IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2251

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioner,

v.

AMERICAN EDUCATIONAL ENTERPRISES, LLC,

Respondent.

On Discretionary Review from the Third District Court Of Appeal, State of Florida, No. 3D09-3492

RESPONDENT'S ANSWER BRIEF ON MERITS

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I. STATEMENT OF THE CASE AND FACTS

The Petitioner, the Board of Trustees of the Internal Improvement Trust Fund ("the Board"), is the entity responsible for the disposition of state-owned property. The Respondent, American Educational Enterprises, LLC ("American"), is the assignee of Florida National College's ("FNC") right, title and interest to and under a contract for sale and purchase of state-owned property. The Board seeks review of the decision of the District Court of Appeal of Florida, Third District, in *American Educational Enterprises, LLC v. Board of Trustees of the Internal Improvement Trust Fund*, 45 So. 3d 941 (Fla. 3d DCA 2010). (R. 582-590)[1]

The underlying dispute between American and the Board arises from American's 2001 purchase of certain state-owned real property. Specifically, two lots with a building on one known as the Glenbeigh Hospital, a treatment facility for substance abuse offenders. In April 2001, the Board sent a bidding package to prospective buyers advising that the property was sold "as is," and that the tax assessed value was $4,462,063. The bid package also required a minimum bid of $3,750,000. (R. 52, 96-104, 113). FNC submitted a bid of $4,025,000 and a $402,500 earnest money deposit. (R. 51-2, 71). *American Educational Enterprises, LLC* ("*AEE*"), 45 So. 3d at 942-943.

[1] The symbol "R" designates the pages of the 3 volume 590-page record prepared and indexed by the clerk of the Third District.

In May 2001, the Board notified FNC that its bid and contract offer was accepted. (R. 51-2, 71, 115, 117-18). At that time, FNC sought financing from Citibank, which obtained an appraisal for the property. The 2001 Citibank appraisal determined that the property's market value was $2,850,000. FNC also received the Board's 1999 appraisal of the property for $3,275,000. (R. 6). The Board had not included its 1999 appraisal in the bid package. In response to FNC's concern about the 1999 lower appraisal value, the Board declined to re-negotiate the purchase and stated that FNC would forfeit its earnest money deposit if it did not close on the property. On June 30, 2001, FNC closed on the sale of the property. *AEE*, 45 So. 3d at 943.

In its third amended complaint, American asserted claims against the Board for negligent misrepresentation, fraud in the inducement, unjust enrichment and reformation of the purchase contract. (R. 32-39). American alleged that the Board made false statements in its bidding package and correspondence, that the Board was unjustly enriched by American's purchase at a price that was significantly above market price, and that the contract should be reformed to reflect a proper purchase price because American mistakenly submitted its bid based on the Board's misrepresentations. The Board answered the complaint, raised numerous affirmative defenses, and asserted a counterclaim for fraud in the inducement. (R. 48-79). The Board's counterclaim asserted that FNC made misrepresentations to the

Board after the Board refused to reduce the purchase price prior to closing, *i.e.*, that FNC would irrevocably purchase the property pursuant to the contract terms. *AEE*, 45 So. 3d at 943.

During discovery, the Board obtained, through a third party subpoena, the financial documents that FNC had submitted to Citibank in order to obtain financing. That production included the following documents for the years 1998-2004: FNC's independent auditor's reports, balance sheets, income statements, statements of cash flow, tax returns, and underlying information for its 2001 through 2008 budgets, and American's balance sheets, income statements, statements of cash flow, and tax returns. The parties entered into a stipulated confidentiality agreement (R. 552-54) governing production of this information from Citibank, which the trial court approved. *AEE*, 45 So. 3d at 943.

In March 2009, the Board propounded a Sixth Request for Production to American (R. 152), requesting, in pertinent part, the following items:

1. FNC's independent auditor's reports for 2005-2007;

2. FNC's balance sheets, income statements and statements of cash flows for 2006 and 2007;

3. FNC's federal tax returns for 2005-2007;

4. Budgets prepared by FNC for 2001 through 2008;

5. American's balance sheets, income statements and statements of cash flows for 2006 and 2007;

6. American's tax returns for 2001, 2002, 2005, 2006, and 2007; and

7. All financial reports filed with the Department of Education for Title IV programs.

AEE, 45 So. 3d at 943.

