

CAUSE NO. 2023-30774

PINEY POINT HOMES, LLC,	§	
<i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
v.	§	
	§	HARRIS COUNTY, TEXAS
JP MORGAN CHASE BANK, N.A., et al.	§	
<i>Defendants</i>	§	333RD JUDICIAL DISTRICT

HARRIS COUNTY DISTRICT CLERK MARILYN BURGESS' OFFICIAL CAPACITY

PLEA TO THE JURISDICTION AND MOTION TO DISMISS

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To The Honorable Brittanye Morris:

COMES NOW Harris County District Clerk Marilyn Burgess, in her official capacity, who files this Plea to the Jurisdiction and Motion to Dismiss.

**I.
FACTS**

Plaintiff Piney Point Homes, LLC brings this action against eight parties, including Harris County District Clerk Marilyn Burgess, in her official capacity (“District Clerk”), after someone stole \$1,070,000 paid to a court-appointed receiver in the underlying case of *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

A. Meng claims Deng stole more than \$2 million from Piney Point Homes.

Susan Meng and Tie Deng formed a company called Piney Point Homes, LLC to conduct real estate transactions and provide construction consulting to the Houston Hua Xia Chinese School.¹ Meng’s husband, Paul Wang, loaned the company money. Piney Point failed to pay the loan, and on July 30, 2019, Meng filed the underlying suit to dissolve the company and recover \$190,000 that she claimed her partner, Deng, stole from the company.²

On April 9, 2020, Meng amended her petition to claim that Deng and his companies “absconded with more than \$2,000,000 from Piney Point.”³ Deng counterclaimed and filed seven amended third-party petitions. Deng claimed that Meng and her husband Wang committed fraud, engaged in self-dealing, denied him access to his property, and filed fraudulent liens against property to which he had an interest.⁴ On July 26, 2022, Deng petitioned the court to appoint

¹ Plaintiff’s Original Verified Petition, *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

² *Id.* at 3-5.

³ Plaintiff’s First Amended Verified Petition at 4, *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

⁴ Tie Deng’s Seventh Amended Counterclaims and Fifth Amended Third-Party Petition, *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

Robert Berleth (doing business as Berleth & Associates, PLLC) as receiver to “do any and all acts necessary to properly and lawfully conduct receivership...” The court granted the petition.⁵

B. The parties settled their claims, and the Court ordered the District Clerk to pay receiver Robert Berleth \$1,070,000 from the registry in accordance with Berleth’s “specific wiring instructions.”

Berleth liquidated Piney Point’s assets and deposited the proceeds in the court registry. In March 2023, Piney Point and Wang settled their claims for \$1,070,000. On April 3, 2023, Berleth filed an unopposed motion to disburse funds from the court registry to himself and then forward the proceeds to Wang.⁶ On April 18, 2023, the Court ordered the District Clerk’s Office to disburse this money.⁷ That order instructed the District Clerk’s Office to “immediately disburse \$1,070,000.00 from the Court’s Registry” based on the “specific wiring instructions” provided by Berleth.⁸ Berleth was ordered to then pay the funds to Wang (through his counsel) within three days of receipt.

C. The parties sent the District Clerk’s Office specific wiring instructions to deposit \$1,070,000 into Berleth’s Chase bank account.

In accordance with the Court’s disbursement order, Lang emailed the District Clerk’s Office an executed affidavit signed by Berleth and notarized by Sheli Davis. That affidavit provided the “specific wiring instructions” required by the court’s order and instructed that the funds be wired to a Bank of America account. No one disputes that this affidavit was properly executed and sent through Lang’s email to the District Clerk’s Office.

⁵ Agreed Order for Appointment of Receiver, July 20, 2022, *Meng v. Deng*, No. 2019-52133, in the 333rd Judicial District of Texas.

⁶ Receiver’s Unopposed Motion to Withdraw and Distribute Funds from the Registry of the Court, *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

⁷ Plaintiff’s First Amended Petition at ¶ 23.

⁸ Exhibit 1, Order Granting Receiver’s Unopposed Motion to Withdraw and Distribute Funds from the Registry of the Court, signed April 18, 2023 in *Meng v. Deng*, Cause No. 2019-52133 (emphasis added).

On Tuesday, May 2, 2023 at 12:38 p.m., Lang emailed the District Clerk's Office again time from her account at shannon.lang@shannonlanglaw.com. The email contained the subject line "Meng v. Deng, No. 2019-52133" and the body of the email stated:

Ms. Valasquez,

Our receiver reports that his Bank of America account was compromised so we have a new account for the disbursement in Cause No. 2019-52133. The revised form is attached. My apologies for the inconvenience; do you still expect that the wire can be initiated tomorrow?⁹

Lang attached a second executed affidavit with amended "specific wiring instructions" requiring that the money be wired to a Chase account designated by Berleth.¹⁰ Lang represented that she (and Berleth) expected the funds to be sent May 3.¹¹ On May 4 at 8:49 a.m., the District Clerk's Office received authorization from the County Auditor to disburse the funds from the Court registry as required by the "specific wiring instructions" in Berleth's affidavit.¹² On May 4 at 11:07 a.m., the District Clerk's Office advised Lang: "[t]he wire has been approved. Please confirm once the funds have been received in the bank account."¹³

Lang admits sending this email and executed affidavit instructing the District Clerk's Office to wire \$1,070,000 from the Court registry to Berleth's Chase account. Lang never attempted to verify the accuracy of the information she provided to the District Clerk's Office or follow up when she did not receive confirmation that Berleth had the funds long after they were expected. Finally, Lang never attempted to recall her email or notify the District Clerk's Office that she had sent a falsified affidavit through her personal law firm email account.

⁹ Exhibit 2-A.

¹⁰ Exhibit 2-B.

¹¹ Exhibit 2-A ("do you still expect that the wire can be initiated tomorrow?")

¹² Exhibit 2-C ("The Wire is approved.")

¹³ Exhibit 2-D.

D. The District Clerk’s Office disbursed the funds in accordance with Berleth and Lang’s specific wiring instructions, but the parties claim not to have the money.

Chase accepted this \$1,070,000 wire transfer for the account of “Berleth & Associates, PLLC” but deposited it into the account of “CHTN/Nguyen”. That account had existed for only seven months, and Chase had flagged it as being potentially involved in fraud.¹⁴

The parties in the underlying suit now claim none of them received the money and that the funds were taken from the Chase account by an unknown person and converted into cyber currency over the course of several weeks. They allege that Lang provided the District Clerk wiring instructions based on a fraudulent affidavit sent to her from Berleth’s email account. Berleth claims he did not send the email and that “hackers” are responsible.¹⁵

Astonishingly, although the parties expected the wire on May 4,¹⁶ none of them notified the District Clerk’s Office about any problems until May 18. They now demand that Harris County spend public funds to reimburse them for money they were paid but claim they cannot find.

¹⁴ First Amended Petition at ¶ 28.

¹⁵ Plaintiff’s First Amended Petition at ¶ 25. Berleth’s implausible theory requires that someone (1) know the name and docket number of the *Meng* case, (2) know there was an order in that case requiring that the District Clerk disburse \$1,070,000 to Berleth in accordance with his wiring instructions, (3) have access to the affidavit he previously sent to Lang, (4) falsify that affidavit by changing the banking information, (5) have access to his password-protected law office email account, (6) use that account to email the affidavit and instructions to Lang in the hope she would forward it to the District Clerk’s Office without verifying its veracity, (7) withdraw the money and convert it to cyber currency after it was deposited, (8) hope Chase would accept the funds even though the accounts did not match, and (9) hope the parties to the underlying case would do nothing for long enough to allow him to remove the funds and convert them to cyber currency.

¹⁶ Exhibit 2-G.

II. SUMMARY OF THE ARGUMENT

Piney Point filed suit against District Clerk Marilyn Burgess under various provisions of the Local Government Code, Civil Practices & Remedies Code, and the Texas and United States constitutions. All claims against Burgess should be dismissed for the following reasons:

- (1) Piney Point sued Burgess in her official capacity, which is actually a suit against the State. The State has not been served and has sovereign immunity from all of Piney Point's claims. *Hickman v. Silva*, No. CA C-12-209, 2013 WL 644356, at *3 (S.D. Tex. Jan. 25, 2013).
- (2) The Legislature has not waived immunity to permit claims under Tex. Loc. Gov. Code § 117.121 or § 117.124, and the Fourteenth Court of Appeals foreclosed on Piney Point's ability to use these statutes. *Scarver v. Waller County*, 346 S.W.3d 212 (Tex. App.—Houston [14th Dist.] 2011, no pet.).
- (3) Even if the Local Government Code permitted this suit, the District Clerk's Office complied with § 117.121 by wiring funds from the court registry after: (1) the designated recipient submitted a written request for the transfer, (2) the District Clerk's Office gave written approval, and (3) a county auditor countersigned the approval.
- (4) The Legislature has not waived immunity under Tex. Civ. Prac. & Rem. Code § 7.001, *et seq.*, and even if it had, Piney Point pled no facts to meet its burden of showing Burgess legally "neglected or refused" to perform any duty under the Rules of Civil Procedure or the Civil Practices & Remedies Code.
- (5) Piney Point fails to state a due process constitutional claim because Art. I, § 19 does not waive sovereign immunity for money judgments. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 411 (Tex. 1997). Further, Piney Point was given due process and agreed to allow the disbursement of registry funds in accordance with Berleth's wiring instructions. Finally, Piney Point's deprivation of property claim is foreclosed by *Osburn v. Denton County*, 124 S.W.3d 289, 293 (Tex. App.—Fort Worth 2003, pet. denied).
- (6) Piney Point fails to plead an *ultra vires* claim, and even if it had, the Legislature has not waived immunity for money damages in those cases.
- (7) It would be futile for Piney Point to amend and name Burgess individually because she has judicial and/or qualified immunity.

