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

CASE NO.: 4D18-1220, 4D18-1519
4D18-2124
L.T. NO.: 432017CA001098
432018CA000108

EVERGLADES LAW CENTER, INC.,
MAGGY HURCHALLA and DONNA
MELZER,

Appellants,

vs.

SOUTH FLORIDA WATER MANAGEMENT
DISTRICT, MARTIN COUNTY, LAKE POINT
PHASE I, LLC, and LAKE POINT PHASE II, LLC,

Appellees.

_______________________________________/

APPELLANTS' MOTION TO STRIKE STATEMENT OF FACTS SET OUT IN APPELLEE'S ANSWER BRIEF

Appellants, EVERGLADES LAW CENTER, INC., MAGGY HURCHALLA and DONNA MELZER, pursuant to Fla. R. App. P. 9.300, move the Court to strike the Statement of Facts from the Answer Brief filed by Appellee SOUTH FLORIDA WATER MANAGEMENT DISTRICT on the grounds that the brief violates Fla. R. App. P. 9.210 because it contains factual recitations that are wholly unsupported, is unduly argumentative, and contains numerous misrepresentations. In support of this Motion, Appellants respectfully state:

1. This action is an appeal of a final order denying Appellants' requests for disclosure of public records consisting of transcripts of SOUTH FLORIDA WATER MANAGEMENT DISTRICT (the "DISTRICT") Governing Board shade meetings related to settlement of litigation. (R1: 361-365, 447-450; R2: 425-429)

2. The contents of an appellate brief are dictated by Fla. R. App. P. 9.210. Factual allegations regarding "the nature of the case, the course of the proceedings, and the disposition in the lower tribunal" must contain reference to "the appropriate volume and page of the record or transcript." See Fla. R. App. P. 9.210(b).

3. The Statement of Facts asserted in the Answer Brief in this matter is so replete with false statements, misrepresentations, and statements which are not supported by the record that the brief should be stricken as a sham.

4. As further detailed below, no record citations are provided for numerous factual allegations. This is improper and constitutes grounds for the brief to be stricken. *See* Greenfield v. Westmoreland, 156 So.3d 1 (Fla. 3rd DCA 2007) (striking brief in part because it contained inadequate citations to the record) and Aptaker v. Dep't of Health, Bd. of Med., 949 So.2d 1071 (Fla. 1st DCA 2007) (striking third amended initial brief because it failed to "contain a citation to the record for each and every asserted fact as directed by this court.")

5. A party may move to strike a filing or part of a pleading if it is deemed to be a sham. A filing is a sham "when it is palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue." Bornstein v. Marcus, 169 So.3d 1239, 1242 (Fla. 4th DCA 2015), *citing* Rhea v. Hackney, 157 So. 190, 193 (Fla. 1934).

6. A sham filing is "good on its face but absolutely false in fact." Id. *See also,* Williams v. Winn-Dixie Stores, Inc., 548 So.2d 829, 830 (Fla. 1st DCA 1989) **(granting motion to strike initial brief because "the statement of the case and facts is unduly argumentative and contains matters immaterial and impertinent to the controversy between the parties.")** (emphasis supplied)

7. Among the false statements presented by the DISTRICT in its Answer Brief is the assertion that Appellants, ENVIRONMENTAL LAW CENTER, INC. ("the LAW CENTER"), MAGGY HURCHALLA ("HURCHALLA") and DONNA MELZER ("MELZER"), stipulated that the transcripts Appellants requested were mediation communications. (*See* Answer Brief, pp. 5-6) In support of this false assertion, the DISTRICT cites to the trial court's Order Denying Writ of Mandamus against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades' Law Center's Counterclaim (R1: 361-365); however, the order contains no such acknowledgment by any of

the Appellants "that the entirety of the requested transcript contained mediation communications" as asserted on Page 6 of the Answer Brief. This assertion is blatantly and materially false, and the DISTRICT knows it to be false.

