

CAUSE NO. 2014-66167

SCOTT AND SARAH LATHAN,

*Plaintiff,*

vs.

HELPINGAHERO.ORG,

*Defendant.*

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

113<sup>TH</sup> JUDICIAL DISTRICT

**DEFENDANT, HELPINGAHERO.ORG'S MOTION FOR PROTECTIVE ORDER**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, HELPINGAHERO.ORG (HAH), Defendant herein, and files this Motion for a Protective Order. In support thereof, HAH would show unto this Honorable Court as follows:

**I.  
INTRODUCTION**

This motion stems from an attempt by Plaintiffs to circumvent the Texas Rules of Civil Procedure by using Chapter 22 of the Texas Business Organizations Code to request documents outside of the scope and limitations provided by the discovery process.

**II.  
BACKGROUND FACTS**

On November 11, 2014, Scott and Sarah Lathan, Plaintiffs herein, filed suit complaining of Helpingahero.org. Specifically, the lawsuit filed on behalf of Plaintiffs alleges that HAH made negligent misrepresentations, violated the Texas Deceptive Trade Practices Act, breached fiduciary duties and fraudulently induced Plaintiffs into accepting HAH's *gift* of a home to Plaintiffs. *See* Plaintiffs' Original Petition. Sarah Lathan has recently nonsuited her claims.

Therefore, at this time, Scott Lathan is the only Plaintiff currently pursuing any claims against HAH.

On December 10, 2014, Plaintiffs, through their counsel of record, served written discovery including, request for production and interrogatories on HAH. The very next day, December 11, 2014, HAH received a request pursuant to TEX. BUS. ORG. CODE Chapter 22 from Wayne Dolcefino, Plaintiffs' agent, to review the financial documents of HAH. The request seeks the following documents:

1. Tax Return from 2013;
2. Complete general ledger of expenditures and income for 2014.
3. Financial Documents detailing [sic] made on behalf of individual veterans in 2014;
4. Financial Documents detailing any expense reports for Meredith Iler in 2014;
5. Financial Documents detailing any credit card expenditures, including documents detailing the stated purpose for all travel and business entertainment for 2014;
6. All financial records used to conduct the 2013 audit of Helping a Hero.

*See* Dolcefino request to Iler dated December 11, 2014, a true and correct copy of said is attached hereto as Exhibit "A." Dolcefino threatened to file criminal charges if HAH fails to comply with his demand. Further, as shown in Exhibit "J" below, he followed through with those plans, and formally filed a criminal complaint against HAH on June 12, 2015, following the hearing in which he told this Honorable Court he was an Intervenor and then subsequently stated he was nonsuiting his Intervention.

All relevant documents were provided by HAH through Plaintiffs' request for production, interrogatories and disclosures. HAH objected to the production of documents that Plaintiffs were not entitled through discovery and those objections are outstanding. Plaintiffs were given

the tax records of HAH for the previous five (5) years and the tax records and audit are available on HAH's website. Furthermore, it has been explained to Plaintiffs by HAH that no donations were made for individual veterans. However, HAH did not provide expense reports or credit card expenditures as the request is not reasonably calculated to lead to the discovery of relevant information and is nothing more than an improper fishing expedition by Plaintiffs as the documents have no relevance to Plaintiffs' causes of action. HAH has a timely filed objection to this request.

While Mr. Dolcefino's request seems innocent on its face, it is HAH's belief, based upon past experience, that Mr. Dolcefino is attempting to obtain information that Plaintiff would not be entitled to obtain through the normal course of discovery. Specifically, Mr. Dolcefino has been employed by Plaintiffs' counsel, Chad Pinkerton. See Email on June 26, 2014, from Wayne Dolcefino to Susan Dowman, a true and correct copy is attached hereto as Exhibit "B." In the email, Dolcefino states, "I have been the investigator for the law firm hired to represent a veteran's family in the Helping a Hero Matter." *Id.* This was related to Mr. Pinkerton's representation of the Levine family against HAH, as discussed more thoroughly below. Mr. Dolcefino also lists the Pinkerton Law Firm as one of firms that he has provided investigative communication services. See Exhibit "P," a true and correct copy from the website of Dolcefino Consulting.

Further, similar to the email chain attached as Exhibit "C," HAH is aware of numerous emails including both Wayne Dolcefino and Chad Pinkerton, in which the individuals are discussing national media exposure against HAH. See a true and correct copy of emails dated April 1, 2014, attached as Exhibit "C."