III. ARGUMENT

A. Standard for a plea to the jurisdiction.

A party may file a plea to the jurisdiction to have a case dismissed for lack of subject matter jurisdiction. *McLane Champions, LLC v. Houston Baseball Partners LLC*, No. 21-0641, 2023 WL 4306378, at *3 (Tex. June 30, 2023), citing *Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 22 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

The question of whether a court has subject matter jurisdiction is a matter of law, and a trial court should determine whether it has jurisdiction at the earliest opportunity before moving on with litigation. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 at 226, 229 (Tex. 2004). A plaintiff has the burden of showing that the trial court has jurisdiction. *Miranda*, 133 S.W.3d at 225-26. If the pleadings negate the existence of jurisdiction, a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227. In this case, the pleadings affirmatively negate the existence of jurisdiction for the reasons explained below.

B. Standard for a Rule 91a motion to dismiss.

In the alternative to the plea to the jurisdiction, Burgess seeks dismissal under Tex. R. Civ. P. 91a. A party may, within 60 days of a pleading being served, move to dismiss on the grounds that a cause of action has no basis in law or fact. Tex. R. Civ. P. 91a.

A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. *Id.* A cause of action has no basis in fact if no reasonable person could believe the facts pleaded. *Id.* A Rule 91a motion to dismiss is akin to a Federal Rule 12(b)(6) motion to dismiss, and a complaint must contain “enough facts to state a claim to relief that is plausible on its face.”

Wooley v. Schaffer, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied).

For a claim to be facially plausible, it must be supported by sufficient facts to allow the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Wooley*, 447 S.W.3d at 76, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009). However, mere “recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Therefore, the face of the complaint must reveal that there is evidence and/or law applicable to the pleaded facts that ushers the case forward. *See Lormand v. U. S. Unwired, Inc.*, 526 F.3d 228 (5th Cir. 2009). Even if Plaintiffs’ allegations in their complaint are taken as true, none of Plaintiffs’ alleged causes of action have any basis in law or fact that entitle claimants to any relief sought.

The Houston First Court of Appeals held that a cause of action has no basis in law under Rule 91a in at least two situations: (1) the petition alleges too few facts to demonstrate a viable, legally cognizable right to relief and (2) the petition alleges additional facts that, if true, bar recovery. *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *see Stallworth v. Ayers*, 510 S.W.3d 187, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

Even assuming this court has jurisdiction over Piney Point’s claims against Burgess, there are no facts alleged that would provide a viable, legally cognizable right to relief. Accordingly, in the alternative, the Court should dismiss under Rule 91a.

C. Plaintiff’s claims against Marilyn Burgess in her official capacity are actually claims against her employer, which has immunity in this case.

Piney Point filed suit against Marilyn Burgess “only in her capacity as Clerk under the Texas Local Government Code.”¹⁷ A suit against a public employee in her official capacity is “a suit against the municipality the official represents.” *Gomez v. Hous. Auth. of the City of El Paso*, 148 S.W.3d 471, 482 (Tex. App.—El Paso 2004, pet. denied). See also, *Hallmark v. City of Fredericksburg*, 94 S.W.3d 703, 708 (Tex. App.—San Antonio 2002, pet. denied) (“[i]t is well-settled that a suit against a public official in his ‘official capacity’ is, in effect, a suit against the municipality or governmental entity the official represents.”); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997); *Garza v. Harrison*, 574 S.W.3d 389, 399 (Tex. 2019) (An official capacity suit “is merely another way of pleading an action against the governmental employer.”) This is true whether based on an employee’s direct conduct or alleged negligent supervision of an employee. *Gomez*, 148 S.W.3d at 482.

A district clerk is an elected official for the State of Texas. In a case alleging the district clerks of two counties failed to provide proper notice under Texas Civil Practices and Remedies Code § 7.001, the Southern District of Texas noted:

To the extent that Plaintiff is suing Defendants [the district clerks] in their official capacities, his claims are effectively ones against the State of Texas. As such, they are barred by the Eleventh Amendment.

Hickman v. Silva, No. CA C-12-209, 2013 WL 644356, at *3 (S.D. Tex. Jan. 25, 2013).

“[C]ourt clerks generally act as an arm of the state as a state official.” *Dunn v. Smith*, No. 5:22-CV-00178-H, 2022 WL 3335675, at *2 (N.D. Tex. July 20, 2022), appeal dismissed, No. 22-10777, 2022 WL 18673217 (5th Cir. Sept. 8, 2022), quoting *United States v. Texas*, 566 F. Supp. 3d 605, 659 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021). Accordingly, “clerks are entitled to

¹⁷ Plaintiff’s First Amended Complaint at ¶ 7.

Eleventh Amendment immunity for claims asserted against them in their official capacities as state actors.” *Dunn*, 2022 WL 3336575, at *2. See also, *Davis v. Tarrant Cnty.*, 565 F.3d 241, 228 (5th Cir. 2009).¹⁸ Piney Point has not sued the State. This is the first reason the claims against Burgess should be dismissed, but they should also be dismissed for the reasons below.

D. Harris County and Burgess have immunity from Piney Point’s claims under the Local Government Code.

1. Piney Point has a high burden to overcome the presumption of immunity.

Texas first recognized in 1847 that “[a] state cannot be sued in her own courts without her own consent, and then only in the manner indicated by that consent.” *Rufus K. Hosner v. John Deyoung, Surveyor, etc.*, 1 Tex. 764 (1847). This is to preserve the dignity of the State, protect public resources, and “shield the public from the costs and consequences of improvident actions of their governments.” *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

Sovereign immunity has two components: immunity from suit and immunity from liability. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). The State retains immunity from suit unless the Legislature has expressly waived it for a particular claim. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex.1997) (superseded by statute on other grounds); *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). Even when the Legislature gives consent to sue, public entities and their officials are still shielded from money judgments based on immunity from

¹⁸ A district clerk can be a county official in some situations, but the distinction is immaterial in this case. In *Hale*, a litigant sued Harris County because she believed the district clerk destroyed, forged, and altered court documents. The First Court of Appeals found the county was entitled to immunity as one of the State’s “governmental units.” *Hale v. Harris County*, 2021 WL 3556685 (Tex.App.—Houston (1 Dist.)), at *3. Further, Texas Rule of Civil Procedure 33 prevents Harris County from being liable in this case because the County was not named in the suit. “Suits by or against a county or incorporated city, town or village shall be in its corporate name.” “If the purpose of a suit is to hold a county liable or in any way to affect its interests the county is a necessary party.” *Estes v. Commissioners Court of Hood County*, 116 S.W.2d 826, 828 (Tex. Civ. App.—Fort Worth 1938, no writ).

liability. For a plaintiff to prevail, he must show that the Legislature has waived both immunity from suit and immunity from liability. *Id.*, 217 S.W.3d at 469.

In 2001, the Legislature codified Texas Gov't Code § 311.034, which requires “clear and unambiguous language” to waive immunity:

In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language . . . Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

Tex. Gov't Code § 311.034; *Texas National Resources Conservation Com'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002). Since then, the Supreme Court has repeatedly reaffirmed the high burden a party asserting a waiver of immunity bears.

2. A statute must either use “magic words” or meet the strict requirements of *Taylor* to waive immunity.

When a statute purportedly waives immunity, “special rules of construction apply, as the Legislature has mandated that no statute should be construed to waive immunity absent ‘clear and unambiguous language.’” *State v. Oakley*, 227 S.W.3d 58, 62 (Tex. 2007). Typically, this requires the Legislature to use “magic words” such as stating that “sovereign immunity to suit is waived.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696-97 (Tex. 2003). Only on “rare occasions” will the Supreme Court find that the Legislature waived immunity without these “magic words.” *Id.* In those cases, a plaintiff has a heavy burden to show:

- (1) that the statute waives the State’s immunity “beyond doubt”,
- (2) if there is any ambiguity, the court must find no waiver of immunity, and
- (3) if a statute waives immunity, it should also have “simultaneous measures to insulate public resources from the reach of judgment creditors.” See, e.g., Tex. Civ. Prac. & Rem. Code §§ 101.023-024; Tex. Gov't Code §§ 554.003, 2007.023. Any statute that does not have an objective cap on damages is likely to not waive immunity.

