, operators, charterers and lenders. The term "Passenger" shall include, the plural where appropriate, and all persons engaging in and/or traveling under this Contract. The restrictive includes the licensee.

(b) The Master, Officers and Crew of the Vessel shall have the benefit of all of the terms and conditions of this Contract.

2. This ticket is valid only for the person or persons named herein as the passenger or passengers and cannot be transferred without the Carrier's consent written herein. Passage money shall be deemed to be earned when paid and not refundable.

3. (a) The acceptance of this ticket by the person or persons named herein as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract ticket.

(b) The passenger admits a full understanding of the character of the Vessel and assumes all risk incident to travel and transportation and handling of passengers and cargo. The Vessel may or may not carry a ship's physician at the election of the Carrier. The fare includes full board, ordinary ship's food during the voyage, but no spirits, wine, beer or mineral water.

4. The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever whatsoever arising and however caused even though the same may have been caused by the negligence or default of the Carrier or its servants or agents. No undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel. This exemption from liability shall extend to the employees, servants and agents of the Carrier and for this purpose this exemption shall be deemed to constitute a Contract entered into between the passenger and the Carrier on behalf of all persons who are or become from time to time its employees, servants or agents and all such persons shall to this extent be deemed to be parties to this Contract.

CONTRACT PAGE 1

10. Each fully paid adult passenger will be allowed an unlimited amount of baggage free of charge. Baggage means only trunks, valises, satchels, bags, hangers and bundles with their contents consisting of any such wearing apparel, toilet articles and similar personal effects as are necessary and appropriate for the duration of the voyage and for the purposes of the journey.

11. No tools of trade, household goods, presents and/or property of others, jewelry, money documents, valuables of any description including but not limited to such articles as are described in Section 4391 Revised Statute of the U.S.A. (46 USCA § 181) shall be carried except under and subject to the terms of a special written contract or Bill of Lading entered into with the Carrier prior to embarkation upon application of the passenger and the passenger hereby warrants that no such articles are retained in any wardrobe or container concealed to him as baggage hereunder. And if any such article or articles are damaged and the passenger's baggage is damaged in this voyage he shall be liable for negligence, gross or ordinary, shall attach to the Carrier for any loss or damage thereon.

12. It is stipulated and agreed that the aggregate value of each passenger's property under the Adult ticket does not exceed \$100.00 shall ticket, \$50.00 and any liability of the Carrier for any cause whatsoever with respect to said property shall not exceed such sum, unless the passenger shall in writing, delivered to the Carrier prior to embarkation, declare the true value thereof and pay to the Carrier upon application a sum (in U.S. Dollars) equal to 5% of the excess of such value, in which event the Carrier's liability shall be limited to the actual damages sustained to the property but not in excess of the declared value.

13. The Vessel shall be entitled to leave and enter ports with or without pilots or tugs, to tow and coast other vessels in any circumstances in relation to or enter any port at the Master's discretion and for any purpose and to deviate in any direction or for any purpose from the direct or usual course, all such deviations being considered as forming part of and included in the proposed voyage.

14. If the performance of the proposed voyage is hindered or prevented or in the opinion of the Carrier or the Master is likely to be hindered or prevented by war, hostilities, blockade, ice, labor conditions, strikes on board or ashore, restraint of rulers or princes, breakdown of the Vessel, congestion, docking difficulties, or any other cause whatsoever, or if the Carrier or the Master considers that for any reason whatsoever, proceeding by, attempting to enter, or awaiting or remaining at the port of passenger's destination may expose the Vessel to risk or loss or damage or be likely to delay her, the passenger and his baggage may be landed at the port of embarkation or at any port or place at which the Vessel may call when the responsibility of the Carrier shall cease and this contract shall be deemed to have been fully performed, or if the passenger has not embarked the Carrier may cancel the proposed voyage without liability to refund passage money or fares paid in advance.

15. The Carrier and the Master shall have liberty to comply with any orders, recommendations or directions whatsoever given by the Government of any nation or by any Department thereof or by any person acting or purporting to act with the authority of such Government or Department or by any Committee of persons having under the terms of the War Risk Insurance on the Vessel the right to give such orders, recommendations or directions, and if by reason of and in compliance with any such orders, recommendations or directions anything is done or is not done the same shall not be deemed a deviation or a breach of this Contract. Disembarkation of any passenger or carriage of his baggage in accordance with such orders, recommendations or directions shall constitute due and proper fulfillment of the obligations of the Carrier under this Contract.

16. (a) The Carrier shall not be liable to make any refund to passengers in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger.

(b) If for any reason whatsoever the passenger is refused permission to land at the port of disembarkation or such other ports as is provided for in Clauses 14 and 15 hereof, the passenger and his baggage may be landed at any port or place at which the Vessel calls or is to call back to the port of embarkation and shall pay the Carrier full fare according to its tariff in use at such time for such further carriage, which shall be upon the terms herein contained.

CONTRACT PAGE 2

17. The Carrier and the Vessel shall have a lien upon all baggage, money, motor cars and other property whatsoever accompanying the passenger and the right to sell the same by public auction or otherwise for all sums whatsoever due from the passenger under this contract and for the costs and expenses of enforcing such lien and of such sale.

18. The passenger or if a minor his parent or guardian shall be liable to the Carrier and to the Master for any loss or pecuniary expense on the Carrier by the authorities for his failure to observe or comply with local requirements in respect of registration, Customs and Excise or any other Government regulations whatsoever.

19. No passenger shall be allowed to bring on board the Vessel Weapons, Firearms, Ammunition, Explosives or other dangerous goods without written permission from the Carrier.

20. The Carrier shall have liberty without previous notice to cancel at the port of embarkation or at any port this Contract and shall thereupon return to the passenger, if the Contract is cancelled at the port of embarkation, his passage money, or, if the Contract is cancelled later, a proportionate part thereof.

21. The passenger warrants that he and those traveling with him are physically fit at the time of embarkation. The Carrier and Master each reserves the right to refuse passage to anyone whose health or welfare would be considered a risk to his own well-being or that of any other passenger.

22. Should the Vessel deviate from its course due to passenger's negligence, said passenger or his estate shall be liable for any related costs incurred.

23. The Carrier reserves the right to increase published fares without prior notice. In the event of an increase, the passenger has the option of accepting the increased fare or cancelling reservations without penalty.

24. In addition to all of the restrictions and exemptions from liability provided in this Contract the Carrier shall have the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provided therein, including but not limited to Sections 4392, 4393A, 4393, 4204, 4205 and 4206 of the Revised Statute of the United States of America (46 USCA Sections 187, 185, 182b, 184, 185 and 186); nothing in this Contract is intended to nor shall it operate to limit or deprive the Carrier of any such statutory limitation of or exoneration from liability.

25. Should any provision of this Contract be contrary to or invalid by virtue of the law of any jurisdiction or be so held by a Court of competent jurisdiction, such provision shall be deemed to be severed from the Contract and of no effect and all remaining provisions herein shall be in full force and effect and constitute the Contract of Carriage.

**IV. Where is all this headed?**

Until now, the discussion has focused on embedding still images, photos, and graphics in briefs. But, of course, technology permits much more, and developments in multimedia creation, storage and display continue at a rapid pace.

Already, litigants have made videos played at trial accessible to appellate courts via a clickable Internet link.<sup>15</sup> But, if megabyte limitations on e-filings can be overcome or are

<sup>15</sup> See Petitioner's Brief on the Merits, *BNSF Railway Co v. Nichols*, No. 12-0884, at 3 (Tex. June 19, 2013), available at <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=9730f55f-c6b0-4408-9b92-afcd8f9d2805&coa=cossup&DT=BRIEFS&MediaID=8f049b10-6caa-45cd-aa2f-f0ba38599a46>; see also Tab A-4.

loosened, it will not be long before video and audio files are directly embedded into e-briefs. An advocate could thus prominently feature footage from a security video, a police dashboard cam or body-cam, a surgical procedure, or the like in the heart of a brief, instead of relegating it to an appendix or record cite. Likewise, any key video deposition clips played to the jury could also be embedded in a brief. Audio files—like a 911 call, for example—could easily be embedded too.

Animations could feature more prominently in appellate briefs, instead of being used only in jury trials. A quick search of the websites of various trial graphics companies illustrates how effective these animations can be.<sup>16</sup> Yet other than the Whirlpool case discussed above (circa 2008), I am unaware of any animations embedded in a Texas appellate brief, despite one consultant's argument that: "If a 'picture is worth a thousand words,' then a computer-generated animation says a thousand words, sings a thousand songs, and paints with a thousand colors all at once."<sup>17</sup>

One scholar speculates that other embedded technology in briefs might include, among other things:

- Graphics Interchange Format, or GIFS;
- 360-degree panoramas (of accident scenes, etc.);
- Powerpoint decks that would allow the viewer to scroll through a slideshow composed of images, graphics, or other information; or
- Rollover/hover states, which would display new information over the existing text or graphic when the cursor hovers over it.<sup>18</sup>

As a paradigmatic example, the scholar points to an article posted in Medium in which the author weaves in a host of embedded images, screenshots, maps, and audio files to tell a story about a harrowing encounter with the San Francisco police.<sup>19</sup>

Texas Supreme Court clerk Blake Hawthorne, in email conversations with me, has pointed at other possibilities.<sup>20</sup> Lawyers could prepare and embed a short video of themselves presenting oral argument, perhaps in place of the traditional written summary of the argument.

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<sup>16</sup> See, e.g., (1) <https://courtroomanimation.com/results/>, (2) <https://www.legalgraphicworks.com/services/animation/>, or (3) <https://www.decisionquest.com/services/litigation-graphics-consulting/legal-animation/>.

<sup>17</sup> Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J. L. TECH. 161, 190 (2000) (author is a professor and litigation consultant).

<sup>18</sup> See Porter, *supra* note 1, at 1749-50.

<sup>19</sup> *Id.* at 1750-51 & n.294 (citing <https://medium.com/indian-thoughts/good-samaritan-backfire-9f53ef6a1c10>).

<sup>20</sup> Mr. Hawthorne has been ahead of the curve, anticipating many of the developments of the last decade. See Don Cruse & Blake Hawthorne, *Appellate Briefs of the Future*, UT Law, 20<sup>th</sup> Annual Conference on State and Federal Appeals (June 3-4, 2010), available at <http://www.scotxblog.com/wp-content/uploads/2010/06/Appellate-Briefs-of-the-Future-final.pdf>.



Briefs could be filed in the ePub format instead of PDF, which would make them look more like a website or e-book, giving the reader the ability to choose the font, adjust the font size, and easily access and manipulate embedded multimedia.<sup>21</sup> In a 2010 paper, Mr. Hawthorne mentions the possibility that courts could “pose their questions of counsel as comments on the published briefs in the case” by attaching “a series of questions to the briefs, some keyed to specific passages” and asking the counsel to respond electronically.<sup>22</sup>

If *The New York Times* is any indication, change is coming. In the 20<sup>th</sup> century, that newspaper earned the nickname “The Gray Lady” for its heavy reliance on text and the absence of color (the first cover with a color picture was published in 1997). Now, its website is a “pulsing quilt of video and interactive graphics,”<sup>23</sup> podcast links, and even virtual reality experiences.

## V. Cautionary considerations

The use of visuals in briefing has not been the subject of significant rulemaking in either federal or state court. Federal Rule of Appellate Procedure 32(a)(1)(C) merely says: “Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.”

There are a host of unanswered questions.<sup>24</sup> To what extent are appellate practitioners constrained by the record? The Whirlpool animation discussed above was not used in the trial court, but was prepared as a substitute for the exemplar dryer that was not accessible to the appellate courts. Can a photo used in the trial court be altered in any way (e.g., adjusted lighting, added labels, cropped) before use in an appellate brief? Can an appellant use an image from Google Maps or Street View that was not used at trial?

Does making photos, animation, or videos (including, potentially, of videos of witness testimony) so easily accessible to appellate justices alter the traditional allocation of decision-making power between juries and trial courts, and between trial and appellate courts? Is an appellate court likely to defer to a jury’s factfinding if a video leads them to the opposite conclusion or it can assess a crucial witness’s credibility directly?

Famously, in *Scott v. Harris*, after both the district court and Eleventh Circuit rejected a police officer’s claim that he had proven his qualified immunity defense as a matter of law, the

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<sup>21</sup> Mr. Hawthorne discusses and displays an example of this ePub format at minute 34 of Part 2 of this presentation: <http://www.appellatecourtclerks.org/ipad-presentation.html>.

<sup>22</sup> Cruse & Hawthorne, *supra* note 20, at 23.

<sup>23</sup> Porter, *supra* note 1, at 1693.

<sup>24</sup> The Porter article grapples with the concerns discussed in this section—and others—and ultimately concludes that benefits of multimedia presentation outweigh the risks, as long as courts develop rules and canons governing its use. See Porter, *supra* note 1, at 1752-82. For another deep dive into the power of visual rhetoric and narrativity and the ethical concerns raised by this power, see Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 LEG. COMM’N & RHETORIC 107 (Fall 2016), available at [https://www.alwd.org/index.php?option=com\\_attachments&task=download&id=48](https://www.alwd.org/index.php?option=com_attachments&task=download&id=48).

Supreme Court overrode the lower courts based on its review of the police dashboard video. 550 U.S. 372, 378-81 (2007) (“The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.”) In response to criticism from a dissenting judge that the majority was misinterpreting the video, the majority responded: “We are happy to allow the videotape to speak for itself” and included a link to a website hosting the video. *Id.* at 378 n.5.

There is also the danger that visuals will be used to make emotional appeals to bypass the logical inquiries that are at the heart of proper legal analysis. A prominent example occurred in a suit filed against Dallas Mavericks owner Mark Cuban by a minority owner, alleging that Cuban’s mishandling of the team’s management and finances led the Mavericks to the brink of insolvency. Cuban filed a motion for summary judgment in which this was the entire argument:<sup>25</sup>

**II. SUMMARY JUDGMENT EVIDENCE AND ARGUMENT**

On June 12, 2011, the World Champion Dallas Mavericks defeated the Miami Heat to claim the franchise’s first NBA championship. A true and correct photo of one of the many victory celebrations is incorporated herein:



Under Hillwood’s ownership, the team was deemed the “worst franchise” in all of professional sports. Under Cuban’s stewardship the Mavericks have become one of the league’s most successful teams and are now NBA champions. Accordingly, there can be no genuine

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DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT – Page 2

<sup>25</sup> Defendants’ Mot. for Summ. J., *Hillwood Investment Props. III, Ltd. v. Radical Mavericks Mgmt., LLC*, No. 10-05639, 2011 WL 2649590 (Tex. Dist. Ct. June 22, 2011).

In effect, Cuban argued that “we won the championship,” so there could not have been any financial mismanagement. While this motion attracted plenty of media attention, it alone did not carry the day in court. A few months later, Cuban filed an amended motion for summary judgment that directly took on the plaintiff’s claims with a more expansive discussion of the relevant facts and law.<sup>26</sup> The amended motion was granted.

While any ethical concerns about the use of visuals are beyond the scope of this paper, they should command the attention of lawmakers and rulemakers as we enter a new age of appellate visual advocacy.<sup>27</sup>

## **VI. Conclusion**

It is my hope that this article has persuaded you to ask, in preparing any brief, how the use of a visual might improve your advocacy, and generated ideas for the types of visuals that can do so.<sup>28</sup>

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<sup>26</sup> Defs’ Am. Mot. for Summ. J., *Hillwood Investment Props. III v. Radical Mavericks Mgt.*, No. 10-05639, 2011 WL 4862623 (Tex. Dist. Ct. Oct 3, 2011).

<sup>27</sup> See sources cited *supra* in notes 3 & 24.

<sup>28</sup> Thanks to Robert Dubose for leading the way in writing about this important topic, to Blake Hawthorne for sharing his many insights, and to my colleagues at Haynes and Boone and other appellate lawyer friends for pointing me to examples of visuals in their briefing, including Doug Alexander, Pam Baron, Derek Bauman, Robert Gilbreath, David Gunn, Connie Pfeiffer, and Russell Post.

# Tab A-1

No. 16-20028; *Kenneth W. Abbott, et al. v. BP Exploration & Production, Inc., et al.*; In the United States Court of Appeals for the Fifth Circuit. Brief of Appellees, filed July 6, 2016.

Lead Counsel ~ Haynes and Boone, LLP: Lynne Liberato, Mark Trachtenberg, William Feldman; Norton Rose Fulbright: Anne Rogers, and Liskow & Lewis: Jonathan A. Hunter.

Against this background, the district court granted a take-nothing judgment. The record and the underlying law confirm the validity of this ruling and shed light on why the district court may have been frustrated with Plaintiffs' meritless claims.

### STATEMENT OF THE CASE

**A. The Atlantis Platform produces hydrocarbons from offshore leases that DOI granted to BP.**

The Atlantis Platform, a semi-submersible floating production facility that began operation in 2007, sits near the Atlantis field in the Gulf of Mexico, 190 miles south of New Orleans. (ROA.280-81.) The Atlantis field encompasses five offshore leases on the Outer Continental Shelf that the Department of the Interior ("DOI") granted to BP and BHP Billiton in 1995.<sup>1</sup> (ROA.21739-805; ROA.5370.)

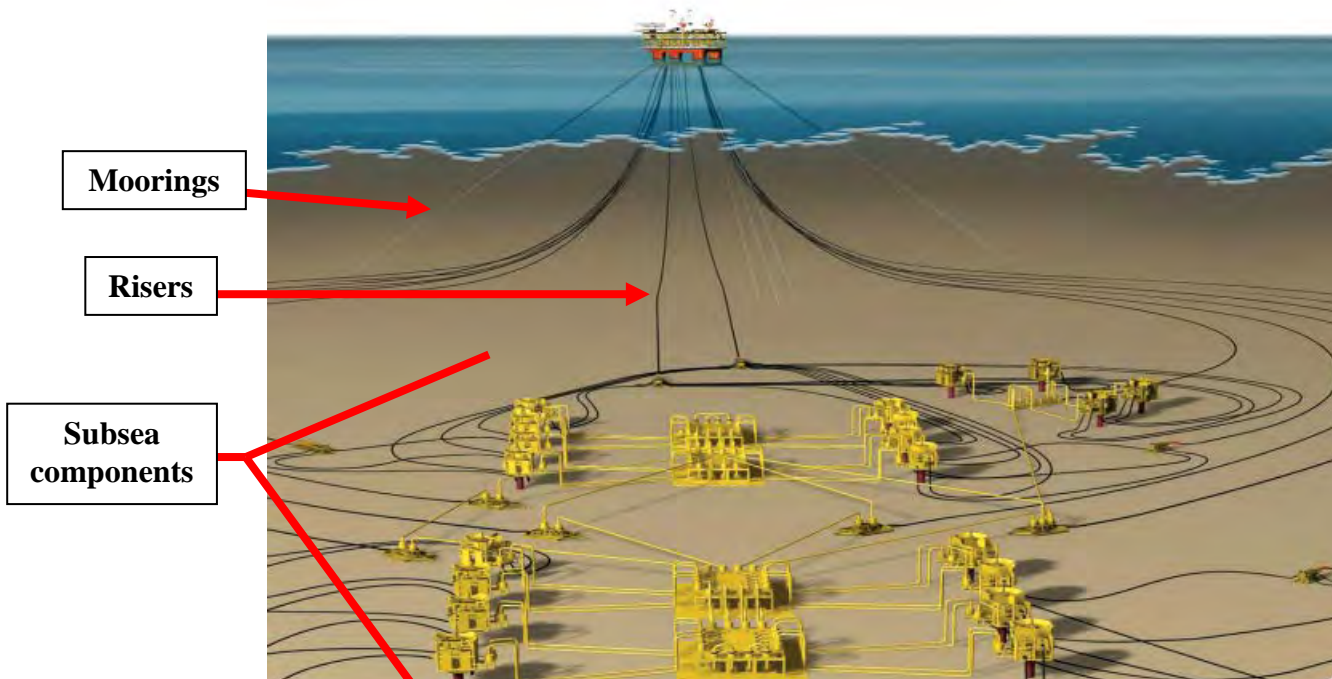
Atlantis floats in about 7000 feet of water. Its four major parts are: (1) the *topsides* (the deck, hydrocarbon processing facilities, export lines, control room, and living quarters), (2) the *hull* (which allows the platform to float), (3) the *moorings* (which keep the platform at its location), and (4) the *pilings* (which anchor the moorings). (ROA.24853-54; ROA.5370-71.)

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<sup>1</sup> "DOI" refers to the Department of the Interior, as well as DOI's former Minerals Management Service ("MMS"), DOI's former Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE"), and DOI's current Bureau of Safety and Environmental Enforcement.



Atlantis also has subsea equipment that facilitates the flow of production from the reservoirs beneath the seafloor through wells and pipelines to a point on the seafloor below Atlantis. (ROA.24854; ROA.6118.) There, the production enters “risers” that carry it up to the platform, where it is processed and measured before entering export pipelines for delivery to shore. (ROA.24853; ROA.5370.)



# Tab A-2

No. 13-0042; *Genie Industries, Inc. v. Ricky Matak, et al.*; In the Supreme Court of Texas. Petitioner's Brief on the Merits, filed October 25, 2013.

Lead Counsel ~ Harrison, Bettis, Staff, McFarland & Weems, L.L.P.: Clifford L. Harrison, Stephen D. Selinidis; Beck Redden LLP: Constance H. Pfeiffer.

## STATEMENT OF FACTS

### *A Church Buys A Genie Lift*

Tall buildings, like gymnasiums, auditoriums and churches, need a safe way to reach the ceilings. The Beaumont church in this case had previously reached the ceilings with a huge stepladder. RR3:82. It eventually invested in a Genie aerial lift, using it weekly to change lightbulbs in the sanctuary or the gym. RR3:60. The stationary lift in this case was especially useful in church environments, given its unique design features and its ability to reach extended heights indoors.

Genie (a Terex Company) is the top seller of aerial work platforms. **Tab E.** It is a U.S.-based company that sells hundreds of thousands of lifts worldwide. *Id.* Its lifts have been used millions of times by its customers. RR4:174.





This lift is uniquely designed to be lightweight and portable. RR5:16.

A single person can roll it around, push it through a door, and load it into a truck.



The lift also has a very compact footprint, because it is stabilized with outriggers and stabilizer pads. RR3:127, RR5:17; DX-9. The four stabilizer pads screw down to the floor and can be adjusted to fit into narrow spaces. RR3:84.



**From Texas Supreme Court opinion:**

Inc.

**I**

Genie Industries, Inc., manufactures and sells a wide variety of aerial lifts throughout the world. An aerial lift is used to raise a worker on a platform to reach the ceilings of tall buildings or other high places. One of these lifts is the Aerial Work Platform-40' SuperSeries, also known as the AWP-40S, pictured here.



**Figure 1: AWP-40S**

The base of the AWP-40S is small, only about 29" x 55"—narrower than a standard door—and sits on wheels. A vertical, telescoping mast is mounted on the base. An enclosed platform

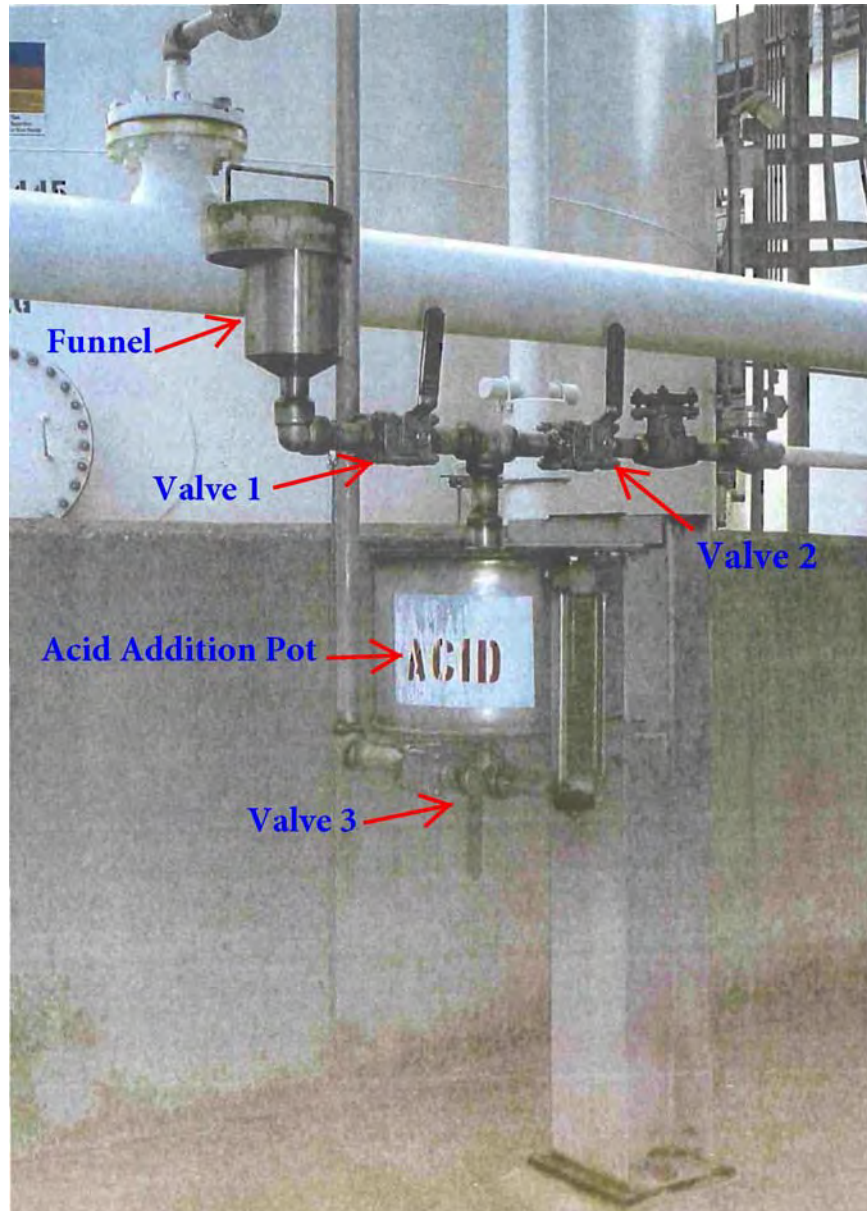
# Tab A-3

No. 13-0961; *Occidental Chemical Corporation v. Jason Jenkins*; In the Texas Supreme Court; Respondent's Brief on the Merits, filed November 26, 2014.

Lead Counsel ~ Alexander Dubose Jefferson & Townsend LLP: Wallace B. Jefferson, Douglas W. Alexander; Beck Redden LLP: Russell S. Post, David M. Gunn, Erin H. Huber, Chad Flores.

## STATEMENT OF FACTS

This is the Acid Addition System that Occidental negligently designed.



P 45; CR2636. Occidental employee Neil Ackerman designed the System. Although he had an engineering degree, Ackerman was not a licensed engineer. RR4:48-49, 64; 5:144-45; CR2642; *see also* p. 52, *infra*.

# Tab A-4

No. 03-17-00315-CV; *U.S. Concrete, Inc. v. Glenn Hegar, Comptroller of Public Accounts, State of Texas; et al.*; In the Court of Appeals for the Third District of Texas at Austin; Brief of Appellant, filed August 23, 2017.

Lead Counsel ~ Haynes and Boone, LLP: Nina Cortell, Mark Trachtenberg, Natasha Breaux; Gardere Wynne Sewell LLP: Arthur Val Perkins, Zachary T. Jones.

(RR2:24-25, 104-05, 110-11.) If the slump is too wet, the truck-operator contacts the dispatcher who determines what to do; this could entail lengthier mixing or adding chemical admixtures at the customer's location, or adding more dry raw materials back at U.S. Concrete's physical plant. (RR2:25-26, 105, 144-45.) A video clip of this mixing and adjustment, which is excerpted from a longer video that shows the entire manufacturing process, can be viewed here: [PX15 at minute 14:35-17:17](#). (See also RR2:90-91, 110-12 (explaining the video).)<sup>8</sup> Below are two frames from the video that depict manufacturing processes at the customer's location.



When—and only when—the correct customer specifications for the concrete are achieved, the truck-operator connects the chute to the drum, slows the speed of

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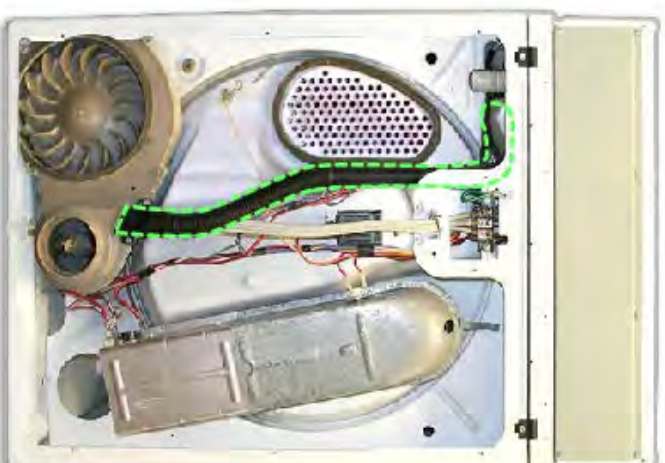
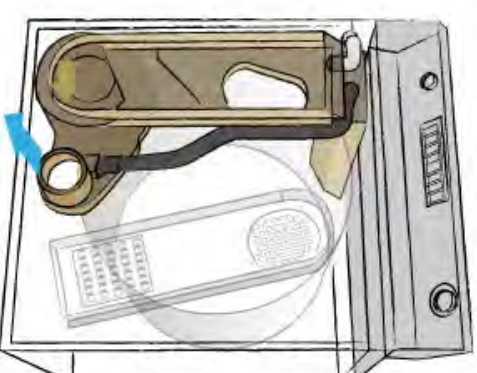
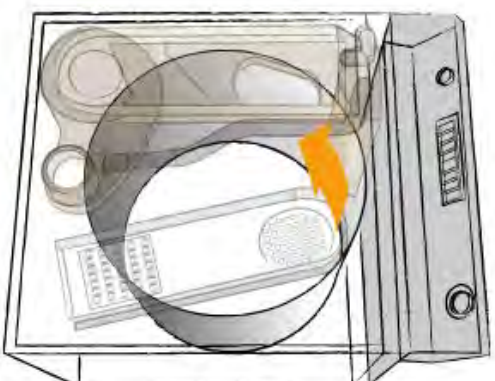
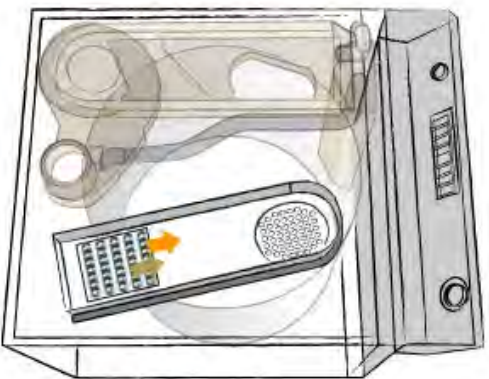
<sup>8</sup> The entire video is in the record at PX15.

# Tab A-5

No. 08-0175; *Whirlpool Corporation v. Margarita Camacho, et al.*; In the Texas Supreme Court.

Lead Counsel ~ Haynes and Boone, LLP: Lynne Liberato, Alene Ross Levy, Mark Trachtenberg; Royston, Rayzor, Vickery & Williams, L.L.P.: Keith N. Uhles, Joe Noe Garza, Jr.; Barnes & Thornburg, LLP: Douglas K. Dieterly, Peter J. Rusthoven.

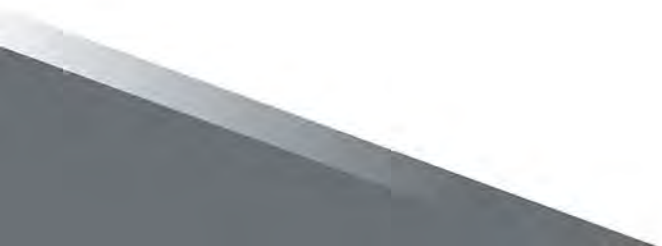
# Whirlpool v. Camacho animations



- Top Of Dryer
- Back Of Dryer
- Heating Element
- Drum Inlet Grill
- Lint Chute
- Blower Housing
- Blower Scroll
- Lint Transport
- Recirculation Tube
- Exhaust Air
- Replace Back

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*L.P.*, the court of appeals held that the trial court did not abuse its discretion in refusing to compel arbitration because the Drennans, as nonsignatories, were not bound by the agreement to arbitrate. *Id.* In *Labatt*, we held that a decedent's pre-death arbitration agreement binds his or her wrongful death beneficiaries because, under Texas law, the wrongful death cause of action is entirely derivative of the decedent's rights. *Id.* at 646.

[1] The Drennans contend the arbitration agreement is nevertheless unenforceable because it violates section 406.033(e) of the Texas Labor Code, which provides

[a] cause of action [against a nonsubscriber] may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable.

TEX. LAB.CODE § 406.033(e). Subsection (a), in turn, limits the common law defenses available to an employer who does not carry workers' compensation insurance. *Id.* § 406.033(a). However, an agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under section 406.033(a), but rather an agreement that those claims should be tried in a specific forum. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (holding that arbitration clauses are, "in effect, a specialized kind of forum-selection clause"). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (stating that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). Accordingly, section 406.033(e) does not render the arbitration agreement void.

[2, 3] A party denied the right to arbitrate pursuant to an agreement subject to the FAA does not have an adequate remedy by appeal and is entitled to mandamus relief to correct a clear abuse of discretion. *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 128 (Tex.1999). In this case, the arbitration agreement Drennan executed provides that any personal injury or wrongful death claim filed by Drennan or his spouse, children, parents, or estate must be arbitrated. If Drennan had sued for his own injuries immediately before his death, he would have been bound to submit his claims to arbitration. As derivative claimants under the wrongful death statute his beneficiaries are bound as well, *In re Labatt*, 279 S.W.3d at 646, and the trial court clearly abused its discretion by refusing to compel arbitration.

Accordingly, without hearing oral argument, *see* TEX.R.APP. P. 52.8(c), we conditionally grant Golden Peanut's petition for writ of mandamus and direct the trial court to enter an order compelling arbitration of the Drennans' wrongful death claims. The writ will issue only if it fails to do so.



**WHIRLPOOL CORPORATION,**  
**Petitioner,**

**v.**

**Margarita CAMACHO, et**  
**al., Respondents.**

**No. 08-0175.**

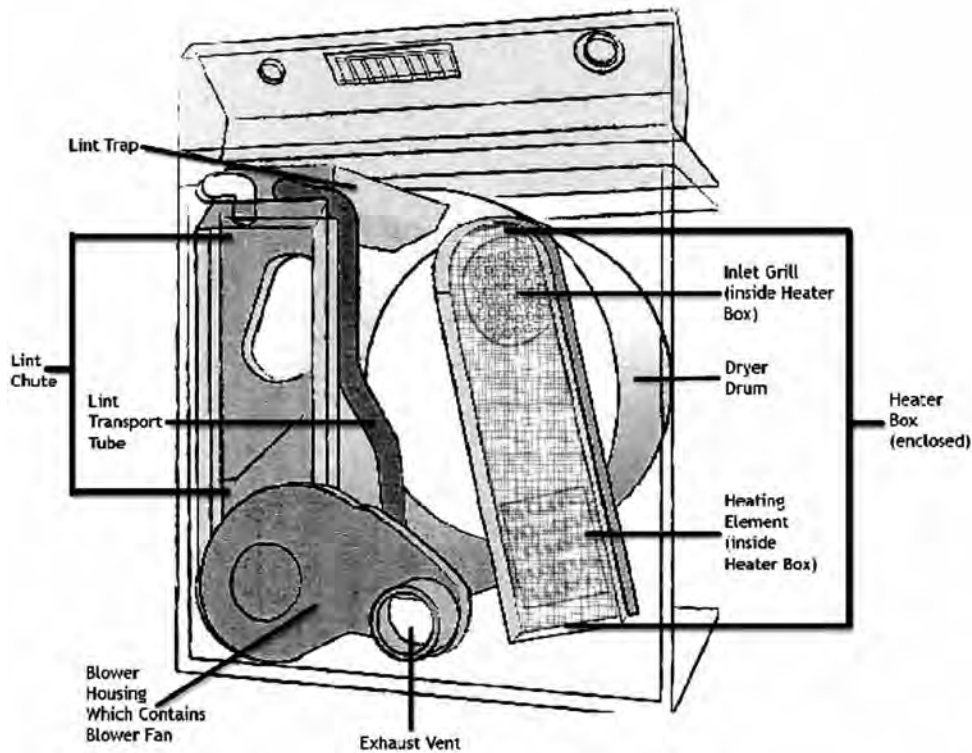
Supreme Court of Texas.

Argued March 10, 2009.

Decided Dec. 11, 2009.

**Background:** Parents, individually, on behalf of estate of deceased child, and as

## APPENDIX A



Steven GREY, Appellant,

v.

The STATE of Texas.

No. PD-0137-09.

Court of Criminal Appeals of Texas.

Nov. 18, 2009.

**Background:** Defendant was convicted in the District Court, Hays County, 22nd Judicial District, William Henry, J., of simple assault as lesser-included offense of aggra-

vated assault. Defendant appealed. The Austin Court of Appeals, 269 S.W.3d 785, W. Kenneth Law, C.J., reversed and remanded.

**Holding:** Granting review, the Court of Criminal Appeals, Keller, P.J., held that when requested by the state, submission of a lesser-included offense does not require some evidence in the record that would permit a jury rationally to find that the defendant, if guilty, is guilty only of the lesser offense; overruling *Arevalo v. State*, 943 S.W.2d 887; abrogating *Hampton v. State*, 165 S.W.3d 691.

Judgment of Court of Appeals reversed; case remanded.

Hervey, J., filed a concurring opinion in which Meyers and Keasler, JJ., joined. Cochran, J., filed a concurring opinion.

# Tab A-6

No. 19-10650; *Hoover Panel Systems, Inc. v. HAT Contract, Inc.*; In the United States Court of Appeals for the Fifth Circuit. Brief of Appellant, filed July 31, 2019.

Lead Counsel ~ Hawkins Parnell & Young LLP: Robert B. Gilbreath.

## STATEMENT OF THE CASE

### 1. Facts.

In the summer of 2014, Appellee HAT Contract, Inc. asked Appellant Hoover Systems, Inc. to develop and manufacture a beam (or raceway) that could be placed alongside desks in an open-office environment to distribute power and data. (ROA.784). The picture below is an example of a power beam (the white rail with outlets below and at the back of the desk).



On the following page is a picture of the power beam now advertised on HAT's website,<sup>1</sup> following the events discussed below:

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<sup>1</sup> <https://www.hatcontract.com/hat-power-data-beam/>



HAT told Hoover that it was interested in selling a product of this type that was made in the United States, as opposed to abroad. (ROA.784). Hoover emphasized it was not interested in developing a product that HAT would copy and have made abroad. HAT assured Hoover that it would not do so. (ROA.784). Hoover would not have entered into an agreement with HAT absent that representation. (ROA.784).

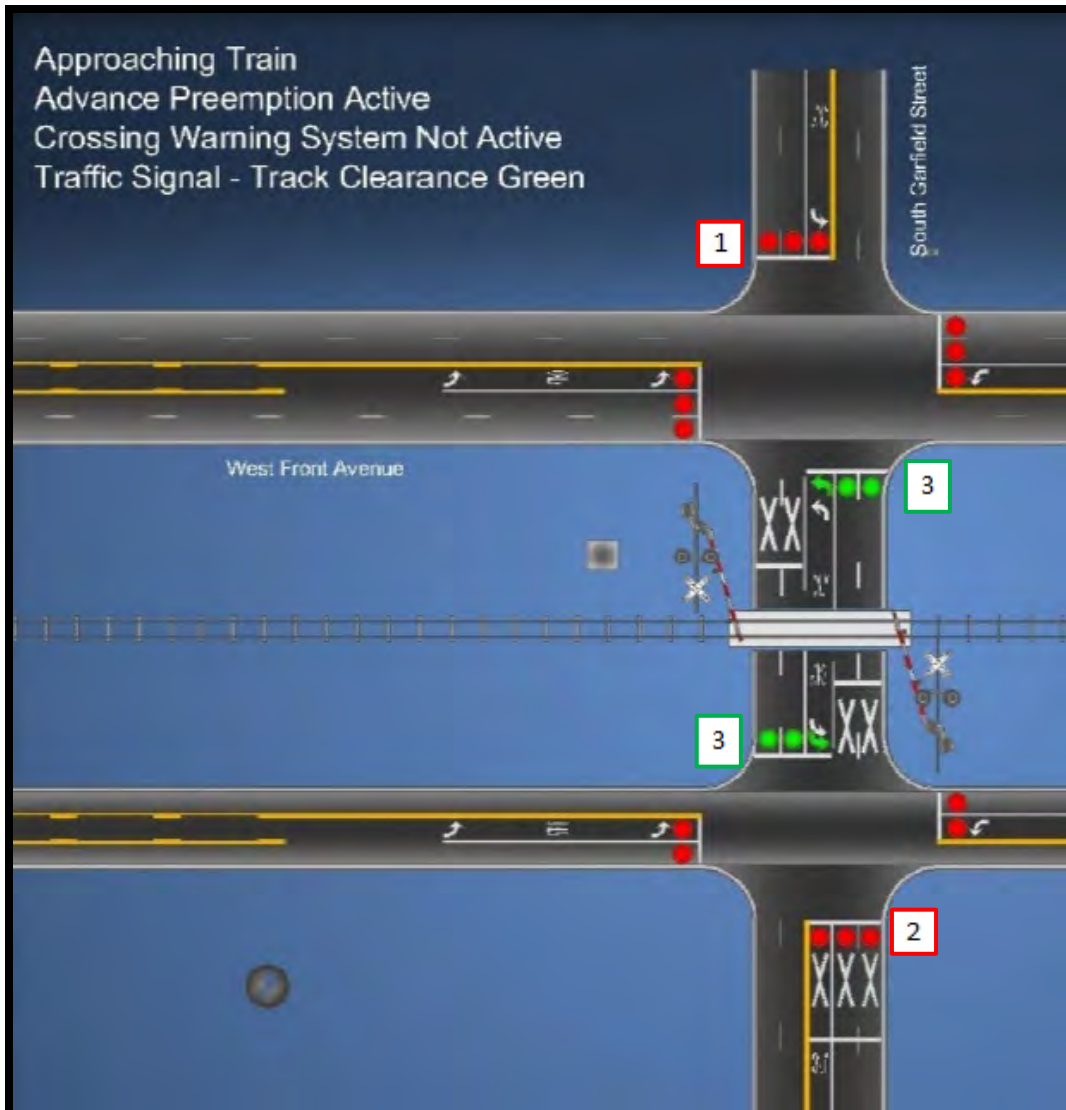
About a month later, HAT and Hoover executed a confidentiality agreement. (ROA.784). The opening paragraph contains this covenant:

Both parties agree that all information disclosed to the other party, such as inventions, improvement, know-how, patent applications, specifications, drawings, sample products or prototypes, engineering data, processes, flow diagrams, software source code, business plans, product plans, customer lists, in-

# Tab A-7

No. 17-0845; *Catherine Stouffer, et al. v. Union Pacific Railroad Company*; In the Texas Supreme Court. Respondent's Brief on the Merits, filed August 2, 2018.

Lead Counsel ~ Haynes and Boone, LLP, Kent Rutter; Brown Dean, Wiseman, Proctor, Hart & Howell, L.L.P.: John W. Proctor.



*Garfield crossing, showing traffic signals as a train approaches*

(CR2:456, 529.)

Before this accident, there had never been a fatal accident at the Garfield crossing, and there had not been any accident of any kind there for approximately 15 years. (CR2:685.) During that time, approximately **85 million** vehicles (including **1.4 million** tractor-trailers) and **126,000 trains** passed through the crossing with **zero accidents**. (CR2:682, 685.) This history of safety can be

weather was clear and Hayden had an unobstructed view extending a half-mile to a mile down the tracks:



*View from South Garfield Street, looking west*

(CR1:323; CR2:765-66.) The locomotive's headlights and ditchlights were shining brightly and the train was well within view. (CR2:766, 867, 903.) However, Hayden failed to notice the train at that time.

Hayden also failed to notice the train horn, which Union Pacific's crew was sounding as the train approached the crossing. (CR2:745.) As it happened, the tractor-trailer in front of Hayden had been equipped with its own train horn, which sounded identical to the horn on Union Pacific's train. (CR2:607, 759-62.) The driver of that tractor-trailer had been sounding his train horn throughout the parade to entertain spectators. (CR2:761.) Hayden testified that if he heard a train horn as

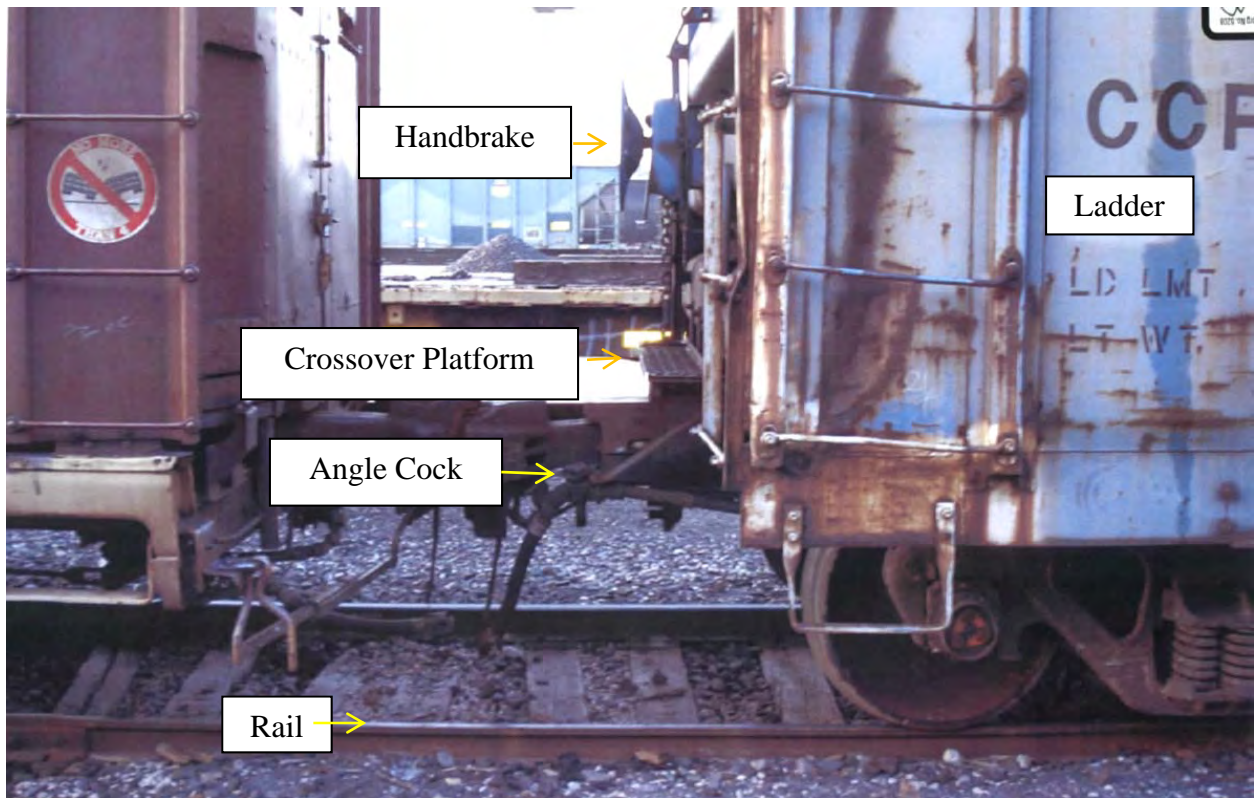


# Tab A-8

No. 14-0794; *Union Pacific Railroad Company v. Estate of Geronimo Gutierrez, Deceased, et al.*; In the Texas Supreme Court. Petitioner's Brief on the Merits, filed April 13, 2015.

