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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: APPLICATION OF MAD HATTER UTILITY, INC. FOR AMENDMENT OF WATER AND WASTEWATER CERTIFICATES IN PASCO COUNTY, FLORIDA
_____/

DOCKET NO. 960576-WS

PASCO COUNTY'S RESPONSE TO MAD HATTER'S UTILITY, INC.'S MOTION TO DELAY AGENDA CONFERENCE, MOTION TO DELAY RENDERING OF DECISION, MOTION FOR STAFF TO RECONSIDER RECOMMENDATION, AND REQUEST TO SUPPLEMENT RECORD

Pasco County, through its undersigned counsel, hereby responds to Mad Hatter Utility, Inc.'s (Mad Hatter) motion to delay agenda conference, motion to delay rendering of decision, motion for staff to reconsider recommendation and request to supplement record as follows:

1) The basis of Mad Hatter's last minute attempt to delay this commission's decision in this matter is its erroneous contention that the federal court may soon order the County to accept more sewage from Mad Hatter, thus lifting the 350,000 gallons per day (GPD) cap in the parties' 1991 agreement. Mad Hatter is intentionally misconstruing the comments the court made during a status conference held last week.

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2) The evidence presented during the public hearing which the commission held in May of this year showed that Hatter and Pasco County entered into a contract on February 11, 1992, which required Pasco County to treat up to 350,000 GPD of wastewater collected from Mad Hatter's customers. A copy of the contract is Exhibit 11 in the record.

3) In 1994, Mad Hatter filed litigation against Pasco County in the United States District Court, Middle District of Florida. In Count XII of the amended and supplemental complaint (the amended complaint) which Mad Hatter filed, it alleged that Pasco County had breached the contract by failing to provide Mad Hatter with additional capacity beyond the 350,000 gallon limit. A copy of Count XII of the amended complaint is attached hereto as Exhibit A.

4) During the trial held in November of 1996, Pasco County moved for a judgment as a matter of law on all remaining counts in the complaint, including Count XII. A copy of the transcript of that argument and the Court's granting of the motion regarding Count XII is attached as Exhibit B. Specifically, the Court held, "The motion with regards to the '92 breach of contract claim is granted."

(Exhibit B, P. 31, lines 18-19). Thus, Mad Hatter lost its only claim regarding the 350,000 GPD cap in the contract.

5) Prior to trial, Mad Hatter realized that it had not requested in the amended complaint that the Court rescind or reform the 1992 agreement to lift the 350,000 gallon cap. Accordingly, it filed a motion for leave to file second amended complaint on September 18, 1996. A copy of the motion is attached as Exhibit C. The Court denied the motion by an order dated October 18, 1996, a copy of which is attached as Exhibit D.

6) Thus, both by Count XII of the amended complaint which was dismissed at trial and by a last-ditch attempt to further amend the complaint to seek reformation and rescission, Mad Hatter sought in the federal court action to lift the 350,000 gallon cap in the parties' 1992 agreement. Both attempts failed. Thus, Mad Hatter's suggestion in its pending motions before this commission that the Court might order Pasco County to provide additional capacity to Mad Hatter is wrong.

7) Mad Hatter relies upon a transcript of a status conference the federal court held on September 3, 1997, to justify its pending motions. The court set the status

conference to establish the trial date for the two remaining claims. One of those claims addresses the issue of whether Pasco County should be enjoined from providing wastewater service to the Denham Oaks Elementary School (the school). During the course of the status conference, the Court acknowledged it had not yet ruled on that issue and suggested that it might consider issuing an injunction requiring the County to provide additional capacity to Mad Hatter so that the utility could serve the school. A complete transcript of the status conference is attached as Exhibit E.

8) By lifting the judge's comments out of context, Mad Hatter wrongfully contends that the comments Judge McCoun made during the September 3 hearing indicate that he would lift the 350,000 gallon cap to require the County to provide unlimited capacity to Mad Hatter. The discussion only concerned service to the school. See P. 7, lines 4-10 of Exhibit E.

9) During the status conference, the court referred to the possibility of adopting Mad Hatter's first alternative which it had set forth in its memorandum regarding entry of injunction relief on June 24, 1997. See Exhibit E, P. 7,

lines 13-25 and P. 8, lines 1-7 and plaintiff's memorandum regarding entry of injunctive relief, a copy of which is attached as Exhibit F. The memorandum which the court discussed at the status conference concerned Mad Hatter's request that the court issue an injunction prohibiting the County from serving both the school and the nearby Oak Grove subdivision. There is no development in the Oak Grove subdivision and thus the sole issue for the injunctive relief before the federal court is whether the County should be enjoined from providing service to the school. See Exhibit G, excerpt from the January 3, 1996, preliminary injunction hearing in which Mr. DeLucenay acknowledges that the only service provided by Pasco County is to the school rather than the Oak Grove subdivision.

10) The territory for which Mad Hatter seeks to add to its certificates of authorization (the extended territory) will generate between 436,000 GPD (R. 33, l. 18-21) to 532,500 GPD (R. 618, l. 25; R. 619, l. 1-10). Obviously, if the federal court requires the County to provide Mad Hatter with capacity to treat the wastewater from the School, that will not give Mad Hatter enough capacity to treat wastewater from the extended territory.

11) Accordingly, Mad Hatter is seeking to delay the agenda conference and the rendering of a decision under the false claim that the federal court may soon order Pasco County to provide sufficient capacity to Mad Hatter to serve the extended territory. As the only additional capacity the federal court is considering ordering the County to provide to Mad Hatter is for the school and that is obviously insufficient to provide enough capacity to Mad Hatter to serve the extended the territory, the pending motions should be denied. Furthermore, the federal court has indicated that it will not issue any injunction regarding the school until after the trial which is tenattively scheduled for January 5-16, 1998. See P. 25 of Exhibit E.

WHEREFORE, Pasco County requests that the Commission deny Mad Hatter's motion to delay the agenda conference, motion to delay rendering of decision, motion for staff to reconsider recommendation and request to supplement record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been served upon the Director, Division of Records and Recording, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399; Roseanne Gervasi, Florida

Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399, and F. Marshall Deterding, Rose Sundstrum & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301, by facsimile and regular U.S. mail this 8th day of September, 1997.

JOHNSON, BLAKELY, POPE,
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC.,
a Florida corporation, LARRY
DeLUCENAY, President of
Mad Hatter Utility, Inc.

Plaintiff,

CASE NO. 94-1473-CIV-T-25E

vs.

PASCO COUNTY, FLORIDA, a political
subdivision of the State of Florida,
DOUGLAS S. BRAMLETT, Assistant Pasco
County Administrator,

Defendants.
_______________________________________/

AMENDED AND SUPPLEMENTAL COMPLAINT
AND DEMAND FOR JURY TRIAL

MAD HATTER UTILITY, INC., Plaintiff in the above styled action, files its complaint seeking damages against Defendant, Pasco County, Florida, as follows:

1. Plaintiff, Mad Hatter Utility, Inc. ("Mad Hatter"), is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Pasco County, Florida.

2. Plaintiff, Larry DeLucenay is a Florida resident residing in Pasco County, Florida. Mr. DeLucenay is the President of Mad Hatter.

3. Defendant, Pasco County, Florida is a political subdivision of the State of Florida. Defendant Douglas S. Bramlett is an Assistant Pasco County Administrator. Utilities Services. Defendants Bramlett and Pasco County will collectively be referred to herein as the "County".

WHEREFORE, Mad Hatter seeks actual and consequential damages for the County's breach of the 1991 Agreement, together with attorney's fees and costs under 42 U.S.C. section 1988 and any other relief deemed just and proper.

COUNT XII
Breach of Contract
-1992 "Permanent" Agreement-

150. Paragraphs 1-66 and 104-108 are hereby incorporated into this claim for relief for the County's breach of the 1992 Agreement with Mad Hatter.

151. This Count is plead in the alternative, should the Plaintiffs fail to prevail in showing the voidability of the 1992 Agreement through duress.

152. The County is obligated under the 1992 Agreement to accept flows through Mad Hatter's interconnect up to 350,000 g.p.d. and beyond to the extent that the County has uncommitted and unused capacity available at County wastewater treatment facilities.

153. An obligation of good faith and fair dealing in the performance of the 1992 Agreement requires the County to take future growth in Mad Hatter's service area into account in planning and permitting expansions of County wastewater treatment facilities and to make that capacity available to Mad Hatter and that it operate its facilities in compliance with the law. The County has alleged that it lacks sufficient capacity for Mad Hatter developers, therefore the County failed to either properly plan or keep its facilities in compliance with the law, leading to a regulatory reduction in capacity.

154. The County's refusal to accept additional flows from Mad Hatter as new developments within Mad Hatter's certificated territory have come on line, i.e., Lake Heron, Oak Groves PUD, Phase 1a and the Denham Oaks Elementary School, constitutes a material

breach of the express terms of the 1992 Agreement, and of the County's obligation of good faith and fair dealing in the execution of the contract.

155. The County cannot, consistent with its obligations under the 1992 Agreement, decline to accept additional flows from Mad Hatter for new development on the basis of lack of capacity and then turn around and provide County wastewater treatment service directly to the same development.

156. Mad Hatter has complied with the contract.

157. As a direct and proximate result of the County's breach of the 1992 Agreement, Mad Hatter has been damaged.

WHEREFORE, Mad Hatter seeks actual and consequential damages, together with attorney's fees and costs under 42 U.S.C. section 1988 and any other relief deemed just and proper.

MAD HATTER DEMANDS TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted, this 16th day of November, 1995.

GERALD T. BUHR, P.A.

By:

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November 16, 1995

1 UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
2 TAMPA DIVISION

3 --------------------------------
MAD HATTER UTILITY INC., No. 94-1473-CIV-T-25(E)
4 a Florida corporation,
LARRY DeLUCENAY, President of
5 Mad Hatter Utility Inc.,

6 Plaintiffs,

7 -vs-

8 PASCO COUNTY, FLORIDA,
A political subdivision of the
9 State of Florida,
DOUGLAS S. BRAMLETT, Assistant
10 Pasco County Administrator,

11 Defendants.
-------------------------------- Tampa, Florida
12 November 19, 1996

13

14

15 JUDGMENT OF ACQUITTAL ARGUMENT
BEFORE THE HONORABLE THOMAS B. McCOUN, III,
16 United States Magistrate Judge, and a jury.

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21 Reported by: MICHAEL J. CANO, RPR
Frecka & Associates
22 P.O. Box 1921
Tampa, Florida 33601-1921
23 (813) 221-4132

24

25

1 APPEARANCES:

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1 P R O C E E D I N G S

2 (Preceding portions reported but not transcribed.)

3 MS. HALE: We do have some legal argument and we
4 need to address the Court.

5 THE COURT: All right. It's appropriate for me to
6 take some argument from the lawyers at this point, so I'm
7 going to have to ask you to step back into the jury room, if
8 you would, for just a few minutes.

9 THE COURT SECURITY OFFICER: All rise for the
10 jury.

11 (Jury out)

12 THE COURT: Go ahead.

13 MS. HALE: Well, as you might imagine we are once
14 again moving for judgment as a matter of law, Your Honor,
15 for all the counts in the complaint.

16 On the procedural due process claim for Count 2,
17 which is the 1991 interconnect, and also for the procedural
18 due process claim for the Denham Oakes school there's
19 several cases which say for procedural due process, that the
20 primary remedy is equitable rather than monetary damages.
21 That's North Florida Educational Development Corp. and the
22 Woodham case -- versus Woodham case, and the McKinny versus
23 Pate (phonetic) case both say that.

