Opinion issued November 3, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00364-CV

IN RE CITY INFO EXPERTS, LLC, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relator, City Info Experts, LLC, has filed a petition for writ of mandamus seeking relief from four orders issued by respondent, the Honorable Elaine H. Palmer. In four issues, City Info complains of respondent's order striking City Info's pleadings, respondent's order denying City Info's motion to withdraw deemed admissions, respondent's order precluding City Info from asserting untimely

objections to discovery responses, and respondent's order striking two paragraphs from City Info's first amended petition.[1] We conditionally grant the petition in part.

Background

Real parties in interest, Walks LLC, a Delaware Limited Liability Company, and Walks LLC, a Texas Limited Liability Company, provide "small-group tour experiences" in various cities with local tour guides.[2] City Info, an "online travel agency," markets and sells "tours, attractions, tickets, and other travel-related products," including tours conducted by Walks. On May 13, 2016, City Info and Walks entered into a written contract whereby City Info would sell tour packages for Walks and keep a portion of the tour package revenues as commission. Specifically, after Walks conducted the tours, it was to (1) invoice City Info for the tours, less the commissions and (2) transmit to City Info vouchers that were collected from the customers who toured. Walks was to be paid after transmission of the vouchers.

The contract states in pertinent part:

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1 The underlying case is *City Info Experts, LLC v. Walks, LLC, a Delaware Limited Liability Company, and Walks, LLC, a Texas Limited Liability Company*, cause number 2018-38482, pending in the 215th District Court of Harris County, Texas, the Honorable Elaine H. Palmer presiding.

2 Real parties in interest are referred to collectively as "Walks." Walks asserts the Texas company is "an entirely unrelated company" and, therefore, not a proper defendant. The contract is with the Delaware company. Regardless, the determination of whether the Texas entity is a proper party is not before this Court.

> 4. COMMISSIONS. [City Info] shall earn a commission equal to 25% or as provided on Rate Schedules of the retail price for each Product sold. . . . [Walks] agrees to provide [City Info] with "Most Favored Nation" status, and shall not pay any other reseller of its Products with a higher commission than that paid to [City Info] hereunder.
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> 5. PAYMENT. [Walks] shall invoice [City Info] monthly, for customers who redeemed [City Info's] [V]ouchers during the prior month. Payment shall be made by [City Info] within 30 days of receipt of [Walks's] invoice. ALL INVOICES MUST BE ACCOMPANIED BY COPIES OF ALL REDEEMED VOUCHER(S). No payment shall be due [Walks] for any consumed Product absent presentation of valid Vouchers, and [Walks] shall remain solely at risk for the loss of redeemed Vouchers. . . . If [Walks] fails to invoice [City Info] and provide all necessary redeemed Vouchers within the 60-day period after the Voucher is redeemed by Customer, [Walks] shall be deemed to have waived any right to payment and any later invoice relating to such Voucher shall be null and void.

(Emphasis in original.)[3]

City Info sued Walks, asserting Walks provided invoices after conducting tours but not the vouchers that supported the invoices. City Info says, without the vouchers, no payment was due to Walks under the terms of the contract. City Info sued Walks "to seek the repayment of amounts paid to Walks in anticipation that the vouchers would be provided." City Info asserted in its original petition that Walks breached the contract by failing to provide City Info with a schedule of tours; paying higher commissions to City Info's competitors and failing to give City Info "most favored nation" status; failing to provide City Info with copies of redeemed vouchers

[3] "Product" is defined as "tours and/or other products" for City Info to sell.

with invoices; providing confidential information to third parties in the tourism industry; and marketing to City Info's customers.

Walks asserted counterclaims for breach of contract, sworn account, and quantum meruit. Walks asserted it forwarded monthly invoices to City Info requesting payments for all tours sold that month less City Info's commission, but that City Info fell behind on payments and owed Walks nearly $62,000 by the time City Info filed suit.

After City Info filed suit and Walks answered, the following occurred:

- Walks specially excepted to City Info's original petition, asserting there was no basis to sue the Texas Walks entity and that the contract claim was "vague and indefinite." Walks requested that respondent order City Info to replead. Respondent granted Walks's special exceptions on November 20, 2018.

- On September 17, 2018, City Info served its responses to Walks's first requests for admissions, admitting, inter alia, it "[did] not have evidence of any instance" in which Walks failed to provide City Info with "most favored nation" status; in which Walks paid higher commissions to City Info's competitors; or in which Walks provided City Info's "confidential information" to third parties in the tourism industry.

- On December 4, 2018, Walks filed a motion to compel the production of documents responsive to twelve requests in Walks's first request for production. Respondent granted Walks's motion on December 17, 2018. The order included the admonition that "[f]ailure to comply may be grounds for sanctions against City Info, including the striking of its pleadings."

- On January 23, 2019, Walks filed a motion for sanctions and to strike City Info's pleadings, asserting City Info admitted in its discovery responses that its claims in its original petition were untrue; that City Info asserted numerous baseless objections in its responses to Walks's

first set of discovery; and that City Info promised to produce responsive documents but failed to do so. City Info asserted in response that the production delays stemmed from the location of documents in various cities and from City Info's counsel's involvement in a massive (unrelated) securities fraud case. Respondent denied the motion to strike but awarded $1,300 in monetary sanctions to Walks. The sanctions, which were imposed jointly and severally against City Info and its counsel, were awarded as attorney fees "incurred by Walks in bringing its [m]otion before the Court."[4]

- On May 30, 2019, more than six months after Walks's special exceptions were sustained, City Info filed its first amended original petition.

- On June 13, 2019, Walks filed special exceptions to City Info's amended petition, asserting the amended petition contained the same defects as the original petition, and asking that paragraphs 10(a) and 10(b) of the amended petition, which comprise most of the contract claim against Walks, be struck. On July 2, 2019, respondent granted the motion to strike the two paragraphs.

- On August 29, 2019, and August 30, 2019, Walks e-served City Info with Walks's second and third sets of discovery, respectively. Both sets of discovery comprised interrogatories, requests for admissions, and requests for production.

