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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

FLORIDA DEMOCRATIC PARTY and BROWARD COUNTY DEMOCRATIC EXECUTIVE COMMITTEE,

Petitioners,

vs.

JANE CARROLL, SUZANNE GUNZBURGER and ROBERT WILLIAMS LEE as Members of the Broward County Canvassing Board,

Respondents.
_____/

CASE NO. 00019324 (07)

INTERVENOR'S VERIFIED MOTION FOR DISQUALIFICATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Intervenors the REPUBLICAN PARTY OF FLORIDA and REPUBLICAN PARTY OF BROWARD COUNTY (collectively the "Republican Party"), hereby file this Verified Motion for Disqualification, and states as follows:

SUMMARY

This matter involves issues relating to the results of the election in Broward County for President of the United States. Since this matter was commenced on November 14, 2000, there have been four hearings before Judge Miller: November 14, 2000, November 15, 2000, and two on November 17, 2000.[1] In the hearing

[1] Citation to the hearing transcripts will be made as "*November___, 2000 Hearing Transcript, p.__, ln.__*.

of November 17, 2000, as well as earlier hearings, Judge Miller has engaged in conduct and made comments clearly demonstrating that he has prejudged crucial and decisive issues in the matter prior to taking evidence or hearing argument of counsel, and has otherwise abrogated his judicial duties.

A judge cannot prejudge a case. Barnett v. Barnett, 727 So. 2d 311, 312 (Fla. 2d DCA 1999). Judge Miller has prejudged this case. Along the way he also has made biased comments and engaged in significant biased conduct. The Republican Party has not received and can not receive a fair adjudication. The Republican Party therefore moves to disqualify Judge Miller.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2000, Petitioners filed a Petition for a Writ of Mandamus and Complaint for Injunctive Relief. Several hearings have been held in this matter and many papers have been filed.

Prejudgment of Declaratory Judgment Motion

Late on November 16, 2000, the Petitioners amended their Petition to add a claim for Declaratory Judgement. The Declaratory Judgment claim seeks to challenge the Broward County Canvassing Board's standards established for determining voter intent in its review of Broward County ballots. Petitioners also filed a Motion for Declaratory Judgment and a Memorandum of Law in Support of Motion for Declaratory Judgment. These pleadings were not served on undersigned counsel until the morning of November 17, 2000.

At 4:01 pm on Friday, November 17, 2000, Petitioner counsel's

office apprised the undersigned of a hearing set for 4:30 p.m. on November 17, i.e., a half-hour later, on Petitioner's Motion for Declaratory Judgement. At the 4:30 p.m. hearing, Judge Miller quickly indicated that he was ready to rule on Petitioners' motion relative to setting standards for determining voter intent in the Broward County Canvassing Board's review of Broward County ballots, without any substantive Republican party response. Judge Miller stated that he agreed an evidentiary hearing was necessary before deciding the Motion. Nonetheless, he went on to state:

> [I]f I find that the Board isn't counting the pregnant chads and all this other stuff that's supposed to show the totality of the ballot and show the intent of the voter, then I will tell them to do it again.

November 17, 2000 Hearing Transcript, p.22, ln.21-25. Then, after a brief recess, he stated:

> I think basically what I said [quoted just above] was that I presume the Broward County Canvassing Board knows what the law is that they're supposed to follow in counting the ballots by hand and knows that under the law they're not supposed to limit that to one or two points in their criteria.

November 17, 2000 Hearing Transcript, p.24, ln.7-12.

In making this decision regarding pregnant chads, Judge Miller stated "There's cases over the last ten years on chads. There's nothing new." *November 17, 2000 Hearing Transcript, p.6, ln.8-9.* Doubtless he was referring to the decisions cited in the Democratic Party's Memorandum in support of its motion, the only cases that were before him in pleadings filed by the Democratic Party. However, the decisions cited by the Democratic Party do not mention

"pregnant" or "dimpled" chads and do not support the result that the Democratic Party seeks in its Declaratory Judgment motion relative to the Broward County manual recount. The result that the Democratic Party seeks is to have the Canvassing Board reverse its previous decision and determine instead that mere dimples on ballots count as the decisive expression of the intent of the voter to choose a particular candidate.

