

No. _____

IN THE
SUPREME COURT OF TEXAS

**IN RE TERRA ENERGY PARTNERS, LLC,
BENJAMIN “B.J.” REYNOLDS,
MARK MEWSHAW, AND WES HOBBS**

Original Proceeding from the
11th Judicial District Court of Harris County, Texas
and from the First Court of Appeals

PETITION FOR WRIT OF MANDAMUS

DLA PIPER LLP (US)

Christina E. Ponig
Texas Bar No. 24041706
Allissa A.R. Pollard
Texas Bar No. 24065915
Wells Fargo Plaza
1000 Louisiana Street, Suite 2800
Houston, Texas 77002
Telephone: (713) 425-8400
Facsimile: (713) 425-8401
christina.ponig@dlapiper.com
allissa.pollard@dlapiper.com

RUSTY HARDIN & ASSOCIATES

Rusty Hardin
Texas Bar No. 08972800
Joe Roden
Texas Bar No. 00794549
1401 McKinney Street, Suite 2250
Houston, Texas 77010
Telephone: (713) 652-9000
Facsimile: (713) 652-9800
rhardin@rustyhardin.com
jroden@rustyhardin.com

**COUNSEL FOR RELATORS TERRA ENERGY PARTNERS, LLC,
BENJAMIN “B.J.” REYNOLDS, MARK MEWSHAW, AND WES HOBBS
EMERGENCY RELIEF REQUESTED BY SEPARATE MOTION
ORAL ARGUMENT REQUESTED**

IDENTITY OF PARTIES AND COUNSEL

Relators:

Terra Energy Partners, LLC, Benjamin
“B.J.” Reynolds, Mark Mewshaw, and
Wes Hobbs

Attorneys for Relators:

DLA PIPER LLP (US)
Christina E. Ponig
Texas Bar No. 24041706
Allissa A.R. Pollard
Texas Bar No. 24065915
Wells Fargo Plaza
1000 Louisiana Street, Suite 2800
Houston, Texas 77002
Telephone: (713) 425-8400
Facsimile: (713) 425-8401
christina.ponig@dlapiper.com
allissa.pollard@dlapiper.com

RUSTY HARDIN & ASSOCIATES
Rusty Hardin
Texas Bar No. 08972800
Joe Roden
Texas Bar No. 00794549
1401 McKinney Street, Suite 2250
Houston, Texas 77010
Telephone: (713) 652-9000
Facsimile: (713) 652-9800
rhardin@rustyhardin.com
jroden@rustyhardin.com

Respondent:

The Honorable Kristen Hawkins
11th Judicial District Court of Harris
County, Texas

Real Parties in Interest:

Sanchez Oil & Gas Corp., Sanchez
Energy Corporation, and Sanchez
Production Partners, LP

Attorneys for Real Parties in Interest:

Gibbs & Bruns LLP
Robin C. Gibbs
Sam W. Cruse
Brice A. Wilkinson
Colin Pogge
1100 Louisiana, Suite 5300
Houston, Texas 77002
Telephone: (713) 650-8805
Facsimile: (713) 750-0903