- On September 30, 2019, Tom Schmidt, City Info's CEO and counsel ("Schmidt"), emailed counsel for Walks and said, "Did you guys serve us with more written discovery? I don't have it in my email or in our file, but I remember seeing something come in. Can you resend?" Walks did not resend the discovery.

- On October 25, 2019, Walks filed a second motion to compel discovery in connection with Walks's second and third sets of discovery. Schmidt conceded in City Info's response to the motion that he "saw a notice of service in September transmitting the discovery." However, Schmidt contended he never saw the discovery that was the subject of the motion

[4] City Info does not complain in this proceeding about the sanctions award.

to compel until the motion to compel was filed on October 25, 2019, because only a link to the requests, and not the requests themselves, was propounded on City Info's counsel.

- On November 6, 2019, respondent granted Walks's second motion to compel discovery. The order deemed admitted Walks's second and third sets of requests for admissions to City Info, ordered City Info to answer Walks's second and third set of interrogatories without objections, and ordered City Info to produce documents responsive to Walks's second and third requests for production without objections.

- On November 13, 2019, City Info filed a motion (1) to withdraw its deemed admissions and (2) to allow it to assert objections to the second and third sets of discovery propounded by Walks. Notwithstanding respondent's order the week before, City Info also served objections to Walks's second and third sets of discovery requests.

- On November 26, 2019, Walks filed a second motion to strike City Info's pleadings. Walks asserted in the motion that City Info had yet to produce responsive documents and had ignored respondent's November 6, 2019 order compelling discovery responses, even though trial was set for December 9, 2019. City Info asserted in response that it had not ignored respondent's order but was, rather, awaiting a response to City Info's motion to allow it to object to "abusive" discovery before producing "trade secret, proprietary, and confidential documents." City Info further asserted that death penalty sanctions, which Walks had requested, were not warranted because, inter alia, Walks had not followed the procedural mechanisms and because City Info was not in violation of respondent's order.

- On December 2, 2019, respondent denied City Info's motion to withdraw deemed admissions. The order did not refer to City Info's motion to allow it to assert untimely discovery objections.

- On December 9, 2019, respondent issued an order granting Walks's motion to strike City Info's pleadings in their entirety, dismissing City Info's contract claim with prejudice, and (again) denying City Info's motion to withdraw deemed admissions.

- On December 20, 2019, the proceedings were stayed pending the resolution of the instant mandamus.

City Info contends respondent abused her discretion in (1) striking City Info's pleadings in their entirety, (2) denying City Info's motion to withdraw deemed admissions, (3) ordering City Info to respond to discovery without asserting objections, and (4) striking paragraphs 10(a) and 10(b) of City Info's amended petition.

Standard of Review

In reviewing the imposition of sanctions, the entire record "including the evidence, arguments of counsel, written discovery on file, and the circumstances surrounding the party's discovery abuse" is reviewed. *Imagine Auto. Grp. v. Boardwalk Motor Cars, Ltd.*, 430 S.W.3d 620, 631 (Tex. App.—Dallas 2014, pet. denied). An order imposing discovery sanctions "is subject to review on appeal from the final judgment, TEX. R. CIV. P. 215.3, but, under certain circumstances, is subject to review before final judgment by writ of mandamus." *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding). The Texas Supreme Court has held that a trial court's discovery sanctions are reviewable by mandamus if the sanctions

> have the effect of precluding a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering default judgment . . . unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment. If such an order of sanctions is not immediately appealable, the party may seek review of the order by petition for writ of mandamus.

TransAmerican Nat. Gas Corp. v. Powell, 811 S.W.2d 913, 920 (Tex. 1991) (orig. proceeding).

For mandamus to issue, the relator must show both that the trial court's action was an abuse of discretion and that there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). An abuse of discretion occurs "where a trial court acts without reference to guiding rules or principles or in an arbitrary or unreasonable manner." *Garza*, 544 S.W.3d at 840 (citing *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding)). There is no adequate remedy by appeal "where a party's ability to present a viable claim or defense at trial is either completely vitiated or severely compromised." *Garza*, 544 S.W.3d 836 at 840 (citing *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding)).

Analysis

Texas Rule of Civil Procedure 215.2 governs the failure to comply with a discovery order or request. Rule 215.2 states, in pertinent part:

> *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party . . . fails to comply with proper discovery requests or to obey an order to provide or permit discovery . . . the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:
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> (1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination . . . .

TEX. R. CIV. P. 215.2(b). The Texas Supreme Court has said the determination of whether discovery sanctions are just depends on two factors: there must be a "direct relationship . . . between the offensive conduct and the sanction imposed," and the sanctions cannot be excessive and "should fit the crime." *TransAmerican,* 811 S.W.2d at 917.

A. Death penalty sanctions

In its first issue, City Info complains of respondent's order granting Walks's motion to strike City Info's pleadings. That order states, in part:

> The COURT FINDS that it has considered and made numerous attempts to compel compliance with discovery requests by Plaintiff City Info, including the imposition of lesser sanctions. Furthermore,
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> The COURT FINDS that Plaintiff City Info Experts, LLC ("City Info") has failed to comply with prior written discovery orders of this Court.
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> IT IS THEREFORE ORDERED that Defendant's Motion to Strike Plaintiff's Pleadings is hereby GRANTED. It is further,
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> ORDERED that Plaintiff City Info's pleadings are stricken in their entirety. It is further,
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> ORDERED that Plaintiff City Info's breach of contract claim is hereby dismissed with prejudice to refiling.[5]

In its November 26, 2019 motion to strike City Info's pleadings, which was filed less than two weeks before the trial date, Walks said City Info had produced only two documents in response to Walks's discovery and had "willfully ignored" respondent's November 6, 2019 order granting Walks's second motion to compel. In support of its motion to strike, Walks provided a timeline that enumerated City Info's purported discovery violations:

> i. August 16, 2018: Walks[] served its First Discovery Requests.
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> ii. November 15, 2018: Walks noticed the deposition of City Info's CEO/counsel, Schmidt. The deposition was scheduled to take place on January 10, 2019.
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> iii. November 20, 2018: After City Info's admission that multiple allegations set forth in its Original Petition were knowingly false,

