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March 15, 2024

**Submitted Via E-File**

Hon. Blake A. Hawthorne  
Clerk, Supreme Court of Texas  
201 West 14th Street,  
Room 104  
Austin, Texas 78701

**Re: No. 24-0161, *In re The Cordish Company and Bayou Place Limited Partnership*; Original Proceeding from Cause No. 2017-72382 in the 129<sup>th</sup> District Court of Harris County**

Dear Mr. Hawthorne:

Washington Legal Foundation (“WLF”) submits this amicus curiae letter brief respectfully urging the Court to grant The Cordish Company’s and Bayou Place Limited Partnership’s (together, “Relators”) Petition for Writ of Mandamus and to grant Relators protection against Plaintiffs<sup>1</sup>

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<sup>1</sup> “Plaintiffs” refer to the Real Parties in Interest as identified in Relators’ Petition for Writ of Mandamus.

Hon. Blake A. Hawthorne  
*In re The Cordish Company and  
Bayou Place Limited Partnership*, No. 24-0161  
March 15, 2024  
Page 2

deposing The Cordish Company's Chairman and Chief Executive Officer,  
David Cordish.

No party's counsel wrote any part of this letter brief. No person or  
entity, other than WLF and its counsel, paid for the letter brief's  
preparation or submission.

## **I. Interest of Amicus Curiae**

WLF is a nonprofit, public-interest law firm and policy center with  
supporters nationwide, including many in Texas. It defends free  
enterprise, individual rights, limited government, and the rule of law.  
WLF has long supported strict application of the apex doctrine to high-  
ranking business executives. *See, e.g., In re Amend. to Fla. Rule of Civ.  
Proc.* 1.280, 324 So. 3d 459 (Fla. 2021). WLF's Legal Studies Division has  
also published papers on the importance of the apex doctrine. *See, e.g.,*  
Paul Alessio Mezzina et al., *The Ongoing Debate Over the Apex Doctrine:  
New Developments in Georgia and Washington*, WLF Legal Opinion  
Letter (Jan. 12, 2024), available at <https://perma.cc/779W-A2CS>.

## **II. The Apex Doctrine Is Critical To Protecting Businesses And Their High-Level Officials From Disruption By Unwarranted Depositions.**

This Court recognizes high-level business leaders are “duty-bound to exercise business judgment for the sole benefit of the [business].” *Ritchie v. Rupe*, 443 S.W.3d 856, 869 (Tex. 2014); *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577–78 (Tex. 1963). Even the State of Texas has urged that “[h]igh-ranking government officials and corporate executives should rarely be subject to deposition” because “[u]nnecessarily requiring apex officials to prepare for and attend depositions takes them away from their duties and hurts the organizations they serve.” Brief for the State of Texas as Amicus Curiae at 1 in *In re Am. Airlines, Inc.*, No. 20-0789 (emphasis added), decided at 634 S.W.3d 38 (Tex. 2021) (per curiam). And “[a]s virtually every court which has addressed the subject has observed, depositions of persons in the upper level management of corporations often involved in lawsuits present problems which should reasonably be accommodated in the

Hon. Blake A. Hawthorne  
*In re The Cordish Company and  
Bayou Place Limited Partnership*, No. 24-0161  
March 15, 2024  
Page 4

discovery process.” *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995).

The apex doctrine exists “to protect high-ranking officials from discovery abuses when they have no particular direct knowledge of the facts pertaining to the lawsuit, and thus require protection from litigation tactics used to create undue leverage by harassing the opposition or inflating its discovery costs.” *Intelligent Verification Sys., LLC v. Microsoft Corp.*, No. 2:12-cv-525, 2014 WL 12544827, \*2 (E.D. Va. Jan. 9, 2014) (cleaned up).

While high-level executives are not immune from discovery, involving them in “unfettered discovery . . . would threaten disruption of their business and could thereby serve as a potent tool for harassment in litigation.” *In re Terrorist Attacks on Sept. 11, 2001*, No. 03MDL1570GBDSN, 2023 WL 5432199, at \*1 (S.D.N.Y. Aug. 23, 2023); see also *Scott v. Chipotle Mexican Grill, Inc.*, 306 F.R.D. 120, 122 (S.D.N.Y. 2015).

