FLORIDA FIRST DISTRICT COURT OF APPEAL
Case No.: 1D14-2163
Lower Case Nos.: 2012-CA-00412 / 2012-CA-00490 / 2012-CA-002842

DATA TARGETING, INC., PAT BAINTER, MATT MITCHELL, and MICHAEL SHEEHAN,
Appellants,

v.

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, THE NATIONAL COUNCIL OF LA RAZA, COMMON CAUSE FLORIDA, JOAN ERWIN, ROLAND SANCHEZ-MEDINA, JR., J. STEELE OLMSTEAD, CHARLES PETERS, OLIVER D. FINNIGAN, SERENA CATHERINA BALDACCHINO, DUDLEY BATES, RENE ROMO, BENJAMIN WEAVER, WILLIAM EVERETT WARINNER, JESSICA BARRETT, JUNE KEENER, RICHARD QUINN BOYLAN, BONITA AGAN, KENNETH W. DETZNER, in his official capacity as Florida Secretary of State, THE FLORIDA SENATE, MICHAEL HARIDOPOLOS, in his official capacity as President of the Florida State Senate; THE FLORIDA HOUSE OF REPRESENTATIVES, and DEAN CANNON, in his official capacity as Speaker of the Florida House of Representatives, and PAM BONDI, in her official capacity as Attorney General of the State of Florida,
Appellees.

REPLY BRIEF OF NON-PARTIES DATA TARGETING, INC., PAT BAINTER, MATT MITCHELL, AND MICHAEL SHEEHAN

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Dated: May 21, 2014

TABLE OF AUTHORITIES

CASES

RULES

TABLE OF ABBREVIATIONS

Plaintiffs	Refers collectively to two groups of plaintiffs in the underlying case. The first is the League of Women Voters of Florida, Common Cause, Robert Allen Schaeffer, Brenda Holt, Roland Sanchez-Medina, Jr., and John Steele Olmstead. The second is a comprised of Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, and Bonita Agan.
Non-Parties	Refers to Pat Bainter, Matt Mitchell, Michael Sheehan, and Data Targeting, Inc.
NP Em. M. App.	Appendix of Pat Bainter, Matt Mitchell, Michael Sheehan, and Data Targeting, Inc.'s Emergency Motion For Stay Of Order Requiring Disclosure Of Constitutionally Privileged And Trade Secret Information Pending Filing And Resolution Of A Petition For Writ Of Certiorari filed May 14, 2014
NP Br.	Initial Brief of Non-Parties' Data Targeting, Inc., Pat Bainter, Matt Mitchell, and Michael Sheehan filed May 19, 2014
NP App.	Non-Parties' Amended Appendix filed May 21, 2014
P. Br.	Plaintiffs' Answer Brief filed May 20, 2014
P. App.	Appendix of Plaintiffs' Answer Brief filed May 20, 2014

ARGUMENT

Plaintiffs fail to squarely address whether the Circuit Court applied the First Amendment's balancing test with the "closest of scrutiny" required by the U.S. Supreme Court, or whether the Circuit Court followed well-established precedent regarding trade secrets. *NAACP v. State of Ala.*, 357 U.S. 449, 460 (1958). The reason is simple: they cannot. Nothing in the record supports the Circuit Court's inconsistent approach to disclosure of documents protected by the First Amendment's associational privilege. And nothing in the record supports the Circuit Court's complete failure to observe the procedural safeguards designed to assess whether information is trade secret and then protect that information.

Plaintiffs thus rely on a maze of misinformation and misrepresentation to mask the Circuit Court's legal errors, and offer no explanation for their own rejection of the Non-Parties' efforts to make the information at issue available in a sealed proceeding. Plaintiffs fail to even mention the "close scrutiny" required by the U.S. Supreme Court in their discussion of the First Amendment's associational privilege. And while attempting to connect the dots from the Non-Parties' intent to the central issue in the case – legislative intent – Plaintiffs make a bold and sweeping statement that "[t]he Legislature, by contrast, gave special access to the Non-Parties and their colleagues and repeatedly relied upon the Partisan Operatives Maps in preparing the enacted districts in the Initial 2012 Senate Plan

and the 2012 Congressional Plan." P. Br. at 19 n.3. This type of bold and sweeping statement, unsupported by any record citation or evidence, becomes the sum of Plaintiffs' Brief. Accusations based on pure speculation, conspiracies, and sensationalism can neither hide nor justify the Circuit Court's errors.

