IN THE THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

CASE NO.:

THE SHIR LAW GROUP, P.A., GUY M. SHIR, ESQ., and STUART J. ZOBERG, ESQ.

Petitioners,

vs.

DARIO CARNEVALE, ESQ. and FLAVIA CARNEVALE, ESQ.,

Respondents.

_____/

L.T. CONSOLIDATED CASE NOS. 2014-13703-CA-01; 2016-001219-CA-01; and 2018-007447-CA-01 (Miami-Dade County, Florida)

PETITIONERS' EMERGENCY PETITION FOR WRIT OF CERTIORARI QUASHING TRIAL COURT'S ORDERS REGARDING FORENSIC EXAMINATION OF SHIR LAW GROUP, P.A.

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Petitioners, THE SHIR LAW GROUP, P.A. ("SLG"), GUY M. SHIR, ESQ., and STUART J. ZOBERG, ESQ. (collectively the "Shir Defendants"), by and through their undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.030(b)(2)(A), petitions this Honorable Court for issuance of a Writ of Certiorari quashing the lower court's orders dated December 22, 2018[1] [Tab 1] and January 24, 2019 [Tab 2] granting and setting protocol for a forensic examination of SLG's computers and server. The granting of the forensic examination departs from the essential requirements of law, causes irreparable harm to SLG and its clients which cannot be remedied on appeal after final judgment. *Martin-Johnson, Inc. v. Savage,* 509 So.2d 1097, 1099 (Fla. 1987); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla. 1995).

I. JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(2)(A), and Article V, Section 4(b)(3) of the Florida

[1] Under Florida law, the filing of this Petition for Writ of Certiorari with regards to the December 22, 2018 Order is timely because the January 24, 2019 Order was both contemplated in the December 22, 2018 Order, and because the January 24, 2019 provided the extent and scope of the forensic examination (and even expanded the extent and scope of same). *See, e.g., St. Moritz Hotel v. Daughtry*, 249 So.2d 27 (Fla. 1971); *Maxfly Aviation Inc. v. Capital Airlines Ltd.*, 842 So.2d 973 (Fla. 4th DCA 2003); *Commonwealth Land Title Ins. Co. v. Freeman*, 884 So.2d 164, 168 (Fla. 2d DCA 2004) (petition is timely where the subsequent order "changes or clarifies a matter of substance"); *Panopoulos v. Panopoulos*, 155 So.3d 1230 (Fla. 2d DCA 2015) (petition untimely where the subsequent order merely "correct[s] only a scrivener's error").

Constitution. The orders to be reviewed were rendered on December 22, 2018 and January 24, 2019.

The Florida Supreme Court has held that "review by certiorari is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal." *Allstate Ins. Co.*, 655 So.2d at 94 (citing *Martin-Johnson, Inc.*, 509 So.2d at 1099). The Florida Supreme Court explained:

> "Discovery of certain kinds of information 'may reasonably cause material injury of an irreparable nature.' *Martin-Johnson,* 509 So.2d at 1100. This includes 'cat out of the bag' material that could be used to injure another person or party outside the context of the litigation, and material protected by privilege, trade secrets, work product, or involving a confidential informant may cause such injury if disclosed. *Id.*"

Allstate Ins. Co., 655 So.2d at 94. Further, when an "order of inspection involves an order compelling discovery of privileged information as well as constitutionally protected information, we have jurisdiction to review by way of certiorari." *Menke v. Broward Cnty. Sch. Bd.*, 916 So.2d 8, 12 (Fla. 4th DCA 2005).

II. INTRODUCTION

SLG is a law firm located in Boca Raton, Florida which focuses its practice in the area of condominium and community association law. Guy M. Shir, Esq. and

Stuart J. Zoberg, Esq. are both Board Certified by The Florida Bar in the area of Condominium and Planned Development Law.

One of the search terms for the forensic examination, which was included in the Plaintiffs/Respondents' proposed order[2], and rubber stamped by the trial court, is the word "Condo*." "Condo*" – as in the area of law in which the Shir Defendants practice. [Tab 2]. As a search term, every document and file which includes the word "Condo" (as well as "condominium") would be subject to forensic examination. This would likely include the private and privileged files of nearly every current and former client of SLG. Another search term is "Robe*" – which likely refers to Roberto Romero, president of Rogenia Trading, Inc. When "Robe*" is used as a search term, all of the Shir Defendants' communications with the undersigned would be captured by the forensic examination (as well as any and all files related to other individuals having the third most common name in the United States – Robert). Another search term is the word "Feldman." "Feldman" – meant to refer to Michael I. Feldman, Esq., counsel for the Cross-Defendants in this action (which would be irrelevant because Mr. Feldman got involved in this litigation in late 2015, well after the relevant timeframe within the scope of the pleadings). SLG also employs an attorney named Michael S. Feldman, Esq. When "Feldman" is used

[2] The Plaintiffs/Respondents failed to confer with the Shir Defendants on search terms as they were court ordered to do.

as a search term, every single file/document that SLG's own Michael Feldman has ever worked on, including his personal matters, would be captured by the forensic examination. Additional examples of the overbroad nature of the forensic examination, including the specific unique names of other specific clients of the SLG (showing that the Plaintiffs/Respondents are using the forensic examination as a fishing expedition) are discussed further below.

