IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

CASE No.: **3D19-0351**
L.T. CASE NO.: **2014-13701-CA-01**
2016-01219-CA-01
2018-07447-CA-01

THE SHIR LAW GROUP, P.A., et al.,
Appellant(s)/Petitioner(s),

vs.

DARIO CARNEVALE, et al.,
Appellee(s)/Respondent(s),

THE CARNEVALES' RESPONSE TO THE SHIR DEFENDANTS' "EMERGENCY" PETITION FOR WRIT OF CERTIORARI

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Dario Carnevale and Flavia Carnevale (the "Carnevales") respond to Petitioners' "Emergency" Petition for Writ of Certiorari. Petitioners seek an extraordinary writ quashing the trial court's December 22, 2018 order requiring an independent forensic examination of discoverable electronic data in Petitioners' possession ("Forensic Examination Order").

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should dismiss the Petition for three reasons. First, this Court lacks jurisdiction because the Petition is untimely. Second, the trial court did not depart from the essential requirements of the law in ordering a forensic examination in response to a pattern and practice of evasive and obstructive discovery tactics by Petitioners and their counsel. Third, the forensic examination order has safeguards in place that will not result in irreparable harm either to Petitioners or to their third-party clients.

The Carnevales sued their former lawyers, the Petitioners, for malpractice, fraud, breach of fiduciary duty and civil theft.[1] Through third party discovery, the Carnevales uncovered critical and responsive documents that Petitioners had authored or received but failed to produce to the Carnevales. The trial court held a

[1] The Petitioners, Shir Law Group, P.A., Guy M. Shir, Esq., and Stuart J. Zoberg, Esq., are frequently referred to in the record as the "Shir Defendants." To avoid confusion, they will be referred to collectively throughout this Response either as the "Shir Law Group" or as Petitioners.

six-hour evidentiary hearing on the Carnevales' motion for forensic examination, at which it heard testimony from five witnesses including the Petitioners. It reviewed written closing arguments and competing proposed orders. Then it entered a thorough, well-reasoned, and narrowly tailored order granting the forensic examination that protects the rights of the parties while requiring them to share the expense of the forensic examination.

Forensic examination is warranted upon a showing that a party has thwarted discovery. *See Holland v. Barfield*, 35 So. 3d 953, 955 (Fla. 5th DCA 2010) (a forensic examination will be "approved after the requesting party proved . . . thwarting of discovery . . . ."). The trial court acted well within its discretion in ordering this relief to remedy the Petitioners' and their counsel's consistent pattern and practice of thwarting discovery and disregarding court rulings, throughout four years of litigation, culminating in their failure to produce responsive and highly relevant documents.

For example, prior to its entry of the Forensic Examination Order, the trial court had to compel the Petitioners to sit for their depositions, which the court eventually found that they had evaded for months in bad faith. (January 4, 2019 Order) ("The Court will not dignify [the Shir Defendants'] ***bad faith*** effort to comply by providing weekend dates in January by commenting on it."). (Emphasis added)

(Supp. App'x, pp. 0609–12).[2] The court warned the Petitioners that "[r]epeatedly testing the boundaries of the Court's orders is a risky proposition." *Id.* And at the same time that it entered the Forensic Examination Order, the court held that the Carnevales' separate motion for contempt "sets forth a *prima facie* case that Counsel for the Shir Defendants . . . violated [yet another order relating to the nondisclosure of critical evidence]. Attorneys are not entitled to defy a court's ruling. If an attorney disagrees with a ruling, the remedy is to appeal — not to ignore." (December 22, 2018 preliminary order on the Carnevales' motion for contempt) (Supp. App'x, pp. 0605–0608).[3]

Approximately three weeks later, the trial court entered an Order to Show Cause why Petitioners' counsel "should not be held in Indirect Criminal Contempt of Court pursuant to Florida Rule of Criminal Procedure 3.840." (January 16, 2019 Order to Show Cause) (finding that Petitioners' counsel disregarded "the court's April 19 order . . . that limited the production of the Carnevales' confidential settlement number for *his* eyes only.") (Supp. App'x, pp. 0626–34).

[2] Citations to the Record for this petition are either to the Petitioners' Appendix (App'x __, p. __), or to the Carnevales' included Supplemental Appendix (Supp. App'x, p. __), indicating the appendix item and page number.

[3] Petitioners' counsel violated this same court order — again — in this Court by disclosing the same confidential information. (Petition, p. 5). That violation will be the subject of separate proceedings.

In the face of this ongoing bad faith and contemptuous discovery misconduct, the trial court was well within its discretion in concluding that the Petitioners had thwarted the Carnevales' discovery efforts such that a forensic examination was warranted. Petitioners initially acquiesced by working with the Carnevales to select a suitable forensic inspector, accepting responsibility for fifty percent of the forensic inspector's initial retainer, and allowing data collection to commence. But they have now reverted to form by filing their untimely Petition. The Petition mischaracterizes the facts and the law, and does not demonstrate, as is necessary for the extraordinary remedy of certiorari, a departure from the essential requirements of law, which requires "'something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice.'" *Chessler v. All American Semiconductor, Inc.*, 225 So. 3d 849, 852 (Fla. 3d DCA 2016) (citing *Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J. concurring specially)).

