

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

CASE NO.: 6:10-CV-247-ORL-31-GLK

VACATION CLUB SERVICES, INC.

Plaintiff,

v.

GIOVANNI RODRIGUEZ and GLOBAL

RESORT MANAGEMENT, LLC

Defendants.

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**GLOBAL RESORT MANAGEMENT, LLC'S RESPONSE TO  
COURT'S NOVEMBER 19, 2010 ORDER TO SHOW CAUSE**

**COMES NOW** Defendant, GLOBAL RESORT MANAGEMENT, LLC, by and through its undersigned counsel, and hereby files its response to this Court's November 19, 2010 Order to Show Cause why Plaintiff's September 17, 2010 Motion for Sanctions against Defendant, Global Resort Management, LLC should not be granted, stating as follows:

**1.** Defendant, GLOBAL RESORT MANAGEMENT, LLC (hereinafter "GLOBAL") has not violated this Court's July 8, 2010 Order on Plaintiff's June 18, 2010 Motion to Compel, and respectfully requests an opportunity to be heard on this issue in oral argument, if this response leaves open any element of doubt.

**2.** The Order which is the subject of Plaintiff's Motion for Sanctions required Global to respond to Plaintiff's discovery requests within fourteen (14) days from the date of the Court's Order (on or before July 22, 2010).

**3.** On July 22, 2010, Global hand delivered to counsel for Plaintiff, VACATION CLUB SERVICES, INC. (hereinafter "VCS"): 1) Defendant, Global Resort Management, LLC's Answers to Plaintiff's First Set of Interrogatories; 2) Defendant, Global Resort Management,

LLC's Response to Plaintiff's First Request for Production of Documents; 3) Defendant, Global Resort Management, LLC's Response to Plaintiff's Amended Notice of Taking Rule 30(b)(6) Deposition Duces Tecum; (4) a thumb drive; (5) an external hard drive; and 6) documents Bates stamped GBL 001 – 149.

**4.** Plaintiff alleges GLOBAL has violated this Court's Order granting VCS's Motion to Compel by failing to produce all electronically stored information in its possession and by intentionally destroying evidence. In addition, Plaintiff alleges GLOBAL has engaged in the deliberate spoliation of evidence by systematically and intentionally destroying evidence prior to its Court ordered production of forensic images to VCS.

**5.** GLOBAL denies it failed to make all electronically stored information available to Plaintiff; GLOBAL denies it intentionally destroyed evidence it was required to preserve; and finally, GLOBAL denies it engaged in deliberate spoliation of evidence by systematically and/or intentionally destroying evidence prior to this Court's Order requiring production of same.

**6.** Plaintiff's April 21, 2010 First Request for Production to Defendant, GLOBAL, includes a section providing definitions and instructions, set out in consecutively numbered paragraphs 1 through 16. Following the instructions and definitions are paragraphs 1 through 33, which section outlines the actual documents sought by Plaintiff.

**7.** Paragraph 16 of the instructions and definitions reads as follows: "Except where specifically noted, each of the following requests should be answered for the time period extending from 2008 through the present."

**8.** Paragraph 27 under Requests for Production requests the following: "A forensically obtained copy of any hard drives contained within the primary business computers of David Michael, Travis Thomas, Alex Simao, Kevin Wiegard, Jeffrey Graham and Jarrod

King, which copies date back to *at least February 11, 2010*, the date of the preservation letter sent to Global.” (Emphasis added).

**9.** As outlined in the Affidavit of Eric Wichhart, the forensic expert retained by the undersigned to insure compliance with Plaintiff’s production requests, GLOBAL granted Mr. Wichhart complete access to its business computers in order to facilitate the production of a complete mirror image of the hard drives of those business computers requested by Plaintiff.

**10.** Mr. Wichhart complied precisely with Plaintiff’s production request, providing copies of the hard drives of the aforementioned computers dating back to data created on or after February 11, 2010. A true and correct copy of Eric Wichhart’s Affidavit is attached hereto and incorporated herein as Exhibit “A”.