American objected to the production and argued that the requested items — which sought post-2001 private, financial information — were overbroad, unduly burdensome, irrelevant to the asserted claims and not reasonably calculated to lead to admissible evidence. (R. 173). American further contended that because it was only seeking the difference between the amount paid for the property and the property's value, the discovery requests violated its privacy rights and were in fact prejudgment discovery in aid of execution. (R. 174-75); *AEE,* 45 So. 3d at 944.

The Board sought an order compelling production, arguing that the documents are relevant and reasonably calculated to lead to the discovery of admissible evidence. In support of its motion, the Board attached the affidavit of its expert, opining that the discovery of this standard financial information was necessary to defend American's claim for economic damages. American responded, asserting, *inter alia*, that it was only seeking out-of-pocket damages and its "financial performance indicators" are irrelevant to damages. Following a hearing (R. 306), the trial court denied American's objections, granted the Board's motion to compel, in part, and ordered American to produce items 1-7 in the Board's Sixth

Request for Production. (R. 31). Thereafter, American petitioned the Third District Court of Appeals to quash the order compelling production of these documents. *AEE,* 45 So. 3d at 944.

The Third District quashed the trial court's order on the basis that: (1) the order compelled the disclosure of corporate financial documents, dated from 2005 to 2007, that do not fall within the time frame of the subject matter of this case; and (2) the order requires the disclosure of corporate financial documents without regard to the issues involved in this case, i.e. they are irrelevant and not likely to lead to the discovery of admissible evidence. *AEE,* 45 So. 3d at 944-945.

On December 8, 2010, the Board sought discretionary review from this Court.

II. ISSUE PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL ABUSED ITS DISCRETION IN GRANTING *CERTIORARI* REVIEW AND QUASHING A PRETRIAL DISCOVERY ORDER THAT CALLED FOR THE PRODUCTION OF OVERBROAD AND IRRELEVANT, CONFIDENTIAL, FINANCIAL INFORMATION FROM THE RESPONDENT AND IN THE ABSENCE OF A PROTECTIVE CONFIDENTIALITY ORDER.

III. STANDARD OF REVIEW

"A common-law writ of *certiorari* rests in the sound discretion of the court to which the application was made, and thus, a court's grant of *certiorari* is subject to an abuse of discretion standard of review." *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011).

IV. SUMMARY OF ARGUMENT

The Third District properly exercised its discretion in granting *certiorari* review and quashing the pre-trial discovery order in this case that required the wholesale production of confidential, financial documents that were overbroad in temporal scope and not relevant to the issues in the case.

A common-law writ of *certiorari* rests in the sound discretion of the court to which the application was made. Before a court may grant *certiorari* relief from a pre-trial discovery order, the petitioner must establish three elements: (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on post-judgment appeal. The Third District properly found that each one of these elements was met by American in this case.

The Third District correctly found that if American was not relieved of the discovery order it would suffer irreparable harm if it was forced to produce confidential, financial information that was overbroad in temporal scope and not relevant to the issues in the case. The Third District analogized the facts of this case to *Redland Co. v. Atl. Civil, Inc.*, 961 So. 2d 1004 (Fla. 3d DCA 2007) in which irreparable harm was found and reached the same conclusion here.

While in *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987), this Court held that ordinarily financial discovery did not by itself present the kind of

irreparable harm necessary for review by common law *certiorari*, the Court retreated from this hard and fast rule in *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995), when it held that a litigant is not entitled "*carte blanche*" to irrelevant discovery, as here.

The Third District properly found that the "updated" documents sought by Petitioner are irrelevant in that they are overbroad in temporal scope and not related to the issues in the case.

Further, American did not waive its right to object to the production of its confidential, financial documents because of any prior production of documents. An earlier production was made by Citibank, pursuant to a subpoena, to Petitioner of some of American's financial documents, but not by American. In addition, the stipulated confidentiality order in place covers only Citibank's prior production of American's financial records and not this production of documents sought directly from American.

Accordingly, the Third District here was well within its discretion when it held that the trial court's order requiring the wholesale production of irrelevant, confidential, financial documents from American should be quashed for departing from the essential elements of law and causing material injury to American that could not be corrected on post-judgment appeal. American's production of

irrelevant, confidential financial documents is unduly burdensome and oppressive, invading American's privacy interest and entitling it to *certiorari* relief.