The Shir Defendants bring this petition before this Court because the trial court's orders related to the forensic examination of the SLG's computer systems are not supported by Florida law, invades the attorney-client privilege and the fundamental privacy rights of the Shir Defendants and their non-party clients protected by both the United States Constitution and the Florida Constitution, will result in irreparable harm to the Shir Defendants and their non-party clients, and which cannot be remedied on appeal.

III. STATEMENT OF FACTS

The Shir Defendants have been sued in this action by two former clients, Plaintiffs/Respondents, Dario Carnevale, Esq. and Flavia Carnevale, Esq. (collectively the "Carnevales") who the Shir Defendants helped make rich to the tune of $10 million. On October 12, 2018, the Carnevales filed a Motion to Compel a Forensic Examination (the "Motion to Compel"), based on false allegations that the SLG *intentionally* concealed and/or *destroyed* evidence, and seeking the trial

court to compel a forensic examination of SLG's computers and servers. On November 1, 2018, the trial court held an evidentiary hearing on the Carnevales' Motion to Compel, which lasted over six hours. After the evidentiary hearing, the trial court requested that the parties submit written briefs and additional supplemental materials.

On December 22, 2018, the trial court entered an Order Granting the Carnevales' Motion to Compel a Forensic Examination (the "December 22 Order"). Trial court determined that the Shir Defendants did not intentionally conceal and/or destroy evidence as the Carnevales had alleged. Specifically, the trial court determined that "the Shir Defendants have in good faith attempted to produce all requested information. . ." December 22 Order at ¶1 (emphasis added). However, the trial court still granted the forensic examination determining that the Shir Defendants' good faith "efforts have not been sufficiently technically competent" and that "[m]ore expertise needs to be brought to bear to the task." December 22 Order at ¶1.

The December 22 Order also required the parties to submit proposed orders regarding the parameters and protocol for the forensic examination:

> Within 30 days of the entry of this Order, counsel for the parties shall submit proposed orders to the Court, setting forth the parameters and search protocols to be used by the forensic examiner to retrieve and examine data taken form the computers. The parameters and search protocols should be 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. Counsel for the parties shall confer telephonically in a good-faith effort to reach agreement on this issue prior to the submission of proposed orders.

December 22 Order at ¶4(c).

The undersigned attempted to contact the Carnevales' counsel on several occasions to confer as ordered by the trial court, however, the undersigned was stonewalled. When the January 22, 2019 deadline approached, the undersigned submitted a proposed order to the trial court. Very late in the evening on January 22, 2019, the Carnevales submitted their own proposed order, which improperly attempted to expand the scope of the forensic examination beyond the scope contemplated in the December 22 Order, and included overbroad search terms, including, for example, the names of other SLG clients, the word "condo*," the word "Feldman," the word "Rober*," etc.

On January 24, 2019, the trial court entered the Order Setting Protocol for Forensic Examination of The Shir Defendants' Electronically Stored Information (the "January 24 Order"), which was based solely on the January 22, 2019 proposed order submitted by the Carnevales. The trial court made no substantive revisions to the Carnevales' proposed order. In addition to the Carnevales' overbroad search terms and overbroad timeframe, the January 24 Order does not protect the fundamental constitutional rights of SLG's non-party clients.

IV. NATURE OF RELIEF SOUGHT

For the reasons stated above, and discussed in greater detail below, the trial court's December 22 Order and January 24 Order should be quashed, and this matter should be remanded to the trial court for further proceedings, including compelling an e-discovery expert to assist the Shir Defendants to extract and produce all relevant evidence.

V. ARGUMENT

i. STANDARD OF REVIEW

To obtain a writ of certiorari from a nonfinal order, the petitioner must show: (1) a departure from the essential requirements of law; (2) resulting in material injury for the remainder of the case; (3) that cannot be corrected on post-judgment appeal. *Paton v. GEICO General Ins. Co.*, 190 So.2d 1047, 1052 (Fla. 2016); *Belair v. Drew*, 770 So.2d 1164, 1166 (Fla. 2000).

ii. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT ORDERED A FORENSIC EXAMINATION OF THE SHIR DEFENDANTS' COMPUTERS AND SERVERS

Allowing the forensic examination of a party's computer system is an "unusual and 'drastic' remedy." *Procaps S.A. v. Pantheon Inc.*, 2014 U.S. Dist. LEXIS 187185, *9 (S.D. Fla. Dec. 30, 2014). The court in *Procaps S.A.* explained:

> "Courts compel a party to turn over its computers for a forensic ESI analysis only where there is a strong showing that the party (1)

> *intentionally* destroyed evidence, *or* (2) *intentionally* thwarted discovery."