8. In its Statement of Facts, the DISTRICT repeatedly mischaracterizes Appellants' public records requests as requests for copies of "mediation communications" (*see, e.g.*, Answer Brief, pp. 1, 4, 6). In fact, Appellants requested copies of transcripts of DISTRICT Governing Board shade meetings regarding settlement of litigation, which are public records pursuant to Sec. 286.011(8), F.S.[1] The primary issue to be determined by this Court is whether

---

[1] The LAW CENTER requested "a copy of the transcripts of any/all closed door attorney-client sessions held pursuant to Chapter 286.011(8), Florida Statutes, in the case Lake Point Phase I, LLC, et al. v. South Florida Water Management District, et al . . . from which the South Florida Water Management District was dismissed as a party, with prejudice, on September 1, 2017." (R1:13). Appellant MELZER requested a "[c]opy of the request of Everglades Law Center for a copy of the transcript from the shade meeting for the Lake Point settlement proposal" and specifically stated that "I am not requesting a copy of mediation documents." (R2: 12) Appellant HURCHALLA requested "transcripts of all closed door attorney-client sessions held pursuant to Section 286.011(8), Florida Statutes in the case of Lake Point Phase I, LLC and Lake Point Phase II, LLC, Florida Limited Liability Companies v. South Florida Water Management District, Martin County, and Maggy Hurchalla . . . This case was dismissed against the South Florida Water Management District with prejudice and no appeal was taken." The requests are set out in their entirety as attachments to the DISTRICT's Complaints. See R1: 13; R1: 154; R2: 12.

shade meeting transcripts constitute written mediation communications.[2]

9. The initial sentence in the Appellee's Statement of the Facts blatantly misrepresents both the nature and genesis of the challenged action in a deliberate attempt to mislead this Court by suggesting that the action below was commenced by MAGGY HURCHALLA and her "allies" in an effort to obtain confidential records from the DISTRICT for use at trial against Appellees LAKE POINT PHASE I, LLC, and LAKE POINT PHASE II, LLC. There is no citation to the record for this blatantly false and pejorative description of the case.

10. The DISTRICT attacks Appellants, who are well-known and highly respected environmentalists and citizen advocates, in a thinly veiled effort to portray the agency as the "victim" of citizens who seek transparency in government operations. Appellants are unabashed government watchdogs who – separately and independently – requested records pursuant to Chapter 119, F.S. (the Public Records Act) and Chapter 286, F.S. (the Government in the Sunshine

---

[2] Point I.A. set out in Appellants' Initial Brief: The trial court erred in determining that transcripts of attorney-client sessions conducted by a government agency pursuant to Sec. 286.011(8), F.S., are "written mediation communications" exempt from public disclosure in perpetuity.

Point I.B. set out in Appellants' Initial Brief: The trial court erred in authorizing non-disclosure of public records, including shade meeting transcripts, and closed-door decision-making by public agencies under the pretext of "mediation communications" without statutory or constitutional basis.

Law) regarding the DISTRICT's inexplicable settlement of a lawsuit.

11. Appellant LAW CENTER submitted a request for public records to the DISTRICT on October 4, 2017, seeking transcripts of private meetings ("shade meetings") conducted by the DISTRICT's Governing Board regarding a lawsuit ("the Lake Point lawsuit") filed by Appellee LAKE POINT PHASE I, LLC, and LAKE POINT PHASE II, LLC ("LAKE POINT"), against the DISTRICT and Appellee MARTIN COUNTY ("the COUNTY") as well as Appellant HURCHALLA. *See* Complaint for Declaratory Relief at R1: 1-55[3] and n.1, *supra*.

12. The DISTRICT sued the LAW CENTER in Martin County for declaratory relief to avoid disclosing the records. (R1: 1-55) HURCHALLA was not a subject of the litigation. HURCHALLA was brought into the case below by the DISTRICT when she was named as a defendant, along with LAKE POINT and the COUNTY, "for the sole purpose to secure a determination of [the DISTRICT's] rights to maintain the information as confidential at this time and to secure a determination that the District is not presently obligated to make this

---

[3] As in the Initial Brief, citations to the Record in this Motion to Strike will be stated as R1: page number(s) pursuant to the Record transmitted by the clerk of the lower court in Case Nos. 4D18-1220 and 4D18-1519, and R2: page number(s) pursuant to the Record transmitted by the clerk of the lower court in Case No. 4D18-2124. Citations to the Supplemental Record are SR: page number(s) pursuant to the Supplemental Record submitted by the DISTRICT.

information available to the Law Center." (R1: 4)

13. The LAW CENTER and HURCHALLA filed motions to dismiss the DISTRICT's Complaint (R1: 56-60) on October 26, 2017, for different reasons.