[5] The order contains an inserted typewritten notation denying City Info's motion to withdraw deemed admissions.

the Court entered its Order Granting Walks'[s] Special Exceptions to Plaintiff's Original Petition on (the "Order to Re-plead").

iv. December 4, 2018: Walks filed its first Motion to Compel Discovery Responses following City Info's failure to produce any documents for more than two months.

v. City Info'[s] Response to Walks'[s] Motion to Compel claimed City Info needed until January 11, 2019—a day after Schmidt's prior-noticed deposition—to produce responsive documents.

vi. December 17, 2018: The Court entered its Order Granting Defendant's Motion to Compel Discovery Responses (the "First Order to Compel"), which ordered document production by December 31, 2018, and warned "[f]ailure to comply may be grounds for sanctions against City Info, including the striking of its pleadings."

vii. December 31, 2018: In violation of the Court's order, City Info fails to produce a single document.

viii. January 8, 2019: Still having received no responsive documents from City Info—Walks was forced to postpone Schmidt's deposition. City Info/Schmidt made another false promise to produce the documents within that week. However, true to prior form, no documents were forthcoming.

ix. January 24, 2019: 131 days after Walks['s] deadline to produce documents, Walks was forced to file its Motion to Strike Plaintiff's Pleadings and Motion for Sanctions. City Info had still produced no documents.

x. February 14, 2019: The Court enters its Order Granting Defendant Walks LLC's Motion for Sanctions (the "Sanctions Order") and awards monetary sanctions against City Info/Schmidt. City Info finally produced some responsive documents.

xi. May 30, 2019: City Info filed its First Amended Original Petition as ordered by the Court's Order to Re-Plead.

xii. July 2, 2019: After City Info re-pleaded knowingly false and unsupported allegations within its breach of contract claim, the Court entered its Order Granting Walks'[s] Motion to Strike (the "First Order to Strike").

xiii. July 15, 2019: Trial of this matter was originally slated to begin. However, prior to trial, Walks and City Info agreed to a short continuance of the setting in order to conduct additional discovery largely related to City Info's failure to disclose its damage model prior to trial.

xiv. August 29, 2019: Walks served its Second Set of Discovery Requests to Plaintiff ("Second Discovery Requests"), consisting of 47 Requests for Admission, 10 Interrogatories, and 18 Requests for Production.

xv. August 30, 2019: Walks served its Third Set of Discovery Requests to Plaintiff ("Third Discovery Requests"), consisting of one Request for Admission, five Interrogatories, and two Requests for Production.

xvi. September 30, 2019: City Info failed to respond or object to Walks'[s] Second Discovery Requests and Third Discovery Requests by the deadline.

xvii. October 25, 2019: With no responses or production from City Info almost a month after its discovery deadline, Walks filed its Motion to Compel Discovery Responses.

xviii. November 6, 2019: The Court entered its Order Granting Defendant's Motion to Compel Discovery Responses (the "Second Order to Compel"), which ordered production and responses, without objection, by November 13, 2019, and warned that any failure by City Info would warrant "monetary sanctions and/or, the striking of City Info's claim in this case."

xix. November 13, 2019: City Info serves objections to Walks's Second and Third Discovery Requests in violation of the Court's Second Order to Compel and produces a total of two documents. City Info also attempted to answer Requests for Admission—with numerous

> baseless objections—that had already been deemed admitted pursuant to the Texas Rules of Civil Procedure and order of the Court.

(Emphasis in original; internal record citations omitted.)

Walks said in its motion to strike that during the eighty-eight days that had passed since service of its second and third sets of discovery on City Info, only two documents[6] had been produced, interrogatories had not been fully answered, and objections had been asserted to the discovery in contravention of respondent's November 6, 2019 order, which forbade City Info from objecting to the discovery. Walks asserted City Info and its counsel had not "rectified" their obstreperous behavior despite "the Texas Rules of Civil Procedure, the order to Re-Plead, the First Order to Compel, the Sanctions Order, the First Order to Strike, and the Second Order to Compel."

In response, City Info said it did not disregard respondent's order in objecting to the discovery. Rather, City Info said, it filed a "motion to withdraw deemed admissions and allow plaintiff's objections" to the discovery "on the basis of overwhelming binding precedent that supports those results." City info continued:

> So far, the Court has denied [City Info's] request to withdraw admissions, but has not ruled on the request to allow objections.

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[6] The two documents produced in response to the second and third requests for production were a check register that had already been produced and a back-dated attorney engagement agreement executed by Schmidt and his firm. Documents referenced by Schmidt in his declaration in support of City Info's summary judgment motion were not produced.

> Because of the substantial and unquantifiable harm to [City Info] that would result from disclosing its confidential contracts and dealings with companies unrelated to this case, [City Info] has elected to wait for a ruling on the motion for reconsideration before producing trade secret, proprietary, and confidential documents. That is not bad faith – that is prudence.[7]

City Info further said it did not act "in violation of any Court Order, because it [was] seeking relief from the Order pursuant to the Rules of Civil Procedure." City Info asserted Walks acted in bad faith by filing a frivolous motion to dismiss, by creating "multiple false emergencies regarding discovery that was not even relevant to the merits of this case," by making false statements to the court, by failing to re-serve the discovery after the response deadline has passed, and by failing to include certificates of conference in its motions.

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[7] City Info now says it was within its rights to resist production until respondent "had an opportunity" to "potentially review documents *in camera*" but the record does not reflect any request by City Info for an in camera review of the documents it asserted should be withheld as secret, proprietary or confidential. City Info says respondent "made no attempt to determine whether the requested information constituted trade secrets." Respondent was under no obligation to do so without timely assertions of privilege or, in the alternative, a request for an in camera review. "When in the course of discovery, a party claiming privilege as to a document requests an *in camera* inspection, it becomes the duty of the court first to determine whether an *in camera* inspection is necessary." *Volcanic Gardens Mgmt. Co., Inc. v. Paxson*, 847 S.W.2d 343, 348 (Tex. App.—El Paso 1993, orig. proceeding) (citing *Enron Oil & Gas Co. v. Flores*, 810 S.W.2d 408, 412–13 (Tex. App.—San Antonio 1991, orig. proceeding)).