Procaps S.A., 2014 U.S. Dist. LEXIS 187185 at *10 (emphasis added).

In *Menke v. Broward Cnty. Sch. Bd.*, the Fourth DCA quashed a trial court's order permitting the respondent's expert to examine the computers of petitioner. The court based its decision, in part, on the lack of evidence showing that evidence was intentionally destroyed or concealed:

> "Where a need for electronically stored information is demanded, such searching should first be done by defendant so as to protect confidential information, unless, of course, there is evidence of data destruction designed to prevent the discovery of relevant evidence in the particular case. *Id.* In fact, in the few cases we have found across the country permitting access to another party's computer, all have been in situations where evidence of intentional deletion of data was present. *See, e.g., Etzion v. Etzion*, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (N.Y. Sup. Ct. 2005); *Renda Marine, Inc. v. U.S.*, 58 Fed. Cl. 57 (Fed. Cl. 2003)."

Menke v. Broward Cnty. Sch. Bd., 916 So.2d 8, 12 (Fla. 4th DCA 2005) (emphasis added).

"A search might be approved after the requesting party proved (1) evidence of any destruction of evidence or thwarting of discovery; (2) a likelihood the information exists on the devices; and (3) no less intrusive means exists of obtaining the information." *Holland v. Barfield*, 35 So.3d 953, 955 (Fla. 5th DCA 2010), citing *Menke*, 916 So.2d at 11. (emphasis added); *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (granting writ stating "the record lacks evidence that defendants have intentionally destroyed relevant ESI in the past, and nothing in the record indicates

that defendants are unwilling, or will refuse, to preserve and produce all relevant ESI in the future.").

Under the first factor of the test there must be "evidence of any destruction of evidence or thwarting of discovery." As described in *Procaps S.A.* and *Menke*, this refers to intentional misconduct. In other words, prior to compelling a forensic examination, a trial court must determine that there is evidence of intentional misconduct such as the intentional destruction of evidence or where a party intentionally thwarts discovery. In the present case, there is no evidence of intentional misconduct. In fact, the opposite is true. The trial court specifically determined that "the Shir Defendants have in good faith attempted to produce all requested information." December 22 Order at ¶1.

While the Carnevales have repeatedly alleged that the Shir Defendants have intentionally destroyed and/or concealed evidence and have thwarted discovery, they failed to prove "evidence of any destruction of evidence or thwarting of discovery." After a more than six-hour evidentiary hearing, written briefs, and supplemental submissions requested by the trial court, the trial court expressly found that the Shir Defendants acted in good faith in their prior discovery efforts. *See Garrett v. University of South Florida Board of Trustees*, Case No. 8:17-cv-2874-T-23AAS (M.D. Fla. Sept. 14, 2018) ("the USF Board has not shown the requisite exceptional circumstances necessary for forensic examinations of Ms. Garrett's personal

computer and cellphone. For example, the USF Board failed to provide any facts or information suggesting Ms. Garrett altered or tampered with the recording or her personal computer. Conclusory assertions or 'bare possibility of misconduct' are insufficient to outweigh an individual's privacy interest.").

In light of the trial court's express good faith finding, the trial court departed from the essential requirements of law when it ordered a forensic examination of the SLG's computers and servers. Not only are the Shir Defendants' privacy interests invaded, but the privacy interests of SLG's nonparty clients are invaded as well.

Under the three-factor test discussed in *Holland*, a trial court must also find that "no less intrusive means exists of obtaining the information." This element was completely ignored in the trial court's December 22 Order and January 24 Order. Here, after expressly finding good faith, the trial court states that the reason for compelling a forensic examination is that the Shir Defendants prior efforts in discovery "have not been sufficiently technically competent" and thus "more expertise needs to be brought to bear to the task." December 22 Order at ¶1. Options other than an extensive, intrusive, and expensive forensic examination are available, and should have been considered. *See John B.*, 531 F.3d at 462 (J. Cole, concurring) (stating "I agree with the majority that, without evidence that Defendants intentionally destroyed relevant ESI in the past or that they are affirmatively unwilling to preserve all relevant ESI in the future, the district court should first

employ less intrusive means to address the perceived discovery violations.").

iii. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT INCLUDED AN OVERBROAD PROTOCOL, TIME PERIOD, AND SEARCH TERMS

Beyond the fact that the three-factor test discussed in *Holland* has not been met, the trial court also departed from the essential requirements of the law when it ordered overbroad protocol and terms for the forensic examination. A forensic examination is extremely intrusive, especially for a law firm. Under the January 24 Order, the Shir Defendants would be required review, and place on a privilege log, and then have reviewed *in camera*, every single irrelevant file having the words "Condo[minium],"[3] every single irrelevant filed related to SLG's Michael Feldman, every single irrelevant file related to anyone with the third most common name in the United States including the Shir Defendants' counsel, and every single irrelevant file related to SLG's other clients which get hit on due to the broad search terms. This will include many tens of thousands, if not hundreds of thousands of documents. Similarly, the search terms "Pino," "Brusc*," "Weinstein," "Blanco" are the names of current/former directors of SLG's client, Miami Beach Club (which further supports the notion that the Carnevales are using the forensic examination to

