

**IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION**

MARY LOU SMITH
an individual, and
SHARON DENSON,
an individual

Plaintiffs,

vs.

CASE NO.: 08 CA 11315
Division: B

TRAILER ESTATES PARK AND
RECREATION DISTRICT,
an independent special taxing district,
JANET JONES, an individual,
JOHN VANDERMOLEN, an individual,
JOSEPH SALERNO, an individual, and
MARY LOU MCNULTY, an individual

Defendants.

**PLAINTIFFS' MOTION TO COMPEL AND MOTION FOR RULING ON
OBJECTIONS TO NON-PARTY SUBPOENAS**

COME NOW, Plaintiffs, MARY LOU SMITH and SHARON DENSON, by and through their undersigned counsel and pursuant to Rule 1.380, Fla. R. Civ. Pro., and move this court for entry of an order compelling Defendant, Trailer Estates Park and Recreation District (hereinafter "District"), Defendant John Vander Molen (hereinafter "Vandermolen") and Defendant Mary Lou McNulty (hereinafter "McNulty") to respond to Plaintiffs' First, Second, and Third Requests for Production and Plaintiffs' Request for Inspection in this matter and an order denying the Defendants' District, Vandermolen, McNulty, and Janet

Jones, objections filed to the non-party subpoenas for Martha Brauer (hereinafter “Brauer”), TJ Miller (hereinafter “Miller”), Gail Opper (hereinafter “Opper”), and Bruce Smith (hereinafter “Smith”), and in support state as follows:

1. This suit alleges violations of the Florida Public Records law and the Florida Sunshine law.

2. Plaintiffs, residents of the District, an adult park and recreation district, allege that the Board of Trustees in general, and the individuals named, in particular, have committed numerous specific violations, and engaged in a pattern and practice of ignoring the mandates of the Public Records and Sunshine Laws.

3. The Plaintiffs have sought documents supporting these allegations from the District and individual Defendants through Public Records Requests, Requests for Production and Depositions Duces Tecum. The Defendants have avoided or failed to provide all documents responsive to Plaintiffs’ initial requests for Production or Duces Tecum.

4. The actions of the Defendants in response to discovery requests are consistent with their defense in this case which is to deny knowledge or claim no memory of violations of the Sunshine Law or Public Records Law until faced with irrefutable evidence of such violations.

5. The Plaintiffs, frustrated in attempts to obtain documents from the Defendants in a cooperative fashion, filed subsequent Requests for Production on Defendants, and proposed to serve Subpoenas on Third Parties who were Trustees, former Trustees, or employees of the District. This discovery seeks access to computers believed to have emails or other

documents responsive to Plaintiffs discovery requests seeking evidence of Public Record and Sunshine violations. These discovery attempts have all been objected to by the Defendants.

6. The Plaintiffs served their First Request for Production Directed to all Defendants on December 11, 2008. Included in the request Plaintiffs sought emails between Trustees or Trustee-elects or other electronic forms of communications involving multiple Trustees or Trustee-elects. In the instructions Plaintiffs indicated if documents were contained only on a computer to produce the computer for inspection and copying of the documents.

7. At that time all five Defendants were represented by single counsel, Kirk Pinkerton, who on January 9, 2009, provided some emails responsive to the Request for Production. No computers were proved for inspection.

8. The Plaintiffs are aware of the potential existence of emails and other computer generated documents existing but not produced on the District Computers, and the Computers of Defendants Vander Molen and McNulty, Trustees Opper and Brauer, former Trustee Smith and District employee Miller.

9. Through discovery pursued to date the Plaintiffs have learned that McNulty, Opper, Brauer, Smith and Miller routinely used District and/or personal computers for District business, or communicated via email with other Trustees, members of the District's committees or residents about District business. Excerpts from depositions, communications with counsel, and documents obtained through discovery or public records requests that demonstrate the need and appropriateness for an order from this court allowing the inspection of the requested computers have been filed with the Court and are based on the following facts:

a. Defendant District does not have a policy establishing public email addresses for Trustees or District employees. Pl. Tr. Ex. 410. Further, only in October of 2007 did the District acknowledge that it needed to have a retention schedule more appropriate for a governmental agency, as its prior record retention schedule did not provide for the retention of emails or other specific governmental records. *See*, October 12, 2007, memo from TJ Miller to Trustees with attachments and the Florida Department of State, General Schedule for State and Local Government Agencies GS1-SL.