Lead Counsel ~ Haynes and Boone, LLP, Lynne Liberato, Christina Crozier, Polly Graham Fohn; McLeod, Alexander, Powell & Apffel, P.C.: Douglas W. Poole, Bryan R. Lasswell.

One of Gutierrez’s responsibilities was releasing handbrakes on railcars. To properly access a handbrake, a carman must climb a ladder affixed to the railcar and then stand on a crossover platform. (RR5:955-56; RR13:DX43.) Although Union Pacific’s rules require carmen to use the ladder, carmen occasionally take a prohibited shortcut to reach the crossover platform by stepping on devices on the back of the railcar instead. (RR5:1103-04, 1114; RR13:DX44.) To take this shortcut, the carman would step from the ground, to the rail, to a device called an angle cock, to the crossover platform. (RR5:1103-04, 1114.) The following photograph shows the configuration of a railcar where the handbrake is located.



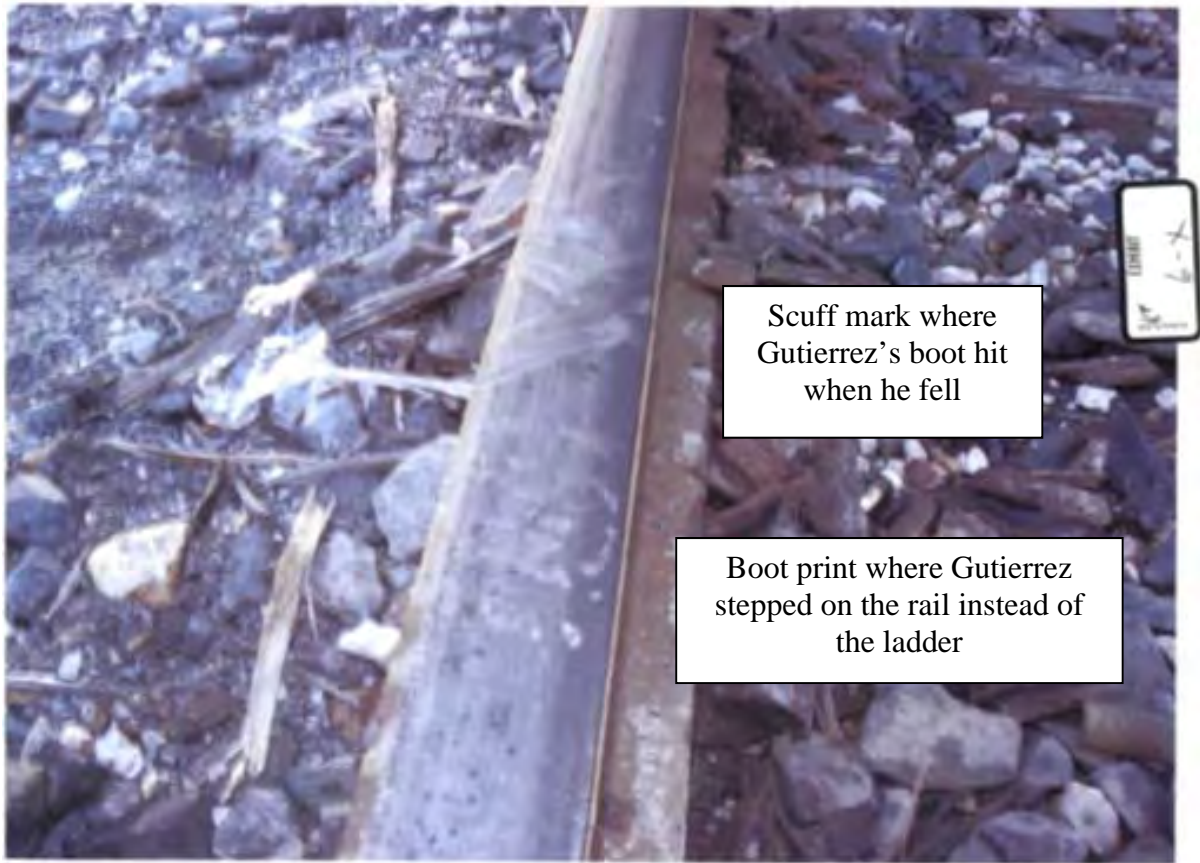
(RR15:DX6F (labels added for clarity), Tab F.)

RR5:1098-99.) The paramedics transported Gutierrez to the hospital. (RR2:289; RR5:1098-99.)

**II. Union Pacific concluded that Gutierrez fell because he took a prohibited shortcut to reach the handbrake.**

Shortly after Gutierrez left for the hospital that morning, Lewis and Williamson began investigating the accident. (RR5:933-35, 1099, 1105.) They found that all of the ladders leading to the handbrakes were still covered with heavy, undisturbed dew, indicating that they had not been used. (RR5:944, 1101.) They also observed a trail of dusty boot prints that began next to where they had found Gutierrez and continued up the back of the railcar to the crossover platform. (RR5:935-49, 949, 1100-01; RR15:DX6A, H, I, J, K, X, Y; Tab G.)

Based on this evidence, Lewis and Williamson concluded that Gutierrez had taken a shortcut on the back of the railcar to reach the handbrake, which caused him to fall. (RR5:950-51; RR12:DX4.) Lewis and Williamson documented the boot prints in 26 photographs that they took on the morning of the accident. (RR5:933-34, 1099; RR15:DX6A-6Z.) The following is one of those photographs.



(RR15: DX6X (labels added for clarity, Tab G).)

**III. Gutierrez reported that working conditions did not cause his accident.**

At the hospital, doctors determined that Gutierrez fractured the bones in his lower leg and sustained a pilon fracture. (RR11:Part1 at 6:55, 15:40-50.) These injuries were consistent with a three to four foot fall and supported Union Pacific's determination that Gutierrez fell while climbing the back of the railcar. (RR3:490, 495, 508, 510.)

On May 19, 2007, while he was still in the hospital, Gutierrez filled out a routine accident report in which he represented that working conditions did not

**1. The physical evidence conclusively proved that mud did not cause Gutierrez to fall.**

All of the physical evidence showed an absence of mud. Evidence “becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied.” *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005).

The boots that Gutierrez wore at the time of the accident were admitted into evidence, and it is undisputed that they had no mud on them, only rocks. (RR3:485-86; RR4:836-37, 884; RR15:DX48, Tab H.) The boots had been returned to Gutierrez’s family from the hospital in a bag, and there is no evidence that the boots were cleaned at the hospital. Although Gutierrez’s wife and son testified that Gutierrez asked them to clean his boots, they admitted that they did not clean the boots. (RR4:836-37, 882-84.) Paramedic Calvin Parker also testified that he did not clean the boots. (RR2:316.) Nor have Plaintiffs identified anyone at the hospital who might have cleaned the boots, and they did not present any evidence that the hospital routinely cleaned the personal items of patients.

In fact, one look at the dirty boots shows that they were not cleaned. They were returned to Gutierrez just as they were when he was last wearing them—far from spotless, with some rocks on them. (RR3:485-86; RR4:836; RR15:DX48, Tab H.)



(RR15:DX48, Tab H.)

In addition to the mud-free boots, 26 photographs taken on the morning of the accident show that there was no mud on the ground where Gutierrez had been working when he was injured. (RR15:DX6A-Z.) The photographs further show that there was no mud on the railcar's ladder, the crossover platform, or any other part of the railcar. (RR3:486, 489; RR15:DX6N, DX6V, DX6W.) The Union Pacific employees who helped Gutierrez after the accident—Bilbo, Lewis, Williamson, and Duncan—all testified that the photographs accurately showed the ground conditions on the morning of the accident. (RR5:934, 1077, 1099-1100, 1112.)

Thus, the physical evidence conclusively proved an absence of mud.

**c. Plaintiff's far-fetched cover-up theory is no substitute for proof.**

Plaintiffs attempted to fill the gaps in their evidence with a strained cover-up theory. (*See* RR2:232-35, 245.) To discount the 26 photographs showing dry conditions on the day of the accident (RR15:DX6A-6Z), Plaintiffs suggested that Union Pacific altered the scene of the accident by pouring rocks (called ballast) throughout the RIP track before taking the photographs (RR2:232-34, 251).<sup>4</sup> There are multiple problems with Plaintiffs' theory.

First, the photographs themselves do not show freshly poured ballast. (*See, e.g.*, RR15:6C, 6K, 6L.) For example, the following photograph shows the area where Gutierrez fell.



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<sup>4</sup> During opening statements, Plaintiffs' counsel also went so far as to suggest that Union Pacific employees must have "took a towel" and "wiped off the rungs of a ladder" to remove mud, but Plaintiffs presented no evidence whatsoever supporting that theory. (RR2:245.)

# Tab A-9

No. 16-04340; *Diamond Offshore Services Limited, et al. v. Willie David Williams*; In Texas Supreme Court. Petitioner's Brief on the Merits, filed February 16, 2017.

Lead Counsel ~ Beck Redden LLP: David M. Gunn, Constance H. Pfeiffer.



## STATEMENT OF FACTS

The plaintiff in this personal injury case, David Williams, alleges he suffers extreme pain and mental anguish and can never work again. He sought to prove at trial that his injury is completely debilitating. Video surveillance evidence refutes his case, but the trial judge would not let the jury see it.

The defendants are two Diamond Offshore entities. They do not deny that Williams has a herniated and a bulging disc in his back and may be unfit to return to his former job as a mechanic on drilling rigs. But they have strong evidence to believe that Williams can indeed work again and that his disability is overstated.

When Williams underwent a Functional Capacity Evaluation to test his physical abilities and fitness to work, the report issued a very objective verdict: Williams is qualified for Medium level work, and his pain is exaggerated. **Tab E.** Exaggeration can be hard to prove, so Diamond Offshore hired an investigator. Diamond wanted to see for itself what Williams can do in his unguarded moments. Through surveillance video of Williams on three consecutive days, Diamond learned he could do quite a lot.

One day of video shows Williams operating heavy equipment, unassisted. He moves about freely, tearing down a structure and loading scrap metal onto a truck—all while the equipment is vibrating heavily and obviously requiring some strength and physical effort to operate.





On another day, the video shows Williams working on the “monster wheels” of his lifted truck. RR5:77. This footage tends to show that Williams, who had previously worked as a car mechanic, could still do this type of work. RR6:137.





Not only can Williams work, he can also play. While on medical leave (while Diamond Offshore was paying Williams his salary and medical expenses), Williams sent photos of himself deer hunting to his buddies on the rig. *See* Defense Proffer No. 2 (photos). Williams stood proudly next to a 120 pound doe.

During the pretrial hearing in this case, Williams preemptively sought to exclude all of Diamond Offshore's visual evidence and even its medical expert's opinions formed after viewing that evidence. Williams assured the trial court that he would admit he could do everything the videotape showed, such that putting the visual evidence before the jury would be improper "impeachment."

The trial court ruled that Diamond Offshore could show the video to the jury only if Williams opened the door by denying things shown on tape:

# Tab A-10

Nos. 19-1386, 19-1387, 19-1389; *Iridescent Networks, Inc. v. RPX Corporation, et al.*; In United States Court of Appeals for the Federal Circuit. Brief of Appellees, filed June 14, 2019.

Lead Counsel ~ Haynes and Boone, LLP: J. Andrew Lowes, Adam C. Fowles, Debra J. McComas

only patent challenged using the reference unpatentable as obvious in light of Golden, a prior art patent. Appx0002.

**A. The Patents.**

The Appellant, Iridescent Networks, Inc. Iridescent , is the owner of United States Patent ,639,612 the 612 patent and its continuation patent, United States Patent 8,036,119 the 119 patent .<sup>1</sup> The patents are directed to a method of providing guaranteed bandwidth on demand between an originating end-point and a terminating end-point. Appx0003, 0308, 0325, 0148, *see* Appx0988. The patents state that they take a distributed approach to handling bearer packets, with a physically separated controller and managed portal platform. Appx0003, 0148, 0309, 0326. To accomplish this, the controller handles control functions, including routing, admission control, and path provisioning, while the portal handles packet transport based on routing instructions received from the controller. Appx0003, 0148, 0309-0310, 0988.

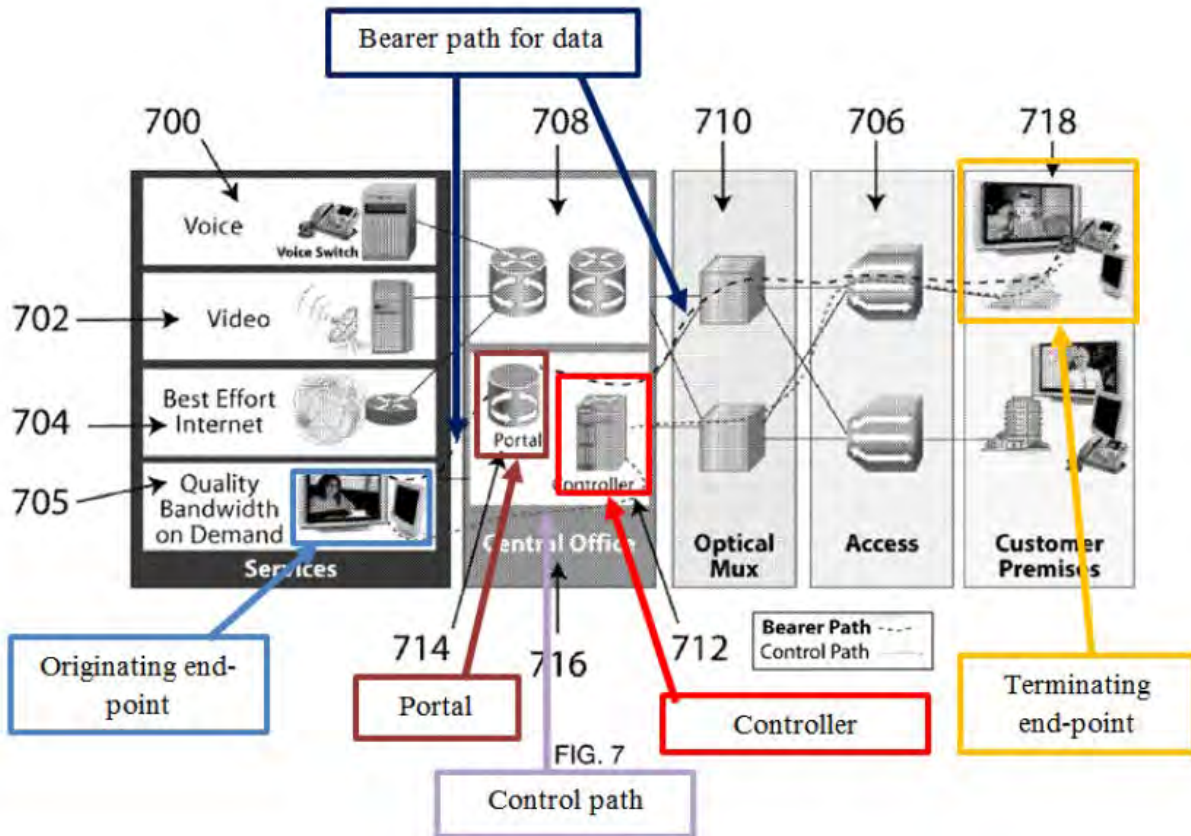
In other words, the patents purport to separate control processing from data transport to manage services end-to-end with a controller in charge of a physically separate portal for a connection between an originating end-point and a terminating end-point. Appx0308. A control path extends between the end-

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<sup>1</sup> For simplicity, citations and references are made solely to the 119 patent, but apply equally to the 612 patent unless otherwise noted.

points and the controller and between the controller and the portal, and a bearer path for data extends between the end-points. Appx1005.

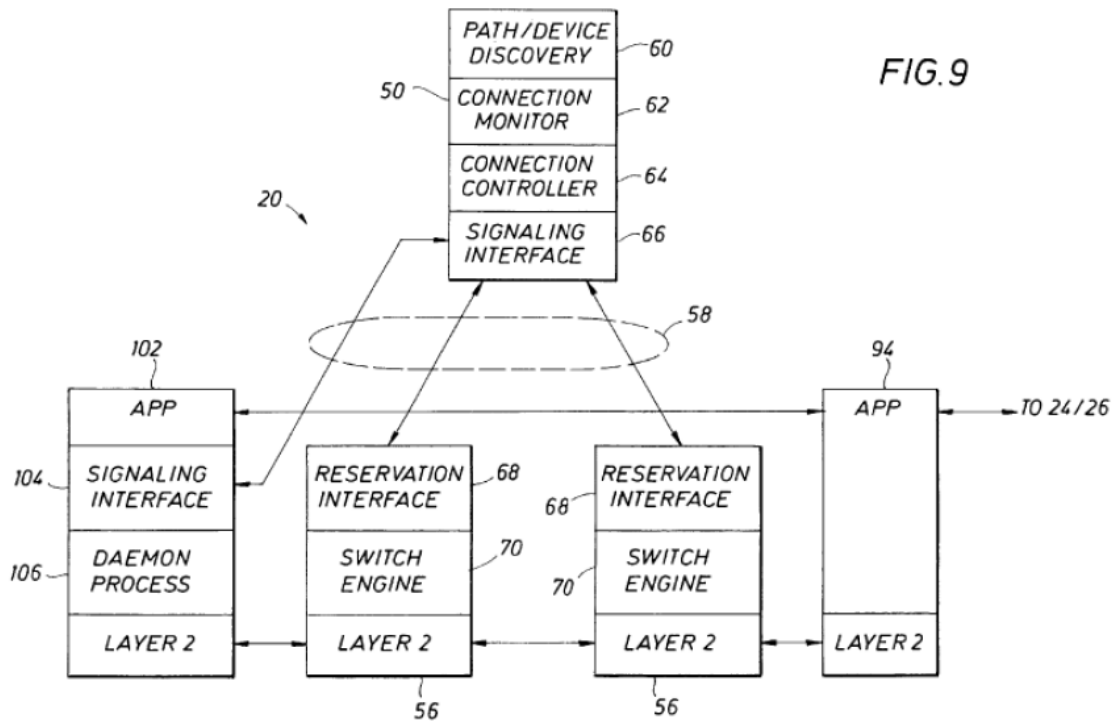
An example of the architecture disclosed in the patents is shown in Figure as annotated by Ericsson s expert, Dr. Narasimha Reddy.



Appx0004, 0148, 0320, 340, 0989, 1005. This version of Figure of the patents is a diagram of a Controller and Portal Solution in the Access Network, annotated to highlight specific elements, including the originating end-point, the portal, the controller, the control path, and the terminating end-point. Appx0004, 0326.

within the network or between networks can be established, while providing interoperability with and improving the performance of existing reservation protocols and frame formats. Appx0013, 1006, 1153. Golden discloses the separation of control functions from packet transmission functions into two physically separate entities: 1 an enterprise control point ECP, i.e., controller that assures end-to-end bandwidth and 2 a switch or router e.g., portal that handles packet transmission based on routing instructions from the controller. Appx1006, 1156-115 .

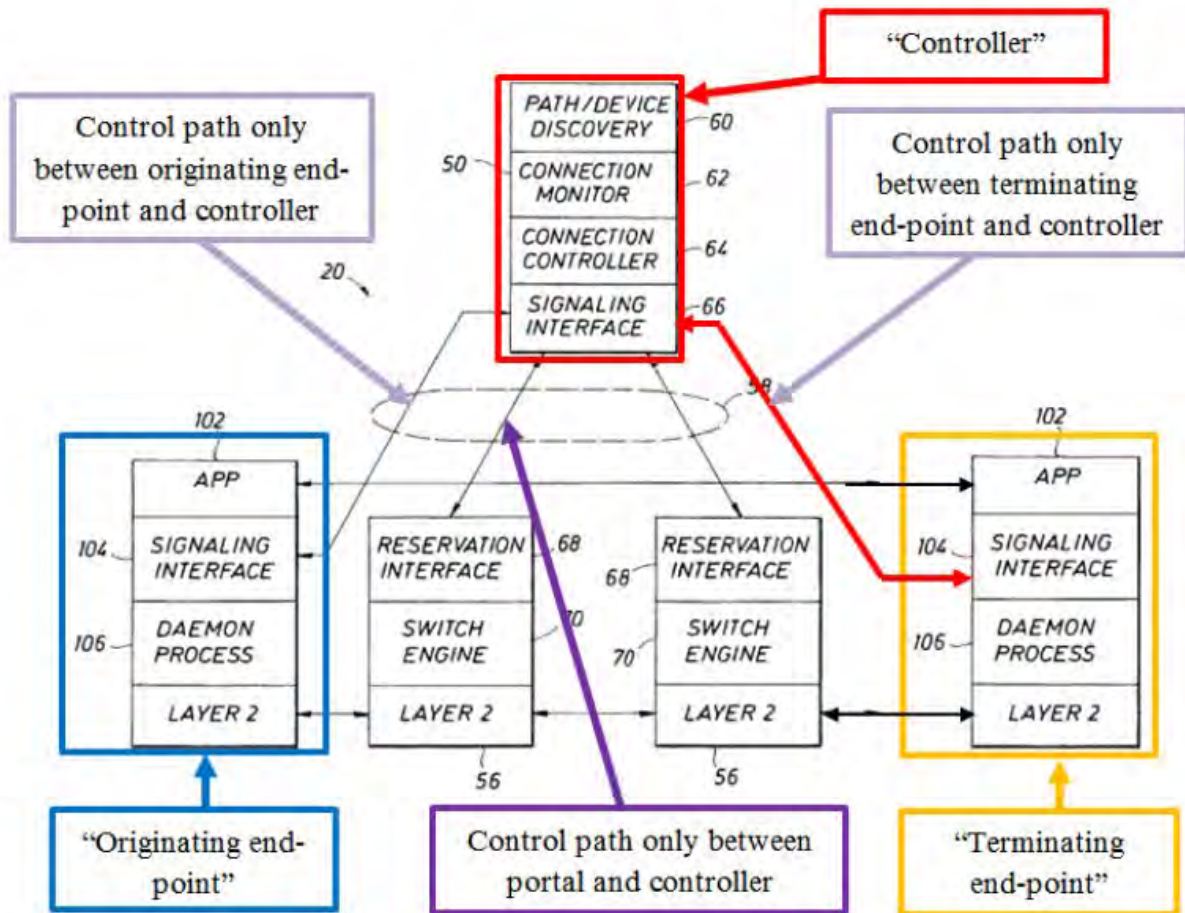
An example of Golden s end-to-end architecture is illustrated by Figure 9 as shown below. Appx0014, 0352, 1145.





Golden Figure 9 illustrates another example of a network that provides guaranteed COS while providing interoperation with IEEE 802.1P frame formats. Appx0015. Golden Figure 9 illustrates enhanced host 102 communicating with conventional host router 94. Appx0015, 1159. However, Golden teaches that it should be apparent that host 102 can also communicate with other hosts similarly upgraded as host 102. Appx0015, 1159.

To help demonstrate how the modification Golden expressly called for would work, Ericsson presented modified Figure 9, as reproduced below. Appx0031, 0341, 0386, 1006, 1011-1012, 1066-106 , 1159.



The above figure shows the replacement of router 94 at the terminating end-point with an enhanced host 102 as annotated to identify the originating end-point, terminating end-point, and the controller. Appx1006, 1011-1012.

Both experts testified that if an upgraded host 102 replaced conventional host 94, the signaling interface 104 of the upgraded host 102 would communicate with a signaling interface 66 of the ECP through signaling channel 58. Appx1011-1012, 1 09, 1 5-1 9.

# Tab A-11

No. 17-0557; *Clinton W. (“Buddy”) Pike, Sr., et al. v. Texas EMC Management, LLC, et al.*; In the Supreme Court of Texas; Petitioners’ Brief on the Merits, filed March 28, 2018.

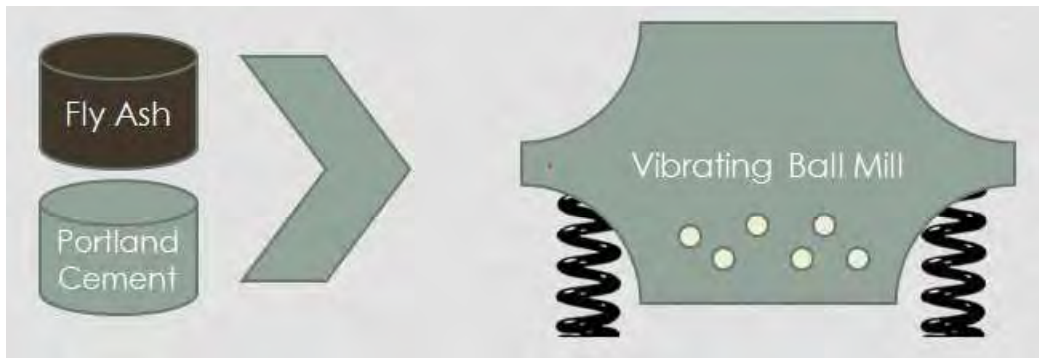
Lead Counsel ~ Haynes and Boone, LLP: Nina Cortell, Ryan Paulsen, Mark Trachtenberg, Mike A. Hatchell.

RR11:135-37; RR15:144-46, 255.) After roughly six weeks, VHSC exhausted the leftover inventory of Portland Cement. (RR15:144-47.) Thereafter, as the trial court found, VHSC “began using different materials in its milling process, by among other things, substituting lime for Portland Cement.” ([App.5:1841.](#))

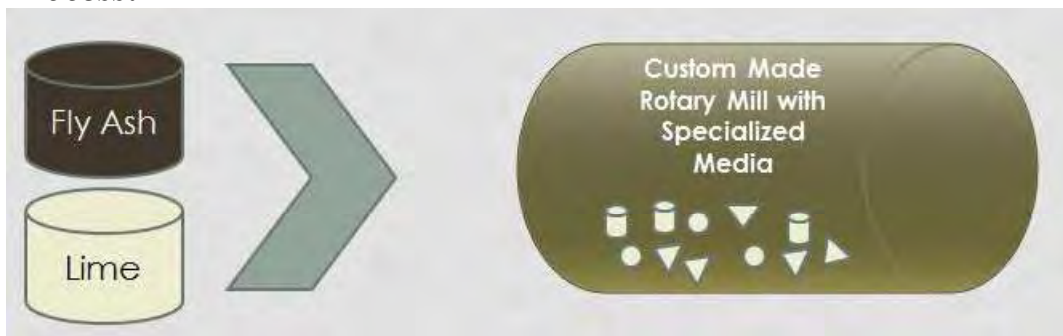
In another unchallenged finding, the trial court found that VHSC soon began using “entirely different milling equipment that employed a different technique”—one VHSC built from the ground up, without any of the milling technology used by EMC Products. (RR15:148-49; [App.5:1841.](#)) VHSC’s newly-installed “reactor” system consisted of rotary mills that slowly turned and ground the fly ash for hours with irregularly-shaped, specialized ceramic materials. (RR15:148-49, 155-56; RR16:72, 75; PX94A, PX157-60.) This process was very different from EMC Products’ vibrating ball mills (VBMs), which shook the ash vigorously for only seconds, using metal balls in the VBMs. (RR15:140-41, 148-49, 155-56; RR16:75; RR11:223-24; PX94.) Indeed, because of the significant differences, VHSC is able to use its new reactor system for other applications beyond fly ash and the production of cementitious materials. (RR15:148.)

The following figures illustrate the distinctly different processes used by VHSC and EMC Products.

***EMC Process:***



***VHSC Process:***



**D. The EMC Parties sued to recover the alleged “lost value” of the partnership (allegedly \$16 million), which the lower courts permitted them to recover notwithstanding the partnership’s historical losses.**

The EMC Parties brought multiple claims against their limited partners (Walker and Wilson), their former manager (Pike) and VHSC. (CR2:577-99.) As to Pike and VHSC, EMC Products claimed that Pike breached confidentiality provisions of his Management Agreement by attaching mill records and test data to a patent application filed shortly after the foreclosure sale (but not publicly available until much later, in November 2012). (RR11:182; RR15:18, 136-37; CR2:591-92.) Relatedly, EMC Products claimed that VHSC tortiously interfered with the agreement by inducing Pike’s breach. (CR2:591-92.) EMC Cement

# Tab A-12

No. 15-777; *Samsung Electronics, Ltd., et al. v. Apple Inc.*; In the United States Supreme Court; Respondent's Brief in Opposition, filed February 3, 2016.

Lead Counsel ~ Morrison & Forrester LLP: Harold J. McElhinny, Rachel Krevans, Nathan B. Sabri, Christopher L. Robinson; Wilmer Cutler Pickering Hale and Dorr LLP: William F. Lee, Mark C. Fleming, Lauren B. Fletcher, Steven J. Horn, Seth P. Waxman.

CAJA25349; *see also* CAJA25346 (“When everybody (both consumers and the industry) talk about [user experience], they weigh it against the iPhone.”).

Rather than innovate, Samsung copied. *E.g.*, CAJA25487, 41414-41416. Before the iPhone, Samsung’s mobile phones resembled walkie-talkie-like boxes with bulky antennas and keyboards, as the following trial demonstrative showed:



CAJA24679. After Apple announced the iPhone, Samsung’s phones transformed—in only “three months” of design, CAJA42538-42539—into sleek, streamlined, narrow rectangles that mimicked the iPhone’s distinctive appearance:



CAJA24681.



CAJA90143. As Apple’s design expert testified, these similarities were “beyond coincidental,” CAJA41409—they were intentional copying. This was confirmed at trial through Samsung’s own documents, including the following comparison that included specific “[d]irections for [i]mprovement” to make Samsung’s graphical user interface and icons more like Apple’s:





## 122. Visual Interaction Effect \_ Icon

Translation  
 Confidential

Usage of indistinguishable icons for different functions makes for difficult differentiation

- i-Phone : Instant recognizability due to highly intuitive icon usage.
- S1 : Difficult differentiation due to icons that are duplicative or are intuitively deficient.

i-Phone	GT-19000
 <p style="font-size: 10px; margin-top: 5px;">Minimize replicate icons; can feel icons were made in consideration of the user, for instant recognition and ease for the user.</p>	 <p style="font-size: 10px; margin-top: 5px;">Confusion can result from indistinguishable icons like Message and e-mail.</p>
<b>Directions for Improvement</b> Change replicate icons and select and use highly intuitive icons. For apps that have long names, change long names to simple ones or change the long name so it can be expressed at once for ease of recognition.	

- 127 / 132 -

CAJA25492. Samsung's copying extended to numerous distinctive aspects of Apple's user experience. *E.g.*, CAJA25408, 25416, 25423, 25487, 25496; *see also* Apple C.A. Br. 15-17.

Before this Court, Samsung (Pet. 8) tries to escape its adjudicated copying by pasting an image of its F700 design to support an argument that Samsung supposedly did not copy the iPhone. Although not shown in the image selected by Samsung, the F700 was an old-fashioned "slider" design with a slide-out keyboard:



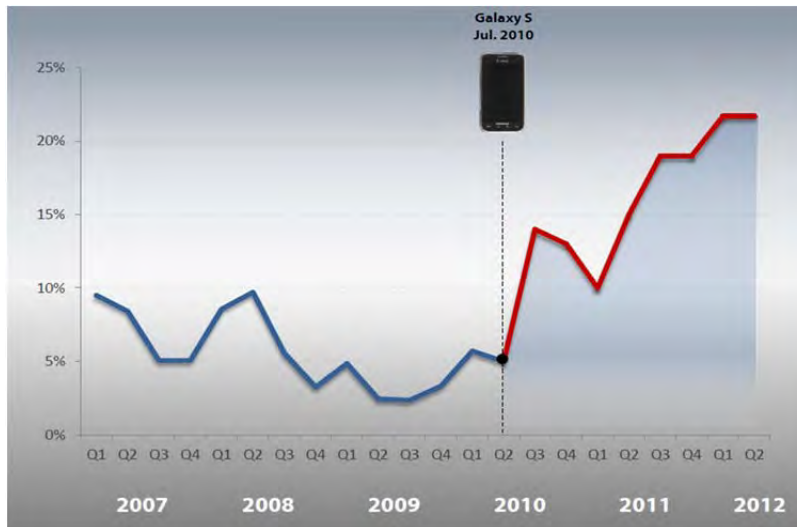
Def. Ex. 2627 at 25. Samsung’s suggestion that the F700 was a precursor to its infringing designs was not supported by any evidence. To the contrary, Samsung’s lead designer testified that the infringing Samsung Galaxy S design was “his own independent one” and was *not* influenced by the F700. Dist. Ct. Dkt. 1648-5 at 7-8; *see also* CAJA6833 (district court noting that Samsung’s F700 designer did not design any of Samsung’s infringing devices and was unaware of any Samsung phone having been based on the F700 design). That is presumably why Samsung never disclosed the F700 during discovery as purported evidence of its own independent development and, consequently, why the district court sanctioned Samsung by forbidding use of the F700 to “rebut an allegation of copying”—a sanction upheld on appeal and not challenged in Samsung’s petition. *See* CAJA6833; Dist. Ct. Dkt. 2708 at 2; Pet. App. 26a.<sup>2</sup>

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<sup>2</sup> Samsung’s use (Pet. 7) of the Q-Bowl image is similarly inappropriate: that device was simply an earlier version of the F700, Dist. Ct. Dkt. 2708 at 2, and the district court accordingly precluded Samsung from using it to rebut copying as well, *compare* Dist. Ct. Dkt. 1441 at 2 (Apple objection to slides 11-19), *with* Dist. Ct. Dkt. 1456 at 2 (sustaining objection).

The only possible conclusion on this record is that Samsung blatantly copied the iPhone’s design. That was certainly the market’s conclusion. WIRED magazine observed that Samsung’s design “is shockingly similar to the iPhone 3G: The rounded curves as the corners, the candybar shape, the glossy black finish and the chrome-colored metallic border around the display.” CAJA24687 (“Samsung Vibrant Rips Off iPhone 3G Design”). And the Wall Street Journal explained that Samsung’s Vibrant “has rounded corners and a prominent border that make it look very much like last year’s iPhone 3GS model.” CAJA24688.

Samsung’s strategy worked. Samsung’s share of the smartphone market swung “abrupt[ly] upward” following its copying, CAJA42050-42052—jumping from 5% to 20% in just two years—while Apple’s market share fell, as the jury saw:



CAJA90104.

41094 (expert testimony that, in light of the number of available alternative designs, “none of the [claimed] elements” of the D’677 and D’087 patents (like corners with particular radii and a rectangle with a particular form factor) was “dictated by function”).

Indeed, the jury saw several alternative, non-infringing designs for both the patented outer casing and the graphical user interface, which demonstrate that one can easily design a functioning smartphone without copying Apple’s designs:





CAJA24767; *see also* CAJA27203-27204, 27206, 27476-27477 (physical exhibits).

Samsung’s assertion (Pet. 22) that Apple’s design patents improperly claim “conceptual or functional attributes like rounded corners and rectangular form” is simply wrong and, in any event, shows no error in the jury instructions. The jury understood that abstract forms and concepts themselves are not patentable. *E.g.*, Pet. App. 160a (instruction stating that “[t]he scope of the [design patent] claim ... does not cover a general design concept, and it is not limited to isolated features of the drawings”). Rather, Apple’s patents protect designs that *incorporate*, but are not limited to, individual shapes and colors—just as one might patent a rug design with a zigzag or floral pattern without claiming an intellectual property right to prevent others from using zigzag lines or flowers. *See Dobson v. Dorman*, 118 U.S. 10, 15 (1886) (design patent for rug with, *inter alia*, “floral decorations” and “an outer zigzag stripe” is valid); *Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1334 (Fed. Cir. 2015) (asserted design patents “do not protect the general design concept of an open trigger, torque knob and activation button” but rather “particular ornamental designs of those underlying elements ... [*i.e.*,] the depicted or-

# Tab A-13

No. 14-18-01091-CV; *Arrows Up, LLC, et al. v. Sandbox Logistics, LLC, et al.*; In the Court of Appeals for the Fourteenth District of Texas at Houston; Brief of Appellees, filed October 4, 2019.

Lead Counsel ~ Beck Redden, LLP: Russell S. Post, Matthew P. Whitley, Michael E. Richardson, Seepan Parseghian, Parth S. Gejji.

Oren and two experts, Erik Howard and Randy Tolman, explained the genesis, purposes, and benefits of the various features. RR7:119-44, 13:31-53; 16:167-206. They explained how the box is part of a logistics process that “works in concert,” RR7:136, and which includes accessorial equipment like:

- Cradle to supports boxes and deliver sand to the blender. RR7:136-38, PX15.
- Forklifts to move boxes, including from stacked position to cradle. RR7:138.
- Rig mats to create a non-muddy floor on which forklifts can move. RR7:144-46.

This logistical process involves filling up boxes at the transload site, using a chassis to transport them to the wellsite, stacking them until needed, putting them on the cradle to deliver sand, and using a forklift to manipulate the boxes. RR7:110-38.



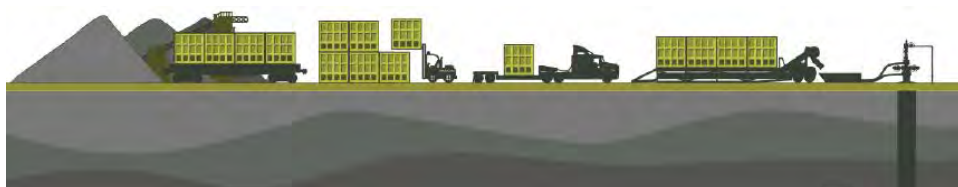
*Sandbox (PX718)*



*Stacked sandboxes (DX425)*



*Cradle (PX15)*



*Process (DX425)*



SandBox's design features were not invented overnight. They were the result of a lengthy trial-and-error process that included working through design changes with a manufacturer, conducting a test run with a customer, RockPile Energy, and then making modifications following its first contract. RR7:111-52, PX121, 131, 649, DX38. The SandBox went through two versions or generations by early 2014. RR15:113-14 ("Gen 2"). Some examples of the know-how developed include:

- The Orens started their design with a 20' long container, but they learned this was too big. RR112-17, PX121.
- They initially used a round hatch, but they found that an elongated rectangular hatch worked better for loading containers with sand. RR7:128-31, 16:188-93, PX649.
- They welded stacking cones on the top ISO corners to prevent slippage after a stacked box nearly fell due to ice. RR7:140-44, 16:193-200.
- They added tubular forklift pockets to prevent mud from sticking to the bottom and falling into the hopper. RR7:131-34, 16:183-88, PX131.
- They incorporated rig mats for a stable forklift platform after nearly having a forklift get stuck in mud. RR7:144-47.
- They changed to a stainless steel funnel after SandBox's first customer kicked it off the site because it could not fully empty sand from the boxes. RR7:148-51.

SandBox's efforts were finalized by 2014. RR7:151. It took about three years to go from idea to viability. RR7:152; 16:217. Research and development cost around \$8 million. RR7:152, 14:40-42, PX599.

This revolutionary system was wildly successful. RR8:44-46; RR7:110-11 (“nobody had ever thought of that before”); 16:163, 213 (“revolutionary”). SandBox’s solution not only eliminated demurrage and other costs, but also reduced exposure to the health hazards of silica dust and noise. RR7:110, 147-48. Critically, SandBox was “the first one to come to market” with a containerized solution and there was “no standard for frac sand containers in the oil and gas industry” before SandBox came along. RR16:170-71. SandBox “set the standard.” RR13:150.

Still, Oren was always looking to “improve upon our idea,” and one area of potential improvement was to make the 6,000-pound box lighter. RR7:153, 120. Oren contemplated making a box out of a lighter steel or plastic, and that is how he was introduced to Arrows Up. RR7:154.

*Arrows Up’s pre-NDA bins for seeds, wood pellets, and clay*

Chicago-based Arrows Up was formed by John Allegretti in 2009. It focused on designing plastic containers capable of holding 3000 pounds of agricultural seeds. RR10:83-86, 11:96-98. This seed bin gave rise to the “Bulk Transport System” or “BTS.” PX41. The BTS took 18 months of trial-and-error to design. RR10:88. Arrows Up marketed the BTS for use with lightweight commodities, such as seeds, plastic pellets, or golf balls. PX41. Arrows Up never sold a BTS container for the purpose of carrying frac sand, a much finer and denser material. RR10:90.

In mid-2012, after another 15 months of trial-and-error, Arrows Up introduced a “Jumbo BTS” container. RR10:97. Made mostly of wood and plastic, the Jumbo BTS was designed to carry around 16,000 pounds of bulky, less dense materials like wood chips or clay. RR10:94, 106, PX44. Arrows Up sold a few Jumbo BTS containers in 2012 and 2013 to customers in those particular industries. RR10:94-95, 115.

While Arrows Up had aspirations of entering the frac sand market, it never sold containers for the purpose of handling frac sand prior to 2014. RR10:114-15. Nor did Arrows Up design or test containers for transporting 48,000 pounds of sand (or anything else) before 2014. RR10:110, 112, 19:185. Before meeting SandBox in 2014, Arrows Up had never:

- Built a container with anything close to SandBox’s dimensions. RR10:86 (BTS dimensions were 4’ x 4’ x 5’), RR10:105, PX550 (Jumbo BTS was a 96” cube).
- Built a hatch with SandBox’s dimensions. RR10:157, 13:38 (2’ x 4’).
- Used felt as a gasket material. RR13:48, 16:201 (brush).
- Used an ISO casting corner or a stacking cone. RR19:175, 16:195 (nesting ears).
- Used funnel angles like SandBox. RR16:180-81 (funnel angles of 30° or 50° for all angles).
- Used fully enclosed forklift tubes. RR10:158-59.
- Used a detachable ladder. RR10:157-58.



*BTS (PX716)*



*Jumbo BTS (PX550)*

At this time, Arrows Up’s business was strictly limited to selling containers. Arrows Up did not develop, market, or provide any kind of logistical system—including any kind of a system for handling frac sand on a well site—before 2014. RR10:101-04. It is hardly surprising, therefore, that Arrows Up had no frac sand customers before 2014. RR10:127 (“not yet entered the sand market”).

But Arrows Up had no intention of performing under Settlement Agreement. To start, even though John Allegretti signed a sworn statement that he had destroyed electronic copies of SandBox’s Confidential Data, PX2, he later admitted in trial that he did not do so. RR10:200-01. Furthermore, Allegretti never distributed copies of the NDA or Settlement Agreement to any employees. RR10:149, 204. As a result, key Arrows Up personnel (including Allegretti’s right-hand man, Kevin Corrigan) were unaware of the terms or obligations of the NDA and Settlement Agreement. RR19:196-200, 216-17, 14:183-86, 194-95.

Then, barely three weeks after it had executed the Settlement Agreement, Arrows Up sent a marketing PowerPoint regarding its “Jumbo Box System” to a potential customer. That presentation used pictures of the plastic SandBox prototype. RR10:205-15, PX60. Suspiciously, one such picture had been Photoshopped to remove the SandBox logo from the prototypes while retaining the Arrows Up logo—a smoking gun that Allegretti called a “clerical error.” RR10:213-15, PX669, 670.



*PX669 (altered picture used in Arrows Up’s advertising)*



*PX670 (the actual picture with SandBox's logo)*

Arrows Up touted “a few successful trials with sand logistics companies,” even though this was not true. RR11:11-18, PX64. In the six months following the Settlement Agreement, Arrows Up sent 327 PowerPoint presentations to oil and gas companies using pictures of the plastic SandBox prototype with the SandBox logo digitally removed. RR11:18-38, PX72.0-.168, 71.0-.107, 624.00-.49. Arrows Up never told any of these potential customers that the plastic prototypes in its advertising had been based on SandBox’s Confidential Data. RR11:38.

Eventually, Arrows Up told RockPile that it had a frac sand container and logistical system. RR11:43-44. Arrows Up was aware that RockPile had been a SandBox customer, and that SandBox had unsuccessfully attempted to have the plastic prototypes tested on a RockPile site in 2014. RR11:42-43. Yet Arrows Up’s presentation to RockPile claimed the plastic SandBox prototype as Arrows Up’s bin, and Arrows Up never informed RockPile that this was the very same bin Oren had asked to test on a RockPile site. RR11:44-46, PX278; *see also* RR18:12.

Even though Arrows Up discussed a frac sand system with RockPile, Allegretti only set foot on a frac site for the first time around May or June of 2015. RR12:105. Allegretti's only real exposure to frac sand logistics had been through SandBox. RR11:17-18 (no successful trials as of March 2015).

Near the end of 2015, after Arrows Up had lost nearly \$2 million, it entered into a relationship with an investor called OmniTrax. RR11:66-69. Arrows Up used a similar PowerPoint depicting a plastic SandBox prototype. RR11:68-69, PX83. OmniTrax eventually agreed to acquire Arrows Up from Allegretti, and Arrows Up used OmniTrax's connections to sign up customers. RR11:69-70.

### *Arrows Up breaches the Settlement Agreement*

Arrows Up not only breached the Settlement Agreement through the use of marketing materials, but also by its design of the post-Settlement Agreement bin.

As Arrows Up developed its post-Settlement Agreement bin (the new version of the Jumbo bin), it followed SandBox's design while making only slight variations. PX655 at AU109758 (changing hatch length because "John [Allegretti] did not like using the same dimensions as SBX."); *id.* (specifying funnel angles only one degree different from SandBox's angles); *see also* RR19:165-71.

Arrows Up eventually signed a contract with RockPile on August 1, 2015. RR11:52, 18:129. It proceeded at an improbable speed, producing the necessary schematics after just one week, RR20:9, PX595, and delivering twelve completed containers by the end of September. RR11:52, 55.

Allegretti testified that, as part of its regular practice, Arrows Up kept track of its testing as a product was developed. RR11:122-23, 170. Yet when asked why there were no documents showing research for the dimensions of the RockPile bin, Corrigan asked the jury to “trust” that he did the necessary testing. RR20:14-15. Similarly, Arrows Up’s financial statements showed no evidence of any associated research costs. *See, e.g.*, PX173.

On the other hand, photos showed that Arrows Up built the RockPile bins just a few feet from one of the plastic SandBox prototypes. RR11:59-62, 666, 672, 679. Arrows Up even called its bins “Sand Bins” instead of SandBoxes. RR11:62-63. Arrows Up launched a copycat logistics process as well. RR16:214-16.

The resulting product, derived from SandBox’s data, was a copycat:



*RockPile bin (PX666)*

A summary comparative table is helpful to illustrate the common features between the SandBox and Arrows Up bins:



# Tab A-14

No. 18-1187; *Endeavor Energy Resources, L.P. v. Energen Resources Corp., et al.*; In the Supreme Court of Texas; Petitioner's Brief on the Merits, filed December 18, 2019.