Taylor, 106 S.W.3d at 697.

It is not enough for a statute to permit individuals and public entities to “sue and be sued”, “plead and be impleaded”, “prosecute and defend”, “defend or be defended”, “answer and be answered”, or “complain and (or) defend”. Although these words may appear to waive immunity, they do not unless there is strong supporting context. As the Supreme Court explains:

Scores of Texas statutes provide, variously, that individuals and entities, public and private, may “sue and (or) be sued”, “(im)plead and (or) be impleaded”, “be impleaded”, “prosecute and defend”, “defend or be defended”, “answer and be answered”, “complain and (or) defend”, or some combination of these phrases, in court. The phrases are also used in municipal charters and ordinances and in corporate articles and bylaws. Read in context, they sometimes waive governmental immunity from suit, sometimes do not, and sometimes have nothing whatever to do with immunity, referring instead to the capacity to sue and be sued or the manner in which suit can be had (for example, by service on specified persons). Because immunity is waived only by clear and unambiguous language, and because the import of these phrases cannot be ascertained apart from the context in which they occur, we hold that they do not, in and of themselves, waive immunity from suit.

Tooke v. City of Mexia, 197 S.W.3d 325, 328-29 (Tex. 2006).

Texas law contains many examples of statutes that appear to create causes of action but are not explicit enough to waive immunity. For example, in *Harris County Hospital District*, the Supreme Court held that Health and Safety Code § 281.056(a) did not waive the Harris County Hospital District’s immunity from suit even though the statute clearly permitted boards of hospital districts to “sue and be sued.” The Court held:

When an entity’s organic statute provides that the entity may “sue and be sued,” the phrase in and of itself does not mean that immunity to suit is waived. *Tooke*, 197 S.W.3d at 337. Reasonably construed, such language means that the entity has the capacity to sue and be sued in its own name, but whether the phrase reflects legislative intent to waive immunity must be determined from the language’s context. *Id.* Thus, section 281.056(a) does not in and of itself waive HCHD’s immunity. *See id.* at 334, 337. Nor does section 281.056(a)’s language indicate a waiver of HCHD’s immunity when considered in context with the remainder of section 281.056 which specifies who will represent the district in civil proceedings. This section anticipates the district’s involvement in civil proceedings of some nature at some point, but it does not address immunity from suit.

Harris Cnty. Hosp. Dist. v. Tomball Reg’l Hosp., 283 S.W.3d 838, 843 (Tex. 2009).

3. The Legislature has not waived immunity or permitted suits under Tex. Loc. Gov't Code § 117.121 or § 117.124, and Burgess complied with statutes.

(a) Tex. Loc. Gov't Code § 117.121.

The Legislature never waived immunity for the claims at bar. Piney Point's principal claim against Burgess is that she somehow "failed in her duties under Tex. Loc. Gov't Code § 117.121" because her staff complied with Berleth's notarized wiring instructions sent by Lang.¹⁹ However, Tex. Loc. Gov't Code § 117.121 does not meet any of the criteria to waive immunity. It provides no "magic words", cause of action, enforcement mechanism, or objective damage cap. Piney Point does not even suggest what authority § 117.121 provides to file suit.

Putting aside the fact that Piney Point cannot file suit under § 117.121, there is no genuine issue of material fact that Burgess fully complied with the statute. A district clerk may wire funds from the court registry if: (1) the designated recipient submits to the clerk a written request for the transfer, (2) the clerk gives written approval, and (3) a county auditor countersigns the approval. Tex. Loc. Gov't Code § 117.121(c).

The District Clerk received not only a written request from Berleth and Lang—but also a notarized request to wire funds to an account designated by Berleth and Lang.²⁰ Further, the auditor countersigned the approval.²¹ Even if § 117.121 permitted suit against Burgess or Harris County, such a claim would have to be dismissed under Rule 91a because Burgess not only complied with the statute, but enforced a higher standard than the Legislature required.

¹⁹ Plaintiff's First Amended Petition at ¶ 42.

²⁰ Exhibit 2-D.

²¹ Exhibit 2-E.

(b) Tex. Loc. Gov't Code § 117.124.

Local Government Code § 117.124 provides that in a county with a population of more than 1.3 million, a clerk is “responsible” for the loss of funds resulting from the clerk’s official misconduct, negligence, or misappropriation of funds. Even if Burgess had lost these funds (which she did not) and was negligent (which she was not), § 117.124 does not provide an independent cause of action for third parties to sue the District Clerk.

First, the statute does not contain the “magic words” that “sovereign immunity to suit is waived.” *Taylor*, 106 S.W.3d at 696-97. It does not even say the clerk can “sue and be sued”, “plead and be impleaded”, “prosecute and defend”, “defend or be defended”, “answer and be answered”, or “complain and (or) defend”—words held to be inadequate to waive immunity. *Tooke*, 197 S.W.3d at 328-29.

Second, the context of Chapter 117 makes clear that it only establishes the district clerk’s “responsibility” related to the internal workings of government. The purpose of Chapter 117 is to promulgate “various provisions addressing the selection, qualification, and designation of depositories as well as the accounts held there” and to allocate within government “the responsibility for ensuring the safety of the funds to different entities at various stages.” *Scarver v. Waller County*, 346 S.W.3d 212, 214 (Tex. App.—Houston [14th Dist.]). There is no third-party enforcement mechanism.²²

²² If Chapter 117 could be enforced, it would have to be by the government through other provisions. For example, Art. 5 § 24 of the Texas Constitution provides a process to remove county officers for failing to perform official duties. Art. 16, § 10 says that when public officers neglect their duties, “[t]he Legislature shall provide for deductions” of their salaries. The Legislature has also passed criminal statutes to hold officers responsible for failing to perform their duties. See, e.g., Tex. Penal § 39.02. Neither these provisions—nor Chapter 117—gives Piney Point the right to breach governmental immunity and file suit against Burgess or Harris County.

Third, this Court is bound by caselaw establishing that a district clerk cannot be sued under Chapter 117. In *Scarver*, the Fourteenth Court of Appeals considered a case where a district clerk disbursed funds from a court registry to the wrong party without obtaining a court order at all. *Scarver v. Waller County*, 346 S.W.3d 212, 214 (Tex. App.—Houston [14th Dist.] 2011, no pet.). *Scarver*—like Piney Point—sued the district clerk (and the county) for negligent disbursement of registry funds under Chapter 117 of the Texas Local Government Code.

The appellate court held that Chapter 117 does not waive the district clerk or county’s immunity from suit, even when the district clerk disburses money from a court registry with no order at all. *Scarver v. Waller Cnty.*, 346 S.W.3d 212, 220 (Tex. App.—Houston [14th Dist.] 2011, no pet.). This case is directly on point, and it conclusively forecloses on Piney Point’s claims against Burgess and Harris County under the Local Government Code.

E. Piney Point fails to state a claim under the Texas Civil Practices & Remedies Code.

1. Tex. Civ. Prac. & Rem. Code § 7.001.

Piney Point also cannot rely on Tex. Civ. Prac. & Rem. Code § 7.001 & § 7.002. First, § 7.001 is implicated only when an officer “neglects or refuses to perform a duty.” Tex. Civ. Prac. & Rem. Code § 7.001 (emphasis added). This contemplates an official who does not show up for work or will not perform a ministerial function required by law.

“Public officials are presumed to do their duty.” *Reyna v. State*, 319 S.W.2d 28, 30 (Tex. App.—San Antonio 1958), *aff’d sub nom. State ex rel. Edwards v. Reyna*, 160 Tex. 404, 333 S.W.2d 832 (1960). When a party accuses an official of neglecting a duty, Texas courts require strong evidence of bad faith. A law must first “plainly enjoin” the duty, and there must be a showing that the official “acted willfully and corruptly” before she can be found to have neglected the duty. *Reyna*, 319 S.W.2d at 28-30. Piney Point does not allege that Burgess refused to perform

a duty or acted willfully or corruptly. Piney Point only alleges someone in her office was provided incorrect wiring instructions and performed the duty in a way Piney Point dislikes.

Second, § 7.001 requires that the neglected duty must arise “under the Texas Rules of Civil Procedure” or the Texas Civil Practices & Remedies Code. Tex. Civ. Prac. & Rem. Code § 7.001 (emphasis added). Piney Point does not claim that Burgess refused to perform a duty imposed by either of these codes. Instead, it claims someone in her office may have improperly performed a duty under Local Government Code § 117.121.²³ Thus, § 7.001 is inapplicable for that reason as well.