[3] This is the equivalent of having a search term of "will" for an estate planning attorney; or the search term "real-estate" for a real-estate attorney; or the search term "injury" for a personal injury attorney; or the search term "divorce" for a marital and family law attorney.

embark on a fishing expedition). All communications with these individuals are privileged and thus not discoverable. Furthermore, the only thing potentially relevant to Miami Beach Club in this litigation is ZTJ Recovery, Inc.'s purchase of Unit E-209 in August 2014 (and even that is only relevant because the Carnevales have made false allegations regarding Unit E-209 and Miami Beach Club in their pleadings).

Furthermore, the relevant date range stated in the January 24 Order is from January 1, 2013 to December 31, 2016, which is substantially overbroad. The Shir Defendants' relationship with the Carnevales ended in September 2014. The Carnevales filed their claims against the Shir Defendants on December 31, 2014, and the initial pleadings were served on the Shir Defendants in early January 2015. Any and all files, correspondence, etc. thereafter are either irrelevant to the claims in this litigation as framed in the pleadings and not reasonably calculated to lead to the discovery of admissible evidence and/or are privileged. *Valdes v. Greater Naples Fire Rescue District*, Case No. 2:17-cv-417-FtM-29CM. (M.D. Fla. Sept. 7, 2018) (finding timeframe of April 2016 to the present to be overbroad where "[t]he allegations in the Complaint involve events occurring from, at most, approximately October 27, 2016 to December 28, 2016," and denying request for forensic examination in light of privacy concerns).

The privilege log contemplated by the trial court will include tens of

thousands, if not hundreds of thousands of irrelevant files. Furthermore, the privilege log contemplated by the trial court must identify (1) the search term, (2) the title of the electronic file, (3) a description of its contents, etc. *See* January 24 Order at ¶12. The privilege log must also be produced to the Carnevales. In other words, the trial court's order requires the Shir Defendants to provide the Carnevales with the title of every file and a description of the contents of nearly every file in SLG's computer systems which include, for example, any and all files with the word "condo[minium]." This would essentially be the equivalent of forcing the SLG to turn over a customer list, which is considered a trade secret, but in this case, requires even greater protection because of the Fifth Amendment and the attorney-client privilege.

The Shir Defendants want all relevant evidence in this litigation to be produced. But this can be achieved by crafting a narrowly tailored order requiring much less intrusive means which are available (such as the Shir Defendants hiring an e-discovery expert to assist in locating all relevant information).

iv. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT INADVERTENTLY EXPANDED THE SCOPE OF THE FORENSIC EXAMINATION (DUE TO THE CARNEVALES' INAPPROPRIATE CONDUCT)

The trial court departed from the essentially requirements of the law when it inadvertently expanded the scope of the forensic examination (due to the

Carnevales' misconduct) to include iPhones, iPads, tablets, etc. Pursuant to the Florida Bar's Professionalism Expectations[4] guidelines:

> 3.7 A lawyer must promptly prepare a proposed order, ensure that the order fairly and adequately represents the court's ruling before submitting the order to the court, and advise the court whether opposing counsel has approved the order. (*See* R. Regulating Fla. Bar 4-3.4(c)).

See Professionalism Expectations at §3.7.

Pursuant to the Florida Bar's Guidelines for Professional Conduct[5]:

> After a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should be submitted immediately to the court. The order fairly and accurately must represent the ruling of the court.

See Guidelines for Professional Conduct at §I(3).

In the December 22 Order, the trial court stated that the SLG's computers/hard drives were to be forensically examined:

> 2. The Carnevales are entitled to forensically examine the Shir Defendants' electronic data, including the Shir Law Group server(s), computers, and email accounts (existing now and for the relevant period of production originally requested by the Carnevales).

See December 22 Order at ¶2. That's "server(s), computers, and email accounts[6]." Pretty clear.

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[4] Adopted by the Eleventh Judicial Circuit via Administrative Order No. 14-01.

[5] Adopted by the Eleventh Judicial Circuit via Administrative Order No. 14-01.

[6] The SLG's email exchange is securely hosted in the Cloud.

The December 22 Order continues:

> b. After 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.

See December 22 Order at ¶4(b). Once again – "ESI recovered from the computers." Still clear.

The December 22 Order continues:

> c. Within 30 days of the entry of this Order, counsel for the parties shall submit proposed orders to the Court, setting forth the parameters and search protocols to be used by the forensic examiner to retrieve and examine data taken form the computers. The parameters and search protocols should be appropriately crafted to protect against the disclosure of privileged or irrelevant information without

See December 22 Order at ¶4(c). Again – "retrieve and examine data taken form [sic] the computers." Clear as can be. Importantly, the December 22 Order was written by Judge de la O (as opposed to a proposed order submitted by the parties) and does not mention cell phones anywhere (likely because the Shir Defendants had previously produced well over 600 pages of text messages, whereas the Carnevales had produced ONE single text message, between the two of them, and the trial court was well aware of this fact).