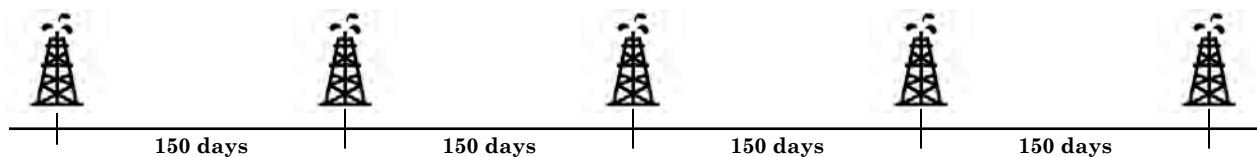
Lead Counsel ~ Lynch, Chappell & Alsup, P.C.: Richard E. Booth, Steven C. Kiser; Clark Hill Strasburger: P. Michael Jung.

ther.

**D. Allowing Accretive Accumulation of Unused Days Over Multiple Terms Produces the Result Most Consistent with the Balanced Interests of the Parties.**

The construction of the retained-acreage clause is a “quest to determine the intent of the parties.” *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 529 (Tex. 1987). “Continuous-development and retained-acreage clauses serve to balance the interests of the lessor [in maximizing development] and the lessee [in timing drilling and production to match the market] ... .” *Endeavor v. Discovery*, 554 S.W.3d at 597. The role of unused days in balancing the parties’ interests can be explored through five examples.

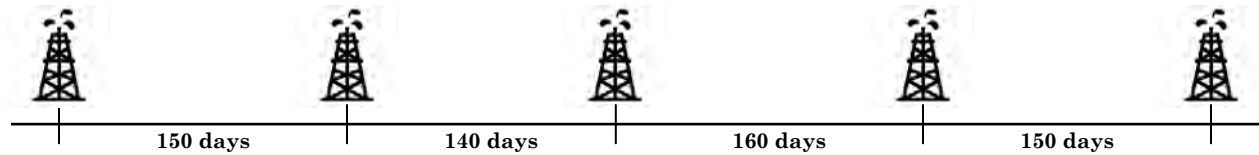
Consider first the prototypical situation where each new well is commenced precisely 150 days after the completion of the previous well, such that there are no unused days:



The lessor receives the benefit of continuous development on a 150-day cycle while the lessee is given a series of 150-day periods in which to

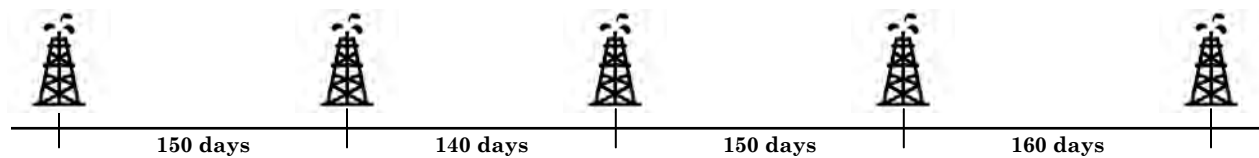
plan and commence each new well.

Now suppose that the third well is started ten days before the deadline, creating ten unused days that are used up during the next term:



The lessor receives the benefit of the same 150-day average cycle as in the first example; the lessee is given extra flexibility in commencing the fourth well as a reward for accelerating the commencement of the third well. The parties' interests are balanced, the continuous-drilling provisions are satisfied, and the lease remains in effect.

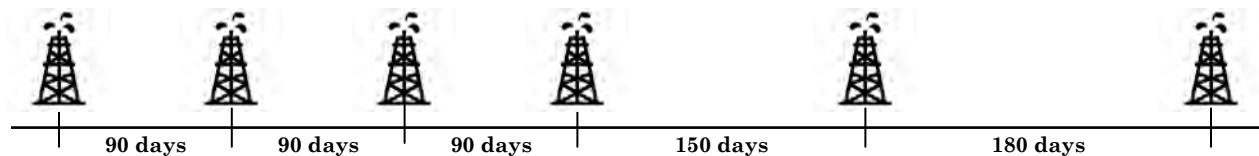
Now consider a variation, in which there is a gap between the term in which the ten unused days accrue and the term in which they are used:



The benefit to the lessor is the same as in the previous two examples. But, under the court of appeals' and Energen's construction, the ten unused days before drilling the third well are not available to excuse the

delay in drilling the fifth well, and the lease terminates as to non-dedicated acreage. The parties' interests are thrown out of balance by arbitrary timing considerations.

Next consider an example where, under the court of appeals' and Energen's construction, the lessor's expectations are exceeded and yet the lessee's interest in flexibility is thwarted:



The lessor receives an average of one new well every 120 days, even though it bargained for only one new well every 150 days. Yet the lessee, despite accruing 180 unused days during the first four terms, loses the opportunity to drill further wells, merely because it has had the temerity to use 30 extra days in a term following a term in which no unused days accrued.

Finally, consider the actual sequence of wells in this case. Energen, as lessor, received twelve new wells over a period of 1,743 days (not counting drilling time). It bargained for twelve new wells within a period of 1,800 days. And it received each of those new wells *earlier* than it would have if Endeavor had consumed each full 150-day term without

# Tab A-15

No. 03-1500; *Thomas Van Orden v. Rick Perry, in His Official Capacity as Governor of Texas*; In the United States Supreme Court; Brief for the Ethics and Public Policy Center as Amicus Curiae in Support of Respondents, filed July 6, 2004.

Lead Counsel ~ Gibson, Dunn & Crutcher, LLP: Mark A. Perry, Daniel J. Davis, Ryan P. Myers, Dustin K. Palmer.

## ARGUMENT

Petitioner and his like-minded friends at the ACLU and similar organizations would have this Court order the removal, defacement, or destruction of a symbolic monument that stands, as it has for many years, on the grounds of the Texas State Capitol, solely because the monument depicts the Ten Commandments that (according to the tradition of the world's major religions) God delivered to Moses for the edification of human civilization. Petitioner's request, although wrapped in the garb of the First Amendment, is in fact emblematic of a pernicious brand of intolerance for religion's role in American public life. By asking this Court to declare that the Texas monument and similar displays throughout our Nation offend the Constitution, petitioner seeks nothing less than a radical transformation of our national identity—from a land founded on and devoted to religious liberty and free expression to a place, unrecognizable to our forebears, where the merest public nod toward religious history or beliefs would be *verboten*.

The constitutional arguments have been fully briefed in this case and need not be repeated here. It suffices to say that whether the test is establishment or promotion, entanglement or endorsement, the public display of the Ten Commandments offends no First Amendment doctrine previously articulated by this Court. Rather than rehash the legal framework in which this decision will be made, EPPC respectfully submits this brief to address the *practical* ramifications of petitioner's challenge.

Religious iconography is an integral part of American public architecture. *See, e.g.*, Brief for United States in No. 03-1693 at 11, 1a-6a; Brief for American Center for Law and Justice in No. 03-1693 at 16-19. Symbols such as the Ten Commandments represent the will of the people as reflected in the halls in which they have chosen to install their respective governments. The Texas monument is neither unique nor isolated; to the contrary, the Decalogue motif has been

incorporated time and again by the artists and architects responsible for designing the halls of American government.

For example, in the Main Reading Room of the Library of Congress stands a large bronze statue of Moses holding the Ten Commandments:



This prominent statue is on display for the one million people who visit the Library of Congress each year. Similarly, the recently completed Ronald Reagan International Trade Building features a very large statue with the Ten Commandments that is visible to all who pass along Pennsylvania Avenue:



And the millions of visitors to the National Archives pass over a bronze plaque inscribed with the Decalogue tablets:



Indeed, Decalogue imagery graces the homes of all three Branches of our federal government. Moses and the Ten Commandments appear on both the south frieze of the courtroom in which this Court sits and the pediment of the Court's building:





# Tab B-1

No. 15-0045; *Roel Garza, et al. v. King Ranch, Inc.*; In the Supreme Court of Texas; Response to Petition for Review, filed April 15, 2015.

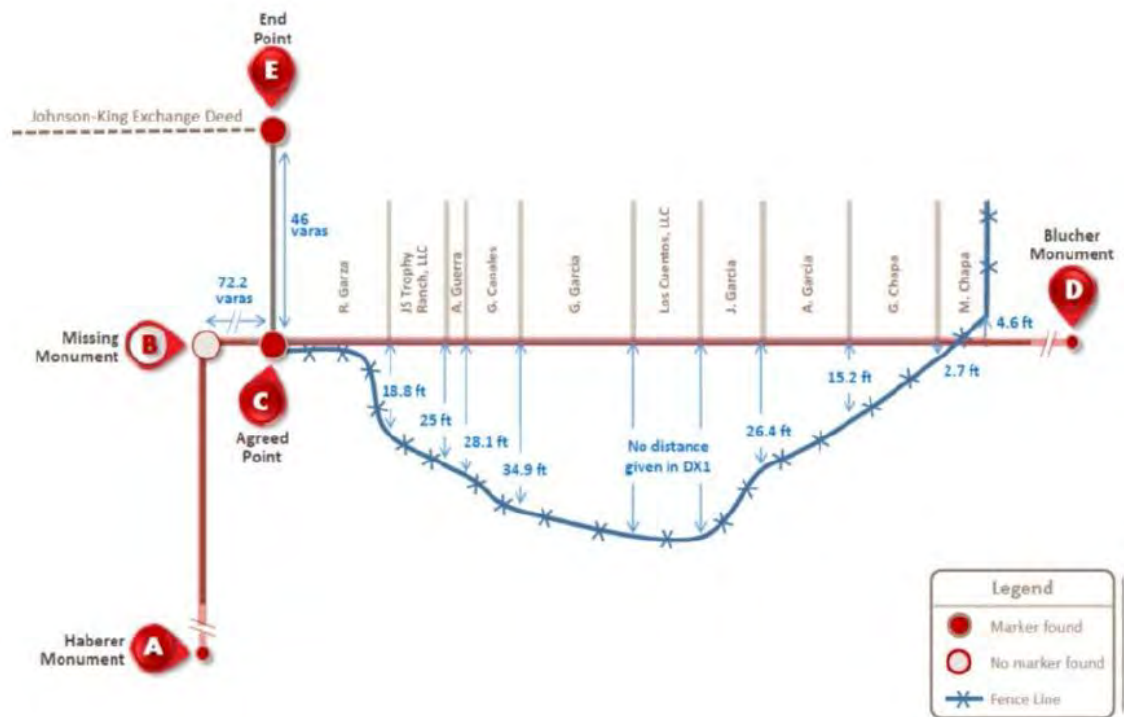
Lead Counsel ~ Locke Lord LLP: Mike A. Hatchell, Charles R. “Skip” Watson, Jr., Susan A. Kidwell, Christopher Dove.

[A]lthough the sketch contains a series of x's indicating a fence was in the location of the boundary line, the sketch still shows the boundary line at this location as a straight line. Absent evidence that the single called bearing was a mistake, the presumption that Haberer ran his survey in accordance with his course and distance calls controls.

*King Ranch I*, 2014 WL 4627592, at \*4.

The fence depicted in Haberer's sketch actually has nothing to do with the current adverse possession claim because that fence no longer exists. In the late 1950s or early 1960s – no one knows for sure – King Ranch constructed another fence in the area. (5RR:17, 78.) Until 2012, all of the Petitioners – and one of the Ranch's employees – believed the fence marked the boundary (5RR:81-84, 121-22; 6RR:64-65, 71-73), although there is no evidence it was built as a boundary fence. To the contrary, Petitioners testified that they did not build the fence and could not say why it was built. (5RR:78-79, 82-84, 126; 6RR:66-67.) Petitioners occasionally used their property up to the fence for grazing, hunting, and hay rides. (5RR:55, 91-98, 116-17; 6RR:41, 59-60.)

In 2012, the Ranch decided to replace its fence. (*See* 5RR:18.) It commissioned a survey to retrace the line created by the 1891 deed and first surveyed by Haberer. (DX1.) The chart below depicting the new survey shows that the existing fence starts along the straight-line boundary but then curves as much as forty feet south of that line (into King Ranch's property) before curving back north and re-crossing the boundary.



**The lawsuit:** The Ranch gave its northern neighbors a copy of the new survey and told them it would be building a new fence along the true boundary, slightly north of the old fence. (See PX4, PX10, PX15.) The Garza Petitioners responded by filing this lawsuit. (1CR:4.) They claimed that the Ranch trespassed onto their property when constructing the new fence. (1CR:6.) They sought the cost of replacing trees and brush as well as an injunction to prevent further trespass. (1CR:7-8.) The Garzas later amended their petition to request a declaration of the true boundary line, even though establishing the boundary location was an essential part of the trespass action. (1CR:191.) Alternatively, to protect against a determination that King Ranch’s new survey followed the

Not Reported in S.W.3d, 2014 WL 4627592 (Tex.App.-San Antonio)  
(Cite as: 2014 WL 4627592 (Tex.App.-San Antonio))

**H**

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION  
AND SIGNING OF OPINIONS.

**MEMORANDUM OPINION**

Court of Appeals of Texas,  
San Antonio.

KING RANCH, INC., Appellant

v.

Juan Antonio GARCIA, Gonzalo Chapa, Jr., and  
Carmen S. Juan Antonio Garcia, Gonzalo Chapa,  
Jr., and Carmen S. Chapa, Appellees.

No. 04–13–00605–CV.  
Sept. 17, 2014.

From the 79th Judicial District Court, Jim Wells  
County, Texas, Trial Court No. 12–11–51704–CV,  
[Richard C. Terrell](#), Judge Presiding.  
[Charles R. Watson, Jr.](#), [Mike A. Hatchell](#), [Susan A.  
Kidwell](#), Locke Lord LLP, Austin, TX, [Michael  
James Krueger](#), [Robert Lee Murphy Jr.](#), Law Office  
of Michael James Krueger, Kingsville, TX, [Chris-  
topher Dove](#), Locke Lord LLP, Houston, TX, for  
King Ranch, Inc.

[David D. Towler](#), Law Office of David D. Towler,  
San Diego, TX, for Juan Antonio Garcia, Gonzalo  
Chapa, Jr., and Carmen S. Juan Antonio Garcia,  
Gonzalo Chapa, Jr., and Carmen S. Chapa.

Sitting: [CATHERINE STONE](#), Chief Justice,  
[MARIALYN BARNARD](#) and [LUZ ELENA D.  
CHAPA](#), Justices (concurring in the judgment  
only).<sup>FN1</sup>

**FN1.** Justice Chapa would vote to request a  
response to the motion for rehearing.

**MEMORANDUM OPINION**

[CATHERINE STONE](#), Chief Justice.

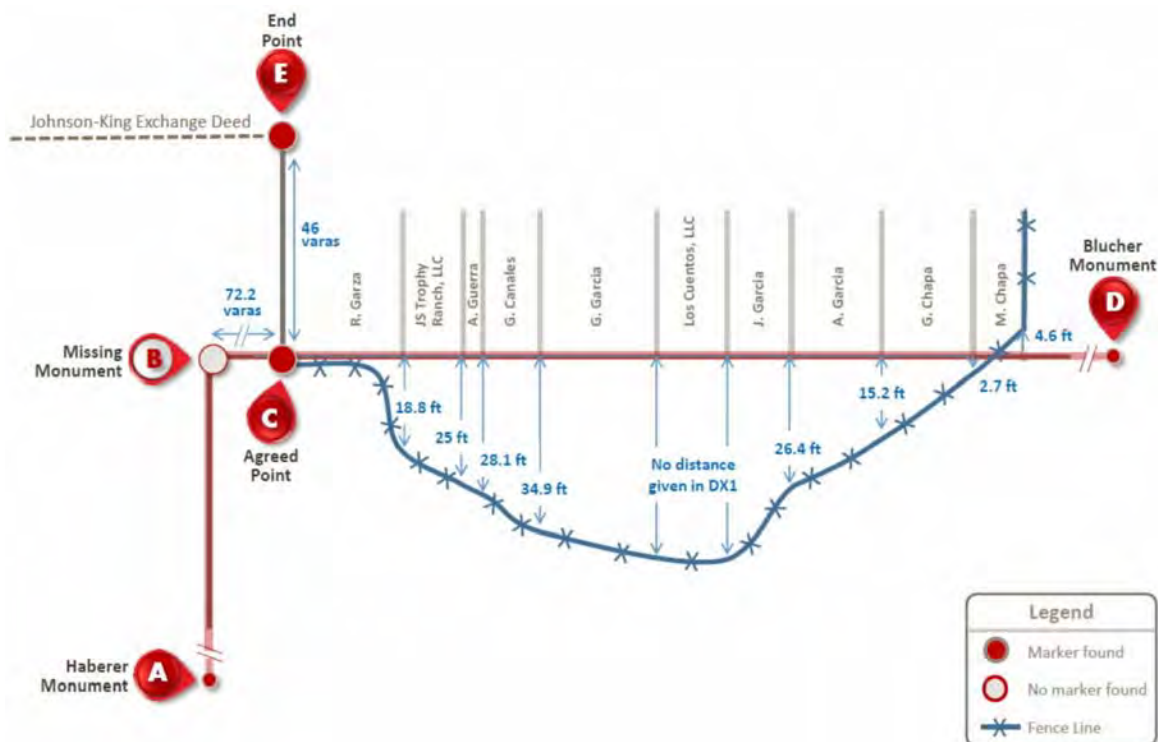
\*1 Appellees' motion for rehearing is denied. This  
court's opinion and judgment dated August 6, 2014  
are withdrawn, and this opinion and judgment are  
substituted. We substitute this opinion to clarify our  
conclusion regarding the location of the boundary  
line.

This appeal arises from a dispute over a boundary  
line established in an 1891 Deed of Exchange  
between Henrietta M. King, predecessor-in-interest  
to appellant King Ranch, Inc., and Luciano Garcia,  
et al., predecessors-in-interest to appellees Juan  
Antonio Garcia, Gonzalo Chapa, Jr., and Carmen S.  
Chapa (the "Garcias"). King Ranch contends that  
the boundary line is a straight line north of an exist-  
ing fence, while the Garcias contend the existing  
fence line is the boundary line. The boundary line  
not only separates the parties' land, but also serves  
as a portion of the boundary line between Jim Wells  
County and Kleberg County. King Ranch chal-  
lenges the legal and factual sufficiency of the evi-  
dence to support the trial court's finding that the ex-  
isting fence line is the boundary line and its altern-  
ative findings that the Garcias adversely possessed  
the land located north of the fence. We reverse the  
trial court's judgment and render judgment that the  
boundary line is a straight line.

**BACKGROUND**

The following diagram illustrates the parties' posi-  
tions, with King Ranch's position depicted by the  
straight line and the Garcias' position depicted by  
the curved fence line.

Not Reported in S.W.3d, 2014 WL 4627592 (Tex.App.-San Antonio)  
 (Cite as: 2014 WL 4627592 (Tex.App.-San Antonio))



The dispute between the parties arose when King Ranch had the boundary line between the properties surveyed to install a new fence. Ronald Brister, who prepared the survey, opined that the boundary line was a straight line north of the existing fence. The Garcias filed the underlying lawsuit to prevent King Ranch from replacing the existing fence. During the subsequent trial, the Garcias' expert, David Nesbitt, testified that the boundary line followed the existing fence line. In addition to Brister's testimony, King Ranch also called Nelda Foster, another surveyor, as a witness, and she also testified that the boundary line was a straight line.

After considering the competing experts' opinions, the trial court agreed with Nesbitt, finding that the existing fence line was the boundary line. The trial court alternatively found that the Garcias adversely possessed the land north of the fence. King Ranch appeals.

#### STANDARD OF REVIEW

When a party challenges the legal sufficiency of the evidence supporting an adverse finding on an

issue for which it did not have the burden of proof, the party must show that no evidence supports the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co., L. C.*, 348 S.W.3d 194, 215 (Tex.2011). "Evidence is legally sufficient if it 'would enable reasonable and fair-minded people to reach the verdict under review.'" *Id.* (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005)). "We 'credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.'" *Id.* "A factual sufficiency attack on an issue on which the appellant did not have the burden of proof requires the complaining party to demonstrate there is insufficient evidence to support the adverse finding." *Flying J Inc. v. Meda, Inc.*, 373 S.W.3d 680, 690–91 (Tex.App.-San Antonio 2012, no pet.). "A reviewing court will reverse the trial court only if the evidence which supports the jury's finding is so weak as to be clearly wrong and manifestly unjust." *Id.* at 691 (internal citations omitted). "We may not substitute our judgment for that of the trier of fact or pass on the credibility of the witnesses." *Sunl*

# Tab B-2

No. 19-0671; *In re Corpus Christi Liquefaction, LLC*; In the Supreme Court of Texas; Petition for Writ of Mandamus and Correlative Declaratory and Injunctive Relief, filed August 5, 2019.

Lead Counsel ~ Baker Botts L.L.P.: Thomas R. Phillips, Benjamin A. Geslison, Renn G. Neilson.

protest [the last two years] in order to preserve its contention that it has been double-taxed and obtain a refund.” *Id.* at 151. CCL describes below in more detail its facility, its history of double taxation, and Nueces County Appraisal District’s response to *In re Oxy* that prompted this action.

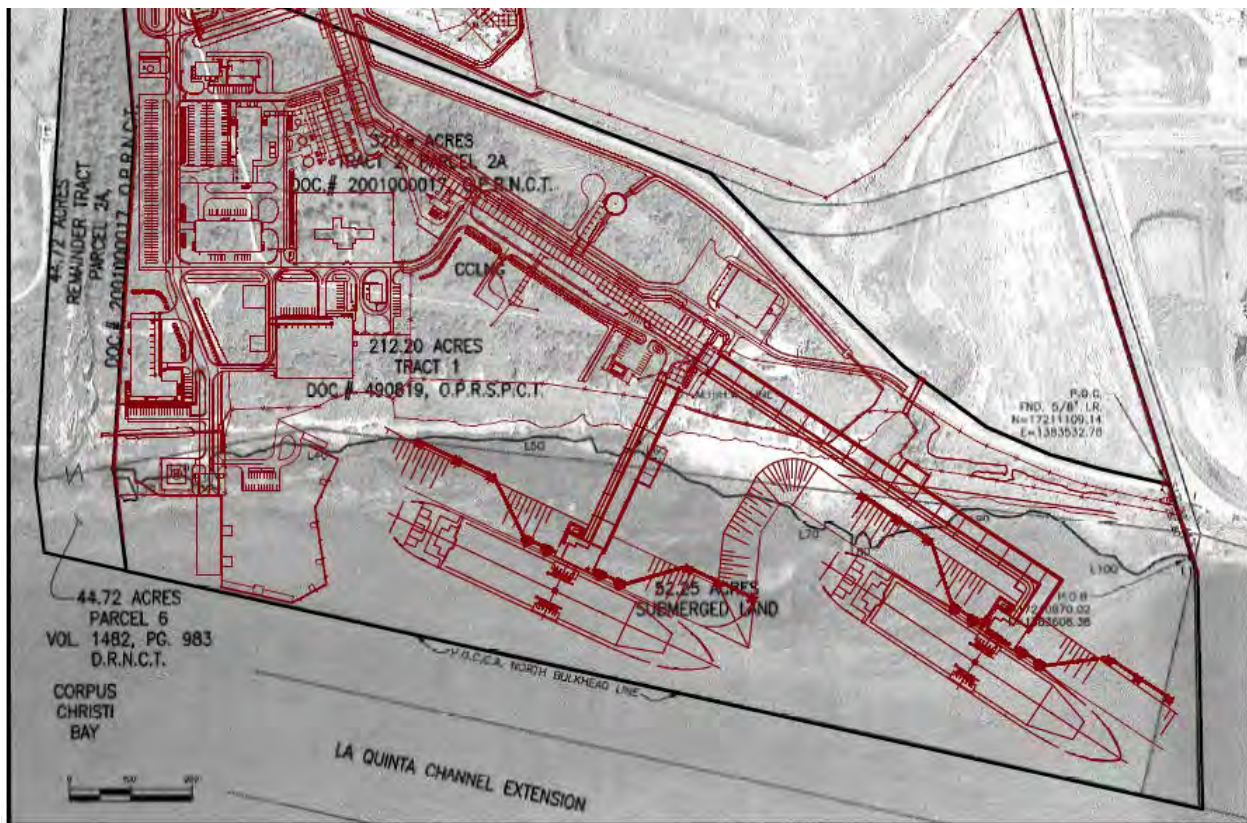
**I. CCL’s projects in the formerly disputed area.**

For several years, CCL has been constructing a massive natural gas liquefaction (LNG) and export facility on CCL-owned land in San Patricio County on the north shore of Corpus Christi Bay, and extending into the La Quinta Channel. CCL’s facility is located approximately 1.5 miles to the northwest of Oxy’s Beta Pier, as shown in the figure below.



<https://www.google.com/maps/@27.8745558,-97.2564494,2424m/data=!3m1!1e3>

CCL's LNG facility is designed for three natural gas liquefaction trains (individual liquefaction and purification centers) with total expected nominal production capacity of up to 13.5 million tonnes per annum (mtpa) of LNG. The facility includes docking for LNG vessels and necessary equipment to load the LNG vessels. As the figure below shows, portions of those docking facilities extend into Corpus Christi Bay, and are the structures that have been, and now continue to be, the subject of Nueces County's "blatant double taxation" of CCL. *In re Oxy*, 561 S.W.3d at 159.



CCL Plant Survey (included at Ex. B).

While the facility is not yet complete, the phases currently under construction represent an investment of approximately \$16 billion, making it



# Tab B-3

No. 18-0660; *In re Occidental Chemical Corporation, et al.*;  
Relators' Brief on the Merits, filed August 13, 2018.

Lead Counsel ~ Norton Rose Fulbright US, LLP: Edward  
Kliwer III, William T. Sullivan, Rosemarie Kanusky;  
Greenberg Traurig LLP: Dale Wainwright, Charles R. "Skip"  
Watson, Kendyl Hanks, Justin Bernstein, Emily Willis.

refund of taxes wrongfully collected for the Properties, and provide other correlative declaratory and injunctive relief.<sup>8</sup>

## **STATEMENT OF FACTS**

### **I. Two Counties Are Taxing The Same Property.**

During the last ten years, Relators have paid ad valorem taxes on the Properties of more than \$3 million to Nueces taxing units and more than \$3 million to San Patricio taxing units. The approximate duplicative amounts paid to each taxing unit are estimated in the Shock Affidavit ¶¶4–5, Appendix F.

Oxy paid these duplicative taxes under protest, sought relief from appraisal review boards, and then filed taxpayer refund suits in state district courts to recover the amounts wrongfully collected under protest pursuant to Code §41.41(a)(3). (*See* MR:68–197.) Those taxpayer suits, some of which were filed as far back as 2009, remain pending, awaiting this Court’s determination of the situs of the Double-Taxed Properties. (*See* Appendix G.)

### **II. The Double-Taxed Properties.**

The Alpha and Beta Piers are massive artificial structures that extend southward into, respectively, Corpus Christi Channel and La Quinta Channel in the Corpus Christi Bay. (Affidavit of Juan E. McLane ¶3, Appendix E.) The Piers are

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<sup>8</sup> *See In re Allcat*, 356 S.W.3d at 462 (Appendix C) (holding that once the Court has jurisdiction to issue a writ of mandamus, it “necessarily ha[s] the correlative authority to provide declaratory and injunctive relief as appropriate”); *see also* TEX. LOC. GOV’T CODE §72.010(d).

immovable structures affixed to the shoreline and anchored with concrete piles. (*Id.*, ¶¶4–6.) Both Piers have been substantially upgraded with enhanced equipment to load and offload crude oil and industrial chemicals from tankers from around the world. (*Id.*, ¶¶5, 6.) Adjacent docks and the structures and equipment on the Piers and the docks are also wrongfully taxed. (Shock Affidavit, ¶3, Appendix F.) Appendices H and I provide close-up views of the Properties.

**A. *The Alpha Pier's construction and location.***



(The two unlabeled islands in the map above apparently do not have official names and were substantially created by dredging operations.)



The Alpha Pier was constructed by the Army Corps of Engineers and operated until 2010 by United States Naval Station Ingleside. (MR:227.) Relator Oxy Ingleside acquired the Alpha Pier and the adjacent docks in 2012. (Shock Affidavit ¶7, Appendix F.) The Alpha Pier extends approximately 1,100 feet into the Corpus Christi Channel. (See McLane Affidavit ¶¶3, 5, Appendix E.)

**B. *The Beta Pier's construction and location.***



The Beta Pier extends approximately 500 feet into the La Quinta Channel from the northern edge of Corpus Christi Bay a short distance northwest of the Alpha Pier. (McLane Affidavit ¶¶3, 6, Appendix E.) Occidental Chemical Corporation constructed the Beta Pier around 1990 and continues to own and operate it. (Shock Affidavit ¶8, Appendix F.)

### III. The Boundary Between Nueces And San Patricio.

#### Map of Northern Portion of Corpus Christi Bay



The Double-Taxed Properties are located on the northern edge of the Corpus Christi Bay, the epicenter of the Counties' boundary dispute. Legislation dating back to the 19<sup>th</sup> Century designated this shoreline the common boundary between the Counties. On February 12, 1852, the legislature delineated the boundary by a statute providing that "the county of San Patricio shall hereafter consist and be composed of the territory lying between the river Nueces and the river and bay of Aransas, commencing where the Bexar county line crosses the Nueces river; thence down the east bank of the Nueces river to Corpus Christi bay, following the meanders of the bay to the mouth of the bayou that connects said bay with the Aransas bay . . . ." See

Act approved February 12, 1852, 4th Cong., 3 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 968 (Austin, Gammel Book Co. 1898), Appendix L. On January 23, 1858, the legislature confirmed the shoreline portion of the boundary providing “the southern boundary of San Patricio county shall be the Nueces river and Corpus Christi bay.” *See* Act approved January 23, 1858, 7th Cong., 4 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 937 (Austin, Gammel Book Co. 1898), Appendix M.

Ingleside Point island and Donnell Point (which is part of La Quinta Island) were originally part of San Patricio’s mainland. These islands were separated from the mainland by dredging designed to create a deep ship channel to support commerce with local ports. Prior court rulings established that Ingleside Point and Donnell Point are part of San Patricio, and that issue is not before the Court. (*See* 2003 Final Judgment, Appendix B; Nueces’s Response to Petition at 3–4.)

#### **IV. Overview Of Prior Proceedings.**

The Counties have been embroiled in boundary litigation for nearly fifty years. The two most relevant lawsuits are: (1) San Patricio’s lawsuit for declaration of the common boundary that culminated in the 2003 Final Judgment, and (2) San Patricio’s lawsuit to enjoin Nueces’s taxation alleged to be contrary to the 2003 Final Judgment.

# Tab B-4

No. 4:17-cv-03374; *Lightering LLC, et al. v. Teichman Group, LLC, et al.*; In the United States District Court for the Southern District of Texas; Motion to Dismiss Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction, filed May 7, 2018.

Lead Counsel ~ Schouest Bamdas Soshea & Benmaier PLLC: Susan Noe Wilson, Michael Hogue, M. Lane Lowrey; Hall Maines Lugin PC: Claude L. Stuart III, Evan T. Caffrey; Haynes and Boone, LLP: Lynne Liberato, Mark Trachtenberg.



## Pelican Island - 2915 Todd Road



This Exhibit shows that the clear majority of the real property used by OSG (about 74%) was for outside storage, parking, office, and warehouse space. OSG engages in transferring petroleum products between shuttle vessels and large tanker vessels in the Gulf of Mexico. OSG did not bring actual tanker or shuttle vessels to Pelican Island premises; even its smaller shuttle ships were too large and/or deep drafted to come in to T&T's premises on Pelican Island. The only vessels OSG occasionally brought to Pelican Island were smaller supply boats that carried the fenders and hoses offshore for lightering support. See Exhibit A at page 3 ¶ 8.

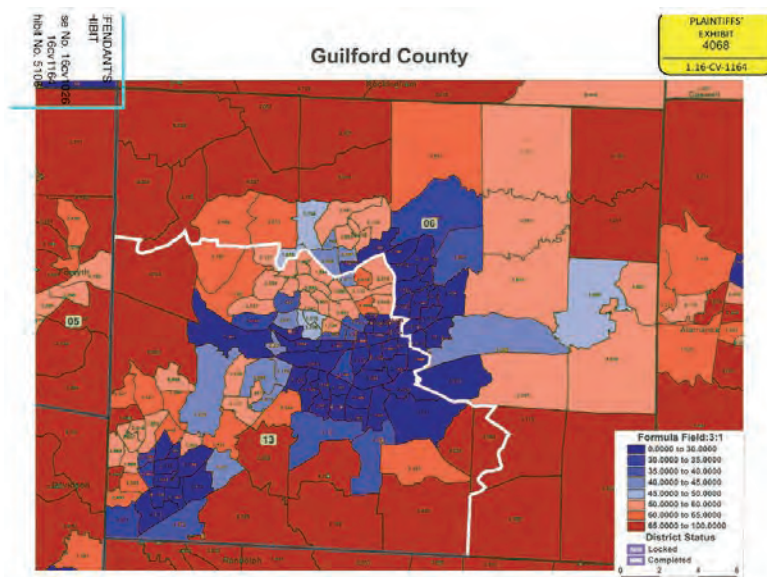
# Tab B-5

No. 18-422; *Robert A. Rucho, et al. v. Common Cause, et al.*;  
In the United States Supreme Court; Brief of Appellees, filed  
March 4, 2019.

Lead Counsel ~ University of Chicago Law School: Nicholas  
Stephanopoulos; Campaign Legal Center: Paul M. Smith,  
Ruth M. Greenwood, Annabelle E. Harless.

*Cracking.* North Carolina's third-most-populous city, Greensboro, offers a dramatic example of the 2016 Plan's cracking of Democratic voters. As shown below, District 6 and District 13 cut Greensboro (and Guilford County) in two, submerging each half within a larger concentration of Republican voters. J.A.298. Thanks to Greensboro's bisection, Hofeller expected District 6 and District 13 each to have Republican vote shares of 54%. Ex.5116:9. In Plan 2-297, on the other hand, League members from District 6 and District 13 are uncracked by being placed in a Democratic-leaning district. J.A.263.<sup>4</sup>

#### Cracking of Democratic Voters in Greensboro

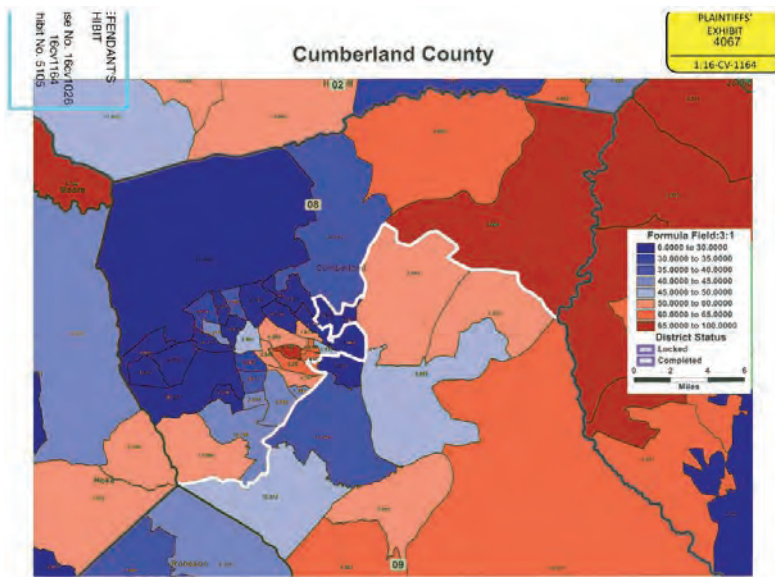


hundreds of maps that are more pro-Democratic than Plan 2-297. Ex.2010.

<sup>4</sup> The League focuses on its own members and plaintiffs. The district court also discussed other plaintiffs, whom the League describes in footnotes. Russell Walker is thus another plaintiff from District 13 who is uncracked by Plan 2-297. J.S.App.62-63.

North Carolina's sixth-most-populous city, Fayetteville, presents another striking instance of cracking. As displayed below, District 8 and District 9 split Fayetteville (and Cumberland County), joining each Democratic fragment with a larger group of Republican voters. J.A.297. Hofeller consequently expected District 8 and District 9 to have Republican vote shares of 55% and 56%, respectively. Ex.5116:9. In Plan 2-297, in contrast, League members from District 8 and District 9 are uncracked by being placed in Democratic-leaning districts. J.A.263.<sup>5</sup>

### Cracking of Democratic Voters in Fayetteville



Further cases of cracking abound in the 2016 Plan. District 2 and District 7 partition the cluster of Democratic voters in Johnston County. J.A.299. As a

<sup>5</sup> Coy Brewer and John McNeill are additional plaintiffs from District 8 and District 9, respectively, who are uncracked by Plan 2-297. J.S.App.57-59.

result, Hofeller expected District 2 and District 7 to have Republican vote shares of 56% and 54%, respectively. Ex.5116:9. But in Plan 2-297, League members from District 2 and District 7 are uncracked by being placed in Democratic-leaning districts. J.A.263.<sup>6</sup> Similarly, District 7 and District 9 break up the Democratic cluster in Bladen County. J.A.304. And District 8 and District 13 carve through yet another Democratic cluster in Rowan County. J.A.307.

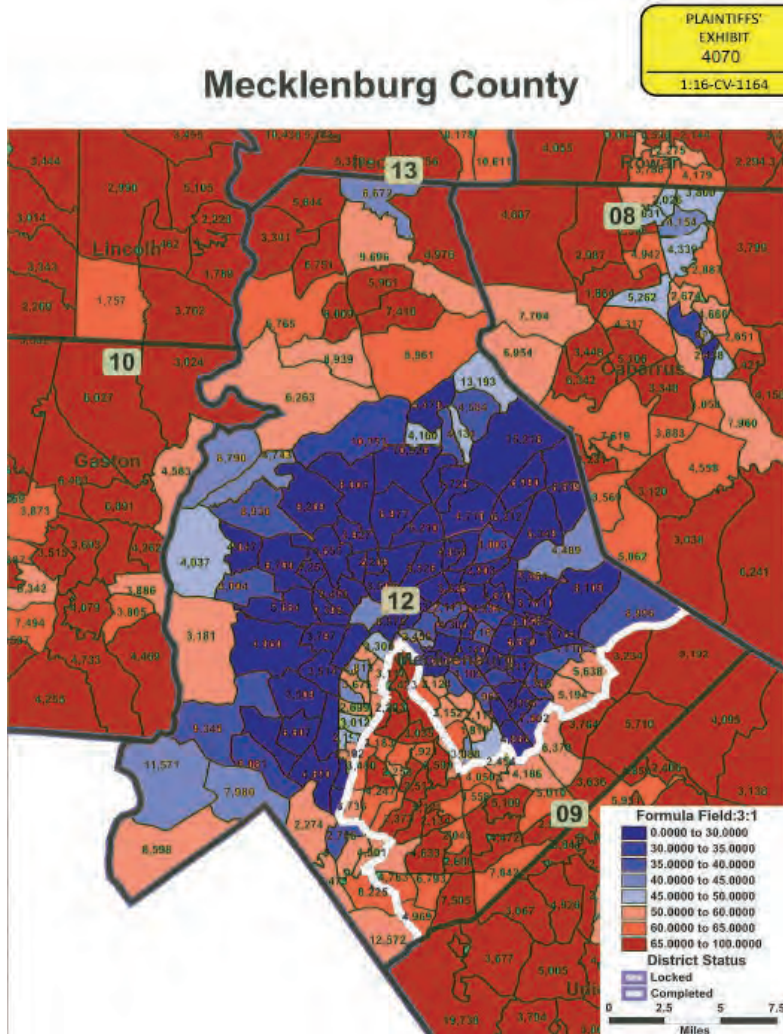
*Packing.* Turning to the gerrymanderer's other tool, North Carolina's biggest city, Charlotte, provides a quintessential example of packing. As shown below, literally every Democratic precinct in Mecklenburg County is squeezed into District 12. District 9 enters Mecklenburg County too, but captures only Republican precincts. J.A.300. Hofeller therefore expected District 12 to have a Democratic vote share of 64%. Ex.5116:9. In Plan 2-297, on the other hand, a League member in District 12 is unpacked by being placed in a less heavily Democratic district. J.A.263.<sup>7</sup>

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<sup>6</sup> Douglas Berger is another plaintiff from District 2 who is uncracked by Plan 2-297. J.S.App.52-53.

<sup>7</sup> John Gresham is another plaintiff from District 12 who is unpacked by Plan 2-297. J.S.App.62.

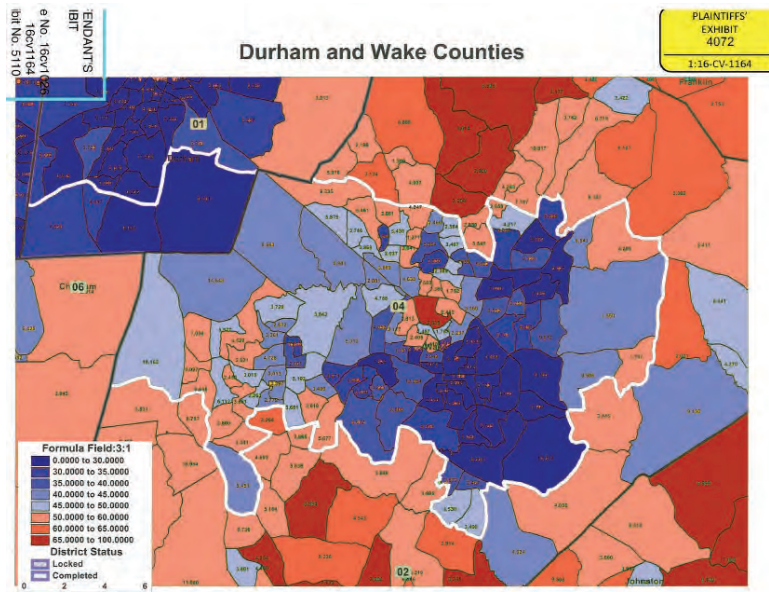
Packing of Democratic Voters in Charlotte



North Carolina’s second-largest city, Raleigh, is another model of packing. As displayed below, virtually every Democratic precinct in Wake County is wedged into District 4. District 2’s portion of Wake County is composed almost exclusively of Republican precincts. J.A.302. Hofeller thus expected District 4 to

have a Democratic vote share of 63%. Ex.5116:9. In Plan 2-297, in contrast, a League member in District 4 is unpacked by being placed in a less heavily Democratic district. J.A.263.

### Packing of Democratic Voters in Raleigh



District 1 packs Democratic voters in northeastern North Carolina as well. It divides Pitt and Wilson Counties, in both cases including their more Democratic areas, and incorporates nearly all of the State's fifth-largest city, Durham. J.A.301-03. As a result, Hofeller expected District 1 to have a Democratic vote share of 69%. Ex.5116:9. But in Plan 2-297, a League member in District 1 is unpacked by being placed in a less heavily Democratic district. J.A.263.<sup>8</sup>

<sup>8</sup> Larry Hall is another plaintiff from District 1 who is unpacked by Plan 2-297. J.S.App.51-52.

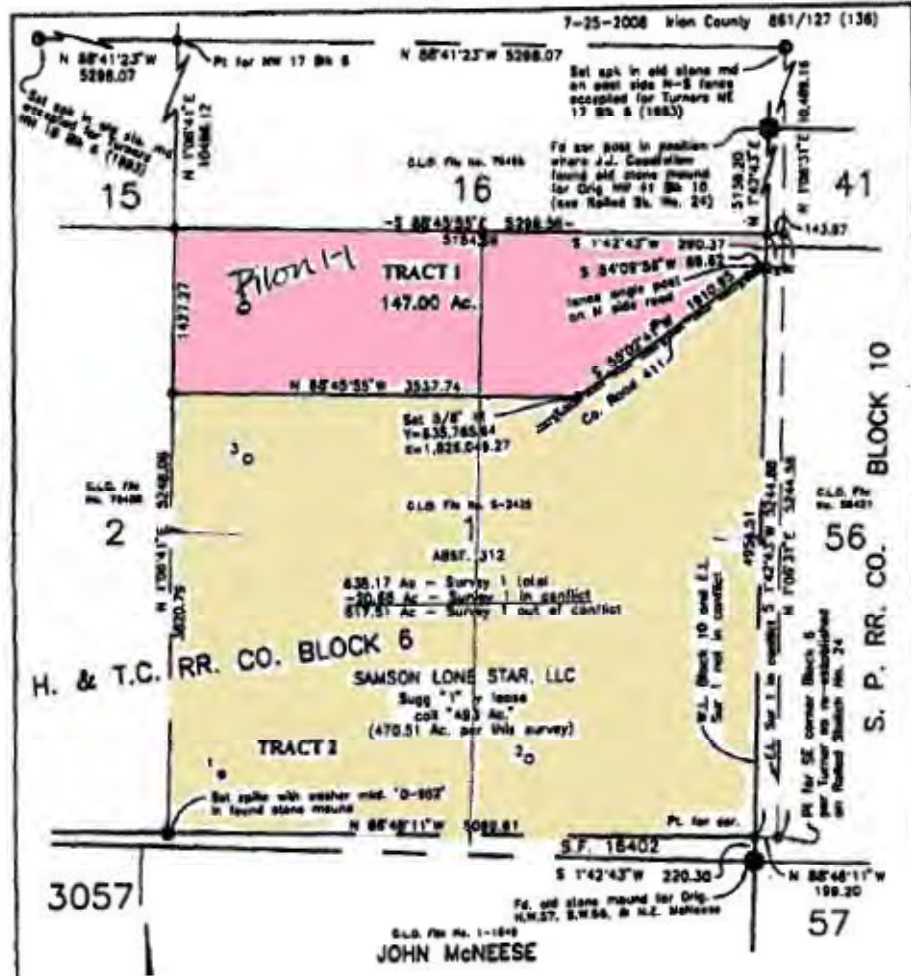
# Tab B-6

No. 19-0233; *Concho Resources, Inc., et al. v. Marsha Ellison, d/b/a Ellison Lease Operating*; In the Supreme Court of Texas; Brief of Petitioners, filed March 10, 2020.

Lead Counsel ~ Clark Hill Strasburger: P. Michael Jung; Alexander Dubose Jefferson, LLP” Wallace B. Jefferson, Rachel A. Ekery.



(1CR651). The stipulation declared that the 147-acre tract consisted of the land shown (here in pink) as Tract 1 on an attached plat:



(1CR661) (colorization supplied), and that the Southeast Tract consisted of the balance of the Section, Tract 2 as shown (here in yellow) on the plat. (1CR651). The stipulation stated that it “shall be deemed to contain adequate words of grant and conveyance as are necessary and proper to transfer and vest the ownership of the mineral estate in the Lands in each of the Parties in the amounts and proportions” set forth.

# Tab B-7

No. 07-13-00391-CV; *Town of DISH, et al. v. Atmos Energy Corporation, et al.*; In Court of Appeals for the Seventh District of Texas at Amarillo. Brief of Appellee, filed March 5, 2014.

Lead Counsel ~ Haynes and Boone, LLP: Karen S. Precella, George Parker Young, Vincent P. Circelli.