I. PLAINTIFFS FAIL TO ADDRESS WHETHER THE CIRCUIT COURT ERRED BY NOT APPLYING CLOSE SCRUTINY UNDER THE FIRST AMENDMENT'S BALANCING TEST, AND IMPROPERLY RAISE ISSUES BEFORE THE COURT.

A. Failure to comply with the First Amendment's balancing test.

First, citing the U.S. Supreme Court's decision in *NAACP*, 357 U.S. at 460, the Non-Parties made clear in their initial brief that action "curtailing the freedom to associate is subject to the *closest of scrutiny*." The Non-Parties further explained that this closest of scrutiny requires courts to conclude that: (1) the information sought is *highly* relevant to the case, (2) the request is narrowly tailored to avoid unnecessary interference with First Amendment rights, (3) the information sought is central to the issue in the case, and (4) no less intrusive means of using the information exists. *See Perry v. Schwarzenegger*, 591F.3d 1147, 1160-61 (9th Cir. 2010). Relying on specific examples to highlight the Circuit Court's cursory review, the Non-Parties showed the Circuit Court's failure to apply the type of close scrutiny envisioned by the U.S. Supreme Court through

application of the First Amendment's four-part test. NP Br. at 14-18. But Plaintiffs never squarely respond to the issue; they squarely avoid it instead.[1]

B. Plaintiffs improperly focus on Non-Parties' intent despite their own admission that Non-Parties' intent is irrelevant.

Plaintiffs focus on the Non-Parties' intent, and accuse them of working with like-minded individuals – whom Plaintiffs disparagingly call "front persons" – to submit partisan maps. P. Br. at 17. Yet Plaintiffs note elsewhere that "the only people whose intent is on trial are the members, staffers, agents, and collaborators of the Legislature who were involved in the preparation of the adopted redistricting plans." P. Br. at 19. Plaintiffs thus miss their own point by deriding the Non-Parties and the Non-Parties' like-minded associates for (potentially) having partisan intent by calling them "operatives," "cohorts," and "plants" simply because they happen to disagree with Plaintiffs' political beliefs. *See* P. Br. at 19.[2]

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[1] Surprisingly, Plaintiffs do not even mention the words "close scrutiny" and avoid the First Amendment's four factor test. Rather, as discussed *infra*, Plaintiffs repeatedly rely on the false premise that Non-Parties somehow "consented" to the Circuit Court's Orders and any of its errors.

[2] Plaintiffs go so far as to inaccurately challenge the testimony of the Non-Parties in a prior deposition as "demonstrably false," but fail to provide any credible evidence to support the allegation. P. Br. at 28. The real falsity lies in the Plaintiffs' outright attack on Mr. Bainter's character arising from Plaintiffs' own failure to examine Mr. Bainter thoroughly on matters the Plaintiffs' deem relevant.

In fact, the manner in which Plaintiffs surgically excise a word or phrase from numerous confidential emails and piece them together in one or more sentences to tell their desired political story is reminiscent of the classic ransom note cobbled together by cutting words and phrases from various magazines. Plaintiffs'

Each and every map submitted through the Legislature's public meetings and public website is a partisan map,[3] reflecting the submitter's intentions, political bias, or views on incumbents.[4] The relevant question for the First Amendment's balancing test and the underlying case is whether the Legislature had an improper intent when it drew its maps. For that, there must be some direct evidence linking the Legislature, individual legislators, or their staff to an improper intent. Nothing in the Non-Parties' 1833 pages of documents shows this link between the Non-Parties, and legislators or their staff to promote maps submitted by "front persons." Non-Parties have long since provided Plaintiffs any correspondence with legislators or staff – any correspondence that goes to the issue of legislative intent. Therefore, Plaintiffs cannot now be allowed to get away with broad, sweeping quips accusing "the Legislature . . . [of giving] special access to the Non-Parties" or the "complicity of the Legislature" without one iota of evidence from the record

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assertions are nothing more than a composite of random words and phrases taken completely out context and arranged in an order to give false impressions. Because of page and time constraints, however, Non-Parties are unable to provide an extensive list of all of Plaintiffs' misstatements.

[3] Plaintiffs intentional focus on 9 of the more than 175 publicly submitted maps, predominantly selected from discovery of Republican non-parties, demonstrates the Plaintiffs' real interest in this case is not on the maps, but rather on non-parties' internal deliberations. Such an interest is precisely the reason for having the associational privilege.