24 In light of that, I think it would be wrong to
25 send this question to the jury for damages when -- if the

1 primary method is equitable.
2 Also on the procedural due process claim on
3 Count 2, we still have yet to hear anything which indicates
4 there was no emergency out there. You mentioned earlier
5 when I made this argument that Mr. DeLucenay had testified
6 there was no emergency, but I frankly don't remember him
7 testifying as such. And we have had every single witness
8 come in here who's addressed this issue has said that there
9 was an emergency out there, Dr. Yacht to Mr. Swann to all of
10 the DEP people, and every single one has said there was a
11 serious problem out there. And they've got nothing to rebut
12 that whatsoever. I don't even know if that's a jury
13 question.
14 And Mr. DeLucenay again has admitted that he was
15 dumping treated sewage, at least into Bird Lake. Although
16 he won't admit to the perc ponds, he does admit that it was
17 going into Bird Lake through the overflow structure. He
18 admitted in that consent decree with DER to give up his
19 permits. He had no permits anymore. And, in fact, one had
20 been -- even before all of this happened for Turtle Lakes
21 had already expired. And, again, the failure to exhaust the
22 state remedies that we had mentioned in the motion for
23 summary judgment.
24 Your Honor, he also admitted from the witness
25 stand yesterday that he did not even own -- and we have now

1 in evidence the quitclaim deeds for the Foxwood perc ponds,
2 and yet he is claiming that that was taken from him both in
3 his taking claim and as part of his damages. The quitclaim
4 deed shows that that did not occur until November of '91.
5 He says that the taking occurred on August 30th of 1991.
6 Well, we couldn't take from him that which he
7 didn't have, and he didn't acquire those perc ponds. In
8 fact, if he was using them it must have been by some license
9 or something. But he did not have title to the perc ponds
10 so we could not have taken that from him on August 30, '91.
11 Back on Count 1 -- I mean, on Count 4 for breach
12 of the '91 agreement, again on the delay issue, there is no
13 evidence the county did anything to delay his ability to
14 perform. The only delays were caused by Mr. DeLucenay and
15 his inability to get the permit application right. And he
16 submitted three permit applications and it wasn't until the
17 last one that was correct.
18 Mr. Towson testified that it was just a few days
19 delay and that's all it was. We're talking about an 80-day
20 period here in which the only delay is by the county by a
21 couple of days. So we did not delay his trying to perform
22 the contract. And there's no evidence that we did delay
23 that whatsoever, nor is there any evidence that we hampered
24 his efforts at all.
25 He testified yesterday that had he known he could

1 have performed within a half to three-quarters of a day, now
2 that's why he claims he didn't know until the 29th, because
3 then he claims, well, I couldn't have performed on time.
4 But yesterday we introduced into evidence his injunction
5 that he filed early in the morning, 9:40 a.m., on the 29th.
6 It would take him a half to three-quarters of a day he had
7 then to perform. It was before the county interconnect was
8 connected.
9 And he had in that petition that he filed with the
10 circuit court that Mr. Bramlett had told him and that the
11 county advised him that this was happening. So he had an
12 opportunity to perform here, under his own testimony, and he
13 failed to do so.
14 Again, I would raise the issue that Anthony
15 Distributors, that if we have only an implied provision in
16 the contract you can't have a breach of that. You have to
17 have an expressed provision.
18 He has nothing but the implied provision in the
19 '91 agreement and the '92 agreement. Every aspect of the
20 '91 agreement that he is contending that we breached is an
21 implied provision in the contract. There is nothing
22 expressly prohibiting us from serving -- I mean, from
23 connecting to his system. So it has to be the implied. He
24 must be going under an implied duty of good faith there.
25 And if that's the case, Anthony Distributors says you can't

1 sue just for an implied duty of good faith.
2 And also in the '91 agreement, again, he performed
3 under the contract. He has waived any right he had to
4 allege a breach. He's fully performed. The '91 agreement
5 is already expired on its own terms. And once you perform,
6 and we cited these cases to you before, once you perform you
7 waive the right to claim a breach by the other party.
8 From Denham Oakes we've got no present ability to
9 serve. He presents a contract to Mr. Orsi, and that
10 contract says, acknowledges right in it that there is no
11 ability to serve and that they've got to go out and they've
12 got to build the facility to do it, and they want Mr. Orsi
13 to fund that. And that's true of the sewer, and Mr. Orsi
14 testified that they insisted upon that for the water. In
15 fact, Mr. DeLucenay's way of getting the water to Mr. Orsi's
16 property was to dig two wells on Mr. Orsi's property and ask
17 Mr. Orsi to lend him $100,000. That's not present ability
18 to serve.
19 J & J Mobile Home Park says, toss out the '88
20 agreement, just presume they've got the first right to serve
21 right now. They don't have the present ability. It
22 exceeded their cap with the county, their 370,000 gallons a
23 day. He has no other way of disposing of sewage by his own
24 testimony, and yet he claims he's got the present ability to
25 serve. There's no evidence he's got the present ability to

1 serve.

2 On the breach of the '92 agreement, Your Honor,

3 once again it's an implied provision. We've got no capacity

4 at the Land O'Lakes plant. Mr. O'Connor has just testified

5 we are over committed at that plant. The sewage from

6 Denham Oakes school was specially diverted to another plant.

7 Mr. DeLucenay knew he was never going to that plant because

8 his permit is for the Land O'Lakes plant.

9 And then he's got this theory that we have to go

10 in and build additional capacity for him, and there's no

11 testimony at all on that subject. That's a legal argument

12 in their complaint, but he's never presented any evidence of

13 that in this case.

14 There's an expressed provision in the contract

15 regarding capacity, and you have already ruled that it was

16 not ambiguous. It's 350,000 gallons a day unless there is

17 additional capacity in the county's estimation, and there is

18 no additional capacity. So I don't know how we can breach

19 the '92 agreement.

20 So even if you believe that we could breach an

21 implied duty of good faith, it's contrary to the written

22 agreement, there's no evidence that we breached it.

23 The tortious interference with business relations

24 claim, which is Count 11. Now, the question is, is it

25 justified? Yes, it was justified. We had a school on

1 double sessions. Again, we think under the Ferguson
2 decision you've got to have a particular customer. Mr. Orsi
3 testified he wasn't going to do business. If it came down
4 to it, he was going to go form his own nonprofit water
5 association and do that rather than take water from
6 Mr. DeLucenay.
7 On the sewage, he said, well, he would consider
8 putting in larger lots so that he could have septic tanks in
9 them. We cannot have interfered with a business
10 relationship when Mr. Orsi doesn't want to do business with
11 Mad Hatter. He's got alternatives outside of Mad Hatter.
12 He says he will use those alternatives. That can't be a
13 tortious interference with business relationship.
14 And then on the inverse condemnation, again, we
15 don't believe there's been any evidence that this taking is
16 without permission. He had ample opportunity to connect,
17 that contract allowed the connection, that connection would
18 have been made anytime prior to the expiration of the
19 90 days.
20 This theory he was only going to send 5 to 12,000
21 gallons a day is belied by his own documents and his own
22 permit application which was for 200 and which he then
23 immediately ran in and asked for 475,000 gallons. We
24 only -- we only diverted 175,000. It was less than the 200
25 he asked to take from him. So we can not have been taking

1 his property without permission.
2 So we move for judgment as a matter of law on all
3 the counts, Your Honor.
4 THE COURT: Okay. Plaintiff?
5 MS. MITCHELL: Your Honor, we are moving for entry
6 of a directed verdict on all of the remaining counts in the
7 amended and supplemental complaints. Specifically we are
8 moving for the entry of a directed verdict on Counts 2 and 8
9 with regard to the county's failure to provide Mad Hatter
10 with notice and an opportunity to be heard prior to taking
11 actions which affected Mad Hatter's property interest.
12 This Court has determined as a matter of law that
13 Mad Hatter's PSC certificate constitutes a constitutional
14 protected property interest pursuant to City of Mount Dora
15 versus J & J Mobile Homes. The defendant admitted that
16 Mad Hatter was not given notice of the August 27, 1991,
17 Board of County Commissioners' meeting. That is
18 uncontroverted.
19 There is no evidence that the defendants provided
20 Mad Hatter with notice and an opportunity for a hearing
21 prior to contracting with Sunfield Homes. And, in fact,
22 Mr. Gallagher on the stand admitted that neither he nor his
23 staff made any attempt to advise Mad Hatter of the meeting
24 during which the Board of County Commissioners approved the
25 contract with Sunfield.

1 In each instance the lack of notice and an
2 opportunity for a hearing is in and of itself a violation of
3 the procedural due process clause of the
4 Fourteenth Amendment for which Mad Hatter is entitled for
5 entry of a directed verdict and an award of nominal damages
6 and attorney's fees.
7 With regard to Count 2, the defendants have argued
8 two defenses, that Mad Hatter had adequate post-deprivation
9 remedies available, and that their failure to provide due
10 process was justified by exigent circumstances. It is well
11 established that the existence of adequate post-deprivation
12 remedies is irrelevant wherein this case a predeprivation
13 notice were neither impractical or impossible.
14 Mad Hatter would contend that up to this point
15 that the county has failed to show any exigent
16 circumstances. Rather that what they have had is some very
17 either rather ignorant individuals running HRS or
18 deliberately uninformed with regard to the difference
19 between treated effluent and raw sewage.
20 And that when they came into the county commission
21 hearing on August 27th and announced that there was an
22 emergency, the county certainly made no inquiry as to the
23 nature of the emergency. And it appears that the basis upon
24 which HRS asked for that emergency was uninformed and that
25 they continued to be uninformed based on the letters that

1 had been put into evidence with regard to the difference
2 between raw sewage and specifically the fact that they did
3 not -- there didn't seem to be any difference in their
4 understanding between the treatment of the raw sewage at the
5 Foxwood and Turtle Lakes Wastewater Treatment Plants. And
6 the fact that once they reached those percolation ponds that
7 had gone through the chlorination process, they were
8 actually bacteria free at that point even though Mr. Swann
9 did admit that had it gone through the chlorination process,
10 and we have had testimony that it did, that it would have
11 been bacteria free.
12 It is Mad Hatter's position that that was a
13 pretext for a predatory action by Pasco County to do a
14 forced interconnect. And that because of that condition,
15 the lack of the procedural due process, that we have, in
16 fact, met our burden of proof with regard to that particular
17 count.
18 The Eleventh Circuit has stated that
19 post-deprivation remedies do not require due process, and
20 that's Vandeberg versus Dempsey. On summary judgment, this
21 Court made the finding that the failure to afford Mad Hatter
22 with predeprivation due process was neither impractical nor
23 impossible. And, in fact, Your Honor, witness after witness
24 has indicated that they could have notified Mad Hatter of
25 both of the Board of County Commission meetings that are a

1 point of contention in this case.
2 THE COURT: What else did they point out about
3 that count, though? If, in fact, there is a true emergency,
4 is there an obligation to give prior notice and opportunity?
5 MS. MITCHELL: Well, Your Honor, I think certainly
6 in the evidence that we have heard that there would have
7 been no reason not to call Mad Hatter to come forward and
8 provide them with an opportunity --
9 THE COURT: I think the case law would suggest
10 that if, in fact, there is really an emergency of
11 significance, that there is no requirement for prior notice
12 and opportunity to be heard. And that under those
13 circumstances, perhaps post-deprivation remedies would be
14 adequate.
15 MS. MITCHELL: Well, Your Honor, in this
16 instance --
17 THE COURT: Which is the same reason I'm going to
18 deny both arguments at this point on this particular count.
19 I think it's a jury question. The jury is going to be
20 instructed as to the admitted facts in this particular case.
21 It seems to me that the decision to be made by the
22 jury on this particular count is whether the defendant has
23 established either of two possible offenses, one of them
24 being that the same result would have occurred even if they
25 had -- even if they had given Mad Hatter notice and an