b. Defendant District does not have a policy requiring Trustees or District employees to use only public email addresses or public computers for District correspondence or District business. Transcr. Depo. McNulty130:24-131:5 (Aug. 12, 2009); Transcr. Depo. Vandermolen 163:13-20 (Apr. 16, 2009).

c. In June 2006, Plaintiff Mary Lou Smith sent a public records request to the District's email as identified on the Department of Community Affairs, website, Special District section, only to receive a response from Vandermolen's email address advising Plaintiff Smith that her request had been sent directly to them and that the TE office does not send out e-mail. *See*, Mary Lou Smith Affidavit. Further, no emails from the District's email address have ever been produced in response to Plaintiffs' public records and discovery requests.

d. In August of 2007, District counsel repeatedly advised District Trustees and Committee members that all emails conducting the business of the District were public records, to be maintained in the District office, regardless of whether they

were sent or received at a Trustee's or Committee Member's home. Pl. Tr. Ex. 123, 126. Until that time, the District did not require Trustees, District Committee members or District employees to retain, maintain District business related documents as public records, nor did the District require those documents to be turned in to the District office. Transcr. Depo. McNulty 129:21-130:23. Further, as late as February 16, 2009, the District's Records Custodian was having to request public records from individual Trustees for maintenance in the District office. Pl. Tr. Ex. 359. Despite these notices, a Trustee has testified she routinely deletes emails and believes it is the recipient's responsibility to place emails in the public folder. Transcr. Depo. Opper 201:1-18 and 202:12-21 (Dec. 1, 2009).

e. Until January 7, 2008, the District did not have a written public records policy and until June 16, 2008, the District did not have any individual identified as the District public records custodian. Pl. Tr. Ex. 36 & District Minutes from June 16, 2008.

f. Defendant Vander Molen has testified that he used his personal computer for emailing and creation of documents but that he routinely deleted documents or that his computer routinely deleted documents. Transcr. Depo. Vander Molen 158:19-160:12 (April 16, 2008). In response to the First Request for Production of Documents Defendant Vander Molen produced a single email and his counsel at that time responded that the single email was the only email in his possession due to his practice of deleting documents created or received by his computer. May 4, 2006, email from Vander Molen to chalkbd@tampabay.rr.com. Mr. Vander Molen testified

that he does not email other Trustees, yet we have received from other sources emails from Vander Molen to other Trustees. Transcr. Depo. Vandermolen 158:13-15; July 22, 2007, email from Vander Molen to Jones. Further, Mr. Vander Molen only provided the District with a redacted October 9, 2007, email and the District is unable to provide an un-redacted version of this public record. Pl. Tr. Ex. 338; Transcr. Depo. Miller 13:2-14:1.

g. Defendant McNulty testified at her deposition that she used her home computer for email and District business, and that she did not provide documents to the District prior to 2007. Transcr. Depo. McNulty 129:21-130:23. She also testified to a habit of routinely destroying documents in her possession. Transcr. Depo. McNulty 134:8-24.

h. T.J. Miller testified that she has served as the District's office manager since 1991, her duties have always included maintenance of the public records, and she received no training related to that position. Transcr. Depo. Miller 7:9-8:7 & 9:23-25 (April 17, 2009). In 2008, she was designated as the records custodian for the District and testified that her training for the position amounted to the attendance of one seminar on public records in the summer of 2007. Transcr. Depo. Miller 10:1-8. She attended that seminar with the District Treasurer Pam Cole. Transcr. Depo. Cole 29:23-30:8 (May 19, 2009). No other District Trustee or employee attended that public records seminar or have attended any public records seminar although since 2007 they have received legal advice on public records issues from current District Counsel. Transcr. Depo. Brauer 327:6-15 (August 28, 2009); Transcr. Depo.