**11.** On May 14, 2010, well prior to commencing the forensic copying which is the subject of the instant Order to Show Cause, a telephone conference took place between the undersigned, Mr. Wichhart, and Adam Losey, counsel for Plaintiff. The purpose of said discussion was to discuss the logistics of meeting the production request of Plaintiff concerning the copying of GLOBAL’s computer hard drives. During said discussion the parties explicitly discussed the February 11, 2010 date and Mr. Wichhart advised Mr. Losey that the date that would be reflected on the drive images would be the date of the imaging. The parties further discussed and agreed that all images would be placed on an external USB hard drive. During said telephone conference, the parties discussed the fact that it was a virtual certainty that certain data residing on the hard drives in question would not be relevant. Mr. Wichhart suggested that once the images were created, the parties could jointly view any material not clearly covered by the production request and, if not relevant, said data could be destroyed using a digital shredder.

**12.** Mr. Losey was present during the entirety of the aforementioned telephone conference and he was well aware of the fact that the copying of GLOBAL's hard drives would encompass all data dating back to February 11, 2010; after all, this date had been selected by the Plaintiff. The undersigned charged Mr. Wichhart with complying explicitly with Plaintiff's request.

**13.** On May 24, 2010, Mr. Wichhart arrived at the corporate office of Global Resort Management, LLC and created a complete copy of the hard drives contained within the primary business computers of David Michael, Travis Thomas, Alex Simao, Kevin Wiegard and Jeffery Graham. The Court should note Plaintiff's Motion for Sanctions erroneously alleges that the full backup was created on March 27, 2010. The undersigned assumes this discrepancy can be attributed to a typographical error, the forensic copy was completed on May 27, 2010. See email from Eric Wichhart dated May 27, 2010 attached hereto and incorporated herein as Exhibit "B".

**14.** Inexplicably, upon Plaintiff's receipt of the aforementioned copies of GLOBAL's hard drives, counsel for Plaintiff began complaining that GLOBAL had failed to produce all electronically stored information in its possession, that it had intentionally destroyed evidence, and that it had engaged in the deliberate spoliation of evidence by systematically and intentionally destroying evidence prior to its Court ordered production.

**15.** Upon Plaintiff's persistent complaints that GLOBAL had failed to comply with its production request, the undersigned, on August 4, 2010, again offered to meet with the Plaintiff to jointly review the materials that had not been provided to the Plaintiff (either because said data pre-dated February 11, 2011 or because it appeared to be entirely irrelevant data). A true and correct copy of the undersigned's August 4, 2010 letter to Plaintiff's counsel is attached hereto and incorporated herein as Exhibit "C". As stated above, the undersigned initially offered such a

review during the parties' telephone conference of May 14, 2010, a date well prior to the date the hard drives were copied.

**16.** Rather than agreeing to participate in the aforementioned exercise designed to permit the Plaintiff to view all of the forensically copied data, Plaintiff instead filed its September 17, 2010 Motion for Sanctions against Defendant.

**17.** Even more confounding than Plaintiff's about-face posture concerning the particulars agreed upon by the parties during the May 14, 2010 telephonic discussion with GLOBAL's forensic computer expert is its professed incredulity when it stumbled upon Mr. Wichhart's notes detailing his alleged spoliation. Plaintiff's forensic expert, Andrew Reisman, outlines in his affidavit how he was able to recover Mr. Wichhart's imbedded text notes detailing the fact that he specifically excluded data created prior to February 11, 2010. This notwithstanding the fact that it was precisely the agreement of the parties and the forewarning of Mr. Wichhart's intention to exclude data created prior to February 11, 2010 because Plaintiff expressly limited its request to data created on or after said date.

**18.** Plaintiff's Motion for Sanctions references Mr. Wichhart's imbedded text notes regarding the deleted data as if it had uncovered the proverbial smoking gun when in reality Mr. Wichhart was simply documenting he had done precisely what he had been asked to do.