1 opportunity to be heard, under that circumstance the jury
2 would be instructed that the verdict should nonetheless be
3 for the plaintiff, but the amount of damages would simply be
4 nominal.
5 The other alternative they're going to be asked to
6 determine is whether or not the defendant has established an
7 emergency situation. Even if the jury is satisfied that
8 there's an emergency situation, I think they're free to find
9 in favor of the defendant against the plaintiff even where
10 there's been no notice and opportunity to be heard.
11 Correct me if I'm wrong, if you think that's not a
12 proper analysis of the case law, but under my understanding
13 of the case law I'm required to on that issue let it go to
14 the jury.
15 MR. BUHR: Your Honor, the correct reading of the
16 case law is that predeprivation remedies are supposed to be
17 provided unless impractical or impossible, and you've ruled
18 as a matter of law that they were not. Therefore, the only
19 decision that needs to be made with regard to defenses of
20 emergency and so on are simply as to the full level of
21 damages, how much was he damaged. The issue of whether the
22 denial of due process has already occurred --
23 THE COURT: What does the case law say with regard
24 to emergency? Does the case law say with regard to
25 emergency --

1 MS. LISTER: I believe usually an emergency
2 assumes that predeprivation notice and an opportunity to be
3 heard is not practical or possible. In this case, given a
4 time frame that there certainly was, there was a meeting on
5 the 27th, there was three days in between. They could have
6 done that even though -- even if there was an emergency.
7 And under those circumstances, I think due process can still
8 operate.
9 THE COURT: Well, we have evidence under the
10 signature of your own client to the fact that they did. He
11 filed some type of legal pleading --
12 MS. LISTER: There is evidence that he knew of the
13 county's action. That's different than getting
14 constitutionally adequate notice and being advised of the
15 procedures through which he can take advantage of an
16 opportunity to present his position. He was never given the
17 opportunity to present his position. Had he been --
18 MR. BUHR: Legal notice is not that he learns
19 through the newspaper article that something has happened
20 and then calls Mr. Bramlett to find out what's going on.
21 Legal notice is the fact that they --
22 THE COURT: Is legal notice being advised by the
23 assistant county administrator in charge of utility that the
24 Board of County Commission has ordered an interconnect that
25 he's proceeding --

1 MS. LISTER: He has to be advised through
2 procedures through which he can be heard, through which he
3 can present his position.
4 MR. BUHR: It's insufficient to simply --
5 THE COURT: What did Mr. DeLucenay do in response
6 to that notice?
7 MS. MITCHELL: Well, he never received the notice,
8 Your Honor. That's the whole point.
9 THE COURT: No. He went out and drafted --
10 somebody drafted a legal pleading and he filed it with the
11 court, post-deprivation remedy.
12 MR. SAMARKOS: Without notice.
13 MS. MITCHELL: He wasn't --
14 THE COURT: You guys are convincing me more and
15 more that my initial analysis is right. I think it's a jury
16 question on that particular count. Both motions are denied.
17 Next argument?
18 MR. BUHR: With regard to the tortious
19 interference, Your Honor, we've established that there was
20 an existence of business relationship. Mr. Orsi established
21 that, Mr. DeLucenay testified to that, and that the
22 defendant has testified to Mr. Bramlett and Mister --
23 THE COURT: I don't need to hear anymore argument
24 on that. You need to make some serious argument about your
25 breach of the '92 contract count.

1 MR. BUHR: Well, Your Honor, in the 1992 agreement
2 it says -- to make capacity available or give the capacity
3 to Mad Hatter if it's available. It's clearly available
4 since they've already provided it through their own utility
5 to Denham Oakes and Oak Grove Subdivision. So that capacity
6 could have easily --
7 THE COURT: But Denham Oakes school, the sewer
8 there is going to Wesley Chapel, correct?
9 MR. BUHR: It doesn't matter, though.
10 THE COURT: They're not obligated to give you
11 capacity to Wesley Chapel.
12 MR. BUHR: Your Honor, we would argue as a matter
13 of good faith and fair dealing under that contract that if
14 the capacity was available at either site, then it was
15 available for Mad Hatter. What they're simply trying to do
16 at this point is play a shell game with Land O'Lakes and --
17 THE COURT: What does the '92 agreement say with
18 regards to the treatment facility? Does it specifically
19 identify Land O'Lakes?
20 MS. HALE: It does not, Your Honor. But the
21 permit application is to Land O'Lakes, it's not to
22 Wesley Chapel.
23 MR. BUHR: That's by fiat of DEP. It has nothing
24 to do with -- that is Mad Hatter's application for permit at
25 its interconnect. That has nothing to do with the actual

1 full interconnect that Pasco County put into effect. They
2 simply bypassed that whole process and took Mad Hatter's
3 permit with regard to that. That's been testified to by
4 Mr. DeLucenay.
5 Simply because they changed the game plan and used
6 his permit, which is -- and the DEP is not going to simply
7 say, okay, well, we'll let you have capacity at any plant
8 you want. They want to have some idea of what that plant is
9 going to connect to for their record-keeping purposes. But
10 that was not the -- that was not the interconnect that was
11 fully made. The interconnect that was actually made was the
12 one that the county made without Mad Hatter's permission.
13 So they changed the game plan with regard to that permit,
14 Your Honor.
15 MR. SAMARKOS: Your Honor, also on the breach
16 of -- on the breach of contract count, there's a couple of
17 things. Number one, we have to clear up what exhibit is
18 going in because under the map introduced in our case, that
19 area is not something that was contemplated to be served
20 under the contract. So we had no contractual obligation to
21 take from there. This is a breach of contract we're talking
22 about. So if it's not defined as one of the areas that we
23 have to accept service from, then we can't breach a contract
24 as to that point.
25 MR. BUHR: Your Honor, that --

1 THE COURT: I think you could breach a contract.
2 But that aside for a moment, I'm going to find that
3 Defendant's 72 is, in fact, the contract. The argument --
4 74? Defendant's 72, 74, one of those numbers is, in fact,
5 the contract in this particular case.
6 THE CLERK: 74.
7 THE COURT: Plaintiff's argument that they're
8 agreeing to everything except to Exhibit 3 because it wasn't
9 appended at the time, I don't buy that under the
10 circumstances of this particular case.
11 My concern about this count -- and I didn't mean
12 to cut you off. You can get back to it in a second here.
13 Let me tell you what I'm concerned about and you can focus
14 in and answer my concern.
15 Where did you prove up what you alleged in this
16 count about asking the county for additional capacity and
17 being denied?
18 MR. BUHR: Your Honor, through --
19 THE COURT: I read your client's testimony again
20 the other morning, you've got copies of it and you've
21 probably reviewed it yourself, and he doesn't testify to
22 that. So where's the proof of what you allege?
23 MR. BUHR: Your Honor, Mr. Towson testified that
24 he asked for capacity increase back in 1992 of the 475 after
25 they forced the interconnect and they were left with having

1 only 350,000 gallons a day. He asked to go up to 475. That
2 was denied by --
3 MS. HALE: That was December of '91. It was
4 before the '92 agreement was signed.
5 MR. BUHR: It was after the forced interconnect.
6 MR. SAMARKOS: Judge, you raise that point, and
7 here's another point. The '92 contract requires the notice
8 that we've been arguing about. If they had been denied
9 capacity and it was a breach of the contract, under the
10 agreement they have to give us notice that says we've asked
11 for capacity, you haven't complied with the contract, you
12 have ten days to cure, and they haven't done that. And
13 that's a condition precedent to maintaining an action on
14 breach of contract.
15 MR. BUHR: Your Honor, you already have found that
16 that's not how that particular provision reads. It's kind
17 of a twisted interpretation of that provision. That doesn't
18 provide a defense for the person who breached the contract,
19 it provides a remedy for the person who was harmed of the
20 breach.
21 THE COURT: Your complaint on the count alleges
22 Paragraph 154, the county's refusal to accept additional
23 flows from Mad Hatter since new developments within
24 Mad Hatter's certificated territory have come online, i.e.,
25 Lake Heron, Oak Grove PUD, and the Denham Oaks Elementary

1 School constitute -- the county's obligation of good faith
2 and fair dealing.
3 Now, the suggestion with regard to good faith and
4 fair dealing was that because the county had capacity they
5 didn't treat you fairly or didn't act in good faith, and
6 that argument, I guess, is based on the fact that it would
7 have had Wesley Chapel; is that right?
8 MR. BUHR: They have capacity to give to
9 Denham Oakes, Oak Grove. It's in the same area. It's not
10 moving from one place to another. Therefore, they have to
11 pass Mad Hatter to serve the same group. The only reason
12 they're denying that --
13 THE COURT: Could they do that within their
14 permit?
15 MR. BUHR: Yes, Your Honor, they certainly can.
16 MS. HALE: The permit is specific that it has to
17 go to Land O'Lakes.
18 THE COURT: Okay. Well, let's go back to the
19 first part of the allegation of breach. The county's
20 refusal to accept additional flows from Mad Hatter -- new
21 developments from Mad Hatter's certificated territory to
22 come online, i.e., Lake Heron, Oak Grove PUD, Denham
23 Oakes --
24 MR. BUHR: Your Honor, I believe it's an issue for
25 the jury to decide.

1 THE COURT: My problem is I didn't find the facts.
2 I reread the testimony, and at the earlier stage where I'm
3 required to consider the matter in the light most favorable
4 to you, I consider what I heard Mr. DeLucenay to say, which
5 was that because of the cap he had been prevented from
6 expanding, or something along those lines, and had not been
7 able to do business with certain developers. And then there
8 was a question about who developers were. And as I recall,
9 he mentioned Oak Groves and Denham Oakes in there.
10 Now, the testimony is -- on the basis of the whole
11 record is that there wasn't capacity available.
12 MR. BUHR: Your Honor, --
13 THE COURT: And that's --
14 MR. BUHR: -- they --
15 THE COURT: -- in the Denham Oakes situation. I
16 don't recall hearing about Lake Heron.
17 MR. BUHR: Your Honor, the fact of the matter is
18 that even Mr. Bramlett admitted that we requested a capacity
19 of 475,000 gallons. He said he denied it.
20 THE COURT: Well, but that can't be a breach of a
21 contract that was not in existence at the time.
22 MR. BUHR: Well, Your Honor, it doesn't matter
23 because we weren't -- we are forced into that interconnect.
24 But the fact still remains that the capacity was available,
25 and they've testified that they were given capacity to

1 Denham Oakes and Oak Grove school. Capacity is a fungible
2 thing. It doesn't matter what treatment plant it comes to.
3 The project itself is not moving. It's not altering in any
4 way, and so there's no basis by which for them to deny
5 Mad Hatter the capacity. It's the same capacity that
6 they're providing themselves.
7 THE COURT: I'm listening to you, I'm sorry.
8 MR. BUHR: They have simply not shown any
9 difference in any testimony between the capacity at the
10 Wesley Chapel plant and the Land O'Lakes plant. Nobody has
11 testified from their side to say there's a problem with
12 giving Wesley Chapel -- in fact, their own witness said, I
13 don't know anything about the Wesley Chapel plant. That's
14 the only thing they've said about it.
15 It doesn't matter. The treatment plant is the
16 same with regard to that capacity whether you get it from
17 Wesley Chapel or the other facility. What they're attempt
18 to do here is point at the Land O'Lakes treatment plant and
19 play a shell game over there while they take over -- while
20 they take over Mad Hatter's service territory.
21 MR. SAMARKOS: Judge, where's their evidence that
22 they came to the county and said, you need to take these
23 flows?
24 THE COURT: I didn't hear that.
25 MR. SAMARKOS: Where's their evidence that they

1 came to the county and we turned them down?

2 THE COURT: That's my question. Do you want me to

3 answer it?

4 MR. SAMARKOS: I can answer it. It hasn't been

5 presented.

6 THE COURT: The provision here says -- the

7 provision on Page 10 that refers to Exhibit 3, and I don't

8 know that I buy the argument about Exhibit 3 because it

9 wasn't colored in, that that is somehow truly significant.