TABLE OF CONTENTS

I. STATEMENT OF THE CASE1

II. STATEMENT OF JURISDICTION2

III. STATEMENT OF PROCEDURAL HISTORY3

IV. STATEMENT REGARDING ORAL ARGUMENT3

V. RECORD AND APPENDIX REFERENCES3

VI. ISSUE PRESENTED5

VII. INTRODUCTION6

VIII. STATEMENT OF FACTS8

 A. General background8

 B. Discovery sought by Relators10

 C. Relators move to compel.....12

IX. ARGUMENT.....14

 A. Trade secrets must be disclosed with specificity.15

 B. Dropping a boxcar of documents is insufficient disclosure.....19

X. CONCLUSION AND PRAYER FOR RELIEF21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AAR Mfg., Inc. v. Matrix Composites, Inc.</i> , 98 So. 3d 186 (5th Dist. Fla. App. 2012) (per curiam).....	16
<i>Able Supply Co. v. Moye</i> , 898 S.W.2d 766 (Tex. 1995)	18, 19, 21
<i>In re Alford Chevrolet-Geo</i> , 997 S.W.2d 173 (Tex. 1999)	20
<i>In re Allied Chem. Corp.</i> , 227 S.W.3d 652 (Tex. 2007)	14, 18
<i>Big Vision Private, Ltd. v. E.I. DuPont de Nemours & Co.</i> , 1 F. Supp. 3d 224 (S.D.N.Y. 2014)	16
<i>Del Monte Fresh Produce Co. v. Dole Food Co., Inc.</i> , 148 F. Supp. 2d 1322 (S.D. Fla. 2001).....	17
<i>Engelhard Corp. v. Savin Corp.</i> , 505 A.2d 30 (Del. Ch. 1986)	16
<i>Fast Food Gourmet, Inc. v. Little Lady Foods, Inc.</i> , 05-CV-6022, 2007 WL 2156665 (N.D. Ill. July 26, 2007).....	21
<i>JB Knowledge Technologies v. BuildingConnected, Inc.</i> , 3:16-cv-218 (Tr. of Hr’g, Mins.) (S.D. Tex. June 14, 2017).....	15
<i>Joachim v. Chambers</i> , 815 S.W.2d 234 (Tex. 1991)	2
<i>Pearson Corp. v. Wichita Falls Boys Club Alumni Ass’n, Inc.</i> , 633 S.W.2d 684 (Tex. App.—Fort Worth 1982, no writ)	15
<i>Porous Media Corp. v. Midland Brake Inc.</i> , 187 F.R.D. 598 (D. Minn. 1999)	7

<i>StoneEagle Services, Inc. v. Valentine</i> , No. 12-1687, 2013 WL 9554563 (N.D. Tex. Jun. 5, 2013) (unpublished)	16, 18
<i>In re Terra Energy Partners, LLC, Benjamin “B.J.” Reynolds, Mark Mewshaw, and Wes Hobbs</i> , No. 01-17-00137-CV (Tex. App. Houston [1st Dist.] Oct. 24, 2017, orig. proceeding).....	1
<i>United Serv. Auto. Ass’n v. Mitek Sys., Inc.</i> , 289 F.R.D. 244 (W.D. Tex. 2013).....	15, 16, 17
<i>In re Van Waters & Rogers, Inc.</i> , 145 S.W.3d 203 (Tex. 2004) (orig. proceeding)	2
<i>Vesta Corp. v. Amdocs Mgmt. Ltd.</i> , 147 F. Supp. 3d 1147 (D. Ore. 2015)	15
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992) (orig. proceeding)	2, 14, 19
<i>Xerox Corp. v. Int’l Bus. Machines Corp.</i> , 64 F.R.D. 367 (S.D.N.Y. 1974).....	17
<i>Zenimax Media, Inc. v. Oculus Vr, Inc.</i> 2015 WL 11120582, at *3 (N.D. Tex. Feb. 13, 2015).....	16, 17
Statutes	
Harmful Access by Computer Act.....	1
Texas Government Code §22.002(a)	2
Texas Uniform Trade Secrets Act.....	<i>passim</i>
Other Authorities	
Rule 197	22
Texas Rule 197.2 of Civil Procedure.....	<i>passim</i>

I. STATEMENT OF THE CASE

<i>Nature of the Case</i>	Suit for damages for alleged misappropriation of trade secrets under the Texas Uniform Trade Secrets Act and claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, as well as breach of contract against the individual relators and violations of Harmful Access by Computer Act against two of the individual relators
<i>Relators</i>	Terra Energy Partners, LLC, Benjamin “B.J.” Reynolds, Mark Mewshaw, and Wes Hobbs
<i>Real Parties in Interest</i>	Sanchez Oil & Gas Corp., Sanchez Energy Corporation, and Sanchez Production Partners, LP
<i>Respondent</i>	The Honorable Kristen Brauchle Hawkins
<i>Trial Court</i>	11th Judicial District Court, Harris County, Texas
<i>Trial Court Orders</i>	Denial of motion to reconsider denial of discovery requiring Real Parties in Interest to identify with specificity the allegedly misappropriated trade secrets
<i>Court of Appeals</i>	First Court of Appeals at Houston
<i>Court of Appeals Panel</i>	Chief Justice Radack and Justices Keyes and Caughey (per curiam)
<i>Court of Appeals Opinion</i>	<i>In re Terra Energy Partners, LLC, Benjamin “B.J.” Reynolds, Mark Mewshaw, and Wes Hobbs</i> , No. 01-17-00137-CV (Tex. App. Houston [1st Dist.] Oct. 24, 2017, orig. proceeding)
<i>Court of Appeals Disposition</i>	Denial of Relators’ petition for writ of mandamus
<i>Motion for Rehearing</i>	Relators sought rehearing <i>en banc</i> , which was denied on February 6, 2018.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over this original proceeding pursuant to Texas Government Code §22.002(a). TEX. GOV'T. CODE §22.002(a).

Mandamus will issue to correct a clear abuse of discretion or violation of duty imposed by law when that abuse cannot be remedied by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). “[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion.” *Id.* at 840 (citing *Joachim v. Chambers*, 815 S.W.2d 234, 240 (Tex. 1991)).