Without a robust—and robustly enforced—apex doctrine, a company’s high-ranking officials can be unnecessarily dragged into hours of depositions instead of tending to the ongoing needs of the business itself. This additional “cost of doing business” would make companies think twice about remaining in such a state. In contrast, Texas has gone to extraordinary efforts to be the “Best State for Business.” Office of the Governor, *Why Texas*, Texas Economic Development & Tourism, (last visited March 15, 2024), available at <https://perma.cc/3CEB-NKN2>; (“Texas offers a combination of unique competitive business advantages that no other state can claim: a business-friendly climate . . . along with a highly skilled and diverse workforce, easy access to global markets, robust infrastructure and a reasonable regulatory environment.”). Failing to faithfully apply the apex doctrine would undermine that effort and make Texas less attractive to businesses.

### **III. Plaintiffs Failed To Show That They Are Entitled To Depose Cordish.**

Plaintiffs have not met their burden under *Crown Central* to show that they are entitled to depose Cordish.

Because subjecting business leaders to unnecessary depositions would cause an “undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights[.]” parties wishing to depose C-suite officers must first show that the high-level executive possesses “unique or superior knowledge” that warrants taking an apex deposition. *Crown Central*, 904 S.W.2d at 128. Only when (1) “there is a reasonable indication that the official’s deposition is calculated to lead to the discovery of admissible evidence” and (2) “less intrusive methods of discovery are unsatisfactory, insufficient, or inadequate” may a court allow the deposition to proceed. *Id.* “Allowing apex depositions merely because a high-level corporate official possesses apex-level knowledge would eviscerate the very guidelines established in *Crown Central.*” *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 177 (Tex. 2000).

As the Chairman and CEO of The Cordish Company, Cordish qualifies as someone in “upper level management” subject to the apex doctrine. *See* Pet. for Writ of Mandamus at 15. Yet Plaintiffs have not shown that Cordish possesses unique or superior personal knowledge about the proposed repairs of an electrical breaker at a Texas facility, especially when Cordish made no repair decisions. *Id.* Cordish’s alleged participation in a phone call with an electrical consultant and up to four other individuals does not establish that Cordish possesses any unique or superior knowledge. *Id.* This is especially true when The Cordish Company’s corporate representative, Taylor Gray, “made all repair decisions” and was one of the individuals alleged to be on the call. *Id.* Plaintiffs also adduced no evidence contradicting or questioning Cordish’s declaration that he lacked personal knowledge about the circumstances leading to the incident in question, that he was neither involved in nor made any of the decisions at issue, and that he had no recollection of the alleged telephone call. *Id.* at 17; MR.762, 791-864.

Plaintiffs also failed to show how other methods of discovery are inadequate. To date, Plaintiffs have deposed Gray in his capacity as corporate representative for 19 hours—totaling 713 pages of testimony. *See* Pet. for Writ of Mandamus at 17. Plaintiffs also deposed two other individuals who were allegedly on the call in question. *Id.* Because Plaintiffs may obtain discoverable information in multiple ways without deposing Cordish, Plaintiffs are not entitled to an apex deposition.

#### **IV. Conclusion**

As explained in Relators' Petition for Writ of Mandamus, Plaintiffs failed to show they are entitled to depose Cordish. This Court adopted the apex doctrine to prevent high-level corporate executives from being deposed on matters in which they lack unique or superior knowledge. But that is exactly what Plaintiffs wish to do here. The Court should grant the Petition and order the trial court to grant the motion for protection.

Hon. Blake A. Hawthorne  
*In re The Cordish Company and  
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March 15, 2024  
Page 9

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because it contains 1,149 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

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March 15, 2024  
Page 11

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I certify that a true and correct copy of the foregoing Amicus Letter Brief was served on the following parties or counsel for the following parties via electronic transmission on March 15, 2024.

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