

**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
DISTRICT'S OBJECTION TO SCOTT RUDACILLE'S SUBPOENA DUCES
TECUM**

COME NOW, Plaintiffs, MARY LOU SMITH and SHARON DENSON, by and through their undersigned counsel and pursuant to Rules 1.380 and 1.410, Fla. R. Civ. Pro., and move this court for entry of an order compelling Defendant, Trailer Estates Park and Recreation District (hereinafter "District") to produce documents in response to Plaintiffs' Subpoena for Deposition Duces Tecum of Scott Rudacille in this matter and an order denying the Defendant District's Notice of Objection filed for Scott Rudacille (hereinafter "Rudacille"), and in support state as follows:

1. Scott Rudacille has been identified by as one of the two attorneys with Kirk Pinkerton, P.A., acting as general counsel for the District and the attorney who took the lead on many of the matters at issue in this case including all public records requests. M. Barnebey Transcr., p. 18, 36-37, 51-53, 58, and 62-64 (April 17, 2009); M. Barnebey Transcr. p. 16, 21-22, 28, 42, 57, 71, 81, 91-93, 95-96, 100-105, and 110 (May 22, 2009) (Attached hereto as Composite Exhibit A). Hence, on February 26, 2010, the Plaintiffs filed their Subpoena for Deposition Duces Tecum of Scott Rudacille. See, Exhibit B.

2. On March 8, 2010, the District filed its Notice of Objection wherein the District does not specify any objection. See, Exhibit C. Subsequently, the Plaintiffs' counsel contacted the District's counsel in a good faith effort to resolve any objections the District may have concerning the required production, and if such a resolution could not be reached, then to identify a time for hearing on the matter. (See, Emails between Z. Ross and J. Cowan, dated March 16, and March 17, 2010, (and attached hereto as Exhibit D). Pursuant to a mutual understanding between counsel that documents responsive to the request would be provided at Rudacille's deposition on March 19, 2010, and supplemented thereafter if District counsel needed additional time in responding to the request. The Deposition went forward. S. Rudacille Transcr. p. 8:20-9:6 (March 19, 2010). (Attached hereto as Exhibit E)

3. However, at Rudacille's deposition, District counsel objected to the production of the documents required under the subpoena duces tecum as containing privileged information, and for the first time claimed the request was overly broad and unduly burdensome. S. Rudacille Transcr., p. 6:14-18 (March 19, 2010). Rudacille admitted

during the deposition that he had in his possession documents responsive to his subpoena duces tecum that were not privileged, and were available for production, yet he did not produce them because, "I couldn't fulfill the entire request. I didn't want to bring part of it." S. Rudacille Transcr. p. 21:1-10 (March 19, 2010).

4. Essentially, the District's counsel only raised objections to emails. S. Rudacille Transcr. p. 12:1-7; 14:9-15; (March 19, 2010). Rudacille explained that the emails were received and sent through the email program Microsoft Outlook. S. Rudacille Transcr. p. 17:21-22 (March 19, 2010). Rudacille admitted he was aware that his emails could be searched by date, sender/recipient, etc., but stated he was unaware of how to perform such searches. S. Rudacille Transcr. p. 16:19-17:20 (March 19, 2010). District counsel, at Rudacille's deposition, failed to provide a privilege log of the alleged privileged documents and produced only 6 pages of calendar documents, and ultimately, by agreement of counsel, his deposition was continued. See, documents produced at S. Rudacille deposition bates number 000001 - 000006, attached hereto as Exhibit G.

5. Again in a good faith effort to resolve the District's objections, Plaintiffs' counsel and District counsel discussed the objections and the continuance of the deposition. District counsel requested the continuance of Rudacille's deposition to the middle or end of May to allow for Rudacille's schedule and to allow the District counsel more time to gather the responsive documents and provide a privilege log pertaining to same. See, email from K. Hennessy to Z. Ross, dated April 5, 2010, and attached hereto as Exhibit F.