An appeal is inadequate when the parties are in danger of losing substantial rights that cannot be cured on appeal. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding). Denial of discovery going to the heart of a party’s case may render an appellate remedy inadequate. *Walker*, 827 S.W.2d at 840-42. In addition, a party has no adequate remedy on appeal when it is effectively denied the reasonable opportunity to develop the merits of its case, making the trial a waste of judicial resources. *Id.* at 843. An appellate remedy is inadequate when the burden imposed by the trial court’s denial of discovery far outweighs any benefit to the other party. Finally, an appeal is inadequate when the trial court’s denial of discovery cannot be made part of the appellate record. *Id.*

III. STATEMENT OF PROCEDURAL HISTORY

On February 24, 2017, Relators sought mandamus and an emergency stay of all proceedings in the trial court. On March 2, 2017, the First Court of Appeals stayed the proceedings in the trial court. On October 24, 2017, after an eight-month stay, the Court of Appeals denied Relators' petition and lifted the stay. Relators sought rehearing *en banc* on November 8, 2017. On February 6, 2018, the Court of Appeals denied rehearing *en banc*, with one justice not participating.

IV. STATEMENT REGARDING ORAL ARGUMENT

Relators believe that oral argument may assist the Court in rendering its decision due to the unique circumstances of this case and the legal questions presented.

V. RECORD AND APPENDIX REFERENCES

References to the record will be denoted by the tab in the record, "Tab __," where the reference may be found and the page number, "R.____." Sealed documents will be filed in a separate record and denoted by the tab in the sealed record, "S.R. Tab____," where the reference may be found and the page number "S.R.____."

References to the Appendix will be denoted by the prefix "App." followed by the number of the document in the Appendix and the page number, such as "App.00001."

For the Court's convenience, the record, sealed record, and Appendix will be bookmarked electronically.

VI. ISSUE PRESENTED

Issue: Relators and Real Parties in Interest are exploration & production companies who are parties to a trade secret lawsuit under the Texas Uniform Trade Secrets Act. Relators are defendants in the lawsuit. In the course of discovery, Relators have propounded interrogatories on Real Parties in Interest, asking for a description of the alleged trade secrets forming the basis of the claims against Relators. Instead of answering the interrogatories, Real Parties in Interest directed Relators to approximately 170,000 pages of documents and told Relators they could divine the trade secrets somewhere among these documents.

Relators moved to compel interrogatory answers, and the trial court denied Relators' motion for reconsideration of the denial of this discovery. A panel of the First Court of Appeals denied Relators' petition for writ of mandamus, and the Court of Appeals denied rehearing *en banc*.

Question: Does denial of Relators' ability to know the basis of the claims against them constitute an extraordinary circumstance warranting mandamus relief?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Relators Terra Energy Partners, LLC, Benjamin “B.J.” Reynolds, Mark Mewshaw, and Wes Hobbs ask this Court to vacate the trial court’s orders denying their requests for discovery.

VII. INTRODUCTION

This petition seeks much needed clarification from this Court on a significant issue regarding the obligations of plaintiffs pursuing claims under the Texas Uniform Trade Secrets Act (TUTSA) to disclose their trade secrets with specificity during discovery.

Real Parties in Interest (collectively “Sanchez”) allege that Relators misappropriated their trade secret processes to drill oil and gas wells and to secure cost savings from vendors. The problem is that Sanchez has not identified what those alleged trade secrets are, even though Relators have served Sanchez with interrogatories seeking a simple narrative description of them. Rather, Sanchez produced 170,000 pages of routine business records allegedly “relating” to these processes and stated that its trade secret processes could be derived from reading these documents. That approach is wholly inadequate. This case warrants mandamus relief for two reasons.

First, since the passage of TUTSA in 2013, there has been a growing consensus in the other 46 states adopting uniform trade secret acts that plaintiffs

must disclose the trade secrets allegedly misappropriated with reasonable particularity at an early stage in the litigation:

The orderly disposition of cases involving claims of misappropriation of trade secrets cannot permit a situation where the details concerning the claimed trade secrets are not disclosed at an early date in the litigation. Adequate discovery cannot be conducted in the absence of the specific disclosure which is required by this Order.

Porous Media Corp. v. Midland Brake Inc., 187 F.R.D. 598, 600 (D. Minn. 1999).

Texas should follow suit.