The Democratic Party cite two Florida decisions, both over 70 years old: Darby v. State, 75 So. 411, 413 (Fla. 1917), and State v. Williams, 120 So. 310 (Fla. 1929). Neither decision addresses whether a pregnant or dimpled chad should be counted as the decisive expression of the voter to choose a particular candidate. Indeed both decisions predate machines of the type used in Broward County in the 2000 presidential election and could not address issues raised by the use of such machines. The Democratic Party cited a number of the decisions from other states. A number of these in fact refute the contention of the Democratic Party here. For example, Wright v. Gettinger, 428 N.E.2d 1212 (Ind. 1981), cited by the Democratic Party in paragraph no. 7 of its Memorandum, held that a ballot on which the voter "had not sufficiently punched the card" was properly rejected. Wright, 428 N.E.2d at 1223 (no mention of pregnant or dimpled chads).

The Broward County Canvassing Board, in its Initial Brief on the Merits filed in the Supreme Court on November 18, 2000 (p. 7), stated that its current rule for interpreting ballots, under which

two corners of a chad must be detached and hanging in order to count as an expression of the voter's intent, is sound and lawful. The Supervisor of Elections concurred with this view in her own Reply Brief filed in the Supreme Court on November 19, 2000.

The Republican Party objected on November 17, 2000 to Judge Miller's making a ruling before the concededly required evidentiary hearing. Judge Miller then stated:

> I guess that I'm going to write an order. That [the above-quoted language] would be the order. If it's not right, the Appellate Court hopefully will straighten me out. Thank you.

November 17, 2000 Hearing Transcript, p.25, ln.15-18.

A close reading of the written orders entered by this judge and the transcripts of his comments in court show that his assessment of the viability of dimpled ballots as the expression of voter intent is based on newspapers and other media, not on case law or a properly developed factual record. See, e.g., *November 17, 2000 Hearing Transcript, p.5, ln.20-24* (Democratic Party attorney Samuels stated, "I know Your Honor has been looking at the newspapers, made no secret of that. You have read the articles."); *November 15, 2000 Hearing Transcript, p.39, ln.8-13* (Judge references articles and cartoons about the Florida Attorney General and Florida Secretary of State). This is all information that the Judge is receiving ex parte, outside the record in this matter. The Republican Party cannot know what he is reading and of course has no opportunity to respond to it.

Inattention by Judge, indicating bias

Before the events of November 17, 2000, at a hearing on November 14, 2000, the day the original Petition was filed, Petitioners sought relief from the November 14, 2000, 5:00 p.m. deadline for any manual recounts that might take place in Broward County. At that time on November 14 the Broward County Canvassing Board had already determined not to go forward with a countywide manual recount. At the November 14 hearing, Judge Miller read the newspaper and talked to his staff during much of the argument by the Republican Party's counsel. This was reported in the media and obvious to those present. On three or four occasions counsel stopped to wait for the Judge to start paying attention, but Judge Miller motioned or stated that "You have to keep talking", then returned to talking to his staff or reading the paper. This occurred on November 15, 2000 as well. See Carroll Affidavit ¶ 3; *November 15, 2000 Hearing Transcript, p.14, ln.17.* The Judge has not been paying attention and has been unable to keep track generally of the procedural posture of this matter at any given point.

Raising issues not before him and granting relief not requested

In the November 14, 2000, hearing the Judge not only granted this revised injunction request, he tried to go much farther. He first stated that manual recounts must continue, though no party was asking for it and the Canvassing Board had at that point

determined not to continue with manual recounts. Judge Miller stated:

> ... So, I'm going to order that the respondents continue the manual recount, which they said they're going to do anyway, to give effect to the intent of the voters, the ballots are counted by the county vote tabulators, and that the respondents be certified a tentative count to the Secretary of State and notice that the count is not the final count of the county, but the final count will be issued at the end of the recount process ..."

November 14, 2000 Hearing Transcript, p.74, ln.14-23. Even the Petitioners, seeing that the Judge had gone too far, did not oppose the Republican Party's request that the Court limit his ruling simply to what the Democratic Party had sought. The Democratic Party had only sought relief from the 5:00 p.m. November 14 deadline for certification of the vote in Broward County.

Making comments derogatory to the Secretary of State and exhibiting bias against the Republican Party.

At a November 15 hearing, Judge Miller held up a magazine cartoon about the Florida Secretary of State, waited for the media present to capture him holding up the cartoon, and while waiting commented on the cartoon and seemed to endorse the view of the lampooning cartoonist. The Judge cited a media reference to Attorney General Butterworth "flexing his democratic background in his opinion [relative to the propriety of manual recounts under Fla. Stat. § 102.166(5)]." Then the Judge referred to the cartoon about the Secretary of State and stated that the cartoon makes a similar point about her. He concluded thus: "**so we're even**." See *November 15, 2000 Hearing Transcript, p.39, ln.8-13.* He said:

> ... I think there was, I know there's a little reference to Attorney General Butterworth maybe flexing his democratic background in his opinion, but I guess Mr. Lowe did that today in his editorial cartoon about the Secretary so we're even.