[4] Much like the partisan maps, Plaintiffs and some of their counsel drew and submitted maps to the Circuit Court while hiding Plaintiffs' own extreme partisan intent. *See* NP. Br. at 21-22.

now before this Court. P. Br. at 19 n. 3 and 22. Public participation in the redistricting process would be discouraged if anyone who submitted a map to the Legislature were suddenly open to public harassment, ridicule, and censure in the ensuing litigation by parties like the Plaintiffs or other partisan groups.

Plaintiffs' attack thus amounts to an effort designed to chill the Non-Parties' participation in the very public redistricting process open to all.[5] Plaintiffs find the Non-Parties' decision to participate in the redistricting process reprehensible, crying foul because the Non-Parties and their associates happen to be Republicans, who happen to be the majority in the Legislature. P. Br. 1-24. But the Non-Parties' participation in the public process together with their like-minded friends is protected political speech, and Plaintiffs cannot change that because the First Amendment imposes no litmus test. *NAACP,* 357 U.S. at 461 (holding privilege applies regardless of "whether the beliefs sought to be advanced by association pertain to *political*, economic, religious, or cultural matters") (emphasis added).

Nothing in the Florida Supreme Court's decision in *League of Women Voters of Florida v. Florida House of Representatives,* 132 So. 3d 135, 148-49 (Fla. 2013) holds to the contrary. There, the Florida Supreme Court addressed legislative intent as discerned from individual legislators and their staff. *Id.* The case allows Plaintiffs to ask *specific legislators and their staff* about their

[5] In reality, Plaintiffs' intent is seemingly to chill the participation of only those individuals with whom the Plaintiffs do not politically agree.

conversations with the Non-Parties. *Id.* The First Amendment, however, shields Non-Parties' internal deliberations absent the "closest of scrutiny." *NAACP*, 357 U.S. at 461. The Florida Supreme Court could not have held otherwise.

C. The issue of whether the associational privilege applies to Non-Parties is not properly before the Court, and even if it were, the Non-Parties clearly qualify for First Amendment protections.

The Plaintiffs also claim that the Circuit Court (and Justice Harding) erred in the first instance by concluding that the Non-Parties qualify for the associational privilege. This argument is procedurally and substantively flawed.

Procedurally, the issue of whether the associational privilege applies to the Non-Parties is not properly before the Court. The Circuit Court's March 20, 2014 Order approved the Special Master's recommendation on the issue. NP App. B. That Order is not on appeal because the Non-Parties did not appeal it. Plaintiffs did not file a petition for writ of *certiorari* from that Order. Plaintiffs chose not to file a cross-appeal on the issue after this Court granted an emergency stay and entered the May 19, 2014 Order treating this case as an appeal of a final order. As such, the issue of whether the association privilege applies is not appropriately before the Court on appeal. Fla. R. App. P. 9.110(h) ("Multiple final orders may be reviewed by a single notice, if the notice is timely filed *as to each such order.*") (emphasis added); *see also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 480-81 (1999) (explaining that an appellate court may not "take up the unappealed

portions of [] orders . . . *sua sponte*" and that the U.S. Supreme Court has never recognized an exception to that rule); *Hollimon v. Florida*, 232 So. 2d 394, 396-97 (Fla. 1970) (holding that a single notice of appeal is sufficient to confer appellate jurisdiction of more than one judgment of the lower court only when that notice of appeal is directed to every judgment intended to be challenged).

Substantively, aside from Plaintiffs' failure to appeal the issue, the Non-Parties clearly qualify for the associational privilege's protections. The Non-Parties' letters to the Special Master provide further detail. NP Em. M. App Tabs 5, 6. The Non-Parties simply note that, contrary to the Plaintiffs assertions, P. Br. at 43, "[t]he burden in making [a] *prima facie* case [for associational privilege] is light," and the Non-Parties satisfied this light burden with Pat Bainter's affidavit and testimony before Justice Harding. *Alliance of Automobile Manufactures v. Jones*, 2013 WL 4838764, *4 (N.D. Fla. Sept. 11, 2013) (citations omitted). Overcoming the associational privilege, however, is subject to "the *closest of scrutiny*." *NAACP*, 357 U.S. at 461 (emphasis added). As expressly pointed out throughout the Non-Parties' Initial Brief, the record is devoid of any scrutiny, much less close scrutiny. Plaintiffs' best response to examples where the Circuit Court's May 2, 2014 Order clearly falls short of the mark – where the Order provides inconsistent rulings on duplicate or blank pages – is to suggest that this was somehow part of a "pragmatic approach." P. Br. at 47. Plaintiffs again rely

on complete speculation as to the kind of review the Circuit Court might have undertaken behind closed doors. Regardless, the Orders and record below demonstrate that the Circuit Court's review was part of a haphazard approach borne of expediency and not the close scrutiny required by the First Amendment.