Third, even if § 7.001 applied to the type of claim Piney Point raises and the statutes Piney Point claims were violated, Piney Point’s claim against Burgess is still improper because Burgess had nothing to do with wiring the funds to Burleigh’s account.²⁴

Fourth, as explained above, Piney Point sued Burgess in her official capacity, which is the same as suing the office she works for. Both the State and Harris County have immunity under § 7.001. *Hickman v. Silva*, No. CA C-12-209, 2013 WL 644356, at *3 (S.D. Tex. Jan. 25, 2013). This is because § 7.001 does not use the “magic words” required by the Supreme Court in *Taylor* and does not contain “clear and unambiguous” language establishing that the Legislature waived immunity “beyond doubt.” Tex. Gov’t Code § 311.034; *Taylor*, 106 S.W.3d at 697. As the Supreme Court explained in *Tooke*, language like that found in § 7.001 often has “nothing whatever to do with immunity.” *Tooke*, 197 S.W.3d at 328-29.

2. Tex. Civ. Prac. & Rem. Code § 7.002.

Tex. Civ. Prac. & Rem. Code § 7.002 is also inapplicable. That provision discusses how to store property in a bank vault, keep an inventory, and transfer property and inventory to the

²³ Plaintiff’s First Amended Petition at ¶ 26 & ¶¶ 40-42.

²⁴ Exhibit 3, Affidavit of Marilyn Burgess.

officer's successor. Piney Point does not allege that Burgess violated any of these provisions. Piney Point also does not assert that § 7.002 provides an independent cause of action or waives immunity. Under a plain reading of these statutes, Piney Point fails to state a claim against Burgess or Harris County.

F. Piney Point fails to state a constitutional claim.

Piney Point alleges a claim for deprivation of property under Art. I, § 19 of the Texas Constitution and the Fourteenth Amendment of the United States Constitution. Art. I, § 19 states “[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land.” The rights granted by Art. I § 19 are congruent with those in the Fourteenth Amendment. *George v. Bourgeois*, 852 F.Supp. 1341 (E.D.Tex. 1994); *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). Accordingly, they are analyzed together.

Texas courts have soundly rejected Piney Point's constitutional arguments. First, in *Federal Sign*, the Supreme Court made clear that a party cannot recover a money judgment against a public entity based on an Art. I, § 19 due process clause. It explained:

The State's immunity to suit is, purely as a matter of sovereignty, impervious to due process concerns. . . . Our Constitution's guarantee of due course of the law does not obligate the State to provide judicial relief from all its actions. It may retain for itself, through its Legislature, the exclusive power to determine its liabilities, bound by its conscience.

Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 411 (Tex. 1997).

Art. I, § 19 does not contain the “magic” language required to waive immunity, and its words do not waive immunity “beyond doubt.” *Taylor*, 106 S.W.3d at 697. The purpose of § 19 is to assure that litigants receive due process, and the remedy for violating § 19 is to provide notice and an opportunity to be heard. A plaintiff stating a due process claim must show: (1) he has a liberty or property interest entitled to procedural due process protection, and if so, (2) what process was due. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995), citing

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

With respect to the disbursement of court registry funds, due process requires only that a person be given a hearing to show cause why the funds should not be released:

While Michael’s right to due process would be compromised in the absence of any kind of notice and hearing, such is not the case here. The trial court ordered the funds to be delivered into the registry of the court, set a hearing, and issued notice of the hearing to Michael to show cause why the funds should not subsequently be released to Diana. Only after the hearing was an order entered into the record and the funds released to Diana. We find that Michael was given proper notice and afforded a hearing and that his due process rights were not violated.

Thomas v. Thomas, 917 S.W.2d 425, 434 (Tex. App.—Waco 1996, no writ).

Piney Point chose to settle its claims. The settlement was placed into the court registry, and Piney Point was provided notice and an opportunity to be heard before the funds were disbursed. Piney Point knew and agreed to have the funds disbursed in accordance with Burleigh’s wiring instructions, and it raised no objection to this process and chose not to require any additional safeguards, despite having the opportunity to do so. This satisfies Art. I, § 19.²⁵

Second, while Piney Point cites Art. I, § 19’s due process clause, it contends that it is making a “deprivation of property” claim. Art. I, § 17 addresses property that has been “taken, damaged or destroyed...” Courts have rejected deprivation of property claims under similar circumstances.

In *Osburn*, a district clerk paid a portion of court registry funds to a third-party despite being ordered by a judge not to do so. *Osburn*—the party entitled to the funds—filed suit against

²⁵ Even if Piney Point was denied due process under Art. I, § 19, the remedy could never be to burden a public entity or its employees with a money judgment. For example, in *Campbell*, a court violated Tex. Rule Civ. Proc. 21 by releasing funds from a court registry and ordering attorney’s fees without conducting a hearing. This deprived the other party notice and an opportunity to be heard. *Campbell v. Stucki*, 220 S.W.3d 562 (Tex. App.—Tyler 2007, no pet.). The remedy was a hearing to determine whether the recipient should be ordered to return the money (if possible)—not to order a judge, district clerk, or other official to pay public money to reimburse funds taken by a third party.

the district clerk under Art. I, § 17 of the Texas Constitution. The court of appeals held Article I of the Texas Constitution provides a remedy for property deliberately taken by the government for a public purpose, but no remedy when a district clerk pays registry funds to the wrong party:

Appellants do not assert on appeal that the payment of funds in this case was a taking for a public use. Instead, they argue that the takings clause also waives governmental immunity when takings are for a private use.

...

Consequently, no authority exists for the proposition that sovereign immunity is waived when governmental entities take private property for a private use. Under *Maher* and *Saunders*, such a taking may be declared void, but these cases do not hold that the void conduct of the State waives immunity from suit for monetary damages. We hold that the trial court did not err by granting appellees' plea to the jurisdiction.

Osburn v. Denton Cnty., 124 S.W.3d 289, 293 (Tex. App.—Fort Worth 2003, pet. denied). Piney Point has failed to state any constitutional claim for either due process or deprivation of property.

G. Piney Point fails to state an *ultra vires* claim.

Piney Point asserts that Burgess is not immune from suit because she acted “without any legal or statutory authority” and, therefore, engaged in an *ultra vires* act.²⁶ Piney Point’s only authority for this is *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997) and *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368 (Tex. 2009). *Federal Sign* does not mention the phrase “ultra vires” a single time. In that case, a university hired a contractor to build a score board but then unlawfully rescinded the bid and failed to pay. Federal Sign argued that it had the right to sue the university for breach of contract despite sovereign immunity. The Supreme Court rejected that claim and held “[a]bsent legislative permission to proceed, sovereign immunity precludes Federal Sign’s breach of contract suit against TSU.” *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 412 (Tex. 1997).

²⁶ Plaintiff’s First Amended Petition at ¶ 48-49.

Piney Point does not adequately plead an *ultra vires* claim for several reasons. First, as explained, Burgess did not have any role in processing Berleth's wire transfer.²⁷ Thus, she could not have engaged in an *ultra vires* act.

Second, Piney Point fails to meet the pleading standard for an *ultra vires* act. The Supreme Court recently explained that:

... to defeat a plea to the jurisdiction, the plaintiff suing the state or its officers must plead facts that, if true, 'affirmatively demonstrate' that sovereign immunity either does not apply or has been waived. As applied to *ultra vires* claims, this rule requires the plaintiff's petition to allege facts affirmatively demonstrating actionable *ultra vires* conduct by state officials in order to avoid dismissal on jurisdictional grounds due to sovereign immunity. . . . If additional facts would be necessary to state a viable *ultra vires* claim or to state a viable claim falling within a waiver or exception to immunity, then the plaintiff has not affirmatively demonstrated the court's jurisdiction. In such a case, a plea to the jurisdiction should be granted.

Matzen v. McLane, 659 S.W.3d 381, 388 (Tex. 2021), reh'g denied (Mar. 11, 2022) (internal citations omitted)(emphasis added). To meet its burden, Piney Point had to show that Burgess acted without legal authority in a purely ministerial duty. A suit cannot complain about a "government officer's exercise of discretion." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

The only fact that Piney Point alleges to support that Burgess engaged in an *ultra vires* act is the single, conclusory statement that Burgess "acted without any legal or statutory authority in processing the Fraudulent Wire."²⁸ As discussed, the District Clerk's Office had authority to process the wire transfer for two reasons: (1) there was a court order directing the District Clerk's Office to process Berleth's "specific wiring instructions"²⁹ and (2) Tex. Loc. Gov't Code § 117.121

²⁷ Exhibit 3, Affidavit of Marilyn Burgess.

²⁸ Plaintiff's First Amended Petition at ¶ 48.

²⁹ Exhibit 1.

authorizes the District Clerk’s Office to process wiring instructions in accordance with the procedure that the office followed.³⁰

Finally, the only remedy in an *ultra vires* suit is “prospective declaratory and injunctive relief.” *Enriquez v. Rodriguez-Mendoza*, No. 03-12-00220-CV, 2013 WL 490993, at *3 (Tex. App.—Austin Feb. 1, 2013, no pet.) The Supreme Court holds that “retrospective monetary claims are generally barred by immunity.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 374 (Tex. 2009), citing *City of Houston v. Williams*, 216 S.W.3d 827, 828 (Tex.2007). Piney Point does not seek a future injunction—it seeks monetary compensation for a past event. Therefore, this is not an *ultra vires* claim.

