

CAUSE NO. 2018528740

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DOLCEFINO
COMMUNICATIONS, LLC DBA
DOLCEFINO CONSULTING,
Plaintiff,

v.

TEXAS TECH UNIVERSITY,
Defendant.

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IN THE DISTRICT COURT

LUBBOCK COUNTY, TEXAS

99th JUDICIAL DISTRICT

**DEFENDANT’S MOTION TO QUASH THE DEPOSITION NOTICE OF TEXAS TECH
UNIVERSITY’S CORPORATE REPRESENTATIVE,
AND MOTION FOR PROTECTIVE ORDER**

Defendant, Texas Tech University (“TTU”) moves for protection from Plaintiff Dolcefino Communications, LLC DBA Dolcefino Consulting’s (“Dolcefino”) Notice of Intention to Take the Oral Deposition of Texas Tech University, attached here as **Exhibit A** (“Deposition Notice”). This Court should quash the deposition notice and protect TTU and its witness because TTU objects to the time of the deposition, noticed for July 22, 2019, and because the discovery sought is irrelevant, not calculated to lead to the discovery of admissible evidence, overbroad, harassing, would cause an undue burden and unnecessary expense to TTU, and seeks discovery of information that is privileged and includes attorney-client communications.

Pursuant to Texas Rule of Civil Procedure 199.4, TTU is filing this Motion for Protective Order within three business days after the date of service of the deposition notice, which entitles TTU to have the deposition notice automatically stayed pending a ruling from the Court on this Motion for Protective Order.

I. Background

On April 25, 2018, Dolcefino filed its Second Amended Petition for mandamus relief under Section 552.321 of the Texas Government Code (contained in the Texas Public Information Act

or “PIA”), seeking to compel TTU to release records in response to various Plaintiff’s open records requests. While Dolcefino’s petition referenced a total of 45 requests (described as R1–45), Dolcefino actually brought claims and sought mandamus relief for only 41 requests—R-1–R-25, R-27, R-28, R-30, and R-33–R-45. *See* Plaintiff’s Second Amended Petition, 20–24. After an interlocutory appeal and a ruling favorable to TTU from the 7th Court of Appeals that dismissed claims related to requests 1-25,¹ and Dolcefino’s non-suit in open court on June 7, 2019 of his claims related to requests 34, 38, and 39, only 13 live claims (Requests 27, 28, 30, 33, 35, 36, 37, 40–45) remain in Plaintiff Dolcefino’s live pleading in this cause, his Second Amended Petition.²

Those thirteen claims all seek documents that exist and are in TTU’s possession, but that TTU is withholding from disclosure based on legal exceptions from disclosure upheld by letter rulings from Attorney General’s Office. TTU has raised the following bases for withholding the information:

Request 27: Texas Government Code §§ 552.107(1) (attorney-client privilege and attorney-work product); 552.111(Deliberative process privilege); 552.117 (Personal information of government employee made confidential under 552.024); and 552.1235 (Identity of private donor to institute of higher education)

Request 28: Texas Government Code §§ 552.107(1) (attorney-client privilege and attorney-work product); 552.111(Deliberative process privilege); 552.117 (Personal information of government employee made confidential under 552.024); and 552.1235 (Identity of private donor to institute of higher education)

Request 30: Texas Government Code § 552.111(Deliberative process privilege)

¹ The trial court had also dismissed Dolcefino’s claims for a declaratory judgment for want of jurisdiction. That ruling was not appealed, so those claims are not longer a part of this case.

² Dolcefino has also filed a “supplemental petition” under this same cause number related to another public information request made in November 2018. This “supplemental petition” was apparently filed because the Court had previously ruled that no further claims regarding public information requests would be entertained in this Cause number and that if Dolcefino wished to bring additional claims, he would need to raise those in a new petition. The “supplemental petition” will be the subject of a different motion to be filed in the near future.

