

### **3. A decision from the Court of Appeals of Texas denying a request to overturn an order requiring certain parties to produce accounting database records in their dynamic native format as opposed to in static Excel files.**

In *In re Blair*, 2022 WL 3135357 (Tex. Ct. App. Aug. 5, 2022), Chief Justice Yvonne T. Rodriguez for the Court of Appeals of Texas addressed a request by certain Relators in the underlying dispute for a writ of mandamus directing the trial court to vacate its discovery order authorizing access to native accounting database files, where the Relators had previously produced the files in static Excel spreadsheets.

In the underlying dispute, certain real parties in interest to the claims (referred to as the “Real Parties”) alleged they had not received water-sale-income proceeds to which they are entitled under a contract with Relators, who sell water generated on their ranch. *Id.* at \*1. The Real Parties argued that Relators had been generating water to sell to other companies they own while representing they did not have water for the Real Parties. Chief Justice Rodriguez stated that the Real Parties had maintained throughout the litigation that Relators’ accounting records would reveal key information and had requested production of their native accounting files. The native accounting files were accessible through Relators’ vendor WolfePak.

The Real Parties sought the native accounting records to have access to the searchable metadata, which would provide information regarding changes that might have been made in the files. Relators, however, discovered confidential information in the files that could not be redacted, so they produced the native files in a static Excel spreadsheet format. The Real Parties objected to this because they claimed it lacked the searchable metadata. Chief Justice Rodriguez characterized the dispute as one “over the form in which the requested accounting records must be produced.” *Id.* at \*2.

Describing the procedural history, Chief Justice Rodriguez stated that in July 2020 Relators agreed to produce the requested accounting records in native format to avoid having the trial court appoint an auditor. Relators had not voluntarily produced the files by March 2021, and the Real Parties then served requests for production. Relators objected to these requests as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. But the Real Parties’ expert, a certified fraud examiner and master analyst in financial forensics, opined on irregularities in the records and the need for the native files to analyze intercompany transactions and an embedded audit trail that “may reveal if expense records were manipulated after the suit was filed.”

In July 2021, Relators agreed pursuant to a Rule 11 agreement to produce the WolfePak accounting databases within two weeks in the same format and with the same information as was available to Relators or their experts. But Relators did not comply

with this agreement because they discovered confidential information in the records, which led to the production of static Excel spreadsheets. Relators claimed that the Rule 11 agreement “only required them to disclose the information in Excel spreadsheet format, which still allows [the Real Parties] to examine whether financial information has been manipulated.” *Id.* at \*3. The special master overseeing the Rule 11 agreement rejected this reasoning, but Relators filed a response to a motion to enforce the agreement, arguing it was impossible to comply with the agreement because they would not be able to redact the confidential information. The Real Parties responded that they could verify transactions and uncover manipulation “with one click, as opposed to the inordinate amount of time it would take to analyze the Excel spreadsheets.”

During a September 2021 hearing, the special master ordered that Relators produce the native files, stating that WolfePak would redact any confidential or privileged information with input from Relators, and Relators were to produce a privilege log. The documents were to be maintained as “Attorneys’ Eyes Only.” The special master also imposed sanctions on Relators. Relators objected to this order, in particular that allowing WolfePak to look through their accounting files would forfeit their attorney-client privilege. The trial court overruled Relators’ objections, leading to the instant writ of mandamus. *Id.* at \*4.

After addressing procedural issues in the writ of mandamus, Chief Justice Rodriguez turned to whether the trial court abused its discretion by ordering Relators to produce responsive records in native format. Chief Justice Rodriguez first laid out the rules under Texas state law for producing electronic data as well as on proportionality of discovery requests. *Id.* at \*5.

Chief Justice Rodriguez disagreed with the Real Parties’ argument that this litigation did not involve intrusive electronic discovery, finding that a search of Relators’ accounting databases was more intrusive than a general forensic search of something like a computer. Therefore, the analysis was to center around “whether the trial court could have reasonably determined [that the Real Parties] met their evidentiary burden of showing [Relators] defaulted on their discovery obligations, [Relators’] production was inadequate, and a search of the requested native accounting files would uncover relevant information.”

Chief Justice Rodriguez stated that the record showed that Relators agreed to produce their accounting files in native format on the condition that certain information was redacted but that their CFO determined that the WolfePak software would not allow documents to be omitted or redacted. *Id.* at \*6. She stated that Relators consulted with WolfePak’s customer support and determined that the confidential information could be removed by exporting the databases into Excel spreadsheets, which Relators represented mirrored the information contained in the native database and could be

imported into WolfePak to be viewed. Relators stated they took “a substantial amount of time to convert the databases into Excel spreadsheets,” which they immediately disclosed to the Real Parties. Relators maintained that the Excel spreadsheets protected their confidential information and were searchable in a similar manner to the native format.

Chief Justice Rodriguez pointed to the Real Parties’ expert affidavit, which disputed Relators’ claim that the spreadsheets were an adequate substitution, as the native WolfePak file “is a relational database that contains the relationships or links between different types of data, such as invoices and payments, and the Excel spreadsheets ... did not link the data in the same way, making a search of the same data in the Excel spreadsheets much more time consuming.” Additionally, the expert stated that there was evidence that a large number of changes had been made to the accounting files on dates relevant to the litigation, and a search of the native files “would reveal when and who made the changes.”

Chief Justice Rodriguez stated that “the trial court could have determined [Relators] defaulted on their obligation to produce the requested data in native form, the static Excel spreadsheet records produced by [Relators] were inadequate because they would not reveal whether the data had been manipulated, the native files would reveal whether the data had been manipulated, and the information contained in the metadata is dispositive to the issues in the case.”

Chief Justice Rodriguez therefore held that “the record supports the trial court’s decision to overrule [Relators’] objections to the special master’s order granting [the Real Parties’] motion to compel” and that Relators were not entitled to the mandamus relief. However, she directed the trial court to reform the discovery order to allow the confidentiality process to be conducted, reasoning that courts “should be mindful of protecting sensitive information and choose the least intrusive means of retrieval.” *Id.* (internal citations omitted).