The December 22 Order also ordered the parties to submit proposed orders within 30 days setting forth the parameters and search protocols for the forensic

examiner to use and ordered the parties to confer telephonically (which the Carnevales failed to do). *See* December 22 Order at ¶4(c). Rather than confer, the Carnevales stonewalled. The undersigned attempted to contact them on several occasions, each time being told "we're working on search terms" and "we'll go over it soon" or something to that effect. Never happened. Instead, the Carnevales submitted their proposed order with the nefarious purpose of covertly expanding the scope of the forensic examination:

> 2. Within seven (7) days of the date of this Order, Fairfield Investigation shall create a mirror image of the Shir Defendants' ESI including the Shir Law Group server(s), computers, and email accounts (existing now and for the relevant period of production originally requested by the Carnevales), and the Shir Defendants' cell phones, and tablets (including iPads).

See Carnevales' Proposed Order at ¶2, submitted on January 22, 2019. [Tab 3].

Ultimately, the trial court adopted the Carnevales' proposed order [*see* Tab 4], likely believing that the Carnevales had submitted a proposed order which "fairly and adequately" represented the trial court's prior ruling (as they were ethically required to do):

> 2. Within seven (7) days of the date of this Order, Fairfield Investigation shall create a mirror image of the Shir Defendants' ESI including the Shir Law Group server(s), computers, and email accounts (existing now and for the relevant period of production originally requested by the Carnevales), and the Shir Defendants' cell phones, and tablets (including iPads).

See January 24, 2019 Order at ¶2.

Suddenly what was originally "server(s), computers, and email accounts" now includes the Shir Defendants' "cell phones, and tablets (including iPads)." It is unlikely that the trial court meant to include that expanded scope based on the December 22 Order (that the trial court drafted). Under the legal maxim *expressio unius est exclusio alterius* – when one or more things of a class are expressly mentioned others of the same class are excluded. *See U.S. v. First Nat. Bank of Crestview*, 513 So.2d 179, 181 (Fla 1st DCA 1987) (recognizing that the application of the legal maxim *expressio unius* not limited to statutory construction). Because the December 22 Order expressly identified "server(s), computers, and email accounts," then "cell phones, and tablets (including iPads)" were not within the scope of the forensic examination (this is also evidence from the trial court's repeated discussion about ESI data taken "from the computers"). Compare the December 22 Order, the Carnevales' proposed order, and the January 24 Order:

> **2. The Carnevales are entitled to forensically examine the Shir Defendants' electronic data, including the Shir Law Group server(s), computers, and email accounts (existing now and for the relevant period of production originally requested by the Carnevales).**

See December 22 Order at ¶2.

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See January 24, 2019 Order at ¶2.

Under Florida law, when an order deriving from a proposed order is inconsistent with the court's earlier pronouncement, that order must be reversed. In *Ford Motor Co. v. Starling*, the Fifth DCA explained:

> Ford complains, justifiably, that the trial judge signed a proposed judgment prepared by the attorney for Starling. There is a split of opinion on this court as to the propriety of this practice. In any event, we have reversed on this basis only when the signed judgment is inconsistent with an earlier pronouncement of the judge. That is not the case here. *See generally White v. White,* 686 So.2d 762 (Fla. 5th DCA 1997); *Polizzi v. Polizzi,* 600 So.2d 490 (Fla. 5th DCA 1992).

Ford Motor Co. v. Starling, 721 So.2d 335, 337, fn.4 (Fla 5th DCA 1998) (emphasis added).

In *Flint v. Fortson*, the Forth DCA was similarly confronted with this issue. The Fourth DCA noted that in these situations "what is critical for a reviewing court

is that [the order] reflect the trial judge's independent decision on the issues of the case." *Flint v. Fortson*, 744 So.2d 1217, 1220 (Fla. 4th DCA 1999); *see also Damiani v. Damiani*, 835 So.2d 1168 (Fla. 4th DCA 2002) (reversing an order based on a proposed order submitted by the husband, finding that "the judgment bears evidence that it does not accurately reflect the findings of the court.").