V. ARGUMENT

A. Applicable Legal Standards

American agrees with Petitioner as to the applicable legal standard the Third District was obligated to apply to its review of the pretrial discovery order in this case. As this Court enunciated in *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (1987):

> A non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for certiorari only in limited circumstances. The order must depart from the essential requirements of law and thus cause material injury to the petition throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal.

See also Allstate Ins. Co. v. Langston, 655 So.2d 91, 94 (Fla.1995). 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.*

In considering a petition for *certiorari* the reviewing court's first duty is to assess whether the petitioner has made a *prima facie* showing that the order creates irreparable harm. If the petitioner does not make such a showing, the court lacks jurisdiction and will dismiss the petition. *Williams v. Oken,* 62 So.3d 1129,

1132 (Fla. 2011); *Bared & Co. v. McGuire*, 670 So.2d 153, 157 (Fla. 4th DCA 1996) (en banc), *cited in Allstate Ins. Co. v. Boecher*, 733 So.2d 993, 999 (Fla. 1999).

Here, the Petitioner disputes that the Third District properly applied this standard. Petitioner is wrong. The Third District did properly apply the controlling law.

B. The Third District Court of Appeals Properly Found the Presence of Irreparable Harm to American.

Petitioner argues that the Third District erred by not determining as a threshold matter that American would suffer irreparable harm if required to produce irrelevant, financial information. Petitioner is wrong.

At the outset of its legal analysis, the Third DCA – citing to *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999) and *Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla. 1987), acknowledged the applicable legal standard that it was required to apply to the discovery order it had on review:

> Certiorari review of a discovery order is proper when the order "departs from the essential requirements of law, and thus causes material injury to the petitioner throughout the remainder of the proceedings, effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Boecher*, 733 So.2d 993, 999 (Fla.1999) (quoting *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94-95 (Fla.1995)); *see also Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097, 1099 (Fla.1987). "Although not every erroneous discovery order creates certiorari jurisdiction, certiorari is the proper remedy for overbroad discovery orders 'because once discovery is wrongfully granted, the complaining party is beyond relief.' "

> *Redland Co. v. Atl. Civil, Inc.*, 961 So.2d 1004, 1006 (Fla. 3d DCA 2007) (quoting *Caterpillar Indus., Inc. v. Keskes*, 639 So.2d 1129, 1129 n. 1 (Fla. 5th DCA 1994)); *Caribbean Sec. Sys., Inc. v. Sec. Control Sys., Inc.*, 486 So.2d 654, 655 (Fla. 3d DCA 1986); *see also Stihl Se., Inc. v. Green Thumb Lawn & Garden Ctr. Newco, Inc.*, 974 So.2d 1200, 1201 (Fla. 5th DCA 2008); *Royal Caribbean Cruises, Ltd. v. Doe*, 964 So.2d 713, 719 (Fla. 3d DCA 2007). The issue whether a discovery order is overbroad must be determined within the context of the facts of each case. *See Computer Solutions, Inc. v. Gnaizda*, 633 So.2d 1100, 1101 (Fla. 3d DCA 1994).

45 So. 3d at 944.

The Third DCA then proceeded to analogize the case to *Redland Co. v. Atl. Civil, Inc.*, 961 So. 2d 1004, 1006-1007 (Fla. 3d DCA 2007):

> This case is similar to this Court's decision in *Redland.* In *Redland*, this Court granted certiorari to quash an order compelling discovery of corporate financial documents, holding that the order was overbroad based on both the time frame of the requested documents and the wholesale turnover of documents without regard to the issues in the case. *Id.* at 1004.

45 So. 3d at 944. In *Redland*, the Third District explicitly found *irreparable harm* where the compelled production of financial information involved an overbroad time frame and the wholesale turnover of documents without regard to the issues of the case:

> **The trial court's order departs from the essential requirements of the law by requiring overbroad discovery that will cause material injury to Redland and leave them with no adequate remedy on appeal**. First, the order requires the production of tax returns, general ledgers, and supporting documentation from 1997 through the present. This time frame request, however, is unreasonably broad given that the settlement

> agreement, which forms the basis of the breach of contract action was not executed by the parties until September 1999. Second, the challenged order requires the wholesale turnover of documents without regard to the issues framed by the alleged breaches of paragraphs five and six of the settlement agreement, and as such we find that the order is overbroad in that respect as well.
>
> We therefore grant the petition and quash the order below.

