CAUSE NO. 2012-20396

1620 HAWTHORNE LTD.	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	
vs.	§	
	§	
MONTROSE MANAGEMENT DISTRICT, THE MONTROSE MANAGEMENT DISTRICT BOARD OF DIRECTORS, CONSISTING OF THE FOLLOWING: CLAUDE WYNN, CHAIRMAN; DR. RANDY MITCHMORE, VICE-CHAIRMAN; CASSIE STINSON, SECRETARY; KATHY HUBBARD, TREASURER; BRAD NAGAR, ASSISTANT TREASURER; ROBERT JARA, POSITION 6; BOBBY HEUGEL, POSITION 7; DANA THORPE, POSITION 8; LANE LLEWELLYN, POSITION 9; TAMMY MANNING, POSITION 10; DAVID ROBINSON, POSITION 11; MICHAEL GROVER, POSITION 12; RANDY ELLIS, POSITION 13; DENNIS MURLAND, POSITION 14 and BILL CALDERON, EXECUTIVE DIRECTOR.	§	HARRIS COUNTY, TEXAS
Defendants	§	333RD JUDICIAL DISTRICT

PLAINTIFF'S MOTION TO CONTINUE AND RESET DEFENDANTS' DECEMBER 14, 2012 HEARING DATE ON THEIR TRADITIONAL MOTION FOR SUMMARY JUDGMENT AND PLEAS TO THE JURISDICTION TO JANUARY 18, 2013 AND PLAINTIFF'S MOTION TO CONTINUE AND RESET PLAINTIFF'S DECEMBER 7, 2012 DEADLINE TO RESPOND TO DEFENDANTS' TRADITIONAL MOTION FOR SUMMARY JUDGMENT TO JANUARY 11, 2013

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff, 1620 Hawthorne Ltd**.,** hereby files this Motion to Continue and Reset Defendants' December 14, 2012 hearing date on their traditional Motion for Summary Judgment and their Pleas to the Jurisdiction to January 18, 2013, as well as Plaintiff's Motion to Continue and Reset Plaintiff's December 7, 2012 deadline to respond to Defendants' traditional Motion for Summary Judgment to January 11, 2013, and would respectfully show the Court as follows:

I.
Summary of Motion

1. In order to adequately respond to Defendants' filings which are currently set for oral hearing on December 14, 2012, Plaintiff needs to depose one witness—Mr. David Hawes. Plaintiff attempted to secure a hearing date in November to obtain the right to depose Mr. Hawes, but was told that the only available hearing date was December 7, 2012. In support of their Plea to the Jurisdiction and their Motion for Summary Judgment, each of the Defendants in this case have voluntarily and intentionally filed sworn affidavits—not once, not twice, but three time—from David Hawes, the former Executive Director of the Montrose Management District ("MMD"). In his affidavits, Mr. Hawes explains his process for how he determined that 3 out of 26 petition signers were eligible to request the initial formation of the District. Mr. Hawes also explains the process for how the District evaluated and ultimately rejected the petition to dissolve the District (the

"Dissolution Petition"). These areas of his sworn testimony are fact-intensive, and should be subjected to cross-examination. Much of his opinion testimony is self-serving and subjective in nature, but a significant portion of his affidavits refer to facts that no one else can rebut, as he describes his thought process and mental evaluation of the paperwork he examined back at the time of his actions. In reaction, Plaintiff promptly requested to take the oral deposition of Mr. Hawes, but has been met with steadfast opposition to allowing this to occur. Instead, Defendants' have tried to undercut Plaintiff's ability to depose their chosen affiant by offering to retract unspecified portions of his affidavit, by permitting a tightly controlled and narrowly circumscribed deposition upon written questions, or by stipulating to certain facts.