In 2014 when HAH produced similar financial documents to Mr. Dolcefino, he did not inform HAH that he was working under a private investigator license, nor did he or Pinkerton inform HAH that they were working together in the Levine lawsuit. Then, after Dolcefino received the financials from HAH "pursuant to Chapter 22 of the Business and Organizations Code" they were used later that same day on local television news to defame HAH. The only party who had been given access to them prior to the appearance on the news and the allegations of financial impropriety was Mr. Dolcefino. This was designed to create negative publicity against HAH during the Levine lawsuit, and the attempt is being made again during this present lawsuit. Mr. Dolcefino has not conducted a financial audit of the documents he has previously obtained. Instead, as evidenced by his use of this information in the media, his purpose is keenly different than what is claimed.

HAH believes the information Mr. Dolcefino seeks to obtain will be used in the present lawsuit. Mr. Dolcefino previously prepared a three page report for Mr. Pinkerton. *See* Dolcefino Consulting Report to Chad Pinkerton dated May 8, 2014, a true and correct copy of said is attached hereto as Exhibit "D." The report begins "Dolcefino Consulting was engaged to review the financial records of Helping a Hero Inc. as part of this engagement..." *Id.* Even more telling, the report states "The focus of our review was the potential breach of fiduciary duty..." *Id.* As this Honorable Court is aware breach of fiduciary duty is one of the causes of action brought in the present suit. *See* Plaintiffs' Original Petition.

As further evidence, attached is a portion of an email string between various parties, including Mr. Dolcefino and Mr. Lathan, regarding a news story pertaining to HAH and the allegations made against it. See Exhibit "E." HAH believes that this is sufficient to believe that, at the very least, any information that Mr. Dolcefino obtains through his request, which could not

be obtained by Plaintiff through the normal course of discovery, will be turned over to Plaintiff and his counsel, Mr. Pinkerton.

Mr. Pinkerton has used HAH financial information to his advantage in the past, even though HAH has never provided such information to Mr. Pinkerton, through the course of litigation or otherwise. Specifically, in April 2014, Meredith Iler was contacted by Scott Noll with KHOU regarding a press conference given by Mr. Pinkerton. In the email correspondence, Mr. Noll asked Ms. Iler to respond to various allegations made by Mr. Pinkerton regarding alleged financial misappropriations. See attached Exhibit "F," a true and correct copy of email correspondence between Meredith Iler and Scott Noll, dated April 7, 2014. If such financial information that is not relevant to the claims made by Scott Lathan is provided to Mr. Pinkerton, and used in news conferences and media blitzes, HAH will be placed at a disadvantage during the pendency of this litigation.

While Mr. Dolcefino has made representations that he has been hired by Mr. Pinkerton, as evidenced in Exhibit "B" above, he has also represented that he is acting directly on behalf of veterans, including Plaintiff, Scott Lathan. In an email dated May 1, 2014, Dolcefino was given permission by Scott Lathan to examine HAH's documents pertaining to Scott and Sarah Lathan. See Email dated May 1, 2014 from Scott Lathan to Wayne Dolcefino, a true and correct copy of said email is attached hereto as Exhibit "G." In the Plea in Intervention filed just prior to the previous oral hearing in which the Motion for Protection was scheduled, Mr. Dolcefino stated "Dolcefino Consulting has been investigating Helping A Hero on behalf of war heroes and their families since 2013, including Eddie Wright, Marty Gonzalez, the Massamino Family, the Levine Family, *Scott and Sarah Lathan*, and others." See a true and correct copy of the Plea in Intervention, attached as Exhibit "H" (emphasis added).

Moreover, as stated above, this is not the first time these tactics have been employed. In the suit styled *Estate of Hunter N. Levine v. Helping a Hero*, wherein the Plaintiff was represented by Mr. Pinkerton, Mr. Dolcefino sent a request to HAH seeking documents. See Dolcefino letter to Meredith Iler dated January 30, 2014, a true and correct copy of said request is attached hereto as "Exhibit I." Dolcefino was acting in the same capacity for Plaintiffs counsel, Chad Pinkerton, as he is in the present matter.