Here, trial court ordered a forensic examination of SLG's "server(s), computers, and email accounts." The December 22 Order repeatedly refers to ESI data "from the computers." On the other hand, the January 24 Order, which was initially drafted by the Carnevales, suddenly includes cell phones and tablets. The trial court likely presumed that the proposed order submitted by the Carnevales would "fairly and accurately" reflect the trial court's prior order. This expanded scope was inconsistent with the intent of the trial court (based on the earlier pronouncement) and therefore must be vacated.

v. THE SLG AND ITS NON-PARTY CLIENTS WILL SUFFER IRREPARABLE INJURY IF THE FORENSIC EXAMINATION PROCEEDS AS ORDERED

Unlike a typical party in litigation, the SLG is a law firm. Besides the Carnevales, SLG has hundreds of current and former clients, all of whom have an attorney-client relationship with SLG, are all protected by the attorney-client privilege, and all of whom have a fundamental Fifth Amendment right to privacy. The Carnevales' desire to forensically examine SLG's electronic information does

not outweigh the rights of these non-parties. The forensic examination ordered by the trial court does not protect those fundamental rights, and therefore such orders should be vacated. Another method of discovery should be fashioned, which protects these rights, while also ensuring that all relevant and discoverable data is obtained and produced (which was the stated intent of the trial court).

The Florida Supreme Court has recognized that the Florida Constitution contains in Article 1, Section 23 a strong right of privacy provision. *See Shaktman v. State*, 553 So.2d 148 (Fla. 1989). In *Shaktman,* the Florida Supreme Court reasoned that this provision "ensures that individuals are able 'to determine for themselves when, how *and* to what extent information about them is communicated to others.'" *Shaktman*, 553 So.2d at 150 (emphasis added). The Florida Supreme Court discussed a "zone of privacy into which not even government may intrude without invitation or consent." The Florida Supreme Court elaborated:

> Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over 'majoritarian sentiment' and thus cannot be universally defined by consensus.

Shaktman, 553 So.2d at 150 – 51 (emphasis added); *see also Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533, 536 (Fla. 1987) ("there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others."); *Winfield v.*

Division of Pari-Mutuel Wagering, 477 So.2d 544, 547 (Fla. 1985) (right of privacy is fundamental right, requiring a compelling state interest to justify an intrusion on privacy, but then only by the least drastic means).

Beyond the Florida Constitution, the United States Constitution also recognizes a strong right to privacy. *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed. 2d 510, 85 S.Ct. 1678 (1965). The right to privacy has been described as "the most comprehensive of rights and the right most valued by civilized man." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). In *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), the Supreme Court specifically recognized that the right to privacy encompasses at least two different kinds of interests, "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions." In *Nixon v. Administrator of General Services*, 433 U.S. 425, 457-458 (1977), the Supreme Court reaffirmed the confidentiality strand of privacy.

Here, the protocol for the forensic examination (which was created by the Carnevales via their proposed order) does not adequately protect the fundamental privacy rights of SLG and SLG's non-party clients. The trial court was aware of the need to protect such privacy interests:

> "The parameters and search protocols should be 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."

December 22 Order at ¶4(c). Yet when it came time to protect those privacy interests in its subsequent order, the trial court entered the Carnevales' overbroad proposed order (which became the January 24 Order) with no substantive revisions and likely without realizing the harm that would be caused.

In *Menke*, the Fourth DCA discussed the invasion of privacy rights:

> "As Menke states in his petition, this order 'gives an agent of the Board carte blanche authorization to examine the hard drives it will duplicate from the computers Menke has been ordered to produce, combing through every byte, every word, every sentence, every data fragment, and every document, including those that are privileged or that may be part of privileged communications, looking for `any data' that may evidence communication between Menke and his accusers.' The only admonition to the Board's expert is that if he finds such communication, he cannot discuss it with counsel. However, those communications are still revealed to a paid representative of the opposing party, as will be everything else on the computer, substantially invading the privacy of Menke and his family members....
>
> Menke contends that the respondent's representative's wholesale access to his personal computer will expose confidential communications and matters entirely extraneous to the present litigation, such as banking records. Additionally, privileged communications, such as those between Menke and his attorney concerning the very issues in the underlying proceeding, may be exposed. Furthermore, Menke contends that his privacy is invaded by such an inspection, and his Fifth Amendment right may also be implicated by such an intrusive review by the opposing expert."

Menke, 916 So.2d at 10.

Similarly, in the present case, the trial court's December 22 Order and January 24 Order give forensic examiner Fairfield Investigations authorization to copy the hard drives and the servers of SLG. Such hard drives and servers include many numerous terabytes worth of irrelevant data unrelated to the underlying litigation involving the Carnevales, but which are (1) related to other SLG clients and their legal issues for which SLG represents them (all of which is protected by the attorney-client privilege and the Fifth Amendment right of privacy; and some of which includes financial information and HIPAA protected information); and (2) related to the undersigned's representation and communications with the Shir Defendants during the instant litigation (all of which is protected by the attorney-client privilege, and work product privilege). These privacy rights and privilege rights must be protected. *See National Sec. Fire & Cas. Co. v. Dunn*, 705 So.2d 605, 608 (Fla. 5th DCA 1997) (quashing discovery order on the basis that the order did not adequately protect the attorney-client privilege and because "proper consideration was not given to the privacy rights of National's other third-eight [nonparty] insureds"); *Beverly Enterprises-Florida, Inc. v. Deutsch,* 765 So.2d 778 (Fla. 5th DCA 2000) (quashing discovery order allowing entry and inspection of nursing home room where a patient fell and broke her hip, finding inspection would violate privacy rights of other nursing home residents, who are innocent non-parties, *disapproved on other grounds by Alterra Healthcare v. Estate of Shelley*, 827 So.2d 936 (Fla.2002)).