The Court should dismiss the Petition as untimely or deny it.

I. BACKGROUND AND HISTORY OF THIS LITIGATION

The underlying litigation arises from the Petitioners' earlier representation of both the Carnevales and another client group in separate lawsuits pertaining to the Seashore Club, an oceanfront condominium property in Sunny Isles, Florida that a

third-party developer was trying to purchase for redevelopment. The condominium association was trying to terminate the condominium to facilitate and, if necessary, force the sale of all units the developer.

A. The Carnevales and the Rogenia Group Oppose the Termination of the Seashore Club Condominium.

The Carnevales, who are brother and sister, owned a unit at the Seashore Club. In 2013, they retained the Petitioners to oppose the termination of the Seashore Club's condominium and the attempted dissolution of their condominium association. The termination would force the owners to sell their units to the developer. The Carnevales retained the Shir Law Group on an hourly basis to oppose and then nullify the recorded Plan of Termination.

Months later, three separate unit owners (collectively, the "Rogenia Group") also each independently retained the Shir Law Group to file lawsuits separate from the Carnevales', but also opposing the termination.[4] But none of the Rogenia Group unit owners were willing or able to pay legal fees. The Carnevales agreed (separately with each member of the Rogenia Group) to fund their legal expenses in exchange for a share of the proceeds of any ultimate sale of the individual units owned by the

[4] The Rogenia Group consisted of Rogenia Trading, Inc., Olga Fernandez, and Nilda and Domingo Delgado. They are frequently referred to in the record as the "Cross Defendants," but to avoid confusion, they will be referred to here as the Rogenia Group. References to the group collectively are solely to distinguish them from the Carnevales. At all times material to the underlying litigation, each member of the Rogenia Group acted independently (and confidentially) from one another.

Rogenia Group. Because they also shared counsel — the Shir Law Group — the Rogenia Group waived any and all conflicts arising from any disputes with the Shir Law Group's first-in-time (and only paying) clients, the Carnevales, such as the possibility that any one of the Shir Law Group's clients might settle with the developer and that such settlement might involve a sale (at a different time or for a different amount) of the settling party's unit to the developer. The Carnevales did not waive conflicts.

Later, when settlement with the developer appeared imminent, the Carnevales and the Rogenia Group revised their original respective agreements, in writing, to include a modified split of the proceeds of any sale of the individual units owned by the Rogenia Group.

B. The Shir Law Group Induces the Rogenia Group to Breach its Agreement with the Carnevales.

On the eve of settlement with the developer, the Shir Law Group abandoned their first-in-time clients, the Carnevales, in favor of the Rogenia Group. Casting away their fiduciary duties to the Carnevales, the Petitioners convinced the Rogenia Group to walk away from their contractual profit-splitting obligations to the Carnevales. Simultaneously, even though the Carnevales had already paid the Petitioners approximately a quarter million dollars in attorney fees on the Rogenia Group's behalf, the Petitioners convinced the Rogenia Group to "re-engage" the Petitioners with new contingent fee agreements. The Petitioners continued on as the

Rogenia Group's lawyers despite the conflict of interest with their first-in-time clients, the Carnevales, and the Petitioners used the new contingent fee agreements to divert to themselves the identifiable settlement profits that the Rogenia Group had promised to the Carnevales.

Petitioners knew that for this scheme to work, the Rogenia Group would have to be convinced to feel comfortable not honoring their contractual profit-splitting payment obligations to the Carnevales. So the Petitioners, while they were still the Carnevales' counsel of record on all matters, began negotiating for the settling developer to indemnify the Rogenia Group against the inevitable claims by the Carnevales. The Petitioners then negotiated with the developer to drop the indemnities in exchange for a higher cash sale price thereby increasing Petitioners' own "contingent fee."

A few weeks after the contingent fee agreements were signed, the Rogenia Group settled with (and sold their units to) the developer without involving the Carnevales. Petitioners did little to finalize negotiations with the developer on behalf of the Rogenia Group. Instead, Petitioners used to their own advantage the leverage that the Carnevales gave the Rogenia Group by funding the Rogenia Group's litigation pursuant to their written agreements. Despite the nominal amount of work performed by the Petitioners after obtaining the Rogenia Group's contingent fee agreements, the Petitioners helped themselves to nearly $2 million of the Rogenia

Group's total settlement while making sure the Rogenia Group did not pay to the Carnevales any of the profit splits (i.e., approximately $2 million) that the Rogenia Group owed to the Carnevales under their written profit-splitting business agreements with the Carnevales.

After the Carnevales learned of the machinations by the Shir Law Group, the Carnevales sued the Rogenia Group for breach of contract and the Shir Law Group for fraud, legal malpractice, breach of fiduciary duty, civil theft and other related claims. These lawsuits are now consolidated before the trial court that entered the Forensic Examination Order at issue here.