H. Piney Point cannot bring a claim against Burgess in her individual capacity because she has judicial immunity.

Piney Point has not sued Burgess in her individual capacity, and it would be futile to do so because she is protected by judicial immunity. The Supreme Court has long held that judges enjoy absolute judicial immunity for judicial acts, no matter how erroneous the act or evil the motive, unless the act is performed in the clear absence of all jurisdiction. *City of Houston v. Swindall*, 960 S.W.2d 413, 417 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (1961); *Delcourt v. Silverman*, 919 S.W.2d 777, 781 (Tex.App.—Houston [14th Dist.] 1996, writ denied); see also, Tex. Civ. Prac. & Rem. Code § 101.053(a), which retains immunity for claims based on acts related to the judicial function of a governmental unit—including “administrative decisions or actions.”

Judicial immunity not only protects judges—it protects others who assist with judicial functions. District clerks are judicial officers under Article V, § 9 of the Texas Constitution, and the interpretive commentary notes that the ordinary function of a District Clerk is “to perform

³⁰ As explained, Burgess’s office received the necessary instructions from Berleth and received authorization from the Auditor. This complies with the Local Government Code.

certain judicial or quasi judicial duties” for the court. Tex. Const. art. V, § 9, West Editors’ Notes Interpretative Commentary 2007 Main Volume. This concept of derived judicial immunity is well-established in Texas:

[w]hen judges delegate their authority or appoint others to perform services for the court, the judge’s judicial immunity may follow the delegation or appointment. This type of immunity is referred to as derived judicial immunity.

City of Houston v. Swindall, 960 S.W.2d 413, 417 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (internal citations omitted), citing *Clements v. Barnes*, 834 S.W.2d 45-46.

Texas uses the federal “functional approach” to determine if a particular person enjoys derived judicial immunity. *Swindall*, 960 S.W.2d at 417. Anyone—regardless of title or job description—who engages in an activity intimately associated with the judicial process is entitled to judicial immunity for that act. *Id.* Thus, “[o]fficers of the court, such as court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees have been accorded derived judicial immunity because they function as an arm of the court.” *Swindall*, 960 S.W.2d at 417. Even entering information into the court’s computer system “is an integral part of the functioning of the court” that entitles the clerk to judicial immunity. *Id.*

An officer of a court entitled to derived judicial immunity “receives the same immunity as a judge acting in his or her official judicial capacity—absolute immunity from liability for judicial acts performed within the scope of jurisdiction.” *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). Judicial immunity can attach to nonjudges because the policy reasons for judicial immunity—to protect the individual judge as well as the public’s interest in an independent judiciary—are implicated when judges delegate a person to perform services for the court or when a person serves as an officer of the court. *Id.* In these circumstances, the immunity attaching to the judge follows the delegation, appointment, or court employment. *Id.*

In *Kastner*, the First Court of Appeals granted judicial immunity to the Harris County District Clerk for failing to “supervise and train employees to ensure compliance with legal standards prior to issuance of arrest warrants.” *Kastner v. Lawrence*, No. 01-10-00291-CV, 2012 WL 5877551, at *1 (Tex. App.—Houston [1st Dist.] Nov. 21, 2012, no pet.).

In *Thompson*, the First Court of Appeals granted judicial immunity to a district clerk for refusing to file a person’s pleadings. “Court clerks, acting in the course of their duties, are accorded judicial immunity because they function as an arm of the court.” *Thompson v. Coleman*, No. 01-01-00114-CV, 2002 WL 1340314, at *5 (Tex. App.—Houston [1st Dist.] June 20, 2002, pet. ref’d).

In *Enriquez*, the Austin Court of Appeals granted judicial immunity to a district clerk alleged to have not properly filed certain documents as required by statute, failed to issue citation as required by statute, failed to issue subpoenas as required by statute, failed to provide a copy of an order, failed to provide notice of court matters, and failed to timely file the clerk’s record in at least three appeals. The court held:

All of Enriquez’s complaints were associated with the judicial process and with the manner in which Rodriguez–Mendoza performed-or allegedly failed to perform-her duties as Travis County District Clerk. Thus she was entitled to judicial immunity or derived judicial immunity-a form of absolute immunity.

Enriquez v. Rodriguez-Mendoza, No. 03-12-00220-CV, 2013 WL 490993, at *2 (Tex. App.—Austin Feb. 1, 2013, no pet.).

In *Albert*, the Fort Worth Court of Appeals granted judicial immunity to a district clerk, two judges, and a district attorney regarding numerous alleged irregularities in a trial. *Albert v. Adelstein*, No. 02–13–00073–CV, 2013 WL 4017511, at *2 (Tex. App.—Fort Worth Aug. 8, 2013, no pet.) (mem. op.).

In this case, it is undisputed that the District Clerk’s Office held funds that Judge Brittanye Morris permitted to be deposited into the court registry.³¹ It is also undisputed that Judge Morris ordered the District Clerk’s Office to disburse these funds in accordance with wiring instructions provided by a court-appointed receiver. The District Clerk and her employees acted “as an arm of the court” to disburse funds from the court registry. Accordingly, they are entitled to judicial immunity—regardless of the outcome of their acts.

I. Piney Point cannot bring a claim against Burgess in her individual capacity because she has official immunity.

Finally, and in the alternative, Piney Point cannot sue Burgess or her staff because they have official immunity. Official immunity “protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority.” *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994) (citations omitted). While sovereign immunity protects public entities, official immunity protects individual officials from liability. *Id.*

Public employees are entitled to official immunity “from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.” *Franka v. Velasquez*, 332 S.W.3d 367, 383 (Tex. 2011). The purpose of official immunity is to encourage public officers to perform their discretionary duties without fear of personal liability for negligent or improper performance. *Champan v. Gonzales*, 824 S.W.2d 685, 687 (Tex. App.—Houston [14th Dist.] 1992 writ denied). It is based on the necessity for public officials to act in the public interest with confidence and without hesitation that could arise from having their judgment continually questioned by extended litigation. *Id.*

As both the Texas and United States Supreme Courts explained:

Officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits

³¹ Agreed Order for Appointment of Receiver, July 20, 2022, *Meng v. Deng*, No. 2019-52133, in the 333rd Judicial District of Texas.

which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Kassen v. Hatley, 887 S.W.2d 4, 8 (Tex.1994), quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1959).

This policy acknowledges that public officials may err in their duties, but the risk of error is preferable to intimidation from having to defend against a barrage of litigation. *Id.* “The public would suffer if government officials, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions.” *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424, quoting *Kassen*, 887 S.W.2d at 8. Official immunity protects even negligent public officials from conduct that would otherwise be actionable. *Telthorster v. Tennell*, 92 S.W.3d 457, 463 (Tex. 2002).

1. Discretionary duty.

The first element of official immunity is whether a public employee was performing a discretionary duty. A duty is discretionary unless the law prescribes and defines the duty with such precision and certainty as to leave nothing to the exercise of discretion or judgment. This element is broadly construed, and even when a statute contains mandatory language instructing an official to do something, the official often has discretion in how to do it. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653-54 (Tex.1994). In this case, the court required the District Clerk’s Office to disburse registry funds, which entitled the office’s employees to judicial immunity. The Legislature also gave the District Clerk’s Office some discretion in how to do that. *See*, Tex. Loc. Gov’t Code § 117.121(c), which provides that a clerk “*may*” make a disbursement under court order by electronic transfer.

2. Within the scope of the employee's authority.

The second element of official immunity is whether the official's acts were within the course and scope of the employee's employment. *Neimes v. Ta*, 985 S.W.2d 132 (Tex. App.—San Antonio 1998, pet. dismissed); *Boozier v. Hambrick*, 846 S.W.2d 593, 596 (Tex. App.—Houston [1st Dist.] 1993, no writ). Public officials are only held personally liable when they act willfully or maliciously. *Richardson v. Thompson*, 390 S.W.2d 30, 35 (Tex. Civ. App.—Dallas 1965, writ dismissed).

Clearly, the employees of the District Clerk's Office acted within the scope of their authority by disbursing court funds: (1) after a Court ordered the District Clerk to disburse court funds to Berleth in accordance with his wiring instructions, (2) the District Clerk disbursed the funds in accordance with Berleth's notarized instructions, and (3) Tex. Loc. Gov't Code § 117.121(c) authorized the funds to be disbursed in this manner.