November 15, 2000 Hearing Transcript, p.39, ln.8-13.

The Judge at another point in the November 14 hearing stated that something -- we are not sure what -- "is delayed by the Secretary's legally unsupported opinion." *November 14, 2000 Hearing Transcript, p.74, ln.23 - p.75, ln.1.*

Entering orders with fact findings not based on evidence

On November 16, 2000, after the November 14 hearing, the Judge without warning entered a five-page written "Injunction" order relative to his decision in the November 14 hearing (dated "November 14, 2000, nunc pro tunc") (hereafter, "November 14 Order"). The Order contains a significant amount of overblown rhetoric tracking faithfully the themes pressed by the Democratic Party and the Gore campaign over the past several days. In addition, the Order references evidence and information that was never introduced or mentioned in the November 14 hearing (e.g., an assertion that 87 votes changed as a result of Broward County's automated recount on November 8, 2000; see November 14 Order, p. 3). The November 14 Order granting the Democratic Party injunctive relief is not based on a verified pleading, on any affidavits, or on any evidence.

The cumulative effect of the events of November 14 through 16, described above, and the Judge's obvious prejudging on November 17

of the Democratic Party's motion for declaratory judgment, confirms his clearly biased posture against the Republican Party in this matter. The Judge's actions are holding this Court up to ridicule and dishonor and damaging the credibility of the Court while a national and international spotlight is trained on it. Judge Miller must be disqualified.

MEMORANDUM OF LAW

JUDGE MILLER HAS PREJUDGED THIS MATTER AND HAS DEMONSTRATED CLEAR BIAS AGAINST THE REPUBLICAN PARTY.

Section 38.10 of the Florida Statutes grants litigants the substantive right to seek the disqualification of a trial judge. Rule 2.160 of the Rules of Judicial Administration sets forth the procedure for disqualification. Underlying Section 38.10 and Rule 2.160, and specifically applicable here, is Canon 3E of the Code of Judicial Conduct, which requires a judge to perform his judicial duties without bias or prejudice.

The principal issue presented in a motion for disqualification is that of legal sufficiency. MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332 (Fla. 1990). The sole consideration is whether the litigant requesting disqualification can reasonably fear that he will not receive a fair and impartial trial at the hands of the trial judge. *Ibid.*; Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); Hayslip v. Douglas, 400 So. 2d 553, 555 (Fla. 4th DCA 1981). This is purely a question of law for the court. MacKenzie, 565 So. 2d at 1335.

The motion and accompanying affidavit are legally sufficient, and disqualification is required, if the movant simply demonstrates that it harbors a well-grounded fear that he will not receive a fair trial. Rucks v. State, 692 So. 2d 976 (Fla. 2d DCA 1997). A movant need not prove that the judge is actually biased. Id. It is not a question of how the judge feels, but rather a question of what feeling resides in the mind of the movant and what the basis is for that feeling. Smith v. Santa Rosa Island Authority, 729 So. 2d 944 (Fla. 1st DCA 1998).

A trial judge's announced intention relative to how he will decide, prior to hearing argument or taking evidence, clearly demonstrates judicial bias and prejudice. Gonzalez v. Goldstein, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994). While a judge may form mental impressions and opinions during the course of hearing evidence, he may not prejudge the case. Barnett v. Barnett, 727 So. 2d 311, 312 (Fla. 2d DCA 1999). Thus disqualification is warranted where a judge's comments can reasonably be interpreted as having has crossed the line from forming mental impressions to prejudging an issue. Id.

Judge Miller prejudged the Democratic Party's Motion seeking declaration of a different standard for interpreting ballots.

In the instant action, Judge Miller obviously has crossed the line and is prejudging critical issues. Judge Miller ended the hearing at 4:30 p.m. on November 17, 2000, by stating that an evidentiary hearing would be necessary to determine the issue of

how voter intent in the presidential ballots is lawfully to be interpreted. Yet in the next breath he purported to rule on the issue, indicating that the Board must count pregnant chads and cannot limit itself to the criteria the Board is currently using. The Judge stated that he would enter an order to that effect, and essentially indicated that if the Republican Party did not like it they could appeal it. This unquestionably evidenced prejudgment of the issue of appropriate interpretation of the ballots. The Judge knew full well that the Democratic Party's lawyers would run back to the Canvassing Board, advise them of the judge's comments, and characterize the comments as a ruling that the Board would be required to follow.