- Request 33: Texas Government Code § 552.103 (Litigation exception)
- Request 35: Texas Government Code §§ 552.021 (not public information); 552.103 (litigation exception for information not subject to 552.022); 552.104 (Competition and Bidding)
- Request 36: Texas Government Code §§ 552.021 (not public information); 552.103 (litigation exception for information not subject to 552.022); 552.104 (Competition and Bidding)
- Request 37: Texas Government Code §§ 552.103 (litigation exception 552.022); and 552.107(1) (attorney-client privilege and attorney-work product); 552.111(Deliberative process privilege); 552.117 (Personal information of government employee made confidential under 552.024); and 552.1235 (Identity of private donor to institute of higher education)
- Request 40: Texas Government Code §§ 552.103 (litigation exception) and 552.104 (Competition and Bidding)
- Request 41: Texas Government Code §§ 552.103 (litigation exception) and 552.104 (Competition and Bidding)
- Request 42: Texas Government Code §§ 552.101 (Confidential information (related to 51.971(c)(1) of the Education Code); 552.107 (Attorney Client privilege and attorney work product)
- Request 43: Texas Government Code §§ 552.101 (Confidential information (related to 51.971(c)(1) of the Education Code); 552.107 (Attorney Client privilege and attorney work product)
- Request 44: Texas Government Code §§ 552.021 (not public information); 552.103 (litigation exception for information not subject to 552.022); 552.104 (Competition and Bidding)
- Request 45: Texas Government Code §§ 552.021 (not public information); 552.103 (litigation exception); and 552.104 (competition and bidding)

Thus the only legal issues in this lawsuit are whether the legal exceptions that TTU asserted for withholding the documents are applicable or not. If TTU's exceptions from disclosure are applicable, then TTU may withhold the documents; if they are not applicable, then TTU must release the documents.

Dolcefino has filed Plaintiff's Notice of Intent to take the Oral and Videotaped Deposition of Texas Tech University. TTU objects to and seeks protection from the Court from all of the listed deposition topics sought by Plaintiff.

TTU also objects to the time of deposition, namely the date of July 22, 2019, because such date could deprive TTU of the presence of its lead counsel due to current medical care and injury recovery of its lead counsel, Cynthia Morales, who suffered a significant knee injury on June 10, 2019 and remains under medical care. TTU also objects to the time of deposition because, given the large number of documents involved and the broadness of the information sought, TTU's representative could not reasonably prepare for deposition by the date noticed, especially considering lead counsel's current limited mobility and ability to prepare the witness for deposition. Additionally, TTU has substantive objections to the discovery sought which cannot be heard by the Court before July 22, 2019.

II. Argument & Authority

A. Objection to time of deposition.

TTU objects to the currently noticed date of July 22, 2019 because such date could deprive TTU of the presence of its lead counsel due to her current medical condition.

Cynthia Morales, lead counsel for TTU, suffered a fall on June 10, 2019, resulting in serious damage to her medial collateral ligament (MCL) of her left knee and possible damage to her meniscus. She is currently in a brace to enable the healing of the MCL and primarily working from home. She has limited mobility and remains under doctor's care.

Ms. Morales has an appointment with her orthopedic doctor for a followup on June 26, 2019. On that date, the doctor will assess the injury and determine a further course of treatment. At that time as well, the doctor will take steps to evaluate potential damage to Ms. Morales's

meniscus. The doctor informed Ms. Morales that once the MCL is healed, he plans to send her for an MRI to determine if the meniscus is also damaged. If the meniscus is damaged, surgery will have to be scheduled. At this time then, Ms. Morales does not know the full extent of her knee damage, what further course of treatment will be required, what restrictions will be placed on her, and whether she will be available to be present for the deposition noticed for June 22 or for any meetings with the client prior to that date. TTU therefore asks this Court to quash the deposition notice and protect TTU from a deposition set for any date that would not permit its lead counsel to be present.

Likewise, TTU objects to the date and time because, as discussed *infra*, because of the broadness of the discovery sought, TTU cannot reasonably prepare for deposition within the time period before the noticed deposition, especially given lead counsel's limited mobility and ability to assist in preparation for deposition.

Lastly, TTU objects to the date and time because TTU has substantive objections to the discovery sought and seeks the Court's protection, but due to the Court's busy schedule, no hearing date is available prior to July 22, 2019.

B. The Court should grant protection against the sought discovery because it is irrelevant, not calculated to lead to the discovery of admissible evidence, overbroad, harassing, would cause an undue burden and unnecessary expense to TTU, and seeks discovery of information that is privileged and includes attorney-client communications.

TTU also seeks protection from the Court from the sought discovery because the discovery topics listed by Dolcefino seek discovery that is irrelevant, not calculated to lead to the discovery of admissible evidence, overbroad, harassing, would cause an undue burden and unnecessary expense to TTU, and seeks discovery of information that is privileged and includes attorney-client communications.