Second, Texas Rule of Civil Procedure 197.2(c), which is designed to prevent discovery abuses by a party responding to discovery, provides in relevant part:

If the answer to an interrogatory may be derived . . . from the responding party's business records . . . , ***and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party***, the responding party may answer the interrogatory by specifying . . . the records

Tex. R. Civ. P. 197.2(c) (emphasis added). Here, the uncontested record demonstrates that production of 170,000 pages of business records with a directive to "go fish" for the answer fails that test: two expert witnesses attested under oath that reviewing these 170,000 pages would cost over \$1 million in fees and still would not enable Relators' experts to discern the alleged trade secrets. Rule 197.2 is not permissive; the trial court had no discretion to allow documents to be substituted in lieu of answering interrogatories once Relators produced un rebutted

affidavits showing the dramatic difference in burdens for the parties in describing versus discovering the processes from the documents.

Either of those reasons is enough to warrant the intervention of this Court through mandamus relief. The coalescence of both illustrates the extraordinary circumstances presented by this case and the paramount and timely importance of defining how Texas courts should handle discovery in emerging litigation under the Texas Uniform Trade Secret Act. Broad allegations and data dumps by plaintiffs deny defendants a fair opportunity to identify and defend against claims based on the alleged trade secrets at issue. Mandamus relief is necessary to prevent such abuse.

VIII. STATEMENT OF FACTS

A. General background

In August 2015, B.J. Reynolds resigned from Sanchez and accepted a position with Relator Terra Energy Partners, LLC (“Terra”) as Vice President of Operations. (S.R. Tab 1, S.R.00035:17-S.R.00036:4). Terra was formed in April 2015 and, in February 2016, it purchased its first property by acquiring WPX Energy Rocky Mountain, LLC (“WPX Rocky Mountain”) from WPX Energy, Inc. (Tab 1, R.00015 at ¶36). The WPX asset is a sandstone formation that had approximately 5,200 active natural gas wells in the Piceance Basin of Colorado at the time of the acquisition. (Tab 9, R.00441:2-4). Seven months later, in early

March 2016, Terra hired two additional Sanchez employees, Mark Mewshaw and Wes Hobbs. (S.R. Tab 1, S.R.00089:13-19); (S.R. Tab 1, S.R.00108:21-S.R.000109:4).

On March 24, 2016, Sanchez filed suit alleging that, upon their respective departures, Reynolds, Mewshaw, and Hobbs each took electronically stored information that purportedly contained Sanchez's trade secrets. (Tab 1, R.00002-4 at ¶¶1-3). Relators immediately entered into an Agreed Restraining Order and subsequently an Agreed Temporary Injunction. (Tab 2, R.00142-R.00146). The Agreed Temporary Injunction included a comprehensive protocol that required the Individual Relators to produce to a third-party computer forensics firm every computer, device, or removable storage device that they owned or used in the 90 days prior to their resignation from Sanchez through the date of the Injunction. (*Id.*, R. 00147-00149).

This protocol was completed on April 27, 2016. (*Id.*, R.00149; Tab 4, R.00166-R.00174). That same day, the forensics expert provided a detailed declaration, under penalty of perjury, certifying that the remediation process had been completed. (Tab 4, R.00168 at ¶¶ 23-24). The injunction further prevented Relators from "directly or indirectly using or disclosing any trade secret, confidential, or proprietary information of Sanchez and its clients." (*Id.*, R.00144 at ¶1a).

After the completion of the protocol, Sanchez elected to proceed with this case to pursue money damages. Sanchez alleges that some of the Sanchez information that Reynolds retained after his resignation *could* have been valuable to Terra. (Tab 6, R.00299-R.00300 at ¶¶ 52-56).¹

B. Discovery sought by Relators

During discovery in this case, Relators served interrogatories which asked Sanchez to describe its trade secrets, including any steps and materials used in its processes for drilling, fracturing, and completing wells. (S.R. Tab 3, S.R.00792, S.R.00804, S.R.00805; S.R. Tab 7, S.R.02069, S.R.02072; *see also* Appendix Tab 3, at App.00015). In response, Sanchez identified 15 different “trade secret” processes that it alleges Terra misappropriated. (S.R. Tab 6, S.R.01937-01954). Seven of the 15 categories of alleged trade secrets pertain to Sanchez’s technical processes and, in particular, its procedures for drilling, hydraulically fracturing, and completing wells. (*Id.*) Five of the 15 categories pertain to Sanchez’s business methods and, in particular, its “cost reduction strategy.” (*Id.*) However, Sanchez’s interrogatory answer did not actually reveal the elements of any trade secret in its response. (See S.R. Tab 6, S.R.01937-01954). Instead, for each alleged trade secret process, Sanchez simply referred Relators to a subset of 7,500

¹ Mewshaw and Hobbs provided all Sanchez’s information in their possession to their counsel before performing any work at Terra, and Sanchez is not making any claims that information was used.

documents (totaling nearly **170,000** pages) that were returned during the forensics protocol, which Sanchez claims “relate to” these trade secret processes. (*See, e.g., id.* S.R.01945-01947; S.R. Tab 7, S.R.01986-01987).