C. The Carnevales Uncover Petitioners' Failures to Comply with their Discovery Obligations.

The Carnevales' claims against Petitioners are based, in part, on the Petitioners' violations of fiduciary and ethical obligations to the Carnevales when Petitioners negotiated the settlement between the Rogenia Group and the developer. The Carnevales sought discovery of those settlement communications. (Carnevales' June 27, 2016 Request for Production) (Supp. App'x, pp. 0016–40). The court ordered production of these communications over Petitioners' objections. ("The Cross-Defendants' settlement agreements and all information related to their negotiation, execution and performance, entered into with [the developer] . . . are discoverable and shall be produced . . . .") (May 4, 2015 Order) (Supp. App'x, pp. 0012–15). Petitioners produced over 31,000 pages of documents, none pertaining to

their negotiations with the developer on the Rogenia Group's behalf. Petitioners nonetheless falsely represented to the Carnevales that the entire "universe of documents" was produced. (October 1, 2018 email from Petitioners' counsel) (Supp. App'x, pp. 0041–45).

The Carnevales also subpoenaed the law firm of Arnstein & Lehr ("Arnstein"), which had represented the developer in the negotiations with the Rogenia Group, including the initial negotiations of a possible indemnity against claims asserted by the Carnevales.

Arnstein's production included evidence critical to the Carnevales' claims against the Petitioners — emails that the Petitioners themselves never produced. For example:

> 1. In exchange for more money, and in lieu of a guaranteed indemnity, the Petitioners attempted to negotiate an optional indemnity with the developer. On November 3, 2014 Petitioners wrote to Arnstein, "no indemnification, **we handle Dario**, BUT, your client has the right to block us from paying [D]ario anything to settle **the contract dispute** between our clients and [D]ario **if your client fully indemnifies us**." (Emphasis added). (Carnevales' written closing argument, Exhibit X) (Supp. App'x, pp. 0340–41). Thus, in a single email, Petitioners (i) acknowledged a conflict between their two sets of clients; and (ii) took the side of the Rogenia Group to the detriment of the Carnevales. **Petitioners did not produce this email.**
>
> 2. On September 18, 2014, , Petitioners sent Arnstein a letter, at Arnstein's request, guaranteeing that Petitioners would never again represent Dario Carnevale even though Petitioners were at that time still counsel of record for the Carnevales in the Carnevales' own actions against the developer. (Carnevales' written closing argument,

Exhibit N) (Supp. App'x, pp. 0288–0290). **Petitioners did not produce this letter**.

3. Petitioners sent Arnstein an email on November 5, 2014 acknowledging a conflict between their two client groups. (Carnevales' written closing argument, Exhibit Q) (Supp. App'x, pp. 0300–0301). Specifically, Petitioners explained that they could not agree to certain language in the developer's proposed settlement agreement with the Rogenia Group because it "creates a potential conflict with Dario, our former client." **Petitioners did not produce this email**.

4. Petitioners asked the developer to forego paying the Carnevales any amount in settlement of the Carnevales' claims. On October 9, 2014 Arnstein emailed its rejection of this request to Petitioners. (Carnevales' written closing argument, Exhibit V) (Supp. App'x, pp. 0327–29). **This email exchange, which illustrates Petitioners' disregard of their obligations to the Carnevales, was not produced by Petitioners**.[5]

D. After a Six-Hour Evidentiary Hearing, the Court finds that the Petitioners Failed to satisfy their Discovery Obligations.

Based on Petitioners' failure to produce critical responsive documents, the Carnevales requested that the trial court authorize "a forensic expert to enter and inspect the Petitioner's computer(s), cell phone(s), and email accounts . . . and to conduct a forensic examination of the devices' and accounts' content." (Carnevales' Motion to Compel a Forensic Examination and for Sanctions, p. 10) (Supp. App'x,

[5] The Carnevales also discovered communications between Petitioners and other third parties, which communications are critical to other issues in this litigation but were withheld by Petitioners. Those communications are more thoroughly described in the Carnevales' written closing argument submitted to the trial court after the November 1 hearing. (Supp. App'x, pp. 0217–0557).

pp. 0046–0132). On November 1, 2018, the trial court heard testimony from Petitioners and their expert. Petitioners blamed their deficient production on an alleged "server crash" (one that apparently deleted only emails helpful to the Carnevales). The evidentiary hearing lasted more than six hours.

On November 13, 2018, at the trial court's direction, the parties submitted lengthy competing orders with proposed factual findings and legal conclusions in support of their respective positions.

E. After the Evidentiary Hearing, and Despite the Alleged "Server Crash," Petitioners Produce Additional Documents for the First Time.

Five days later, on November 18, and again on December 5, Petitioners filed various pleadings referring to and attaching numerous emails that had never before been produced. (App'x 6, pp. 61-116). This curious circumstance would contribute to the trial court's ultimate ruling that Petitioners' "efforts have not been sufficiently technically competent", and that "more expertise needs to be bought to bear to the task", and that the "Carnevales are entitled to forensically examine the Shir Defendants' electronic data . . . ." (Forensic Examination Order, ¶¶ 1 – 2).