While Piney Point claims the District Clerk's Office should have ignored Berleth's final wiring instructions and honored his earlier ones, the District Clerk's employees still acted well within the scope of their authority. "The fact that a specific act that forms the basis of the suit may have been wrongly or negligently performed does not take it outside of the scope of authority." *Souder v. Cannon*, 235 S.W.3d 841, 853 (Tex. App.—Fort Worth 2007) (quoting *Wethington v. Mann*, 172 S.W.3d 146, 152 (Tex. App.—Beaumont 2005, no pet.); *Harris County v. Ochoa*, 881 S.W.2d 884, 888 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

3. Actions taken in good faith.

The final element of official immunity is that the actions should be taken in good faith. This is not a test of carelessness or negligence, legality, or motivation. *Ballantyne*, 144 S.W.3d at 426-27. A defendant's subjective intent is irrelevant. *Id.* "This test of good faith does not inquire into 'what a reasonable person would have done,' but into 'what a reasonable [person] could have

believed,” and a government official’s actions do not need to be “be legally correct, only colorable.” *Ballantyne*, 144 S.W.3d at 426. Burgess had no personal involvement in sending the wire transfer,³² and Piney Point never alleges that Burgess—or anyone in her office—acted in bad faith.

Piney Point never alleges that Burgess—or anyone in her office—acted outside her discretionary duties, deliberately stole the funds in question or otherwise acted in bad faith, or lacked authority to disburse court registry funds. Accordingly, it would be futile to permit Piney Point to amend and name Burgess or any of her employees in an individual capacity, because they would be entitled to official immunity.

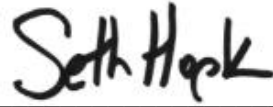
IV. CONCLUSION AND PRAYER

The parties to the underlying *Meng v. Deng* litigation requested—and received—a court-appointed receiver. The Court ordered the District Clerk’s Office to wire \$1,070,000 from the court registry according to the receiver’s detailed wiring instructions. The receiver sent a notarized copy of these instructions, and the Harris County District Clerk’s Office complied.

The District Clerk’s Office fulfilled its obligations under the relevant statutes, and even if it had somehow been negligent in those duties, the District Clerk has sovereign immunity in her official capacity and judicial and official immunity in her individual capacity. Accordingly, all claims against Burgess should be dismissed with prejudice.

³² Exhibit 3, Affidavit of Marilyn Burgess.

Respectfully submitted,



CHRISTIAN D. MENEFEE

Harris County Attorney

JONATHAN FOMBONNE

First Assistant County Attorney

SETH HOPKINS

Special Assistant County Attorney

Texas Bar No. 24032435

VERONICA JONES

Deputy Director of Defensive Litigation

Texas Bar No. 24097902

1019 Congress Plaza, 15th Floor

Houston, Texas 77002

(713) 274-5141 (telephone)

Seth.Hopkins@harriscountytexas.gov

**ATTORNEYS FOR MARILYN
BURGESS, IN HER OFFICIAL
CAPACITY**

CERTIFICATE OF SERVICE

Pursuant to Tex. R. Civ. P. 21a(a)(1), I certify that on the 26th day of August, 2023, a true and correct copy of the foregoing instrument was served to all counsel of record by filing through the electronic filing manager.

/s/ Seth Hopkins
SETH HOPKINS

CAUSE NO. 2023-30774

PINEY POINT HOMES, LLC, §
Plaintiff, § IN THE DISTRICT COURT OF
v. §
§ HARRIS COUNTY, TEXAS
JP MORGAN CHASE BANK, N.A., et al. §
Defendants § 333RD JUDICIAL DISTRICT

EXHIBIT LIST

Exhibit	Description
1	Order Granting Receiver's Unopposed Motion to Withdraw and Distribute Funds from the Registry of the Court <i>Meng v. Deng</i> , No. 2019-52133, in the 333rd District Court of Texas
2	Harris County District Clerk's Office Business Records Affidavit
2-A	May 2, 2023 email from Shannon Lang to District Clerk's Office instructing the District Clerk's Office to wire court registry funds to Berleth's Chase account, and that the parties expected the wire to be initiated the next day.
2-B	Berleth's notarized wiring instructions to Chase Bank.
2-C	May 4, 2023 email from Auditor authorizing Berleth's wire transfer instructions.
2-D	May 4, 2023 email from the District Clerk's Office to Shannon Lang advising Berleth's wire transfer has been approved and asking Lang to confirm that funds were received.
3	Affidavit of Harris County District Clerk Marilyn Burgess

CAUSE NO. 2019-52133

**SUSAN MENG, Individually and in Right
of Piney Point Homes, LLC
*Plaintiff***

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

vs.

HARRIS COUNTY, TEXAS

**TIE DENG, H-TOWN HOMES, LCC, and
AKD ENGINEERS, LLC
*Defendants***

333rd JUDICIAL DISTRICT

**ORDER GRANTING RECEIVER’S UNOPPOSED MOTION TO WITHDRAW AND
DISTRIBUTE FUNDS FROM THE REGISTRY OF THE COURT**

On this day, _____, 2023, the Court considered Receiver’s Motion to Withdraw and Distribute Funds from the Registry of the Court. After considering the Motion, any arguments in support or opposition, the pleadings on file, and applicable law, the Court finds that the Receiver’s motion should be GRANTED.

It is therefore ORDERED that:

1. The Harris County District Clerk shall immediately disburse **\$1,070,000.00** from the Court’s Registry Account No. 86205 (consisting of \$1,366,328.77 in principal, plus all accrued interest), to the Court-appointed Receiver in this case, Robert Berleth, by way of ACH wire transfer to his IOLTA account (Frost Bank account number *****386, with Robert Berleth to provide specific wiring instructions to the Accounting Clerk). It is FURTHER ORDERED that:
2. Within three (3) business days of receipt of the funds from the Court Registry, the Receiver shall pay to Yongfu “Paul” Wang **\$1,070,000.00**. Payment shall be made by check endorsed to Yongfu Wang and delivered to his attorney of record.

SIGNED this the _____ day of _____, 2023.

Signed: *Brittany Morio*
4/18/2023

Judge Presiding

APPROVED AS TO FORM AND CONTENT:



Shannon Lang



Robert Berleth

Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Nancy Vo on behalf of Kang Chen

Bar No. 24059562

nancy@kangchenlaw.com

Envelope ID: 74253762

Filing Code Description: Motion (No Fee)

Filing Description: Receiver's Motion to Withdraw and Distribute Funds

Status as of 4/3/2023 10:24 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Teri A.Walter		twalter@prevaillawyers.com	4/3/2023 9:47:32 AM	SENT
Shannon Lang	24070103	shannon.lang@shannonlanglaw.com	4/3/2023 9:47:32 AM	SENT
Justin William Renshaw	24013392	justin@renshaw-law.com	4/3/2023 9:47:32 AM	SENT
Kim Conkey		kim@renshaw-law.com	4/3/2023 9:47:32 AM	SENT
Derek WLoetzerich		derek@loetzerichlaw.com	4/3/2023 9:47:32 AM	SENT
Shannon A.Lang		shannon.lang@shannonlanglaw.com	4/3/2023 9:47:32 AM	SENT
Jessica Hughes		jessica.hughes@shannonlanglaw.com	4/3/2023 9:47:32 AM	SENT
Laurie Garza		lgarza@prevaillawyers.com	4/3/2023 9:47:32 AM	SENT
Jennifer Tatum Lee		jennifer@clands.com	4/3/2023 9:47:32 AM	SENT
John MShumaker		John@CLandS.com	4/3/2023 9:47:32 AM	SENT
Jennifer Tatum Lee		Jennifer@clands.com	4/3/2023 9:47:32 AM	SENT
John M. Shumaker		John@clands.com	4/3/2023 9:47:32 AM	SENT
Robert Berleth		rberleth@berlethlaw.com	4/3/2023 9:47:32 AM	SENT
Kang Chen		kangc@kangchenlaw.com	4/3/2023 9:47:32 AM	SENT
Nancy Vo		nancy@kangchenlaw.com	4/3/2023 9:47:32 AM	SENT

CAUSE NO. 2023-30774

PINEY POINT HOMES, LLC,	§	
<i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
v.	§	
	§	HARRIS COUNTY, TEXAS
JP MORGAN CHASE BANK, N.A., <i>et al.</i>	§	
<i>Defendants</i>	§	333 RD JUDICIAL DISTRICT

BUSINESS RECORDS AFFIDAVIT

STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, personally appeared Tracy Hopper, who, being by me duly sworn, deposed as follows:

My name is Tracy Hopper. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

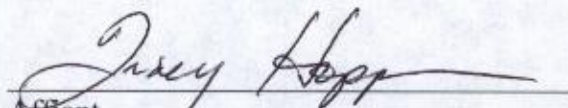
1. I am custodian of the records of the Harris County District Clerk's Office at 201 Caroline Street, Suite 420, Houston, Harris County, Texas. I am familiar with the manner in which these records are created and maintained by virtue of my duties and responsibilities.
2. Attached are seven pages of records (in addition to the cover pages) from the Harris County District Clerk's Office. They are the original records or the exact duplicates of original records.
3. These records were kept on the Harris County District Clerk's Office email server. Based on the regular practices of the Harris County District Clerk's Office, the records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth in the record, made by, or from information transmitted by persons with knowledge of the matters set forth, and kept in the course of regularly conducted business activity.