1. Requested discovery on cost estimates

Plaintiff seeks discovery on costs estimates, namely:

1. How TTU calculated any Cost Estimate to Plaintiff. This topic includes, but is not limited to:
 - a. what specific tasks were contemplated when calculating costs for labor;
 - b. how the document retrieval charges were calculated;
 - c. how it was decided to charge a document retrieval fee at all;
 - d. how costs for material were calculated;
 - e. how the costs for programming and manipulation of data were calculated;
 - f. what specific tasks were contemplated when estimating the costs for programing and manipulation of data;
 - g. how costs for overhead were calculated; and
 - h. how any other line item contained in any of the Cost Estimates were calculated.

Deposition Notice, p. 8.

Cost estimates are irrelevant to any of the issues in this lawsuit, will not lead to the discovery of any admissible evidence, and are, therefore, harassing. The issue in this lawsuit is whether TTU must release the requested information to Dolcefino, and more specifically, whether the exceptions that TTU asserts for withholding the requested information apply or not. TTU is not withholding any information based on costs estimates, or the payment or non-payment of any sums. How TTU calculated any cost estimate will not lead to the discovery of any admissible evidence on whether any of the bases for withholding asserted by TTU are applicable or not or whether the documents should be released. Because this deposition topic seeks discovery that is irrelevant to any of the issues in this lawsuit, will not lead to the discovery of any admissible evidence, and is harassing, the Court should enter a protective order protecting TTU from discovery on this topic.

2. Requested discovery on TTU's Search for Documents

Plaintiff seeks discovery on how TTU searched for documents, namely:

2. How TTU searched for documents responsive to each of the ORRs submitted by Plaintiff. This topic includes, but is not limited to:

- a. how TTU interpreted the phrases and terms used in the ORRs;
- b. TTU's methodology in identifying locations and sources of responsive documents;
- c. the identification of any possible source of responsive documents;
- d. TTU's methodology in identifying responsive documents;
- e. The physical location of responsive documents, including the physical location of any responsive documents maintained in electronic or magnetic form;
- f. What form or forms responsive documents exist in;
- g. if responsive documents exist in electronic or magnetic form, what methodology was used to search for responsive ESI;
- h. what search terms, if any, were used;
- i. what custodians were searched; and
- j. the identification of every custodian who may have responsive documents.

Deposition Notice, p. 8. This request likewise seeks information which is irrelevant to any of the issues in this lawsuit, will not lead to the discovery of any admissible evidence, and is, therefore, harassing.

The issue in this lawsuit is not how TTU searched for documents, but rather, whether the legal basis for withholding documents which TTU has asserted is applicable. TTU does not deny having responsive documents—TTU is simply abiding by the OAG rulings that indicate that such documents may be withheld because certain bases for withholding apply. Section 552.321, which is the sole basis for this Court's jurisdiction, does not provide a cause of action regarding how a search is conducted. *See* How TTU conducted its searches will not lead to the discovery of any admissible evidence on whether any of the bases for withholding asserted by TTU are applicable or not or whether the documents should be released. Moreover, this request seeks a large amount of detailed information that will take a great deal of time to prepare for on a topic that is irrelevant to any issue in this lawsuit. Because this deposition topic seeks discovery that is irrelevant to any of the issues in this lawsuit, will not lead to the discovery of any admissible evidence, and is harassing, the Court should enter a protective order protecting TTU from discovery on this topic.

3. Requested discovery seeking legal opinions and privileged information

Plaintiff's deposition topics 3-7 seek:

3. Whether TTU is contending that some or all of the documents requested by any of the ORRs are either exempted or protected from disclosure;
4. For any requested categories of documents contained in any of the ORRs that TTU contends is either exempted or protected from disclosure, the legal and factual basis for that contention;
5. The factual and legal allegations contained in Plaintiff's live petition, amendments, thereto, or supplements on file at the time of this deposition.
6. The factual and legal allegations contained in TTU's Original Answer on file at the time of this deposition; and
7. The factual and legal allegations contained in any of TTU's letters to the Texas Attorney General in connection to any of the ORRs.

All of these requests seek discovery on legal matters that are not properly the subject of a deposition and would impinge on attorney-client communications and attorney-product privileges. This Court should grant TTU protection from discovery inquiring into such privileged matters.

4. Requested discovery for information not related to any claims before this Court

Plaintiff also seeks discovery on

9. The existence of any documents concerning or in connection to any disciplinary action, internal investigation, or complaints regarding Kent Hance since January 1, 2014; and
10. The existence of any documents evidencing either the expenses or revenues of the Texas Tech University football team between January 1, 2015, and the present.