None of these documents actually describe the processes that Sanchez alleges had been misappropriated. Rather, these documents were an amalgamation of random business records detailing activity at dozens of different Sanchez wells on a daily basis, including, for example:

- Invoices and billing information;
- Proof of insurance forms by third-party vendors;
- Solicitations from potential vendors attaching marketing brochures and other publically available materials;
- Well completion plans and reports from third-party vendors;
- Daily reports prepared by outside vendors showing the output of the wells on a day-to-day basis;
- Daily reports prepared by outside vendors showing the debris coming out of the well during the fracking process; and
- Daily reports, spanning several years, merely documenting when the choke was opened or closed.

In short, Sanchez left Relators to review 170,000 pages of assorted business records to try and piece together elements from these documents and further divine which aspects of the process were actually trade secrets.

C. Relators move to compel

Relators subsequently asked the trial court to compel Sanchez to provide narrative responses describing with reasonable specificity the actual steps or elements of any trade secret processes that it claims were misappropriated. (S.R. Tab 7, S.R.02165; Tab 16, R.00778:15-19, R.00790:7-13). In support of that motion, Relators provided affidavits from two of their testifying experts, Dr. Steven A. Holditch and Arun Shukla, explaining why the designation of documents in lieu of providing narrative responses imposed a disproportionately larger burden on Terra than on Sanchez—a plain violation of Rule 197.2. (S.R. Tab 7, S.R.02008-S.R.02009 (citing Exhibits 18-19)).

Relators retained Dr. Steven Holditch to offer an opinion on whether any of Sanchez's procedures for drilling, fracturing, and completing wells are actually a trade secret. (S.R. Tab 7, S.R.02008-S.R.02009). Dr. Holditch provided an affidavit stating that, in order to perform even a cursory review of the more than 1,500 documents identified which purportedly reveal Sanchez's trade secret drilling and completions process, it would take approximately 375 hours, and Relators would incur more than \$250,000 in expert fees. (S.R. Tab 7, S.R.02571 at ¶5). Dr. Holditch has also attested that, given the nature of the documents, at the end of this exercise, it still would be impossible for him to meaningfully identify Sanchez's trade secret process for drilling or completing wells. (*Id.* ¶¶ 6-7).

Relators also retained Arun Shukla to testify about whether the cost-saving processes Sanchez has described are simply Lean Six Sigma concepts that corporations have been employing for years. (*See* S.R. Tab 7, S.R.02573 at ¶ 3). Shukla provided an affidavit stating that, in order to perform even a cursory review of the more than 5,500 documents which purportedly reveal Sanchez's trade secret cost-saving measures, it would take approximately 1,375 hours, and Relators would incur more than \$1 million in fees. (*Id.*, S.R.02574 at ¶ 5). Like Dr. Holditch, Mr. Shukla has stated that, at the end of this exercise, it would be impossible for him to meaningfully identify Sanchez's trade secrets. (*Id.*, S.R.02574-75 at ¶¶ 6-9).

Relators also submitted an affidavit from Mark Mewshaw, who formerly worked for Sanchez. Mewshaw attested that, by comparison, someone familiar with Sanchez's processes could prepare a narrative response in the manner and form that Relators request in less than one day.

In response to these three declarations, Sanchez produced no counter declarations and never contested the unequal burden upon the parties. Sanchez simply claimed it had done enough by referring Relators to the documents.

Relators' motion to compel was originally heard by Judge Michael Miller on December 5, 2016. (Tab 16). Judge Miller denied Relators' motion to compel in its entirety, stating at the hearing:

From what they have said, they have identified 8,000 files as the ones that they're basically contending are the subject of their claims. ***That is a finite universe of what they're contending was confidential information or trade secrets for purposes of the statute.***

(*Id.*, R.00828:11-16 (emphasis added)). On December 31, 2016, Judge Miller retired and was succeeded by Judge Kristen Hawkins who officially took the bench on January 1, 2017. On February 6, 2017, Judge Hawkins heard Relators' motion to reconsider Judge Miller's December 5, 2016 denial of the motion to compel and for sanctions. (Tab 15). On February 16, 2017, Judge Hawkins denied the motion to reconsider. (Appendix Tab 1, App.00001).