## STATEMENT OF FACTS

**A. Complaints that the Ponder Compressor Stations allegedly create “nuisances” began immediately after operations commenced and escalated more than 2 years before suit was filed.**

**1. In 2005, Enbridge’s compressor near the outskirts of DISH becomes fully operational.**

On November 9, 2004, and January 24, 2005, Enbridge obtained building permits from DISH (formerly the Town of Clark) to construct a natural gas pipeline compressor station near the outskirts of DISH and to construct a sound barrier around the compressor station. [AppC/SCR1:105](#), SCR1:111, 114. The Enbridge compressor station (sometimes referred to as the East Justin Compressor Station) became fully operational by February 17, 2005. [AppC/SCR1:105](#).

The Enbridge compressor station is adjacent to other compressor stations that began operating in 2006, 2007 and 2008 and a metering station that began operating in 2009, each owned and operated by other Defendants. CR1:11-17; SCR1:10-16, 27-33. The TCEQ sometimes refers to stations at this locale as an operator’s Ponder Compressor Station, and so the compressor stations and metering station are collectively referred to here as the “Ponder Compressor Stations.”<sup>1</sup> Plaintiffs and former mayor Calvin Tillman (“Tillman”) live near the Ponder Compressor Stations, as shown below:<sup>2</sup>

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<sup>1</sup> Defendant Enterprise does not actually have a compressor station at its site. CR3:547-48.

<sup>2</sup> CR1:9; CR2:264 (“These compressor stations are approximately 1/4 to 1/2 mile from the residential Plaintiffs’ homes.”); CR2:284 (Tillman Address: “6026 Tim Donald Road”);



CR2:289 (Sciscoe Address: “Eakin Cemetery Road and Tim Donald Road”); CR2:350 (Dow Address: “9208 Chisum Road”); CR2:358 (Draper Address: “9219 Chisum Road”); CR2:366 (Harris Address: “9212 Chisum Road”); CR2:374 (Pegg Address: “9203 Chisum Road”); CR2:382 (Petree Address: “9206 Chisum Road”); CR2:386 (Randall Address: “9205 Chisum Road”); CR2:390 (Reames Address: “9213 Chisum Road”); CR2:398 (Wagner Address: “9217 Chisum Road”); CR2:406 (Zimmerman Address: “9210 Chisum Road”).

# Tab B-8

No. 01-19-00194-CV; *Camilla Hrdy, et al. v. Second Street Properties LLC, et al.*; In the Court of Appeals for the First District of Texas at Houston; Brief of Appellants, filed April 27, 2020.

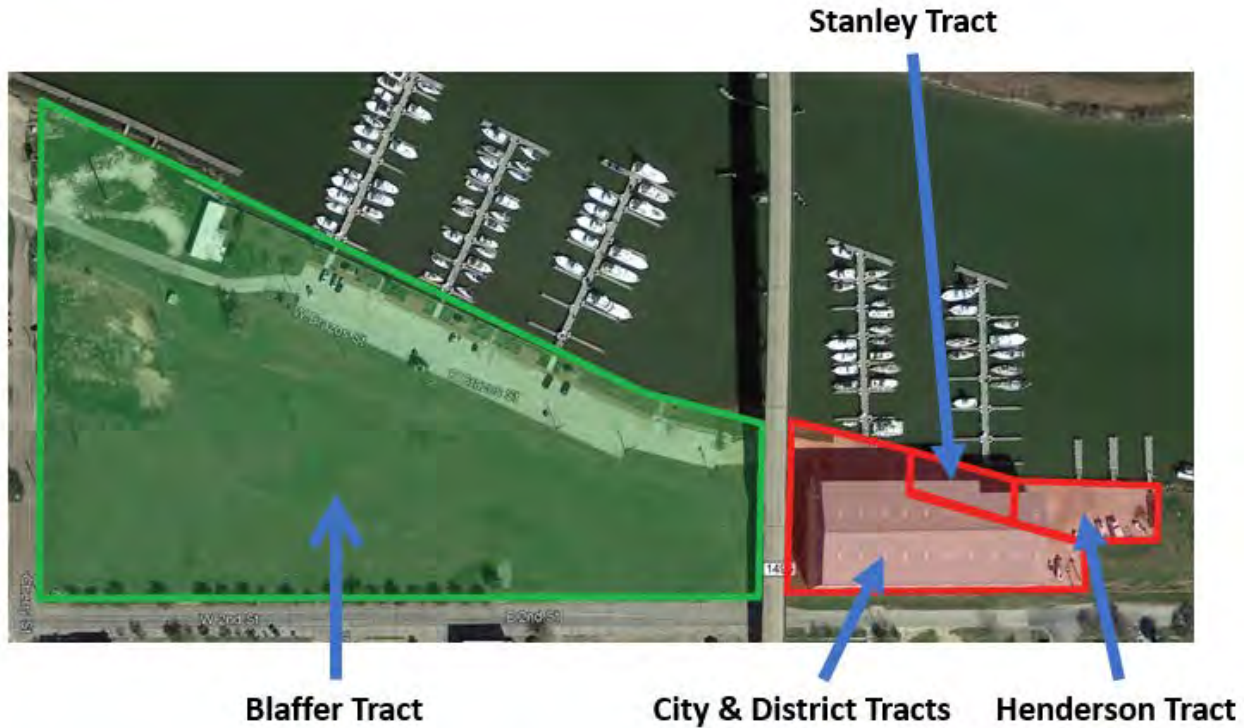
Lead Counsel ~ Haynes and Boone, LLP: Mark Trachtenberg, Andrew Guthrie; Joyce + McFarland LLP: John H. McFarland, Jason E. Beesinger.

Agreement, the other cousins/limited partners (the “Freeport LPs”) had no management rights and therefore relied on Royall to act in their best interests in the management of the Partnership’s affairs. (DX8.)

Royall’s first order of business was to continue the family’s longstanding discussions with the City of Freeport (the “City”) about a plan for developing a marina on the Blaffer Tract. (DX7, 10, 14; 5RR:50, 70.) Royall eventually signed a Development Agreement with the City under which the Partnership would build a marina—on land the Partnership owned or would acquire—using a \$6 million loan from the City, then lease the completed marina to the City to operate. (DX26; 5RR:71, 78.) As part of this arrangement, the City agreed to help the Partnership acquire several adjacent properties to complete the marina site. (5RR:78.) These adjacent properties are the subject of this litigation and are shown in red in the modern-day image of the marina below. (DX174.<sup>3</sup>) (The Partnership’s original Blaffer Tract is shown in green.)

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<sup>3</sup> Because the reporter’s record contains an incomplete copy of this exhibit, the parties filed a *Joint Motion to File Corrected Trial Exhibit*, which the Court granted on April 14, 2020. The Freeport LPs have added references to the names of each tract in the image above for the Court’s convenience.



In late 2002, the Partnership negotiated a contract to purchase the Stanley Tract for \$90,000. (5RR:102-03; DX15.) As the Development Agreement with the City took shape, but before it was signed, the Partnership allowed the City to purchase the Stanley Tract to secure the property. (DX16, 17.) But, the City gave the Partnership an exclusive written option to repurchase Stanley for the same price at any time. (DX18.) The City also gave the Partnership an option under the Development Agreement to purchase the City and District Tracts—properties already owned by the City and its affiliates—and agreed to help the Partnership acquire the Henderson Tract. (5RR:189-90, 209, 222; DX26 at 20.)

Royall quickly capitalized on one of those options, albeit through a separate partnership he controlled called Freeport Marina, L.P. (“Freeport Marina”). The

# Tab B-9

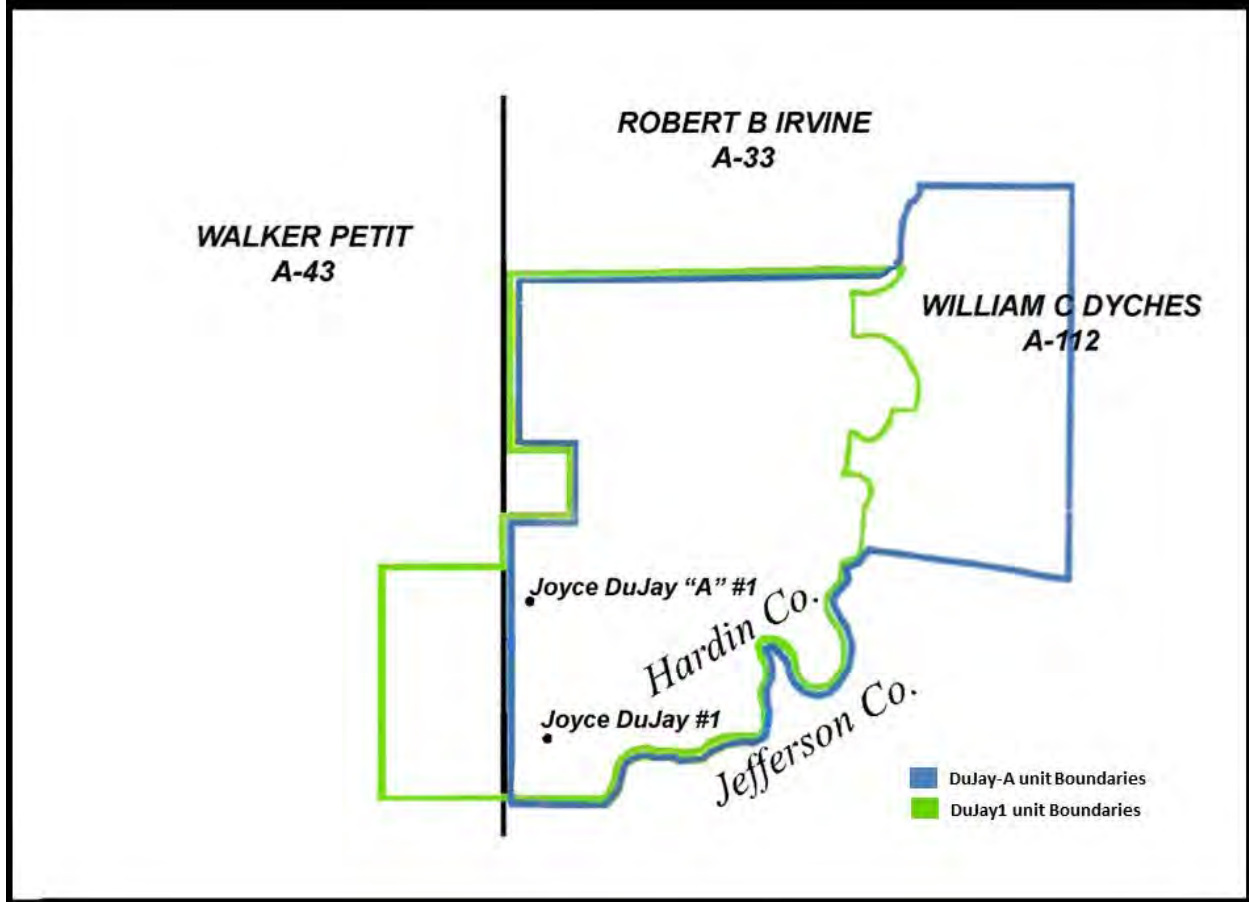
No. 15-0886; *Samson Exploration, LLC v. T.S. Reed Properties, Inc, et al.*; In the Texas Supreme Court; Brief of Appellants, filed January 6, 2016.

Lead Counsel ~ Mehaffy Weber P.C.: M.C. Carrington, David B. Gaultney; Locke Lord LLP: Michael V. Powell, Cynthia Keely Timms, Susan E. Adams.



court of appeals' decision is to allow repeated cross-conveyances, to different owners, of the same producing acreage and horizons.

A schematic of the two units at issue in this petition shows that neither well was drilled on the Reed Lease and both were a considerable distance from that lease:



The DuJay1 unit is in green and covers approximately 571 surface acres. The DuJay1 well produced from 13,150 to 13,176 feet subsurface. Samson intended the DuJay1 well to produce gas from a deep Doyle Sand reservoir and, therefore, pooled the green acreage insofar as it lies at 12,400 feet subsurface or below into the DuJay1 unit. 4CR:31-32, 348, 361. The blue line marks the boundaries of the DuJay-A unit,

# Tab C-1

No. 05-18-00860-CV; *BBVA Compass and Sam Meade v. David Bagwell, et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Brief of Appellants, filed January 16, 2019.

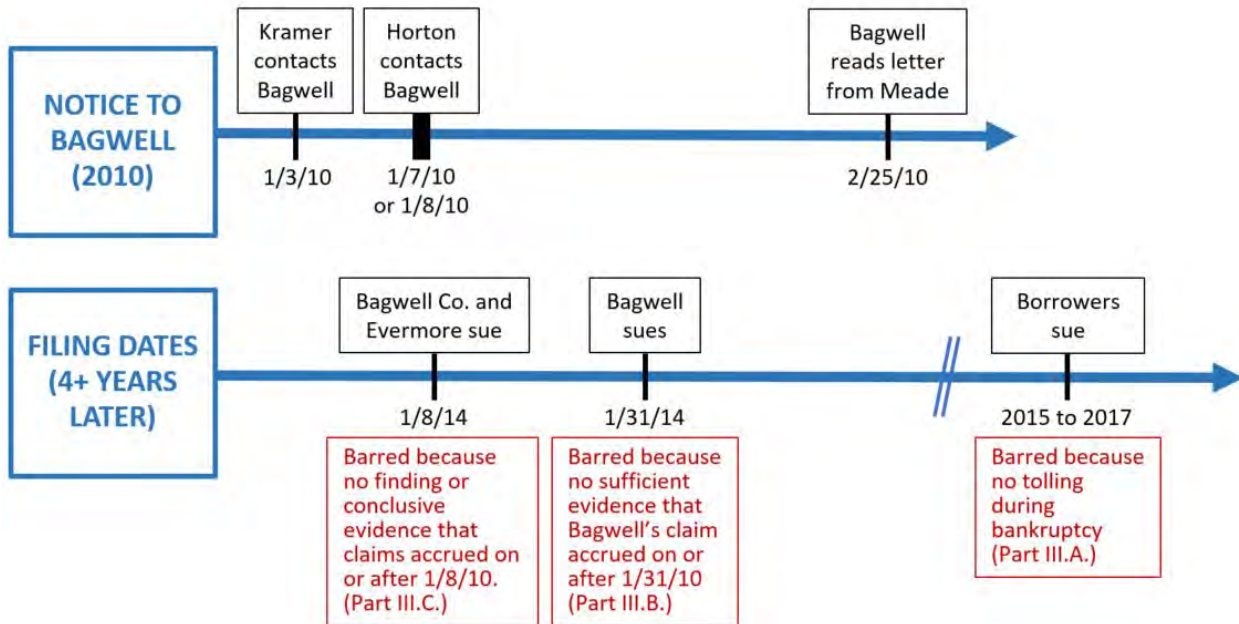
Lead Counsel ~ Haynes and Boone, LLP: Anne M. Johnson, Nina Cortell, Michael A. Hatchell, Kent Rutter; Kane Russell Coleman Logan PC: Michael A. Logan, Kenneth C. Riney, Jeffrey S. Seeburger

### III. Plaintiffs' claims are barred by limitations.

Plaintiffs' claims also fail because they did not assert their claims until after limitations expired.

Plaintiffs' claims are subject to a four-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(4); *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 216 (Tex. 2011). The limitations period began to run for each Plaintiff when that Plaintiff discovered the alleged fraud or should have discovered it through reasonable diligence. *See Hooks v. Samson Lone Star, L.P.*, 457 S.W.3d 52, 57 (Tex. 2015).

The following chart summarizes the dates Bagwell received notice, the dates each Plaintiff sued, and the reasons each Plaintiff's claim is time-barred:

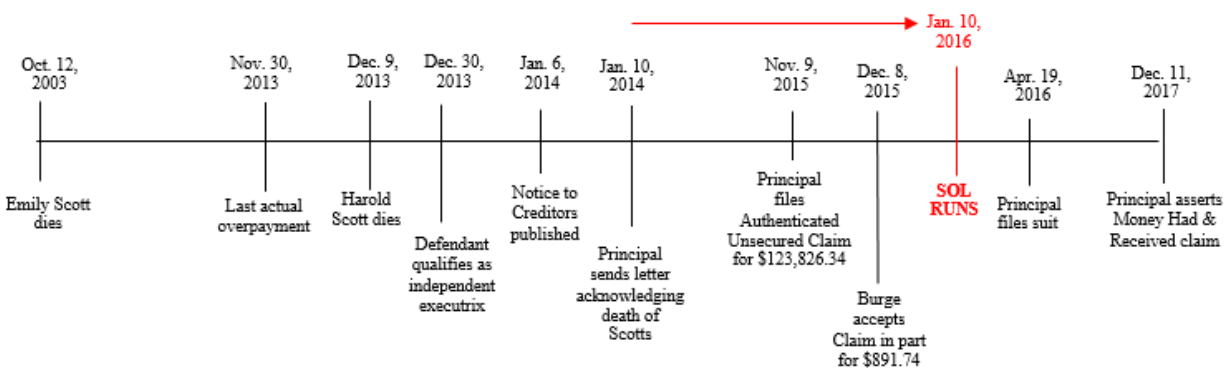


# Tab C-2

No. 04-19-00592-CV; *In re the Estate of Harold G. Scott, Deceased*; In the Court of Appeals for the Fourth District of Texas at San Antonio; Brief of Appellant, filed November 20, 2019.

Lead Counsel ~ Pulman, Cappuccio & Pullen, LLP: Randall A. Pulman, Ryan C. Reed, Matthew J. McGowan.

date, meaning Principal had until January 10, 2016, to file its money-had-and-received claim. See CR 239 (conceding that “the limitations period did not commence until January 10, 2014”). Principal did not add that claim until December 2017, or just shy of two years too late. See CR 185 ¶¶ 29-30.<sup>7</sup>



## E. The probate court erred even under four-year limitations

Even under a four-year limitations period, Principal would still be entitled to recover, at most, only \$21,314.27, not all \$125,000-plus awarded by the probate court. This is true for all of Principal’s claims.

### 1. Money-had-and-received

Even if (*arguendo*) the probate court properly applied a four-year limitations period to money-had-and-received in contravention of *Elledge*, Plaintiff’s maximum recovery should have been either \$1,014.97 or, at most,

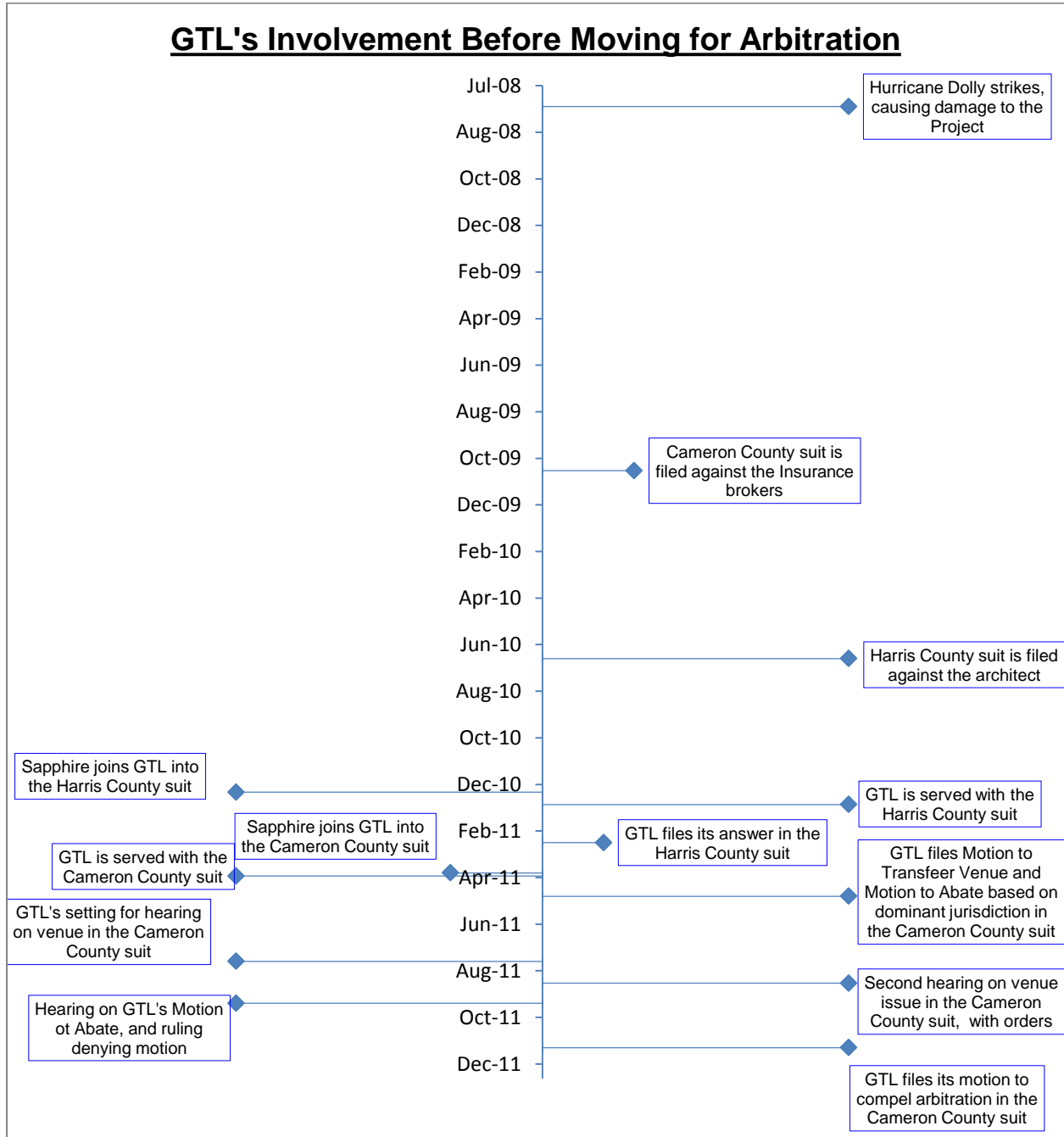
<sup>7</sup> In effect, the discovery rule and fraudulent concealment both toll the accrual of a cause of action. *Cody*, 513 S.W.3d at 534 (“Accrual of a cause of action is deferred in [those] two types of cases[.]”). Because such accrual occurred after Harold’s death, the 21-day tolling under CPRC section 16.062 did not apply.

# Tab C-3

No. 13-0497; *G.T. Leach Builders, L.L.C., et al. v. Sapphire VP, LP*; In the Texas Supreme Court; G.T. Leach Builders, LLC's Brief on the Merits, filed April 16, 2014.

Lead Counsel ~ Coats Rose Yale Ryman & Lee, P.C.: Edward S. Hubbard, Charles Clayton Conrad; Law Offices of Gilberto Hinojosa & Associates, P.C.: Gilberto Hinojosa.

The following table provides a timeline of GTL’s involvement in these cases up to the filing of its Motion to Compel Arbitration:

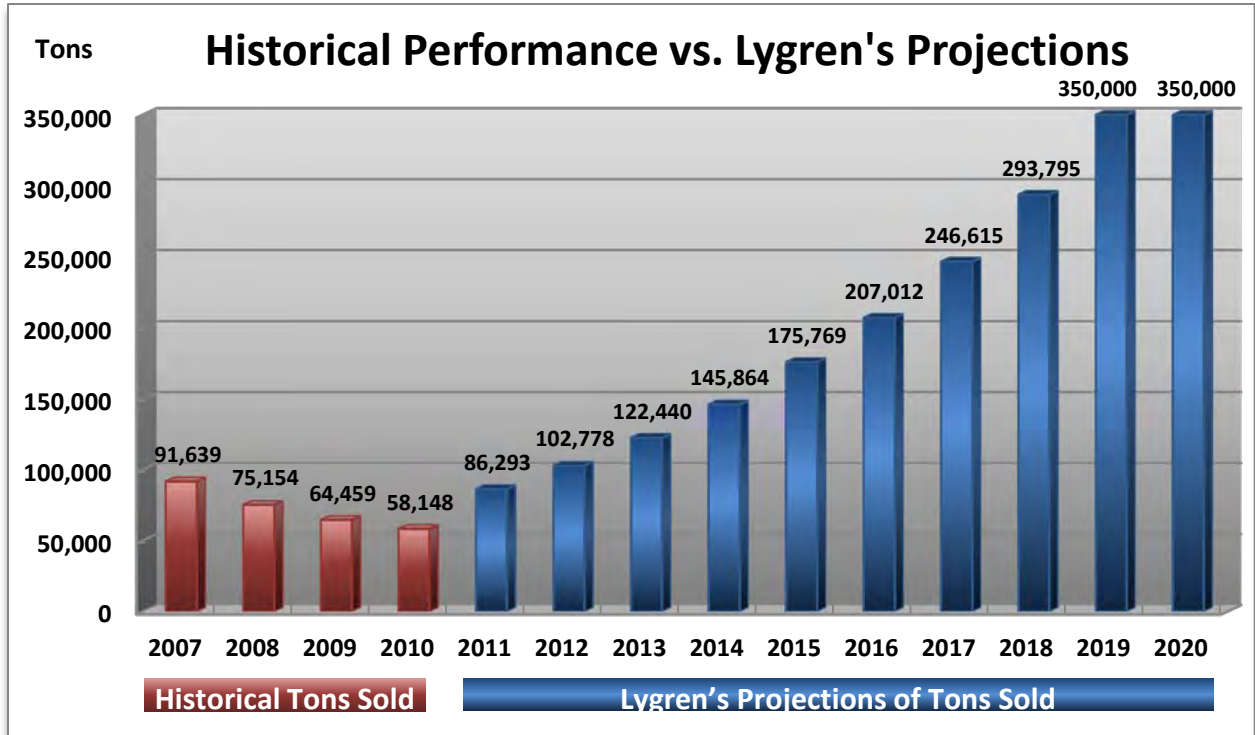


# Tab D-1

No. 17-0557; *Clinton W. (“Buddy”) Pike, Sr., et al. v. Texas EMC Management, LLC, et al.*; In the Texas Supreme Court; Petitioners’ Joint Motion for Rehearing, filed October 17, 2018.

Lead Counsel ~ Haynes and Boone, LLP: Mike A. Hatchell, Nina Cortell, Ryan Paulsen, Mark Trachtenberg; Fulbright Winniford, PC: Andy McSwain; Alexander Dubose Jefferson & Townsend: Charles T. Frazier, Jr.; Law Office of Greg White: Greg White





The red bars on the left reflect EMC Products' historical performance. At the time of the May 2011 foreclosure (the date on which EMC Products' "lost value" must be calculated), EMC Products:

- had declining sales (RR13:83-85, 87);
- had never earned a profit (RR13:120; RR16:207; RR17:29);
- had liabilities that exceeded assets by \$1.4 million (RR17:32);
- could not pay its \$4 million secured loan or obtain other financing (RR12:142-46; EMC App. Resp. 15);
- could not obtain contracts to acquire the requisite raw materials (DX 128); and
- had an annual production capacity of only 60,000 tons of the new product (RR15:142-43; *see also* RR17:102).

The blue bars on the right reflect plaintiff Lygren’s projections of future sales growth. Notwithstanding the business’s tailspin, Lygren speculated that:

- the partnership would achieve a sales volume in 2011 that was 67% higher than the volume sold in the last full year of operations in 2010;
- the tonnage of product sold would increase by *a constant 19%* every year until 2020, hitting totals that the business had *never* come close to achieving (RR16:304-06) and which contradicted Pike’s unrebutted testimony that the plant could produce only *60,000 tons* of the new product per year (RR15:142); and
- the partnership would be able to *increase its price per ton sold by 39% over nine years* (RR16:305-07) and thus increase its profit margin, leading to a total EBITDA of \$41,428,204 for the ten-year period. (RR16:330-32; DX182.)

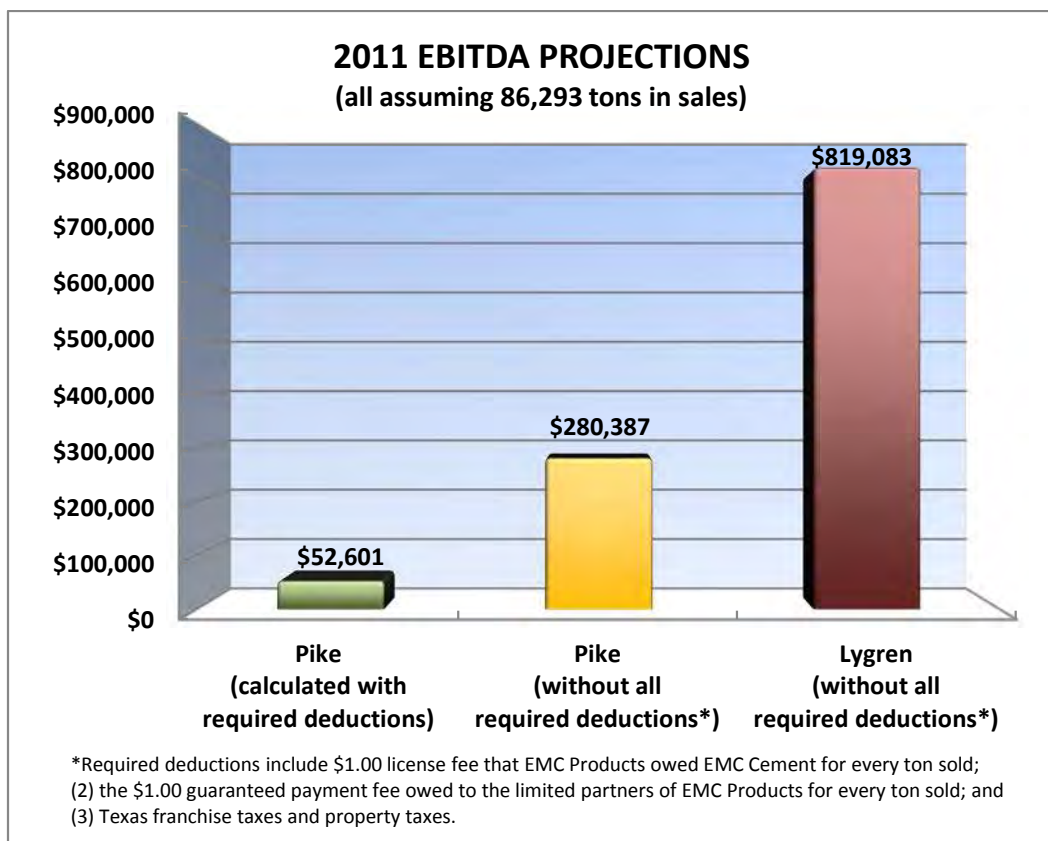
Lygren then discounted this stream of untethered future “earnings” back to a May 2011 present value of \$12 million. (RR16:332-33; RR17:37-38.)

The court of appeals’ opinion excuses Lygren’s failure to present the objective evidence required to support his projections of miraculous growth. But the “reasonable certainty” standard is not satisfied by a mere conclusory recitation by the reviewing court (as occurred here, Op. 33); otherwise, its opinion becomes the kind of *ipse dixit* the Court has strongly denounced. *Phillips*, 475 S.W.3d at 280; *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 351 (Tex. 2015). Just as dramatic are numerous other “analytical gaps” and “unsupported assumptions” in Respondents’ damages model (recounted in the merits briefs), which are also left unaddressed by the court of appeals.

# Tab D-2

No. 17-0557; *Clinton W. (“Buddy”) Pike, Sr., et al. v. Texas EMC Management, LLC, et al.*; In the Supreme Court of Texas; Petitioners’ Brief on the Merits, filed March 28, 2018.

Lead Counsel ~ Haynes and Boone, LLP: Nina Cortell, Ryan Paulsen, Mark Trachtenberg, Mike A. Hatchell.



The absence of any explanation for the difference demonstrates that Lygren’s EBITDA calculation—manufactured for this litigation—is conclusory and incompetent. Because Lygren’s entire damages opinion is built on that calculation, the rest is necessarily conclusory and incompetent too.

**Errors in Lygren’s 2012-2021 Earnings Projections.** The problems with Lygren’s damages model are compounded by his extraordinary growth projections, which have no support in, and are contradicted by, the record.

*First*, Lygren’s assumption that the partnership’s sales would grow at a constant 19% rate cannot be reconciled with the actual facts, and Lygren did not bridge this analytical gap. The amount of product that EMC Products sold *declined*

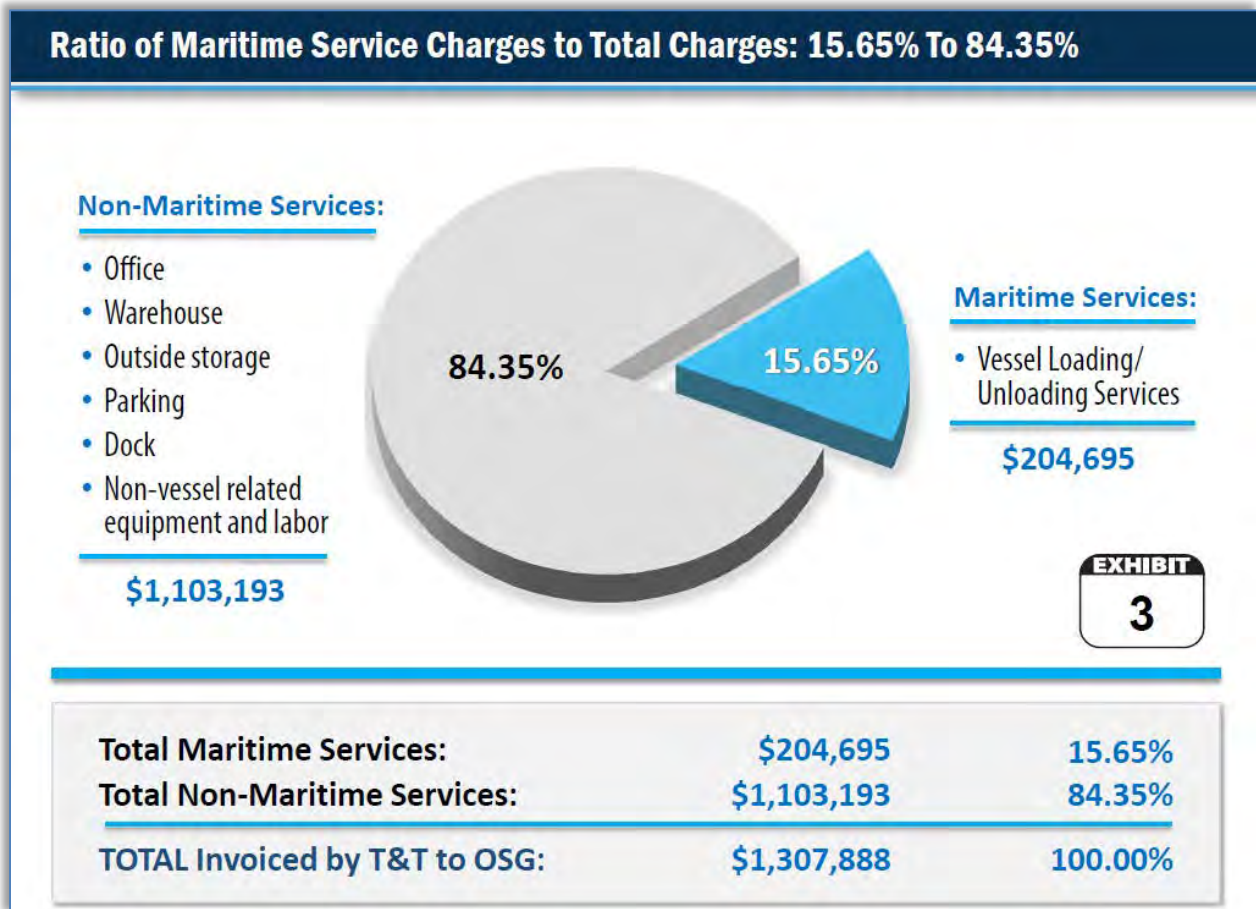
# Tab D-3

No. 4:17-cv-03374; *Lightering LLC, et al. v. Teichman Group, LLC, et al.*; In the United States District Court for the Southern District of Texas; Motion to Dismiss Under Rule 12(B)(1) for Lack of Subject Matter Jurisdiction, filed May 7, 2018.

Lead Counsel ~ Schouest Bamdas Soshea & Benmaier PLLC: Susan Noe Wilson, Michael Hogue, M. Lane Lowrey; Hall Maines Lugin PC: Claude L. Stuart III, Evan T. Caffrey; Haynes and Boone, LLP: Lynne Liberato, Mark Trachtenberg.

**b. Services measured by money: mostly (84%) non-maritime**

Of all amounts paid by OSG to T&T in the almost-five-year period leading up to the incident (a total of approximately \$1,307,887.83), an approximate maximum of \$204,695.00 or 15.65% was for the only maritime service that T&T provided to OSG under the MSA: vessel loading and unloading services.<sup>17</sup> The remaining \$1,103,192.83 charged by T&T (84.35% of all charges) was for rental of real property and provision of various non-maritime services. A chart of the respective charges follows:

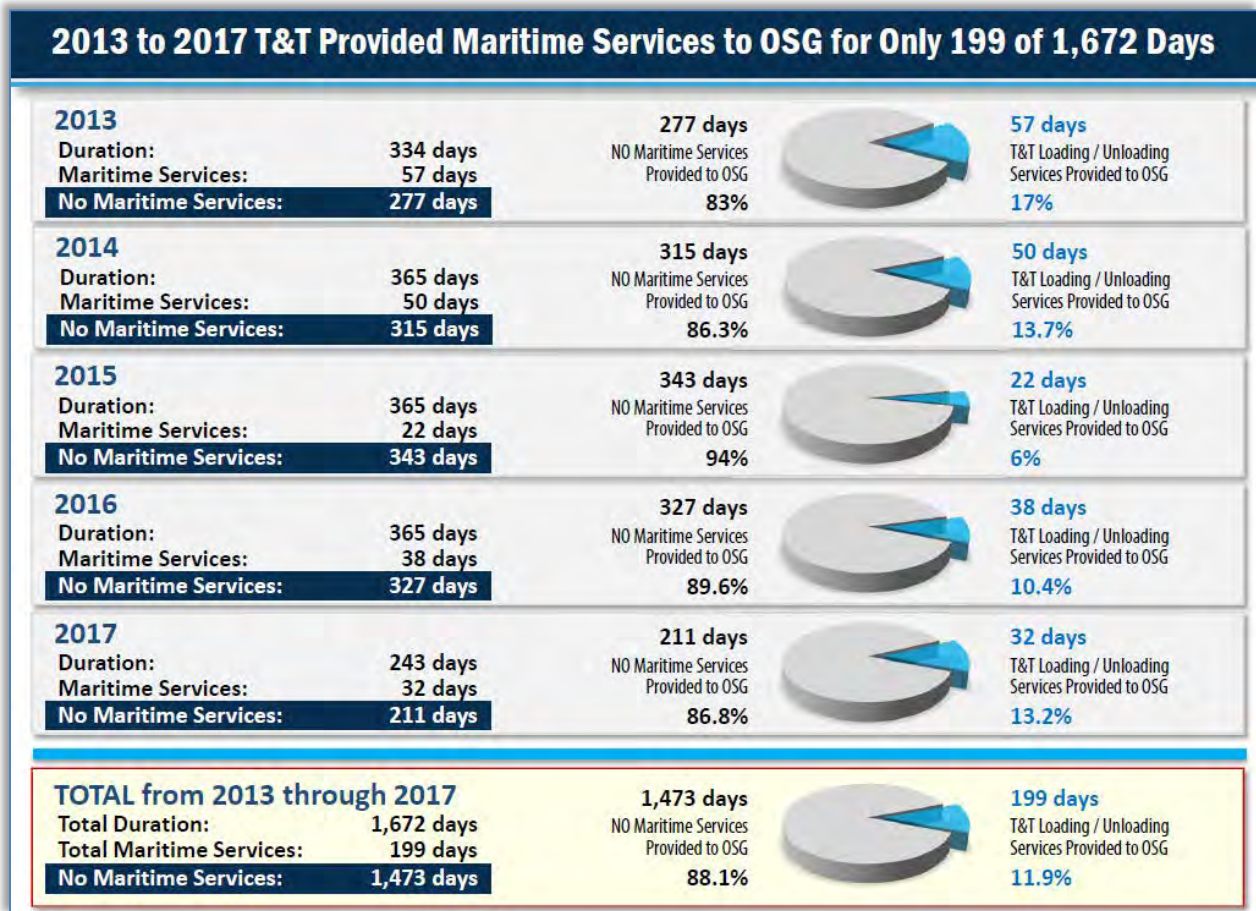


<sup>17</sup> Contracts relating purely to the loading or unloading of vessels have been held to be maritime. *See, e.g., A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.*, 256 F.2d 227 (2d Cir. 1958).

A full-sized copy of this chart is attached as Exhibit 3 to Exhibit A. A summary of the various charges by month is attached and incorporated herein by reference as Exhibit 4 to Exhibit A.

**c. Services measured by time: mostly (88%) non-maritime**

During the same five years leading up to the incident, from February 1, 2013 to August 31, 2017 (1,672 days), in this seven-day-a-week business, T&T only participated in loading or unloading OSG’s vessels on 199 days or 11.9% of the time OSG occupied the premises. A graphic depiction of the relatively few days on which T&T loaded or unloaded OSG vessels is set forth below:



# Tab D-4

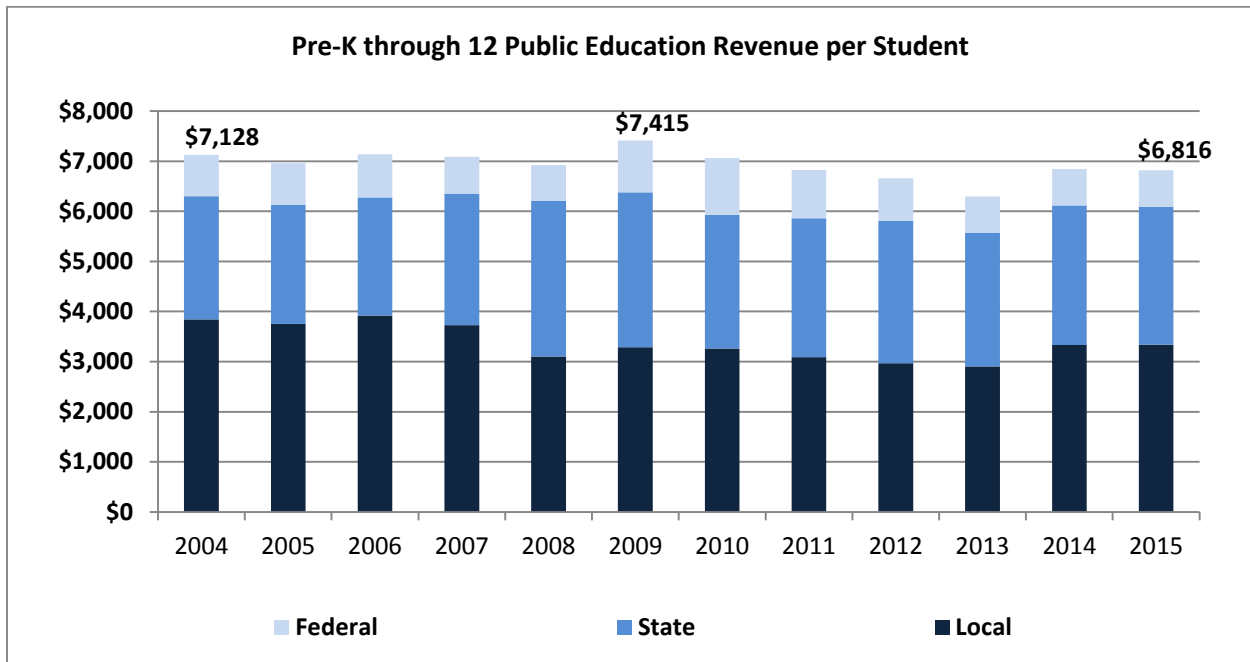
No. 14-0776; *Michael Williams, Commissioner of Education in his Official Capacity, et al. v. Calhoun County ISD, et al.*; In the Texas Supreme Court; Fort Bend ISD Appellees' Brief on the Merits, filed July 2, 2015.