II. PLAINTIFFS COMPLETELY IGNORE THE ISSUE OF WHETHER THE CIRCUIT COURT ERRED BY FAILING TO FOLLOW THE PROCEDURES FOR DETERMINING WHETHER INFORMATION IS TRADE SECRET AND THEN PROTECTING IT.

Second, Plaintiffs argue that the Non-Parties' information could never have qualified for trade secret protection; however, this is not the issue on appeal. At issue is whether the Circuit Court erred by not giving the Non-Parties an *opportunity* to explain why the information contained in the documents ordered disclosed is trade secret. It did. *See* NP Br. at 27-30 (collecting cases); *Summitbridge National Invs., LLC v. 1221 Palm Harbor LLC,* 67 So. 3d 448 (Fla. 2d DCA 2011) (holding that compelled disclosure of information from investment company to borrowers was improper because the trial court did not conduct an *in camera* review to determine status of the claimed trade secret).

Had the Circuit Court conducted an *in camera* review and evidentiary hearing on the Non-Parties' trade secrets issues, Non-Parties could have shown that their documents qualify for trade secret protections for several reasons. Some contain confidential data, analysis, and impressions crucial to the Non-Parties' business as political consultants, disclosure of which would be harmful to the Non-

Parties' financial interests if obtained by other Republican or even Democratic political consultants. NP Supp. App. Tab 1 at DATA CONF 00009-00011. Other documents include information on grassroots members, again information competitors would use to pick-off members of an organization the Non-Parties have carefully organized and maintained. NP Supp. App. Tab 1 at DATA CONF 00094. Still other documents provide insight on the Non-Parties' direct mailing capabilities and the clients soliciting such services. NP Supp. App. Tab 1 at DATAT CONF 00070-00072. Had they been given the opportunity, the Non-Parties could have shown that all such information qualifies as trade secret. *See, e.g., Bright House Networks, LLC, v. Cassidy*, 129 So.3d 501, 506 (Fla. 2d DCA 2014) ("A customer list that is not readily ascertainable by the public can be a trade secret.") (citations omitted); *Salick Health Care, Inc. v. Spunberg*, 722 So.2d 944, 945 (Fla. 4th DCA 1998) (holding that information concerning strategies, designs, and market analysis may constitute trade secrets).

III. THE NON-PARTIES COULD NOT HAVE WAIVED THEIR RIGHT TO AN APPEAL BY DISCLOSING DOCUMENTS, SUBJECT TO A CONFIDENTIALITY ORDER, TO AVOID CONTEMPT OF COURT.

Third, the Plaintiffs suggest that the Non-Parties waived their right to an appeal by refusing to withhold the documents in contempt of the Circuit Court's Orders. Not true. "Waiver imports the intentional relinquishment of a known right." *Gustavo Prieto v. Union American Insurance Co.*, 673 So. 2d 521, 523 (Fla.

3d DCA 1996). The issue is not whether the Non-Parties disclosed the documents, but rather their intentions at the time of disclosure. Disclosure subject to a confidentiality agreement that prevents privileged and confidential information from reaching competitors, newspapers, and even the Plaintiffs' own cannot be construed as a waiver. *C.P. Smith v. Armour Pharmaceutical Co.*, 838 F. Supp. 1573, 1577 (S.D. Fla. 1993) (interpreting Florida law on attorney-client privilege, explaining that the privilege is not waived even if information is published in newspapers, inadvertently disclosed by one's own attorneys, or obtained by theft, and stating "that the contents of a privileged document have become widely known is insufficient by itself to eliminate the privilege that covers the document").