F. The Forensic Examination Order Establishes the Rights of the Parties.

Contrary to Petitioners' allegation that the court "rubber stamped" the Carnevales' proposed order, the trial court naturally reviewed the parties' competing submissions and entered its own order establishing the scope of the forensic

examination. The trial court also imposed guidelines aimed at protecting against disclosure of privileged or irrelevant information. Specifically, the trial court ordered, "[a]fter copying the ESI, the forensic examiner shall not review, inspect, or disseminate any of the ESI recovered from the computers until further Order of the Court. The ESI shall be quarantined pending the entry of an order setting forth review parameters." (Forensic Examination Order, ¶ 4(b)). The order also required the parties to agree to a forensic inspector and to submit proposed orders setting forth parameters and search protocols to guide the forensic inspector.

In compliance with the order, the parties cooperated in selecting Fairfield Investigation as the proposed forensic inspector. (January 7, 2019 letter to the trial court) ("[t]he parties have discussed the selection of a forensic examiner and have tentatively agreed to one of three potential forensic examiners.") (Supp. App'x, pp. 0613); (January 11, 2019 email exchanged between counsel) (Supp. App'x, pp. 0614–19); (January 14, 2019 email exchanged between counsel) (Supp. App'x, pp. 0620–25).

G. Petitioners Unilaterally Submit their Proposed Search Parameters.

In the spirit of what initially appeared to be ongoing, good-faith cooperation, counsel for the Carnevales intended to work with counsel for the Petitioners to draft agreed search parameters and protocols to propose to the court. (January 17, 2019 emails between counsel) (Supp. App'x, pp. 0641–48). Instead, Petitioners

unilaterally and preemptively submitted their proposed search parameters and protocols to the court. (January 22, 2019 email and attached submission to the trial court) (Supp. App'x, pp. 0652–59).

Petitioners wrongly accuse the Carnevales of "stonewalling" their efforts to agree to mutually acceptable parameters and protocols. (Petition, p. 7). On January 17, 2019, Petitioners' counsel expressed "excitement" at the cooperation achieved during the early stages of the forensic examination: "So exciting. Judge de la O will be happy that we were able to work SOMETHING out." (January 17, 2019 emails between counsel) (Supp. App'x, pp. 0635–40). Even after Petitioners submitted their unilateral proposal to the court, their counsel stated to the Carnevales' counsel: "I agree that we were working well together." (January 22, 2019 email from Petitioners' counsel) (Supp. App'x, pp. 0649–51).

H. The Trial Court does not "Rubber Stamp" the Carnevales' Proposed Order and does not Modify the Rights of the Parties.

Contrary to Petitioners' assertion, the trial court did not "rubber stamp" the Carnevales' proposed order. In its follow-up January 24, 2019 Order Setting Protocol for Forensic Examination of the Shir Defendants' Electronically Stored Information ("January 24 Order"), the court noted that "the Parties submitted competing proposed orders suggesting search parameters and protocols." (App'x 2, pp. 8–12). The trial court also stated that it "reviewed the Parties' submissions and

is fully advised in the premises." *Id.* The trial court then included language ***proposed by Petitioners***, but this fact is omitted from the Petition.

The January 24 Order did not modify the rights of the parties established by the Forensic Examination Order. Instead, the court simply identified Fairfield as the entity that would perform the prescribed examination, set forth a data collection and inspection protocol to guide Fairfield, and gave the Petitioners a timeframe for the production of resulting documents.

I. The Petition is the Continuation of Petitioners' Efforts to Hinder Discovery.

This Court should also evaluate the Petition in light of Petitioners' obstructive conduct after entry of the subject orders. The court-ordered data collection commenced on February 11, 2019. Petitioners originally represented that only five or six computers existed separate and apart from the Petitioners' servers. Fairfield based its original cost estimate on this representation. In reality, there are nineteen computer hard drives at Petitioners' office (not including the hard drives located in the servers).

Between February 11 and 12, Fairfield replicated seven of these drives, but the Shir Lawyers refused to allow Fairfield to image the remaining twelve. According to the Shir Lawyers, "they were not used in connection with the Carnevale matter . . . ." (February 11, 2019 email emails between counsel) (Supp. App'x, pp. 0650–61). Additionally, between Guy Shir and Stuart Zoberg, there are

three cell phones and at least one iPad. Mr. Shir used the iPad throughout the six-hour hearing on November 1. But because he claimed it belongs to his wife, Jodi Shir — who is also a named defendant in this lawsuit — he refused to allow Fairfield to replicate it. In short, Petitioners appointed themselves as the arbiters of the requirements of the Forensic Examination Order.

Petitioners have also impeded the court-ordered forensic examination by failing to timely pay Fairfield. The Forensic Examination Order required the parties to equally share the cost of the examination. (Forensic Examination Order, ¶ 4(d)). As of February 13, Fairfield had ceased all work on the examination. (February 13, 2019 email from Fairfield) (Supp. App'x, pp. 0662–65). Petitioners' counsel first promised that "if [Fairfield] doesn't get the check in the next day or two, I will personally cut a check for $4,750 myself (or wire him the money)." (February 14, 2019 email between counsel) (Supp. App'x, pp. 0666–67). Instead, he filed this Petition challenging, and further delaying the forensic examination. The Petitioners paid Fairfield only after this Petition, which stayed the litigation, was filed.

As a result of Petitioners' continued obstruction of the forensic examination, the Carnevales moved for contempt on February 15, 2019. (Supp. App'x, pp. 0670–0742). On the same day, Petitioners filed their own emergency motion asking the

trial court to reconsider whether a forensic examination was appropriate at all.[6] (App'x 7, pp. 227-261). When their motion was not acknowledged by the trial court, the Petitioners filed their "Emergency" Petition for Writ of Certiorari with this Court.