Emphasis added.

Thus, in finding that this case was analogous to *Redland*, the Third DCA expressly found *ipso facto* the presence of irreparable harm here, which justified its *certiorari* jurisdiction. The harm is irreparable because once confidential information is disclosed, it cannot be "taken back." *Woodward v. Berkery*, 714 So. 2d 1027, 1035 (Fla. 4th DCA 1998) ("[t]he discovery of financial worth information that is not material to any issue reasonably likely to be contested" is incurable by any possible action that can be taken on final appeal). It is "material that could be used by an unscrupulous litigant to injure another person or party outside the context of the litigation." *Martin-Johnson, Inc.*, 509 So.2d at 1100.

Petitioner, however, contends that a "proper determination" of the jurisdictional issue requires review of (1) the type of information ordered disclosed, along with (2) consideration of the trial court's confidentiality order and American's voluntary prior disclosure of its private financial information. Br. at 22. Petitioner's argument is unavailing.

1. The Disclosure of Irrelevant Financial Information Constitutes Irreparable Harm.

Petitioner first asserts that the financial information was of the same type as addressed in *Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla. 1987) and *Eberhardt v. Eberhardt*, 666 So. 2d 1024, (4th DCA 1996), which was not found to be protected from disclosure and, that the same result should, therefore, adhere here. Petitioner's argument is unfounded.

Here, Petitioner seeks American's private financial information, including independent auditor's reports, balance sheets, income statements, statements of cash flows, budgets, federal income tax returns, and financial reports filed with the Department of Education.[2] A corporation, as a legal entity, possesses a legitimate expectation of privacy in its financial information and corporate records. *See Capco Props., LLC v. Monterey Gardens of Pinecrest Condo*., 982 So. 2d 1211, 1213-14, 1215 (Fla. 3d DCA 2008) (recognizing a corporation's privacy interests in its financial information, including its financial statements, balance sheets, profit and loss statements, bank accounts, and tax returns); *Universal Eng'g Testing Co. v. Israel*, 707 So. 2d 900, 901 (Fla. 5th DCA 1998) (specifying that a corporation's tax records and financial statements constitute confidential and proprietary information). Where a discovery order compels

[2] Petitioner seeks production of American's private financial information mainly for the years 2005 to 2007,which is, at a minimum, over four years after the sale of the Property.

production of matters which implicate privacy rights, irreparable harm is demonstrated. *See Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So.2d 533, 536-37 (Fla.1987).

Where the production of documents results in an invasion of privacy rights, the trial judge is "mandated first to require the parties seeking production to 'make a showing of necessity which outweigh[s] the countervailing interests in maintaining the confidentiality of such information." *Banc of America v. Barnett*, 997 So. 2d 1154, 1157 (Fla. 3d DCA 2008). "Failure to make this determination constitutes a departure from the essential requirements of law." *Banc of America*, 997 So. 2d at 1157.

Unlike in this case, in *Martin-Johnson*, the issue was whether district courts of appeal should review, by *certiorari*, orders denying motions to dismiss or strike claims for punitive damages. The defendant argued that the erroneous refusal to strike an invalid punitive damage claim could result in irreparable injury in that it would permit the plaintiff to inquire into confidential financial information of the defendant. The Court held that ordinarily an order allowing financial worth discovery did not by itself present the kind of irreparable harm necessary for review by common law *certiorari*. 509 So. 2d at 1099. The Court explained that "[i]n *certiorari* proceedings, an order may be quashed only for certain fundamental errors." *Id.* The Court noted that permitting interlocutory review of

these types of orders would unduly interrupt trial court proceedings, and that trial courts had the means to limit dissemination of such private information so as to protect a party from embarrassment or undue burden. *Id.* at 1099–1100.

> We do not ignore petitioner's valid privacy interest in avoiding unnecessary disclosure of matters of a personal nature. We believe, however, that our discovery rules provide sufficient means to limit the use and dissemination of discoverable information via protective orders.