10 But listen to what this says, the provision says: This

11 agreement shall not be considered an obligation on the part

12 of the county to perform in any way other than as indicated

13 herein. The county shall not be obligated under the terms

14 of this agreement to treat additional wastewater for

15 Mad Hatter from areas outside of its certificated area, or

16 areas which are not presently served by Mad Hatter unless

17 the county issues written notification that it does not

18 object to such additional service.

19 So it would seem to me that to breach the contract

20 they would have had to -- they would have had to -- there

21 would have had to have been discussions with them, we need

22 your capacity for Denham Oakes and Oak Groves PUD in order

23 to kick in the obligation.

24 MR. BUHR: Your Honor --

25 THE COURT: And I don't -- I don't find proof

1 where anybody has testified that you went to the county and
2 said we need your capacity or we need additional capacity
3 for these areas.
4 MR. BUHR: That has not been the standard of
5 practice between the two parties, Your Honor. What's
6 happened in every event before that, the standard of
7 practice has been under that contract that Mad Hatter sends
8 the developer -- tells the developer, as we read in the
9 contract, you need to go and make reservation for capacity
10 at Pasco County. Every instance before this Pasco County
11 has said, okay, we'll take your money, go ahead and hookup
12 to Mad Hatter. Now they suddenly want to say, just because
13 we didn't write a letter to them saying give us capacity to
14 Oak Grove Subdivision --
15 THE COURT: I don't think it requires a letter. I
16 think it requires that someone had made the request of them
17 for the capacity, give them the opportunity to say no, and
18 then prove up that they did have capacity and then you've
19 got what amounts to a breach.
20 MR. SAMARKOS: Judge, that provision expressly
21 says that the only way we have to take additional flows is
22 if we do not object to the service.
23 THE COURT: Well, that's where I think the implied
24 condition of good faith and fair dealing kicks into play.
25 MR. BUHR: Well, Your Honor there was --

1 THE COURT: But we don't get there unless we've
2 got some breach.
3 MR. BUHR: Well, Your Honor, I mean, the breach is
4 the fact that they -- part of the breach is the fact that
5 they intruded on the territory and didn't provide the
6 capacity. But the capacity relationship was already
7 established in 1994 when they tried to intrude in the first
8 place. We sent a letter to Mr. Bustin, and Mr. Bustin wrote
9 us back a letter saying, okay, you're right. You'll provide
10 service to that particular subdivision. They knew that the
11 service had to get the capacity through Pasco County. I
12 mean, this is really just a facade.
13 MR. SAMARKOS: Judge, I'm going to object to that.
14 MR. BUHR: There's never been a formal procedure
15 for requesting service for a subdivision, and this issue was
16 never raised until the lawsuit.
17 MR. SAMARKOS: First of all, Judge --
18 THE COURT: Well, your complaint says the county
19 refused to accept additional flows. Now, I don't care how
20 that occurs, but there has to be some proof that they
21 refused to accept additional flows as you allege. And
22 that's what I am telling you I don't find. I ran through
23 the testimony again the other morning and I couldn't find
24 it. I'm trying to give you the opportunity to point out
25 where it exists.

1 MR. BUHR: Your Honor, we have a letter that we
2 think is going to show that. We're looking for it now.
3 THE COURT: Excuse me one second.
4 (Pause)
5 MR. SAMARKOS: Your Honor, one other thing that I
6 would point out in the whereas clause in the contract it
7 says: The utility is requesting the county to provide bulk
8 wastewater treatment for its customer and specifically
9 designated new customers.
10 MR. BUHR: Well, Your Honor --
11 MR. SAMARKOS: On the first page.
12 THE COURT: Where are you reading?
13 MR. SAMARKOS: I'm reading on the very first page
14 of contract on the whereas clause. It talks about the
15 utility has received a certificate from the Florida PSC.
16 The second clause says: The utility has requested the
17 county to provide such bulk wastewater treatment service for
18 its existing customers and specifically designated new
19 customers of Mad Hatter's system.
20 So there also has to be a specific designation of
21 request pursuant to that contract. That's what this whole
22 contract is about. When we're getting into what did they
23 ask for, that's not something that was requested.
24 MR. BUHR: Your Honor, it's not a direct -- it's
25 not a direct denial by virtue of the fact that somebody said

1 yes or no. What happened was they diverted the client to
2 themselves, they took the contract, therefore, Mad Hatter
3 couldn't ask for the capacity. And that's how a capacity
4 gets denied.
5 MR. SAMARKOS: Judge, it's not a breach.
6 THE COURT: That's your tortious interference?
7 MR. BUHR: Well, I believe it's also the breach,
8 Your Honor. It's a matter of denial when they take the only
9 instrument by which he can request capacity, the contract
10 itself. They take that away from Mad Hatter and there's no
11 way that he can enter into a contract and make that request.
12 And if you can't make the request, the denial is just the
13 same by virtue of the fact they took it. And then later on
14 they said the reason we took it is because we're not going
15 to give you capacity.
16 MR. SAMARKOS: Your Honor, he's bootstrapping now.
17 Now he's backing off saying we didn't give notice, we didn't
18 make the request.
19 THE COURT: Okay. Anything else? Let me back up
20 and start over here. On the procedural due process counts,
21 I played devil's advocate with plaintiff's counsel in saying
22 that they were convincing me it was a jury question.
23 I'm going to reserve ruling on the procedural due
24 process counts in regards to whether or not the admitted
25 facts in this case establish, at a minimum, a procedural due

1 process violation and because I want to consider the case
2 law again. Nobody's given me any case law today with regard
3 to emergency situations, and I want to make sure that what I
4 said in my argument back to you all was, in fact, accurate.
5 MS. HALE: Your Honor, the case is Harris versus
6 City of Akron. I have tabbed the applicable provision, and
7 with all due respect, you weren't quite right on the money.
8 THE COURT: Okay. Well, that's why I'm backing up
9 here. I want to make sure I am.
10 MS. HALE: If there is an emergency situation,
11 then all we have to provide is a meaningful post-deprivation
12 process.
13 THE COURT: What did I say?
14 MS. HALE: Well, you said --
15 THE COURT: I didn't use the word "meaningful."
16 MS. HALE: Well, no. But you did say that there
17 could be an automatic right to nominal damages if there was
18 no proof. I thought you said that at least.
19 THE COURT: I think there's two defenses you
20 offer. One is that the same results would have occurred
21 regardless of whether or not you gave the person notice.
22 The case law says under that theory, even if they find under
23 that case, they are entitled to nominal damages.
24 MS. HALE: I'll have to look at those cases again.
25 I was looking at City of Akron versus -- or Harris versus

1 City of Akron. If they find there's an emergency --

2 THE COURT: But what you're talking about, an

3 emergency situation, is something separate and apart.

4 MS. HALE: Clearly that they had a

5 post-deprivation remedy, they didn't use it, it was denied,

6 and they had the case dismissed for failure to prosecute.

7 THE COURT: What I'm suggesting is that I think I

8 was right in denying the motions. I am going to reserve and

9 take a look at the case law.

10 MS. MITCHELL: Your Honor, we've filed a

11 memorandum of law.

12 THE COURT: I've got it right here.

13 MS. MITCHELL: What distinguishes that case from

14 the facts in this case is there was no opportunity for a

15 hearing in this case. And there is --

16 THE COURT: I'll read it and see.

17 MR. BUHR: Your Honor, also with regard to the

18 emergency situation there's been a great deal of testimony

19 on their part that they were looking around for weeks

20 beforehand.

21 THE COURT: I understand that.

22 MR. BUHR: That doesn't cause an emergency. All

23 of a sudden --

24 THE COURT: Which is why I don't think it's

25 appropriate to --

1 MS. MITCHELL: Your Honor --
2 THE COURT: -- grant their motion for judgment as
3 a matter of law under that theory. I think that is a
4 circumstance and it's arguable.
5 MR. BUHR: Okay.
6 THE COURT: You won that argument.
7 MR. BUHR: Thank you.
8 THE COURT: With regard to the '91 breach of
9 contract, somebody may ultimately say that I am wrong, but I
10 think that the expressed provision that is alleged to be
11 breached here is the provision that says that Mad Hatter was
12 to build the interconnect. There were Florida cases on
13 point that basically said that if a party interfered with
14 another party's expressed obligation under the contract,
15 that it was a breach of contract. So the motion with
16 regards to the 1991 contract -- breach of contract claim is
17 denied.
18 The motion with regards to the '92 breach of
19 contract claim is granted.
20 MS. MITCHELL: Don't you mean the other way
21 around?
22 THE COURT: Motion with regard to the procedural
23 due process claim concerning Denham Oakes, I'll take that
24 under advisement again to consider the import of the
25 admitted facts in relation to that case. And the motion as

1 it relates to tortious interference claim is denied.
2 Bring the jury in.
3 Ms. Hale if you could give me a copy of that case
4 I would appreciate it.
5 MS. HALE: Harris versus City of Akron?
6 THE COURT: Yes.
7 (End of excerpt.)
8
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14 - - - - -
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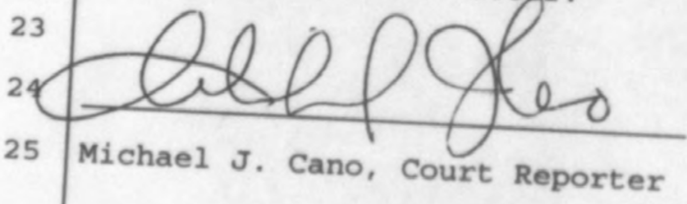
18
19 CERTIFICATE
20 I certify that the foregoing is a correct
21 transcript of the stenographic record of proceedings held in
22 the above-entitled matter.
23
24  5/8/97
25 Michael J. Cano, Court Reporter Date

93201

or.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC.,
a Florida corporation,

Plaintiffs,

vs. Case No. 94-1473-Civ-T-25E

PASCO COUNTY, FLORIDA, a
political subdivision of
the State of Florida,
DOUGLAS S. BRAMLETT,
Assistant Pasco County
Administrator,

Defendants.
_______________________________/

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND COMBINED MEMORANDUM OF LAW

COMES NOW the Plaintiff, Mad Hatter Utility, Inc. ("Mad Hatter") by and through its undersigned counsel, and request leave of court to file the attached Second Amended and Supplemental Complaint and Demand for Jury Trial. The purpose of the proposed amendment is to add a single count for purposes of clarification only. Although Mad Hatter has specifically pled that it was acting under extreme duress when it entered into the 1992 Long Term Bulk Wastewater Treatment Agreement (the "Permanent Agreement") with Pasco County ("the County"), Mad Hatter wishes amend the complaint to set forth a separate count based on duress which specifically sets forth alternative prayers for relief of rescission and reformation of the 1992 Agreement. This motion is not interposed for purposes of delay and will not operate to

prejudice any party to this action. The proposed amendment pleads no new factual allegations, nor does it interject any new legal theories into the case.

CERTIFICATE OF GOOD FAITH

By letter dated September 13, 1996, Plaintiff's counsel provided Pasco County's attorneys with a copy of the attached proposed Second Amended and Supplemental Complaint and Demand for Jury Trial. A copy of the letter is attached hereto as Exhibit "A". In accordance with Rule 3.01(g) M.D.Fla.Rules, the undersigned described the nature and intent of the proposed amendment and asked if Pasco County could consent to Mad Hatter's request to file the same. Counsel for Pasco County has notified Plaintiff's counsel telephonically that the County will not only oppose the request for leave to amend, but that it intends to file a third motion to dismiss in the event that the amendment is permitted.

MEMORANDUM OF LAW

This case was filed in September, 1994. The original complaint contained seven counts; one was dismissed. In November, 1995, leave to amend was granted and eight additional counts were added. The additional counts included claims arising out of events which transpired subsequent to the filing of the action, as well as causes of action which came to light during discovery. The amended complaint survived a second motion to dismiss intact. The parties are presently awaiting the Court's ruling on cross motions for summary judgment.