As with other discovery sanctions, death penalty sanctions may not be excessive and must bear some relationship to the offensive conduct. *TransAmerican*, 811 S.W.2d at 917. In addition, the imposition of death penalty sanctions is limited by constitutional due process because the striking of a party's pleading and dismissal of its action necessarily results in the adjudication of the party's claims or defenses "without regard to their merits but based upon the parties' conduct of discovery." *Id.* at 918. Therefore, before the trial court may impose death penalty sanctions, the court must determine the offensive conduct "justif[ies] a presumption that the offending party's claims or defenses lack merit." *Id.*

City Info relies on *TransAmerican* in support of its petition. In *TransAmerican*, TransAmerican sued Toma, alleging it had been damaged by defective pipe casing purchased from Toma. 811 S.W.2d at 914. Toma countersued for TransAmerican's failure to pay for the casing. *Id.* Repeated disagreements over the scheduling of the deposition of TransAmerican's president ultimately led to each party's seeking sanctions against the other. *Id.* at 915. Toma's motion for sanctions was based on the failure of TransAmerican's president to appear at a deposition noticed by Toma for the second time. *Id.* TransAmerican's motion for sanctions asserted Toma abused the discovery process by the very filing of its motion for sanctions. *Id.*

The trial court, without hearing arguments, signed an order granting Toma's motion for sanctions and striking TransAmerican's pleadings. *Id.* at 915–16. After hearing arguments on TransAmerican's motion for reconsideration but refusing to hear any evidence, the district court denied the motion for reconsideration. *Id.* at 916. The court set a trial date only for the purpose of determining the damages to be awarded to Toma. *Id.* TransAmerican's petition for writ of mandamus in the Fourteenth Court of Appeals was denied but the Texas Supreme Court granted mandamus relief, concluding (1) it was unclear whether TransAmerican or its counsel was at fault for its president's failure to attend his deposition; (2) the record did not reflect the district court's having considered imposing lesser sanctions or that lesser sanctions would not have worked; and (3) the failure by a party's president to appear for deposition did not "even approach[] justification for so severe a sanction." *Id.* at 918–19.

Relying on *TransAmerican*, City Info asserts it did not engage in a pattern of discovery abuse in the instant case, that the sanctions were targeted at the wrong party, and that its claims have merit. City Info's failure to produce documents despite respondent's order, its failure to respond to discovery, and its assertion of discovery objections after the trial court forbade it from doing so, however, apparently were construed by respondent as discovery abuse. Further, respondent's December 17, 2018 order threatening "sanctions against City Info, including the

striking of its pleadings," her February 14, 2019 order imposing monetary sanctions, and her November 6, 2019 order requiring City Info to respond to discovery without asserting objections support respondent's determination that there was a pattern of discovery abuse by the time she struck City Info's pleadings. Indeed, the order striking the pleadings says respondent found "that it has considered and made numerous attempts to compel compliance with discovery requests" by City Info, "including the imposition of lesser sanctions." Apparently, respondent believed there was a relationship between the offensive conduct and the sanctions, and that lesser sanctions had been attempted unsuccessfully. We find respondent did not abuse her discretion in making that determination.

City Info's second argument, that the sanctions were directed at the wrong target, is belied by the fact that Schmidt, City Info's counsel, is also its CEO. "A court must attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both." *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 363 (Tex. 2014) (citing *TransAmerica*, 811 S.W.2d at 917). Here, any misconduct by Schmidt is attributable both to City Info, of which he is CEO, and to its counsel, in which capacity he has appeared in this lawsuit. *Cf. Imagine*, 430 S.W.3d at 641–43 (Tex. App.—Dallas 2014, pet. denied) (CEO who did not produce documents in response to discovery requests committed sanctionable conduct); *Prof'l Sec. Patrol v. Perez*, No. 01-12-00506-CV, 2013 WL 4478020, at *4 (Tex.

App.—Houston [1st Dist.] Aug. 20, 2013, no pet.) (mem. op.) (counsel's knowledge of hearing was imputed to his client when counsel received notice of hearing while acting in scope of his authority).

City Info next argues the striking of its pleadings was improper because its claims have merit. City Info is correct that death penalty sanctions can only be imposed "when the sanctioned party's conduct justifies a presumption that its claims or defenses lack merit." *Ring & Ring v. Sharpstown Mall Tex., LLC*, No. 01-16-00341-CV, 2017 WL 3140121, at *8 (Tex. App.—Houston [1st Dist.] July 25, 2017, no pet.) (mem. op.) (citing *TransAmerican*, 811 S.W.3d at 917–18). In support of its argument, City Info notes that respondent denied Walks's summary judgment motion and Walks's motion to dismiss City's Info's claims. City Info does not cite any support for the proposition that such denials are tantamount to a trial court's affirmative finding that a plaintiff's claims have merit. Such denials could have, for instance, been premised on procedural deficiencies in the motions or the presence of questions of fact, none of which affirmatively adjudicates the merits of a case.

However, the analysis does not end there. An order imposing death penalty sanctions must include a determination that City Info's claims lacked merit. *See Ring & Ring*, 2017 WL 3140121, at *8 (for death penalty sanctions to be proper, trial court, "through its sanction order . . . must have held that [defendant's] discovery conduct supported a presumption that it did not have a defense to

[plaintiff's] petition for injunctive relief.").[8] Respondent's order did not include such language or any type of determination that City Info's claims lacked merit. Accordingly, imposition of the death penalty sanction was improper and mandamus relief is warranted in that regard.

We sustain City Info's first issue.