14. The motions were denied by the trial court on December 6, 2017. (R1: 86-87; 114-117) Because the trial court declined to dismiss the action against HURCHALLA despite the fact that she had not made a public records request, HURCHALLA subsequently made a request for the DISTRICT shade meeting transcripts regarding the Lake Point litigation settlement. (R1: 154)

15. HURCHALLA's request was made on December 11, 2017 (more than two months after the LAW CENTER submitted its request). The DISTRICT then filed a Motion for Leave to File Supplement to Complaint for Declaratory Relief requesting authorization from the court to withhold the requested records from HURCHALLA. (R1: 146-154) The Lake Point lawsuit was dismissed with prejudice against the DISTRICT on September 1, 2017, as noted by the LAW CENTER and HURCHALLA in their public records requests. *See* n.1, *supra*.

16. Appellant DONNA MELZER ("MELZER") had no involvement in the action commenced by the DISTRICT against the LAW CENTER and HURCHALLA. She filed her own public records request which was met by a separate action commenced against her by the DISTRICT for declaratory relief

similar to that sought against the LAW CENTER and HURCHALLA. (R2: 1-85)

17. By making wholly unsupported assertions of fact indicating that the case below was merely an effort by HURCHALLA "with the help of allies" to gain an advantage at trial of the Lake Point lawsuit against HURCHALLA (conducted February 5-14, 2018, in Martin County Circuit Court), the DISTRICT not only misrepresents the basis of the proceedings below but belittles and mocks the importance of Florida's Public Records Act and Government in the Sunshine Law to citizens who consider transparency to be of paramount importance to government operations.

18. In the second paragraph of the DISTRICT's Statement of Facts, the DISTRICT attempts to justify its secret settlement with LAKE POINT without any citation to the record except for citation to the Settlement Agreement (SR: 265-291) which does not support the statements set out in the Statement of Facts. The DISTRICT's Statement of Facts is speculative, argumentative, and pejorative. It is virtually devoid of facts or citations to the record and is wholly unreliable in outlining issues in the action below or in this appeal.

19. The third paragraph of the Statement of Facts begins with the conclusion that "[d]espite its merits, the District's co-defendants were unhappy with the compromise" because the COUNTY and HURCHALLA "lost [the

DISTRICT] as a litigation ally and the economics of continuing the litigation had changed." This statement is not only irrelevant to the instant appeal, it is unsupported conjecture designed solely to make it appear that the Appellants have motives beyond the desire to require the DISTRICT to comply with the law.

20. The DISTRICT bashes HURCHALLA for her decision to defend her actions in the Lake Point litigation, stating that the DISTRICT cooperated with the COUNTY and LAKE POINT in settling the litigation (at taxpayers' expense but without taxpayers' knowledge or participation) while "Hurchalla charged forward, placing her fate in the hands of a Martin County jury." (Answer Brief, pp. 1-2)

21. The DISTRICT asserts that "a long-time Hurchalla friend sought to rally special-interest allies to Hurchalla's aid: ***Presumably*** to see if anything could be learned from the District's mediated settlement that would frustrate Lake Point's continuing case against Hurchalla."[4] (Emphasis supplied) The DISTRICT

---

[4] This undisguised speculation is based on a communication from the late Nathaniel Reed to environmental advocates about the DISTRICT's unexplained settlement with LAKE POINT. Mr. Reed asked for help in determining "the circumstances that led the Director of the South Florida Water Management District to propose a settlement to his board in a backroom session without public notice and without giving the audience of concerned citizens the opportunity to examine and comment on the terms of the settlement." Mr. Reed made no reference to Maggy Hurchalla or her defense in the Lake Point lawsuit. He expressed concern only about the DISTRICT's decision to settle. (R1: 14-15) The DISTRICT's shocking attempt to malign the reputation of one of Florida's most beloved and revered environmental icons who died during the course of these

disparagingly states that the LAW CENTER "answered the call to action" by seeking public records from the DISTRICT, inaccurately and maliciously implying that the LAW CENTER had no valid interest in government transparency or protecting the environment but was acting only at the behest of HURCHALLA through her "long-time friend." (Answer Brief, p. 2) Again, there is no record support for this baseless conjecture.