Lead Counsel ~ Alexander Dubose Jefferson & Townsend LLP: Wallace B. Jefferson, Rachel A. Ekery; Thompson & Horton LLP: J. David Thompson, III, Phillip Fraissinet, Holly G. McIntush

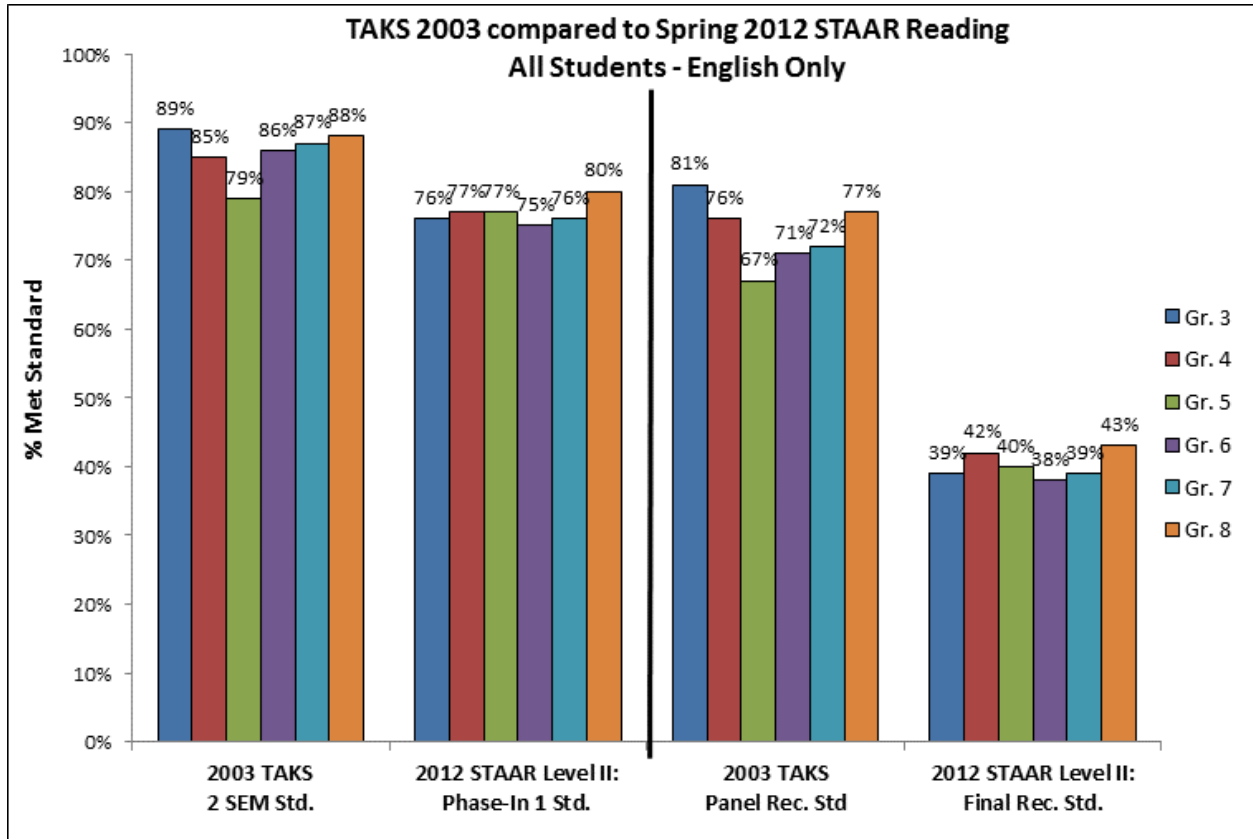


**c. The Legislature’s partial “restoration” of the cuts in 2013 did not cure the constitutional defects.**

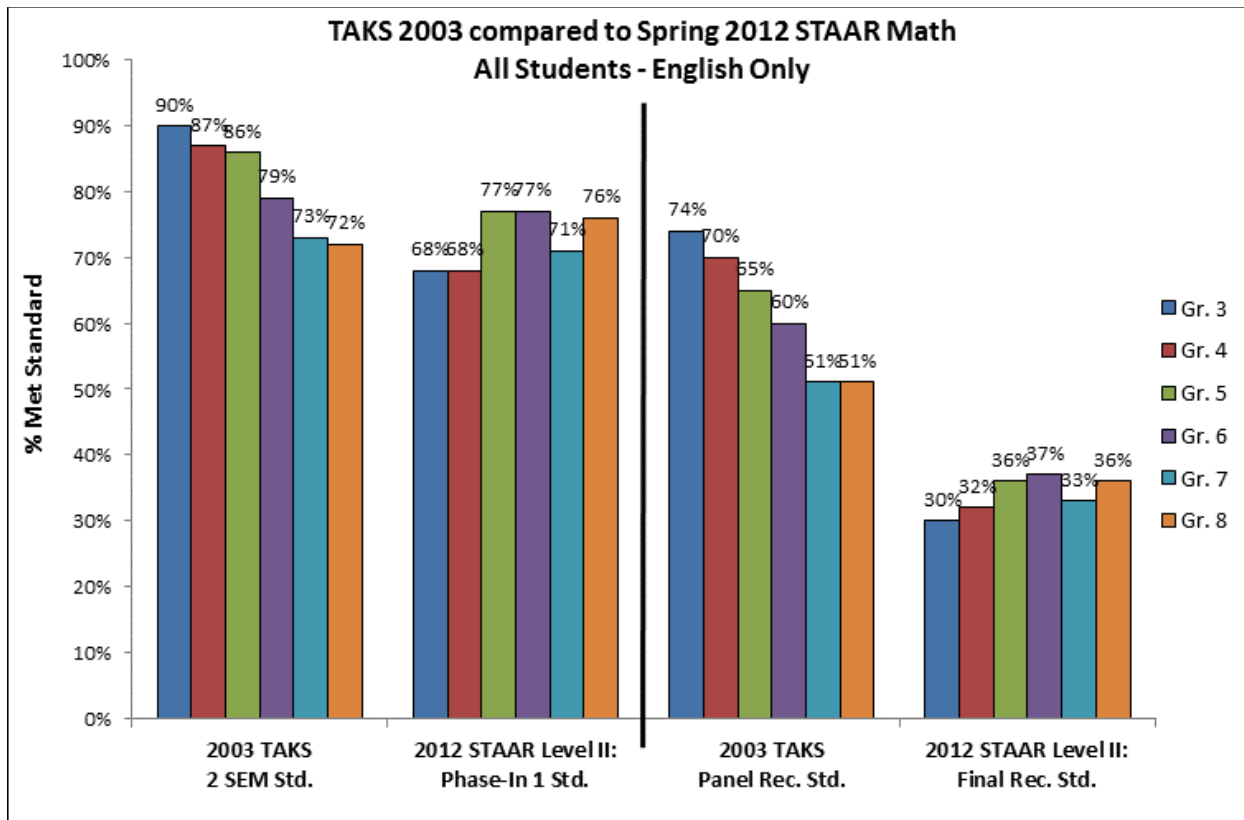
In 2013, the Legislature convened with an \$8.8 billion surplus, and an almost \$12 billion balance in the State’s Rainy-Day Fund. RR14:121. Yet the Legislature only partially restored the 2011 formula funding cuts, reinstating just \$3.4 of the \$4 billion cut. RR54:88; Ex.6618:4. When adjusted for inflation, total per student revenues for public education in 2015—combining state, local, and federal dollars for operations and facilities—remained \$599 *less* than it was after tax compression was completed in 2009 and \$312 *less* than it was in 2004, at the time of *WOC II*, as seen in the chart below. Ex.6618:7. During this same time, the State significantly increased the standards students must meet to graduate. This dichotomy, fewer funds chasing higher standards, is described more fully in Section II.B, *infra*.



Reading and in all but one grade for Math. Ex.6515. The percentage of students meeting the final standard was approximately *half* the percentage that met the final standard in the first year of TAKS:



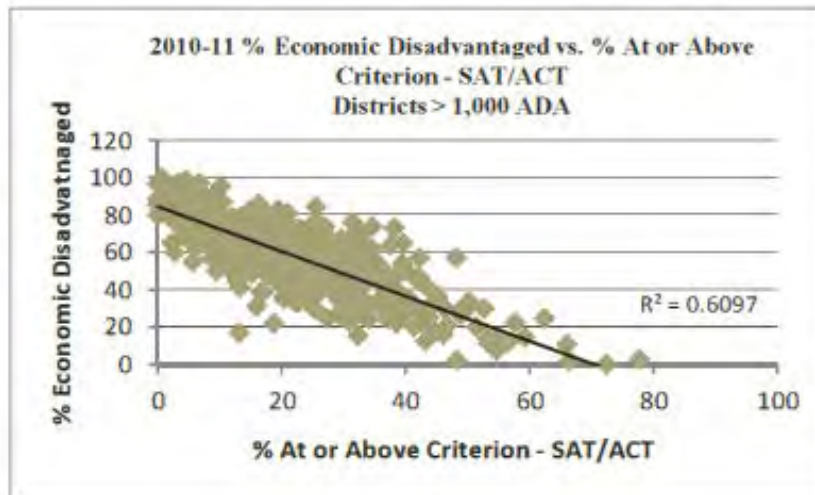
Ex.6515:1.



Ex.6515:2.

The Class of 2015 was the first class of students to take EOC exams during their freshman year. More than half—53%—failed at least one of these exams at the Level II Phase-In standard. Ex.6322:26. In comparison, in 2004, the first year that the TAKS test was required for graduation,<sup>20</sup> just 28% of all students failed to pass all their exams. Ex.6514:13. More than two-thirds of economically disadvantaged ninth-graders—67%—failed at least one exam in 2012, compared to 42% on the TAKS in 2004. *Compare Ex.6322:29 with Ex.6514:13.* 81% of all

<sup>20</sup> See Ex.6350 (showing that TAAS was required for graduation in 2003).



RR6:222-25; Ex.6349:49; Ex.6322:60. TAKS exams followed the same pattern. See Ex.6349:49; RR6:222-25.

**b. Economically disadvantaged students face challenges that make them more expensive to educate.**

The challenges economically disadvantaged students face in achieving a general diffusion of knowledge begin before they even start school. They often are not exposed to adult language or enriched vocabulary in the home. They know roughly 500 words by age three, compared to 5,000 words for non-economically disadvantaged students. See Ex.3202:15-17; see also Ex.3206:12-13. Many enter school without knowing basic colors, numbers, animals, the alphabet, how to turn a page, or in which direction to read. See RR20:77; Ex.3206:12; RR19:78-79; Ex.3207:14-15; RR5:172-75, RR5:181-183; RR19:18-19; RR20:100; Ex.3202:15-17.

# Tab D-5

No. 18-422; *Robert A. Rucho, et al. v. Common Cause, et al.*;  
In the United States Supreme Court; Brief of Appellees, filed  
March 4, 2019.

Lead Counsel ~ University of Chicago Law School: Nicholas  
Stephanopoulos; Campaign Legal Center: Paul M. Smith,  
Ruth M. Greenwood, Annabelle E. Harless

2011 Plan had the worst average efficiency gap of any map in Professor Jackman's database. Ex.4002:10. Not to be outdone, the 2016 Plan had the worst efficiency gap in the country in 2016—and in the wake of the 2018 election, has overtaken the 2011 Plan as the most asymmetric map of the last half-century. J.S.App.195. The 2011 and 2016 Plans have also exhibited nearly unparalleled scores on other measures. Their partisan biases, for instance, are the second-largest in the modern era. J.S.App.206-07.

The 2016 Plan Is an Extreme Outlier Among Modern Congressional Plans

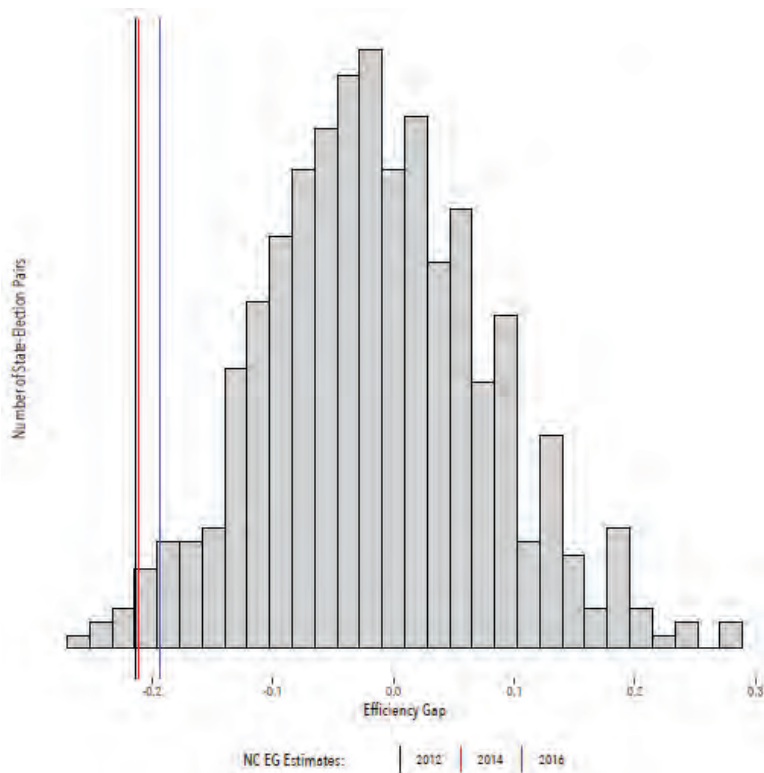
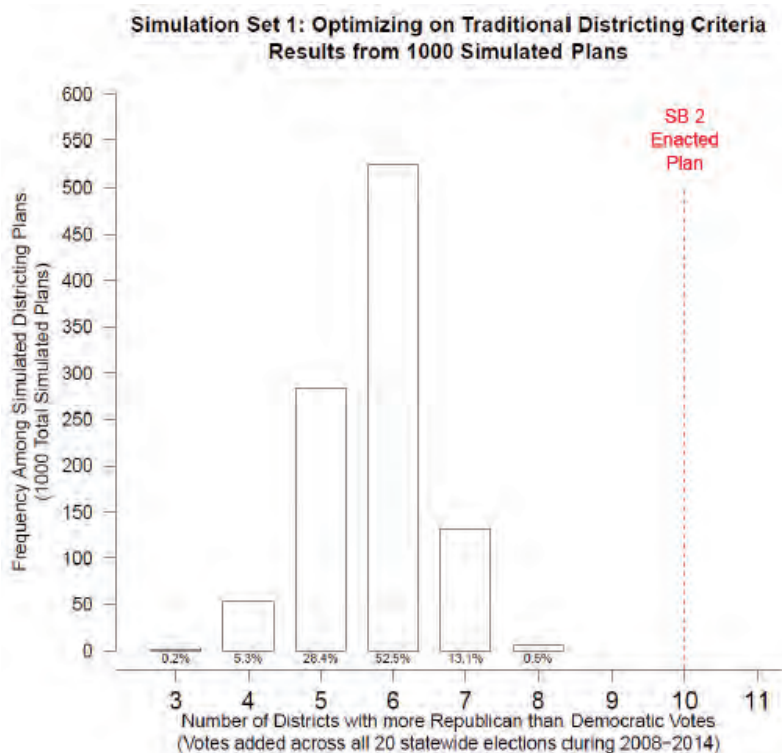


Figure 6: Histogram of efficiency gap estimates in 512 elections, 1972-2016. The three vertical lines indicate where North Carolina's three most recent elections lie in the distribution of efficiency gap scores.

The 2016 Plan Is an Extreme Outlier Among  
Potential North Carolina Plans



*Second*, Hofeller himself, the architect of the 2016 Plan, created two draft maps that performed about as well as the Plan in terms of traditional criteria but were far less skewed. J.S.App.226. Both of these maps’ districts were more compact, on average, than the Plan’s districts. J.A.293. The “ST-B” map divided three fewer counties than the Plan; the “17A” map split two more. *Id.* But using Hofeller’s own set of twenty prior statewide elections, both maps were expected to yield seven (rather than ten) Republican seats and six (instead of three) Democratic seats. *Id.*

# Tab D-6

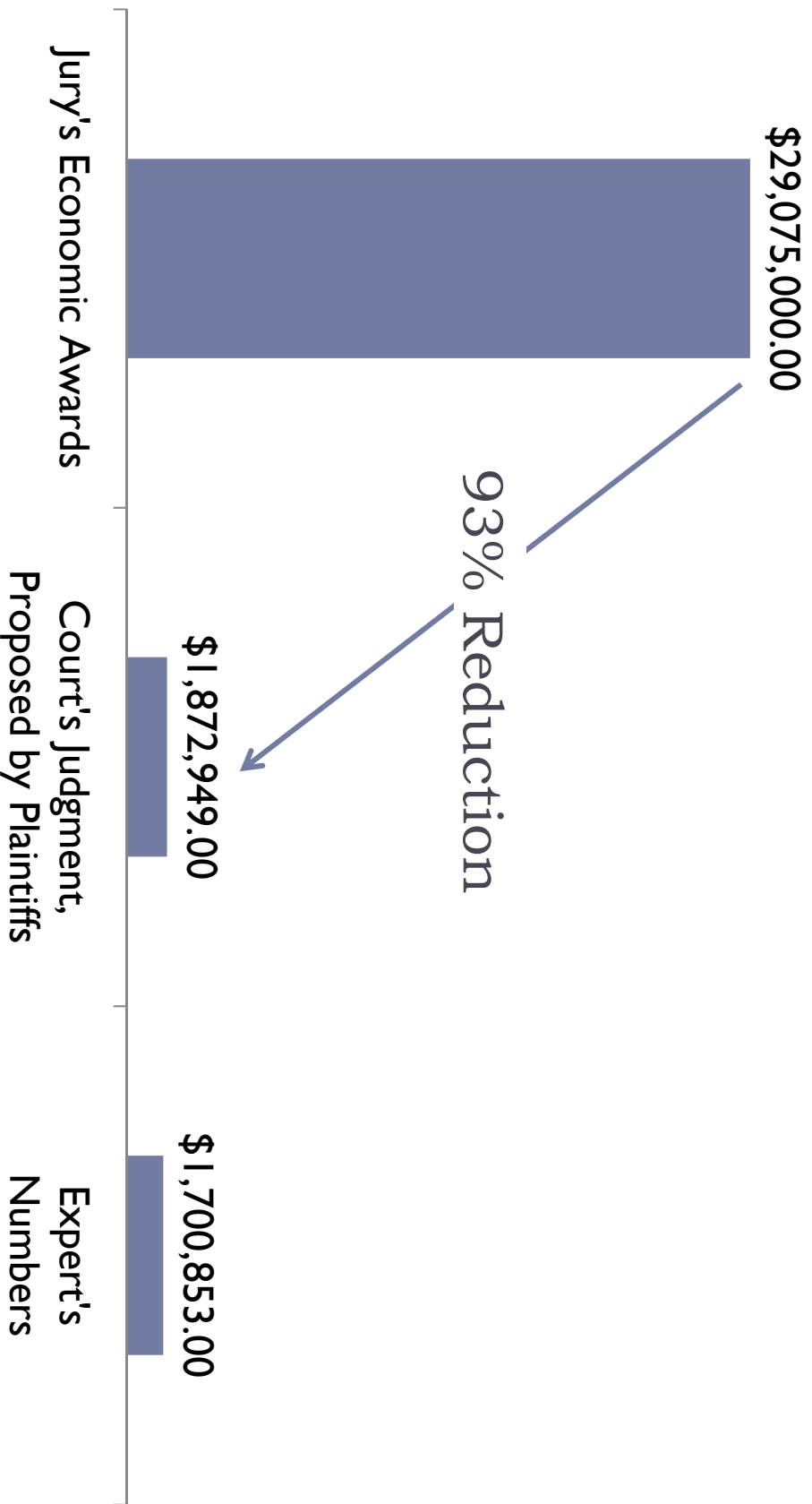
No. 12-06-11697-DCVCLM; *Jose Luis Aguilar, et al. v. Heckman Water Resources (CVR) Inc., et al.*; In the 293rd Judicial District Court of Dimmit County, Texas; Defendants' Post-trial Motion Hearing PowerPoint.

Lead Counsel ~ Alexander Dubose Jefferson & Townsend LLP: Wallace B. Jefferson, Susan S. Vance; Haynes and Boone, LLP: Nina Cortell, Anne M. Johnson, Lynne Liberato, William Feldman, Brock Guerra Strandmo Dimaline Jones, P.C.: Ricardo R. Reyna, Desiree G. Marrufo, Greg Hokenson; Jacqueline M. Stroh, P.C.: Jacqueline M. Stroh.

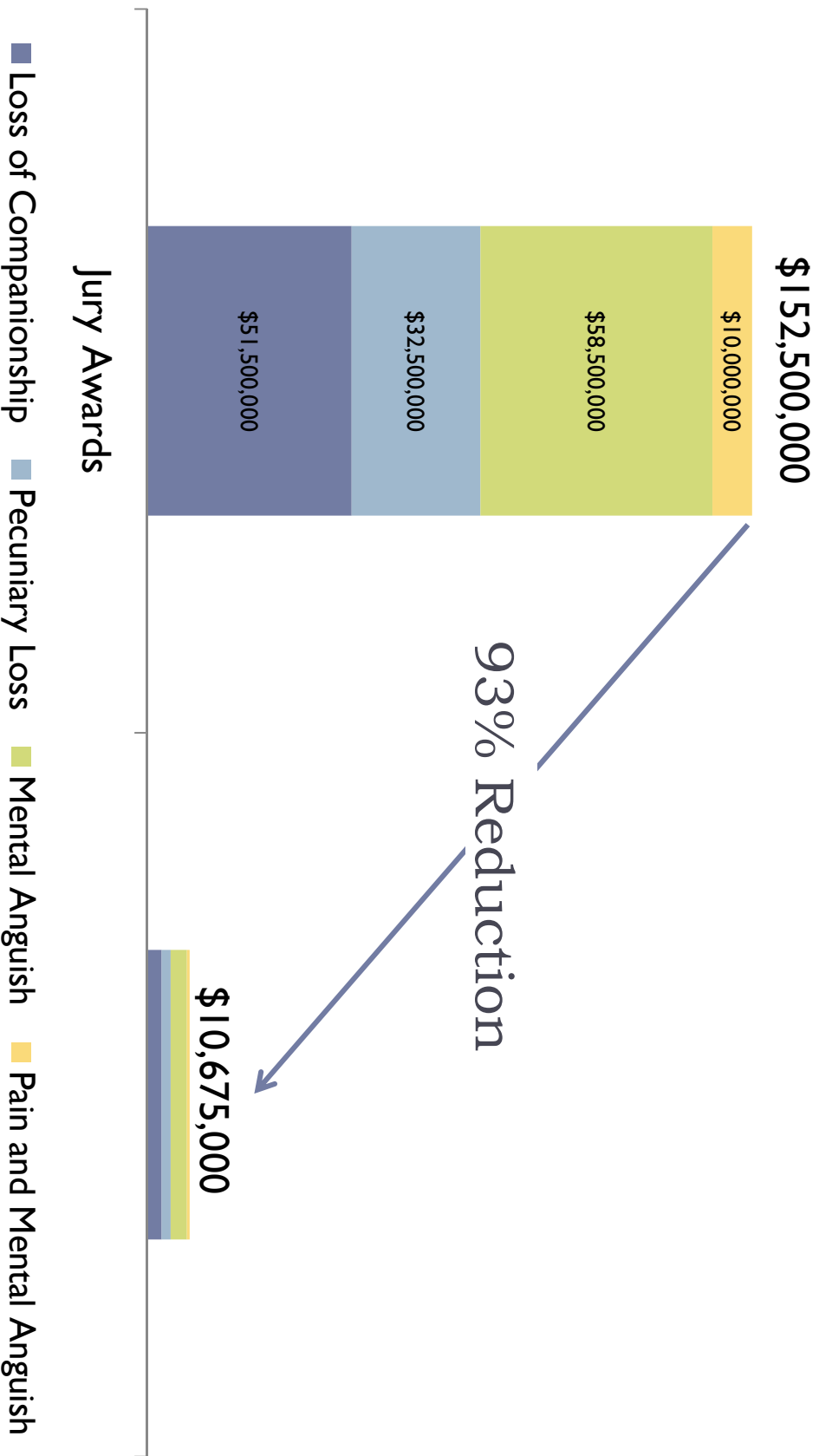


# Plaintiffs Concede Economic Awards Exceed Evidence by \$27 Million

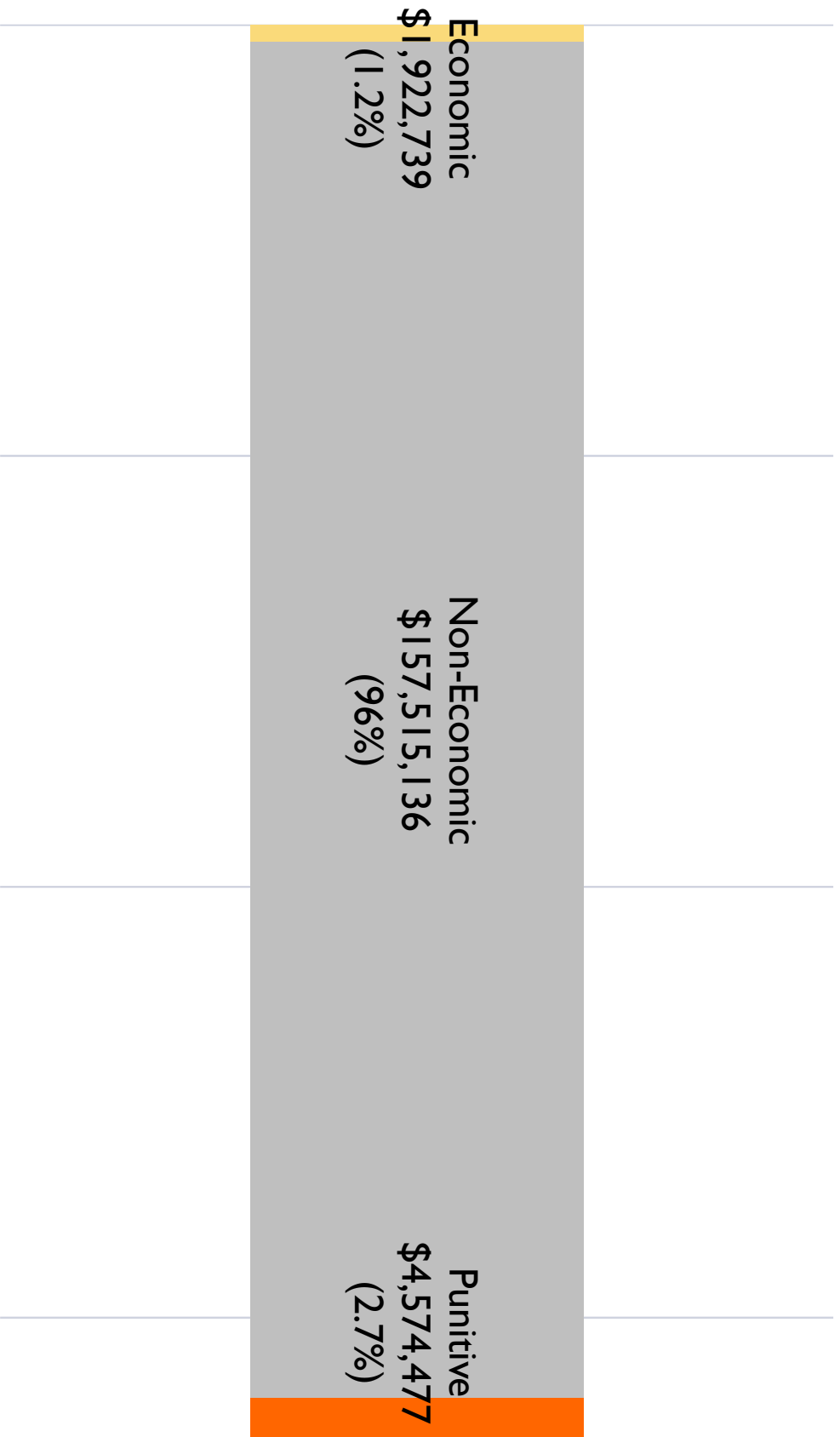
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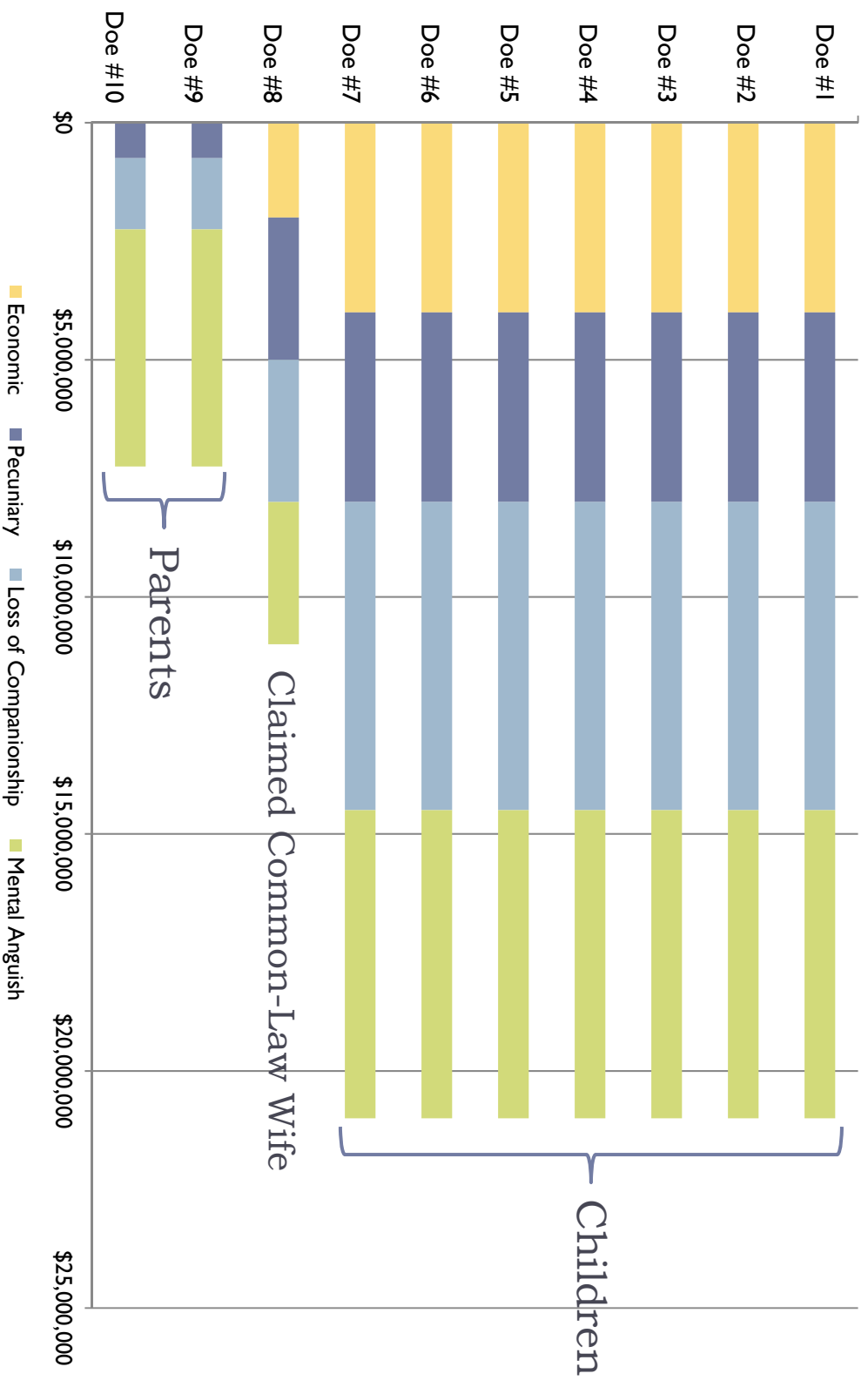
# Same Excessiveness Infects Jury's Non-economic Damage Awards



# Non-Economic Awards: 96% of Judgment



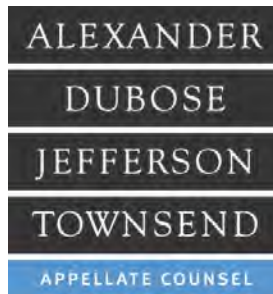
# Jury Did Not Differentiate Between Members of Plaintiff Groups



# Tab D-7

No. 14-0776; *Michael Williams, et al. v. Texas Taxpayer & Student Fairness Coalition, et al.*; In the Texas Supreme Court; Appellees' Post-Submission Letter Brief, filed September 16, 2015.

Lead Counsel ~ Alexander Dubose Jefferson & Townsend LLP: Wallace B. Jefferson, Rachel A. Ekery; Haynes and Boone, LLP: Mark Trachtenberg; MALDEF, Inc.: Marisa Bono; Gray & Becker, PC: Richard E. Gray, III



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Wallace B. Jefferson  
*Board Certified—Civil Appellate Law*  
*Texas Board of Legal Specialization*  
wjefferson@adjtlaw.com

September 16, 2015

Mr. Blake A. Hawthorne, Clerk  
SUPREME COURT OF TEXAS  
201 West 14th Street, Room 104  
Austin, Texas 78701

Re: No. 14-0776; *Michael Williams, et al. v. Texas Taxpayer and Student Fairness Coalition, et al.*; In the Supreme Court of Texas.

Dear Mr. Hawthorne:

Please circulate this post-submission letter brief submitted on behalf of Appellees Fort Bend ISD, et al., Calhoun County ISD, et al., Edgewood ISD, et al., and the Texas Taxpayer and Student Fairness Coalition, et al., to the members of the Court. Please also file this document in the “Briefs” section of the Court’s website.

The primary purpose of this letter brief is to respond to Governor Abbott’s assertion—made in his August 26, 2015 amicus brief submitted shortly before oral argument—that the 84th Legislature “substantially increased funding for the State’s school finance system.” Gov. Br. at 14.<sup>1</sup> Contrary to the Governor’s assertion, funding provided by the Legislature for the 2016-17 biennium barely kept pace with enrollment growth and inflation.

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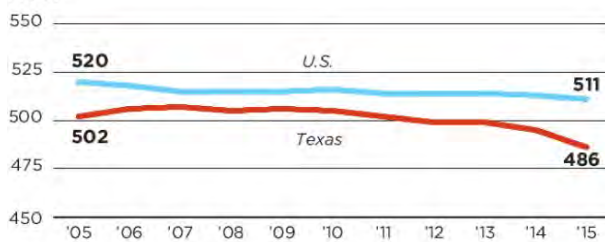
<sup>1</sup> See Brief for the Governor of Texas as Amicus Curiae Supporting Appellants/Cross-Appellees Michael Williams, *et al.*, received Aug. 26, 2015 (“Gov. Br.”).

Benchmark, compared to 41.9% for the rest of the nation. *Compare* College Board, News Release: Sep. 3, 2015 (national results) *with* College Board, “2015 College Board Program Results: Texas”<sup>20</sup> at 4 (Texas results). In 2015, Texas’s scores were twenty-five points below the national average in both Critical Reading and Math and thirty points below the national average in Writing. *Compare* College Board, “State Profile Report: Texas” (2015) at 3 (national scores)) *with id.* at 5 (Texas scores).<sup>21</sup> This data shows that the gap between Texas and the national average continues to grow, as it has over the past decade.

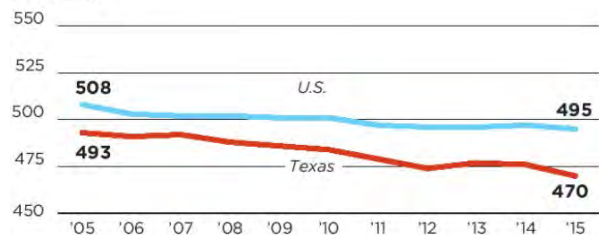
**Average SAT scores for Texas, U.S. 2005-15**

A perfect score on each section is 800.

**Math**



**Reading**



<sup>20</sup> Available at: <https://www.collegeboard.org/release/2015-program-results> (last visited Sep. 15, 2015).

<sup>21</sup> Available at: [https://secure-media.collegeboard.org/digitalServices/pdf/sat/TX\\_15\\_03\\_03\\_01.pdf](https://secure-media.collegeboard.org/digitalServices/pdf/sat/TX_15_03_03_01.pdf) (last visited Sep. 10, 2015).



Terrence Stutz, *SAT Scores in Texas Plummet as More Students Take Exam*, DALLAS MORNING NEWS, Sep. 3, 2015.<sup>22</sup> Particularly telling is the comparison between Texas’s and California’s SAT performance. California outperformed Texas by 20 points in Math and 25 points in Critical Reading this year, even though (1) the demographics of the two states are comparable (with 53.6% Hispanic and 24.6% white students in California, compared to 51.8% Hispanic and 29.5% white students in Texas), (2) more than 60% of seniors in both states took the SAT, and (3) a higher percentage of low-income students took the exam in California than in Texas. *Id.*; College Board, “State Profile Report: Texas” (2015) at 5; College Board, “State Profile Report: California” (2015) at 5.<sup>23</sup> This new data belies any claim of “forward progress” and further demonstrates how far Texas is from achieving a general diffusion of knowledge, which the Legislature has defined as college and career readiness.

At oral argument, some of the justices’ questions raised the issue of where the boundary between constitutionally acceptable and unacceptable student performance lies. While this Court’s precedents offer guidance on this question, the Court has wisely refrained from precisely delineating the boundary between acceptable and unacceptable student performance when it is not necessary to do so.

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<sup>22</sup> Available at: <http://www.dallasnews.com/news/education/headlines/20150903-sat-scores-in-texas-plummet-as-more-students-take-exam.ece> (last visited Sep. 10, 2015).

<sup>23</sup> Available at: [https://secure-media.collegeboard.org/digitalServices/pdf/sat/CA\\_15\\_03\\_03\\_01.pdf](https://secure-media.collegeboard.org/digitalServices/pdf/sat/CA_15_03_03_01.pdf) (last visited Sep. 10, 2015).

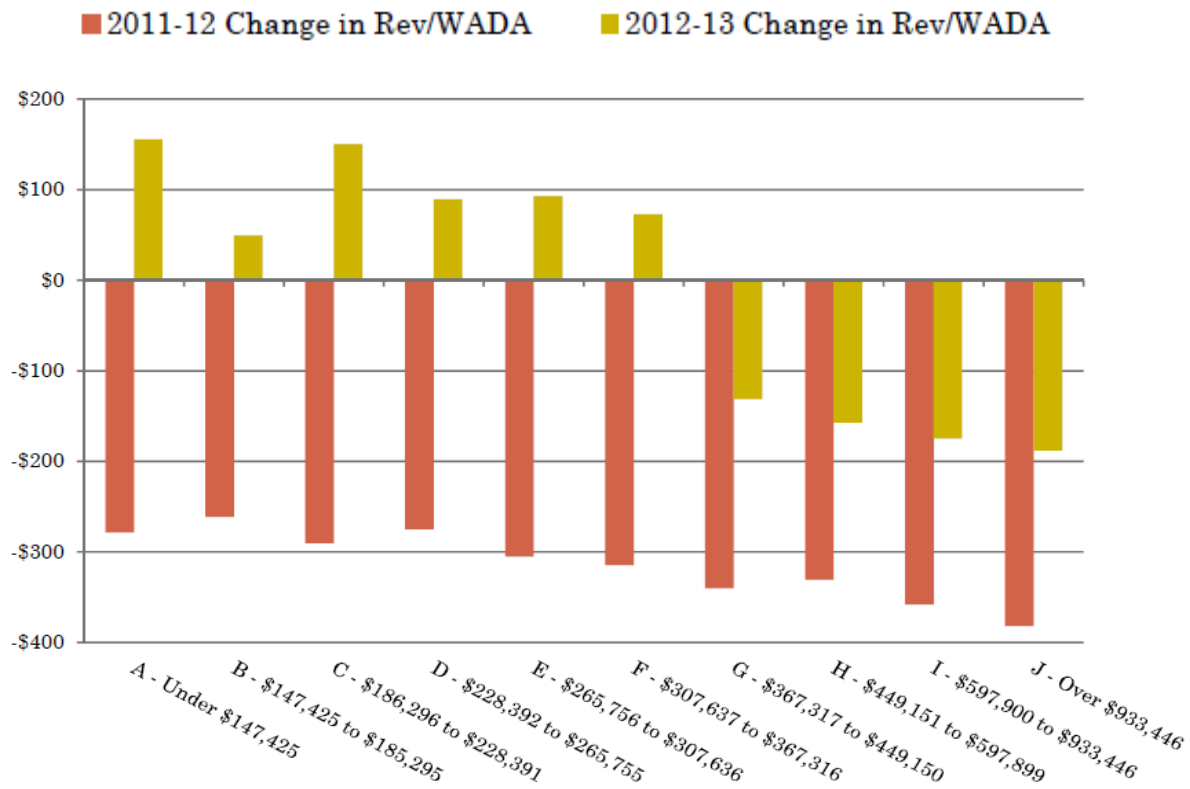


# Tab D-8

No. 14-0776; *Michael Williams, et al. v. Texas Taxpayer & Student Fairness Coalition, et al.*; In the Texas Supreme Court; Calhoun County ISD Plaintiffs' Brief of Appellants, filed April 13, 2015.

Lead Counsel ~ Haynes and Boone, LLP: Mark Trachtenberg, John Turner, Michael E. Skidmore, Michelle C. Jacobs

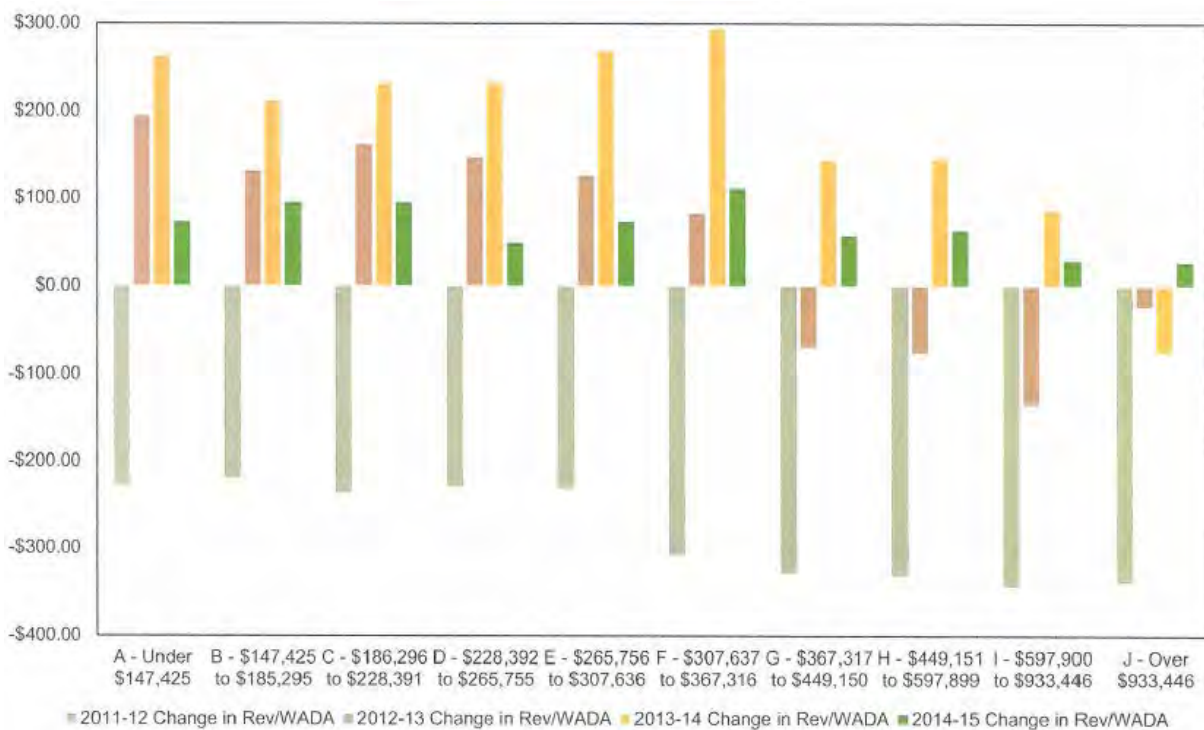
The following chart summarizes the impact of the cuts on property-wealthy and property-poor districts in the first and second years of the biennium. The chart depicts year-to-year changes in revenue per WADA for districts based on their property wealth. (Ex.5654:135 (referencing Ex.5653:152).) The orange bars show that the cuts impacted all districts in 2011-12, including property-wealthy districts. In 2012-13, however, as indicated by the yellow bars, funding for property-wealthy districts dropped even more, while funding for property-poor districts was partially restored.



(Ex.5653:152.)

**2. The 83rd Legislature’s partial restoration of the 2011 funding cuts for the 2013-15 biennium primarily benefited property-poor districts.**

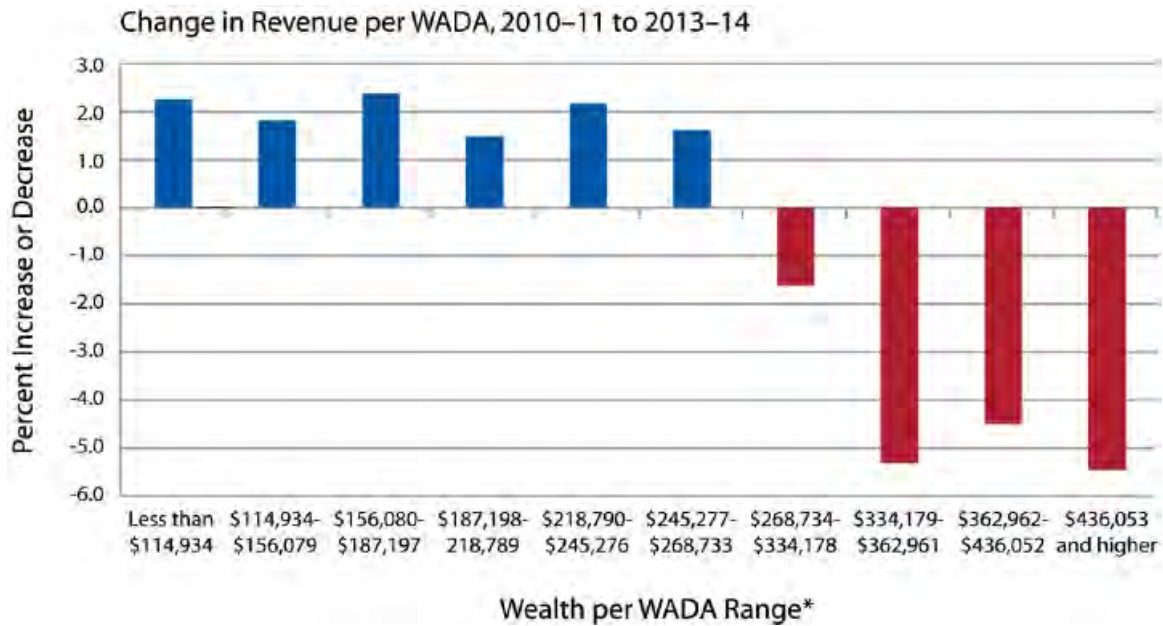
The 83rd Legislature’s actions in 2013 continued the trend of narrowing any gaps between property-wealthy and property-poor districts. The Legislature restored \$3.4 billion of the \$4 billion that had been cut from the FSP in the 2011 session, but most of this restored funding was directed to property-poor districts. (RR54:88; Ex.20219A:152R; Ex.6618:9.) The chart below shows the projected year-to-year change in revenue per WADA in 2013-14 and 2014-15 for districts grouped by property wealth. (Ex.20219A:152R.) Property-poor districts’ revenue per WADA increased significantly more than property-wealthy districts’ revenue per WADA in both years (represented by the yellow and green bars).



As had been the case in 2012-13, this relative shift of resources away from property-wealthy districts had the effect of further narrowing average per-WADA revenue gaps that existed between property-wealthy and property-poor school districts. (FOF 1270; RR59:26-27; RR57:45; RR62:50-51 (referencing Ex.11476:14).)

The actions of the 82nd and 83rd Legislatures together significantly decreased the per-WADA funding levels of Chapter 41 districts. These districts bore the brunt of the cuts in the 2011-13 biennium, and had the least funding restored to them in the 2013-15 biennium.

The chart below displays the percent increase or decrease in revenue per WADA from 2010-11 (before the 2011 cuts) to 2013-14 (after the partial restoration of cuts) for districts based on their property wealth per WADA. The six groups of districts with the lowest property wealth each received *more* funding in 2013-14 than they had before the 2011 cuts, while the four groups of the highest-property-wealth districts each received *less* funding than before the cuts. (RR58:26-27 (referencing Ex.6622:5-6).)



(Ex.6622:6; *see also* RR54:109-10 (referencing Ex.6618:9).)

A major driving force behind the relative shift of resources away from property-wealthy districts was a reduction in ASATR/“target revenue” funding. (See RR59:157-58; RR54:103-05 (referencing Ex.6618:5).) Both the number of districts funded by ASATR and the total amount of ASATR funding in the system have sharply declined since 2011. (RR54:113-14 (referencing Ex.6618:12).) As the table below shows, there are projected to be 791 districts with about 5.2 million in WADA on formula funding in the current school year (2014-15). This is an enormous increase from the 238 districts and 1.4 million WADA which were funded by the formulas in 2011-12. Conversely, the number of districts receiving target revenue is estimated to be 230 this year, with about 900,000 WADA in these districts—a substantial decrease from the 783 districts, with roughly 4.3 million

# Tab D-9

No. 05-18-00860-CV; *BBVA Compass and Sam Meade v. David Bagwell, et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Reply Brief of Appellants, filed June 6, 2019.

Lead Counsel ~ Haynes and Boone, LLP: Anne M. Johnson, Nina Cortell, Michael A. Hatchell, Kent Rutter, Christopher R. Knight; Kane Russell Coleman Logan PC: Michael A. Logan, Kenneth C. Riney

Bagwell tries to fit these awards into the out-of-pocket measure by saying they represent the “value” of the unsold lots he “parted with” when he defaulted on his loans and the lots were sold to Toll Brothers. (Bagwell Br. 53-54.) But that is just artful pleading. Bagwell measures the “value” of the unsold lots by subtracting his loan payoff amount from what he hoped to sell them for in 2010 (a hypothetical bargain never struck), during what he now describes as a “historically depressed” real-estate market. (Bagwell Br. 56; *see also* PX228, 230, 232, 238; RR8:87.) These are precisely the kinds of speculative damages that *Formosa* holds may *not* be recovered under the out-of-pocket measure. *Formosa*, 960 S.W.2d at 49-50; *see also Phillips v. Carlton Energy Grp., LLC*, 475 S.W.3d 265, 280 (Tex. 2015) (“We can think of no reason . . . why it would make sense to deny damages based on speculative evidence of lost profits but allow recovery of lost value based on the same evidence.”).