In arguing otherwise, the Plaintiffs misstate the facts on how this privilege matter first arose. Plaintiffs either forget or choose to ignore that *after* Pat Bainter's deposition, they made a completely new discovery request that was far broader and more invasive than the original. P. App. at 183 Line 12 – 185 Line 2. Months passed in attempting to narrow the relevant search, including numerous hearings before the Circuit Court where Non-Parties acknowledged concerns regarding the burdens of the request and the likelihood of inherent privilege matters once potentially responsive documents were identified. NP App. at 5-7, 9-10, 18-21; NP App. Q at 9-12, 19-20. Apprised of this process, Plaintiffs refused several opportunities to provide search terms by which the request could be limited

to relevant documents central to their case. Non-Parties proceeded, at significant time and expense, with the necessary steps to comply with the subpoenas and the directions of the Circuit Court – collecting the ~32,000 pages of documents identified in the search, reviewing the ~32,000 pages documents to assess responsiveness, and identifying matters of privilege in the documents determined responsive under the broad scope of the subpoenas. Once distilled to responsive documents, Non-Parties were finally able to review them for privileges. A privilege log followed, carefully avoiding waiver of any privileges through disclosure of names, contact information, or other salient details about the Non-Parties' ideas or like-minded associates.[6] NP App. F. Even as amended, the Circuit Court did not require more information of the Non-Parties due to the nature of the privileges and the anticipation that additional information not shown on a privilege log could be discerned in a hearing with the Special Master, even if *ex*

[6] Plaintiffs claim that Non-Parties repeatedly violated the Circuit Court's Orders by not filing an appropriate privilege log to assert associational privilege and trade secret claims. Not true. The Circuit Court Order submitting the privilege matter to a Special Master explicitly provided to the contrary: "c. Revisions or additions to the Non-Parties' Amended Privilege Log are not required. As necessary, the Special Master shall request … information not otherwise provided in the Amended Privilege Log in order to ascertain the nature, scope, or applicability of the associational privilege under the First Amendment or trade secrets protection; d. The Special Master may hear the testimony of witnesses from the Non-Parties in order to assist in his analysis regarding the applicability of the associational privilege under the First Amendment or trade secrets protection; e. To the extent necessary to preserve a privilege asserted with respect to a specific document(s), the Non-Parties and Special Master may have ex parte communications regarding the specific document(s) during the in-camera review." P. App. at 1227.

parte. NP App. R (explaining limitations of disclosure on Non-Parties' privilege log); P. App. at 1227. As such, Non-Parties asserted the appropriate privileges at the appropriate time with the appropriate precautions. And even Plaintiffs concede that by submitting the privilege log, the Non-Parties did more than is required of them under the Fourth District's decision in *Westco, Inc. v. Scott Lewis' Gardening & Trimming, Inc.*, 26 So. 3d 620, 623 (Fla. 4th DCA 2009). P. Br. at 27.

The Plaintiffs similarly and persistently mislead the Court by suggesting that the Non-Parties "consented" to the Circuit Court's findings by "negotiating" and helping "draft" the Orders. *E.g.,* P. Br. at 11. After the Circuit Court issued its oral ruling on April 29, 2014, the Non-Parties helped draft the written order because the Circuit Court instructed them to do so, and to ensure that the disclosure was properly identified in the subsequent written order. App. J at 5. The only fact to which the Non-Parties consented was that the written order accurately captured the Circuit Court's oral ruling. The same was true of the May 15 Order. NP App. L at 17, Lines 13-18; P. App. at 1446. At no time did Non-Parties ever agree or consent to the substance of the Circuit Court's May 2 or May 15 Orders. The repeated suggestion that the Non-Parties consented to the actual findings merely by placing the Circuit Court's oral rulings into written form is patently false.

The fact is that the Non-Parties faced a Hobson's Choice when confronted with the Circuit Court's May 2, 2014 Order: either turn over the documents subject

to the temporary confidentiality provision in the May 2, 2014 Order and then appeal, or withhold the documents and face contempt of court before appealing and perhaps bringing the two-week trial to a halt.[7] The Non-Parties chose to avoid contempt of court and tread a middle ground: turning over documents by the Circuit Court's deadline – also May 2, 2014 – but thereafter asking the Circuit Court for a sealed trial proceeding as it relates to the Non-Parties' privileged documents and their only witness in the trial. The Circuit Court rejected the Non-Parties request and then rejected their request for a stay pending review by this Court in its May 15, 2014 Order. Only after exhausting all possible avenues of complying but still protecting their privileges did Non-Parties pursue this appeal. Had the Non-Parties failed to comply with the Circuit Court's instructions to turn over documents on the very date the Circuit Court issued its written order, dire consequences could have resulted with the trial fast approaching.