4. It was the regular practice of the business activity to make, keep, and maintain these records.

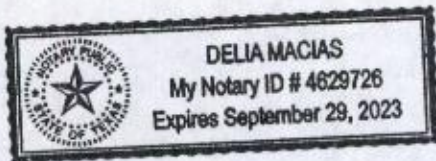
5. These records consist of the following emails:

Ex.	Date	Sender	Notes
A	5/2/2023	Lang/Berleth	Email from Lang advising the District Clerk's Office to wire the court registry funds to Berleth's Chase account, and that the parties expected the wire to be initiated the next day.
B	5/2/2023	Lang/Berleth	Berleth's third verified wiring instructions.
C	5/4/2023	Auditor	Authorization to wire the funds.
D	5/4/2023	Velasquez	Email to Lang advising the wire has been approved and asking Lang to confirm that funds were received.

Signed on 8/25/23


Affiant

SWORN TO AND SUBSCRIBED before me on 8/25/2023



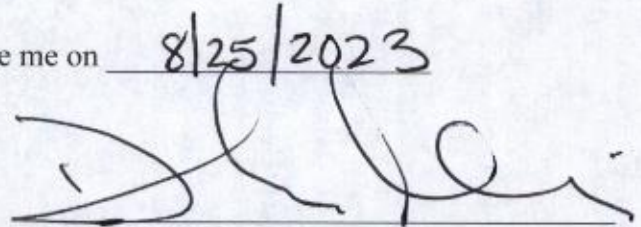

NOTARY PUBLIC, State of Texas
Printed Name: Delia N. Macias
My Commission Expires: 9/29/2023

Exhibit A

From: Shannon A. Lang <shannon.lang@shannonlanglaw.com>
Sent: Tuesday, May 2, 2023 12:38 PM
To: Velasquez, Ruddy (DCO) <Ruddy.Velasquez@hcdistrictclerk.com>
Subject: Meng v Deng, No. 2019-52133

[WARNING] This email originated outside the HCDCO email system. **DO NOT CLICK** links or attachments unless you know the content is safe.

Ms. Velasquez,

Our receiver reports that his Bank of America account was compromised so we have a new account for the disbursement in Cause No. 2019-52133. The revised form is attached. My apologies for the inconvenience; do you still expect that the wire can be initiated tomorrow?

Best,

Shannon A. Lang
Attorney
LANG & ASSOCIATES, PLLC
1903 Vermont Street
Houston, Texas 77019
(832) 479-9400 tel.
(832) 479-9421 fax
shannon.lang@shannonlanglaw.com
www.shannonlanglaw.com

This email may contain confidential and privileged material for the sole use of the intended recipient. Any review, use, or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply email and delete all copies of this message. Thank you.

Exhibit B

**REGISTRY ADMINISTRATION FEE
FUNDS TRANSFER REQUEST**

TO BE COMPLETED BY COUNTY CLERK OR DISTRICT CLERK, AS APPLICABLE

Date 05/04/2023	Transfer Amount \$ 1,070,000.00	Transfer Initiation Date 05/04/2023	Effective Date/Date To Be Transferred 05/04/2023
---------------------------	---	---	--

Recording Required <input checked="" type="checkbox"/> Only Treasurer Recording Required	REASON FOR TRANSFER Transfer Registry administrative fee to the County as prescribed by statute.
---	--

SPECIAL INSTRUCTIONS/COMMENTS

Cause No. 2019-52133

TRANSFER

FROM	TO
Bank Name CADENCE BANK, NA	Bank Name Chase Bank
Bank Address (Street, P.O. Box, etc., City, State, Postal Code) 2800 Post Oak BLVD, STE 3800 Houston, TX 77056	Bank Address (Street, P.O. Box, etc., City, State, Postal Code) 5445 Almeda Road Houston, Texas 77004
Account Name Harris County District Clerk General Depository of Re	Account Name Berleth & Associates, PLLC
Account Number [REDACTED]	Account Number [REDACTED] 7696
	ABA/Transit/Routing Number 021000021

Transfer Requested By <i>Cecily Hurd</i>	<i>Cecily Hurd</i>	5-4-2023
County/District Clerk or Designee Signature	Print Name	Date

Transfer Approved By:		
County/District Clerk or Designee Signature	Print Name	Date

TRANSACTION CODING

	GLBU	FUND	DEPARTMENT	ACCOUNT	PCBU	PROJECT	ACTIVITY	BKID	AMOUNT
FROM									
FROM									
FROM									
FROM									
TOTAL									\$ 0.00
TO									
TO									
TO									
TO									
TOTAL									\$ 0.00

TO BE COMPLETED BY COUNTY AUDITOR

Verified Proper Account Coding By:

Initials	Print Name	Date
Approved By:		
County Auditor or Designee Signature	Print Name	Date

**REQUEST FOR DISBURSEMENT OF REGISTRY FUNDS
BY WIRE TRANSFER**

(Account name must be exactly as stated in the Court's Order. All payees must be listed on and sign this form.)

CAUSE NO. 2019-52133

I/We (print name(s)), Robert Berleth, Court-Appointed Receiver

request that the funds I am/we are to receive from the Court Registry be transferred by wire to my/our bank

Chase Bank 5445 Almeda Road, Houston, Texas 77004

ABA Number (9 digit checking or saving account wire ABA number) 021000021

Account Number: ██████████7696

Name on Account: Berleth & Associates, PLLC

I/We understand that I am/we are liable for any Incoming Wire Transfer fee my/our bank may charge.

[Signature]
Applicant Signature (As on Court Order and styling of bank account)

Applicant Signature (As on Court Order and styling of bank account)

4/29/2023
Date

Date

Applicant Signature (As on Court Order and styling of bank account)

Applicant Signature (As on Court Order and styling of bank account)

Date

Date

NOTARY

(This section is required only if form is being submitted by mail without a copy of each applicant's driver's license or social security card)

THE STATE OF Texas §

COUNTY OF Harris §

Before me, SHELI DAVIS, a notary public, on this day personally appeared Robert Berleth,
(Notary Public's Name) (Applicant(s) listed above)

Court-Appointed Receiver known to me (or proved to me on the
(Applicant(s) listed above)

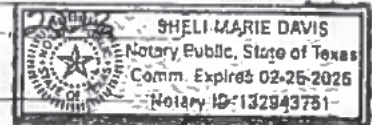
oath of Robert Berleth) to be the person(s) whose name(s) is/are subscribed to the foregoing instrument

and acknowledged to me that he/she/they executed the same for the purpose and consideration therein expressed. Given under my

hand and seal of office this 29th day of April

[Signature]
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS
MY COMMISSION EXPIRES

SHELI DAVIS
PRINT NAME



County/District Clerk and County Auditor Use Only

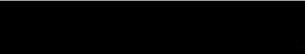
Approximate Amount: _____

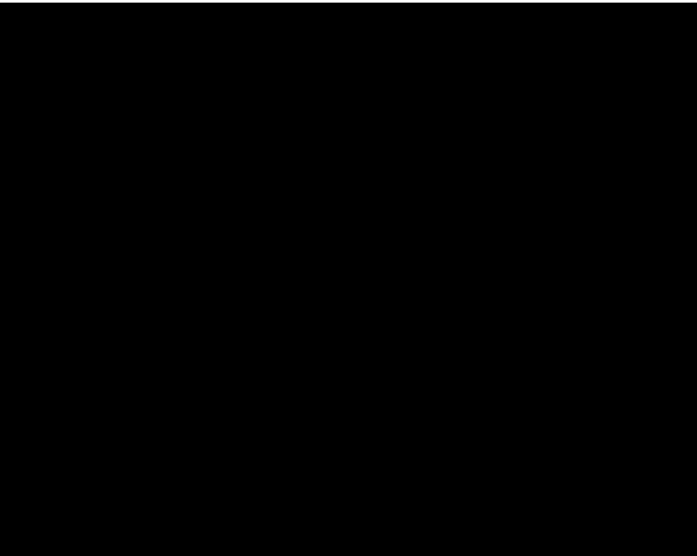
(Actual amount transferred from Registry may differ by interest earned from approval date to transfer date)

APPROVED:

County or District Clerk or Designee Print Name Date County Auditor/Designee Print Name Date

Exhibit C





From: Serrano, Edgar (Auditors) <Edgar.Serrano@aud.hctx.net>

Sent: Thursday, May 4, 2023 10:58 AM

To: Velasquez, Ruddy (DCO) <Ruddy.Velasquez@hcdistrictclerk.com>; Gentry, Yolanda (Auditors) <Yolanda.Gentry@aud.hctx.net>; Moreno, Patricia (Auditors) <Patricia.Moreno@aud.hctx.net>

Cc: Yancey, Reginald (Auditors) <Reginald.Yancey@aud.hctx.net>; Lloyd, Jo Ann (Auditors) <JoAnn.Lloyd@aud.hctx.net>; Olison, Kimberlyn (Auditors) <Kimberlyn.Olison@aud.hctx.net>; Duque Jr., Luis (DCO) <Luis.Duque@hcdistrictclerk.com>; Hurd, Cecily (DCO) <cecily.hurd@hcdistrictclerk.com>

Subject: RE: Wire Transfer

[WARNING] This email originated outside the HCDCO email system. **DO NOT CLICK** links or attachments unless you know the content is safe.