2. No depositions have been taken in this case. This is the one and only targeted request that has been made. The Defendants should not be allowed to have it both ways. They seek dismissal of this case on jurisdictional grounds AND on traditional summary judgment grounds by relying on Mr. Hawes' sworn testimony, yet they refuse to allow Plaintiff access to oral deposition discovery so that Plaintiff may defeat both their Plea and their Motion. As will be demonstrated herein, no immunity bars this discovery because Plaintiff has brought a legitimate ultra vires claim. Further, even if immunity were to potentially apply, the Texas Supreme Court has already recognized that there is a legitimate need for discovery

in the context of a jurisdictional challenge, as is the case here. Third, this case creates an exception to the immunity doctrine because the Defendants do not possess the discretion to violate state law and the District is a necessary party to Plaintiff's claims for declaratory relief. And fourth, now the District seeks summary judgment adjudication on the MERITS, virtually guaranteeing Plaintiff's entitlement to basic discovery in order to defeat that effort. Simply put, David Hawes' testimony is not only fair game, but should be required under even the most basic rights of discovery to ensure fundamental fairness. Accordingly, Plaintiff has filed a Motion to allow it to depose Mr. Hawes, which will be heard on December 7, 2012, at 10:00a.m. Because Defendants' Motion for Summary Judgment and Pleas to the Jurisdiction are set for December 14, 2012, it will be impossible to obtain a court order permitting this deposition in time to respond. Thus, Plaintiff seeks to continue and reset Defendants' Motion and Pleas until January 18, 2013, thereby allowing Plaintiff adequate time to depose Mr. Hawes, obtain a transcription from the court reporter, and file a Response to Defendants' Motion by January 11, 2013.

II.
Factual Background

3. Plaintiff filed its Original Petition solely against the District on April 5, 2012. Plaintiff owns commercial property within the District and has been assessed by the District. As such, Plaintiff sought certain declaratory and other

relief. Defendant thereafter filed a Plea to the Jurisdiction, and this Honorable Court conducted a hearing on said Plea on June 1, 2012. No hearings have occurred since.

4. On May 25, 2012, Plaintiff filed its First Amended Petition, adding each of the Board Members and the current Executive Director as Parties. On July 30, 2012, the individual Defendants filed their Plea to the Jurisdiction. Attached to the Plea was an affidavit from David Hawes, the District's former Executive Director.[1] A true and correct copy of Hawes' first affidavit is attached hereto as Exhibit 1. On August 30, 2012, Defendants filed a second affidavit of Mr. Hawes. A true and correct copy of Hawes' second affidavit is attached hereto as Exhibit 2. In light of these two affidavits and the purported facts therein, Plaintiff served a deposition notice for David Hawes on October 22, 2012. A true and correct copy of Hawes' deposition notice is attached hereto as Exhibit 3. On October 23, 2012, Plaintiff received Defendants' Objection, Motion to Quash and Motion for Protective Order Regarding Notice for Oral Deposition of David Hawes. Finally, Defendants filed their Motion for Summary Judgment on October 31, 2012. In support of their Motion, Defendants relied, for a third time, on both of Hawes' affidavits. As such, Plaintiff seeks a Motion to Compel the Oral Deposition of David Hawes.[2]

[1] Hawes is not a named Defendant in this lawsuit, but is intimately involved with what transpired factually between Plaintiff and the Defendants.

[2] Counsel for both parties have conferred at length regarding this issue. It is only out of necessity that Plaintiff seeks the Court's intervention on this discovery matter.

III.
Argument

5. Defendants' entire argument centers on the faulty premise that—because Hawes is a public official—he is entitled to immunity and thus a deposition is neither necessary nor appropriate. Defendants are wrong for four (4) reasons. First, the immunity doctrine does not apply to Plaintiff's assertion of an ultra vires claim. Second, even if immunity were potentially available, the Texas Supreme Court has recognized that Plaintiff nevertheless has a right to take discovery to prove why immunity does not exist under the particular facts of the case. Third, immunity has been waived under the facts of this case. And fourth, Defendants' use of the Hawes' affidavits in support of their traditional Motion for Summary Judgment makes this affiant fair game for deposition discovery on the merits of Plaintiff's entire lawsuit, not just the ultra vires allegations.