B. Deemed admissions

Requests for admissions, which are governed by Texas Rule of Civil Procedure 198, are not intended to require a defendant to admit the validity of a plaintiff's claims or concede his defenses. *Time Warner*, 441 S.W.3d at 665 (Tex. App.—San Antonio 2014, pet. denied). Rather, they are intended to "simplify trials by 'addressing uncontroverted matters or evidentiary ones like the authenticity or

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[8] In *Ring & Ring*, PlazAmericas Mall Texas, LLC and its predecessor entity sought an injunction to prohibit Ring & Ring from operating carnivals on PlazAmericas's premises. 2017 WL 3140121 at *1. Ring & Ring counterclaimed for declaratory relief. *Id*. The day that trial was scheduled to begin, the trial court granted a motion filed by PlazAmericas and its predecessor against Ring & Ring, struck the portion of Ring & Ring's answer that pertained to injunctive relief and entered a permanent injunction against Ring & Ring. *Id.* at *1, 3. The sanction was imposed because Ring & Ring's owner missed her deposition and had difficulty retrieving documents requested for the deposition, but by the time the sanction motion was heard, the deposition had been conducted and the documents had been produced. *Id.* at *4. On appeal, Ring & Ring challenged the judgment and the order striking part of its answer. *Id.* at *2. This Court concluded the imposition of death penalty sanctions was an abuse of discretion because (1) the order did not support the presumption that Ring & Ring's defense(s) lacked merit, (2) the record did not reflect the trial court attempted less severe sanctions first, and (3) the death penalty sanctions were more severe than necessary "to satisfy the legitimate purposes of such a sanction." *Id.* at *8–9.

admissibility of documents . . . .'" *Time Warner*, 441 S.W.3d at 665 (quoting *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005)).

If responses to requests for admissions are not timely served, "the request is considered admitted without the necessity of a court order." TEX. R. CIV. P. 198.2(c). Matters that are admitted or deemed admitted are "conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission." TEX. R. CIV. P. 198.3. Trial courts cannot permit or deny withdrawal of deemed admissions "arbitrarily, unreasonably, or without reference to guiding rules or principles." *Wheeler*, 157 S.W.3d at 443. The party that seeks withdrawal of deemed admissions must show (1) good cause for the responding party's failure to serve the responses; (2) that the other party will not be "unduly prejudiced" if the deemed admissions are withdrawn; and (3) that "the presentation of the merits of the lawsuit will be subserved by the withdrawal."[9] TEX. R. CIV. P. 198.3.

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[9] Deemed admissions that are used to preclude the presentation of the merits of the case are considered "merits-preclusive" admissions. A merits-preclusive request for admission, for example, might ask the plaintiff to admit he was negligent in causing a motor vehicle accident, or that the defendant was not a proper party to a lawsuit. *See, e.g., Ramirez v. Noble Energy, Inc.*, 521 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (defendant's request asking plaintiff to admit defendant was not proper party to lawsuit was improper because it asked plaintiff to admit the validity of his claim against defendant); *In re TT-Fountains of Tomball, Ltd.*, 01-15-00817-CV, 2016 WL 3965117, at *13 (Tex. App.—Houston [1st Dist.] July 21, 2016, orig. proceeding) (mem. op.) (requests for admissions that defendants' negligence proximately caused plaintiff's injuries and that plaintiff was

The first requirement, good cause, is established "by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference." *In re TT-Fountains of Tomball, Ltd.*, No. 01-15-00817-CV, 2016 WL 3965117, at *6 (Tex. App.—Houston [1st Dist.] July 21, 2016, orig. proceeding) (mem. op.) (quoting *Wheeler*, 157 S.W.3d at 442). The burden to show good cause is generally on the party that seeks withdrawal of the deemed admissions. *Id.*[10]

In asserting there was good cause for its failure to timely respond to the requests for admissions, City Info contends it did not receive the requests for admissions or production in the second and third sets of discovery propounded by Walks, but, rather, only received "a link" to the discovery and "a notice of service in September transmitting the discovery." Yet, City Info says, when the discovery "came due, [its] counsel was unable to locate any email, US Mail, or facsimile transmitting the requests."

Walks asserts it served both sets of discovery via the e-File Texas filing portal on City Info at six addresses identified with City Info's CEO/counsel and one

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not contributorily negligent "were improper and outside the scope of proper requests for admission").

[10] However, when the requests for admissions are merits preclusive, the party that opposes the withdrawal has the burden to show the other party acted "with bad faith or callous disregard for the rules." *Fountains of Tomball*, 2016 WL 3965117, at *6. As discussed below, the admissions at issue here are not merits preclusive.

identified with Schmidt's associate, who had appeared in the case. City Info told Walks it "need only serve one email address, firm@schmidtfirm.com, the one that [p]laintiff's counsel has designated for service." "Firm@schmidtfirm.com" was one of the six email addresses Walks served with the second and third sets of discovery. So, City Info confirmed the discovery was served on the correct email address.[11] Electronic service is "complete on transmission of the document to the serving party's electronic filing service provider." TEX. R. CIV. P. 21a(b)(3).

Further, if notice is properly sent pursuant to Rule 21a, service is presumed unless the party offers proof as to non-receipt. *Graham-Rutledge & Co., Inc. v. Nadia Corp.*, 281 S.W.3d 683, 691 (Tex. App.—Dallas 2009, no pet.). The exhibits to Walks's pleadings in the trial court include Schmidt's email inquiring as to whether Walks had served a second set of written discovery, as he "remember[ed] seeing something come in." The email further supports Walks's assertion that the discovery was successfully served on City Info. As such, City Info cannot establish the "good cause" requirement for the withdrawal of deemed admissions. *See Garcha v. Chatha*, No. 05-17-00084-CV, 2018 WL 1755391, at *3 (Tex. App.—Dallas Apr. 12, 2018, no pet.) (mem. op.) (no abuse of discretion when trial court concluded

[11] City Info did not complain of failing to receive the first set of discovery propounded by Walks.

defendant's failure to answer admissions "was, at the least, the result of conscious indifference rather than an accident or the result of mistake"; plaintiff attempted to serve discovery using email address provided by defense counsel and defense counsel acknowledged he did not receive discovery because his emails were automatically forwarded to his staff).