The amendment which Mad Hatter now wishes to make is not based on any new facts and does not interject any new legal theories into this litigation. Rather, the amendment is sought solely for purposes of clarification. From the inception of this case, Mad Hatter has taken the position that it acted under duress when it entered into the Permanent Agreement which

was foisted upon it by Pasco County. At Paragraph 64 of the original Complaint and Paragraph 64 of the Amended and Supplemental Complaint, Mad Hatter specifically pled that the Permanent Agreement was signed under duress. In addition, Mad Hatter has, in numerous motions, referenced the fact that the 1992 Permanent Agreement was entered into under duress. See Composite Exhibit "B". Additionally, in both its motions and arguments addressed to the Court, Mad Hatter has consistently taken the position that it is entitled to reformation or rescission of the Permanent Agreement. At page 2 of Plaintiffs' Reply Memorandum to Pasco County's Response to Plaintiffs' Motion for Preliminary Injunction and Motion for Leave to File Supplemental Complaint, Mad Hatter expressly stated: "It has always been the plaintiffs' position that the Permanent Agreement is the product of duress and, therefore, is unenforceable. Plaintiffs do not seek to rewrite an unfavorable contract, rather they seek the well recognized remedy of reformation."[1] Exhibit "C". Mad Hatter's entitlement to the remedy of reformation is discussed again at page 9 of that pleading.

Notwithstanding the fact that it is clear to all parties that Mad Hatter is seeking reformation or, alternatively rescission for breach of the 1992 Agreement by duress, Mad Hatter must candidly admit that the Amended and Supplemental Complaint is not itself a model of clarity in this regard. Accordingly, Mad Hatter wishes simply to perfect its pleadings. The defendants cannot claim that this formality introduces any surprises or in any way causes them any prejudice. In a Motion to Stay filed recently by Pasco County in a pending state court

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[1]Although this Court declined to consider the reply memorandum in connection with its determination of the request for preliminary injunction, this does not negate the fact that the reply was properly served on defense counsel.

action brought by the Lake Heron General Partnership against Mad Hatter and Pasco County, the County succinctly summarized Mad Hatter's claims in this case as follows:

> 2. . . . Mad Hatter alleges that acting under "extreme duress" it entered into an agreement with Pasco County on February 11, 1992 (the 1992 [permanent] agreement.
>
> 3. In Count I, Mad Hatter requests either a rescission or a reformation of the 1992 [permanent] agreement. . . .
>
> . . . .
>
> 5. In the federal case, Mad Hatter has alleged it entered into the agreements under duress and therefore they are subject to reformation. . . . The parties have engaged in extensive discovery in the federal action which is scheduled for trial November 4, 1996.

Exhibit "D", Pasco County's Motion to Stay filed in Lake Heron v. Mad Hatter Utility, Inc. and Pasco County, Pasco County Circuit Court, Case. No. 95-2958 CA/Y.

Examination of the discovery taken by Pasco County in the instant case conclusively confirms that the County is prepared to defend against Mad Hatter's duress claim. The Defendants' extensive questioning of both Larry DeLucenay and Janice DeLucenay relative to the duress claim illustrates this point. Composite Exhibit "E", Janice DeLucenay's Deposition at 20 - 30, Larry DeLucenay's deposition at 37 - 38. If there is any doubt that Pasco County fully understands and is prepared to defend against the Plaintiff's claim of duress, one need look no further than the County's own pleadings in this case. See for example, Exhibit "F", Defendants' Response to Plaintiffs' Motion for Expedited Consideration of and Supplement to Plaintiffs' Motion for Preliminary Injunction at 10-11.[2]

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[2]While they may characterize the plaintiff's reliance on the theory of duress as concocted, it is, nonetheless, clear that the defense understands the plaintiff's position and is prepared to defend against it.

Leave to amend is to "be freely given when justice so requires." Rule 15(a), Fed.R.Civ.P. As the Supreme Court forcefully stated in Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962), "this mandate is to be heeded." Discretion to grant or deny leave to amend lies with the district court, but "refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Id; Accord, Municipal Utilities Board v. Alabama Power Co., 925 F.2d 1385, 1394 (11th Cir. 1991). The policy underlying the rules is to promote full and complete adjudication of every dispute on the merits. Unless the rights of the adverse party would be unduly prejudiced, amendment is to be freely allowed. Foman, 371 U.S. 178, 83 S.Ct. 227.

In Gropp v. United Airlines, Inc., 847 F.Supp. 941 (M.D.Fla. 1994), Judge Kovachevich considered a strongly contested motion to extensively amend plaintiffs five count complaint. The proposed amendment would delete a plaintiff, add five additional plaintiffs, add a defendant, delete a count and insert, for the first time, a RICO claim. Judge Kovachevich analyzed the request under the liberal standard established under Rule 15(a) and the relevant case law. She reasoned that the amendment should be allowed to reflect the legal theory set forth by the plaintiffs in their memoranda. With regard to the addition of the RICO count, Judge Kovachevich specifically noted that:

> [T]he enlarged scope of coverage only adds specificity to the alleged acts and does not change their nature or substance. Under Eastman Kodak Co. v. Image Technical Services, ___ U.S. ___, 112 S.Ct. 2072 (1992), the Supreme Court affirmed the Court of Appeals' denial of a summary judgment where the lower

> court failed to consider all reasonable theories that *could* have been pled under the evidence. As Plaintiffs' amended claim for relief under RICO arises from the same general conduct as alleged in the initial complaint, it is feasible that this theory could have been pled under the evidence as presented by Plaintiffs under their original cause of action.

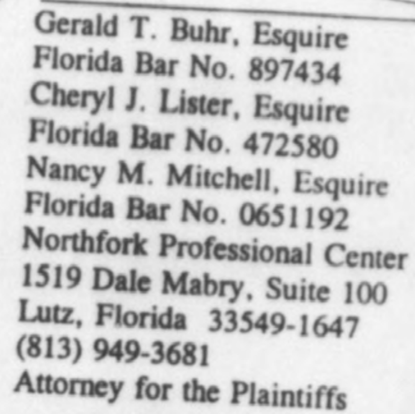
Gropp, 847 F.Supp. at 945 (emphasis in original). Judge Kovachevich observed further, that amendment is permissible even when the additional claim "is predicated on a new theory which is *inconsistent* with" allegations of the original complaint so long as no prejudice results to the opposing party. Id. (emphasis in original).

The amendment which Mad Hatter seeks leave to make is hardly on the scale of the amendment allowed in Gropp. Mad Hatter seeks only to specifically plead its entitlement to reformation or, in the alternative, rescission of the 1992 Permanent Agreement which was entered into by Mad Hatter under extreme duress. As demonstrated above, Defendants fully understand this to be a theory upon which Mad Hatter is relying and they have crafted their discovery accordingly. Under these circumstances, it would be an abuse of discretion not to allow the amendment. Foman v. Davis, supra; accord, Thomas v. Town of Davie, 847 F.2d 771, 773 (11th Cir. 1988).

WHEREFORE, Mad Hatter requests leave to file the attached Second Amended and Supplemental Complaint and Demand for Jury Trial.

Respectfully submitted, this 18th day of September, 1996.

GERALD T. BUHR, P.A.

By: 

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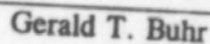
Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished by U.S. Mail to Marion Hale, Esquire, Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., P.O. Box 1368, Clearwater, Florida, 34617, on this 18th day of September, 1996.



Gerald T. Buhr

93201

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC.,
a Florida corporation, and
LARRY DELUCENAY,
President of Mad Hatter
Utility, Inc.

Plaintiffs,

v. Case No. 94-1473-CIV-T-25(E)

PASCO COUNTY, FLORIDA, a
political subdivision of
the State of Florida, and
DOUGLAS S. BRAMLETT,
Assistant Pasco County Administrator,

Defendants,

______________________________________/

ORDER

THIS MATTER is before the court on the Motion For Leave To File Second Amended Complaint (Doc. 149). In response to the court's request, the Plaintiffs have filed a Memorandum of Law in Response to Court's Demand for Showing of Evidentiary Basis for Claim of Duress. (Doc. 161). The County has filed pleadings in opposition. (Doc. 150).

While amendment pursuant to Rule 15, Fed. R. Civ. P. is to be freely given when justice requires, this court declines to allow the proposed amendment in this instance. Plaintiffs have offered no excuse for their failure to address this issue before the eve of the trial. The submission made in support of the motion establishes

AO 72A
(Rev. 8/82)

that the interests of justice do not require this court to allow Plaintiffs to add the equitable counts of rescission or reformation.

Duress is a product of the mind "produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition." City of Miami v. Korey, 394 So.2d 494, 497 (Fla. 3d Dist. Ct. App. 1981) (quoting Herald v. Hardin, 116 So.2d 863,864 (Fla. 1928). A plaintiff claiming duress must necessarily establish that his condition of mind is the product of the improper conduct of the opposing party. Here, Plaintiffs blame the Florida Department of Environmental Protection, the Florida Department of Health and Rehabilitative Services, the Florida Public Service Commission, the Florida Game and Freshwater Fish Commission, as well as the County for its decision to sign the 1992 agreement. None of these agencies are defendants and proof of their allegedly coercive action against the Plaintiff certainly is not proof supporting the duress claim against the County.[1]

There is no basis whatsoever to support a new claim for reformation. There is no excuse for the late filing of the request regarding rescission nor is there an arguable basis to support such a claim. Giving Plaintiffs every benefit of the doubt, the court concludes that the Plaintiffs' Motion is unexcusably untimely and that the interest of justice do not require the amendment.

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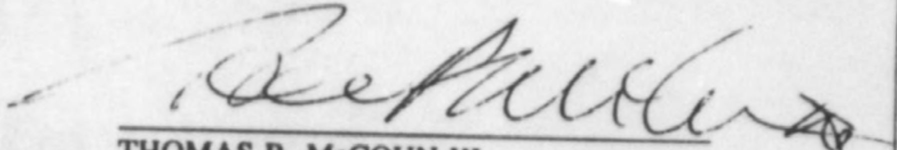
[1] The court would note that Plaintiffs' claim of conspiracy was long ago dropped by the Plaintiffs.

AO 72A
(Rev. 8/82)

Accordingly, the Motion For Leave To File Second Amended Complaint (Doc. 149) is DENIED.

Done and Ordered in Tampa, Florida this 18th day of October, 1996.



THOMAS B. McCOUN III
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Cheryl J. Lister, Attorney for Plaintiff
Marion Hale, Attorney for Defendant

AO 72A
(Rev. 8/82)

1 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
2 TAMPA DIVISION

3

4

5	MAD HATTER UTILITY, INC., a Florida Corporation, et al.,	) Case No. 94-1473-CIV-T-25E
6		)
	Plaintiffs,	)
7		)
	vs.	) September 3, 1997
8		) Tampa, Florida
	PASCO COUNTY, a political	)
9	subdivision of the State of Florida, et al.,	)
10		)
	Defendants.	)
11		)
	-----------------------------	)

12

13

14

15 TRANSCRIPT OF TAPE-RECORDED STATUS CONFERENCE
BEFORE THE HONORABLE THOMAS B. McCOUN, III,
UNITED STATES MAGISTRATE JUDGE

16

17

18

19 Appearances of Counsel:

20 For the Plaintiffs: Mr. Gerald Buhr
(Appearing by telephone)
21 Ms. Cheryl Lister
(Appearing by telephone)

22

For the Defendants: Ms. Marion Hale
23 Mr. Charles Samarkos

24

Transcribed by: Dennis Miracle
25 Official Court Reporter

1 P R O C E E D I N G S

2 THE COURT: Good morning.

3 MR. BUHR: Good morning.

4 THE COURT: How are you?

5 MR. BUHR: Fine. How are you?

6 THE COURT: Good.

7 Who do we have on the phone?

8 THE DEPUTY CLERK: Mr. Buhr.

9 THE COURT: Mr. Buhr?

10 MR. SAMARKOS: And Cheryl.

11 MS. HALE: And Ms. Lister.

12 THE COURT: I set this for a status conference so
13 that we could get pointed in the direction of a trial date
14 and to briefly talk about anything else that we needed to
15 talk about today.

