

TEXAS CIVIL JUSTICE LEAGUE
400 West Fifteenth Street, Suite 1400
Austin, Texas 78701-1648
512.320.0474 (T)
www.tcjl.com

November 19, 2019

Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. 19-0845; *In re Toyota Motor Sales, U.S.A. Inc. and Toyota Motor Corporation*

To the Honorable Members of the Texas Supreme Court:

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this letter in the above-referenced cause in support of the Relator, Toyota Motor Sales, U.S.A. Inc. and Toyota Motor Corporation (hereinafter referred to as “Toyota”).

Statement of Interest

The Texas Civil Justice League (“TCJL”) is a non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair and efficient civil justice system. Since its inception in 1986, TCJL has advocated on behalf of a tort liability system that provides access to adequate judicial remedies for legitimate claims, while encouraging capital investment and job creation in this state. TCJL has directed a significant part of this advocacy towards discovery reforms designed to reduce litigation costs. To that end, TCJL has

urged both federal and state courts to adopt reasonable rules regarding electronic discovery to prevent business defendants from bearing unduly expensive, burdensome, and repetitive requests for production of electronically stored information (ESI). TCJL has also consistently advocated that discovery rules must protect sensitive proprietary and confidential information. This letter brief has been prepared in the ordinary course of TCJL's operations. No fee has been paid for the preparation or filing of this letter brief.

ARGUMENT

TCJL agrees with arguments made by *amici* Lawyers for Civil Justice and the Chamber of Commerce of the United States of America and will not reiterate them here. TCJL and its members (1) recognize the grave threat posed by hostile actors seeking confidential business and consumer data and, like Toyota, and (2) spend hundreds of millions of dollars a year to protect themselves, their employees, their vendors, and their customers from cyber crime. In this environment, courts should consider the release of *any* information to the public regarding a business's electronic information databases and infrastructure, particularly information that would enable a hostile actor to identify, locate, and attack data systems, with extreme caution and *only* after a party seeking disclosure meets a stringent burden of proof.

TCJL's concern here involves the lack of a clear standard defining "confidential" information for purposes of the more or less standard language of the protective order involved in this case. As amply demonstrated in Toyota's Petition, *In re Ford Motor Co.*, 211 S.W.3d 295 (Tex. 2006) offers guidance but no real standard, leaving disputes such as this one to be resolved in case-by-case mandamus actions arising from fact patterns that closely resemble that of *Ford*. Undoubtedly, there are better uses of precious judicial resources than adjudicating substantially similar facts over and over again, particularly when a business's confidential commercial information (not just its trade secrets, the primary concern of the pre-ESI era) has become vulnerable to incessant hacking attempts from the outside.

Above all else, businesses require predictability and a reasonable expectation of how litigation may affect their confidential information. Based on the rulings of the trial court and court of appeals here, neither exist at present. The court of appeals deferred to the trial court's "broad discretion" to grant protective orders without analysis of the *Ford* opinion's application or reasoning. "Broad discretion" addresses power, but not definitions or standards. When a business takes specific and consistent action to protect information from disclosure, up to and including limiting access to it by its own employees, spending millions of dollars every year to make sure no one

else can get it, and producing it in a court of law only under compulsion and with the apparent agreement that it could only be used in connection with specific litigation, we see the outlines of a standard that should have been applied by the trial and appellate courts to Toyota's confidential information. By emphasizing the power of the trial court, the court of appeals missed an opportunity to help future litigants through the discovery minefield and left the problem to this Court. Moreover, it is doubly unfortunate that the Dallas court of appeals missed it because of the high concentration of major corporate and other business operations in the region that look to that court for predictability.

So what does TCJL suggest that this Court do beyond requesting briefing on the merits and granting Toyota's petition? First, we would ask that this Court consider going beyond its discussion in *Ford* to develop explicit criteria defining "confidential" information. These criteria should be incorporated into the standard language of protective orders and negotiated at the front end of the discovery process. Second, if a dispute arises, as it did here, regarding the scope of the protective order, the party seeking disclosure should have to demonstrate that the benefits of disclosure outweigh the risk of harm to the business. That risk should be measured in terms of the type of information sought be disclosed and whether disclosure exposes the business

to unfair competition, diminution of capital, revenue, or market value, or liability to employees, vendors, or customers for a breach of data security. Such a standard would not just protect the business itself, but the other constituencies that implicitly rely upon and trust the security of their data in the hands of the business. Third, we would urge the Court to initiate a rulemaking process to establish formal standards so that litigants on all sides know what they are and can reasonably predict what information is and is not “confidential” and thus protected. Such a rule would bring substantially more certainty and predictability to discovery, allow businesses to invest confidently in the development and construction of electronic infrastructure to protect data from hackers (rather than from trial judges), and help prevent repetitive discovery disputes from papering the dockets of busy appellate courts. We realize that this is an unorthodox request for an *amicus curiae* submission, but we believe the seriousness of the issues in the case warrants it.