The Non-Parties remain keenly aware of the fact that "[r]efusal to abide by the law is not cost-free," and that "[n]o litigant and no attorney, even if motivated

[7] Plaintiffs discussion of Rule 2.420(e) is a red herring because it pertains to information a "movant seeks to have determined as confidential." The Circuit Court already deemed portions of the record to be confidential – specifically the Non-Parties 1833 pages of privileged documents – and that determination is not on appeal. Instead, on appeal is the Circuit Court's application of the First Amendment's balancing test. Non-Parties make this error clear in their initial brief. Plaintiffs' reliance on Rule 2.420(e) and *City of Bartow v. Brewer*, 896 So. 2d 931 (Fla. 1st DCA 2005) is thus misplaced.

by misguided perceptions of constitutional privilege, may be permitted to exhibit such contumacious conduct without risk of sanctions." *Adolph Coors Company v. Movement Against Racism,* 777 F.2d 1538, 1543 (11th Cir. 1985). The Rules of Civil Procedure provide that if one "fails to obey an order to provide or permit discovery" the trial court "shall require the party failing to obey the order to pay the reasonable expenses caused by the failure," and the trial court may issue orders penalizing the party that failed to obey the order. Fla. R. Civ. P. 1.380(b)(2).

Contempt of court was also a very real possibility. *Id.* at 1.380(b)(2)(D). The Circuit Court had already once held Non-Parties in contempt, threatening to subject them to daily monetary fines and fees for the Plaintiffs' attorneys. *See* P. Br. at 8. The Non-Parties chose to comply with the Circuit Court's May 2, 2014 Order to avoid a similar result. Disclosing information under a confidentiality agreement to avoid contempt of court did not constitute a waiver. *See Nussbaumer v. State,* 882 So. 2d 1067, 1072 (Fla. 1st DCA 2004) ("[T]he only way that a nonparty claiming privilege may test a court's order – other than by certiorari – is to risk a contempt citation and then to appeal if cited for contempt. However, this is *too great a price* to require [the nonparty] to pay.").[8]

[8] The cases Plaintiffs cite in support of their waiver argument are readily distinguishable. *Progressive Am. Ins. Co. v. Lanier,* 800 So. 2d 689 (Fla. 1st DCA 2001) and *Metabolife Int'l v. Holster,* 888 So. 2d 140 (Fla. 1st DCA 2004) are distinguishable because, unlike in those cases, the Non-Parties here have filed a privilege log even when they did not need to do so, *see Westco,* 26 So. 3d at 623,

CONCLUSION

The Non-Parties and Plaintiffs disagree on the appropriate standard of review.[9] But even if this Court must give deference to the Circuit Court, that deference has its limits; up is *not* down, left is *not* right, and everything the Circuit Court does is *not* alright. Here the Circuit Court clearly fell short of its obligations under the First Amendment's balancing test, and failed to apply the procedural mechanisms for trade secrets protection. This Court should thus reverse the Circuit Court's May 2, 2014 and May 15, 2014 Orders and allow the Non-Parties' privileged and confidential information to remain privileged and confidential.

Respectfully submitted:

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and at no point did the Circuit Court find that the Non-Parties failure to file a privilege log within any specific timeframe constituted a waiver of privileges. *Hoyas v. State,* 456 So. 2d 1225 (Fla. 3d DCA 1984) involved a specific, voluntary disclosure on the stand; Mr. Bainter's testimony was at a deposition Plaintiffs' noticed and there were no specific, voluntary disclosures there. *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994) involved a tactical, voluntary disclosure to further the party's claim. *Cicenia v. Mitey Mite Race Tracks,* 415 So. 2d 128 (Fla. 4th DCA 1982), *Marion Country Hosp. v. Atkins,* 435 So. 2d 272 (Fla. 1st DCA 1983), and *Johnson v. Dickinson,* 46 So. 3d 1016 (Fla. 1st DCA 2010) all involved instances where a party conceded the issues. Unlike the Non-Parties, in *Dismas Charities v. Dabbs,* 795 So. 2d 1038 (Fla. 4th DCA 2001) the party failed to ask for an evidentiary hearing.

[9] Plaintiffs state that "[t]his [C]ourt and other district courts have held that a trial court's finding of waiver is revised for abuse of discretion." P. Br. at 25 (citation omitted). That may be true but is irrelevant here because the Circuit Court never made a finding of waiver. A *de novo* standard is more appropriate. *Varela v. Bernachea,* 917 So. 2d 295, 298 (Fla. 3d DCA 2005).

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