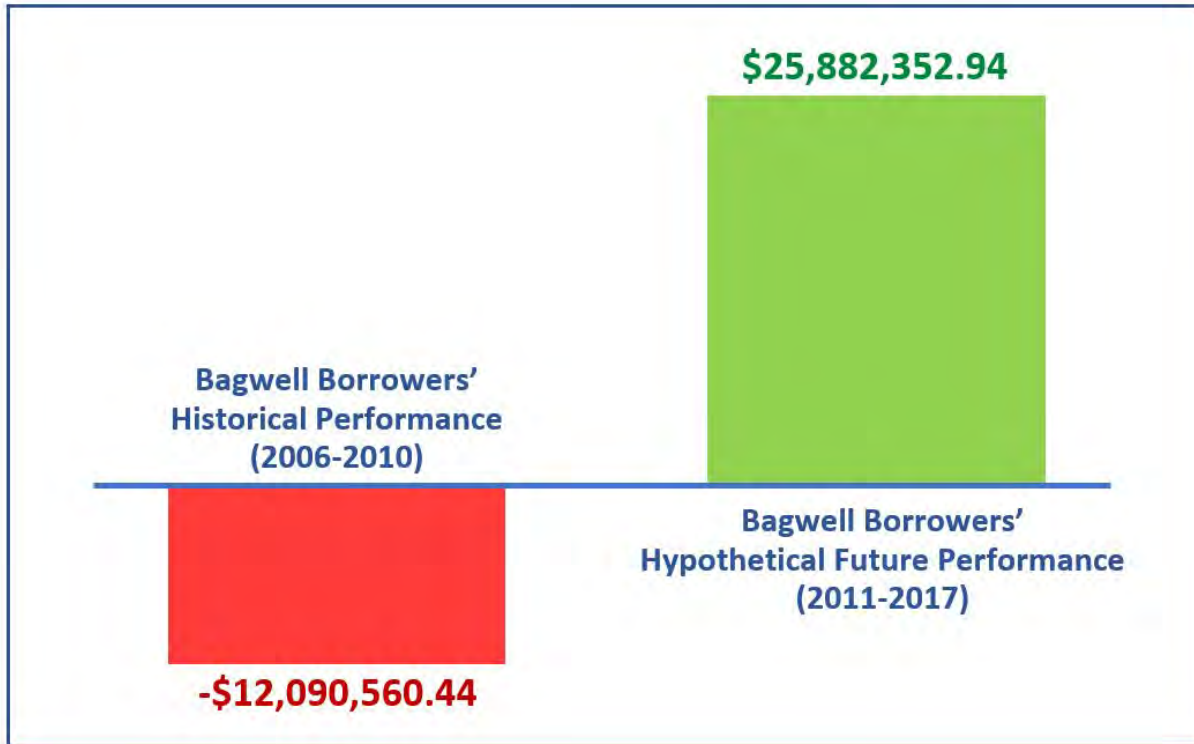
***\$11 million profits on four hypothetical developments from 2010-17.***<sup>10</sup>

Bagwell does not dispute that he presented no evidence of historical profitability that

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<sup>10</sup> The \$11 million lost-profits award in Question 5(2) assumes Bagwell had a “clean slate” in 2010—i.e., that all lots in Broughton, Broadland, and Old Grove were sold at top retail value, with all loans paid off. (RR8:146-47; Bagwell Br. 57.) If that premise fails—i.e., if Bagwell’s \$8 million award for these lots fails for the reasons above—then his \$11 million award for 2010-17 lost profits necessarily fail as well.

could support the \$11 million award that assumes future, hypothetical profits. Just the opposite:



(PX228, 230, 232, 238.)<sup>11</sup>

Bagwell claims this evidentiary gap is bridged by his expert's opinion that the real-estate market improved after 2010. (Bagwell Br. 56.) But his expert's bare speculation about how Bagwell *might* have performed in a better market is no evidence to support \$11 million in future lost profits without "objective facts,

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<sup>11</sup> Borrowers' historical profits are calculated by subtracting Bagwell's expected expenses and debt (PX238) from actual sales (PX228, 230, 232). Borrowers' hypothetical profits are calculated based on the \$11 million award (lost profits to Bagwell personally) and the fact that Bagwell's interest represented 42.5% of the overall profit. (See Bagwell Br. 55-56.)



# Tab E-1

No. 17-0557; *Clinton W. (“Buddy”) Pike, Sr., et al. v. Texas EMC Management, LLC, et al.*; In the Supreme Court of Texas; Petitioners’ Reply Brief on the Merits, filed June 11, 2018.

Lead Counsel ~ Haynes and Boone, LLP: Nina Cortell, Ryan Paulsen, Mark Trachtenberg, Mike A. Hatchell.

## Pathways to Reversal and Rendition (R/R)

<i>VHSC/Pike Appellate Arguments</i> ↓	<b>Claim: Breach of Management Agreement against Pike \$1M</b>	<b>Claim: Tortious Interference with Management Agreement against VHSC \$ 7M</b>	<b>Claim: Trade Secret Misappropriation against VHSC/Pike \$ 1.5M</b>	<b>Permanent Injunction</b>
No standing (Part I.A)	R/R	R/R		
Acquired rights (Part I.A-B)	R/R	R/R	R/R	R/R
No competent evidence of damages <sup>1</sup> (Part II.A)	R/R	R/R	R/R	
No evidence of causation (Part II.B)	R/R	R/R	R/R	R/R
Failure to appeal trade secret damage ruling (Part II.C)			R/R	
One-Satisfaction Rule <sup>2</sup> (Part II.D)	R/R	R/R	R/R	
No protectable trade secret (Part III.A)			R/R	R/R
Dispositive trial court findings of no imminent harm/cannot presume harm (Part III.B)				R/R
Adequate remedy at law (Part III.C)				R/R

<sup>1</sup> This argument also requires rendition of all awards against Walker, Wilson and FEW.

<sup>2</sup> Under the one-satisfaction rule, this Court should reverse and render judgment on the greatest surviving recovery, taking into account all of the damages awards.

# Tab E-2

No. 19-1122; *Kinder Morgan Sacroc, LP, et al. v. Scurry County, et al.*; In the Texas Supreme Court; Petition for Review, filed December 20, 2019.

Lead Counsel ~ Lynch, Chappell & Alsup, PC: Harper Estes, B. Jack Shepherd; Vinson & Elkins LLP: Michael A. Heidler, Catherine B. Smith, James Leader, Leslie Gardner Mason.

**B. The Court of Appeals’ application of the “fair notice” standard conflicts with decisions from other Texas appellate courts.**

Other Texas appellate courts examine the factual allegations in a pleading to determine whether the pleading asserts a legal action that starts the running of the 60-day period to file a TCPA motion:

Case	Holding
<i>Campone v. Kline</i> , 2018 WL 3652231, at *6 (Tex. App.—Austin 2018, no pet.).	An amended petition “reset” the deadline for filing a TCPA motion because the amended petition “added <u>new factual allegations</u> about instances of alleged defamation.” (emphasis added)
<i>Montelongo v. Abrea</i> , 2019 WL 5927742, at *4 (Tex. App.—San Antonio 2019, no pet. h.).	Under the TCPA, litigants must “consider the <u>factual allegations</u> that have been asserted against them and decide, within the TCPA’s 60-day timeline, whether those allegations are ‘based on’ or ‘in response to’ the exercise of rights protected by the TCPA.” (emphasis added)
<i>Jordan v. Hall</i> , 510 S.W.3d 194, 197 (Tex. App.—Houston [1st Dist.] 2016, no pet.).	“An amended petition asserting claims based upon <u>new factual allegations</u> may reset a TCPA deadline as to the newly-added substance.” (emphasis added)

On a related issue, this Court determined whether claims fell within the TCPA by examining the factual allegations underlying the claims—*i.e.*, by examining what the claims were “based on” and what they “asserted” and “alleged.” *Creative Oil & Gas*, 2019 WL 6971659, at \*3, 6-8. Of course, such a factual analysis is not possible until the plaintiff provides notice of the *factual theory* underlying its claims.

# Tab E-3

No. 14-18-01091-CV; *Arrows Up, LLC, et al. v. Sandbox Logistics, LLC, et al.*; In the Court of Appeals for the Fourteenth District of Texas at Houston; Brief of Appellees, filed October 4, 2019.

Lead Counsel ~ Beck Redden, LLP: Russell S. Post, Matthew P. Whitley, Michael E. Richardson, Seepan Parseghian, Parth S. Gejji.

<b>Feature</b>	<b>Arrows Up's pre-NDA Jumbo BTS bin</b>	<b>SandBox</b>	<b>Arrows Up's post-Settlement Agreement Jumbo bin</b>
<i>Dimensions</i>	96" cube	117.75" x 96" x 114"	117.75" x 100" x 114"
<i>Weight Capacity</i>	16,000 lbs.	48,000 lbs.	48,000 lbs.
<i>Roof Hatch</i>	2' x 4'	91" x 19"	84" x 20"
<i>Gasket Material</i>	Plastic brush	Felt	Felt
<i>Stacking Cones</i>	None	Welded to ISO Corners	Welded to Corner with ISO Spacing
<i>Tubular Forklift Pocket</i>	No	Yes	Yes
<i>Funnel Angles</i>	30° x 30° or 50° x 50°	31° x 37°	30° x 36°
<i>Detachable Ladder</i>	No	Yes	Yes

See RR16:170, 20:106, 109 (dimensions); RR16:178 (weight capacity); RR11:76, 16:191, 13:39 (roof hatch); RR16:202 (gasket); RR16:198, 20:11, 79 (ISO corner); RR16:185 (tubular forklift pocket); RR16:181 (funnel angles); RR16:204-05 (detachable ladder).<sup>2</sup>

SandBox found out about Arrows Up's conduct when it saw pictures of the post-Settlement Agreement bins at RockPile's terminal yard. This lawsuit followed. RR7:91-92, PX641.

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<sup>2</sup> A few of these features have had minor modifications over time. See RR13:32 (height increase); RR11:75-76 (hatch size); RR16:206 (ladder discontinued in 2016).

# Tab E-4

No. 14-0776; *Michael Williams, et al. v. Texas Taxpayer & Student Fairness Coalition, et al.*; In the Texas Supreme Court; Fort Bend ISD Appellees' Brief on the Merits, filed July 2, 2015.

Lead Counsel ~ Alexander Dubose Jefferson & Townsend, LLP: Wallace B. Jefferson, Rachel A. Ekery, Thompson & Horton LLP: J. David Thompson, III, Phillip Fraissinet, Holly G. McIntush.

ninth-graders failed to reach the Final Level II (college-ready) standard on at least one exam, and 91% of economically disadvantaged students fell short. FOF130; Ex.6322: 29.

More disturbingly, performance did not improve appreciably for the second class of students taking the exams. Performance was stagnant across grades, subjects, and socio-economic status:

STAAR Tests – Combined English and Spanish	% Passing at Level II Phase-In 1 Standard		
	Spring 2012	Spring 2013	Change
First Administration Only—Spring 2012 and Spring 2013			
Grades 3 – 8 Reading Econ. Disadvantaged*	67%	66%	-1
Grades 3 – 8 Reading Non- Econ. Disadvantaged*	88%	88%	0
Grades 3 – 8 Mathematics Econ. Disadvantaged*	63%	62%	-1
Grades 3 – 8 Mathematics Non- Econ. Disadvantaged*	83%	83%	0
Grades 4 and 7 Writing Econ. Disadvantaged*	63%	61%	-2
Grades 4 and 7 Writing Non- Econ. Disadvantaged*	84%	83%	-1
Grades 5 and 8 Science Econ. Disadvantaged*	62%	65%	+3
Grades 5 and 8 Science Non- Econ. Disadvantaged*	85%	86%	+1
Grade 8 Social Studies Econ. Disadvantaged*	48%	52%	+4
Grade 8 Social Studies Non- Econ. Disadvantaged*	75%	78%	+3
<i>Algebra I Econ. Disadvantaged^</i>	72%	71%	-1
<i>Algebra I Non-Econ. Disadvantaged^</i>	85%	84%	-1
<i>English I Reading Econ. Disadvantaged^</i>	56%	59%	+3
<i>English I Reading Non-Econ. Disadvantaged^</i>	81%	83%	+2
<i>English I Writing Econ. Disadvantaged^</i>	41%	41%	0
<i>English I Writing Non-Econ. Disadvantaged^</i>	70%	70%	0
<i>Biology Econ. Disadvantaged^</i>	81%	83%	+2
<i>Biology Non-Econ. Disadvantaged^</i>	93%	94%	+1
<i>World Geography Econ. Disadvantaged^</i>	72%	72%	0
<i>World Geography Non-Econ. Disadvantaged^</i>	90%	90%	0

Ex.6618:26.



below maximum rates, the Court looked to several systemwide trends, including a “marked increase” in local tax rates and an increasing percentage of available revenue being spent. *WOC II*, 176 S.W.3d at 794-796.

Once again, the cost pressures from rising academic standards and the changing student population are forcing districts to the cap in an attempt to provide a general diffusion of knowledge. In 2012-13, 928 districts (over 90%), with almost 4.2 million students, taxed at or above \$1.04—up from 630 at the time tax compression was passed. Ex.6618:14. Despite the State’s attempt to control district tax rates and prevent them from taxing above \$1.04 (*see* Argument Section IV.C.2 and note 37, *supra*), the number of districts taxing at the cap has more than doubled in five years:

Figure F-17. M&O Tax Rates for Texas School Districts 2007-08 and 2012-13

M&O Tax Rate	# Districts 2007-08	% Districts	2007-08 ADA	% ADA	# Districts 2012-13	% Districts	2012-13 ADA	% ADA
<\$1.00	98	9.55	165,709	3.92	54	5.29	80,452	1.78
\$1.00 to <\$1.04	108	10.53	994,860	23.52	39	3.82	292,556	6.46
\$1.04	699	68.13	2,680,939	63.38	607	59.45	3,046,938	67.29
\$1.04 to <\$1.17	24	2.34	217,130	5.13	74	7.25	505,855	11.17
\$1.17 and Above	97	9.49	171,294	4.05	247	24.19	602,429	13.30
Total	1,026	100	4,229,933	100	1,021	100	4,528,231	100

Source: Moak, Casey & Associates data files (original source data from the State Comptroller of Public Accounts Self-Report Property Value File and TEA reports of student counts by district)

Ex.6618:14 (emphasis added). The number of students living in districts that are taxing at the cap has more than *tripled*. *Id.* As tax rates rise and the tax cap stays the same, the percentage of available revenue being spent necessarily also rises.

Similarly, because state aid for facilities has not kept pace with property value growth or the growing student population, districts have been forced to raise facility

*Edgewood IV*, 917 S.W.2d at 736-37, the one here does—especially for the state’s growing populations of economically disadvantaged and ELL students.

- 1. The system’s structure and operation prevent it from achieving a general diffusion of knowledge for economically disadvantaged students.**
  - a. Performance outcomes for economically disadvantaged students reveal that the state’s largest subpopulation of students is not achieving a general diffusion of knowledge.**

Texas holds *all* of its students to the same rigorous academic standards. RR26:172-73. Yet the state’s economically disadvantaged students are not receiving the same opportunity to achieve those standards. The Spring 2013 STAAR EOC exams revealed poor performance by economically disadvantaged students. Just one out of every three passed all of their exams on the first try. Ex.6618:25. The data also reveal large achievement gaps between economically disadvantaged students and their peers:

STAAR EOC Tests	% of Students <u>Failing</u> at Level II Phase-in 1 Standard
Eng. I Reading Econ. Disadvantaged*	46%
Eng. I Reading Non-econ. Disadvantaged*	20%
Eng. I Writing Econ. Disadvantaged*	65%
Eng. I Writing Non-econ. Disadvantaged*	35%
Biology Econ. Disadvantaged*	21%
Biology Non-econ. Disadvantaged*	7%
Algebra I Econ. Disadvantaged*	29%
Algebra I Non-econ. Disadvantaged*	13%
Eng. II Reading Econ. Disadvantaged*	31%
Eng. II Reading Non-econ. Disadvantaged*	12%
Eng. II Writing Econ. Disadvantaged*	61%
Eng. II Writing Non-econ. Disadvantaged*	33%
World History (Proxy) Econ. Disadvantaged*	41%
World History (Proxy) Non-econ. Disadvantaged*	19%
All Tests Taken. Econ. Disadvantaged – Graduation Tests Only <sup>58</sup>	64%
All Tests Taken. Non-econ. Disadvantaged – Graduation Tests Only	35%

*Id.* (emphasis added).

These gaps are troublingly persistent. Between the first and second year of STAAR, the gaps *increased* for four of the five EOC tests required for graduation:

- English I Reading performance gap increased from twenty-three to twenty-six percentage points and Writing from twenty-eight to thirty percentage points. *Compare* Ex.4114, and 4115:1, *with* Ex.4259:110, and Ex.4259:112.
- Algebra I performance gap increased from thirteen to sixteen percentage points. *Compare* Ex.4131:1, *with* Ex.4259:104.

<sup>58</sup> To estimate the percentage of ninth and tenth graders who were able to pass all of the exams required for graduation, this analysis uses passing rates on sophomore-level World History as a proxy for junior-level United States History. Ex.6618:25.

- U.S. History performance gap increased from fourteen to eighteen percentage points; *Compare* Ex.4135:3, *with* Ex.4259:124.
- Biology performance gap increased from eleven to fourteen percentage points. *Compare* Ex.4133:1, *with* Ex.4259:107.

*See also* FOF301.

EOC exams are given in the spring, and students are allowed to retest until they either pass or give up and drop-out. But even after multiple retests, tens of thousands of economically disadvantaged ninth and tenth graders still failed. Taking into account all retests through December 2013 and the “transition rule” that allowed more than 32,000 economically disadvantaged students who passed *either* Reading *or* Writing and only failed the other by a certain amount to be considered to have “passed” English I and II—135,000 students from the Classes of 2015 and 2016 *still* could not pass all of their exams:

	Number of ED students having failed to pass all exams taken <b>(with transition rule)</b>	Percent of ED students having failed to pass all exams taken <b>(with transition rule)</b>	Number of ED students not required to retest based on transition rule
Class of 2015	54,755	34.4	19,069
Class of 2016	80,192	44.2	13,424

FOF307; Ex.5797:12. These numbers do not include the more than 36,500 students who had taken the freshman level exams in Spring 2012 but, by December 2013, had either left the public school system or fallen too far behind to be considered part of the “Class of 2015.” *See* Ex.5795:39-40 (approximately 345,688 ninth graders

took EOC exams in 2012), 76 (309,133 students in TEA’s “Class of 2015” analysis prepared for trial);<sup>59</sup> Ex.10855; Ex.11452.

To put these passing percentages into context, it helps to know just how low the phased-in passing standard is. As shown below, in Spring 2012, students needed only answer twenty out of fifty-four questions correctly, or 37%, to “pass” the Algebra I and Biology tests.

	# Items Tested	Phase-in 1, Level 2		Final Level 2	
		# Correct	% Correct	# Correct	% Correct
<b>Eng I Read</b>	56	30	54%	36	64%
<b>Eng II Read</b>	56	27	48%	33	59%
<b>Eng I Write</b>	62	40	65%	45	73%
<b>Eng II Write</b>	62	38	61%	43	69%
<b>Algebra I</b>	54	20	37%	34	63%
<b>Biology</b>	54	20	37%	33	61%
<b>U.S. History</b>	68	28	41%	44	65%

Ex.44:9-10.<sup>60</sup>

Looking at the college-ready standard, the percentage of items needed to pass is still relatively low—with only one being above 70%, or what would traditionally be considered a “C” grade. *Id.* Yet the percentages of economically disadvantaged students who can meet this standard are low across all subjects. In Spring 2013, just

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<sup>59</sup> By January 2015, the “Class of 2015” had lost another 18,500 students, down to 291,062. [http://tea.texas.gov/About\\_TEA/News\\_and\\_Multimedia/Press\\_Releases/2015/Class\\_of\\_2015\\_S\\_TAAR%C2%AE\\_end-of-course\\_exam\\_passing\\_rate\\_hits\\_90\\_percent\\_\(Jan.\\_15,\\_2015\).](http://tea.texas.gov/About_TEA/News_and_Multimedia/Press_Releases/2015/Class_of_2015_S_TAAR%C2%AE_end-of-course_exam_passing_rate_hits_90_percent_(Jan._15,_2015).)

<sup>60</sup> The numbers of correct items required to pass the test have not changed appreciably since 2012. See <http://tea.texas.gov/student.assessment/convtables/> (last visited Jun. 30, 2015).

13% of economically disadvantaged students achieved the college-ready standard on all of the required EOC exams.<sup>61</sup>

STAAR EOC Tests	% <b>Failing to Meet Level II Final Standard</b>
Eng. I Reading Econ. Disadvantaged*	70%
Eng. I Reading Non-econ. Disadvantaged*	39%
Eng. I Writing Econ. Disadvantaged*	82%
Eng. I Writing Non-econ. Disadvantaged*	54%
Biology Econ. Disadvantaged*	67%
Biology Non-econ. Disadvantaged*	37%
Algebra I Econ. Disadvantaged*	75%
Algebra I Non-econ. Disadvantaged*	50%
Eng. II Reading Econ. Disadvantaged*	49%
Eng. II Reading Non-econ. Disadvantaged*	23%
Eng. II Writing Econ. Disadvantaged*	82%
Eng. II Writing Non-econ. Disadvantaged*	58%
World History (Proxy) Econ. Disadvantaged*	77%
World History (Proxy) Non-econ. Disadvantaged*	52%
All Tests Taken. Econ. Disadvantaged – Graduation Tests Only <sup>^</sup>	87%
All Tests Taken. Non-econ. Disadvantaged – Graduation Tests Only <sup>^</sup>	64%

See Ex.6536:14 (emphasis added).

Furthermore, as the percentage of economically disadvantaged students in a district increases, performance levels drop. This pattern holds true across grade levels, subjects, and types of exams. For example, on both the STAAR exams in grades three through eight and the STAAR EOC exams, passing rates decline for

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<sup>61</sup> To estimate the percentage of ninth and tenth graders able to achieve the college-ready standard on all of the exams required for graduation, this analysis uses passing rates on sophomore-level World History as a proxy for junior-level United States History. Ex.6536:14.

both the economically disadvantaged students *and* the *non*-economically disadvantaged students:

<b>STAAR 3-8 Spring 2013 Percentage Passing (at Level II Phase-In)</b>			
<b>% Economically disadvantaged</b>	<b># Districts</b>	<b>Economically disadvantaged Students % Passing</b>	<b>Non-Economically Disadvantaged Students % Passing</b>
Under 30%	93	56.6%	84.0%
30% to less than 50%	257	53.0%	78.2%
50% to less than 70%	467	48.0%	72.2%
70% to less than 90%	291	46.3%	67.2%
90% and Over	81	42.6%	59.7%
Grand Total	1,189	47.9%	76.2%

<b>STAAR EOC Spring 2013 Percentage Passing (at Level II Phase-In)</b>			
<b>% Economically disadvantaged</b>	<b># Districts</b>	<b>Economically disadvantaged Students % Passing</b>	<b>Non-Economically Disadvantaged Students % Passing</b>
Under 30%	77	49.6%	77.2%
30% to less than 50%	243	41.0%	66.9%
50% to less than 70%	449	35.9%	60.1%
70% to less than 90%	273	33.9%	54.1%
90% and Over	61	31.3%	47.7%
Grand Total	1,103	36.1%	65.0%

*See* Ex.6620; RR54:147-48; Ex.6618:27. This is not a new phenomenon, nor is it unique to the STAAR exams. A 2010-11 analysis shows that SAT/ACT scores also decline as the percentage of economically disadvantaged students increases:

study of the cost differentials and recommended a weight for economically disadvantaged students of at least 40%. *See* RR23:80-81; *cf.* RR6:218-19. But the Legislature set the differential at half the recommended amount, where it has remained ever since. Ex.1328:16.

Every biennium, the LBB should be calculating the differential cost of educating economically disadvantaged students. TEX. EDUC. CODE §§ 42.007(c)(3), .152. They have not done so in more than ten years. But three experts researched the current differential and determined that the weight should be at least doubled. *See* RR6:219-26; Ex.6322:58; Ex.1123:36; RR16:34-35; Ex.3188:28-29. Research from other states indicates that the true cost difference of educating low-income students can be as much as 100%. Ex.6322:58.

The underfunding of the compensatory education weight is evidenced by the fact that, in 2010-11 its impact was so overwhelmed by other aspects of the formula system that, as the percentage of economically disadvantaged students increased, districts' revenue per weighted student *decreased* and its revenue per unweighted student varied only slightly:



% Economically Disadvantaged	ADA	WADA	FSP Revenue	Revenue per ADA	Revenue per WADA
Under 10%	30,219	34,415	\$225,853,345	\$7,474	\$6,563
10% to under 30%	570,856	697,294	\$4,244,405,813	\$7,435	\$6,087
30% to under 50%	808,325	1,020,791	\$5,892,091,212	\$7,289	\$5,772
50% to under 70%	1,276,001	1,698,012	\$9,635,063,254	\$7,551	\$5,674
70% to under 90%	1,298,873	1,793,660	\$10,022,020,910	\$7,716	\$5,587
90% and over	221,735	316,250	\$1,755,071,075	\$7,915	\$5,550
Grand Total	4,206,008	5,560,423	\$31,774,505,609	\$7,555	\$5,714

Ex.6349:53; *see also* Ex.6322:56 (after other formula adjustments are applied, compensatory education funding represents just 10% of Tier I funds).

**ii. The Legislature arbitrarily cut programs for economically disadvantaged students.**

In addition, as discussed in Facts Section Argument Section IV.D.4.a *supra*, the Legislature eliminated or drastically reduced funding for several programs that helped districts provide additional remediation for economically disadvantaged students who are struggling to pass the State’s standardized test—including the Student Success Initiative and the Extended Year Programs—at the same time that it increased the rigor of those tests and *did not restore those cuts in 2013*. *See* RR63:109, 111; Ex.20216-A; Ex.5630:28-29, 44-45; Ex.4000:49-50; RR31:171-72;

*cf.* RR63:108; RR63:110. These funding decisions were made without any analysis of the costs to districts of providing the still mandatory remediation.<sup>62</sup>

**2. The system’s structure and operation prevent it from achieving a general diffusion of knowledge for ELL students.**

**a. Performance outcomes reveal that ELL students are not achieving a general diffusion of knowledge.**

The State assesses ELL students’ progress in learning English using the Texas English Language Proficiency Assessment System (“TELPAS”). That system measures students’ English language skills as “beginner,” “intermediate,” “advanced,” or “advanced high.” Ex.1104:13-14. “Advanced high” signifies enough English proficiency to predict passage of the TAKS test.<sup>63</sup> *See* Ex.4224-T:148-50. The State expects that an ELL will advance at least one level each year and become proficient within four to five years. In actuality, roughly one-third of

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<sup>62</sup> *See* RR.63:106; RR31:168-69; RR27:134, 148; TEX. EDUC. CODE §§ 28.0211 (a-1) (“Each time a student fails to perform satisfactorily on an assessment instrument administered under Section 39.023(a) in the third, fourth, fifth, sixth, seventh, or eighth grade, the school district in which the student attends school *shall* provide to the student accelerated instruction in the applicable subject area.”), 28.0211(c) (“Each time a student fails to perform satisfactorily on an assessment instrument specified under Subsection (a), the school district in which the student attends school *shall* provide to the student accelerated instruction in the applicable subject area, including reading instruction for a student who fails to perform satisfactorily on a reading assessment instrument. After a student fails to perform satisfactorily on an assessment instrument a second time, a grade placement committee *shall* be established to prescribe the accelerated instruction the district shall provide to the student before the student is administered the assessment instrument the third time . . . .”), 39.025(b-1) (“A school district *shall* provide each student who fails to perform satisfactorily as determined by the commissioner under Section 39.0241(a) on an end-of-course assessment instrument with accelerated instruction in the subject assessed by the assessment instrument.”) (emphases added).

<sup>63</sup> The State has not linked TELPAS standards to STAAR. RR35:87-89; Ex.4224-T:142.

ELL students fail to advance a level in a year and stay ELLs for six or more years. RR35:105-06; Ex.11010:29; Ex.4262.

ELL students’ struggles to achieve English proficiency impact the rest of their education. In Spring 2013, ELL students failed not just English, but also Biology and Algebra at significantly higher rates than their non-ELL peers:

<b>2013 EOC</b>	<b>% ELL Students <u>Failing</u> at Level II Phase-In</b>	<b>% Non-ELL Students <u>Failing</u> at Level II Phase-In</b>
<b>English I Reading</b>	82%	30%
<b>English I Writing</b>	91%	48%
<b>Algebra I</b>	49%	20%
<b>Biology</b>	45%	12%

See Ex.4259:104, 107, 110, 112.

ELL students drop out of school at significantly higher rates, and graduate at much lower rates, than their peers. For example, ELL students in the Class of 2012, dropped out at three times the rate of non-ELL students. Ex.4269:73.

**b. ELL students face educational challenges beyond those of non-ELL economically disadvantaged students.**

ELL students are largely low-income and therefore face the challenges discussed in Argument Section V.D.1.b *supra*, but they also face additional hurdles due to their limited English proficiency. See RR14:126-27; RR34:173; RR17:152. For example, ELL students in the upper-elementary and middle school grades often must learn basic English and specialized subject-area vocabularies at the same time. RR14:145-48; Ex.1104:23. ELL students who arrive in the United States with

Figure 25. The Percentage of Students in Grades 3-11 Meeting the Commended Standard on All TAKS Tests Taken: 2003 through 2011

All Tests Taken	2003	2005	2007	2009	2011
All Students - Commended	5%	10%	12%	16%	16%
Economically Disadvantaged	2%	5%	7%	9%	10%
Non-Economically Disadvantaged	7%	15%	18%	23%	24%
Gap	5 points	10 points	11 points	14 points	14 points

Source: Texas Education Agency TAKS Aggregate System data, various years.

Ex.6322:23.

After the transition to STAAR, the percentage of students passing the tests dropped significantly—and not just below the final TAKS passing rates, but well below *initial* TAKS passing rates. In the first year of the STAAR, passing rates in grades three through eight averaged nine percentage points lower at the phase-in standard than the first year of TAKS and *thirty-two* percentage points lower at the final recommended standard. *See* Ex.6515; *see also* Facts Section II.C.1.b *supra*. The percentage of high school students passing all of their EOC exams was *twenty-five* percentage points lower than the passing rate for the exit level TAKS in the first year it was required for graduation. *Compare* Ex.6514:13 (72% of 11th graders passed all exams in 2004) *with* Ex.6349:19 (47% passed all exams in 2012).

Further, STAAR scores are not improving in the initial years like they did on the TAKS. Fifth and eighth grade students are required to pass the State’s reading and math exams to be promoted to the next grade. TEX. EDUC. CODE § 28.0211(a). On TAKS reading, performance increased between the first and second

**2. The vast majority of school districts cannot legally raise their rates high enough to access sufficient revenue to achieve a general diffusion of knowledge.**

The cost of a general diffusion of knowledge that the *Edgewood IV* Court used to calculate the tax rate gap was \$3,500. 917 S.W.2d at 731 and n.12. As discussed above, once adjusted for inflation, that represents \$6,955 in 2014-15. *See* RR58:49; *see also* RR58:46-48. In the intervening twenty years, the State has also significantly increased standards, and the student population has become more diverse and costly to educate. *See* Facts Section II.B and Argument Section IV.D *supra*. Under the 2014-15 formulas, 888 districts, with a collective weighted student enrollment of almost 5.9 million, cannot raise \$6,955 even if taxing at the \$1.17 cap, as noted below in the chart prepared by Dr. Clark. *See* RR58:49-50.

		<b>\$6,955 Adequacy Estimate for 2014-15</b>			
Formula System	M&O Tax Rate	# Districts Above	# Districts Below	# WADA Above	# WADA Below
2014-15 Formulas	Current Rate	87	934	83,340	5,995,437
	\$1.00	73	948	72,132	6,006,646
	\$1.04	92	929	97,697	5,981,081
	Maximum Rate Allowed	133	<b>888</b>	207,682	<b>5,871,095</b>

*See* Ex.6622:20 (emphasis added). In comparison, seventy-three districts, enrolling only 72,000 weighted students, can raise this revenue amount at a tax rate of \$1.00. *Id.* In other words, even if 888 poorest districts levied tax rates that were 17 cents higher than the seventy-three wealthiest districts, they *still* could not raise the

# Tab E-5

No. 14-0776; *Michael Williams, et al. v. Texas Taxpayer & Student Fairness Coalition, et al.*; In the Texas Supreme Court; Calhoun County ISD Plaintiffs' Brief of Appellants, filed April 13, 2015.

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WADA, that were funded on target revenue in 2011-12. During the current school year, only 14.8% of the WADA in Texas are still funded on target revenue, compared to 75.84% in 2011-12.

	2011-12	2012-13	2013-14	2014-15
Formula Districts	238	692	758	791
WADA on Formula	1,372,624	4,074,197	4,854,320	5,179,434
% WADA on Formula	24.16%	68.07%	79.85%	85.20%
Target Districts	783	329	263	230
WADA on TARGET	4,307,966	1,910,916	1,224,814	899,746
% WADA on Target	75.84%	31.93%	20.15%	14.8%
ASATR	\$2,051,553,457	\$628,778,297	\$425,503,996	\$335,594,233

(Ex.6618:12.)<sup>7</sup>

Similarly, the total cost of ASATR was over \$2.05 billion as recently as 2011-12. That cost is projected to drop to \$335.6 million during the current school year, a figure that represents only about 1% of total FSP funding. (RR54:113-14 (referencing Ex.6618:12); RR62:57-58 (referencing [Ex.11476:20](#).) Under current law, ASATR is slated to expire altogether in 2017. (Ex.5654:133.)

**3. Per-WADA funding differences in the current system have continued to narrow and today primarily involve only a small percentage of the state’s WADA.**

This evolution of the Texas school finance system—through Senate Bill 7, House Bill 1, target revenue, and the most recent changes in 2011 and 2013—has led to a current distribution where the vast majority of students in Texas live in districts funded within a few hundred dollars per WADA of each other.

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<sup>7</sup> The State, using a different model, came up with similar estimates for fiscal years 2014 and 2015. (RR62:56-58 (referencing [Ex.11476:19-20](#)); RR62:140-43.)

The table below was prepared from data presented at trial by Catherine Clark, the Associate Executive Director of the Texas Association of School Boards (“TASB”) and an expert witness for the Fort Bend ISD Plaintiff group. Clark sorted the 1,021 school districts by their property wealth per WADA, placed them into ten groups with near-equal numbers of districts, and applied the funding formulas and target revenue calculations for 2013-14 (using M&O tax rates as they were known to exist in 2012) to generate a weighted-average,<sup>8</sup> per-WADA funding amount for each decile. (RR58:31-33 (referencing Ex.6622:9, 11); RR59:164.) The 103 districts in decile #1 are the 103 districts with the lowest property wealth; those in decile #2 have the next-lowest property wealth, and so on.

<b>Decile</b>	<b>Number of Districts</b>	<b>WADA</b>	<b>Percent of WADA</b>	<b>Revenue/WADA at 2012 M&amp;O Tax Rates (with 2013-14 formulas)</b>
1	103	525,472	8.6	\$5,801
2	102	456,494	7.5	\$5,573
3	102	415,541	6.8	\$5,669
4	102	635,181	10.4	\$5,689
5	102	432,141	7.1	\$5,741
6	102	743,360	12.2	\$5,653
7	102	961,772	15.8	\$5,671
8	102	914,937	15.1	\$5,734
9	102	817,346	13.4	\$5,799
10	102	176,531	2.9	\$6,708

(Ex.6622:11.)

As the table shows, nine of the ten deciles are funded within a range of \$226 per WADA. The difference between the highest-funded decile (#10) and the

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<sup>8</sup> Weighted averages are discussed below in Part II.B.



# Tab E-6

No. 14-0776; *Michael Williams, et al. v. Texas Taxpayer & Student Fairness Coalition, et al.*; In the Texas Supreme Court; Calhoun County ISD Plaintiffs' Brief of Appellees, filed July 2, 2015.

Lead Counsel ~ Haynes and Boone, LLP: Mark Trachtenberg, William Feldman, John W. Turner, Micah E. Skidmore, Michelle C. Jacobs.

Level III standards that have been empirically linked to other measures of college and post-secondary readiness. Four out of five ninth graders failed to reach the final Level II standard on all exams—the standard reflecting only a 60% chance of earning a C or better in a college course—while 99% failed to reach Level III on at least one exam.

Performance on spring 2012 STAAR EOC exams			
STAAR EOC exams for typical 9th grade courses	Students below Level II phase-in 1 standard	Students below Level II final standard	Students below Level III standard
English I Reading	107,435 (32%)	181,814 (54%)	308,373 (92%)
English I Writing	152,270 (45%)	219,517 (66%)	324,483 (97%)
Algebra I	57,669 (17%)	203,688 (61%)	277,688 (83%)
Biology	41,406 (13%)	187,938 (59%)	290,137 (91%)
World Geography	62,270 (19%)	192,168 (60%)	277,745 (87%)
Failed at least one EOC exam (9th graders only)	185,757 (53%)	284,544 (81%)	346,784 (99%)

(FOF 130; Ex. 6322 at 26-27.) Performance on the first round of STAAR exams was even lower than the TEA had anticipated.<sup>6</sup>

In the summer of 2012 and December 2012, ninth-grade students who had previously failed one or more EOC exams were given the opportunity to retest.

(FOFs 137, 139; Ex. 6324 at 1; *see* Ex. 6519 at 3 of PDF.) On the summer 2012

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<sup>6</sup> For example, the percentages of students reaching the phase-in 1 and final Level II standards on English I Writing were fourteen and seventeen percentage points lower, respectively, than TEA had predicted. (Ex. 5624 at 96-97; Ex. 42 at D-25; Ex. 44 at 5.) The percentages of students reaching the phase-in 1 and final Level II standards on English I Reading were seven and eight percentage points lower, respectively, than TEA had expected. (Ex. 5624 at 94-95; Ex. 42 at D-22; Ex. 44 at 5.)

Performance on spring 2013 STAAR EOC exams			
STAAR EOC tests required for graduation	Below Level II phase-in 1 standard	Below Level II final standard	Below Level III standard
English I Reading	134,986 (35%)	216,208 (56%)	342,948 (89%)
English I Writing	211,422 (52%)	284,698 (70%)	395,530 (98%)
Algebra I	78,535 (22%)	233,143 (64%)	306,311 (84%)
Biology	52,841 (15%)	191,839 (53%)	314,333 (88%)
English II Reading	69,489 (22%)	115,165 (37%)	249,548 (79%)
English II Writing	150,338 (48%)	222,531 (70%)	307,692 (97%)
World History	93,388 (30%)	200,593 (65%)	281,633 (91%)
Did not meet standard on at least one test	338,038 (51%)	511,704 (76%)	N/A

(FOF 141; Ex. 6618 at 23.)

The picture is similar for the STAAR exams in grades three through eight. The trial court discussed these results in its findings at FOFs 136, 143-45, and 159. The passing rates on these exams were substantially lower than the corresponding passing rates at the phase-in standards for those grade levels in the first years of TAKS. (FOF 136; Ex. 6515; Ex. 6513; Ex. 6514.)

## 2. Cumulative STAAR results

As testing administrations continue, and students in a class continue to retest as necessary and take the EOC exams for the next grade level, it becomes important to know the cumulative percentage of students who have not met the phase-in passing standard on one or more tests taken. Each of these students is

table below shows the percentage of economically disadvantaged students (referred to as “ED”) that failed to reach the Level II phase-in 1, final Level II, and Level III standards on the spring 2012 STAAR EOC exams, compared to the number of non-economically disadvantaged students (referred to as “Non-ED”) failing to meet those same standards.

STAAR EOC tests for typical 9th grade courses	Below Level II phase-in 1 standard		Below final Level II standard		Below Level III standard	
	ED	Non-ED	ED	Non-ED	ED	Non-ED
English I Reading	43%	19%	67%	39%	96%	87%
English I Writing	59%	30%	79%	50%	99%	94%
Algebra I	23%	10%	72%	48%	91%	75%
Biology	19%	7%	72%	44%	97%	85%
World Geography	28%	10%	74%	44%	95%	77%
All Tests Taken (9th grade only)	67%	37%	91%	69%	99.6%	97.6%

(See Ex. 6322 at 29; see also FOFs 300, 314; Ex. 6618 at 25 (showing similar gaps in spring 2013).) As the table shows, more than two-thirds of economically disadvantaged students failed to reach the initial Level II phase-in standard on all tests taken. More than nine in ten economically disadvantaged ninth graders were unable to reach the final Level II standard on all tests taken, and 99.6% of economically disadvantaged ninth graders were unable to reach the Level III standard on all tests taken.

Even after five opportunities to test, 55% of economically disadvantaged students who were in ninth grade in spring of 2012 still had not achieved the Level

II phase-in 1 standard on all EOC exams taken (compared to 42% of all spring 2012 ninth graders, including economically disadvantaged ninth graders). (FOF 304; Ex. 5797 at 4; Ex. 11366 at 20 of PDF.)

ELL student performance has also consistently trailed behind that of non-ELL students. As shown in the table below, ELL students failed to reach even the Level II phase-in 1 standard on the spring 2012 EOC exams far more often than non-ELL students.

STAAR EOC Tests for typical 9th grade courses	Below Level II Phase-in 1 standard		Below final Level II standard		Below Level III standard	
	ELL	Non-ELL	ELL	Non-ELL	ELL	Non-ELL
English I Reading	82%	28%	94%	51%	100%	91%
English I Writing	92%	41%	97%	62%	100%	97%
Algebra I	40%	16%	85%	59%	96%	82%
Biology	42%	11%	91%	56%	99%	90%
World Geography	57%	17%	93%	57%	99%	85%

(FOF 363; Ex. 4114 at 2, 8 of PDF; Ex. 4115 at 2, 8 of PDF; Ex. 4131 at 2, 5 of PDF; Ex. 4133 at 2, 5 of PDF; Ex. 4135 at 2, 5 of PDF.) The gaps between ELL and non-ELL students on EOC exams were comparable, and in some cases even worse, in 2013 than in 2012. (FOFs 362-63; Ex. 4259 at 107 of PDF.)

that it is constrained by the State to tax at a particular rate,” and rejected the State’s contention that a violation could occur only where every district, or even most districts, are forced to tax at maximum rates. 107 S.W.3d at 579 (emphasis added).

Moreover, the trial court properly found that many districts are likely taxing at their maximum practical rates even if they are not taxing at the \$1.17 statutory cap. (See FOFs 258-62.) The chart below helps to illustrate this point. It shows two huge “bulges” in districts’ tax rates. More than 24% of districts (247 districts) are taxing at the maximum \$1.17 statutory cap. Almost 60% of districts are taxing at a \$1.04 rate, the maximum rate available without passage of a TRE—a strong indication that the Legislature has succeeded in its goal of constraining districts’ discretion through adoption of the TRE requirement. (FOF 254.) As the trial court found, many of these districts are Chapter 41 districts which, as a practical matter, are unable to ask voters to approve tax increases when much of the additional revenue would not even be retained by the district.

Figure F-17. M&O Tax Rates for Texas School Districts 2007-08 and 2012-13

M&O Tax Rate	# Districts 2007-08	% Districts	2007-08 ADA	% ADA	# Districts 2012-13	% Districts	2012-13 ADA	% ADA
<\$1.00	98	9.55	165,709	3.92	54	5.29	80,452	1.78
\$1.00 to <\$1.04	108	10.53	994,860	23.52	39	3.82	292,556	6.46
\$1.04	699	68.13	2,680,939	63.38	607	59.45	3,046,938	67.29
\$1.04 to <\$1.17	24	2.34	217,130	5.13	74	7.25	505,855	11.17
\$1.17 and Above	97	9.49	171,294	4.05	247	24.19	602,429	13.30
Total	1,026	100	4,229,933	100	1,021	100	4,528,231	100

Source: Moak, Casey & Associates data files (original source data from the State Comptroller of Public Accounts Self-Report Property Value File and TEA reports of student counts by district)

(FOF 213; RR54:117 (referencing Ex. 6618 at 14).)

# Tab E-7

No. 05-18-00860-CV; *BBVA Compass and Sam Meade v. David Bagwell, et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Brief of Appellants, filed January 16, 2019.

Lead Counsel ~ Haynes and Boone, LLP: Anne M. Johnson, Nina Cortell, Michael A. Hatchell, Kent Rutter, Christopher R. Knight; Kane Russell Coleman Logan PC: Michael A. Logan, Kenneth C. Riney.

The following summarizes the judgment:

	<b>Actual Damages</b>	<b>Represents</b>	<b>Prejudgment Interest</b>	<b>Punitive Damages</b>	<b>TOTAL</b>
<b>Broughton</b> (Bagwell Borrower)	\$ 2,149,671 <u>\$ 439,994</u> <b>\$ 2,589,665</b>	Lost profits on sale of 22 lots Bankruptcy expenses	\$322,259	\$1,784,000	<b>\$4,695,924</b>
<b>Broadland</b> (Bagwell Borrower)	\$ 2,604,503 <u>\$ 481,841</u> <b>\$ 3,086,344</b>	Lost profits on sale of 36 lots Bankruptcy expenses	\$138,674	\$2,128,000	<b>\$5,353,018</b>
<b>Old Grove</b> (Bagwell Borrower)	\$ 3,263,658 <u>\$ 400,000</u> <b>\$ 3,663,658</b>	Lost profits on sale of 48 lots Bankruptcy expenses	\$206,770	\$2,524,000	<b>\$6,394,428</b>
<b>David Bagwell</b> (individually)	\$ 2,482,243 \$ 1,039,720 \$ 167,000 \$ 132,000 \$ 130,000 \$ 11,000,000 <u>\$ 10,000,000</u> <b>\$ 24,950,963</b>	Net worth of Bagwell Trust as of July 2009 Unpaid loan from a Bagwell entity to Bagwell RAAV litigation expenses Bankruptcy litigation expenses Lost management fees Future lost profits on 4 never-developed projects Mental anguish	\$5,496,047	\$22,368,000	<b>\$52,815,010</b>
<b>David Bagwell</b> (Bagwell Guarantor)	\$ 1,614,005 \$ 501,577 <u>\$ 3,296,910</u> <b>\$ 5,412,492</b>	Deficiency owed after property sale Attorneys' fees 18% interest since 4/19/2012	\$523,158	\$3,732,000	<b>\$9,667,650</b>
<b>Evermore</b> (Bagwell Guarantor)	\$ 1,614,005 \$ 501,577 <u>\$ 3,296,910</u> <b>\$ 5,412,492</b>	Deficiency owed after property sale Attorneys' fees 18% interest since 4/19/2012	\$523,158	\$3,732,000	<b>\$9,667,650</b>
<b>David Bagwell Co.</b> (Bagwell Guarantor)	\$ 1,614,005 \$ 501,577 <u>\$ 3,296,910</u> <b>\$ 5,412,492</b>	Deficiency owed after property sale Attorneys' fees 18% interest since 4/19/2012	\$523,158	\$3,732,000	<b>\$9,667,650</b>
	<b>\$ 50,528,106</b>		<b>\$7,733,224</b>	<b>\$40,000,000</b>	<b>\$98,261,330</b>

(CR3:6605-09.)<sup>4</sup>

<sup>4</sup> The jury verdict also awards \$7.5 million to Bagwell for damage to his credit reputation (CR3:6387), but Plaintiffs did not seek judgment on this amount (CR3:6409 n.1). Plaintiffs stated that the award for damage to credit reputation is duplicative of other awards; it is also not supported by the evidence.