16 And then Mr. Buhr's office contacted us yesterday
17 to indicate that they are substituting in new counsel, or
18 something, and asked that we extend or pass this hearing for
19 a week or two. And I just thought it would be better,
20 frankly, if we just held the hearing and figure out where we
21 are.

22 MR. BUHR: Okay.

23 THE COURT: We have pencilled this in for trial the
24 first two weeks in January. I'd like to keep that date, if
25 we can, simply because we've got that block of time

1 available.

2 Do you all know what your schedule looks like right

3 after the first of the year?

4 MR. SAMARKOS: Judge, I had contacted your office

5 about the first week of January. January 6th specifically is

6 Epiphany in the orthodox religion. I'm a board of director

7 on my church, and I'm also the ahead of our Epiphany

8 committee. I have not missed an Epiphany since I was about

9 two years old.

10 THE COURT: I wouldn't want you to miss one.

11 MR. SAMARKOS: Ms. Hale has informed me that if

12 we're going on January 6th, I'm going to be here at the trial

13 but it is --

14 THE COURT: Do you dive for the cross still, or are

15 you too old for that?

16 MR. SAMARKOS: No, I'm too old for that.

17 (Laughter.)

18 MR. SAMARKOS: I did that before --

19 THE COURT: Did you ever win?

20 MR. SAMARKOS: I didn't win.

21 MS. HALE: No, no. We can guarantee that.

22 MR. SAMARKOS: I tell everybody I came in second

23 along with 40 other guys.

24 THE COURT: Is that a one day --

25 MR. SAMARKOS: That's just the one day on January

1 6th.
2 THE COURT: We could take a recess that day, if we
3 had to.
4 What day is the 6th?
5 MS. HALE: It's Tuesday.
6 MR. SAMARKOS: It's Tuesday.
7 THE COURT: Tuesday?
8 I'm aware of that. If we had to, we could take a
9 one-day recess.
10 Mr. Buhr, from your all's standpoint, are you all
11 staying in this, or are we getting new counsel, or what's the
12 deal?
13 MR. BUHR: At this point it looks like we're going
14 to have new counsel. We'll probably have a peripheral --
15 (inaudible) -- but we won't be doing the work towards trial
16 or anything else, the way it stands right now. We haven't
17 finalized everything, but that's the way it appears at the
18 moment.
19 THE COURT: Okay.
20 MS. HALE: Can we be told who the new counsel is?
21 THE COURT: Do you know who the new counsel is
22 going to be?
23 MR. BUHR: Yeah. It's Bill Moore from Brigham,
24 Moore.
25 MS. HALE: Is that Ben Moore?

1 THE COURT: Bill Moore, right.
2 MS. HALE: Brigham, Moore?
3 THE COURT: Okay. Is Mr. Moore present with you?
4 MR. BUHR: No.
5 THE COURT: Okay.
6 MR..BUHR: He wasn't able to link up today. Larry
7 is going to want to get an extension, and I -- I don't know
8 what his calendar is going to be like in January, but I'll
9 let him address that when he steps in.
10 THE COURT: All right. Well, we can work around
11 Mr. Samarkos' concerns if we have to, but that's a clear
12 two-week block right now for us, so we would propose to put
13 it on that date, to begin that Monday, which I guess is the
14 5th, and allow two weeks, although I hope it doesn't take
15 that long.
16 MR. BUHR: Okay.
17 THE COURT: Judging from your response -- or your
18 pleadings in regards to the matter of the injunction, it does
19 appear that you wish to pursue the matter of damages. I read
20 your pleadings in regards to the responses two ways -- in
21 regards to the injunction two ways: One, you want to -- you
22 don't want to give up any appellate issues you may have on my
23 setting aside the larger verdict amount that was previously
24 awarded.
25 But in addition to that, you still believe that

1 you're entitled to damages as well as equitable relief. If
2 that's the position, then in line with what I previously did
3 in setting aside that jury award we will calendar that issue
4 along with the takings issue for trial and allow you to
5 produce what evidence you wish on the matter of damages.
6 And if that's the case, it just seems to me that
7 we're going to have to wait on the entry of the judgment,
8 including the matter of the injunction, until that time. It
9 doesn't make sense to me to enter a partial final judgment at
10 this point that does not include those matters.
11 If you're in a position to wrap up the procedural
12 due process claim, then it would seem to me it would make
13 some sense to go ahead and enter a partial judgment and leave
14 the matter of the takings for a separate trial, and we'll let
15 you start working in the Eleventh Circuit.
16 But if we're going to pursue damages, then it's my
17 intention to defer entry of the final judgment until after we
18 have the trial on that issue.
19 MS. HALE: Are you anticipating --
20 MS. LISTER: My only question, Judge, would be the
21 extent that it could impact o: -- unless we know what the
22 scope -- what the injunction is going to look like, I don't
23 know if we can calculate what our damages are going to be.
24 THE COURT: Well, one of the things that I wanted
25 to suggest was that -- and I presume this would be up to new

1 counsel -- but at some point prior to the scheduled day,
2 we're going to need to have a hearing on the matter of the
3 damages on that count so that we can -- I'll take argument.
4 My thought is, frankly, that you would -- and I
5 felt all along that, for instance, in relation to any lost
6 revenues you might claim from the school, that you could
7 claim that up to the point where the Court enters some type
8 of equitable relief; and then after that, it just doesn't
9 appear to me to be appropriate at all to allow you to claim
10 damages out into the future.
11 MS. LISTER: I understand and I think -- I don't
12 know that we disagree with that.
13 My question was, you know, depending on the kind of
14 equitable relief, we asked for two kinds -- we have suggested
15 two scenarios: One would be the county would continue to
16 give Mad Hatter service under the contract at county
17 facilities; and the other one would be, okay, Mad Hatter is
18 going to serve those, but there has got to be a period of
19 time of transition. And during that transition, there would
20 be a period of time where Mad Hatter wouldn't be serving;
21 that they might be able to collect damages because the county
22 would have to continue to serve in the -- during a transition
23 period where Mad Hatter would bring a plant on line which
24 could take several years.
25 THE COURT: Well, frankly, the former position is a

1 lot more -- made a lot more sense to me than the latter.
2 If you look back at the contract, although the
3 county disputes that this particular area was a part of that
4 contract that they were obligated to provide services for,
5 it's pretty clear I think when you put it into context that
6 the county at that point in time contemplated providing new
7 services.
8
9 There's some language from Mr. Gallagher before the
10 commission indicating that, in fact, as new business came on,
11 the county would be in a position to service it if it has the
12 capacity.
13 MS. LISTER: Okay.
14 THE COURT: And if, in fact, the county has the
15 capacity, there's some appeal to that.
16 MS. LISTER: -- (inaudible) -- coming out, but
17 our -- and our damages would be far more minimal --
18 THE COURT: Right.
19 MS. LISTER: -- that way.
20 THE COURT: Right.
21 On the other hand, there's some -- the county's
22 position with regards to the matter of the injunction, which
23 would propose a much more narrow equitable relief, has some
24 support.
25 The thing I question about the county's position in
reality, though, is whether or not granting a new hearing,

1 frankly, is in any sense relief at all. I think the county
2 has made it very clear their positions and intentions with
3 regards to Mad Hatter.
4 And, frankly, it just seems to me that to simply
5 say go back and let them have a hearing may not be any remedy
6 at all. It seems to me that something beyond that would be
7 necessary.
8 And I'm not going to reach that point until -- if
9 we're going to go after damages on the county. I'm not
10 stopping you; I'm not suggesting you don't have a right to do
11 that. I think that you do if you want to do that.
12 What I am suggesting is we're not going to enter a
13 partial judgment at this time. We're going to defer until we
14 have had the trial and then we'll just enter one, one
15 judgment.
16 MS. HALE: You're contemplating that the trial
17 would be both the taking plan and damages on Count 8?
18 THE COURT: Yes. Right.
19 MS. LISTER: What was -- I'm sorry. I didn't catch
20 the last -- our phone is breaking up --
21 THE COURT: It's not your fault; it's on this end.
22 This speaker phone is -- although brand new, it's not working
23 worth a darn.
24 In my contemplation, we just have one trial to
25 clean up the remaining issues on damages.

1 MS. LISTER: Okay.
2 THE COURT: Ms. Hale was questioning that and I --
3 we have to have a trial on the matter of the taking.
4 MS. LISTER: And our only question is, you know,
5 having some guidance on what the injunction is going to look
6 like, because until we know what that looks like, it's hard
7 to frame our damages.
8 THE COURT: All right.
9 MR. SAMARKOS: We're going to have 12 people decide
10 the damages count on Count 8?
11 THE COURT: Right. That's my proposal.
12 MS. HALE: We asked for 12 people to begin with --
13 (inaudible) --
14 THE COURT: What else is out there that I have
15 missed? It seems to me that --
16 MR. SAMARKOS: Judge, I think one of the things
17 with your order is that we're going to need to see what their
18 expert comes up with fairly quickly, because in our minds
19 there's still outstanding issues that relate to the damages
20 that they are going to be able to seek even in light of your
21 amended order.
22 And if we're going to have a trial date in January,
23 I am going to tell you from now that I don't want to have
24 happen what happened the last time, which is the expert keeps
25 changing his opinions right up through trial.

1 MS. HALE: We're also -- just so everybody knows,
2 we are filing a motion for rehearing on your -- even on your
3 amended order. We have some issues that -- such as we
4 stopped taking any flow from the Plaintiff on December 4th of
5 '91 as opposed to February of '92. A couple issues like that
6 that we think need to be clarified.
7 So, we're going to end up -- again, we're going to
8 be asking to file a motion on that subject. We have delayed
9 any discovery pending a ruling on our motion for rehearing on
10 the original order of taking.
11 We don't want a situation like Mr. Samarkos just
12 suggested where we keep getting changes in the expert
13 testimony like we did last time.
14 THE COURT: Do both sides know who their experts
15 are going to be on the matter of the taking?
16 MR. BUHR: Not yet, Your Honor.
17 I just wanted to mention I only got about 10
18 percent of what Ms. Hale said there but --
19 THE COURT: She's going to file a rehearing -- a
20 motion for rehearing on the matter of my amended takings
21 order --
22 MR. BUHR: Okay.
23 THE COURT: -- which I suppose it could cause me to
24 change the order, which would have some impact on what your
25 experts do; but I think you all ought to be moving out and

1 obtaining the services of experts.
2 MR. BUHR: All right. We intend to do that. We
3 just didn't want to commit ourselves to an expert that the
4 Brigham firm wouldn't prefer to work with. It is more their
5 bailiwick than ours.
6 THE COURT: How long does each side think they'll
7 need to obtain an expert? I think we ought to exchange the
8 identities of the experts relatively quickly.
9 MR. BUHR: All right. Well, I don't know offhand,
10 but they should be on board by next week. And perhaps it
11 would be that we -- that we can perhaps -- everybody could
12 touch base shortly thereafter and talk about the time
13 schedules and so on.
14 I'm sort of hesitant to try and commit them to
15 something that maybe I would do that they would have more
16 problems doing.
17 MR. SAMARKOS: Judge, our expert is going to --
18 part of it is going to depend on what their expert eventually
19 opines.
20 We had Mr. Moses in our last case, and we would
21 anticipate using him; but we may reserve the right to have
22 somebody else because we don't know exactly what their expert
23 is going to say on the damages.
24 MR. BUHR: I will not agree that it would be
25 appropriate for them to choose their expert after our expert

1 has already been disclosed and presented his report. That
2 kind of goes contrary to what he said about us choosing an
3 expert.
4 THE COURT: I think he's already disclosed his
5 expert to be Mr. Moses.
6 MR. BUHR: I didn't know that that's what he said.
7 What I could hear, which was probably about 50
8 percent, was that he didn't know what they were going to do
9 until he saw our expert's report.
10 If Mr. Moses is going to be their expert, then
11 fine.
12 MR. SAMARKOS: What I said, to make it clear, was
13 that we anticipate using Mr. Moses. However, until we see
14 your expert's report, we don't know whether Mr. Moses is
15 going to be able to testify about all the issues your expert
16 may allege are damages.
17 MS. HALE: We may use Mr. O'Connor as another
18 possibility in conjunction with Mr. Moses.
19 MR. BUHR: Well, then, we'll reserve the right
20 to -- (inaudible) -- expert ourselves because if -- this
21 thing goes on and on and on, and I think if we're going to
22 be -- (inaudible) -- we need to do it in a fairly quick
23 manner, but I think both sides need the same thing.
24 This is not a new case. Everybody knows what the
25 issues are. Everybody knows what the elements of damage are.