McNulty 8:11-17.

i. In response to the seminar Trustee Cole submitted a record retention policy to the Board for their approval that incorporated advice she had learned from attending the seminar. Transcr. Depo. Cole 30:3-31:10. Not only did the Board fail to approve the suggested record retention policy or any similar or alternative policy, the Board, including Vandermolen, stated that the District was too small, the public records law did not apply to such a small district, and the State did not care. Transcr. Depo. Cole 31:5-10 & 34:5-24.

j. Ms. Miller has further testified that she has been unable to find a number of District created documents requested by the plaintiffs that she believes either no longer exist or cannot be found in the District hard files. Transcr. Depo. Miller 46:14-48:10, 62:17-63:5, 63:24-64:5. The District annually provides the State with a report on any District documents destroyed and these reports do not indicate the destruction by the District of the documents sought by the Plaintiffs. Pl. Tr. Ex. 364, 365, 366. Ms. Miller also stated that she types up District documents and prepares documents for District Trustees on the computers in the District office and at times uses her personal computer. *See*, Sharon Denson Affidavit. Further, Ms. Miller failed to produce public records documents that were emails on her computer in response to Plaintiffs' subpoena duces tecum, but documents of this type were discovered through another District witness. Depo. Cole Ex. 3.

k. The Plaintiffs have submitted numerous public records requests in an effort to obtain complete responses their initial Request for Production and to obtain

additional evidence of the District and Trustees pattern and practice of Sunshine and Public Records violations. PL. Tr. Ex. 322, 325, 329, 331, 333, 336, 338, 343, 348, 350, 352; Nov. 13, 2009 and Jan. 20, 2010 Public Records Requests from Lewis, Longman & Walker. In their efforts the Plaintiffs and their representatives have found the District either intentionally uncooperative or incapable of providing competent and complete responses to their requests due to the lack of organization of District records, the lack of knowledge among District personnel of where records were located, or the possession of District records by Trustees or others outside the District offices. *See*, M. Marken Affidavit; Transcr. Depo. M. Smith 70:9-71:4. These actions have required numerous repeat requests from the Plaintiffs or their representatives and a significant amount of unnecessary time reviewing incomplete, redundant or unresponsive document production.

1. Trustee Opper testified that her computer automatically or she routinely deletes documents to maintain available room on her system. Transcr. Depo. Opper 201:1-18 (December 1, 2009). She testified to routinely emailing trustees, she also was shown a number of emails from Trustees Vander Molen and Jones that she did not produce at her deposition that she indicated must have been deleted from her computer. Transcr. Depo. Opper 209:10-210:24. Ms. Opper testified that she did not maintain and provide such documents to the District because it is not her responsibility as the creator of the document to maintain documents, rather it is the responsibility of the email recipient. Transcr. Depo. Opper 202:12-21. Ms. Opper admitted that there were emails responsive to her *duces tecum* that she has deleted.

Transcr. Depo. Opper 212:1-10; Pl. Tr. Ex. 70. Further, when questioned as to an email Opper sent to McNulty and why it was not produced responsive to her subpoena duces tecum, Ms. Opper testified that she cannot think of all the “small things”. Transr. Depo. Opper 205:22-206:24 & Ex. 15.

m. Trustee Brauer testified that she performed a number of District functions before and during her time as a trustee in which it was necessary for her to use District and personal computers. Transcr. Depo. Brauer 248:1-253:6 & 341:15-343:17. Only recently has she adopted a practice of saving and turning in these documents to the District office to maintain as public records. *Id.* During Brauer’s deposition she and her counsel only identified two specific documents and assert privilege for “some” other without any identification of those documents. Transcr. Depo Brauer 196:21-199:5. On January 27, 2010, Plaintiffs received Brauer’s privilege log alleging approximately 76 documents as privileged which were not produced by Brauer at her deposition. *See, Privilege Log.* Furthermore, many of these alleged privileged documents are not between the District and its counsel, but rather documents between Brauer and a District employee or computer technician, between Brauer and another Defendant in this matter, between Brauer and an unidentified person. *Id.* Additionally, some of the documents allege no privilege or do not identify the author, recipient or date. *Id.*

n. At the outset of this litigation the Plaintiffs served the Defendants with letters requiring them to maintain and not destroy any records in their possession related to the allegations in this lawsuit. Pl. Tr. Ex. 211 & 212. Despite this warning

it is evident that documents have been destroyed or deleted from District and personal computers.

o. The Plaintiffs have hired an expert in computer systems who has provided a sworn affidavit as to his ability to effectively recover from computers District business related documents that have been deleted, and that this can be done in a manner so as to minimize intrusion or disclosure of any unrelated or personal information.