Promulgating a rule through the Court’s existing process is a far better choice than asking the Legislature to do it. This Court has consistently shown its willingness to modernize and update the Texas Rules of Civil Procedure when changing conditions and contexts so demand. The Supreme Court Advisory Committee is the best possible venue for assisting this Court in the

development of appropriate standards in these cases. Moreover, this process can begin immediately, whereas the Legislature does not convene again until January, 2021. Given the extreme sensitivity of the information at issue and the substantial risks involved in disclosure, time is of the essence.

This case does not involve only “big business.” Every business, large or small, that faces the public has the same concerns as Toyota does about confidentiality and spends a lot of money to guard it. While it might be possible for major international businesses to overcome the reputational and financial harm that hackers can and do cause when they steal data, think of what happens to a small manufacturer or retailer whose information technology database becomes suddenly exposed for all the world to see? In an era in which information technology drives business entrepreneurship and profitability but simultaneously creates massive potential liabilities that can sink a business overnight, our courts must adapt quickly to the changing nature of technological approaches to maintaining confidential commercial information. This Court can help accelerate this adaptation by accepting this case and taking the opportunity to establish clear and stable standards for discovery of this information.

CONCLUSION AND PRAYER

TCJL respectfully requests this Court to request briefing on the merits and grant Relators' petition for writ of mandamus. We further request that this Court instruct the Supreme Court Advisory Committee to draft proposed amendments to the Texas Rules of Civil Procedure consistent with this Court's ruling in this case.

Respectfully submitted,

/s/ George S. Christian

GEORGE S. CHRISTIAN
State Bar No. 04227300
400 West 15th Street, Suite 1400
Austin, Texas 78701
512.791.1429
george@thechristianco.com
**ATTORNEY FOR *AMICUS*
CURIAE TEXAS CIVIL
JUSTICE LEAGUE**

CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,177 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ George S. Christian

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amicus* letter was served on counsel of record by using the Court's CM/ECF system on the ___ day of November 2019, addressed as follows:

Counsel for Relators

Respondent

Allyson N. Ho
Bradley G. Hubbard
GIBSON, DUNN & CRUTCHER LLO
2100 McKinney Avenue, Ste 1100
Dallas, Texas 75201

Honorable Dale Tillery
134TH CIVIL DISTRICT COURT
600 Commerce Street, Box 650
Dallas, Texas 75202

Anne M. Johnson
Nina Cortell
Jason N. Jordan
HAYNES & BOONE, LLP
2323 Victory Avenue, Ste 700
Dallas, Texas 75219

Victor Vital
Benjamin T. Pendroff
BARNES & THORNBURGH LLP
2121 North Pearl Street, Ste 700
Dallas, Texas 75201

James W. Halbrooks, Jr.
Suzanne H. Waner
BOWMAN AND BROOKE LLP
5830 Granite Park, Ste 1000
Plano, Texas 75024

Winstol D. "Winn" Carter, Jr.
Claire Swift Kugler
John M. Deck
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana, Ste 4000
Houston, Texas 77002

Real Parties in Interest

Benjamin Thomas Reavis and
Kristie Carol Reavis,
Individually and as Next Friends
of E.R. and O.R., Minor Children

Counsel for Real Parties

Frank L. Branson
FRANK L. BRANSON, P.C.
4514 Cole Avenue, Ste 1800
Dallas, Texas 75205

Eric T. Stahl
LAW OFFICES OF ERIC T. STAHL

3212 Drexel Drive
Dallas, Texas 75205

Eugene A. "Chip" Brooker
Brooker Law, PLLC
750 North Saint Paul Street
Suite 600
Dallas, Texas 75201

Harry M. Reasoner
Marie R. Yeates
Benjamin H. Moss
VINSON & ELKINS LLP
1001 Fannin Street, Ste 2500
Houston, Texas 77002

Michael A. Heidler
VINSON & ELKINS LLP
2801 Via Fortuna, Ste 100
Austin, Texas 78746

Amicus Curiae
Lawyers for Civil Justice

Counsel for Amicus Curiae
Jennifer Henry
THOMPSON & KNIGHT LLP
777 Main Street, Ste 3300
Fort Worth, Texas 76102

Stephanie Dooley Nelson
THOMPSON & KNIGHT LLP
1722 Routh Street, Ste 1500
Dallas, Texas 75201

/s/ George S. Christian
George S. Christian