These deposition topics do not relate to any of the live 13 claims before this Court, but rather to claims that are not before this Court. Whether or not TTU has documents on these topics for which Dolcefino is **not** seeking any mandamus relief (or which have been stuck by the Court of Appeals) and are **not** part of Dolcefino's remaining 13 live claims in his Second Amended Petition, will not lead to the discovery of any admissible evidence on whether TTU's bases for withholding documents on the 13 claims actually before this Court. Because this deposition topic

seeks discovery that is irrelevant to any of the issues in this lawsuit, will not lead to the discovery of any admissible evidence, and is harassing, the Court should enter a protective order protecting TTU from discovery on this topic.

III. Conclusion

For the reasons cited above, the Court should protect TTU and its witness from the deposition topics sought because the discovery sought is overbroad, constitutes an impermissible fishing expedition, is unlikely to produce new relevant information, and is harassing. *See generally In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223-24 (Tex. 2016) (Discovery requests must be reasonably tailored to include only relevant matters.); *see also In re Univar USA Inc.*, 311 S.W.3d 186, 189 (Tex. App.—Beaumont 2010, orig. proceeding).

IV. Prayer

WHEREFORE, PREMISES CONSIDERED, Texas Tech University prays that this Court grant this motion and quash the deposition and enter a protective order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via e-serve by eFileTexas.gov on this 25th day of June 2019 to:

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CAUSE NO. 2018528740

tb

DOLCEFINO COMMUNICATIONS, LLC DBA
DOLCEFINO CONSULTING,

PLAINTIFF,

VS.

TEXAS TECH UNIVERSITY,

DEFENDANT.

IN THE DISTRICT COURT

99TH JUDICIAL DISTRICT

LUBBOCK COUNTY, TEXAS

PLAINTIFF'S NOTICE OF INTENT TO TAKE THE ORAL AND VIDEOTAPED
DEPOSITION OF TEXAS TECH UNIVERSITY

TO: Texas Tech University, by and through its attorneys of record Cynthia Morales,
P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548.

Please take notice that pursuant to Rule 199.2 of the Texas Rules of Civil Procedure, Dolcefino Communications, LLC, Plaintiff in the above-entitled and numbered cause, by and through its attorneys of record, will take the oral and videotaped deposition of witnesses who are designated by Defendant Texas Tech University ("Defendant"), commencing on July 22, 2019 at 9:00 am. at 1508 Knoxville Avenue, Lubbock, Texas 79409.

The deposition will take place before a certified court reporter and will be recorded by stenographic means and by videotape. The deposition will continue from day to day until completed.

Defendant is hereby notified to designate and prepare one or more witnesses who will testify on its behalf regarding the topics set forth in the attached Exhibit A.

Respectfully Submitted,

THE PETTIT LAW FIRM

By: /s/ Julie Pettit

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The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon all counsel of record *via Email* on June 20, 2019:

/s/ Julie Pettit _____

Julie Pettit

EXHIBIT A

I. Definitions

The following definitions apply:

1. "Communication" means all oral, written, or electronic statements, representations, utterances, or other means of conveying information to another.
2. "Concerning" means in any way constituting, reflecting, concerning, containing, pertaining to, referring to, relating to, indicating, showing, describing, evidencing, discussing, mentioning, embodying, or computing.
3. "Cost Estimates" means, collectively, all the cost estimates created by Texas Tech University in connection to any of the ORRs.
4. "Defendant," "You," "Your," "Texas Tech," and "TTU" refer to Texas Tech University, including without limitation any assumed name under which it does business, and all of its predecessors, successors, wholly or partially owned subsidiaries, parents, affiliates, and all past or present agents, representatives, members, managers, partners, employees, officers, consultants, attorneys, entities acting in joint-venture or partnership relations with it and any other person acting or purporting to act on its behalf.
5. "Document" shall be synonymous in meaning and equal in scope to the usage of the term "documents and tangible things" in Rule 192.3(b) of the Texas Rules of Civil Procedure. "Document" also includes, without limitation, all printed matter, electronic mail, materials stored on computer hard drives, diskettes, tapes, any other computer media, and any other information stored in any magnetic or electronic format.

6. “ESI” stands for electronically stored information and means data or information that exists in electronic or magnetic form.

7. “Evidence” or “evidencing” means constituting or having some bearing on an indicated subject or mentioning the subject, even if only in passing, including but not limited to, any document or communication that constitutes, contains, embodies, comprises, reflects, identifies, states, refers to, deal with, comments on, responds to, describes, involves, or is in any way pertinent to that subject.