Id. at 1100.[3]

This rationale, however, has not gone without criticism. Chief Judge Farmer of the Fourth District wrote in *All About Cruises, Inc. v. Cruise Options, Inc.*, 889 So. 2d 905, 909 (Fla. 4th DCA 2005) (concurrence):

> Make no mistake about it, the supreme court is really saying that the appellate courts can ignore the infringement of important privacy interests created by civil litigation procedures because trial judges have remedial tools available and can therefore be relied on to do the right thing.
>
> Well, if that were true there would be little need for appeals-or for appellate courts. The law is filled with remedies. If their very existence were enough to refrain from reviewing a miscarriage of justice arising from their misuse or nonuse, why have any extraordinary review available at all? In what kind of case could we not rely on trial courts doing the right thing with the many tools at hand? For that matter, why bother at all with

[3] *Eberhardt v. Eberhardt,* 666 So.2d 1024 (Fla. 4th DCA 1996) involved the production of income tax returns in an action for accounting indistinguishable from the financial worth information sought in *Martin-Johnson*. The Fourth District, constrained by *Martin-Johnson*, held that the mere production of financial worth information without more was insufficient to show irreparable harm. 666 So. 2d at 1025.

> any appellate review? Why not just take the erasers off the pencils-or should I say take the delete keys off the word processors- and let authors try to get it right the first time?
>
> This rationale simply won't do. If it is really too disruptive to permit interlocutory review, then we judges should say so. We should make the reasons apparent for limiting review to final judgment. What we should not do is attempt to justify a blanket refusal by implying that trial judges should be relied on to use the rules at hand to correct discovery abuses.

In *Capco Properties, LLC v. Monterey Gardens of Pinecrest Condominium*, 982 So. 2d 1211, 1215 (Fla. 3d DCA 2008), Judge Ramirez writing for the majority said:

> The Florida Supreme Court assumes that important privacy interests will be protected by trial judges who have remedial tools available and will presumably do the right thing. But what happens when the trial judge does not do the right thing? Are appellate judges obliged to sit on their hands when totally irrelevant material encompassing six years of extensive and intrusive financial information is ordered to be produced where the plaintiff has not even pled a count for accounting nor moved to amend to assert punitive damages?

Indeed, this Court has retreated from the inflexible rule of *Martin-Johnson* in *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995) when it held:

> Although we cannot say that irrelevant materials sought in a discovery request necessarily cause irreparable harm, **we do not believe that a litigant is entitled *carte blanche* to irrelevant discovery.** We therefore quash the district court decision to the extent that it permits discovery even when it has been affirmatively established that such discovery is neither relevant nor will lead to the discovery of relevant information.

Emphasis added.

Here, the Petitioner seeks the wholesale production of financial information that American has affirmatively established, and the Third District has concluded, "is neither relevant nor will lead to the discovery of relevant information." *See AEE*, 45 So. 3d at 944-946:

> There is no record basis justifying disclosure of financial documents for the requested time period when this action involves events which occurred prior to and during June 2001. . . .
>
> Second, the order requires the disclosure of corporate financial documents without regard to the issues involved in this case. . . .
>
> Accordingly, we hold that he trial court's order is also overbroad because it compels the wholesale production of financial documents that are not relevant to any issue in the case.

Accordingly, American's compelled wholesale production of irrelevant documents, which invades its privacy interest, constitutes irreparable harm to American.

2. The Disclosure of Confidential, Financial Information In the Absence of a Confidentiality Order Constitutes Irreparable Harm.

Petitioner argues that the "trial court's confidentiality order sufficiently protects whatever privacy rights American might have in the financial information ordered disclosed so as to defeat any claim of irreparable injury." Br. at 23. Petitioner is wrong on the facts.

While this Court in *Martin-Johnson* approved (and relied upon) the use of confidentiality orders to safeguard the disclosure of confidential financial information, no blanket confidentiality order is in place here that applies to the documents requested by Petitioner of American. The "Stipulated Confidentiality Agreement" in place between the parties is limited to the documents produced by Citibank (not American) to the Petitioner. The Confidentiality Agreement states, in pertinent part:

> Plaintiff, AMERICAN EDUCATIONAL LLC, and Defendant, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, (hereinafter "Party or "Parties"), hereby execute this Stipulated Confidentiality Agreement concerning all documents **produced by Citibank to the Parties** and hereby stipulate as follows:
>
> 1. All information delivered by **Citibank** to the Parties pursuant to document discovery, subpoena, or other legal means is hereby designated and marked confidential by the Parties and shall be treated accordingly.
>
> 2. As confidential, such information may not be disclosed to any other person or entity unless required by law. Such information may be used only to the extent necessary for the defense or prosecution of the claims which are the subject matter of this action.