II. ARGUMENT

A. The Petition is Untimely.

Petitioners request that this Court quash the trial court's December 22 Forensic Examination Order. Under Rule 9.100(c)(1) of the Florida Rules of Appellate Procedure, the deadline for the Petition was January 21, 2019. The Petition was untimely filed 32 days later, on February 22, 2019. This Court lacks jurisdiction to consider the Petition.

Petitioners claim in a footnote that the trial court's January 24 Order substantively "changes or clarifies" the Forensic Examination Order, therefore restarting the clock on the time within which an appeal must be taken. (Petition, n.1). The Carnevales acknowledge that substantive changes to an order will restart the time within which an appeal must be taken. Florida law has long recognized a practical approach to determine whether a change in an order is substantive: "'The

[6] The Petitioners' motion was not an emergency. As explained above, the forensic examination was on hold because the Petitioners refused to pay the forensic inspector. The Carnevales advised the trial court as much on February 15, 2019. (Carnevales' February 15 letter to the trial court) (Supp. App'x, pp. 0668–69).

question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.'" *St. Moritz Hotel v. Daughtry*, 249 So. 2d 27, 28 (Fla. 1971) (quoting *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952)). The test is whether the modified judgment or order had an "impact on the rights of the parties . . . ." *DeGale v. Krongold, Bass & Todd*, 773 So. 2d 630, 632 (Fla. 3d DCA 2000) (dismissing an appeal from an amended judgment that "had no impact on the rights of the parties . . . ."); *see also B.G. Leasing, Inc. v. Hider*, 372 So. 2d 184, 185 (Fla. 3d DCA 1979) (dismissing an appeal from an amended final judgment because "[t]he amended final judgment did not change the status of the remaining insured and Travelers from the original final judgment.").

The January 24 Order did not disturb or revise the legal rights and obligations settled by the December 22 Forensic Examination Order. The Forensic Examination Order settled the Carnevales' right to forensically examine Petitioners' electronic data. The January 24 Order acknowledged the parties agreement to appoint Fairfield as the forensic inspector, set forth a protocol to guide Fairfield's data collection and inspection, and established a timeframe within which the resulting documents must be produced. The rights of the parties as prescribed by the Forensic Examination Order were not changed in any way whatsoever. The Petition is untimely and should be dismissed.

B. The Trial Court does not depart from the Essential Requirements of Law by Granting a Forensic Examination.

A "departure from the essential requirements of law" is "something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Chessler*, *supra*, 225 So. 3d at 852 (quoting *Jones*, 477 So. 2d at 569 (Boyd, C.J., concurring specially)); *see also R.J. Reynolds Tobacco Company v. Morales*, 237 So. 3d 1023, 1095-96 (Fla. 3d DCA 2017)(citing *Chessler*). Certiorari is inappropriate to correct mere legal error. *See Haines City Community Development v. Heggs*, 658 So. 2d 523, 529 (Fla. 1995) ("'The writ of certiorari properly issues to correct essential illegality but not legal error.'" (quoting *Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring specially))).

Petitioners argue that the trial court departed from the essential requirements of law for three reasons. First, they argue that the Carnevales failed to meet their burden to obtain a forensic examination. (Petition, p. 8). Second, they complain about the scope of the examination and the court-ordered search terms and protocol. (Petition, p. 12). Third, they claim that the Carnevales induced the trial court into inadvertently, but improperly, expanding the scope of the examination. (Petition, p. 14).

Petitioners' are wrong. The trial court found that Petitioners failed to comply with their discovery obligations and that they lacked the capacity to do so. Its search terms and protocols are consistent with the scope of the examination prescribed in the December 22 order. Finally, the trial court did not abdicate its responsibility by merely "rubber stamping" the Carnevales' proposed order.

i. The Trial Court Orders a Forensic Examination of the Petitioners' Electronic Data because they failed to Comply with their Discovery Obligations.

Petitioners acknowledge that a forensic examination is warranted if the Carnevales made a showing that the Petitioners thwarted discovery. *See* Petition, at p. 9 (citing *Procaps S.A. v. Pantheon, Inc.*, 2014 U.S. Dist. LEXIS 187185, *9 (S.D. Fla. Dec. 30, 2014)); *see also Holland v. Barfield*, 35, So. 3d 953, 955 (Fla. 5th DCA 2010) (a forensic examination will be "approved after the requesting party proved . . . thwarting of discovery . . . .").[7] The Carnevales made that showing at the November 1 hearing, and the Petitioners could not credibly refute it.

Petitioners claimed to have searched their computers and cell phones and produced their entire "universe of documents." (October 1, 2018 email from Petitioners' counsel) (Supp. App'x, pp. 0043–45). Petitioners even claimed that there would be "no surprises" from them. (Supp. App'x, p. 0041). Yet they failed to

[7] The Carnevales cited *Holland* in their original Motion to Compel a Forensic Examination and for Sanctions. (Motion, p. 4) (Supp. App'x, p. 49).

produce critical, responsive, and damaging emails with Arnstein evidencing their abandonment of their fiduciary and ethical obligations to the Carnevales.