22. The DISTRICT refers to all of the Appellants collectively as "Hurchalla" without any rational basis for doing so. In fact, the lead Appellant in this appeal is the LAW CENTER, which was the primary defendant below and made its request for public records from the DISTRICT months before either of the individual Appellants submitted requests. Referring to all of the Appellants as "Hurchalla" (see n.2 in the DISTRICT's Statement of Facts) and assigning the role of all other Appellants and interested persons as "allies" of HURCHALLA is an inexcusable attempt to diminish the value and contributions of respected environmentalists, government watchdogs and citizens who honor and depend on Florida's open government laws.

23. In footnotes to the last paragraph beginning on Page 2 of the Statement

---

proceedings is entirely inappropriate and is without any factual foundation.

of Facts, the DISTRICT states that the DISTRICT's Governing Board "conducted discussion" about the settlement agreement before voting, falsely implying that the terms of the agreement were discussed in a publicly noticed meeting. The DISTRICT cites only to its self-serving joint motion with the COUNTY to enforce the trial court's mediation order (SR: 295-303) rather than the transcript of the DISTRICT's Governing Board meeting, which confirms that none of the terms of the settlement agreement were discussed in public. (R2: 271-286)

24. Page 3 of the Statement of Facts again makes references to presumptions – not facts – and conclusory statements about the filing of the Complaint because "The District was in a bind." The DISTRICT quotes from the trial court's pre-trial order directing that "[a]ll discussions, representations and statements made at the mediation conference are privileged as settlement negotiations" in misrepresenting the order as having "mandated" refusal to disclose shade meeting transcripts requested by the LAW CENTER after the conclusion of the litigation.

25. On Page 4 of the Statement of Facts, the DISTRICT falsely asserts that HURCHALLA and the LAW CENTER "each attempted, but failed, to have a different judge consider the DISTRICT's questions of mediation confidentiality and public records production." The DISTRICT knows that the defendants sought to have the case heard in the Circuit Court in Palm Beach County, where

DISTRICT records are maintained, where the LAW CENTER has an office and where the request was submitted, seeking a change in venue, not a "different judge." Once again, the DISTRICT has misrepresented the filings below in its Statement of Facts in an improper effort to mislead this Court.

26. The Statement of Facts then refers to "additional Hurchalla allies [who] submitted multiple public records requests" in another blatant attempt to misrepresent the motives of citizens of Martin County who filed their own public records requests to try to find out why the DISTRICT entered into what appeared to be an unnecessarily costly and punitive settlement agreement with LAKE POINT. The DISTRICT cites only to the Initial Brief that refers to other public records requests. There is no factual basis whatsoever for the DISTRICT's false attempt to label involved and interested citizens as "additional Hurchalla allies" and to impugn their motives for seeking release of the Governing Board shade meeting transcripts pursuant to Chapter 286, F.S.

27. In the last paragraph on Page 4 of the Statement of Facts, the DISTRICT makes unsupported allegations about the relationship between Appellants HURCHALLA and MELZER, calling MELZER a "long time Hurchalla associate."

28. The DISTRICT criticizes MELZER for first seeking relief in Palm

Beach County Circuit Court and asserts that the Palm Beach County judge "chastised MELZER for withholding information about the Martin County lawsuit" which is inaccurate, not supported by the record, and designed solely to prejudice this Court against the Appellants by presenting irrelevant and false statements that constitute argument, not facts. (Answer Brief, p. 5)

29. In the final paragraph on Page 5 of the Statement of Facts, the DISTRICT asserts that its attorneys and Governing Board members "discussed the potential settlement of claims on terms negotiated through mediation" during the shade meeting for which transcripts have been withheld from public disclosure, making it impossible to know whether this statement is true. Without the transcripts, it is impossible to ascertain what the attorneys and Board members discussed in their secret meetings.