The second requirement, undue prejudice, occurs if "withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party's ability to prepare for it." *Wheeler*, 157 S.W.3d at 443. As with the "good cause" requirement, the burden to prove undue prejudice lies with the party that seeks withdrawal of the deemed admissions unless the deemed admissions are merits preclusive. *Time Warner*, 441 S.W.3d at 666.

City Info asserted Walks would not be unduly prejudiced by the withdrawal of the deemed admissions because (1) Walks refused to provide copies of the discovery requests to City Info until after the motion to compel was filed, and (2) the discovery period ended at or near the time the responses initially were due.[12] City Info is correct to the extent Walks refused to provide the discovery requests when City Info asked for them on September 30, 2019, after the response deadline. But even if Walks had forwarded the requests to City Info that day, City Info's

[12] The parties entered into an agreement whereby discovery would end on September 30, 2019.

responses would still have been late, and City Info would still have been forced to file a motion to withdraw the deemed admissions. Walks did not address the prejudice requirement in the lower court and, only now, in response to the petition for writ of mandamus, says it would be prejudiced by the withdrawal of the deemed admissions because it would expand the scope of factual issues to be proven at trial.

To satisfy the third requirement to withdraw deemed admissions, City Info must establish withdrawal of the admissions would serve the preservation of the lawsuit's merits. "Preservation of the merits is not served when 'the case is decided on deemed (but perhaps untrue) facts. . . .'" *Time Warner*, 441 S.W.3d at 665 (quoting *Wheeler*, 157 S.W.3d at 443 n.2). "When requests for admissions are used as intended—addressing uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents—deeming admissions by default is unlikely to compromise presentation of the merits." *Wheeler*, 157 S.W.3d at 443 (citing *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996)). However,

> [i]t is not enough to demonstrate that admissions do not conclusively establish the ultimate issue in the case to escape withdrawal of the deemed admissions. Instead, "the record must affirmatively show that the requests are not merit-preclusive, either by showing that they seek to authenticate or prove the admissibility of documents or by showing that they involve uncontroverted facts." Because merits-preclusive admissions implicate due process concerns, we must presume that the admissions are merits-preclusive if the record does not affirmatively establish that they are not merits-preclusive.

Ramirez v. Noble Energy, Inc., 521 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (quoting *In re Sewell*, 472 S.W.3d 449, 461 (Tex. App.—Texarkana 2015, orig. proceeding)). Walks's second set of discovery included the following requests for admissions:

- Request for Admission No. 1: Admit the Agreement at issue in the Lawsuit has been executed by City Info in the same form with tour suppliers other than Walks and/or Walks TX.

- Request for Admission No. 3**:** Admit Tom Schmidt signed Check No. 2226 made payable to Walks LLC and attached hereto as Exhibit 1.

- Request for Admission No. 16: Admit Big City Sightseeing routinely submitted invoices to City Info for tours Big City Sightseeing provided to City Info's customers.

- Request for Admission No. 17: Admit City Info paid Big City Sightseeing's invoices without first receiving customer vouchers as required by the parties' contract.

- Request for Admission No. 34**:** Admit that prior to filing the Lawsuit, City Info never requested "any further information in order to process payment" of the invoice referenced in the email attached hereto as Exhibit 23 and sent to "billing@cityinfo.expert."

- Request for Admission No. 40**:** Admit that City Info never attempted to perform an audit—as set forth in the Declaration of Carolyn Carter filed in the Lawsuit—at any point prior to instituting the Lawsuit.

None of these requests is merits preclusive.[13]

[13] These requests are representative of, and some are virtually identical to, the other requests for admissions in Walks's second set of discovery.

City Info did not address whether the requests were merits preclusive in its motion, but said only the "merits of this case will be furthered by allowing [it] to introduce evidence on the topics covered by the [r]equests." Walks also failed to address this requirement for the withdrawal of deemed admissions in the lower court. Rather, Walks's response to the motion to withdraw deemed admissions only provided examples of and documents from other lawsuits in which Schmidt purportedly "claimed he did not receive a properly served filing and then blamed email, fax, or some other means of service."

City Info relies on a 2016 case from this Court in support of its argument that respondent abused her discretion in denying the motion to withdraw deemed admissions. In *Fountains of Tomball*, defendant Fountains of Tomball's corporate representative testified that he had been served with discovery—including requests for admissions—along with the plaintiff's original petition, but mistakenly believed the discovery was directed at another defendant.[14] 2016 WL 3965117 at *2. When the corporate representative forwarded the petition to Fountains of Tomball's insurer, he neglected to forward the discovery. *Id.* Accordingly, Fountains of Tomball's insurer did not forward any discovery to Fountains of Tomball's attorney. *Id.* at *3. The corporate representative testified he did not realize discovery directed

[14] The citation served with the original petition in *Fountains of Tomball* did not mention that discovery requests were being served along with the original petition. 2016 WL 3965117 at *3.

at Fountains of Tomball had been included with the petition until more than a year after the discovery was served. *Id.* at *2. Fountains of Tomball's attorney only received the discovery after opposing counsel inquired as to the discovery responses more than a year after the discovery was served. *Id.* at *3.

Fountains of Tomball is inapposite because in that case, defendant's counsel never received the requests for admissions and there was no assertion by plaintiff that defense counsel was served with the discovery. On the contrary, the defendant's corporate representative testified that he did not realize the original petition was served with discovery directed at Fountains of Tomball and, therefore, did not forward the discovery to its insurer or counsel. *Id.* at *2. Holding the trial court abused its discretion in refusing to withdrawal the deemed admissions, this Court said that "a lack of care, simple bad judgment, or a mistaken belief that no discovery had been served does not rise to the level of bad faith or callous disregard for the rules." 2016 WL 3965117, at *11. "Rather, a determination of bad faith or callous disregard for the rules has been reserved for cases in which the evidence shows that a party is mindful of pending deadlines and nonetheless either consciously or flagrantly fails to comply with the rules." *Id.* at *12.