A. The Doctrine of Immunity is Inapplicable Since A Valid *Ultra Vires* Claim Has Been Asserted

6. Immunity does not exist for a claim alleging the performance of an *ultra vires* act. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Thus, *ultra vires* suits do not attempt to exert control over the state--they attempt to

reassert the control *of* the state. Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy. *Id.* Plaintiff's live pleading asserts that Defendants violated the law in several ways, three of which are pertinent here. First, Defendants violated state law by creating the District based on petition-signers who were not eligible to sign such a petition in the first place. Second, Defendants violated state law by intentionally misinterpreting the denominator for the 75% requirement for petition-signers to dissolve the District. Third, to the extent that the Court finds that the Defendants properly interpreted the denominator, which Plaintiff denies, then such interpretation renders that particular state statute unconstitutional as applied to the facts of this particular case.

7. The *ultra vires* exception to immunity allows a plaintiff to sue a state official for prospective injunctive and/or declaratory relief to restrain the official from violating statutory or constitutional provisions. *Id*. at 369-376. Sovereign and/or governmental immunity does not bar such a suit because, in concept, acts of state officials that are not lawfully authorized are not considered to be acts of the State. Affording the remedy of compelling such officials to comply with the law, while binding on the State, does not attempt to exert control over the State, but instead attempts to reassert the control of the State. It is for this reason that Plaintiff has sued the individual Defendants.

8. As described above, an *ultra vires* claim is an exception to the doctrine of immunity. Therefore, as Plaintiff has asserted a valid *ultra vires* claim against the individual Defendants, immunity does not apply. As such, Plaintiff is entitled to elicit deposition testimony from David Hawes as the doctrine of immunity is inapplicable.

B. Discovery Is Appropriate In A Plea To The Jurisdiction

9. Throughout their Motion to Quash, Defendants argue that discovery is not necessary because there are no jurisdictional facts in dispute. This is not true. Defendants' Plea to the Jurisdiction is supported by an affidavit from David Hawes. Throughout this affidavit Hawes swears to facts as to why he did what he did in regards to the petitions submitted when he was Executive Director of the District. For example, in his first affidavit, Hawes swears that "I was personally involved in the process of receiving and reviewing the petition submitted by real property owners …." See Exhibit 1, page 3, paragraph 4. In his second affidavit, Hawes swears that "[a]mong the tasks I performed at that time was to determine whether or not a signatory was an owner of 'real property subject to assessment in the district….'" See Exhibit 2, page 1, paragraph 2. These activities go to the core of Plaintiff's suit against the Defendants. A deposition is necessary in order to explore the accuracy or inaccuracy of these facts.

10. Texas Courts have consistently held that "because courts should determine whether they have jurisdiction as early as practicable, courts should allow 'reasonable opportunity for targeted discovery' if necessary to illuminate jurisdictional facts in a plea to the jurisdiction." *Hearts Bluff Game Ranch v. State*, No. 10-0491, 2012 Tex. LEXIS 727 (Tex. Sup. Ct. Aug. 31, 2012)(publication status pending)(Court allowed for limited discover, including six deposition); *see also Tex. Dep't of Parks & Wildlife*, 133 S.W.3d 217, 226 (Tex. 2004). Here, in order to combat the Plea to the Jurisdiction, Plaintiff is asking for a single deposition—that of David Hawes. This is certainly targeted discovery and is appropriate under the circumstances. Plaintiff seeks an order from this Court permitting the deposition of David Hawes.

C. Defendants Have Waived Immunity

11. In addition, the Texas Declaratory Judgments Act contains a waiver of immunity from suit. *City of El Paso v. Heinrich*, 284 S.W. 3d 366, 373 n.6 (Tex. 2009); TEX. CIV. PRAC. & REM. CODE § 37.006(b). If a party joins a governmental entity and seeks a declaration that an ordinance or statute is invalid, based on either constitutional or even nonconstitutional grounds, immunity from suit is waived. *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 391-92 (Tex. 2007); *Heinrich*, 284 S.W. 3d at 373, n. 6; *Lakey v. Taylor ex rel. Shearer*, 278 S.W. 3d 6, 15 (Tex. App.—Austin 2008, no pet.); *City of Beaumont v. Bouillion*, 896 S.W. 2d 143, 148-49 (Tex.