30. The DISTRICT further misrepresents the basis for this appeal by falsely stating that "[t]he narrow dispute at the time of the circuit court's decisions on the merits of both declaratory judgment suits concerned only production of a transcript of a single meeting between the District's counsel and Governing Board." (Answer Brief, p. 5) This is blatantly untrue, as the requested records sought ***all*** transcripts of ***all*** shade meetings related to the Lake Point litigation (n. 2, *supra*). There were at least three such meetings, as confirmed by the

DISTRICT's Complaint against MELZER, which alleges in Paragraphs 5.5 and 5.6 that transcripts of at least two attorney-client sessions were "minimally redacted" and made public while a third transcript dated August 23, 2017, was withheld in its entirety because it "consisted of nothing but mediation communications." (R2: 8)

31. In Paragraph 3.5 of the Complaint, the DISTRICT confirms that there were multiple meetings pursuant to Chapter 286, F.S., where DISTRICT counsel and the Governing Board discussed the Lake Point litigation and that the "confidential attorney-client sessions were transcribed. Those transcriptions are the subject of Melzers *(sic)* request. They are the same transcripts requested in the District's pending case against the Law Center and others." (R2: 5)

32. The trial court's orders refer to multiple transcripts.[5] The DISTRICT is attempting to mislead this Court by falsely stating that only a single transcript is the subject of the Appellants' request.

---

[5] *See, e.g.*, Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim, which acknowledges that transcripts of attorney-client shade meetings must be prepared and that "the transcripts of such discussions between the District and its Governing Board during those attorney-client sessions also constitute 'written communications in a mediation proceeding'" because the transcripts "were made after mediation was ordered and before the settlement was approved and executed." (R1: 364)

33. Perhaps the most egregious falsehood in the Statement of Facts is on Page 6, as the DISTRICT flatly – and falsely – states that the LAW CENTER, HURCHALLA and MELZER all "stipulated to all factual matters, including that the entirety of the requested transcript contained mediation communications." There is no record evidence of such a stipulation. Because the DISTRICT refuses to release the transcripts, Appellants would have to be prescient to so stipulate.

34. As evidence of this alleged stipulation, the DISTRICT cites to the trial court's Order Denying Writ of Mandamus against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim, which states: "Because the parties agreed that this Court was not required to take evidence, the Court relies on the representations of counsel." The trial court then sets out the undisputed date the settlement agreement was signed and undisputed date of the "global settlement" among the DISTRICT, the COUNTY and LAKE POINT on January 11, 2018. (R1: 361-365)

35. The DISTRICT's final conclusory statement, based upon the false and deliberately misleading representation set out above, asserts that all parties accepted the "fact" that the transcripts sought in public records requests "contained mediation discussions." This is a disingenous statement belied by the points set out on appeal in Appellants' Initial Brief, which clearly define the

Appellants' position that shade meeting transcripts are **not** mediation communications. *See* n.2, *supra*.

36. The false and misleading statements are so pervasive throughout the Statement of Facts in Appellee's Answer Brief as to constitute a sham. The statements are palpably and inherently false and from the plain or conceded facts in the case must have been known to the party interposing them to be untrue.

WHEREFORE, Appellants EVERGLADES LAW CENTER, INC., MAGGY HURCHALLA, and DONNA MELZER request the Court to strike the Statement of Facts from the Answer Brief.