Petitioners do not deny that they failed to produce the Arnstein emails as well as emails with other third parties that are relevant to the Carnevales' claims. Instead, they adopt a "plausible deniability" strategy and blame their lawyers. For example:

> Question: You don't know what went out past your attorneys?
>
> Mr. Shir: Well, I mean, a lawsuit - - there's no other way to produce anything other than to my counsel.
>
> Question: Well, you didn't review the production before it went out to the other lawyers?
>
> Mr. Shir: In this case? In the lawsuit now? No, I trusted that my attorneys - - what I wanted to make sure is that when the documents were produced and reviewed, that I had absolutely no oversight, no looking, other than saying you have free reign to my servers, free reign to my phone so that there would never be an issue with what was produced, not produced.
>
> Mr. Menje's had free reign, sat in my office for an entire day on a computer and looked at every single email in my office.

(Transcript of November 1 Hearing, pp. 79:16 – 80:6) (Supp. App's, pp. 0133–0216).

Petitioners also blamed their deficient production on a purported "server crash" — which they disclosed for the first time at the November 1 hearing (after four years of litigation) — that allegedly caused them to lose a significant amount of their electronic data, including emails. Petitioners' IT subcontractor was their primary witness. He testified that, despite the purported server crash, he was able to recover a "continuous stream" of emails going back to a date certain by searching through the Petitioners' individual email accounts. (Hearing Transcript, pp. 285:25–286:2).

However, this subcontractor's testimony did not explain the holes in the Petitioners' production. For example, Petitioners produced an email dated August 22, 2014 containing communications with Arnstein pertaining to the state of the Seashore Club Condominium. (August 22, 2014 email) (Supp. App'x, pp. 0001–0003). Following the IT subcontractor's logic, all emails after August 22, 2014 should have been recovered and produced. They were not. *See*, *supra*, Section I(C).

After the November 1 hearing, Petitioners filed two pleadings; one on November 18, 2018 (App'x 6, pp. 61–116) and another on December 5, 2018. Despite their reliance on their "server crash" theory only weeks earlier, Petitioners referred to and attached as exhibits numerous emails that they had previously withheld. The trial court ruled that Petitioners' discovery of a number of new documents subsequent to the November 1 hearing led it to believe that the

Petitioners' discovery "efforts have not been sufficiently technically competent" and that "more expertise needs to be brought to bear to the task." (Forensic Examination Order, ¶ 1).

The trial court acted well within its discretion in ordering a forensic examination. There was no legal error, let alone essential illegality or judicial tyranny.

ii. The Parameters of the Forensic Examination do not depart from the Essential Requirements of Law.

Petitioners claim that the trial court has imposed overbroad protocols, search terms, and time periods. Their purported concern is to protect against disclosure of privileged or irrelevant information pertaining to their third-party clients. But the trial court's orders contain appropriate protections.

a. The Trial Court Establishes Appropriate Safeguards against the Production of Irrelevant or Privileged Third-Party Information.

The trial court protected the rights of Petitioners' third-party clients by allowing Petitioners to review the collected data and create a privilege log *before* any substantive data is shared with the Carnevales. The January 24 Order provides:

> 7. Once all responsive ESI is organized and Bates stamped, Fairfield Investigation shall provide a copy to counsel for the Shir Defendants only. . . .
>
> 8. Fairfield Investigation shall permanently, securely, and immediately delete and destroy any documents or files

> or electronic data that are in its possession which do not contain any of the search terms.
>
> . . .
>
> 10. Counsel for the Shir Defendants shall have 45 days to review each document/file that contains a search term, and determine whether the file is relevant to this litigation. This review must be completed within [45] days. . . .

(January 24 Order, ¶¶ 7, 8, and 10).

Petitioners also claim that the trial court's protocols are overbroad because it "rubber stamped" the Carnevales' proposed order. They omit the fact that that their own proposed order was very similar to the Carnevales'. Using similar language, both proposals contemplated (i) that Fairfield would filter electronically stored information using search terms provided by the court or by the parties; (ii) that Petitioners would receive the filtered data first, before the Carnevales, in order to conduct their own privilege and relevance review; (iii) that privileged and irrelevant data would be placed on a privilege log; that the trial court would review the privilege log *in camera*; and (iv) that Petitioners would produce relevant data upon the conclusion of their review. The only material difference between the competing orders is that Petitioners proposed that Fairfield destroy the irrelevant data filtered out by the search terms and the Carnevales did not (which difference was addressed when the court incorporated *Petitioners'* language). Otherwise, the proposed orders are nearly identical to each other in all other material respects.

Petitioners' repeated accusations of "rubber stamping" are simply untrue. The January 24 Order provides that "Fairfield Investigation shall permanently, securely, and immediately delete and destroy any documents or files or electronic data that are in its possession which do not contain any of the search terms." (January 24 Order, ¶ 8). The Carnevales did not propose this language; *Petitioners did*. (Supp. App'x, p. 0658).

b. The Relevant Time Period for the Data to be Searched is Reasonable.