1 I anticipate they are not going to be able to put together
2 their report until our report is done, but I
3 think -- (inaudible) -- with the time we have left -- we're
4 looking at January -- it could take a week to a month for an
5 expert to put together a report. That's presuming we -- you
6 know, we're looking at November before we have, you know, a
7 full report. If they're going to do a report in December,
8 we're not going to know at that point?
9 I think the time limit is pretty critical here if
10 we're going to stick with a January deadline.
11 THE COURT: Well, it seems to me that allowing four
12 to six weeks for the expert to get up to speed to put his
13 opinions together would put you in the middle of October; and
14 that still leaves you a pretty good amount of time until the
15 end of the year in order to take depositions. It just
16 doesn't seem that insurmountable to me.
17 MR. BUHR: Well, I guess --
18 THE COURT: You know, if we get into this later in
19 the fall and it's not workable, then you can come back to me,
20 but, frankly, I want to get rid of this case. You all have
21 raised dozens of issues that's not going to be resolved,
22 apparently, until this case gets up to the Eleventh Circuit.
23 We need to wrap it up on this end and let you all take your
24 appeal and see what happens.
25 It's taking up an inordinate amount of my time, and

1 I'm sure it's taking up an inordinate amount of your time. I
2 just want to get it wrapped up as soon as possible.
3 It doesn't seem insurmountable with the time period
4 we've got until January to wrap this up so...
5 MR. BUHR: (Inaudible.)
6 THE COURT: If we get into the fall and it's not
7 working, then you'll have to come back; but it seems to me
8 certainly within the next three weeks or so there ought to be
9 an exchange of the proposed experts on this, the names. You
10 all ought to talk about it and set up a schedule to -- wnen
11 you can exchange your reports, when you can take depositions.
12 Where is Mr. Moore located? I may know him, but I
13 don't know that I do.
14 MR. BUHR: His office is in Sarasota, but his firm
15 has an office here in Tampa and probably -- (inaudible) --
16 for the inverse condemnation section.
17 THE COURT: Okay. Well, I'm sure I'll learn a lot,
18 then.
19 MR. BUHR: I certainly have learned a lot from him.
20 THE COURT: What else do we have?
21 MR. BUHR: I don't know if there's anything else --
22 (inaudible) -- other than the -- (inaudible) -- we still
23 haven't had the amount set yet, and we -- (inaudible) --
24 information on it.
25 THE COURT: I know. I keep putting that on my

1 to-do list.

2 MR. BUHR: -- (inaudible) -- it's not nearly as

3 important as everything else we have been doing, so I

4 certainly understand.

5 THE COURT: All right. Other than that, anything

6 else that's still out here?

7 MS. HALE: Are we going to get a date from the

8 Court as to when experts -- we should get disclosure of their

9 experts?

10 THE COURT: Let's talk about this. I'd rather have

11 you work on something that's agreeable to you all.

12 How quickly should we have a cutoff for disclosing

13 experts? I mean, Mr. Buhr --

14 MR. BUHR: I was thinking we could just hold off

15 long enough for Bill Moore to get involved in the case. I'm

16 sure he'll work with Marion on it and Charles. I just hate

17 to set dates that are going to be difficult for him to work

18 with. He may want even quicker dates. I don't know. I

19 just -- I feel uncomfortable, since we're going to have such

20 a minor role in this thing, to be establishing dates he's

21 going to have to live with in the future.

22 If we could just hold off a while, I think maybe

23 they can file some sort of joint motion on this issue.

24 THE COURT: When are you filing your motion for

25 rehearing?

1 MS. HALE: The research is supposed to come to me
2 by the end of the week, so end of the week, early next week.
3 It's really very finite issues. We think if
4 there's a taking, it has to end with our actual physical
5 taking of the sewage, and so that's just a factual issue for
6 you to resolve.
7 There are a couple of other small issues like that.
8 Some, we're still looking at whether -- like can you get lost
9 profits on an inverse condemnation? You cited the statute;
10 we need to look at that question.
11 MR. BUHR: I can't hear anything that's being said
12 there but --
13 THE COURT: She's --
14 MR. BUHR: -- I'm sure you can fill me in on that.
15 THE COURT: She's proposing -- I wanted to know
16 when she was going to file her motion for rehearing, and she
17 just outlined some of the areas. There's some small,
18 specific areas that they want to address. She suggested that
19 probably it will be filed next week.
20 MR. BUHR: Okay.
21 MR. SAMARKOS: Judge, when we're looking at these
22 experts for this damage analysis, I want to make sure that --
23 the order is pretty clear to me: There are no damages post
24 February 11th of '92 under your order. Isn't that correct?
25 THE COURT: Well, except as some expert might

1 suggest a loss of fair market value of the utility as a
2 result of the taking -- as of the date of the taking.
3 MR. SAMARKOS: So, you're talking about the day
4 before and the day after the taking?
5 THE COURT: Yeah. It seems to me that they can --
6 I'm not sure how their expert is going to propose it, to
7 calculate the damages.
8 MR. SAMARKOS: Well, that's one of the concerns, is
9 that we're going to have different --
10 THE COURT: Well --
11 MR. SAMARKOS: -- issues of damages that we're
12 looking at.
13 THE COURT: Well, I would suggest -- I'm sure that
14 their estimation of damages is going to be broader than yours
15 but...
16 MR. BUHR: I have no doubt that once we present our
17 damages, we'll be hearing from Mr. Samarkos on it because
18 I -- if we try and predict today what an expert is going to
19 do, I think it's -- (inaudible) -- is not going to accomplish
20 anything.
21 THE COURT: All right. I think at the outside by
22 September 19th both sides ought to be able to exchange the
23 identity of their proposed experts on this matter.
24 MR. BUHR: Okay.
25 THE COURT: That gives you two and a half weeks,

1 roughly.

2 Frankly, I would hope that the parties can --

3 counsel can work it out in terms of the date for exchanging

4 the reports and scheduling the depositions.

5 If you can't, then somebody can file a short motion

6 and I'll set a schedule on it; but I'd prefer to let you all

7 do that yourselves.

8 MR. BUHR: I'm sure that we can work together on

9 that.

10 THE COURT: All right.

11 MR. SAMARKOS: I'm assuming, Judge, that our --

12 they will disclose their expert. He will prepare his

13 opinion. I'll depose him. My expert will prepare his

14 report. They will depose him.

15 MR. BUHR: I think the way it should work is we

16 prepare the report, submit it. You submit your report and

17 then we can submit a rebuttal. Then we go to depositions.

18 I think if we try to get out of that framework, you

19 know, it's going to give them an incredible advantage over

20 us.

21 THE COURT: Well, this is what I want you to try to

22 work out. Exchange the names by the 19th, and then discuss

23 how you're going to proceed on the matter in terms of the

24 exchange of the reports and the depositions.

25 If you can't work it out, then let me know and I'll

1 issue an order. But I prefer to let you all work it out
2 yourselves than me have to do it.
3 MR. BUHR: That's what we prefer as well.
4 THE COURT: All right.
5 MR. SAMARKOS: I prefer you rule on it. I lose...
6 MR. BUHR: (Inaudible.)
7 THE COURT: Okay. Anything else?
8 MR. BUHR: Nope.
9 MS. HALE: You anticipate ruling on the injunction
10 issue prior to the trial, I presume?
11 THE COURT: I think what I am hearing Ms. Lister
12 say is that they need that in order to determine the scope of
13 their damages. If we have to do that, if that's necessary,
14 yes, I'll do that.
15 Frankly, it's going to take the form, it seems to
16 me, of something in the nature of what the county -- or what
17 Mad Hatter proposed by its first proposal.
18 MR. SAMARKOS: Where the Court enters an injunction
19 requiring us to treat --
20 THE COURT: Provide the treatment.
21 MR. SAMARKOS: Do we get to charge for that?
22 THE COURT: (Inaudible.)
23 MS. HALE: Well, we would not have damages --
24 THE COURT: It would operate the same way
25 anticipated -- that it would have anticipated to have

1 occurred under the '92 agreement.

2 MS. HALE: But we would not be --

3 THE COURT: Alternatively, the -- you know, it will

4 take the form something in the nature of what you all

5 proposed but something more than that, because just, quite

6 frankly, it just doesn't strike me, in light of the evidence

7 I have heard up to this point -- I mean, you've got the guy

8 that was the former head of the county commission saying he

9 wants to put the company out of business. Just allowing for

10 another notice and an opportunity to be heard doesn't strike

11 me as being an adequate remedy.

12 MR. SAMARKOS: He's not on the commission anymore.

13 THE COURT: Oh, he's not?

14 MR. SAMARKOS: No.

15 MS. HALE: Who said he wanted to put them out of

16 business?

17 THE COURT: Mister -- what was his name?

18 MR. SAMARKOS: I don't think he put -- I don't know

19 if it was that term. It was Mike Wells.

20 THE COURT: He was saying he would like to see them

21 out of business. But anyway --

22 MS. HALE: Well, you don't anticipate, if you

23 required us to continue service, that we would be liable for

24 damages during that time, do you?

25 MR. BUHR: I couldn't hear that.

1 THE COURT: If, in fact, the injunction involved
2 something close to what you proposed in your first
3 alternative, it would not be my thought that you could claim
4 damages thereafter.
5 MR. BUHR: At this point I can't see how we could
6 disagree with that; but until we see the actual order, it's
7 kind of hard for us to say what the different areas are.
8 We're certainly not going to try and plug damages
9 for after we receive service which is --
10 THE COURT: I tell you what --
11 MR. BUHR: -- (inaudible) -- but like I said --
12 THE COURT: -- we'll set a hearing sometime in
13 December, prior to the trial, after -- we've got -- our last
14 jury trial is calendared for December 8th, I believe.
15 Sometime after that we'll calendar the matter down
16 for a hearing. It might be the very first -- excuse me --
17 the very end of the year there, but we'll work with you all's
18 calendar. We'll set something down so that we can resolve
19 that issue.
20 By then, your experts will have all their opinions
21 in and we'll be able to make some kind of --
22 MS. LISTER: My only question is, are we to include
23 this in our expert's report? Because our expert report will
24 be due sometime before that. Are those reports just going to
25 the valuation on the taking?