The plaintiff in *Fountains of Tomball* contended she would be prejudiced by the withdrawal of the deemed admissions because she would have to conduct discovery on the facts that were undeemed. *Id.* at *12. This Court concluded,

however, that given that the defendant contested liability, plaintiff's decision not to pursue additional discovery was made at her own risk. *Id.* at *13. Finally, unlike the requests for admissions at issue here, the requests for admissions in *Fountains of Tomball* were merits preclusive and, therefore, improper. "Such requests, involving controverted legal issues, were improper and outside the scope of proper requests for admission." *Id.* at *13.

City Info did not show good cause for its failure to timely respond to the requests for admissions. Further, the requests for admissions are not merits preclusive. Given that withdrawal of the deemed requests is not needed to preserve the merits of the lawsuit, and in the absence of a showing of good cause for the late responses, respondent did not abuse her discretion in denying the motion to withdraw the deemed admissions.

We overrule City Info's second issue.

C. Discovery objections

City Info next contends respondent abused her discretion in ordering City Info to respond to Walks's second and third sets of discovery without asserting objections. Texas Rule of Civil Procedure 193.2 requires all objections to written discovery (1) to be in writing and (2) to be made "within the time for response." TEX. R. CIV. P. 193.2(a).

City Info contends it did not receive the second and third sets of discovery propounded by Walks and that it "never saw the discovery requests until October 25, 2019." However, Walks served both sets of discovery[15] via the e-File Texas filing portal on City Info at six addresses identified with City Info's CEO/counsel and one identified with his associate, who had appeared in the case. Indeed, Schmidt conceded that one of the six email addresses was proper for service on his firm.[16] Electronic service is "complete on transmission of the document to the serving party's electronic filing service provider." TEX. R. CIV. P. 21a(b)(3). Only after receiving Walks's discovery responses and objections on September 30, 2019, the date discovery closed, did City Info's counsel and CEO email Walks's counsel, asking:

> Did you guys serve us with more written discovery? I don't have it in my email or in our file, but *I remember seeing something come in*. Can you resend?

(Emphasis added).

When a party fails to offer proof as to non-receipt, service pursuant to the certificate of service is presumed. *Graham-Rutledge*, 281 S.W.3d at 691. Not only did City Info fail to offer proof of non-receipt, the September 30, 2019 email reflects

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15 The second set of discovery was served on August 29, 2019, and the third set was served on August 30, 2019.

16 *See supra,* note 11.

receipt of the discovery. After apparently receiving no response on September 30, 2019 from his email to Walks, Schmidt sent an October 1, 2019 email thanking Walks for the "confirmation" that there had been no additional discovery. On October 2, 2019, Walks emailed Schmidt, advising of the email addresses where the discovery had been sent on August 29, 2019 and August 30, 2019 and that a motion to compel would be filed. In response, Schmidt emailed on October 2, 2019: "[W]e will seek sanctions. We do not have the discovery requests. You can keep playing games, but it will not work for you. Send me the discovery if you want it answered."

Given the presumption that the discovery was properly served on City Info, City Info waived its right to object to the discovery by failing to assert objections by the date the discovery responses and answers were due. "An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown." TEX. R. CIV. P. 193.2(e). City Info asserts here, as it did in the court below, that it was not obligated to produce the documents because its objections–that the requests were for customer information and supplier information that was unrelated to this litigation, that the information sought comprised trade secrets, and that the requests were overly burdensome and outside the scope of discovery–were valid, and because it showed good cause for failing to assert the objections timely:

> Although Plaintiff's counsel saw a notice of service in September transmitting the discovery, when they came due, Plaintiff's counsel was unable to locate any email, US Mail, or facsimile transmitting the discovery requests. In that event, what should a responsible attorney do? The answer is to reach out to opposing counsel, confirm that in fact something had been sent, and, if so, request a copy of the documents in question. That is precisely what Plaintiff's Counsel did, in a very professional manner.

City Info continued:

> Had Defendants provided the discovery to Plaintiffs upon request, the discovery would already have been answered and the Court would not be bothered with yet another discovery dispute.

But City Info requested the discovery after the deadline for responding and objecting to it had passed. In fact, City Info requested the discovery on the day the discovery period closed. Although Walks could have resent the discovery when asked on September 30, 2019, more than a month after it was served, it was under no obligation to do so and certainly under no obligation to allow City Info to assert untimely objections.

Moreover, given respondent's apparent conclusion that City Info did not show good cause for failing to timely answer, respond and object to the discovery, the legitimacy of City Info's objections is of no import. Inasmuch as the discovery-response deadline had passed, it was within respondent's discretion to determine whether City Info showed good cause for its tardiness. *See Sand Point Ranch, Ltd. v. Smith*, 363 S.W.3d 268, 271 n.7 (Tex. App.—Corpus Christi 2012, no pet.) (noting "whether to grant a motion for leave to file late objections is within the discretion of

the trial court") (citing *Woods v. Woods*, 193 S.W.3d 720, 723 (Tex. App.—Beaumont 2006, pet. denied)).

City Info's only proffered excuse for its failure to object was its purported non-receipt of the discovery. In light of Walks's proof of service, the absence of proof of non-receipt by City Info, Schmidt's admission that he recalled seeing something about the discovery, and Schmidt's identification of the address where the discovery should have been – and was – sent, and given that the sanction satisfies *TransAmerican*'*s* requirement[17] that there be a direct relationship between the offensive conduct and the sanction imposed, respondent did not abuse her discretion in ordering City Info to respond to the discovery without asserting objections.

We overrule City Info's third issue.

D. Striking the contract paragraphs

Finally, City Info contends respondent abused her discretion in striking two paragraphs from its first amended petition, eliminating much of its contract claim. Paragraphs 10(a) through 10(c) in City Info's first amended petition state:

> 10. Plaintiff and Defendant(s) entered into the contract. Plaintiff performed all components of its agreement with Walks. However, Walks breached the agreement in multiple ways. The provisions Walks breached include, but are not limited to:
>
> a. Walks failed to provide a schedule of tours to Plaintiff in the format of Exhibit A to the Contract as required in Paragraph 2;

[17] *See TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding).

b. Walks failed to provide Plaintiff with "Most Favored Nation" status, and paid higher commissions to Plaintiff's competitors, in contravention of Paragraph 4; and

c. Walks failed to provide copies of redeemed vouchers with their invoices, as required in Paragraph 5.