In its Forensic Examination Order, the trial court ruled that the Carnevales were entitled to a forensic examination of electronic data for the relevant period of production originally requested by the Carnevales. (Forensic Examination Order, ¶ 2). Petitioners do not dispute that the relevant time period for the forensic examination of the Petitioners begins on January 1, 2013. However, Petitioners assert that the trial court overreached when it allowed inspection of electronic data generated until December 31, 2016. But that argument ignores the fact that this was the time period originally requested by the Carnevales in their request for production.

The Carnevales' request for production was served on the Petitioners in June 2016 and requested documents "through the date of production." (Supp. App'x, pp. 0016–40). At the time, the Carnevales suspected that Petitioners were improperly sharing with the Rogenia Group confidential information learned from the

Carnevales through privileged attorney client communications (in violation of the Petitioners' continuing ethical obligations) to gain a litigation advantage over the Carnevales. These suspicions were later validated when counsel for the Petitioners and the Rogenia Group referenced a purported "joint defense" agreement among them.

Petitioners did not respond to the Carnevales discovery requests until October 2016. The Carnevales viewed December 31, 2016 as a reasonable cutoff date given the Petitioners' delayed responses and anticipated delays in production. The trial court did not abuse its discretion in imposing this cutoff date.

c. The Search Terms are Necessary to capture all Relevant Documents.

Petitioners also argue that the search terms depart from the essential requirements of law because they are too broad and will generate too many "hits." The trial court reasonably concluded that, especially given the glaring deficiencies in Petitioners' own searches, it was necessary to adopt search terms broad enough to capture all relevant electronic data. And its orders contain specific measures to protect against the production of privileged or irrelevant information.

The Carnevales' proposed search terms, which the trial court reviewed and adopted, are sufficient to include all potentially relevant electronic data. In contrast, the search terms proposed by the Petitioners are too specific. For example, the Petitioners proposed the term "Carnevale." This search term does not account for

misspellings the Carnevales' name. The Carnevales' Boolean search term — "Carn*" — addresses this issue in a reasonable manner.

Petitioners complain that the court's search terms would not adequately filter out irrelevant or privileged information. But the court made sure that Petitioners maintain control over whether irrelevant or privileged information is produced. The Forensic Examination Order provides that "[a]fter copying the ESI, the forensic examiner shall not review, inspect, or disseminate any of the ESI recovered from the computers until further Order of the Court. The ESI shall be quarantined pending the entry of an order setting forth review parameters." (Forensic Examination Order, ¶ 4(b)). The January 24 Order expressly allows Petitioners to review every single document before producing it to the Carnevales: "Counsel for the Shir Defendants shall have 45 days to review each document/file that contains a search term, and determine whether the file is relevant to this litigation." (January 24 Order, ¶ 10).[8]

[8] The Carnevales maintain that their search terms are appropriate because they will capture the relevant data. However, to the extent that Petitioners believe certain search terms would result in too much filtered electronic data, there is nothing in the court's orders preventing the parties from agreeing to additional protocols. For example, the Carnevales would agree that all filtered electronic data that is uniquely responsive to the search term "Condo*" (i.e., not responsive to any other search term) is irrelevant and does not need to be Bates stamped or reviewed for relevance or privilege. Petitioners did not confer with the Carnevales about such issues before filing their motion for protective order with the trial court, or their Petition to this Court.

iii. The Trial Court does not "Inadvertently Expand" the Scope of the Forensic Examination.

The Carnevales originally requested that "an independent forensic expert enter and inspect Attorney Shir's and Attorney Zoberg's computer(s), server(s), cell phone(s), and email accounts . . . ." (Motion, p. 16) (Supp. App'x, p. 0055). The Forensic Examination Order entitled the Carnevales to a forensic examination of Petitioners' "electronic data, *including* the Shir Law Group server(s), computers, and email accounts . . . ." (Forensic Examination Order, ¶ 2) (Emphasis Added). Petitioners claim that the trial court "inadvertently expanded" the scope of the forensic examination when it "rubber stamped" the Carnevales' proposed order, which provided for the collection of electronic data on "the Shir Law Group server(s), computers, and email accounts . . . and the Shir Defendants' cell phones, and tablets (including iPads)." (January 24 Order, ¶ 2).

The court fashioned its own order incorporating language proposed by both parties. Petitioners incorrectly assert that the word "including" in the Forensic Examination Order *limited* the scope of searchable electronic devices to servers, computers, and email accounts. Black's Law Dictionary states that "[t]he participle *including* typically indicates a partial list . . . ." *See* Black's Law Dictionary (10th ed. 2014). "Including" is not a term of limitation. *See Tarantola v. William B. Henghold M.D., P.A.*, 214 So. 3d 726, 727 (Fla. 1st DCA 2017) (finding "the

participial phrase 'including Mohs surgery' is not one of limitation." (citing Black's Law Dictionary (10th ed. 2014), include)).

Petitioners' invocation of the axiom *expressio unius est exclusio alterius* is also unavailing. The Florida Supreme Court has held that "it is improper to apply expressio unius to a statute in which the Legislature used the word 'include.' . . . This follows the conventional rule in Florida that the Legislature uses the word 'including' in a statute as a word of expansion, not one of limitation." *White v. Mederi Caretenders Visiting Services of Southeast Florida, LLC*, 226 So. 3d 774, 781 (Fla. 2017). Here, the inclusion of "servers, computers, and email accounts" does not imply the exclusion of all other electronic devices. This is especially true given the trial court's order that the search embrace Petitioners' "electronic data." (Forensic Examination Order, ¶ 2).