**19.** Finally, Plaintiff asserts GLOBAL waived its right to object to the production of certain non-relevant data when it failed to timely object, but Mr. Losey participated in the May 14, 2010 telephonic conference with the undersigned and Mr. Wichhart and all parties agreed at that time that if Plaintiff disagreed with GLOBAL's assertion that some of the data was not relevant, it would jointly view all of the data with GLOBAL and the parties would jointly make a determination regarding same. When the undersigned offered to do precisely that, Plaintiff

declined the offer and instead filed its Motion for Sanctions seeking a finding of contempt.

**MEMORADUM OF LAW**

**DID GLOBAL VIOLATE THIS COURT'S JULY 8, 2010 ORDER ON PLAINTIFF'S JUNE 18, 2010 MOTION TO COMPEL?**

No. Global complied expressly with the letter and the spirit of Plaintiff's production request, as ordered by this Court. GLOBAL met with Plaintiff's counsel via telephonic conference on May 14, 2010 wherein the parties expressly discussed the manner and logistics of complete compliance. It engaged a forensic expert well qualified to complete the task of copying GLOBAL's computer hard drives, and it did in fact create a complete copy of GLOBAL's computer hard drives. GLOBAL then proceeded to carve out all data created prior to February 11, 2010, pursuant to Plaintiff's express request, and it excluded certain non-relevant data that the parties had expressly discussed would most likely be caught up and copied by virtue of the wide net cast by Plaintiff's production request. When Plaintiff's counsel questioned whether it had been provided with all of the data to which it was entitled under the Court's July 8<sup>th</sup> Order, the undersigned timely responded and offered to make ALL data available to be viewed jointly by the parties so Plaintiff would feel confident that it had been provided every bit of data it was entitled to possess. Despite complete compliance by GLOBAL and despite GLOBAL's good faith effort to resolve Plaintiff's allegations of incomplete production, Plaintiff persists in claiming GLOBAL has not responded as required.

**ANALYSIS**

In order for Plaintiff to prevail on its motion for a finding of sanctions and/or contempt, it must specifically establish, by clear and convincing evidence, that a willful disregard for the authority of the court occurred through a parties' failure to comply with a court order. Bank of America v. The United Cities Group, Inc., 2009 U.S. Dist. Lexis 28521 (2009). No such facts

are present in the instant case. Plaintiff has alleged GLOBAL failed to provide data created prior to February 11, 2010. GLOBAL has demonstrated that it was not required to provide data created prior to February 11, 2010. Plaintiff has alleged GLOBAL has engaged in deliberate spoliation and destruction of evidence. GLOBAL has demonstrated that it did not spoliate or destroy any evidence, that it presently still holds a complete mirror image copy of the hard drives of the business computers of GLOBAL, including all of the data created prior to February 11, 2010 and all of the data that GLOBAL considers non-relevant. Plaintiff has alleged GLOBAL waived its right to object to the dissemination of certain non-relevant data but GLOBAL has demonstrated that the parties agreed to the copying and dissemination of the data in the manner in which it actually took place. Plaintiff has alleged that it repeatedly requested GLOBAL's compliance but it failed and refused to respond. GLOBAL has demonstrated that it offered to make all of the data available for joint viewing by the parties but Plaintiff filed its motion for sanctions and contempt instead.

A party moving for contempt bears the burden of establishing by clear and convincing evidence that the underlying order was violated. Howard Johnson v. Khimani, 892 F.2d 1512, 1516 (11<sup>th</sup> Cir. 1990). GLOBAL's response demonstrates a reasonable explanation for the manner in which it complied with Plaintiff's production requests. GLOBAL asserts clearly and unequivocally that it did not violate (and certainly, did not willfully violate) the Court's Order.

### **CONCLUSION**

Plaintiff has failed to prove by clear and convincing evidence that GLOBAL violated this Court's February 11, 2010 Order thus it is not entitled to the relief sought and its motion for the entry of an order of contempt and/ or the application of sanctions should be denied.

/s/Philip F. Bonus  
PHILIP F. BONUS, ESQUIRE

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 3, 2010, I electronically filed the foregoing Response to Court's Order to Show Cause with the Clerk of this Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/Philip F. Bonus  
PHILIP F. BONUS, ESQUIRE  
Florida Bar No.: 0347205

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