On February 24, 2017, Relators filed a petition for writ of mandamus with the First Court of Appeals and sought to stay the trial court proceedings. On March 2, 2017, the Court of Appeals stayed the proceedings in the trial court in their entirety. On October 24, 2017, the Court of Appeals denied Relators' petition for writ of mandamus in a *per curiam* decision. (Appendix Tab 4, App.00018). On February 6, 2018, the Court of Appeals denied rehearing *en banc*. (Appendix Tab 5, App.00021).

IX. ARGUMENT

Mandamus is proper “when a denial of discovery goes to the heart of a party's case.” *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007); *see also Walker*, 827 S.W.2d at 843 (explaining that mandamus may be granted

“where the party’s ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court’s discovery error”).

This case is one such case. Defendants in trade secret cases are entitled to know what the alleged trade secret is that they are accused of misappropriating. Where, as here, a plaintiff demands that defendants play a multi-million-dollar game of blind-man’s bluff, the discovery process has been abused. *Pearson Corp. v. Wichita Falls Boys Club Alumni Ass’n, Inc.*, 633 S.W.2d 684, 686 (Tex. App.—Fort Worth 1982, no writ) (“The purpose of the Discovery Rules is . . . to change the trial of a lawsuit from a game of chance and surprise, or ‘Blind Man’s Bluff’, as it once was, to an orderly process of unclouding matters . . .”).

A. Trade secrets must be disclosed with specificity.

Increasingly, federal and state courts applying the Uniform Trade Secret Act are requiring plaintiffs alleging misappropriation of trade secrets to disclose their alleged trade secrets with reasonable particularity early in the litigation and before taking extensive discovery. *JB Knowledge Technologies v. BuildingConnected, Inc.*, 3:16-cv-218 (Tr. of Hr’g, Mins.) (S.D. Tex. June 14, 2017) (Hanks, J.) (ordering TUTSA plaintiff to identify allegedly misappropriated trade secrets with specificity before further discovery allowed); *United Serv. Auto. Ass’n v. Mitek Sys., Inc.*, 289 F.R.D. 244, 248 (W.D. Tex. 2013) (requiring plaintiff to disclose

trade secrets with particularity).² These courts have recognized that early identification: (1) ensures the defendant has fair notice of the charges when the case commences, rather than at the close of discovery; (2) assists the court in setting the boundaries for the scope of discovery; and (3) prevents the plaintiff from using the discovery process as a fishing expedition. *See, e.g., United Auto. Ass'n*, 289 F.R.D. at 248.

Texas federal courts interpreting TUTSA have further articulated precisely what such disclosure should entail. For example, in *Zenimax Media, Inc. v. Oculus Vr, Inc.*, the court ordered plaintiffs to do as follows:

- (1) Identify each alleged trade secret;
- (2) Separately break out each of the individual alleged trade secrets that plaintiffs claim defendants misappropriated;

² *See also Vesta Corp. v. Amdocs Mgmt. Ltd.*, 147 F. Supp. 3d 1147, 1153-54 (D. Ore. 2015) (requiring plaintiff to disclose trade secrets with particularity before participating in any further discovery); *StoneEagle Services, Inc. v. Valentine*, No. 12-1687, 2013 WL 9554563, *5 (N.D. Tex. Jun. 5, 2013) (unpublished) (granting defendants' motion for an order requiring identification of the plaintiff's allegedly misappropriated trade secrets even though the defendants had yet not served interrogatories requesting identification); *Big Vision Private, Ltd. v. E.I. DuPont de Nemours & Co.*, 1 F. Supp. 3d 224, 258-59 (S.D.N.Y. 2014) (requiring disclosure and recognizing trend); *AAR Mfg., Inc. v. Matrix Composites, Inc.*, 98 So. 3d 186, 187 (5th Dist. Fla. App. 2012) (per curiam) (“[P]laintiff is required to identify with reasonable particularity the trade secrets at issue before proceeding with discovery.”) *Big Vision Private*, 1 F. Supp. 3d at 258-59 (requiring disclosure and recognizing trend); *Engelhard Corp. v. Savin Corp.*, 505 A.2d 30, 32-33 (Del. Ch. 1986)(recognizing that a plaintiff alleging trade secret misappropriation is required to identify with reasonable particularity the matter which it claims constitutes a trade secret).

- (3) Identify all such claims with sufficient particularity so that defendants understand how each claim differs from public domain information; and
- (4) To the extent that one defendant was accused of misappropriating information different from the others, provide a list of which trade secrets each defendant allegedly misappropriated.