Petitioners' cell phones and tablets are electronic devices. Rule 2.451 of the Florida Rules of Judicial Administration defines an "electronic device" as "[a]ny device capable of making or transmitting still or moving photographs, video recordings, or images of any kind; any device capable of creating, transmitting, or receiving text or data; and any device capable of receiving, transmitting, or recording sound." Under the rule, examples of such electronic devices include "cellular telephones . . . laptop computers, personal digital assistants, or other similar technological devices . . . ." *See* Fla. R. Jud. Admin. 2.451. The express inclusion of

additional electronic devices in the January 24 Order did not depart from the essential requirements of law.

C. There is no Risk of Irreparable Injury to Petitioners or their Third-Party Clients.

Petitioners now cite their ethical obligations to their third-party clients in claiming that the forensic examination will cause irreparable harm to them and their clients because it will disclose irrelevant or privileged information.

The Forensic Examination Order required the parties to submit proposed parameters and search protocols "appropriately crafted to protect against the disclosure of privileged or irrelevant information, without restricting the forensic examiner's ability to retrieve relevant, non-privileged information, if any." (Forensic Examination Order, ¶ 4(c)). Both parties suggested that Petitioners should review the collected electronic data first, and both parties suggested that the irrelevant or privileged data be compiled on a privilege log. And that is exactly what the January 24 Order provides.

Petitioners' real grievance appears to be that creation of the privilege log will require work on their part. Apart from the fact that this is a problem of Petitioners' own making, this is a legally insufficient objection and it certainly does not constitute irreparable harm. *See Walgreen Co. v. Rubin*, 229 So. 3d 418, 421 (Fla. 3d DCA 2017) ("Florida's courts are consistent in holding that undue burden or expense arising from a discovery order does not constitute irreparable harm."). This

is particularly true where the trial court ordered the Carnevales to pay half of the forensic examiner's fees (another fact which the Petitioner's omit in their Petition).

III. RESPONSE TO THE "ADDITIONAL CONSIDERATIONS"

Petitioners conclude their Petition with an inflammatory and misleading section called "Additional Considerations." The Additional Considerations section includes a number of material statements that are wrong or misleading. For example, the Petitioners' counsel refers to proceedings unrelated to the forensic examination which are pending in the trial court. While beyond the scope of the Petition and this Response, recent discovery (among other things) has made clear that those proceedings — specifically Petitioners' continued claims of fraud on the court — are a sham. The Carnevales will address those proceedings in the trial court, and Petitioners' counsel's conduct before this Court, by separate motion. The Petitioners' allegations are otherwise false and misleading.

To the extent that any of the "Additional Considerations" are relevant to the Petition, they have already been addressed here. The Carnevales will not otherwise respond to Petitioners' inclusion of largely irrelevant information other than to note that, in this case, Petitioners' counsel currently faces indirect criminal contempt proceedings in the trial court as a result of a pattern of unprofessional behavior and

overzealous advocacy culminating in disregard of various court orders.[9] The Carnevales' motion for contempt is included in the Carnevales' Supplemental Appendix at pages 0558–0604 and the court's Order to Show Cause — which the trial court entered eight days before the January 24, 2019 Order Setting Protocol for Forensic Examination — is included at pages 0626–0634. Petitioners' counsel has pled not guilty, and a trial date has not yet been set.

CONCLUSION

The Petition was untimely, Petitioners have not established that the trial court departed from the essential requirements of law, and the forensic examination will not cause irreparable harm to the Petitioners or their clients. Accordingly, this Court should dismiss the Petition as untimely or deny it, and award the Carnevales their taxable costs associated with the Petition and this Response in accordance with Rule 9.400 of the Florida Rules of Appellate Procedure.

Respectfully submitted March 12, 2019,

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[9] Despite the criminal contempt proceedings pending in the trial court, Petitioners' counsel violated the same court orders again when it disclosed confidential, irrelevant information in the Petition to this Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Tuesday, March 12, 2019, a true copy of the foregoing was served on all counsel of record via email through the Court's Florida e-portal filing system to: Robert Menje, Esq., robert@remlawyer.com on behalf of petitioners, Guy M. Shir, Stuart J. Zoberg, Shir Law Group, P.A, as well as ZTJ Recovery, Inc., and Jodi Shir; and Cary A. Lubetsky, Esq., cal@khllaw.com and Michael Feldman, Esq., mif@khllaw.com and Salvatore Fasulo, Esq., shf@khllaw.com as well as Michael Schiffrin, Esq., mschiffrin@SDTriallaw.com and schifflaw@aol.com, and Michelle Vargas, Esq., michelle@SDTriallaw.com, on behalf of Rogenia Trading, Inc., Olga Fernandez, individually and as Trustee of the Olga Fernandez Revocable Trust, Domingo J. Delgado, and Nilda R. Delgado.

By: /s/Javier A. Lopez
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