Hello,

The Wire is approved.

Last Login:05/04/2023 - 09:22 (Central Time)

PAYMENTS

PAYMENT OPTION

Payment Option	US Wire
----------------	---------

PAYMENT INFORMATION

Status	Confirmed
Confirmation Number	[REDACTED]
Debit Account	*****1222 - DISTRICT CLERK REGISTRY
Amount	1,070,000.00 USD
Payment Number	[REDACTED]
Value Date	05/04/2023
Send Date	05/04/2023
Frequency	One-Time Only
Recipient	Berleth & Associates, PLLC [REDACTED] 5445 Alameda Road Houston, Texas 77004
Bank	JPMORGAN CHASE BANK, NA ABA (Wire) 021000021 NEW YORK UNITED STATES

From: Velasquez, Ruddy (DCO) <Ruddy.Velasquez@hcdistrictclerk.com>
Sent: Thursday, May 4, 2023 8:47 AM
To: Serrano, Edgar (Auditors) <Edgar.Serrano@aud.hctx.net>; Gentry, Yolanda (Auditors) <Yolanda.Gentry@aud.hctx.net>; Moreno, Patricia (Auditors) <Patricia.Moreno@aud.hctx.net>
Cc: Yancey, Reginald (Auditors) <Reginald.Yancey@aud.hctx.net>; Lloyd, Jo Ann (Auditors) <JoAnn.Lloyd@aud.hctx.net>;

Olison, Kimberlyn (Auditors) <Kimberlyn.Olison@aud.hctx.net>; Duque Jr., Luis (DCO) <Luis.Duque@hcdistrictclerk.com>; Hurd, Cecily (DCO) <cecily.hurd@hcdistrictclerk.com>

Subject: Wire Transfer

Importance: High

Good Morning,

I submitted a wire transfer in the amount of \$1,070,000.00. The disbursement is under Cause No. 2019-52133 for Robert Berleth, Court-Appointed Receiver. Attached is the wire transfer sheet, form 752R. Please let me know when this has been approved.

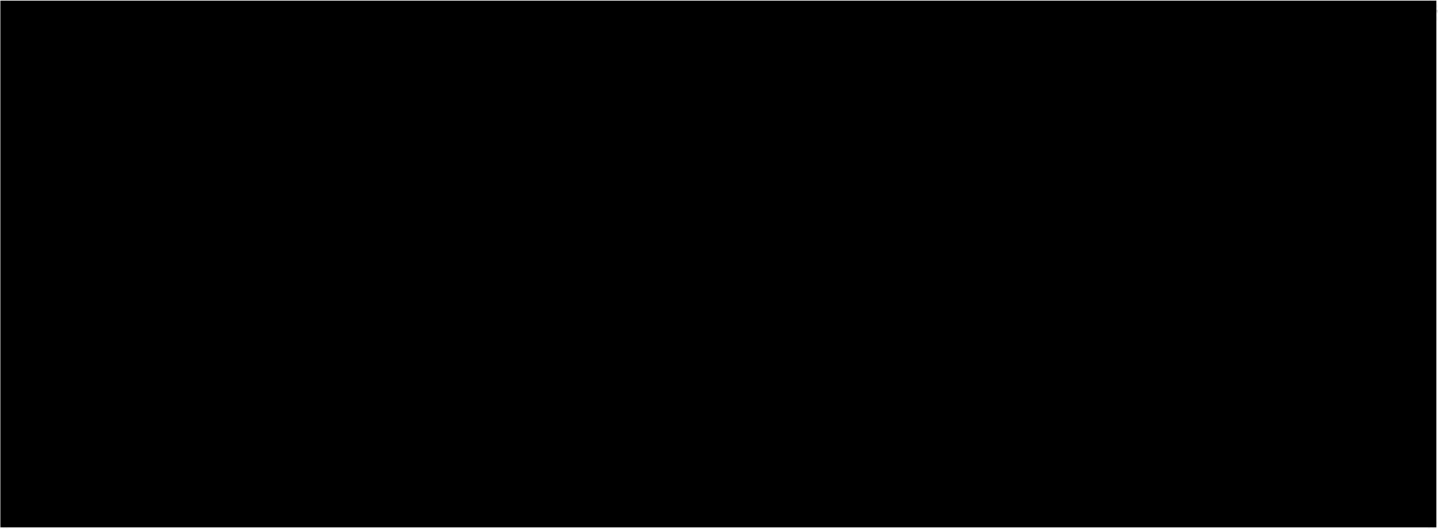
Thank you,



Ruddy Velasquez
Court Registry

MARILYN BURGESS, [Harris County District Clerk](#)
201 Caroline, Suite 170 | Houston, TX 77002
(832) 927-5670

Exhibit D



From: Velasquez, Ruddy (DCO)
Sent: Thursday, May 4, 2023 11:07 AM
To: 'Shannon A. Lang' <shannon.lang@shannonlanglaw.com>
Subject: RE: Meng v Deng, No. 2019-52133
Importance: High

The wire has been approved.

Please confirm once the funds have been received in the bank account.

Thank you,

Ruddy Velasquez
Court Registry

MARILYN BURGESS, [Harris County District Clerk](#)
201 Caroline, Suite 170 | Houston, TX 77002
(832) 927-5670

From: Shannon A. Lang <shannon.lang@shannonlanglaw.com>
Sent: Thursday, May 4, 2023 8:49 AM
To: Velasquez, Ruddy (DCO) <Ruddy.Velasquez@hcdistrictclerk.com>
Subject: RE: Meng v Deng, No. 2019-52133

[WARNING] This email originated outside the HCDCO email system. **DO NOT CLICK** links or attachments unless you know the content is safe.

Attached; thank you!

Shannon A. Lang
Attorney
LANG & ASSOCIATES, PLLC

CAUSE NO. 2023-30774

PINEY POINT HOMES, LLC,
Plaintiff,

v.

JP MORGAN CHASE BANK, N.A., *et al.*
Defendants

§
§ IN THE DISTRICT COURT OF
§
§ HARRIS COUNTY, TEXAS
§
§ 333RD JUDICIAL DISTRICT

AFFIDAVIT OF HARRIS COUNTY DISTRICT CLERK MARILYN BURGESS

STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, personally appeared Harris County District Clerk Marilyn Burgess, who, being by me duly sworn, deposed as follows:

My name is Marilyn Burgess, and I am the Harris County district clerk. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

1. I reviewed the petition in the above-captioned lawsuit, but otherwise do not have personal knowledge of the underlying facts in this case.

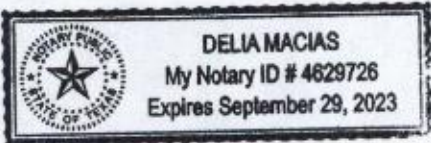
2. I had no personal involvement in reviewing the order to disburse court registry funds or the wiring instructions referenced in the lawsuit. I had no personal involvement in processing the wiring instructions.

Signed on 8/24/2023

M J Burgess
Affiant

SWORN TO AND SUBSCRIBED before me on 8/24/2023

[Signature]



NOTARY PUBLIC, State of Texas
Printed Name:
My Commission Expires:

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Seth Hopkins on behalf of Seth Hopkins

Bar No. 24032435

seth.hopkins@harriscountytexas.gov

Envelope ID: 78948092

Filing Code Description: Answer/ Response / Waiver

Filing Description: Marilyn Burgess (official capacity) Original Answer

subject to Plea to the Jurisdiction & Motion to Dismiss

Status as of 8/28/2023 8:46 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jennifer Tomsen		tomsenj@gtlaw.com	8/26/2023 5:07:42 AM	SENT
Yvette Manzano		manzanoy@gtlaw.com	8/26/2023 5:07:42 AM	SENT
Robert Berleth	24091860	rberleth@berlethlaw.com	8/26/2023 5:07:42 AM	SENT
Jeremy Simmons		simmonsje@gtlaw.com	8/26/2023 5:07:42 AM	SENT
Jarrett Poindexter		poindexterj@gtlaw.com	8/26/2023 5:07:42 AM	SENT
Shannon A.Lang		shannon.lang@shannonlanglaw.com	8/26/2023 5:07:42 AM	SENT
Justin Renshaw		justin@renshaw-law.com	8/26/2023 5:07:42 AM	SENT
Jessica Hughes		jessica.hughes@shannonlanglaw.com	8/26/2023 5:07:42 AM	SENT
Diana M.Barba		Diana.Barba@gtlaw.com	8/26/2023 5:07:42 AM	ERROR