8. “Identify” or “Identification”:

a. When used in reference to a person, “identify” or “identification” means to state his or her full name, present or last known residence address, present or last known business address, and telephone number.

b. When used in reference to a public or private corporation, governmental entity, partnership, or association, “identify” or “identification” means to state its full name, present or last known business address or operating address, the name of its Chief Executive Officer, and telephone number.

c. When used in reference to a document, “identify” or “identification” shall include statement of the following:

- i. the title, heading, or caption, if any, of such document;
- ii. the identifying number(s), letter(s), or combination thereof, if any; and the significance or meaning of such number(s),

letter(s), or combination thereof, if necessary to an understanding of the document and evaluation of any claim of protection from discovery;

- iii. the date appearing on such document; if no date appears thereon, the answer shall so state and shall give the date or approximate date on which such document was prepared;
- iv. the number of pages and the general nature or description of such document (i.e., whether it is a letter, memorandum, minutes of a meeting, etc.), with sufficient particularity so as to enable such document to be precisely identified;
- v. the name and capacity of the person who signed such document; if it was not signed, the answer shall so state and shall give the name of the person or persons who prepared it;
- vi. the name and capacity of the person to whom such document was addressed and the name and capacity of such person, other than such addressee, to whom such document, or a copy thereof, was sent; and

9. the physical location of the document and the name of its custodian or custodians.

10. "Lawsuit" means the action styled *Dolcefino Communications, LLC dba Dolcefino Consulting v. Texas Tech University*, Cause No. 2018528740, pending in the 99th Judicial District Court of Lubbock County, Texas.

11. "ORRs" means, collectively, the requests for records served pursuant to the Texas Public Information Act by Dolcefino Communications, LLC on Texas Tech University that are now the subject of the Lawsuit.

12. "Person" means and includes the plural and the singular and includes natural persons, corporations, firms, associations, partnerships, joint ventures, any other form of legal business entity, or any governmental agency, department, units, or any subdivision thereof.

13. "Plaintiff" means Dolcefino Communications, LLC.

14. "TPIA" means the Texas Public Information Act.

15. The use of a verb in any context shall be construed as the verb in all tenses. The plural shall include the singular and the singular shall include the plural.

16. The word "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the deposition topic inclusive rather than exclusive.

17. Whenever the singular is used herein it also includes the plural, and vice versa. Whenever the conjunctive is used herein it also includes the disjunctive, and vice versa.

II. Deposition Topics

1. How TTU calculated any Cost Estimate to Plaintiff. This topic includes, but is not limited to:
 - a. what specific tasks were contemplated when calculating costs for labor;
 - b. how the document retrieval charges were calculated;
 - c. how it was decided to charge a document retrieval fee at all;
 - d. how costs for materials were calculated;
 - e. how the costs for programing and manipulation of data were calculated;
 - f. what specific tasks were contemplated when estimating the costs for programing and manipulation of data;
 - g. how costs for overhead were calculated; and
 - h. how any other line item contained in any of the Cost Estimates were calculated.
2. How TTU searched for documents responsive to each of the ORRs submitted by Plaintiff. This topic includes, but is not limited to:
 - a. how TTU interpreted the phrases and terms used in the ORRs;
 - b. TTU's methodology in identifying locations and sources of responsive documents;
 - c. the identification of any possible source of responsive documents;
 - d. TTU's methodology in identifying responsive documents;
 - e. the physical location of responsive documents, including the physical location of any responsive documents maintained in electronic or magnetic form;
 - f. what form or forms responsive documents exist in;
 - g. if responsive documents exist in electronic or magnetic form, what methodology was used to search for responsive ESI;
 - h. what search terms, if any, were used;
 - i. what custodians were searched; and
 - j. the identification of every custodian who may have responsive documents.
3. Whether TTU is contending that some or all of the documents requested by any of the ORRs are either exempted or protected from disclosure.
4. For any requested categories of documents contained in any of the ORRs that TTU contends is either exempted or protected from disclosure, the legal and factual basis for that contention.
5. The factual and legal allegations contained in Plaintiff's live petition, amendments thereto, or supplements on file at the time of this deposition.
6. The factual and legal allegations contained in TTU's Original Answer on file at the time of this deposition.
7. The factual and legal allegations contained in any of TTU's letters to the Texas Attorney General in connection to any of the ORRs.
8. The existence of any documents concerning or in connection to any investigation of the alleged mistreatment of Adam James by Mike Leach.

9. The existence of any documents concerning or in connection to any disciplinary action, internal investigation, or complaints regarding Kent Hance since January 1, 2014.
10. The existence of any documents evidencing either the expenses or revenues of the Texas Tech University football team between January 1, 2015, and the present.