Respectfully submitted,

MARCY I. LAHART, P.A.
Attorney for Appellant
EVERGLADES LAW CENTER, INC.
207 SE Tuscawilla Road
Micanopy, FL 32667
(352) 545-7001
marcy@floridaanimallawyer.com

By: /s/ Marcy I. LaHart
Marcy I. LaHart
Fla. Bar No. 0967009

LITTMAN, SHERLOCK & HEIMS, P.A.
Attorneys for Appellant
MAGGY HURCHALLA
P.O. Box 1197
Stuart, Florida 34995
(772) 287-0200
LSHLawfirm@gmail.com

By: s/ Virginia P. Sherlock
Virginia P. Sherlock
Fla. Bar No. 893544
Howard K. Heims
Fla. Bar No. 38539

DONNA SUTTER MELZER
Attorney for Appellant DONNA MELZER
2286 SW Creekside Drive
Palm City, FL 34990
(772) 485-9429
DonnaSMelzer@gmail.com

By: /s/ Donna Sutter Melzer
Donna Sutter Melzer
Fla. Bar No. 0216941

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed through the Florida eDCA Portal and served via electronic mail on counsel of record listed below this 21st day of November, 2018:

/s/ Virginia P. Sherlock
Virginia P. Sherlock

Counsel for SFWMD
Michael J. McCluskey, Esq.
Fox, McCluskey, Bush, Robison, PLLC
P.O. Drawer 6
Stuart, FL 34995-0006
(772) 287-4444
mmccluskey@foxmccluskey.com
Brian J. Accardo, Esq.
Judith Levine, Esq.
Laura Scala-Olympio, Esq.
James Sherman, Esq.
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 68206546
jlevine@sfwmd.gov
lscalaol@sfwmd.gov

Timothy Riley, Esq.
Erin Tilton, Esq.
Hopping Green & Sams, P.A.
P.O. Box 6526
Tallahassee, FL 32314
(850) 222-7500
Erint@hgslaw.com
timothyr@hgslaw.com

jsherman@sfwmd.gov
baccardo@sfwmd.gov

Counsel for Martin County
Edward de la Parte, Esq.
Nicolas Q. Porter, Esq.
De La Parte & Gilbert, P.A.
P.O. Box 2350
Tampa, FL 33601-2350
(813) 229-2775
edelaparte@dgfirm.com
nporter@dgfirm.com

Sarah Woods, Esq.
Martin County Attorney's Office
2601 SE Monterey Road
Stuart, FL 34996
(772) 288-5446
swoods@martin.fl.us

Counsel for Lake Point Phase I, LLC, and Lake Point Phase II, LLC
Ethan J. Loeb, Esq., Jon P. Tasso, Esq.
Michael Labbee, Esq.
E. Colin Thompson, Esq.
Smolker Bartlett Loeb Hinds & Sheppard
100 N. Tampa Street, Suite 2050
Tampa, FL 33602
(813) 223-3888
EthanL@smolkerbartlett.com
SusanM@smolkerbarlett.com
JonT@smolkerbartlett.com
cynthiam@smolkerbartlett.com
MichaelL@smolkerbartlett.com
RochelleB@smolkerbartlett.com
ColinT@smolkerbartlett.com

Dan Bishop, Esq.
Bishop London & Dodds
3701 Bee Cave Road, Suite 200
Austin, TX 78746
dbishop@bishoplondon.com
Christina Carlson Dodds, Esq.
Christina Dodds, PLLC
2506 Hillview Road
Austin, TX 78703
cdodds61@gmail.com

Counsel for Amicus Curiae
First Amendment Foundation, Inc.
Thomas E. Warner, Esq.
Dean A. Morande, Esq.
Carlton Fields Jorden Burt, P.A.
525 Okeechobee Blvd., Suite 1200
West Palm Beach, FL 33401
(561) 659-7070

Counsel for Amicus Curiae
Florida Defense Lawyers Association
Kansas R. Gooden, Esq.
Boyd & Jenerette, P.A.
201 North Hogan St., Suite 400
Jacksonville, FL 32202
Meagan L. Logan, Esq.
Marks Gray, P.A.

twarner@carltonfields.com
dmorande@carltonfields.com

1200 Riverplace Blvd., Suite 800
Jacksonville, FL 32207
(904) 398-0900
Kgooden@boydjen.com
Mlogan@marksgray.com

CERTIFICATE OF COMPLIANCE

I certify that the foregoing has been prepared in Times New Roman 14 point font in compliance with appellate font requirements.

/s/ Virginia P. Sherlock
Virginia P. Sherlock