In the *Levine* matter, the same scenario emerged as in the present case. Discovery was propounded by Mr. Pinkerton on behalf of the Plaintiffs, followed by Mr. Dolcefino's request to HAH seeking the documents. Exhibit "I." Further, similar to the *Levine* matter, Mr. Dolcefino has once again filed a criminal complaint against HAH for allegedly refusing to produce documents. See Exhibit "J," a true and correct copy of correspondence from Mr. Dolcefino to Devon Anderson dated June 12, 2015. In the present matter, after the hearing in which the Motion for Protection was passed, Mr. Dolcefino subsequently forwarded Exhibit "I" to the District Attorney. Not only has Mr. Dolcefino shared financial documents he has obtained from HAH, he has also filed complaints with the DA, alleging HAH's criminal and financial misconduct. Therefore, HAH believes the protection is necessary from the baseless and continuous attempts of prosecution by Mr. Dolcefino.

HAH anticipates, based upon prior actions, that once Mr. Dolcefino obtains the requested information, he will provide it to Mr. Pinkerton, who will then use it unfairly and prejudicially to HAH. Specifically, in a press release dated June 11, 2015, Mr. Dolcefino stated that HAH was filing the Motion for Protection to "keep secrets from the public." See attached Exhibit "K." Further, the day of the hearing, in which the Motion for Protection was not even heard by this Honorable Judge, Mr. Dolcefino again issued a press release, stating that this Honorable Court

“rejected attempts by the controversial Houston Veteran’s Charity Helping a Hero to conceal 2014 financial records.” See attached Exhibit “L.”

Further, Mr. Dolcefino has recently sent *another* request to HAH, seeking various documents from January 1, 2015 to the present. See a true and correct copy of correspondence from Wayne Dolcefino dated September 14, 2015, attached as Exhibit “M”. In this request, Mr. Dolcefino seeks not only documents that the District Attorney has previously told him he is not entitled to obtain, but also documents that Plaintiff sought in the present lawsuit. At the very least, HAH should not be required to produce any documents requested by Mr. Dolcefino until the present matter is resolved.

Based upon Mr. Dolcefino’s complaints to the District Attorney’s office, a 9 month investigation was conducted before the case was closed without requiring a Grand Jury determination. Subsequent to Mr. Dolcefino obtaining prior records from HAH, an independent audit was performed, proving that no money was missing; a complete copy of the audit can be found on HAH’s website. Finally, HAH received the Better Business Bureau’s certification as a transparent and accountable charity. See attached Exhibit “M,” a true and correct copy of correspondence from the Better Business Bureau dated February 25, 2015.

HAH is not attempting to keep secrets or conceal anything. HAH believes there is a clear link between Mr. Dolcefino, Mr. Pinkerton and Plaintiff, Scott Lathan. Through Mr. Dolcefino, Plaintiff is attempting to circumvent the Texas Rules of Civil Procedure by using Chapter 22 of the Texas Business Organizations Code to obtain documents outside of the scope of discovery and in an effort to avoid the limitations provided by the Rules. While Mr. Dolcefino may claim that is he pursuing his own interests and agenda, there is a clear connection between Plaintiff, his

counsel and Mr. Dolcefino. As such, HAH would seek protection from documents that may not otherwise be discoverable or admissible in the current litigation.

As stated above, a nearly identical Motion for Protection was previously filed on behalf of HAH, and set for an oral hearing. At the time of the hearing, Mr. Dolcefino indicated that he intervened in the lawsuit, which then made his demand and the corresponding request for protection moot since he was then required to abide by the Rules of Discovery. Subsequently, Mr. Dolcefino nonsuited his Intervention, thus again making the request for protection ripe for a ruling from this Honorable Judge.

### III. ARGUMENT AND ANALYSIS

The Texas Rules of Civil Procedure list the permissible forms of discovery that may be sought in a lawsuit. Tex. R. Civ. Pro. 192.1(a-g). None of the permissible forms of discovery include a public inspection request to an eleemosynary institution. *Id.* Plaintiffs are attempting to circumvent the Texas Rules of Civil Procedure to obtain information regarding HAH's finances which is not reasonably calculated to lead to the discovery of admissible and/or relevant evidence.

Several courts have held that only the permissible forms of discovery should be used to obtain information with regard to a pending lawsuit. In *United States v. Weber Aircraft Corp.*, the United States Supreme Court admonished against using the Freedom of Information act to circumvent discovery limitations. 465 U.S. 792, 801-02 (1984). The Court stated, "respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA." *Id.*



Additionally, the Attorney General of Texas Public Information Handbook 2014<sup>1</sup>, states that Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery used in litigation. *Thomas v. Colwyn*, 71 S.W.3d 473, 487 (Tex. App. —Austin 2002, no pet.); Attorney General Opinion JIM-1048 at 4 (1989). Section 552.103(a) provides,

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

TEX. GOV'T CODE § 552.103(a). Although the information sought may be information that the general public is entitled to, the literal language of the statute assumes the information is public yet the legislature provided an exception for the very specific purpose of protection disclosure during litigation purposes due to the discovery process. *See Colwyn v. City of Garland*, 994 S.W.2d 258, 264-65 (Tex.App.—Austin 1999, no pet.).