1995). Likewise, if a party joins a governmental entity and seeks a declaration construing an ordinance or statute, immunity from suit is waived. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W. 3d 628, 634, (Tex. 2010), *Heirnrich*, 284 S.W. 3d at 373, n.6; *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 445-46 (Tex. 1994). By its Amended Petition, Plaintiff asserts claims under this Act against each of the Defendants. With respect to the District, this entity is a necessary party to Plaintiff's claim for declaratory and/or injunctive relief that the District does not have any statutory authority or constitutional authority to make tax assessments. The District is also a necessary party to Plaintiff's claim for declaratory and/or injunctive relief that the District has a ministerial duty to dissolve. Furthermore, Plaintiff's constitutional claims of equal protection under both the Texas and United States Constitutions require the District to be joined as a necessary party. Thus, immunity from suit is waived because Plaintiff is joining the District to its suit: (1) which seeks a judicial declaration that the District's tax ordinance is illegal because the petition allegedly authorizing such assessment is invalid; (2) which seeks a declaration that the District's tax ordinance is illegal because such an assessment against only one class of land owner—commercial property owners—is unconstitutional; (3) which seeks to construe state law relating to the requirements for a petition for dissolution of the District and the effect of MMD's refusal to dissolve; and (4) the constitutionality of a state law

which allows taxation of commercial property owners but not other property owners where the tax assessment is used for the mutual benefit of all property owners. Accordingly, governmental immunity does not preclude prospective equitable remedies in official-capacity suits against government actors who have violated statutory and constitutional provisions, by acting without legal authority, and by failing to perform a purely ministerial act. *Heinrich*, 284 S.W.3d at 372-73. Simply put, even if Defendant does enjoy immunity, which Plaintiff denies, that immunity was been waived. Beacon Nat'l Ins. Co. v. Montemayor, 86 S.W.3d 260, 266 (Tex. App.—Austin 2002, no pet.)(stating that "[s]tate agencies have immunity from suit under the doctrine of sovereign immunity. The UDJA waives this immunity when a party seeks a court's construction of a statute or rule."). As such, Plaintiff is entitled to take the deposition of David Hawes as soon as possible.

D. Defendants' Reliance On Hawes' Affidavits In Support Of Their Traditional Motion For Summary Judgment Provides Entitles Plaintiff To Take His Deposition On Independent Grounds

12. Not only do the Defendants rely on both Hawes' affidavits to support their jurisdictional challenge, but these same Parties also voluntarily and intentionally submit these sworn affidavits in support of their traditional Motion for Summary Judgment. Given the wide latitude and liberal nature of our discovery rules, common logic and fundamental fairness would dictate that Plaintiff should be

allowed to test the veracity and accuracy of sworn testimony an opposing party choose to interject into the facts of the case.

IV.
Conclusion

For the reasons detailed above, Plaintiff 1620 Hawthorne Ltd. respectfully requests that this Court grant Plaintiff's Motion to Continue and Reset the Defendants' December 14, 2012 hearing date on their traditional Motion for Summary Judgment and their Pleas to the Jurisdiction until January 18, 2013, thereby making Plaintiff's Response deadline on January 11, 2013. In addition, Plaintiff requests the Court grant its separately-filed Motion to Compel the deposition of David Hawes, as well as all other and further relief to which Plaintiff may show itself to be justly entitled.

Respectfully Submitted,

ANDY TAYLOR & ASSOCIATES, P.C.

BY: /s/ Andy Taylor

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CERTIFICATE OF CONFERENCE

I certify that I have conferred with counsel for Defendants regarding the subject of this Motion and he is opposed.

/s/ Andy Taylor_____
Andy Taylor

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has been served upon the following via facsimile transmission, on November 27, 2012:

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