VI. ADDITIONAL CONSIDERATIONS

A more than two (2) year delay occurred in this litigation (from 2016 – 2018) when the General Magistrate had to review (less than) 10,000 pages of documents *in camera* which the Carnevales' improperly alleged were privileged (which was recently overruled). With the overbroad scope, the overbroad search terms, and the overbroad timeframe, the trial court will have to review tens, if not hundreds of thousands of irrelevant documents and files *in camera* to protect SLG and its clients.

The forensic examination that the Carnevales demand includes 12 TB (terabytes) of data from SLG's servers, and at least another 6+ TB of data from computers. This means that if every file is 1 MB (a common file size for .doc and .pdf files), then there will be 18 million total files, many of which, for example, will have the word "condo[minium]." A quick search of SLG's TrialWorks system, which includes only a small fraction of the total data in SLG's systems, results in nearly 35,000 files (not pages… but files) just with the word "condo" or "condominium."

The Carnevales are using the forensic examination as an excuse to delay this litigation, in light of their recent misconduct on November 1, 2018. The Carnevales are facing the striking of their pleadings and dismissal for committing a fraud on the court when the Carnevales intentionally lied under oath regarding (what the Carnevales' counsel, Javier Lopez, Esq. admits is) the "ultimate issue" in this

litigation. At the November 1, 2018 evidentiary hearing, Judge de la O asked the Carnevales questions directly regarding this "ultimate issue." The Carnevales looked Judge de la O in the eyes and lied about that "ultimate issue" in an effort to induce the trial court into making a decision prejudicial to the defendants in this litigation and favorable to the Carnevales – which is precisely what is contemplated in *Cox v. Burke*, 706 So.2d 43, 47 (Fla. 5th DCA 1998) ("[F]raud on the court occurs where 'it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.'").

After the November 1, 2018 evidentiary hearing, the Shir Defendants voluntarily began to search their computer systems to see if any evidence had been overlooked in their initial document production. To their surprise, the Shir Defendants located literally the smoking-gun evidence[7] which proves their defenses and proves the Cross-Defendants' claims against the Carnevales. This newly discovered evidence also proved that the Carnevales intentionally lied under oath at

[7] Evidence which the Carnevales had failed to produce and/or failed to identify on a privilege log, even though such evidence was specifically requested in discovery by the Shir Defendants and the Cross-Defendants.

the November 1, 2018 evidentiary hearing to the court's questions. This led to the Shir Defendants' to file their Renewed Motion to Strike Plaintiffs' Pleadings, for Dismissal with Prejudice, and for Sanctions, including Attorneys' Fees Due to Plaintiffs' Fraud on the Court and Other Misconduct (the "MTD for FOTC") on November 18, 2018. *See* MTD for FOTC. [Tab 6]. The MTD for FOTC and its Supplement/Reply methodically lays out precisely how the Carnevales lied under oath at the November 1, 2018 evidentiary hearing regarding numerous material issues and facts in an effort to fraudulently induce the trial court into entering a decision[8] prejudicial to defendants and favorable to the Carnevales.

The trial court recently commented on the Shir Defendants' MTD for FOTC and the Carnevales' misconduct throughout this litigation:

> THE COURT: . . . The issue is that Mr. Carnevale sat there and said he didn't know -- I don't even know how to pronounce that anagram of letters. That he didn't know where that came from. He made it very clear it had not come from him. And there is now an allegation that it did, in fact, come from him, and it was in the draft of the releases that he -- releases or conflict waivers, I think it was, that he forwarded. That could be a serious problem if that's true. I don't have to find that he was co-counsel for me to find that there was -- that he misled this Court and committed perjury.

See January 10, 2019 Hearing Transcript at p. 4, lines 4 – 16. [Tab 5].

[8] The importance of the trial court's decision related to the November 1, 2018 evidentiary hearing cannot be overstated. It was the culmination of the parties ongoing dispute regarding the scope of discovery and the waiver of privilege which had been ongoing since 2016 when the General Magistrate was ordered to review the documents on the Carnevales' privilege logs *in camera*.

> THE COURT: Okay. So let me address the issue you said about the way this litigation is going. There's a larger context in this case of findings I've already made about the Carnevales behavior. And I wouldn't just take any motion for fraud on the Court and set it for four, five -- I don't know how long this hearing will or was going to take. It's only when I take it seriously that I do it. So the fact that I set it and wanted to hear it should be a signal to your clients that I'm very concerned about it.
>
> And especially in the context of this case and their prior behavior[9], and I watched them testify, and it was my questions that he was answering. All of that is highly relevant. I don't disagree with you that there would be some relevance to it. If at the end of the day if I concluded that they were in fact the co-counsel, that only makes the situation worse.