10. While the Courts have been cautious about allowing a party to access an opposing party's or third party's computer, such orders have issued where: a Court determines that a party's claims that no documents responsive to discovery requests exist on the computer is contradicted by documents presented to the Court; where a Court has cause to question whether a party has produced all responsive documents; where discrepancies exist regarding a party's document production; or where a party has deleted documents after litigation had commenced. *Scotts Co. LLC, v. Liberty Mutual Ins. Co.*, 2007 WL 1723509 (S.D. Ohio, June 12, 2007) (citing to *Simon Prop. Group L.P. v. Simon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000); *Ameriwood Indus. Inc. v. Liberman*, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006); *Balboa Threadworks, Inc. v. Stucky*, 2006 WL 763668 (D. Kan. March 24, 2006)).

11. Locally, in the context of public record and sunshine law litigation the City of Venice and individual commissioners were required to produce computers for inspection because the City had allowed the commissioners to use personal computers for City business and personally maintain public records rather than turning them in to the City.

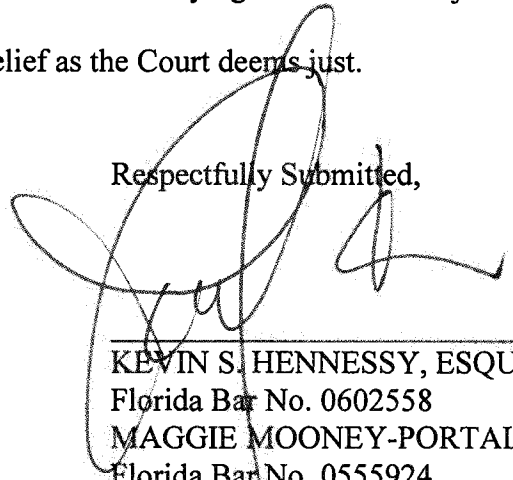
12. For the all the above stated reasons the Plaintiffs request the opportunity to

inspect the computers of the District, Vander Molen, McNulty, Opper, Smith and Miller in a manner consistent with that proposed in the affidavit of its forensic computer expert.

13. The undersigned certifies that it has in good faith conferred with all counsel in an attempt to resolve this discovery dispute including providing the predicate for its requests and indicating its willingness to follow the protocols for inspection but have been unable to resolve all objections.

WHEREFORE, the Plaintiffs move this Court for entry of an order requiring Defendants to respond to Plaintiffs' First, Second, and Third Requests for Production, an order requiring the District allow the Plaintiffs to inspect in accordance with Plaintiffs Request for Inspection, and an order denying Defendants objections to the non-party production, and such other relief as the Court deems just.

Respectfully Submitted,



KEVIN S. HENNESSY, ESQUIRE

Florida Bar No. 0602558

MAGGIE MOONEY-PORTALE, ESQUIRE

Florida Bar No. 0555924

JENNIFER R. COWAN, ESQUIRE

Florida Bar No. 038081

Lewis, Longman & Walker, P.A.

1001 3rd Avenue West, Suite 670

Telephone (941) 708-4040

Facsimile (941) 708-4024

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Hunter Carroll, Esquire**, Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A., 1777 Main Street, Suite 500, Sarasota, FL 34236, **James D. Dye, Esquire**, Dye, Deitrich, Petruff, & St. Paul, 1111 Third Ave. West, Suite 300, Bradenton, FL 34205, **Robert E. Turffs, Esquire**, 1444 First Street, Suite B, Sarasota, FL 34236, **Daniel E. Scott, Esquire**, Daniel E. Scott, P.A., 2033 Main Street, Suite 408, Sarasota, FL 34237, **Thomas D. Shults, Esquire**, Kirk Pinkerton, P.A., 50 Central Avenue, Suite 700, Sarasota, FL 34236, by U.S. Mail and facsimile, this 29th day of January 2010.



Jennifer Cowan, Esquire