3:14-CV-1849-P (BF), 2015 WL 11120582, at *3 (N.D. Tex. Feb. 13, 2015).³

In trade secret litigation, this level of disclosure is a fundamental necessity to prevent prejudice to the defendant:

At the very least, a defendant is entitled to know the bases for plaintiff's charges against it. The burden is upon the plaintiff to specify those charges, not upon the defendant to guess at what they are. Thus, after nearly a year of pre-trial discovery, Xerox should be able to identify in detail the trade secrets and confidential information alleged to have been misappropriated by IBM. Clearly until this is done, neither the court nor the parties can know, with any degree of certainty, whether discovery is relevant or not

Xerox Corp. v. Int'l Bus. Machines Corp., 64 F.R.D. 367, 371-72 (S.D.N.Y. 1974).

³ See also *United Serv. Auto. Ass'n*, 289 F.R.D. at 249 (ordering the plaintiff "to provide a list to [the defendant] that (1) separately breaks out each of the individual alleged trade secrets that [plaintiff] claims [defendant] has misappropriated; and (2) identifies all such claims with sufficient particularity so that the reader understands how each such claim differs from public domain information—including public [plaintiff] patent filings"); *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 148 F. Supp. 2d 1322, 1325-26 (S.D. Fla. 2001) (granting motion to compel plaintiff to provide a more robust description of its trade secrets, explaining, "[i]f [plaintiff] is claiming [defendant] has misappropriated the percentage of concentration of certain chemicals, it . . . must [state that defendant] . . . misappropriated the process for combining chemicals 'X, Y, and Z' . . . in an organized fashion. [Defendant] and the court should not have to piece [plaintiff's] allegations together by referring collectively to the vague claims contained in [plaintiff's] complaint, discovery responses").

These courts have further recognized that justice and due process are not served by more generic disclosures made by Sanchez in this litigation.

[These courts have] been descriptive about what will not satisfy the requirement: a laundry list of general categories of alleged “trade secret” information, lengthy, descriptive, but non-specific, paragraphs; generally listing software, data processing algorithms, and processes that a plaintiff developed, owned, or licensed; disclosures that only reveal the end results of, or functions performed by, the claimed trade secrets; and various concepts, elements, or components that make up designs.

StoneEagle Services, 2013 WL 9554563 at *4-5 (unpublished) (internal citations omitted) (granting defendants’ motion for an order requiring identification of the plaintiff’s allegedly misappropriated trade secrets even though the defendants *had not served interrogatories* requesting identification).

Here, the trial court’s failure to impose any such obligation upon Sanchez has severely prejudiced Relators’ ability to adequately prepare their defense. *Allied Chem.*, 227 S.W.3d at 658 (stating that mandamus may be granted “when a denial of discovery goes to the heart of a party’s case.”); *Able Supply Co. v. Moye*, 898 S.W.2d 766, 769-71 (Tex. 1995) (granting mandamus where Relators had been subjected to millions of dollars of defense costs over several years without information about the basic facts underpinning the claims against them).

Able Supply is instructive. Defendants in a toxic tort case sought mandamus from the Texas Supreme Court after the trial court refused to compel plaintiffs to

identify each physician who had attributed plaintiffs' injuries to one of defendants'

specific products. In granting the writ, the Supreme Court reasoned:

Under these facts, the trial court properly could reach only one conclusion. Requiring the plaintiffs to answer an interrogatory linking each plaintiff's injuries with a particular product will simplify the case, streamline costs to both plaintiffs and defendants, conserve judicial resources, and aid the trial court in preparing a plan for the trial of these cases. We hold, therefore, that the trial court's denial of the defendants' motion to compel constituted a clear abuse of discretion.

Id. The standard under TUTSA should be no less stringent. This Court should make clear that a TUTSA plaintiff is required to disclose its trade secrets with reasonable particularity, consistent with the disclosures required by the *Zenimax Media* court. 2015 WL 11120582, at *3.

B. Dropping a boxcar of documents is insufficient disclosure.

The Texas Rules of Civil Procedure permit a party to specify and produce documents in lieu of answering only “[i]f . . . **the burden** of deriving or ascertaining the answer **is substantially the same** for the requesting party as for the responding party. . . .” TEX. R. CIV. P. 197.2. The rule does not provide courts with discretion to disregard this standard. *Walker*, 827 S.W.2d at 840 (“A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law

correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.”).

Here, Relators submitted affidavits from two experts attesting under penalty of perjury that it would take over 1,500 hours and more than \$1 million in expert fees to review the documents produced in lieu of a fair interrogatory answer defining the alleged trade secrets at stake. (S.R. Tab 7, S.R.02571 at ¶5; see S.R. Tab 7, S.R.02574 at ¶ 5). In contrast, Sanchez came forward with no objection that providing a narrative response imposed an undue burden on it or was not possible. See *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (“A party resisting discovery . . . cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order.” (internal citations omitted)).