See January 10, 2019 Hearing Transcript at p. 10, lines 5 – 23.

The trial court initially set the MTD for FOTC for an evidentiary hearing to occur on January 18, 2019. In an effort to avoid the imminent striking of their pleadings, the Carnevales threw up a Hail Mary – and filed an Emergency Motion to Continue the January 18, 2019 evidentiary hearing, alleging that they should be able to take the Shir Defendants' depositions, and until after the forensic examination is completed (both of which are irrelevant to the issue of whether the Carnevales intentionally lied under oath to the trial court on November 1, 2018

[9] The trial court is referring to its March 2013 Order where it found that the Carnevales had both repeatedly lied under oath in this litigation and in the underlying litigation and made misrepresentations to the trial court on six occasions in an effort to block a subpoena in this litigation. The trial court sanctioned Dario Carnevale, Esq., and referred them to the Florida Bar after finding that they had engaged in a "pattern of misconduct." *See* March 24, 2018 Order.

regarding material facts in an effort to induce the trial court into making a decision favorable to the Carnevales and prejudicial to the defendants). The trial court granted their Emergency Motion, and the depositions of the Shir Defendants occurred in January and February. However, the evidence related to the Carnevales' fraud on the court derives from communications between the Carnevales and the Shir Defendants – evidence that the Carnevales have always had in their possession in their own email accounts (a portion of which they first produced on February 20, 2019). In an effort to further delay the evidentiary hearing on the MTD for FOTC from going forward in a timely manner, the Carnevales submitted the proposed order which ultimately became the January 24 Order, calculated to expand the scope of the forensic examination, drive up the costs (which will likely exceed $100,000), and unduly burden the Shir Defendants by forcing them and the trial court to review thousands of irrelevant files, including every document with the search term "condo" and/or "condominium" that are in the computers of a law firm that practices in that field.

Finally, on February 14, 2019, the Shir Defendants filed an Emergency Motion for Protective Order and/or Reconsideration Regarding Forensic Examination, which seeks the relief requested herein. [Tab 7]. However, such motion remains pending in light of the recent transfer of Judge de la O to the criminal division, and the transfer of Judge Rebull to Division 5 who has been on a trial

docket. This Petition was filed before a ruling on the Emergency Motion to ensure that the Petition is timely under the Rules.

VII. CONCLUSION

First and foremost, the trial court found that the Shir Defendants acted in "good faith" in their prior efforts to produce documents. That alone, under *Menke* and related cases, warranted a denial of the Carnevales' Motion to Compel. Instead, the trial court granted the forensic examination – the purpose of which was to bring in "more expertise" to assist the Shir Defendants with their document production (from a technological standpoint). It wasn't meant to harass or unduly burden the Shir Defendants. But that is what it has become. The Shir Defendants are willing to do what is necessary to ensure that all relevant evidence is produced.

From a failure to adequately protect the Shir Defendants and their nonparty clients' privacy interests, to overbroad search terms, an overbroad timeframe, and expanding the scope to include items not contemplated, the trial court departed from the essential requirements of law, causing material injury to the Shir Defendants throughout the remainder of the proceedings below and has effectively left no adequate remedy on appeal. For the reasons stated above, this petition should be granted, and the trial court's December 22 Order and January 24 Order should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been served via e-mail to: **Javier A. Lopez, Esq.**, **Tal J. Lifshitz, Esq.**, and **John I. Criste, Jr., Esq.**, jal@kttlaw.comtjl@kttlaw.com, jcriste@kttlaw.com, nm@kttlaw.com, rcp@kttlaw.com, Kozyak Tropin & Throckmorton LLP (*Counsel for Plaintiffs*), 2525 Ponce de Leon Blvd., 9th Floor, Miami, Florida 33134; **Cary A. Lubetsky, Esq.**, **Michael I. Feldman, Esq.**, and **Salvatore Fasulo, Esq.**, cal@khllaw.com, mif@khllaw.com,, shf@khllaw.com, eservicemia@khllaw.com, Krinzman, Huss & Lubetsky (*Co-Counsel for Defendants Rogenia Trading, Inc., Olga Fernandez, Domingo J. Delgado and Nilda Delgado*), 800 Brickell Avenue, Suite 1501, Miami, Florida 33131; and **Michael Schiffrin, Esq.** and **Michelle Vargas, Esq.**, mschiffrin@SDTriallaw.com, Michelle@SDTriallaw.com, St. Denis & Davey, P.A. (*Co-Counsel for Defendants Rogenia Trading, Inc., Olga Fernandez, Domingo J. Delgado and Nilda Delgado*), 1395 Brickell Avenue, Suite 800, Miami, Florida 33131, on this 22nd day of February, 2019.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated document complies with the requirements of Rule 9.100(l), *Florida Rules of Appellate Procedure*.

Respectfully submitted,

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