(R.-554-555; emphasis added).

Thus, this fact alone separates and distinguishes this case from *Capital One, N.A. v. Forbes,* 34 So. 3d 209 (Fla. 2 DCA 2010) and *Crocker Construction Co.,* 562 So.2d at 84 *(*Fla. 4th DCA 1990), relied upon by Petitioner, wherein there were

blanket confidentiality agreements fashioned that covered the specific trade secret material at issue. No such confidentiality order exists here and the trial judge did not impose one when it ordered the disclosure of the confidential, financial information. In the absence of such a confidentiality order in place, the compelled production of irrelevant financial information intrudes upon American's privacy interest and constitutes irreparable injury.

3. American's Prior Production of Relevant Financial Information Does Not Constitute A Waiver of Its Right to Refuse to Produce Irrelevant Financial Information.

Finally, Petitioner contends that there is no irreparable harm here because "American previously disclosed its private financial information to the Board." Br. at 2. According to Petitioner, this prior production constitutes a waiver and shows that "the challenged order to update the financial discovery would let the 'cat out of the bag' is without merit." *Id*. Petitioner is again wrong on the facts, which defeats its argument.

American did not previously produce any private financial documents itself. Citibank produced financial documents that American had submitted to Citibank for financing and those documents were produced pursuant to a stipulated confidentiality order. Those documents, for the most part, were for the relevant time frame (1998-2004) and arguably relevant to damages. As the Third District has concluded the "updated" documents (dated from 2005 to 2007) that Petitioner

requests do not fall "within the time frame of the subject matter of the case" and are not "pertinent to the 2001 property appraisal, the issue of damages, and the Board's defense of the reformation claim." *AEE*, 45 So. 3d at 945. The fact that American may have permitted Citibank to produce relevant financial documents to Petitioner does not mean that American consents to the additional production of irrelevant financial documents.

C. *Certiorari* Lies to Review American's Overbreadth and Relevance Claims On this Record

Although the Florida Rules of Civil Procedure generally allow for liberal discovery, "litigants are not entitled to *carte blanche* discovery of irrelevant material." *Life Care Centers of Am. V. Reese*, 948 So. 2d 830, 832 (Fla. 5th DCA 2007); *see also Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995). Discovery must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence. Fla. R. Civ. P. 1.280(b)(1). Ordinarily, the financial records of a party are not discoverable unless the documents themselves or the status which they evidence is somehow at issue in the case. *Compton v. West Volusia Hosp. Authority*, 727 So.2d 379, 381 (Fla. 5th DCA 1999); *Graphic Assocs., Inc. v. Riviana Restaurant Corp.*, 461 So.2d 1011 (Fla. 4th DCA 1984).

Petitioner argues that "mere overbreadth in the discovery order is not a basis for *certiorari* relief. There must be material injury, such as where the discovery

request is overbroad as to be oppressive or encompass privileged material." Br. at 26-27. Petitioner is wrong. This Court has said that *certiorari* relief is appropriate when it has been established that the information requested is neither relevant to any pending claim or defense nor will it lead to the discovery of admissible evidence. *Langston*, 655 So. 2d at 94.[4] Nevertheless, even accepting Petitioner's suggested standard, The Third District did not abuse its discretion in finding that American met this standard or burden.

In its Response to Petitioner's Motion to Compel, American objected to each and every document request on the basis that the document request was "unduly burdensome, duplicative, and harassing" (General Objection 3, R-337) and that:

> . . .it is overbroad, intrusive, and unduly burdensome in that it purports to request the production of private and protected financial records for which a privacy right exists under Florida law, and seeks documents not relevant to the subject matter of the litigation and not reasonably calculated to lead to admissible evidence.

Responses 1-7, R. 338-40. In opposition to Petitioner's Motion to Compel, American explained that:

> Defendant's Sixth Request for Production is nothing more than a fishing trip for materials which have absolutely nothing to do with the Plaintiff's Complaint or the Defendant's Counter Claim. Rather, Defendant is seeking discovery in aid of a

[4] Courts have found that overbreadth alone is sufficient for *certiorari* relief. *Redland Co. v. Atlantic Civil, Inc.*, 961 So. 2d 1004, 1006 (Fla. 3d DCA 2007); *Wooten v. Honeywell & Kest, P.A. v. Posner*, 556 So. 2d 1245, 1246 (Fla. 5th DCA 1990)

> potential execution on a theoretical, future judgment, as well as to harass Plaintiff by the production of documents completely immaterial to this lawsuit and otherwise nondiscoverable for the reasons stated herein. Plaintiff has incurred undue expense as a result of Defendant's unfounded attempt to obtain documents which are in no way related to the allegations in this lawsuit.