Second, as Relators’ experts attested, even if the experts spent the next six months reviewing these documents, they still would not be able to identify Sanchez’s alleged trade secret processes with any certainty. That is because,

[Sanchez] did not make it easy for the defendants when it came to identifying the components of the trade secrets. Instead of simply identifying those components, [Sanchez] provided a list of documents that were claimed to contain the information that was sought. The patchwork of documents was not exactly illuminating and to a large extent required the defendants to guess what the trade secrets were: were they comprised of the many elements mentioned in the more

than 30 documents, or only some? The inevitable element of speculation could and should have been avoided.

Fast Food Gourmet, Inc. v. Little Lady Foods, Inc., 05-CV-6022, 2007 WL 2156665, at *12 (N.D. Ill. July 26, 2007), *objections sustained in part and overruled in part*, 05-CV-6022, 2007 WL 3052944 (N.D. Ill. Oct. 18, 2007) (barring plaintiff from, *inter alia*, introducing evidence of certain alleged trade secrets that plaintiff did not specifically disclose in response to an interrogatory, even though those alleged trade secrets were referenced in certain documents produced in response to the interrogatory in part because, as the court explained, “the burden to have ascertained the precise information sought was not substantially the same for the defendants as it was for [the plaintiff]”).

Given the record and the nondiscretionary language of Rule 197.2, there is no basis in law or equity for permitting Sanchez to avoid defining its alleged trade secrets. *Able Supply*, 898 S.W.2d at 771 (granting mandamus where defendants have been subjected to millions of dollars of defense costs over the past two years without information about the basic facts underpinning the claims against them).

X. CONCLUSION AND PRAYER FOR RELIEF

Sanchez has conducted extensive discovery in the trial court. Yet, at this late stage, Relators still do not know what precise trade secrets they are accused of taking or the basis of the claims against them. Sanchez’s position that Relators should simply “go fish” and divine the alleged trade secrets from nearly 170,000

pages of material simply does not remotely satisfy Sanchez's obligations under TUTSA or Rule 197. The trial court's denial of discovery on the basis that identification of documents in lieu of answers to interrogatories was proper constituted an abuse of discretion that risks depriving Relators of the ability to defend themselves in this matter. It also promises to heap enormous costs on Relators in the form of expert and attorney's fees. The issues presented by Relators' petition will recur in Texas courts without further guidance from the courts on the expectations on plaintiffs in disclosing their alleged trade secrets in TUTSA cases. For all these reasons and because this matter presents extraordinary circumstances, Relators respectfully request that this Court grant Relators' petition for writ of mandamus.

Respectfully submitted,

DLA PIPER LLP (US)

By: /s/Christina E. Ponig

Christina E. Ponig
Texas Bar No. 24041706
Dawn Jenkins
Texas Bar No. 24074484

Wells Fargo Plaza
1000 Louisiana Street, Suite 2800
Houston, Texas 77002
Telephone: (713) 425-8400
Facsimile: (713) 425-8401
christina.ponig@dlapiper.com

RUSTY HARDIN & ASSOCIATES, LLP

Rusty Hardin
State Bar No. 08972800
Joe Roden
State Bar No. 00794549
1401 McKinney Street, Suite 2250
Houston, Texas 77010
Telephone: (713) 652-9000
Facsimile: (713) 652-9800
rhardin@rustyhardin.com
jroden@rustyhardin.com

**COUNSEL FOR RELATORS
TERRA ENERGY PARTNERS, LLC,
BENJAMIN "B.J." REYNOLDS,
MARK MEWSHAW, AND WES
HOBBS**

CERTIFICATION

I hereby certify that I have reviewed the foregoing petition and have concluded that every factual statement made in the petition is supported by competent evidence included in the Appendix, Record, and Sealed Record.

I further certify that this petition was prepared with Microsoft Word 2010, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 3,969 words.

/s/ Christina E. Ponig
Christina E. Ponig

CERTIFICATE OF SERVICE

I hereby certify that, on February 12, 2018, a true and correct copy of Relators' petition for writ of mandamus was sent through the Court's electronic filing manager, in accordance with the Texas Rules of Appellate Procedure and the Rules of the Supreme Court of Texas, to the following counsel:

Gibbs & Bruns LLP
Robin C. Gibbs
Sam W. Cruse
Brice A. Wilkinson
Colin Pogge
1100 Louisiana, Suite 5300
Houston, Texas 77002

/s/ Christina E. Ponig
Christina E. Ponig