Respondent struck paragraphs 10(a) and 10(b) in response to Walks's special exceptions to City Info's amended original petition and motion to strike. City Info does not challenge respondent's granting of Walks's first special exceptions, and the order granting the motion to strike paragraphs 10(a) and 10(b) specifically struck through the language indicating it was granting Walks's special exceptions to City Info's amended petition. Therefore, City Info does not seek relief from respondent's granting of any special exceptions.[18]

In granting Walks's special exceptions to City Info's original petition, respondent ordered City Info to amend its petition "to plead with particularity the factual bases of its breach of contract claim against Walks." City Info eventually filed an amended original petition. However, Walks asserted in its special exceptions to City Info's amended petition that the amended petition "fails to cure

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[18] Inasmuch as City Info does not complain of the granting of the first special exceptions, it cannot argue that the trial court acted improperly in sustaining the special exceptions. *See Sunbelt Tectonics, Inc. v. Ramirez*, 742 S.W.2d 771, 774 (Tex. App.—San Antonio 1987, no writ) (party who complained of striking of pleadings but not the granting of special exceptions waived challenge to granting of special exceptions).

any of the deficiencies underlying the Court's Order granting [] Walks' first Special Exception[s]." Walks asserted the breach of contract claim in the amended petition comprised

> vague and indefinite allegations . . . [that] fail to provide fair notice of the alleged acts or omissions by Walks, specifically with regard to Plaintiff's claims that Walks: (i) failed to provide a schedule of tours to Plaintiff, (ii) failed to provide Plaintiff "Most Favored Nation" status, and (iii) paid higher commissions to Plaintiff's competitors.

Walks further said:

> Walks simply has no clue what Plaintiff is talking about with regard to the base allegations set forth in Paragraphs 10(a) and 10(b) of the Amended Petition, and there are no new facts offered in the Amended Petition that would serve to shed light on such. Plaintiff must plead facts—the "who," "what," "where," and "when"—that substantiate its claim. However, Plaintiff has wholly failed to do so, even after being given ample opportunity.

In specially excepting to the first amended petition, Walks requested that respondent strike paragraphs 10(a) and 10(b).

City Info said in response to the special exceptions and motion to strike that the claims in the first amended petition

> relate to specific provisions of the parties' contract with which Defendants failed to comply. . . . The language of the Petition is succinct because the contract is clear and the claims are simple. There are specific provisions of the contract that are clear and unambiguous. Defendants failed to comply with them. Plaintiff is not required to plead more details in this context because there are no more details to plead.

City Info asserted the second special exceptions should be overruled because they were filed late and because respondent had already denied summary judgment as to the same claims.[19] No elaboration of or support for either of these arguments was included in City Info's response to the special exceptions and motion to strike.

Respondent's order granting the motion to strike paragraphs 10(a) and 10(b) does not explain her reasoning for striking the paragraphs.[20] However, City Info's amended petition was virtually identical to the original petition in the fact section and in the section describing the contract claim, except that the amended petition *deleted* two bases for the contract claim. After special exceptions are sustained, "[t]hat a trial court has the authority to strike pleadings for failure to amend is axiomatic." *Sunbelt Tectonics, Inc. v. Ramirez*, 742 S.W.2d 771, 774 (Tex. App.—San Antonio 1987, no writ). City Info's purported amendment was tantamount to a failure to amend, given that the descriptions of the facts and the contract claim were not expanded upon in any way in the amended pleading. *See McCaskell v. Methodist Hosp.*, 856 S.W.2d 519, 520 (Tex. App.—Houston [1st Dist.] 1993, no writ) (when plaintiff's amended petition "did not replead in compliance with the order on the special exceptions," trial court "had the authority to strike the offending

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19 *See supra*, note 18. City Info does not complain here of the granting of special exceptions.

20 The order striking paragraphs 10(a) and 10(b) specifically struck through the language indicating it was granting "special exceptions."

paragraphs"); *see also Lentworth v. Trahan*, 981 S.W.2d 720, 722–23 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (dismissal of claims is proper "on the failure of a plaintiff to amend deficient pleadings when given that opportunity"); *M & M Res., Inc. v. DSTJ, LLP*, 564 S.W.3d 446, 453 (Tex. App.—Beaumont 2018, no pet.) ("If a trial court sustains special exceptions and requires a party to replead, the litigant must obey the order and file a curative amendment or suffer the consequences of dismissal.") (citing *Hefley v. Sentry Ins. Co.*, 131 S.W.3d 63, 65 (Tex. App.—San Antonio 2003, pet. denied)).

To the extent City Info failed to adequately replead pursuant to respondent's order sustaining Walks's special exceptions to City Info's original petition, respondent did not abuse her discretion in striking paragraphs 10(a) and 10(b) of City Info's amended petition.[21]

We overrule City Info's fourth issue.

Adequate remedy by appeal

The supreme court has said the eventual appeal of sanctions that "have the effect of precluding a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering default judgment" is an inadequate

[21] Our granting of mandamus relief is limited to the order striking City Info's pleadings. Given that mandamus relief is not granted with respect to the order striking paragraphs 10(a) and 10(b) of City Info's first amended petition, those paragraphs will remain struck from City Info's first amended petition after respondent vacates her order striking City Info's pleadings.

remedy, "unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment." *TransAmerican*, 811 S.W.2d at 920. City Info has no adequate remedy by appeal for the striking of its pleadings. We need not address whether City Info has adequate remedy by appeal for any other order of which it complains, given that we have found respondent did not abuse her discretion in issuing those three orders.

Conclusion

We conclude that respondent abused her discretion by striking City Info's pleadings and that City Info has no adequate appellate remedy to correct this error. *See TransAmerican*, 811 S.W.2d at 920.

Accordingly, we direct respondent to vacate her order striking City Info's pleadings. Our writ of mandamus will issue only if the trial court does not comply.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Landau.