1 THE COURT: I was thinking about it in terms of the
2 taking, but I mean the -- I think if you're going to
3 introduce testimony with regards to the matter of your
4 damages for the procedural due process claim, the county has
5 got a right to take depositions on that.
6 MS. LISTER: Okay. But that doesn't need to be
7 included in the report? I'm just trying to --
8 THE COURT: I think if it's part of an expert
9 opinion that you -- yes, I think it does.
10 MS. LISTER: Okay.
11 THE COURT: And I don't know that this --
12 MS. LISTER: I think if we talk about the scope of
13 the taking again -- or the scope of the injunction again
14 until after, our expert report will probably be due --
15 THE COURT: Right, and I don't think that --
16 MS. LISTER: We'll just assume that you're probably
17 going with the first alternative and calculate our damages in
18 that fashion.
19 THE COURT: It seems to me that I have said from
20 day one that the remedy there appears to me to be intended to
21 be equitable; and it would seem to me that after the point in
22 time that you get equitable relief, you should not be
23 authorized to make a claim for damages, so...
24 MS. LISTER: Okay. We'll move forward with that in
25 mind and assume that you're not going to order Mad Hatter to

1 build a treatment plant out there. We'll go forward with
2 that in mind. And if something changes, then we'll have to
3 regroup, I guess.
4 MR. SAMARKOS: I don't know that we would agree
5 that he's not going to say you don't have to build a
6 treatment plant.
7 MR. BUHR: That was alternative one.
8 MS. LISTER: Then that's our predicament. We
9 can't --
10 MR. BUHR: There's a big difference.
11 MS. LISTER: Experts are very expensive, and we
12 don't want to put somebody through an exercise they don't
13 need to go through.
14 But if our expert reports are due in mid-November,
15 then we're going to have to -- and the county is still taking
16 the position that they -- apparently that we might have to
17 build a plant, then we're going to have to go through the
18 whole exercise.
19 THE COURT: I think you should anticipate the
20 former remedy as being the one that the Court would likely
21 adopt, if it adopts your thoughts on the matter.
22 MS. LISTER: All right. We will do that.
23 THE COURT: Okay.
24 MS. HALE: One thing the Court ought to be aware of
25 is that Sunfield Homes, which is not present today, has

1 repeatedly said that if the Court enters an injunction, that
2 they are going to take it up right away. I just want the
3 Court to be aware of that. That issue, then, will be up on
4 appeal as we're dealing with the collateral issue of damages,
5 and I don't know that --
6 THE COURT: Maybe not.
7 MS. HALE: Pardon?
8 THE COURT: Maybe not. My injunction may not -- we
9 may have some hearings on the matter where I may set the
10 scope of damages, but I'm not so sure that my injunction is
11 going to come out until everything -- until the final
12 judgment comes out and then you ultimately take everything
13 up; okay? I want to get the case over with in toto.
14 So, I think what we probably should do is have some
15 hearing -- I anticipate we're going to have some pleading
16 filed by one side or the other. The fact that the other side
17 -- (inaudible) -- the last time anyway, so I'm just telling
18 you we'll do that at the end of December, because I don't
19 know that I'm going to enter an injunction prior to that
20 point. I want this going up one time.
21 MS. HALE: So do we.
22 THE COURT: Okay. Anything else?
23 MR. BUHR: That's it.
24 THE COURT: All right. Thank you all. Have a nice
25 day.

1 (Thereupon, the proceedings in this case for this
2 date were concluded at this time.)
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20 C E R T I F I C A T E
21 I hereby certify that the foregoing is an accurate
22 transcription of proceedings in the above-entitled matter.
23
24
25 Official Court Reporter 9/4/97 Date

9320!

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC.,
a Florida corporation, LARRY
DeLUCENAY, President of
Mad Hatter Utility, Inc.

Plaintiffs,

vs.

Case No. 94-1473-Civ-T-25E

PASCO COUNTY, FLORIDA, a
political subdivision of
the State of Florida,
DOUGLAS S. BRAMLETT,
Assistant Pasco County
Administrator,

Defendants.
______________________________/

PLAINTIFF'S MEMORANDUM REGARDING ENTRY OF INJUNCTIVE RELIEF

I. INTRODUCTION

COMES NOW the Plaintiff, Mad Hatter Utility, Inc. ("Mad Hatter", by and through its undersigned counsel and files this memorandum for the purpose of assisting the Court in fashioning an order of injunction based on the jury's finding of liability on the procedural due process claim set forth in County VIII of the Amended and Supplemental Complaint. There are essentially two alternative forms of equitable relief which are possible: (1) Pasco County ("the County") can be directed to provide capacity to Mad Hatter for the existing Denham Oaks and permitted Oak Groves project pursuant to the terms of the Permanent Bulk Wastewater Treatment Agreement ("the 1992 Agreement") or, (2) the Court can frame an injunction which allows for a period of transition during which the County would continue to

provide utility service to the Denham Oaks/Oak Groves project while Mad Hatter takes the steps necessary to bring its own water and wastewater treatment facilities on-line. Under the first scenario, the County would continue to provide utility service to the Oak Groves, PUD through Mad Hatter pursuant to the 1992 Agreement. Under the second alternative, Mad Hatter would ultimately become the direct provider of utility services to the area. Additionally, Mad Hatter should receive an award of monetary damages as compensation for lost revenues during the total period of time in which Pasco County has provided service to the Denham Oaks Elementary School and the Oak Groves PUD. *See, Malkentzos v. DeBuono*, 923 F.Supp. 505, 517 (S.D.N.Y. 1996)("A monetary award 'incidental to or intertwined with injunctive relief' may be equitable rather than legal.")(*citing Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 548, 571 (1990)); *Eidie v. Sarasota County*, 908 F.2d 716, 722 (11th Cir.)(In the case of an as applied challenge to a zoning decision, the proper remedy is injunctive relief and/or damages) *cert. denied*, 498 U.S. 1120 (1990). Damages are properly awarded in equity to the extent necessary to make the injured party whole. *See, Brewer v. Chevin*, 938 F.2d 860, 864 (8th Cir. 199).

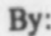
For its part, the County continues to argue that the only thing the Court can do in the face of the jury's determination that Mad Hatter's procedural due process rights were violated is to send the matter back to the Pasco County Board of County Commission for a hearing. This position finds no support in the law. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Supreme Court held that section 1983 guaranteed damages to a plaintiff who could establish actual damages. The underlying premise of Court's holding was that damage awards should be based on the compensation principle. *Id.* at 255. Writing for the Court,

V. CONCLUSION

For the reasons set forth herein, Mad Hatter submits that the most practical form of injunction is one which directs the County to provide capacity for the Denham Oaks/Oak Groves project pursuant to the terms of the 1992 Agreement. This alternative is well within the Court's equitable powers and the most cost effective for all concerned. Mad Hatter submits further that it is also within the Court's power to direct that Mad Hatter be compensated monetarily for lost profits and any other monetary losses the utility has suffered at the hands of the County which will not be adequately redressed by injunctive relief alone.

Respectfully submitted this **24th** day of **June, 1997.**

GERALD T. BUHR, P.A.



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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAD HATTER UTILITY, INC., a Florida corporation, and LARRY DELUCENAY, President of Mad Hatter Utility, Inc.,	
Plaintiffs,	CASE NO: 94-1473-CIV-T-25(E)
vs.	
PASCO COUNTY, a political subdivision of the State of Florida and DOUGLAS S. BRAMLETT, Assistant Pasco County Administrator,	
Defendants.	Tampa, Florida January 3, 1996

PRELIMINARY INJUNCTION HEARING
TESTIMONY OF LARRY G. DeLUCENAY
BEFORE THE HONORABLE TOM McCOUN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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P R O C E E D I N G S

(Excerpt of proceedings.)

1 MR. GRANTHAM: Call Larry DeLucenay.
2 THE COURT: Mr. DeLucenay, come forward and be sworn
3 please, sir.
4 THE CLERK: Raise your right hand.
5 PLAINTIFF'S WITNESS, LARRY G. DeLUCENAY, SWORN
6 THE CLERK: Please state your full name for the
7 record.
8 THE WITNESS: Larry G. DeLucenay.
9 THE CLERK: Thank you.

DIRECT EXAMINATION

10 BY MR. GRANTHAM:
11 Q. Would you state your address and occupation, sir?
12 A. Care of 1900 Land O' Lakes Boulevard, Suite 113, Lutz,
13 Florida. I'm president of Mad Hatter Utility.
14 Q. Do you have any other sources of income other than that
15 what you earn through Mad Hatter Utility?
16 A. I have passive income. I own Scarecrow Utility which
17 operates in Hillsborough County. I have some investment
18 property in Manatee County.
19 Q. What percent of your income approximately comes from
20 Mad Hatter Utility?
21 A. Approximately 90 percent.
22 Q. What type of training, education, certification and

1 those far precedes the first gallon of usage. And we are in
2 the process of looking at several things along the way so as
3 to meet our obligation to our service area to put additional
4 flow on-line in the future.
5 THE COURT: Okay. Now, when the questions were
6 asked at this point about the Oak Grove development, it was
7 pointed out that at the time you were negotiating with the
8 developer there was no construction or there was no
9 development in existence. Is there development now? I mean,
10 has there been development in that area?
11 THE WITNESS: In specifically that legal description
12 of Oak Grove, which includes the school, the main primary road
13 and off of Cypress Creek from the east is installed, it is the
14 only single access to the Denham Oaks School, the related
15 infrastructure storm water drainage, GTE cables and conduit
16 are all installed both along that corridor, as well as a loop
17 back to the north out on Highway 54. So to answer the Court's
18 question, yes, there is a segment of development
19 infrastructure-wise that has been completed as part of the
20 planned First Phase I-A as it's listed to the regulatory
21 agencies.
22 THE COURT: All right. But is the county providing
23 -- other than to the school, is the county providing either
24 water source or wastewater treatment --
25 THE WITNESS: Yes. If I might explain to the

1 court --

2 THE COURT: Let me finish my question first --

3 either potable water or wastewater treatment to any

4 development within that area other than the school?

5 THE WITNESS: No, sir.

6 THE COURT: Okay. Go ahead if you want to explain.

7 THE WITNESS: What I was explaining for the benefit

8 of the court was the fact that the design of the

9 infrastructure is a single main artery or water line and, of

10 course, the school merely pools off of that main artery with a

11 three- or four-inch water meter to supply just the school, and

12 that main water line is looped down that access road and back

13 out to 54. It's design along that artery, that access road,

14 is per the original design by the project engineer and by the

15 developer to receive service along that corridor from Mad

16 Hatter.

17 THE COURT: But the only facility that's actually

18 encroaching on your rights would be the school?

19 THE WITNESS: Physically receiving service today on

20 that location, section 33, is the school, yes, sir.

21 THE COURT: Okay. Mr. Grantham, do you have any

22 other follow-up questions before Ms. Hale?

23 MR. GRANTHAM: Yes, sir. Perhaps I can help clarify

24 a couple of those.

25 BY MR. GRANTHAM:

1 Q. Mr. DeLucenay, are there any houses in Oak Grove that
2 have been constructed yet?
3 A. No, sir.
4 Q. So there's no houses within that subdivision as of now,
5 correct?
6 A. No, sir. That's why I explained to the court that the
7 school structure is the only existing facility or structure
8 receiving service from the county.
9 Q. But the county has placed their infrastructure in there
10 so when a house is built, it's going to run through --
11 A. That infrastructure a connect to the county.
12 Q. I guess the developer put it that way; is that correct?
13 A. Yes.
14 Q. The court asked you about whether the 3 -- or how the
15 350,000 gallon a day limit has caused you problems. Attached
16 to our motion for expedited consideration is Exhibit F, a
17 letter from Mr. Bramlett to a Mr. Morrow. Are you familiar
18 with that letter?
19 A. Yes, sir, I have.
20 Q. Basically indicating that the county has no more capacity
21 for you but they would serve this customer within your area at
22 the same place they were serving you, correct?
23 A. Yes, sir, that's true.
24 Q. You're also aware of letters to you from Mr. Bramlett
25 saying we don't have any more capacity for you?