Specifically, in the present case, since the Attorney General *may be* a party in this litigation, the Government Code is applicable. As such, information like what has been requested by Mr. Dolcefino is subject to §552.103, and therefore, Mr. Dolcefino cannot circumvent the rules of discovery in requesting this information. To do so would provide Plaintiffs with an unfair advantage, and unnecessarily prejudice HAH.

While there is no precedent regarding the Texas Business Organizations Code Chapter 22, it is clear from identical statutes allowing for the release of information, the discovery process should not be circumvented. Both the Federal and Texas precedent states that discovery is the sole process to obtain information during the pendency of a lawsuit. Plaintiffs are

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<sup>1</sup> Pg. 81, [https://www.texasattorneygeneral.gov/ag\\_publications/pdfs/publicinfo.hb.pdf](https://www.texasattorneygeneral.gov/ag_publications/pdfs/publicinfo.hb.pdf).

attempting to circumvent the Texas Rules of Civil Procedure by gaining access to documents that are protected and are otherwise precluded from obtaining through discovery as the documents are not relevant to the present litigation.

HAH seeks protection from this Honorable Court to prevent the disclosure of this information. Plaintiffs' abuse of Chapter 22 of the Texas Business Organizations Code is clearly against the legislative intent that nonprofit corporations operate transparently for their donors benefit and not so that Plaintiffs may gain access to documents outside of the scope of discovery. *Knapp Med. Ctr., Inc. v. Grass*, 443 S.W.3d 182, 188 (Tex. App. Corpus Christi 2013, pet. denied)(stating the legislative intent for Chapter 22).

Moreover, HAH will not be able to properly object to the documents as HAH has done through discovery and will unfairly prejudice the HAH due to the inability of HAH to object. It is clear that Dolcefino's request, as Plaintiffs' agent, is nothing more than an improper attempt to circumvent the Texas Rules of Civil Procedure and the protections afforded to parties in litigation and HAH seeks this Court's protection.

Just as troubling as the clear abuse of the discovery process is that Mr. Dolcefino has threatened criminal action if his demand is not met. *See* email from Dolcefino to Chris Tritico dated May 5, 2014, a true and correct copy is attached hereto as Exhibit "O." Pursuant to Rule 4.04(b), "a lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to gain an advantage in a civil matter." TEX. Disc. R. PROF. CON. 4.04(b).

HAH believes that it is being unfairly harassed and unjustly targeted by private investigator Wayne Dolcefino as a means for something beyond looking for the truth in the financial records of the charity. HAH believes that Mr. Dolcefino's continued publicized threats

of criminal prosecution against HAH are harming HAH in the contemporaneous civil suits filed by Chad Pinkerton against HAH, including the current Lathan lawsuit, which HAH contends is frivolous and full of false allegations against the charity.

Mr. Dolcefino complained to the Attorney General's office in 2014, and persuaded this office to open a charity review of HAH, which is has been undergoing since 2014. At this time, the AG's office has reviewed the 2011, 2012 and 2013 financial records, and will begin reviewing the 2014 financial records as soon as the 2014 audit is complete. HAH believes that this scrutiny of HAH by the public is welcome so long as the public uses the information honestly and for a just purpose. The AG is currently conducting that scrutiny, and HAH is cooperating fully.

HAH hereby requests that this Honorable Court grant its Motion for Protective Order and order Plaintiffs' to halt circumventing the Texas Rules of Civil Procedure by improperly using disclosure statutes to obtain documents that Plaintiffs could request in discovery and/or documents that would be outside of the scope of discovery pursuant to the Texas Rules of Civil Procedure.

#### **IV. PRAYER**

WHEREFORE PREMISES CONSIDERED, HELPINGAHERO.ORG , Defendant herein respectfully request that this Honorable Court grant its Motion for a Protective Order thereby ordering the practices of Plaintiff stated above halted and all other remedies Defendant may be entitled, in law or equity.

Respectfully submitted,

**LECLAIRRYAN**

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument was forwarded by facsimile, on this 16<sup>th</sup> day of September, 2015, to the following:

***Via Facsimile: (713) 360-6810***  
C. Chad Pinkerton  
Benjamin R. Roberts  
The Pinkerton Law Firm, PLLC  
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