Response at 5, R. 177. Furthermore, during the hearing on the Motion to Compel, American argued that the document requests not only were immaterial and irrelevant, but harassing:

> . . . All of these requests are irrelevant and immaterial. They're not going to lead to anything resembling admissible discovery. You're not going to see anything that's not harassing.

Hearing Transcript at 110, R-316.[5]

Thus, American argued and established -- at least to the Third District's satisfaction -- that American would suffer irreparable harm by having to comply with wholly irrelevant and overbroad requests for documents that would be unduly burdensome, harassing and oppressive to produce.[6] The Third District's conclusion was on all fours with this Court's holding in *Langston* that a party is not entitled *carte blanche* to irrelevant discovery. There is a limit, when it is

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[5] It is self-evident that the compelled production of wholly irrelevant confidential financial documents is unduly burdensome and harassing.

[6] Petitioner argues that American made "no evidentiary showing of overbreadth in the trial court." Br. at 27. It is difficult to comprehend what more that American could have done than what it did. It objected to the requests on the basis that they were overbroad. *See* Responses 1-7, R-338-40.

oppressive and burdensome to produce. 655 So. 2d at 95. That limit was found to have been reached here.

D. The Discovery Requested Is Patently Irrelevant.

Petitioner contends that the trial court did not abuse its discretion in ordering production of the financial information because the information would prove useful to the Board's defenses and might lead to admissible evidence. Br. at 30. The Third District considered each of the Petitioner's alleged bases of relevance and flatly rejected them.

> As to the damages issue, the record supports American's position that it seeks out-of-pocket damages-the difference between the purchase price and the real or actual value of the property at the time of sale-rather than general economic or special damages. Documents concerning American's financial worth and performance are not relevant to this issue. *Cf. Frank Medina Trading Co. v. Blanco,* 553 So.2d 285, 286 (Fla. 3d DCA 1989) (holding that corporate tax returns are discoverable in an action to recover profits misdirected by an employee).
>
> Finally, the Board's defense of American's reformation claim does not support discovery of the corporate financial documents. American alleged that its mistaken bid was made in reliance on the Board's misrepresentations regarding the property's assessed value, rather than American's prospective use of the property. In response, the Board asserted that such mistake was a result of American's considered business decision and that American has benefitted financially from this purchase, i.e., that American factored into the bid its best and highest use of the property. However, the documents evidence American's financial performance for several years far removed from American's 2001 business decision. The factors underlying American's decision were those American considered in 2001, and the requested

> financial documents have no relationship to its decision-making process in submitting the bid.

AEE, 45 So. 3d at 945-46 (footnotes omitted).

Petitioner now also argues that the financial information is discoverable "because it could reasonably be employed to impeach any attempt by American to claim that it would be inequitable not to reduce the purchase price based upon American's losses." Br. at 31. This argument, however, is unavailing because American's damages are based on out-of-pocket damages -- the difference between the purchase price and the real or actual value of the property at the time of sale -- rather than general economic or special damages. American's alleged losses are not implicated.

Accordingly, the Third District did not abuse its discretion in finding that the documents requested were wholly irrelevant to the issues in the case.

VI. CONCLUSION

The Third District Court of Appeal did not abuse its discretion in holding that the trial court departed from the essential elements of the law when it ordered the wholesale production of American's confidential, financial documents that were overbroad in temporal scope and not relevant to the issues in the case. Accordingly, this Court should affirm the decision of the Third District Court of Appeal quashing the trial court's pre-trial discovery order.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on December 8th, 2011, a copy of this brief was mailed to Paul Morris, Esquire, LAW OFFICE OF PAUL MORRIS,P.A., 9350 S. Dixie Highway, Suite 1450, Miami, Florida 33156 and Richard A. Ayalon, Esquire, ALAYON & ASSOCIATES, PA., 4551 Ponce de Leon Blvd., Coral Gables, FL 33134.

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I hereby certify that this brief is submitted in Times New Roman 14-point font.

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