# Tab E-8

No. 05-18-00860-CV; *BBVA Compass and Sam Meade v. David Bagwell, et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Reply Brief of Appellants, filed June 6, 2019.

Lead Counsel ~ Haynes and Boone, LLP: Anne M. Johnson, Nina Cortell, Michael A. Hatchell, Kent Rutter, Christopher R. Knight; Kane Russell Coleman Logan PC: Michael A. Logan, Kenneth C. Riney.

53) and, at best, have a claim “against [their] principal[s]”—the Bagwell Borrowers. *See Crimmins v. Lowry*, 691 S.W.2d 582, 585 (Tex. 1985). This common-sense limitation ensures that those who are derivatively injured do not recover the same damages as their principals based on the same losses, which they suffer only secondarily. *See id.*<sup>12</sup>

By accepting the Bagwell Guarantors’ muddled arguments, the trial court violated a second bedrock principle of law and awarded the *single* RAAV judgment *three* times—once each to Bagwell, Evermore, and Bagwell Co. But the RAAV judgment was entered against three Bagwell Guarantors only because they *jointly* obligated themselves to pay the loans if the Bagwell Borrowers did not. That obligation did not multiply just because multiple parties were jointly liable for paying it. *See InvestIN.com Corp. v. Europa Int’l, Ltd.*, 293 S.W.3d 819, 828-29 (Tex. App.—Dallas 2009, pet. denied).

This single obligation cannot be awarded three times, because it is only owed once. Indeed, even Bagwell understood this, arguing in his motion for entry of judgment that “Plaintiffs and Intervenors are entitled *collectively* to an award of \$5,412,492.28 based on the amount included in the award in Question 5(1), and the

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<sup>12</sup> This also makes sense given that the Guarantors—which had no independent ability to change how the Borrowers conducted their business with Compass—cannot have their own, independent fraud claim against Compass because, among other things, there is no action they could have taken in reliance on any representation.

amounts awarded in Question 6 and Question 7.” (CR3:6409-10 (emphasis added).)

The trial court disregarded Bagwell’s request and tripled the award.

The following chart shows that the Bagwell Guarantors’ contrary arguments are pure nonsense:

<i>The RAAV judgment represents a single, indivisible injury</i>	<i>The judgment here includes the award 3 times, once for each Guarantor</i>	<i>Total judgment awarded in this case</i>
\$5.4 million = single RAAV judgment	Evermore: \$5.4 million	<b><u>\$16.2 million</u></b>
	Bagwell Co: \$5.4 million	
	Bagwell: \$5.4 million	

*Hernandez v. Great American Insurance Co.*, 464 S.W.2d 91 (Tex. 1971) does not support a triple recovery.<sup>13</sup> (See Intervenor Br. 27.) That case dealt with an action against an insurer for negligently rejecting reasonable settlement offers within the insurance policy’s limits (an independent tort under Texas law), and the singular injury (recovered only once) was based on that failure—not the tort of the original

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<sup>13</sup> The Bagwell Guarantors also cite *Montfort v. Jeter*, 567 S.W.2d 498 (Tex. 1978), but for the same point. These cases hold that Texas applies the “judgment” rule, which permits recovery of a judgment owed even if not paid. They do not allow for triple recoveries.

# Tab E-9

No. 15-0935; *XOG Operating, LLC, et al. v. Chesapeake Exploration Limited Partnership, et al.*; In the Texas Supreme Court; Petitioners' Brief on the Merits, filed November 2, 2016.

Lead Counsel ~ Hays & Owens L.L.P.: John R. Hays, Jr.,  
Alicia Ringuet French.

**II. The majority opinion of the Seventh Court is in irreconcilable conflict with the Eleventh Court’s opinion in *Endeavor*.**

The key question this case presents is whether the Term Assignment’s provision for the retention of acreage “*included within* the proration... unit of each well drilled under this Assignment” allows the operator to retain acreage that it *never* included within proration units for any of the wells. The Seventh Court says the answer is “yes.” The Eleventh Court in *Endeavor* says the answer is “no.”

The two courts reached conflicting decisions in interpreting substantively identical retained acreage clauses, as the following chart makes clear:<sup>15</sup>

	<i>Endeavor v. Discovery Operating</i>	<i>XOG v. Chesapeake</i>
<b>Key language in retained acreage clause</b>	“lease shall automatically terminate as to all lands... save and except those lands ... <i>located within</i> a governmental proration unit assigned to a well”	“Said lease shall revert to Assignor, save and except that portion of said lease <i>included within</i> the proration or pooled unit of each well”
<b>Court Holding</b>	The leases terminated as to all acreage that was not included in certified proration plats (P-15) filed with the Commission.	The majority concluded that Chesapeake retained the maximum acreage allowed to be included within proration units (320 acres per well), irrespective of what Chesapeake actually designated on its P-15 filings.

<sup>15</sup> See *Endeavor*, 448 S.W.3d 169 (Tex. App.—Eastland 2014, pet. filed).

# Tab E-10

No. 19-0135; *In re McAllen Hospitals, L.P.*; In Texas Supreme Court; Petition for Writ of Mandamus, filed February 4, 2019.

Lead Counsel ~ Haynes and Boone, LLP: Kent Rutter, Christopher R. Knight; McGlinchey Stafford PLLC: Joel W. Mohrman, Anderson L. Cao.

2011). When the Legislature enacted the hospital-lien statute in 1933, the term “admit” had nothing to do with *inpatient* admission. WEBSTER’S NEW INT’L DICTIONARY (1933) (defining “admit” as “to grant . . . entrance” without reference to inpatient admission). The term bears the same meaning today. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 17 (11th ed. 2012) (“admit”: “to allow entry” or “give . . . access”).

*Third*, if “admitted” were redefined to mean “admitted as an inpatient,” the incongruous result would be that a lien would be available to every medical-care provider from the EMT to follow-up physicians—*but not* the hospital that provided the emergency care:

<b>Provider/Stage of Care</b>	<b>Lien</b>	<b>Property Code Provision</b>
EMT services and ambulance ride	✓	§§ 55.002(c), 55.004(f)-(g) <sup>7</sup>
Physicians’ charges for emergency hospital care	✓	§ 55.004(c)
<b>Hospital providing emergency care only</b>	<b>✗</b>	<b>No lien, according to Plaintiffs</b>
Hospital providing inpatient care	✓	§ 55.002(a)
Transfer-destination hospitals	✓	§ 55.002(b)

*Finally*, redefining “admitted” to mean “admitted as an inpatient” would result in a windfall to emergency-room-only patients, who could recover their

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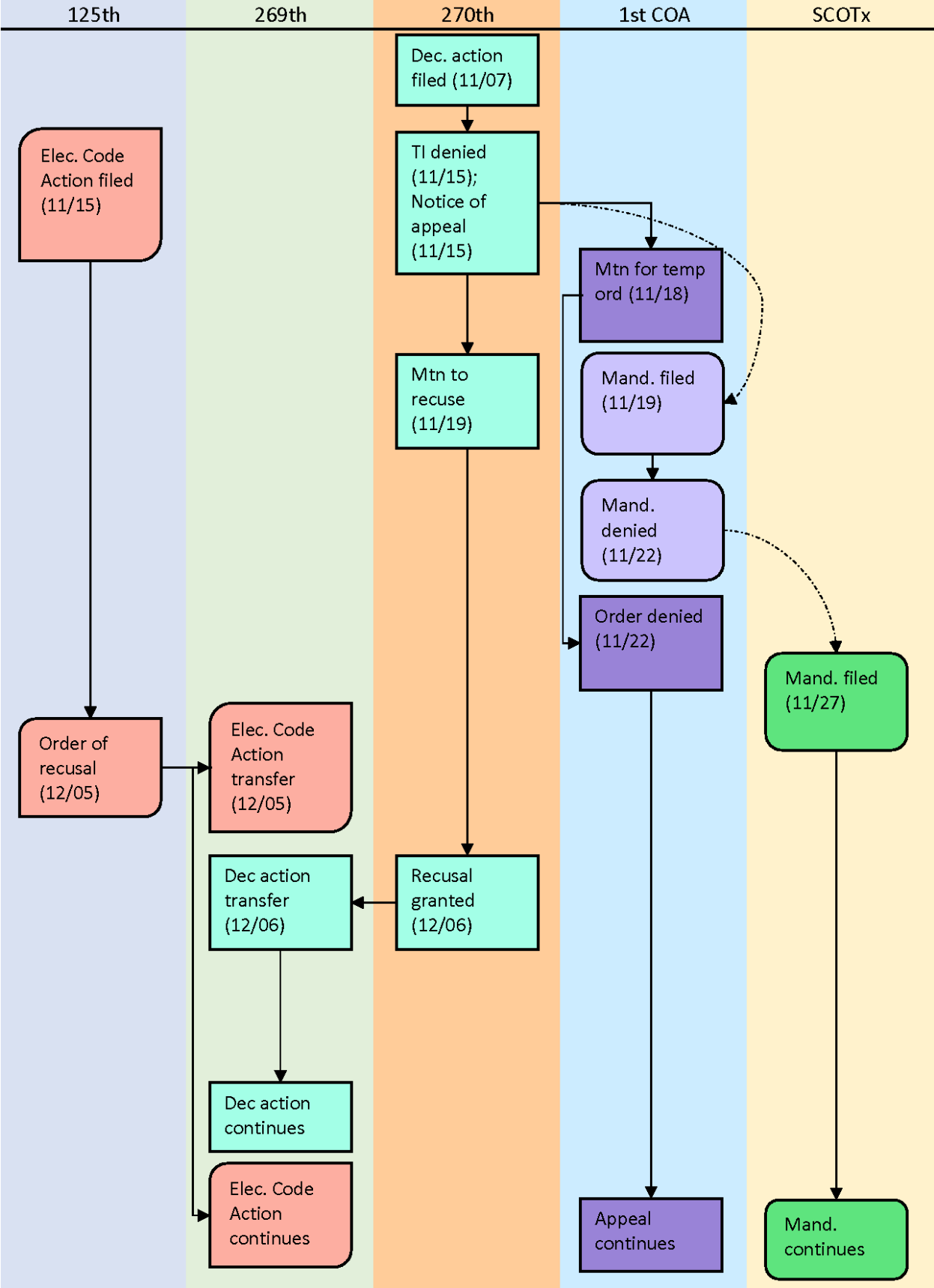
<sup>7</sup> An “emergency medical services provider” is “a person who uses or maintains emergency medical services vehicles, medical equipment, and emergency medical services personnel to provide emergency medical services.” See TEX. HEALTH & SAFETY CODE § 773.003(11), (10).

# Tab F-1

No. 19-1056; *In re Renee Jefferson-Smith*; In the Texas Supreme Court; Response to Petition for Writ of Mandamus, filed December 18, 2019.

Lead Counsel ~ City of Houston Legal Department: Ronald C. Lewis, Judith L. Ramsey, Derek D. Bauman.





# Tab F-2

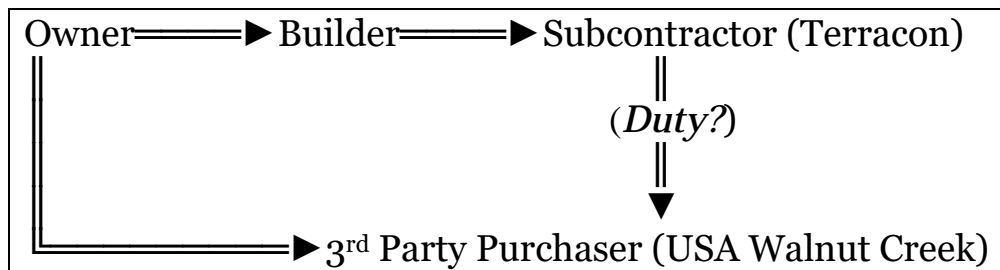
No. 15-0512; *Terracon Consultants, Inc. f/k/a HBC Engineering, Inc. v. USA Walnut Creek, DST*; In the Texas Supreme Court; Petitioner's Brief on the Merits, filed February 22, 2016.

Lead Counsel ~ The Medina Law Firm: David M. Medina; Dubois, Bryan & Campbell, LLP: William S. Rhea, Matthew J. Sullivan; Timothy A. Hootman.

The key facts relevant to this appeal are:

- An owner of real property (Creekstone Walnut, LP) hired a builder (Creekstone Builders, Inc.) to construct an apartment complex on its property.
- Thereafter, the builder hired a subcontractor (Terracon) to provide engineering services regarding the construction project which, allegedly being improperly performed caused a defect in the apartment complex.
- The owner later sold the property to a third-party (USA Walnut Creek).
- USA Walnut Creek then sued the subcontractor (Terracon) to recover for *negligent* performance of the subcontractor's contractual obligations owed to the *builder*.

The relationships of the various players and the duty question at issue arising from these key facts are shown schematically as follows:

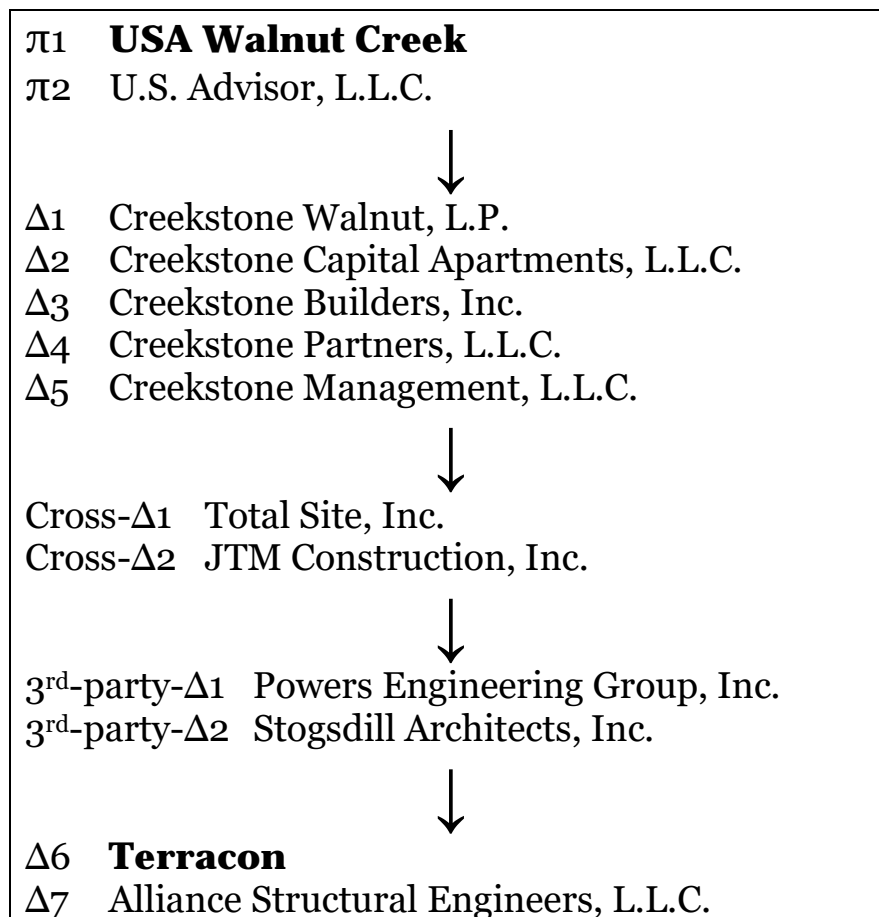


The less important details that surround the above key facts and schematic are broken down in parts **b**, **c**, **d** and **e** of this statement of facts. Part **b** provides a flowchart of the parties in the order they came into in the case in the trial court. Part **c** provides a flowchart of the many pleadings that were filed by the various parties. Part **d** provides a flowchart of the proceedings that led up to the final judgment with Terracon and USA

Walnut Creek as the remaining parties. Part **e** discusses Terracon’s motion for summary judgment, the trial court’s reasoning in granting the motion, and the basis of the court of appeals’ reversal.

**b. Flowchart of the order in which the parties came into the case.**

The following flowchart lists the parties in the order they first came in the case when it was pending in the trial court:



That is,  $\pi_1$  (USA Walnut Creek) and  $\pi_2$  first sued  $\Delta_1$ ,  $\Delta_2$ ,  $\Delta_3$ ,  $\Delta_4$  and  $\Delta_5$  (CR 4-13), who then sued Cross- $\Delta_1$  and Cross- $\Delta_2$  (CR 117-119; 565-571);  $\Delta_1$ ,  $\Delta_2$ ,  $\Delta_3$ ,  $\Delta_4$  and  $\Delta_5$  also brought in 3<sup>rd</sup>-party- $\Delta_1$  and 3<sup>rd</sup>-party- $\Delta_2$  as

responsible third parties (CR 121-124; 208-209; 215-220) and sued  $\Delta 6$  (Terracon) and  $\Delta 7$  as cross-defendants (CR 457-460; 497-500), which thereby caused  $\pi 1$  (USA Walnut Creek) and  $\pi 2$  to add  $\Delta 6$  (Terracon) and  $\Delta 7$  as additional defendants via an amended petition. Op. at 3.

**c. Flowchart of the pleadings.**

The pleadings that give rise to the above alignment of the parties are summarized as follows:

- $\pi 1$  and  $\pi 2$  filed a petition against  $\Delta 1$ ,  $\Delta 2$ ,  $\Delta 3$ ,  $\Delta 4$  and  $\Delta 5$  asserting breach of contract, fraud, fraudulent inducement, negligence, breach of fiduciary duty, conspiracy, and joint enterprise because  $\Delta 1$ ,  $\Delta 2$ ,  $\Delta 3$ ,  $\Delta 4$ , and  $\Delta 5$  failed to properly construct the foundation of the apartment complex (CR 4-13).
- $\Delta 1$ ,  $\Delta 2$ ,  $\Delta 3$ ,  $\Delta 4$ , and  $\Delta 5$  filed a crossclaim against Cross- $\Delta 1$  and Cross- $\Delta 2$  asserting breach of contract, negligence, fraud, fraudulent inducement, conspiracy, and joint enterprise, or alternatively, contributory negligence because of the construction problems  $\pi 1$  and  $\pi 2$  complain about in their lawsuit (CR 117-119; 565-571).
- $\Delta 1$ ,  $\Delta 2$ ,  $\Delta 3$ ,  $\Delta 4$  and  $\Delta 5$  filed a motion for leave to designate 3<sup>rd</sup>-party- $\Delta 1$  and 3<sup>rd</sup>-party- $\Delta 2$  as responsible third parties (which was granted) asserting negligence because of the construction problems  $\pi 1$  and  $\pi 2$  complain about in their lawsuit (CR 121-124; 208-209; 215-220).
- $\Delta 1$ ,  $\Delta 2$ ,  $\Delta 3$ ,  $\Delta 4$  and  $\Delta 5$  filed a cross claim against Cross- $\Delta 3$  and Cross- $\Delta 4$  asserting “contribution and contractual comparative indemnity” because of the construction problems  $\pi 1$  and  $\pi 2$  complain about in their lawsuit (CR 457-460; 497-500).
- $\pi 1$  (USA Walnut Creek) amended its petition adding  $\Delta 6$  (Terracon) asserting negligence because of the construction problems. Op. at 3.

**d. Flowchart of the procedure as to how the parties were pared down with just Terracon and USA Walnut remaining in the final judgment.**

The parties summarized in part **b** were removed from the case through the following procedural steps:

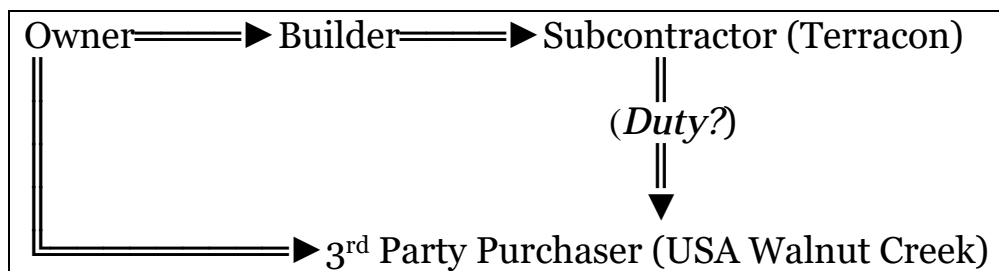
- $\pi$ 2 nonsuited its claims (CR 104).
- $\Delta$ 6 (Terracon) filed a no-evidence motion for summary judgment as to the claims asserted by  $\pi$ 1 (USA Walnut Creek), which was granted (CR 272-456; 492).
- All remaining claims were severed with the result that the final judgment on appeal left only the claim of  $\pi$ 1 (USA Walnut Creek) against  $\Delta$ 6 (Terracon) (CR 1336-1339).

Accordingly, the remaining parties to the final summary judgment at issue in this appeal are Terracon and USA Walnut Creek.

**e. Terracon's motion for summary judgment, the trial court's reasoning in granting the motion, and the basis of the appellate court's reversal.**

The summary judgment evidence regarding the terms of the various contracts, dates of construction and subsequent sale, *et cetera* are accurately stated in the memorandum opinion from the perspective of the summary judgment standard of review. Op. at 2-4. In this regard, the opinion states in relevant part as follows:

Here, the court of appeals held that Terracon, agreed to provide construction-related services to the real property owned by Creekstone Walnut, LP via the written subcontractor contract between Creekstone Builders, Inc. and Terracon. Therefore Terracon owes a duty under negligence law to subsequent purchases, in particular USA Walnut Creek. Again, the schematic in the statement of acts is useful to understanding the players and the duty question:



In other words, the holding concludes that a contracting party must now not only contend with their contractual obligations—which are self-imposed by consent to the agreement—but also tort obligations to unknown potential future parties. No court in Texas has ever reached such a conclusion.<sup>3</sup> In short, the court of appeals created a new cause of action that never previously existed.

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<sup>3</sup> It also appears that no out of state court has reached such a conclusion. See *Black + Vernoooy Architects v. Smith*, 346 S.W.3d 877, 887 n.7 (Tex. App.—Austin 2011, pet. denied) (citing cases from Georgia, Iowa, New York, Mississippi, and Wisconsin rejecting such a theory).

# Tab F-3

No. 18-10092; *Freedom Path, Inc. v. Lois Lerner, et al.*; In the United States Court of Appeals for the Fifth Circuit; Brief of Appellant, filed April 6, 2018.

Lead Counsel ~ The Gober Group PLLC: Chris K. Gober, Troy A. McCurry; Holtzman Vogel Josefiak, Torchinsky, PLLC: Jason Torchinsky, Shawn Sheehy.



## **B. This is a Speech Case Requiring Strict Scrutiny Analysis**

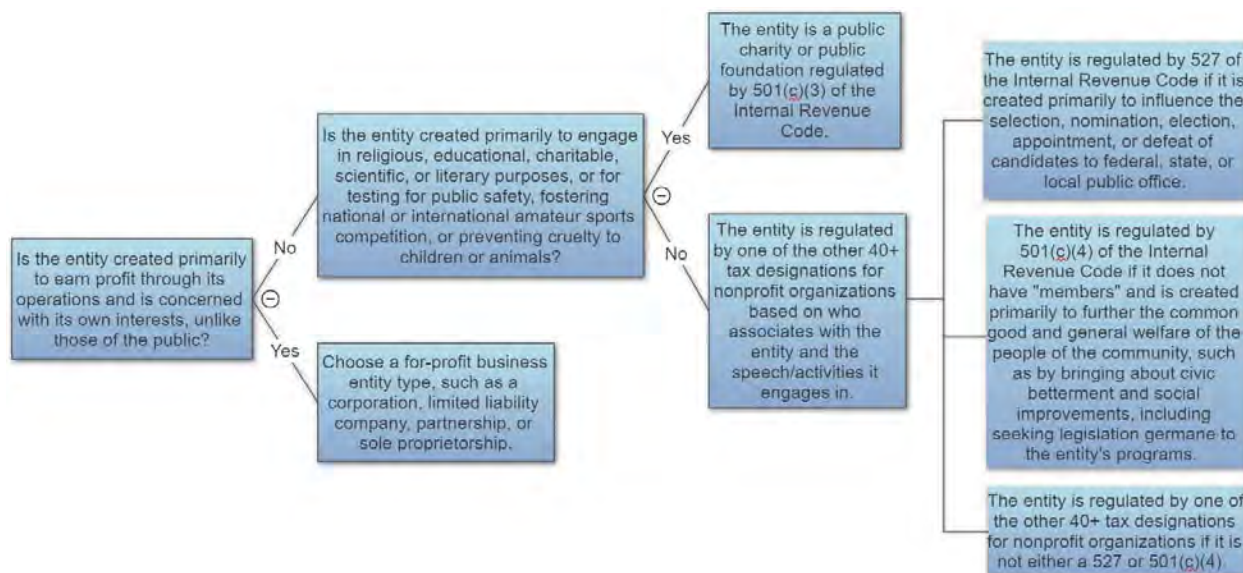
The district court denied Freedom Path’s facial challenge because it incorrectly concluded that the Facts and Circumstances Test is an economic regulation that “does not ban, restrain, or punish speech.”<sup>3</sup> ROA.2093. Neither the desire nor the need for a particular tax status is enough to dispose of this case because the district court missed the mark in at least three respects.

First, the district court opinion suggests that Freedom Path chose to operate under § 501(c)(4) of the Internal Revenue Code so it could be “subsidized through their treatment for federal income tax purposes.” *Id.* Freedom Path did not choose a tax designation; rather, the tax designation effectively chose Freedom Path based upon the express purpose of the persons who associated together to speak on issues. Unlike a for-profit business that can choose its entity type (e.g., corporation, LLC, sole proprietorship, etc.) based on ownership, liability, and tax considerations, the Internal Revenue Code *dictates* the permissible tax

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<sup>3</sup> The title of Revenue Ruling 2004-06 is literally “Public Advocacy,” not “Business Activity.” Not to mention that the entire test laid out in the revenue ruling is focused on the content of public advocacy communications.

designation of nonprofit organizations. And, importantly, that designation is dictated by who *associates* with the organization and the *speech* and activities that the organization engages in. The decision tree below, which summarizes some of the key questions that any newly formed group must answer, helps illustrate this distinction:



# Tab F-4

No. 04-19-00500-CV; *Mary Ann Johnson v. Chandler Elizabeth Johnson, et al.*; In the Court of Appeals for the Fourth District of Texas at San Antonio; Appellant's Supplemental Briefing Regarding Subject Matter Jurisdiction, filed December 3, 2019.

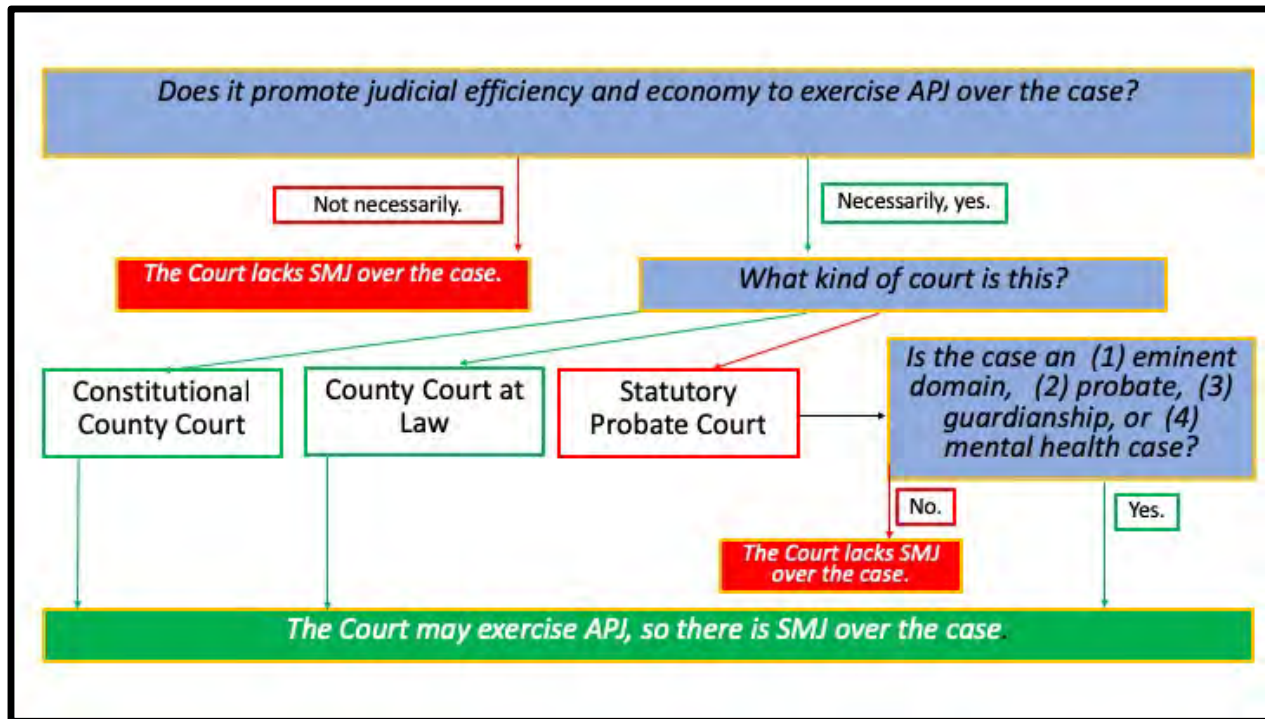
Lead Counsel ~ The Law Office of Sergio R. Davila, PLLC: Sergio R. Davila; Law Office of Olga Brown: Olga G. Brown.

Therefore, if a statutory probate court is considering whether to exercise APJ pursuant to Tex. Est. Code § 32.001(b), that statutory probate court's discretion to exercise APJ is less broad than a county court at law's discretion or a constitutional county court's discretion would be under identical circumstances.

Such discretion is less broad because a statutory probate court cannot, under any circumstances, exercise APJ unless that exercise of APJ falls into one of the four expressly-enumerated categories set forth in Tex. Gov. Code § 25.0021(a). This is so *even when it would otherwise "promote judicial efficiency and economy[.]"* Tex. Est. Code § 32.001(b).

In contrast, county courts at law and constitutional county courts are not prohibited from exercising APJ over controversies that are not "probate, guardianship, mental health, or eminent domain proceedings." Tex. Gov. Code § 25.0021(a). The only requirement is that it must promote judicial efficiency and economy for those proceedings to be heard in the same court as the probate matter. § 32.001(b).

The following flowchart diagram synthesizes the analysis for determining whether a court exercising original probate jurisdiction may also exercise ancillary and pendent jurisdiction over another matter:



**2. Probate Court No. 2 Lacked Subject Matter Jurisdiction by Operation of Tex. Gov. Code § 25.0021(a).**

The Court should conclude Probate Court No. 2 lacked the power to exercise subject matter jurisdiction over Nurse Johnson’s claims because (1) her operative pleadings present a controversy that was not within the four expressly-enumerated categories set forth in Tex. Gov. Code § 25.0021(a)—regardless of whether Nurse Johnson reasonably believed it was “necessary to promote judicial efficiency and economy”; and (2) the specific and express intent of the Legislature in Tex. Gov. Code § 25.0021(a) indicates that any conflict between that provision and any other provision purporting to enlarge the jurisdiction of Probate Court

# Tab G-1

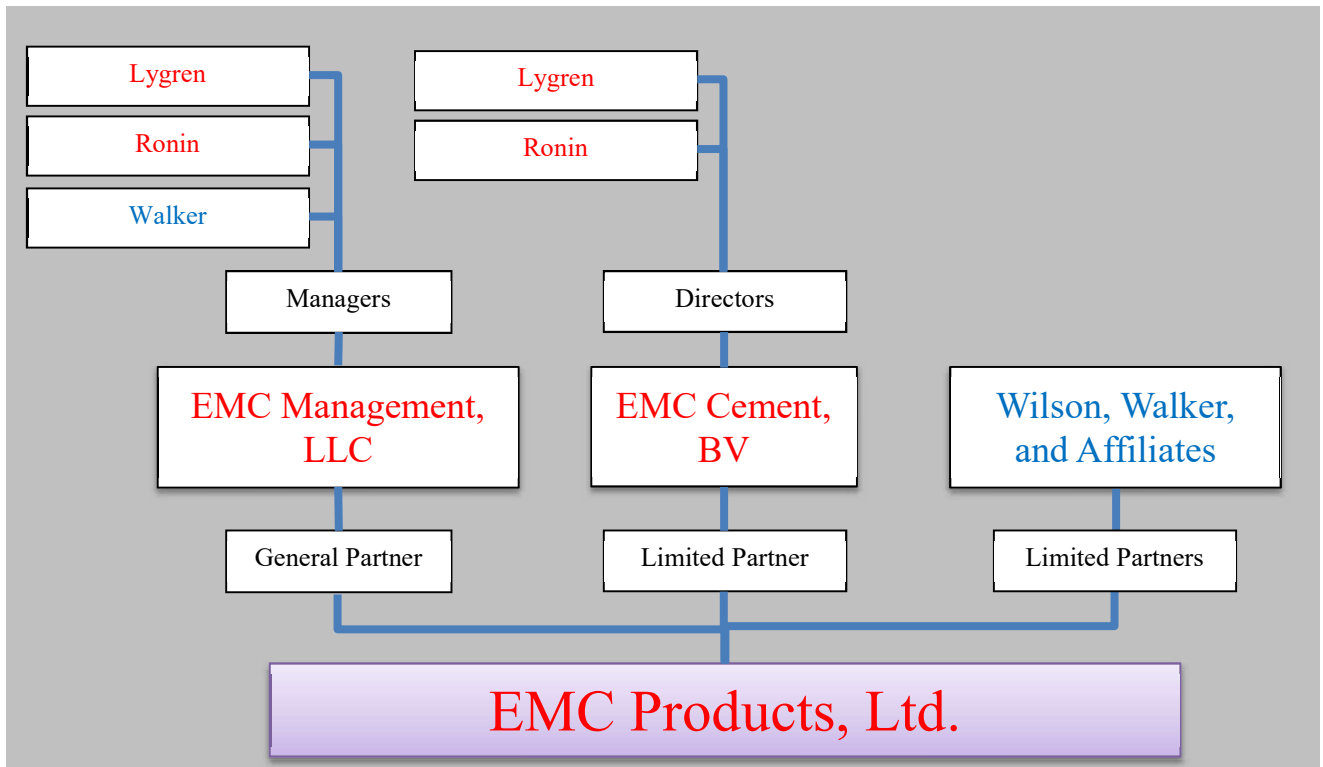
No. 17-0557; *Clinton W. (“Buddy”) Pike, Sr., et al. v. Texas EMC Management, LLC, et al.*; In the Supreme Court of Texas; Petitioners’ Brief on the Merits, filed March 28, 2018.

Lead Counsel ~ Haynes and Boone, LLP: Nina Cortell, Ryan Paulsen, Mark Trachtenberg, Mike A. Hatchell.

## STATEMENT OF FACTS

**A. EMC Products was a partnership formed to produce and sell a new cement-replacement product.**

Plaintiff EMC Products was formed in 2005 to produce and sell a cement-replacement product created by combining Portland Cement with fly ash, a waste byproduct of coal-burning power plants. (RR11:35, 64-65; DX1.) The structure of EMC Products is detailed below.



Plaintiff EMC Cement provided EMC Products a license to its technology in return for a 49% limited partnership interest in EMC Products. (DX1 §2; [App.7](#); *see also* RR11:219.)

# Tab G-2

No. 17-0414; *CBIF Limited Partnership, et al. v. TGI Friday's Inc., et al.*; In the Texas Supreme Court; CBIF's Brief on the Merits, filed May 30, 2018.

Lead Counsel ~ Kelly Hart & Hallman LLP: John H. Cayce, Jr., Joe Greenhill; Levinger PC: Jeffrey S. Levinger.



## STATEMENT OF FACTS

### 1. The JV and Related Entities.

The JV was formed in 1995 for the purpose of owning and operating Friday's-branded restaurants at DFW in Terminals A, B, C, and E "for profit." [Ex.11,§1.01] In every year of its existence, the JV has fulfilled this purpose, making millions of dollars in profits for its four partners:

- **CBIF.** CBIF owns 49.75% of the JV—a 37.5% direct interest and a 12.25% indirect interest through its ownership interest in TSQF. [10RR84;10RR137;15RR49;16RR25-26].
- **TSQF.** TSQF owns 25% of the JV and is one of its two "minority-certified partners."<sup>1</sup> [15RR116-17;16RR28;49RR8;Ex.22].
- **LBD.** LBD is a subsidiary of Friday's that owns 27.5% of the JV. [4RR26-27,30-31;Exs.51-55].
- **Domain.** Domain, the second minority-certified partner, owns 10% of the JV. [4RR31,75;49RR8].

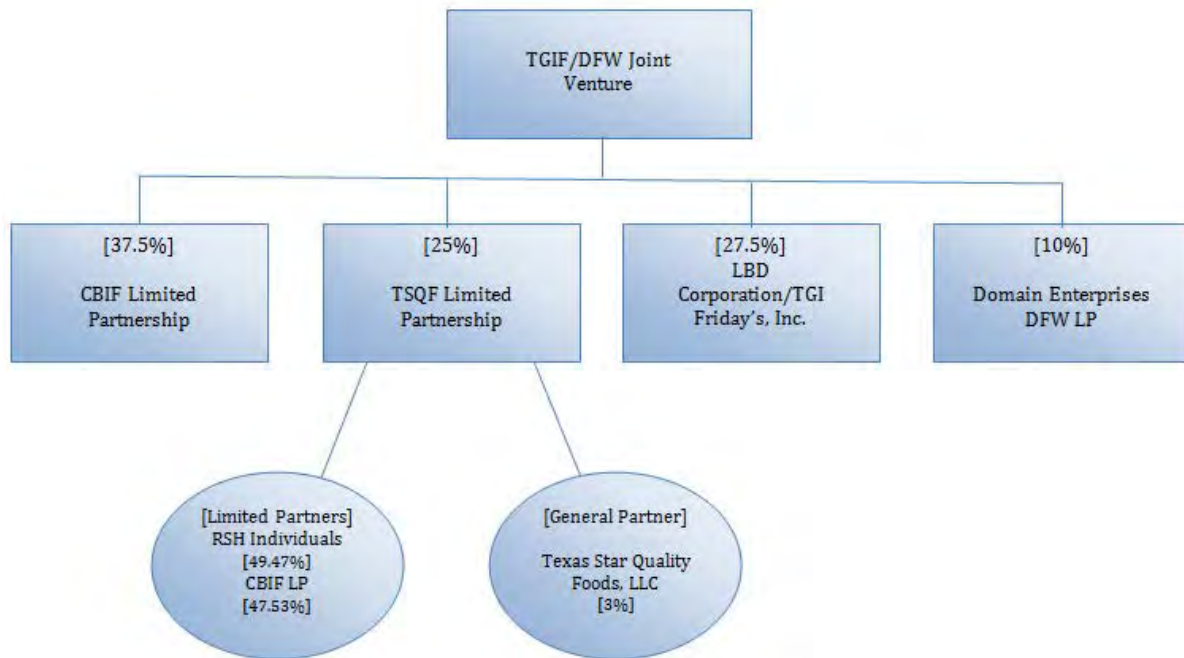
Friday's manages the JV's day-to-day operations.<sup>2</sup> [4RR26-27,30-31;Exs.51-55].

The JV's ownership structure is as follows:

---

<sup>1</sup> A minority-certified partner is an entity that is at least 51% owned by minority individuals and has been certified as a MBE, DBE, or an ACDBE. [23RR118-20].

<sup>2</sup> Under the JVMA, Friday's is paid a management fee, which has amounted to millions of dollars over the years. [Ex.10,¶1.02(c);4RR41-42;17RR35-36;Ex.306].



## 2. Relevant Contracts.

***JVA and JVMA.*** The JVA is the JV’s “constitution.” [Ex.11;16RR27]. Among other requirements, it prohibits the partners from taking “extraordinary” actions, such as “modification or termination of th[e] [JVA]” without the partners’ unanimous consent.<sup>3</sup> [Ex.11,§2.04;16RR30] “Ordinary, day-to-day, routine decisions,” on the other hand, are decided by a majority vote. [10RR137].

The JVMA also governs the relationship between the partners as well as their relationship with Friday’s as the JV’s manager. [Ex.10]. Section 12.05 and Exhibit B of the JVMA (the “Competing-Restaurant Covenants”) forbid the partners, as well as the entities owning the partners, from participating or owning

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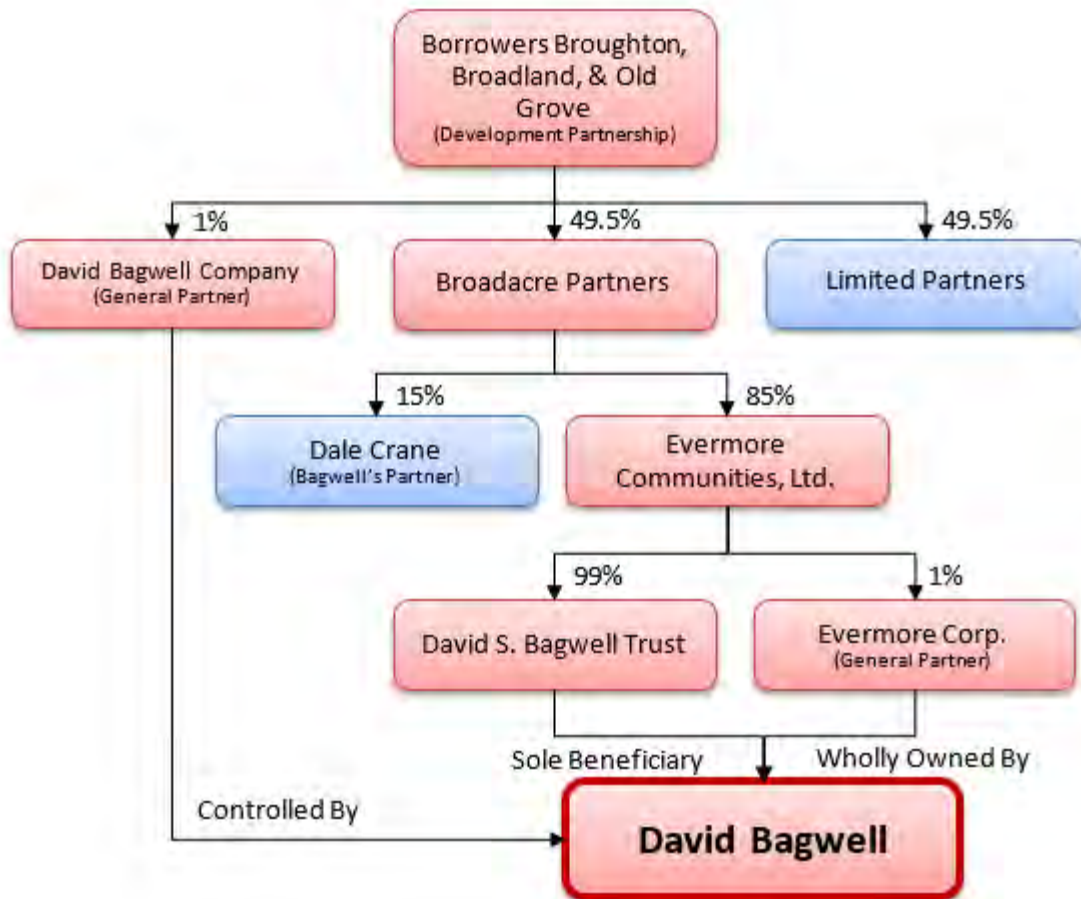
<sup>3</sup> This provision is consistent with the TBOC, which provides that “[a] partnership agreement may be amended only with the consent of all partners.” TBOC § 152.208.

# Tab G-3

No. 05-18-00860-CV; *BBVA Compass and Sam Meade v. David Bagwell, et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Brief of Appellants, filed January 16, 2019.

Lead Counsel ~ Haynes and Boone, LLP: Anne M. Johnson, Nina Cortell, Michael A. Hatchell, Kent Rutter, Christopher R. Knight; Kane Russell Coleman Logan PC: Michael A. Logan, Kenneth C. Riney, Jeffrey S. Seeburger.

25(DX15), 232-47(DX16), 302-17(DX18).) The corporate structure of Bagwell’s borrowing and guaranteeing entities is complicated, but all these entities were created and controlled by David Bagwell. (RR4:288-89.)<sup>1</sup> Other than Bagwell’s investors, the only other person involved was Bagwell’s friend Dale Crane, who held a 15% share in the developments. (RR8:8-15.) The following chart reflects this relationship:



<sup>1</sup> References in this brief to “Bagwell” should, when appropriate in context, be understood to refer to Bagwell individually and the Bagwell Borrowers and Bagwell Guarantors, which Bagwell controlled.

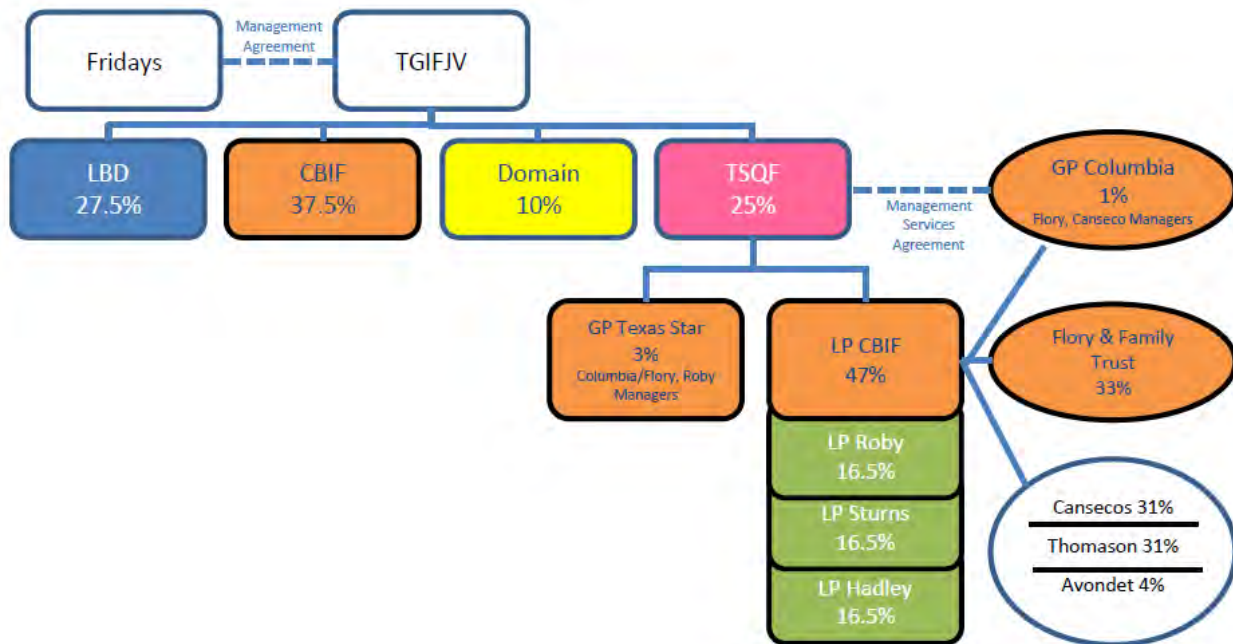
# Tab G-4

No. 05-15-00157-CV; *CBIF Limited Partnership, et al. v. TGI Friday's Inc., et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Brief of Appellees, filed February 22, 2016.