6. District counsel has now informed the Plaintiffs' Counsel Rudacille's

deposition cannot be rescheduled until a time in June. Further, more than one and a half months after Rudacille's deposition was noticed, District counsel has stated he will not be producing any documents required by Rudacille's subpoena duces tecum, alleging the documents requested are privileged, and that the request is overly broad, oppressive, unduly burdensome, meant to annoy, and meant to needlessly increase the cost of litigation. See, email from Z. Ross to K. Hennessy, dated April 8, 2010, and attached hereto as Exhibit F. Further, District counsel has failed to provide a privilege log related to this production.

7. Pursuant to Fla. R. Civ. P. 1.280, parties may obtain information reasonably calculated to lead to the discovery of admissible evidence. Further, a subpoena may command the person to whom it is directed to produce designated books, papers, documents or tangible things discoverable as defined in Fla. R. Civ. P. 1.280. See, Fla. R. Civ. P. 1.410 (e) (1) "A subpoena duces tecum is used to commend a witness, who has in his possession or control some documents pertinent to the issues of a pending controversy, to produce that document (s)." See, *State v. Smith*, 139 So. 2d 794,794 (Fla. 1932).

8. For the Court to sustain an objection based on a request being overly broad, unreasonable, or oppressive, the objector has the burden to demonstrate sufficient facts and evidence to the tribunal. See, *Sunrise Shopping Center v. Allied Stores Corp.*, 270 So. 2d 32, 34 (Fla. 4th DCA 1972); *First City Development of Fla. v. Hallmark of Hollywood Condominium Assoc., Inc.*, 545 So. 2d 502, 503 (Fla. 4th DCA 1989). Further, mere costliness of compliance in and of itself is not a ground for valid objection. See,

Ford Motor Co. v. Edwards, 363 So. 2d 867, 869 (Fla. 1st DCA 1978).

9. Additionally, under Rule 1.280(b)(5), when a party withholds information otherwise discoverable under the Rules by claiming such material is privileged, the party shall make the claim expressly and shall describe the nature of the documents not produced in a manner that “will enable other parties to assess the applicability of the privilege.” Rule 1.280(b)(5), Fla. R. Civ. P.

10. This litigation is centered on public record and sunshine law violations. The requested information is clearly calculated to lead to the discovery of admissible evidence and falls within the definition of discoverable evidence in accordance with the Fla. R. Civ. P., as every document requested in the subpoena duces tecum for Rudacille is a public record and many directly request information related to a specific sunshine violations alleged in the Third Amended Complaint and Addenda.

11. Further, the District’s inconsistent position on the production of the discoverable evidence is nothing more than another delay tactic aimed at prejudicing the Plaintiffs in their course for justice. The District has failed to provide any evidence that the request is overly broad and unreasonable. To the contrary, the District’s counsel has admitted that that “these documents are public records and we would have to produce them in response to a public records request,” but contends that this is a matter of discovery and as such they will pursue the objections. See, Exhibit F. The District’s motivation is merely to delay and increase the Plaintiffs’ litigation costs by withholding documents it would clearly have to produce within a much shorter time period if the Plaintiffs utilized a different vehicle for obtaining the documents. Additionally, this is

another consistent tactic of the District to require the Plaintiffs to pursue documents through public record requests, so that the District can in turn argue to the Court how burdensome and numerous the Plaintiffs' public records requests to the District have been.

12. The undersigned certifies that he has in good faith conferred with District counsel in an attempt to resolve this discovery dispute but has been unable to resolve the District's objections.

13. Pursuant to Fla. R. Civ. P. 1.380 (4) the Plaintiffs are entitled to an award of its reasonable expenses, including attorneys' fees, in having to bring this motion before the Court.

WHEREFORE, the Plaintiffs move this Court for entry of an order requiring the District to produce documents in response to Plaintiffs' Subpoena for Scott Rudacille (Duces Tecum) in this matter, denying the Defendant District's Notice of Objection, awarding Plaintiffs' attorney's fees and costs associated with bringing this motion, and such other relief as the Court deems just.

Respectfully Submitted,



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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 13th day of April 2010.


KEVIN S. HENNESSY, ESQUIRE