Lead Counsel ~ Haynes and Boone, LLP: Karen S. Precella, Nina Cortell, Deborah S. Coldwell, Ryan Paulsen; Reese Gordon Marketos, LLC: Pete Marketos, Leslie Chaggaris.

for not vetting DPC/Jackmont. (CBIF38) So Fridays had to sell 10% of its interest to Domain, owned by the Kings who are also “Black Americans,” leaving Fridays with 27.5% ownership. (11RR14-15, 27-28) Flory blocked TSQF from purchasing any additional interest in the JV and extracted a \$109,000 premium from Fridays to waive its right of first refusal. (PX8; DOM18, 20; CBIF45, 47, 49, 53, 54; 11RR13, 28-35; 20RR27-33)<sup>5</sup>

Flory’s actions set an early pattern—writing lengthy letters professing CBIF’s conduct as proper while blaming its partners for transgressions and demanding some benefit for CBIF. Flory’s early maneuverings left the JV comprised and managed as follows with Flory in key control spots (in orange):



<sup>5</sup> Fridays assigned its 27.5% interest to LBD, a wholly owned subsidiary, to comply with liquor license requirements, but Fridays remained liable to the JV partners under the JV and Management Agreements. (PX8 at 1-2; CBIF51; 4RR26-27, 49-50)

# Tab H-1

No. 95-0405; *John Jay Stokes, et al. v. Aberdeen Insurance Company, et al.*; In the Texas Supreme Court; Application for Writ of Error, filed June 15, 1995.

Lead Counsel ~ Whittington, Pfeiffer & Vacek: Jeffrey Lee Hoffman, Ronnie E. Pfeiffer, John G. Emerson, Jr.; Ramela Stanton Baron.

No. 95-0405

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IN THE  
SUPREME COURT OF TEXAS

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JOHN JAY STOKES, GEM STOKES, AND STOKES PROPERTIES, INC.,

*Petitioners,*

v.

ABERDEEN INSURANCE COMPANY AND HIGHLANDS INSURANCE COMPANY,

*Respondents.*

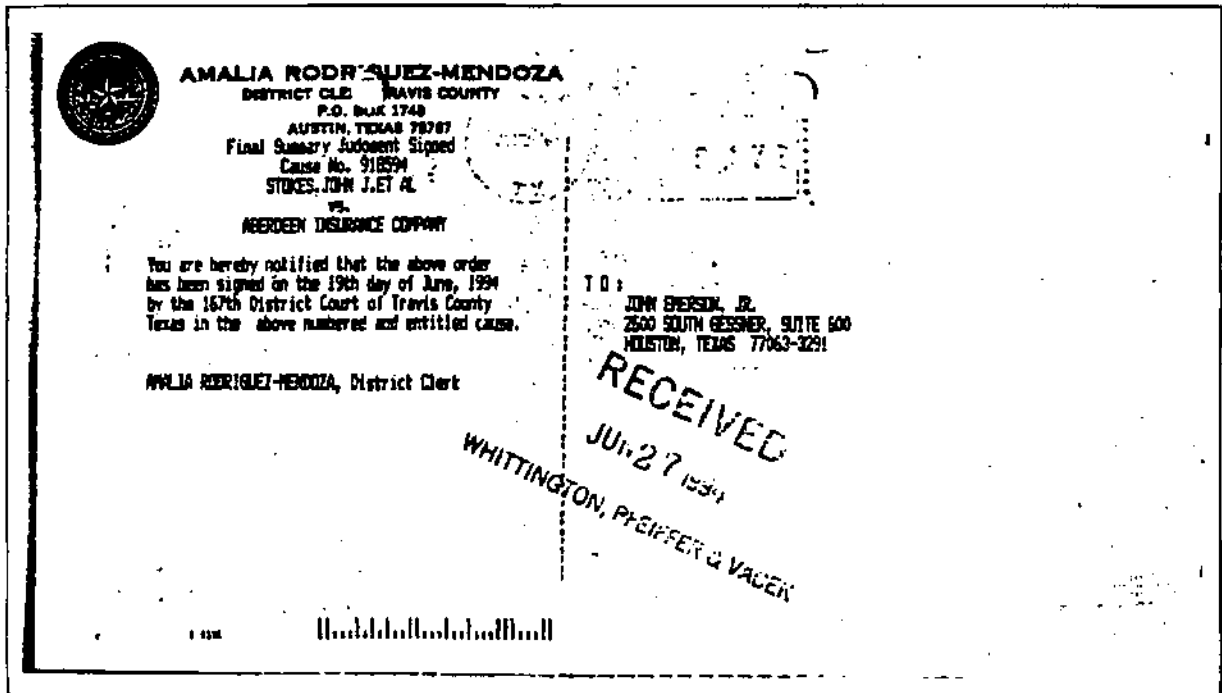
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APPLICATION FOR WRIT OF ERROR

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Because of this postcard, Petitioners lost their right to appeal:




 **AMALIA RODRIGUEZ-MENDOZA**  
DISTRICT CLERK TRAVIS COUNTY  
P.O. BOX 1748  
AUSTIN, TEXAS 78767  
Final Summary Judgment Signed  
Cause No. 918594  
STOKES, JOHN J. ET AL.  
vs.  
ABERDEEN INSURANCE COMPANY

You are hereby notified that the above order  
has been signed on the 19th day of June, 1994  
by the 167th District Court of Travis County  
Texas in the above numbered and entitled cause.

AMALIA RODRIGUEZ-MENDOZA, District Clerk

TO:  
JOHN EBERSON, JR.  
2500 SOUTH GESSNER, SUITE 600  
HOUSTON, TEXAS 77063-3291

**RECEIVED**  
JUN 27 1994  
WHITTINGTON, PFEIFFER & VAGER

1 1334 



It is undisputed that the card contained a grievous mistake. The trial court signed the judgment on June 16, not June 19.

Thus began an appellate nightmare in which (1) the court of appeals found that the Petitioners' motion for new trial was filed one day too late; (2) the court of appeals' refused Petitioners' request — more than three months after that request was made — to have the trial court determine when they discovered the postcard's error on grounds that it must be directed to the trial court, not the appellate court; (3) the court of appeals dismissed the appeal; (4) the trial court refused to determine when Petitioners discovered the postcard's error, finding that the request came too late; and (5) the same court of appeals that had belatedly advised Petitioners to take their request to the trial court refused to grant mandamus, holding that the request came too late.

Petitioners urge this Court to permit this appeal to be heard on its merits and to let reason and fairness prevail over blind procedural pettiness. Petitioners respectfully submit that the procedural issues in this appeal are appropriate for resolution by per curiam opinion.

#### STATEMENT OF THE CASE

This is a suit for breach of a contract of insurance, as well as statutory and common-law claims, after a fire totally destroyed Petitioners' business in January 1986. (Tr. 13-19). Respondents filed a motion for summary judgment on highly technical grounds (Tr. 20-29), which the trial court granted. (Tr. 157-58). Petitioners have been denied an opportunity to have their challenge to this judgment heard on the merits.

# Tab H-2

No. 05-18-00860-CV; *BBVA Compass and Sam Meade v. David Bagwell, et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Reply Brief of Appellants, filed June 6, 2019.

Lead Counsel ~ Haynes and Boone, LLP: Anne M. Johnson, Nina Cortell, Michael A. Hatchell, Kent Rutter, Christopher R. Knight; Kane Russell Coleman Logan PC: Michael A. Logan, Kenneth C. Riney.

**IV. Bagwell waived most of his damages, and failed to present legally and factually sufficient evidence for any of them.**

**A. Bagwell waived recovery of consequential and exemplary damages.**

Bagwell does not dispute that he signed loan agreements waiving any right to recover “[c]onsequential and exemplary damages” in any suit “on or with respect to . . . the dealings of the parties with respect” to the loans. (Bagwell Br. 51-54; *see* DX17 ¶7.22.) He argues instead that he should not be bound by his waiver for two reasons.

*First*, Bagwell denies that this lawsuit relates to the “dealings of the parties” with respect to the loans. (Bagwell Br. 51.) That is absurd. Bagwell’s entire lawsuit is premised on a Compass employee’s representation to Bagwell about the status of his loans. It is hard to imagine anything more closely related to “the dealings of the parties with respect” to Bagwell’s loans.

*Second*, Bagwell argues that the damage waiver binds only the three partnerships he created (the Borrowers), and that both he and the other two entities he created to guarantee the loans are free to recover damages from Compass far beyond the Borrowers’ recovery. There are four conclusive rejoinders.

(i) Bagwell was essentially indistinguishable from the Bagwell Borrowers and Bagwell Guarantors—all entities he admits he created and controlled. (Compass Br. 5; Intervenor Br. 21-22; Bagwell Br. vii, 3, Tab 3 at 6.) Bagwell signed the loan

agreement for himself and all his entities—and knew they were all bound by its terms:

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

**BORROWER:**

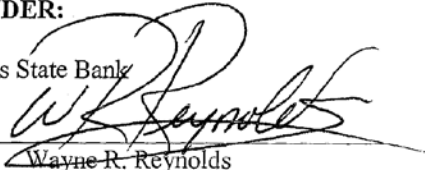
Broughton Limited Partnership, a Texas limited partnership

By: The David Bagwell Company  
a Texas corporation, its sole General Partner

By:   
David S. Bagwell, President

**LENDER:**

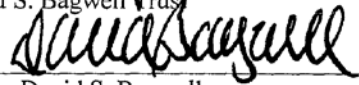
Texas State Bank

By:   
Wayne R. Reynolds  
Senior Vice President

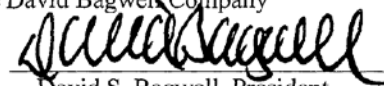
**GUARANTORS:**

  
David S. Bagwell

David S. Bagwell Trust

By:   
David S. Bagwell  
Trustee

The David Bagwell Company

By:   
David S. Bagwell, President

(DX17 at 39.)

(ii) The Bagwell Guarantors signed the loan documents containing the damage waiver, as well as a Loan Agreement Rider stating that their “rights and

# Tab H-3

No. 4:17-cv-03374; *Lightering LLC, et al. v. Teichman Group, LLC, et al.*; In the United States District Court for the Southern District of Texas; Motion to Dismiss Under Rule 12(B)(1) for Lack of Subject Matter Jurisdiction, filed May 7, 2018.

Lead Counsel ~ Schouest Bamdas Soshea & Benmaier PLLC: Susan Noe Wilson, Michael Hogue, M. Lane Lowrey; Hall Maines Lugin PC: Claude L. Stuart III, Evan T. Caffrey; Haynes and Boone, LLP: Lynne Liberato, Mark Trachtenberg.

A full-sized chart, together with yearly summaries, is attached as Exhibit 5 to Exhibit A.

### 3. OSG treated the MSA as a lease of real property.

Finally, OSG's own descriptions of the MSA indicate that it understood it to be a primarily a lease of real property. *Cf. Icon Amazing LLC v. Amazing Shipping, Ltd.*, 951 F. Supp. 2d 909, 913-14, 917 (S.D. Tex. 2013) (plaintiff's own description of the contract as a vessel sale/financing, not as a conventional maritime charter, supported the court's conclusion that it was not a maritime contract). For example, OSG referred to Pelican Island as a "leased facility" in its most recent annual report to its shareholders:<sup>18</sup>

*The Company may be subject to litigation and government inquiries or investigations that, if not resolved in the Company's favor and not sufficiently covered by insurance, could have a material adverse effect on it.*

The Company has been and is, from time to time, involved in various litigation matters and subject to government inquiries and investigations. These matters may include, among other things, regulatory proceedings and litigation arising out of or relating to contract disputes, personal injury claims, environmental claims or proceedings, asbestos and other toxic tort claims, employment matters, governmental claims for taxes or duties, and other disputes that arise in the ordinary course of the Company's business. For example, in late September 2017, an industrial accident at a leased facility in Galveston resulted in fatalities to two temporary employees. In accordance with law, an investigation of the accident is currently underway, and filed lawsuits have identified several defendants, including a subsidiary of the Company. The Company believes it is too early to determine what, if any, effect the outcome of this matter will have on us.

OSG also described its interest in the Pelican Island property as "Field Office/Warehouse Equipment Storage" (e.g., not as a dock or wharf) in its insurance property schedule:<sup>19</sup>

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<sup>18</sup> True and correct copies of excerpts of this Annual Report are attached as Exhibit 1 to Exhibit B.

<sup>19</sup> True and correct copies of excerpts of OSG's Insurance Policy, as produced by OSG, are attached as Exhibit 2 to Exhibit B.

SCHEDULED LOCATIONS		
LOCATION	ADDRESS	DESCRIPTION
<b>DOMESTIC</b>		
California	971 S. Seaside Ave Terminal Island, CA 90731	Equipment Storage (Houston Lightering)
Louisiana	Martin Terminal North 120 17 <sup>th</sup> Street Port Fourchon, LA 70357	Equipment Storage (Houston Lightering)
New York	600 Third Ave, 39 <sup>th</sup> Floor New York, NY 10019	Corporate Headquarters
	Miller's Launch Pier 7 ½ Staten Island NY	Field Office (Houston Lightering)
Texas	1001 Woodloch Forest Dr., Suite325 The Woodlands, TX 77380	Office
	2915 A Todd Road Galveston TX 77554	Field Office/Warehouse Equipment Storage (Houston Lightering)
	Able Infosat Communications, Inc. 5906 Broadway Pearland TX 77581	Warehouse (IS Group)

**C. The fact that OSG contracted for wharf space does not render the MSA a maritime contract.**

OSG has suggested that because the MSA includes an obligation for T&T to provide wharf space, it is a “contract for wharfage”<sup>20</sup> and thus is a maritime contract. This is incorrect. Numerous cases distinguish between: (1) contracts for wharfage, in which wharf space is provided to a *specific* vessel for a *limited* period based on the credit of that vessel, so as to give rise to a maritime lien; and (2) longer term lease contracts for land such as the MSA, which include some wharf space for *non-specific* vessels, for which rent is paid regardless of the presence of a vessel. The former are maritime contracts; the latter are not.

Several decisions from district courts in this Circuit illustrate this point. In *Jaspriza v. Schlumberger Tech. Corp.*, 2010 WL 4879442 (E.D. La. 2010), the court held that a lease of land fronting on a navigable canal—which provided space for dockage of the lessee’s vessels and the loading and unloading of the crews and their

<sup>20</sup> The terms “dockage” and “wharfage” are synonymous and are used interchangeably. *Trafikaktiebolaget Grangesberg Okelosund v. Wilkens*, 4 F.2d 577, 580 (S.D. Tex.), *aff’d as modified on other grounds*, 10 F.2d 129 (5th Cir. 1925).

# Tab H-4

No. 14-0794; *Union Pacific Railroad Company v. Estate of Geronimo Gutierrez, Deceased, et al.*; In the Texas Supreme Court. Petitioner's Brief on the Merits, filed April 13, 2015.

Lead Counsel ~ Haynes and Boone, LLP, Lynne Liberato, Christina Crozier, Polly Graham Fohn; McLeod, Alexander, Powell & Apffel, P.C.: Douglas W. Poole, Bryan R. Lasswell.



cause his accident. RR5:1009-11, 1013-16; RR12:D 1, Tab E. On the report, Gutierre did not admit that he had taken a prohibited shortcut, and instead represented that he fell after properly descending from a ladder. RR12:D 1, Tab E. The relevant excerpt of his accident report follows:

(1) DESCRIBE FULLY HOW THE ACCIDENT/INJURY OCCURRED:	Getting down on ladder with hands + feet one step at a time, then having reached ground with both feet on ground I turned to go East and fell.
(2) WHAT SPECIFICALLY CAUSED THE ACCIDENT/INJURY:	My ankle gave way and I fell
(3) DID EQUIPMENT OR TOOLS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YES, PROVIDE DETAILS (INCLUDING EQUIPMENT ID NUMBER)	
(4) DID WORKING CONDITIONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YES, PROVIDE COMPLETE DETAILS	
(5) DID OTHER PERSONS CAUSE OR CONTRIBUTE TO THE CAUSE OF THE ACCIDENT/INJURY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YES, PROVIDE COMPLETE DETAILS	

RR12:D 1, Tab E.

**IV. Gutierrez died due to a rare reaction to medication.**

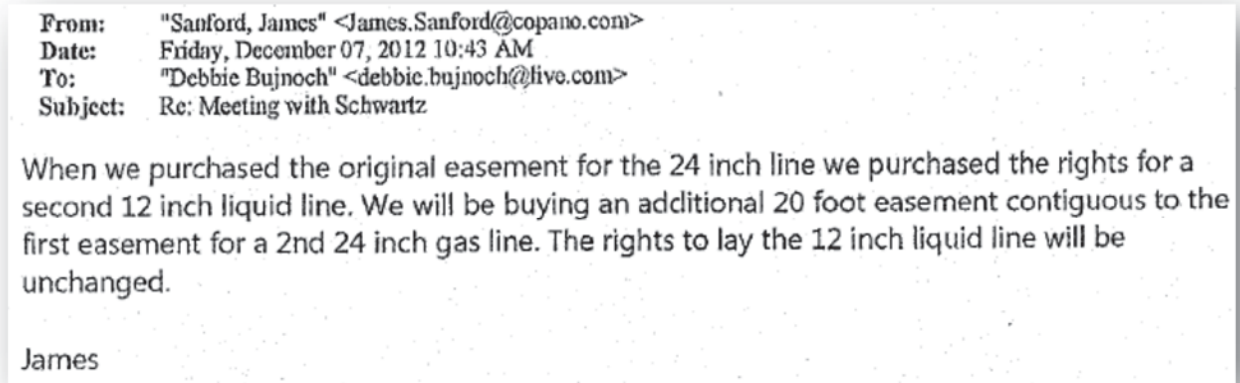
To repair the fracture in his leg, Gutierre had three surgeries between May 12, 200 and May 16, 200 . RR11:Part1 at :05-30, 16:00-20:32. After his surgeries, he was given a standard medication to prevent blood clots. RR11:Part1 at :30- :39. Gutierre was released from the hospital and sent home on May 20, 200 . RR1:Part1 at 8:40. Three days later, Gutierre returned to the hospital, where physicians discovered that he had suffered a rare complication from the anti-

# Tab H-5

No. 18-0044: *Copano Energy, LLC, et al. v. Stanley D. Bujnoch, Life Estate, et al.*; In the Supreme Court of Texas; Respondents' Brief on the Merits, filed February 19, 2019.

Lead Counsel ~ Beck Redden LLP: Kyle Lawrence, Joe W. Redden, Jr., Matthew P. Whitley, M. Jake McClellan.

original easements. CR.184. Copano specified the size and location of the additional easement early in the negotiations. On December 7, 2012, Sanford emailed Schwartz and explained that Copano would be “buying an additional 20 feet” of easement “contiguous to the first easement for a 2nd 24 inch gas line.”



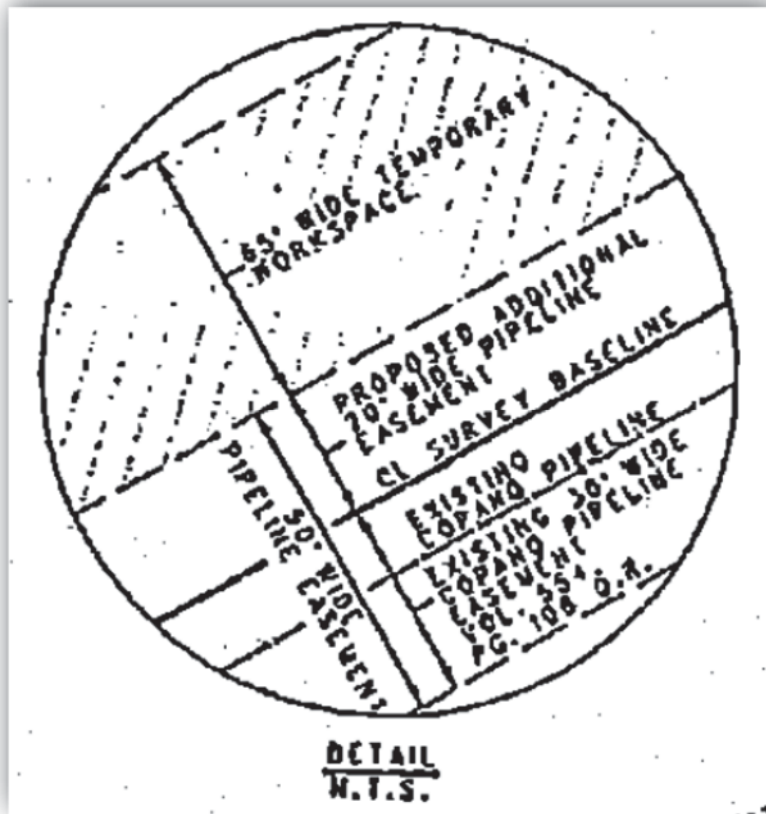
**From:** "Sanford, James" <James.Sanford@copano.com>  
**Date:** Friday, December 07, 2012 10:43 AM  
**To:** "Debbie Bujnoch" <debbie.bujnoch@live.com>  
**Subject:** Re: Meeting with Schwartz

When we purchased the original easement for the 24 inch line we purchased the rights for a second 12 inch liquid line. We will be buying an additional 20 foot easement contiguous to the first easement for a 2nd 24 inch gas line. The rights to lay the 12 inch liquid line will be unchanged.

James

CR.208. In an earlier email that same day, Sanford explained that Copano would “be laying the line generally on the North side of the existing 24 inch line (temporary workspace side).” CR.209.

Copano then had survey plats of the proposed amendment prepared. The survey plats were dated December 20, 2012, and included enlarged “details” which, although difficult to read, identified the location of the “Proposed Additional 20’ Wide Pipeline Easement” in relation to the “Existing 36’ Wide Copano Easement” and “Existing Copano Pipeline”:



*See, e.g.,* CR.227. Consistent with Copano’s earlier statements, the plats showed the proposed easement contiguous to and on the north side of the original easement.

Rather than formally condemning the Landowners’ property, Copano offered to pay them the amount it expected to have paid after a condemnation proceeding. *See* CR.179, 184. On January 30, 2013, Copano offered to pay most of the Landowners \$70 per foot for the proposed easement.

**From:** Sanford, James <James.Sanford@copano.com>  
**To:** Marcus F. Schwartz <marcusfschwartz@aol.com>; bcaraway <bcaraway@cmaaccess.com>  
**Subject:** Easements  
**Date:** Wed, Jan 30, 2013 2:24 pm

Mark/Bill,

Pursuant to our conversation earlier, Copano agrees to pay your clients \$70.00 per foot for the second 24 inch line it proposes to build. In addition to this amount Copano agrees to address and correct the damages to your client's property caused due to the construction of the first 24 inch line.

Please confirm that Copano has access to your client's property for survey and environmental.

CR.190. Copano separately offered \$88 per foot to one specific Landowner: Transportation Equipment, Inc. CR.204.

Within an hour, the Landowners accepted the offer and gave Copano permission to send representatives onto their property to conduct the necessary environmental assessments:

**From:** Marcus F. Schwartz <marcusfschwartz@aol.com>  
**To:** James.Sanford <James.Sanford@copano.com>; bcaraway <bcaraway@me.com>  
**Subject:** Re: Easements  
**Date:** Wed, Jan 30, 2013 2:49 pm

James: In reliance on this representation we accept your offer and will tell our client you are authorized to proceed with the survey of their property. We would appreciate your letting them know a reasonable time before going on their property. mfs/bbc

CR.279. Contrary to Copano's and the court of appeals' assertions that there is "no evidence" that Copano ever entered the property, Op. at \*1 n.3; Br. at 49, Schwartz testified that the Landowners "allowed Copano representatives onto their properties to perform the environmental assessments and surveys." CR.185 (¶ 11)

On February 13, Schwartz’s secretary sent Copano minor, non-substantive revisions to the proposed amendment to the original right-of-way (“row”) agreement that would be executed by the Landowners.

**From:** Debbie Bujnoch [mailto:debbie.bujnoch@live.com]  
**Sent:** Wednesday, February 13, 2013 11:06 AM  
**To:** Sanford, James  
**Cc:** Bill Caraway  
**Subject:** Amendment to ROW Agreement

Please find revisions made to the amendment of row agreement for execution by our clients. If this is satisfactory please let us know and we will have our clients execute the amendments.

Debbie Bujnoch, Secretary to  
Marcus F. Schwartz

CR.212. The attached amendment referred to the original easement by its location in the county records and, consistent with the earlier emails, specified that the original easement would be expanded to “include an additional twenty feet (20’) of permanent right of way . . . .” CR.213. That same afternoon, Copano responded and approved the documents for execution by the Landowners:

**From:** "Sanford, James" <James.Sanford@copano.com>  
**Date:** Wednesday, February 13, 2013 5:44 PM  
**To:** "Debbie Bujnoch" <debbie.bujnoch@live.com>  
**Cc:** "Bill Caraway" <bcaraway@mc.com>  
**Subject:** RE: Amendment to ROW Agreement  
Debbie,

I am fine with these changes.

James

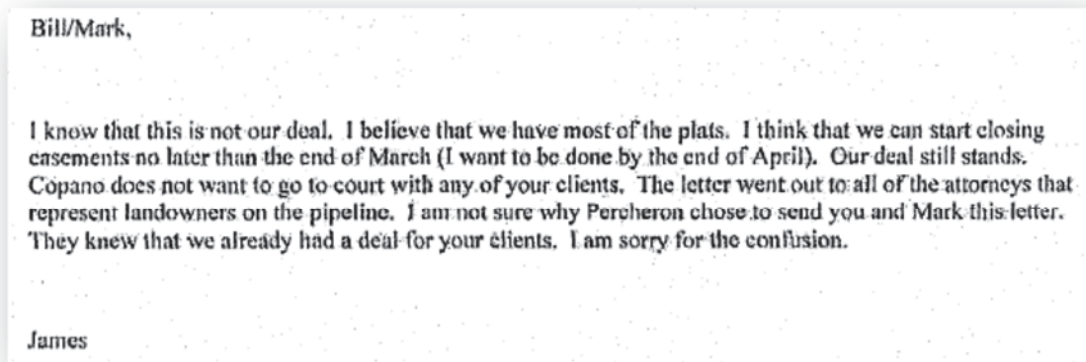
CR.212.

**B. After Copano tried to renege, Sanford reaffirmed the terms of the parties' agreement.**

By March 2013, Copano and Kinder Morgan were finalizing a merger. Copano's conduct changed dramatically as the merger approached.

On March 14, Schwartz received an email from Brent Eubank of Percheron Field Services, another representative acting on behalf of Copano. CR.255. Eubank attached a "landowner compensation proposal letter" that included the amounts "Copano is willing to pay" for the proposed easements. *Id.* Eubank acknowledged that "Mr. Sanford had prior contact with [Schwartz] on this matter," but explained that Copano had "provided the same letter to all attorneys representing landowners on this project." *Id.* The proposal letters offered only \$20 to \$40 per foot for the additional easements—a drastic reduction from the \$70 per foot agreed to previously. CR.256–58.

Stunned, Schwartz forwarded the email to Sanford. CR.251. Sanford responded: "I know that this is not our deal. . . . Our deal still stands."



Bill/Mark,

I know that this is not our deal. I believe that we have most of the plats. I think that we can start closing easements no later than the end of March (I want to be done by the end of April). Our deal still stands. Copano does not want to go to court with any of your clients. The letter went out to all of the attorneys that represent landowners on the pipeline. I am not sure why Percheron chose to send you and Mark this letter. They knew that we already had a deal for your clients. I am sorry for the confusion.

James

# Tab H-6

No. 15-0935; *XOG Operating, LLC, et al. v. Chesapeake Exploration Limited Partnership, et al.*; In the Texas Supreme Court; Petitioners' Brief on the Merits, filed November 2, 2016.

Lead Counsel ~ Hays & Owens L.L.P.: John R. Hays, Jr.,  
Alicia Ringuet French.



unit. CR 121-142.<sup>5</sup> The Commission then accepts these filings as showing the specific proration unit for a given well. CR 200. The size of the units is then published by the Commission on its proration schedules. CR 204-228.

***B. Chesapeake designated the specific acreage to be included within proration units for the individual wells.***

Chesapeake designated the acreage for each well's proration unit. CR 121-142. It did so by specifying the amount and boundaries of the acreage that it chose to include within the proration unit for each well on its Form P-15 filings with the Commission. CR 121-142. The Form P-15 filing for each well included the "certified plat" required by Commission rule.<sup>6</sup> CR 121-142.

For example, the P-15 filed by Chesapeake in September 2004 for the Legg 206 well designated a 160-acre proration unit for this well, which it set out on the attached plat:

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<sup>5</sup> The applicable Commission rule is clear: "If acreage is a factor in the allocation formula, a certified plat showing the acreage assigned to the well for proration purposes shall be submitted. . . . If a plat shows acreage in the unit in excess of the *maximum number of acres* permitted by the field rules, it will not be accepted." 16 TEX. ADMIN. CODE § 3.31(c)(1) (emphasis added).

<sup>6</sup>See 16 TEX. ADMIN. CODE § 3.31(c)(1).

Form 0-113  
8-27-78  
DISCOUNT

**STATEMENT OF PRODUCTIVITY OF ACREAGE  
ASSIGNED TO PRORATION UNITS**

The undersigned herein is authorized to make this statement, that to his knowledge of the facts concerning the CHESAPEAKE OPERATING, INC. OPERATOR

LEASE # 202611 No. 202611 that each well is completed in the ALLENBORN-BRITT (12350) Field, WHEELER County,

Taxes and that the acreage allocated, and assigned to such well for proration purposes as authorized by special rule and as shown on the attached certified plat entrance

150.00 acres which can reasonably be considered to be productive of hydrocarbons.

- CERTIFICATE -

I declare under penalties prescribed in Sec. 91.843, Texas Natural Resources Code, that I am authorized to make this report, that this report was prepared by me or under my supervision and direction, and that data and facts stated therein are true, correct, and consistent to the best of my knowledge.

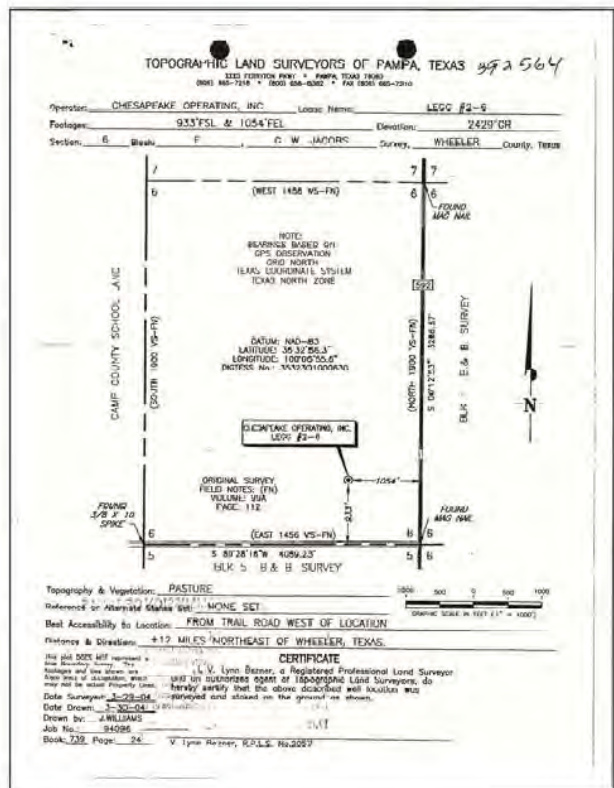
Date: 09/29/08 Signature: Brian J. Dale

Telephone: AREA CODE 469 NUMBER 848-8500 Title: REGULATORY ANALYST

*off* 9/21/08

Return to  
Central  
Records

RECEIVED  
PRC OF TEXAS  
OCT 05 2008  
AUSTIN TX  
O&G



CR 124-126. See Appendix F for Chesapeake's P-15 filings for all of the subject wells.

Chesapeake's selection of the specific acreage included within the proration unit for each well is confirmed by the Commission's published proration schedules. CR 204-228. Of particular note, the June 2005 proration schedule shows the proration unit for each of the subject wells, the acreage Chesapeake

designated on its Form P-15 filings, and the accompanying plats.<sup>7</sup> CR 121-142, 205. Witness:

ALLISON-BRITT (12350)		GAS PRORATION SCHEDULE -		JUNE 2005		DIST 10	
CHESAPEAKE OPERATING, INC. 147714 P-5		ACRES	MWP	DEL	G-1 POTE	G-10 GAS ALLOW	04-1
					EFF	NO. MCF	STATUS
129780	KEY	3	320.000	1444			ENDPT
129783	BEAM J	4	160.000	240			ENDPT
CHESAPEAKE OPERATING, INC. 147715 P-5							
098729	LEGG -7-	1	160.000	820			ENDPT
111509	LEGG -6-	1	352.000	2008			ENDPT
150084	BRITT -6-	1	320.000	1200			ENDPT
197455	ELMORE 32	2	320.000	900			ENDPT
199458	FIELDS	2	160.000	1000			ENDPT
200208	ELMORE 32	103	160.000	1000			ENDPT
201516	ELMORE 32	3	160.000	2000			ENDPT
202611	LEGG -6-	4	160.000	1000			ENDPT
203228	LEGG	206	160.000	1048			ENDPT
203228	LEGG	207	160.000	890			ENDPT
203230	LEGG	307	160.000	740			ENDPT
204453	BRITT -6-	306	320.000	574			ENDPT
204801	ELMORE 21	2	160.000	1000			ENDPT
204742	GRAYSON	102	320.000	1000			ENDPT
207870	GRAYSON	203	160.000	1543			ENDPT
DEVON ENERGY PRODUCTION CO, L.P. 216378 P-5							
200223	HOLT	1	440.000	875	201	3720X	ENDPT
EAG RESOURCES, INC. 253142 P-5							
084356	BRITT -7-	1	280.000	800	100E	ET 1650N	DEARP
098499	BRITT -7-	1	160.000	1450	67E	ET 330N	DEARP
114A27	KEY-0-	2	160.000				

LEASE NAME	WELL	ACRES
...	...	...
LEGG -6-	206	160.000
LEGG	207	160.000
LEGG	307	160.000
BRITT -6-	306	320.000

CR 205 (emphasis added). See Appendix G.

The proration unit acreage shown on the proration schedule for each of the subject wells is identical to that certified by Chesapeake on its Form P-15 filings. CR 121-142, 205.

***C. Chesapeake’s designation of acreage included within each of the proration units determined the leasehold acreage retained under the Term Assignment.***

Because Chesapeake formed no pooled units under the Term Assignment, Chesapeake retained only the acreage that it *included within* the proration unit of each well. All other acreage automatically reverted to XOG effective on the

<sup>7</sup> The only well listed as having a 320 acre proration unit is the Britt 3-6 well, because Chesapeake chose to include 320 acres within the proration unit for that well in its Form P-15 filing. CR 133-136, 205.

# Tab H-7

No. 05-15-00157-CV; *CBIF Limited Partnership, et al. v. TGI Friday's Inc., et al.*; In the Court of Appeals for the Fifth District of Texas at Dallas; Appellees' Response to Motions for Rehearing, filed February 28, 2017.

Lead Counsel ~ Haynes and Boone, LLP: Karen S. Precella, Nina Cortell, Deborah S. Coldwell, Ryan Paulsen; Reese Gordon Marketos, LLC: Pete Marketos, Leslie Chaggaris.

Terminals A, B, C, and E (not just A), and (3) *did* threaten termination or condemnation of the leased spaces when CBIF/Flory and Canseco would not agree to necessary changes. The Court also correctly noted that Flory and Canseco confirmed that they would continue to act in the same way that precluded the Terminal A agreement. (Op. 18-20)

**a. The Airport demanded new leases for Terminals A, B, C and E.**

At trial, Fridays proved that the Airport, using the threat of condemnation, demanded new leases (and joint venture agreements) for each Terminal. Yet Flory claims this Court erred in “assuming” the Airport demanded new leases for Terminals other than A by failing to “differentiate between the restaurant in Terminal A and the restaurants and café bars in Terminals B, C, and E.” (CBIF Reh’g 6-7) That argument ignores extensive evidence favorable to the jury’s finding regarding the Airport’s demands and threats (including the Airport’s testimony at trial), ignores the Airport’s condemnation power, and again presents Flory’s trial story that the jury rejected.

The following are highlighted exhibits where Airport personnel demanded separate new leases (and joint venture agreements) for each location under threat of loss or condemnation.<sup>3</sup> Terminal A was merely first up in the process:

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<sup>3</sup> Fridays repeatedly informed the partners about, and tried to comply with, the Airport’s demands for leases and joint venture agreements for all Terminals. Some highlighted examples are attached hereto as appendices. See [PX34](#), [PX36](#), [PX73](#), [PX89](#).



## T.R.I.P. Impact on TGIF Locations

- Due to space needs for Airport operations locations will be impacted
  - Terminal A
  - Terminal B
  - Terminal C – both locations
- No change is currently needed for Terminal E

(CBIF256) Terminal E involved a remodel rather than a relocation. (See, e.g., PX45; CRX3/7, 9)

From Zenola Campbell, Vice President, Concessions, DFW Airport to Fridays' Lee Sanders:

Thank you for your quick attention to our future proposed treatment of the TGIF locations in Terminals A, B, C, and E. We are pleased that the proposed future locations have met your approval. We value TGIF as a continuing integral participant in the overall DFW International Airport Concessions Program.

...

While we understand the desire to have the ten-year term commence once the last location opens, due to the fluid nature of the TRIP and unforeseen changes, we intend to treat each location individually with its own unique commencement date and associated Minimum Annual Guarantee. In all cases, the lease terms would mirror the current lease you have in Terminal D along with all associated amendments with the exception of the percentage rent structure being twelve percent (12%).

Although, your Terminal E location will not be relocated, it is our expectation that this restaurant be thoroughly renovated to reflect a "like new" image equal to the other future store locations. We realize from recent past conversations that this is a mutual desire.

A critical component of these future leases is the incorporation of a new, fully consummated lease and Joint Venture Agreement that meets all the requirements as set forth by the FAA and our Business Diversity and Development Department.

As you know from our previous conversations, we are on a limited timeline with our Board and other stakeholders. To ensure these locations are not part of the upcoming Request for Proposal, it will be important for us to receive a fully executed lease for the Terminals A and E locations, in particular, along with the associated JV Agreement, 30 days from Board approval.

(PX45)

From Ms. Campbell, copying DFW's legal and diversity departments:

**Tomme, Paul**

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**From:** Campbell, Zenola  
**Sent:** Tuesday, November 16, 2010 3:41 PM  
**To:** 'Markatos, Peter D.'  
**Cc:** Cruz-Sewell, Suzanne; Tomme, Paul  
**Subject:** RE: Contact info

Peter

Please know that the Joint venture agreement must be approved by Suzanne Cruz-Sewell who is our Assistant VP of Business Development and Diversity.

As mentioned we will need all confirmed by Monday morning November 22, 2010 including **the signed lease agreements** which I have been working with Stephen Jones on.

Zenola

(PX58; *see also* PX51 (“like to have all leases and updated JV agreements brought to the December, 2010 Committee and Board meetings for approval”))

From Ms. Campbell to Fridays' Stephen Jones:

November 16, 2010

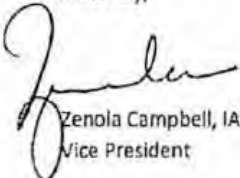
Mr. Jones,

As discussed in our conversation this morning, TGI Friday's will need to provide a **signed Lease Agreement for each location and Joint Venture Agreement that conforms to FAA guidelines** by Monday, November 22, 2010. **Failure to do so will result in the loss of the replacement space in Terminal A.**

We have been advised by the DFW Airport Board to provide no further extensions.

Please feel free to contact me if you have any questions.

Sincerely,

  
Zenola Campbell, IAP  
Vice President

(PX59)

From the Airport's legal counsel:

**From:** Tomme, Paul <ptomme@dfwairport.com>  
**Sent:** Monday, November 22, 2010 10:36 PM (GMT)  
**To:** Marketos, Peter D. <Pete.Marketos@haynesboone.com>; Campbell, Zenola <zcampbell@dfwairport.com>; Cruz-Sewell, Suzanne <SCSewell@dfwairport.com>; Barwinkel, Peter <PBarwinkel@dfwairport.com>; Baldwin, Michael <MiBaldwin@dfwairport.com>  
**Cc:** Buchanan, Kenneth <KenBuchanan@dfwairport.com>  
**Subject:** RE: TGIF/DFW Terminal A Restaurant Joint Venture and Lease Agreement

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Pete, I don't know whether your JV agreement is MBE compliant, but I can tell you that deal cannot be done piecemeal. We will all have to sign a termination agreement as to the existing lease, and **replace it with four new leases**. I assume that TGIF is not willing to terminate the existing lease, and give up all its rights as to **all 5 locations, with only one new lease executed and in hand for one location**.

As for execution of the termination agreement, we will have to insist that all partners sign it, because we don't want some partner coming back later and suing us for terminating the agreement without their consent.

I can also tell you that today is the deadline to sign the **four new leases** and **to prove that all the tenants are MBE compliant**. Without that, we have instructions from the Board not to put any action item on the December agenda for them to approve **new leases**. They are expecting us to report that no deal was reached in time, and that we will be putting all the new locations out for bid, and **condemning the old locations when necessary for the TRIP**.

Paul Tomme  
Legal Counsel

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**From:** Campbell, Zenola  
**Sent:** Monday, November 22, 2010 2:21 PM  
**To:** Cruz-Sewell, Suzanne; Barwinkel, Peter; Baldwin, Michael  
**Cc:** Buchanan, Kenneth; Tomme, Paul  
**Subject:** FW: TGIF/DFW Terminal A Restaurant Joint Venture and Lease Agreement  
**Importance:** High

Please see the Lease and JV Agreement for Terminal A. I do not have **signed agreements for Terminals B, C and E**. They say they are committed to get it done prior to end of year but are running into issues with current JV partners.

Thanks

(PX78)

Flory admitted at trial that he understood the Airport's position from Mr. Tomme—all new leases were required.

Q. ...And he wrote in response to Friday's proposed Terminal A joint venture that the airport *wanted all – A, B, C and E all at the same time?*

A. Yes. *That was his position.*

...

Q. ...And you don't disagree that the airport was telling Friday's at this point it *needed all the new leases* for all the new



terminals that were going to be renovated under the TRIP, right?

A. I think *that is what they were hoping for*, yes.

(13RR112-14) (emphasis added)

The Airport continued to demand all new leases, refused to apply the relocation provision, and indicated that it would condemn the spaces without new agreements:

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**From:** Tomme, Paul [mailto:ptomme@dfwairport.com]  
**Sent:** Wednesday, February 16, 2011 7:09 PM  
**To:** Coldwell, Deborah  
**Cc:** pete.markelos@gmail.com; Wells, Jennifer  
**Subject:** TGIFriday's at DFW Airport



Deborah,

The statute that I mentioned, **exempting condemnation of government leaseholds** from the general prohibition on condemnations for economic development, is found at Texas Government Code Section 2206.001(d). However, given that all of the TGIF leaseholds will be taken for things that are clearly public purposes, such as TSA checkpoints, we don't really need to rely on that statute.

**The relocation provision in Article 20 of the lease affects only the three café/bars in Terminals B and C. Even as to those locations, it can't prevent the taking of the leasehold by eminent domain.** First, Article 20 never mentions condemnation or eminent domain. Second, to the extent the tenant or any individual investor seeks to use Article 20 to prevent condemnation, or to augment compensation above the property's value absent condemnation, it would be void as against public policy. Governmental entities cannot contract away their power of eminent domain. See *West River Bridge Co. v. Dix*, 47 U.S. 507, 12 L.Ed. 535 (1848); *Gay Investment Co. v. Texas Turnpike Authority*, 510 S.W.2d 147 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); and *Corpus Christi v. Taylor*, 126 S.W.3d 712 (Tex. App.—Corpus Christi 2004, pet. dismissed). That is especially true in our case, because it is actually the Cities of Dallas and Fort Worth that have the power of eminent domain, which they exercise occasionally on behalf of the Airport Board; and they didn't sign the

The testimony at trial from Fridays and the Airport confirmed the points made in the documents that were contemporaneously created at the time of the negotiations—the Airport demanded new leases and joint venture agreements for each location. (See, e.g., 4RR105; 5RR9-12, 50-55, 59-60, 72; 13RR53-54;

space, and (2) that losing that space was not in the JV's or its partners' best interests as required pursuant to CBIF's fiduciary obligations. Moreover, the jury heard that Flory tried to gain advantages for CBIF and himself in the 2010 and 2011 period during which the JV fought to maintain its spaces at the Airport. For example, in the face of frenzied November 2010 activity in advance of the Airport's compliance deadline, Flory provided his fifteen-point "solution" plan in which he, among other things, attempted to extract \$4,287,500 and 25% of Domain's Terminal D restaurant interests before he would resolve any of the issues preventing the JV from moving forward. (*See, e.g.,* [PX56 at 3-5](#), ¶¶ III, V, VIII, IX) A few days later on November 17, Fridays' counsel reminded CBIF's counsel of CBIF's fiduciary duty and Flory's continued role in CBIF's efforts to obtain benefits for itself (and Flory) at the detriment of other partners in derogation of that duty:

**Since forwarding my last letter to you earlier today, we have received two letters from you on behalf of CBIF. The first is three pages long and feigns "bewilderment" on CBIF's behalf while attempting to set up a future dispute in a favorable light to CBIF. The second purports to give Mr. Flory's approval of George Tinsley as a substitute ACDBE while raising concerns about Mr. Tinsley's ability to qualify as an ACDBE based on Mr. Flory's short conversation with him yesterday. The calculated nature of CBIF's correspondence is readily apparent to its current JV partners. Every letter includes a recitation of CBIF's behavior as a "good partner" over the last 15 years, provides cover for CBIF for an anticipated future dispute, and imposes obstacles for the current JV to retain its opportunities with the Airport. Friday's is rightfully concerned that CBIF has forgotten its fiduciary obligations to its JV partners and prioritized its own interests ahead of its partners and the JV.**

(PX64) Indeed, the jury saw other voluminous exhibits and heard extensive testimony about how Flory acted through CBIF to preclude the JV and TSQF from