Judge Miller agreed to entertain the Democratic Party's Motion for Declaratory Judgment seeking a more favorable interpretation of Broward County's ballots even though seven hours earlier he had confirmed in open court that the case before him was over and completed based upon the fact that his November 14 Order granted the Democratic Party all of the relief that it had sought.

Judge Miller also has exhibited bias by his failing to pay attention to arguments and by making gratuitous comments and engaging in gratuitous conduct showing bias.

As recounted above, at the hearings on November 14 and November 15 Judge Miller read the paper and talked to his staff during much of the argument by the Republican Party's counsel, and during some of the other parties' arguments. This was reported in

various media and obvious to those present. After counsel waited for him to start paying attention, Judge Miller motioned or stated to counsel on more than one occasion just to "to keep talking," then returned to talking to his staff or reading the paper. See e.g., *November 15, 2000 Hearing Transcript, p.14, ln.17.; Carroll Affid. ¶ 3.* This evidenced abrogation of his judicial duties to act fairly and impartially.

Judge Miller's holding up a cartoon on November 14 from a magazine lampooning the Florida Secretary of State, a Republican, waiting for media to capture him holding up the cartoon, and while waiting commenting on the cartoon in a fashion evidencing agreement with the lampooning cartoonist, further evidences abrogation of his judicial duties to act fairly and impartially.

The Judge has made other gratuitous comments about the Secretary of State and her actions relative to presidential election issues, including the following comment at the November 15 hearing:

> Also, I think there's some comment on the letters from Katherine Harris concerning this issue and I think the second letter from Secretary Harris to the Broward County Board appears to be something in the form of a CYA from Judge Lewis' order that admonishes her to exercise her discretion in accepting or not accepting the later recounted votes and setting forth the guidelines on that, so I think she's just trying to protect herself on that situation and not get in trouble there.

Transcript of November 15, 2000 Hearing at p. 38. "CYA" is a universally known acronym meaning "cover your ...." Talking in

open court in a potentially nationally broadcast hearing about the Secretary of State trying to "CYA" evidences completely inappropriate judicial behavior and illustrates obvious bias against the Republican Party.

Judge Miller must be disqualified.

The foregoing clearly demonstrates that Judge Miller has prejudged critical issues in this case prior to taking evidence or hearing argument of counsel, and that he is biased against the Republican Party in this matter. Judge Miller's conduct and statements plainly form a reasonable basis for the Republican Party to fear that it will not receive a fair hearing in the instant action. *See* Gonzalez, *supra*; Begens v. Olschewski, 743 So. 2d 133 (Fla. 4th DCA 1999) (judge's statement that the plaintiff was going to lose the case under any set of facts warranted disqualification).

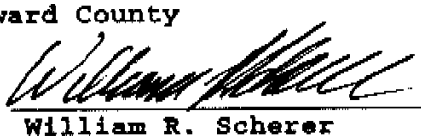
Litigants in this Court are entitled to nothing less than the cold neutrality of an impartial judge. James v. Theobald, 557 So. 2d 591 (Fla. 3d DCA 1990). This can be no more true than in the situation here, in which a national spotlight is trained on the judge's courtroom and on his conduct and statements. It is the duty of the court to scrupulously guard the right to a fair trial and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question. Id.

Because of the Judge's actions, the Republican Party has a reasonable and well-grounded fear that Judge Miller is biased against them, and that the Judge's bias and prejudice is so pervasive that it will deprive the Republican Party of the fair and impartial consideration to which every litigant is entitled. Based upon the cumulative effect of all of his actions as described above, Judge Miller must disqualify himself from presiding in further in this litigation.

WHEREFORE, the Republican Party respectfully requests that Judge Miller disqualify himself from presiding over any further proceedings in this cause.

Respectfully submitted,

CONRAD & SCHERER
Attorneys for the Republican Party of Florida and Republican Party of Broward County

By: 

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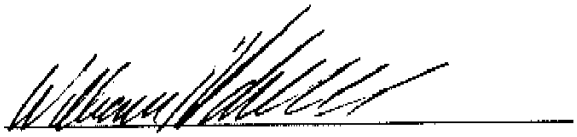
CERTIFICATE OF COUNSEL

Counsel of record for the Republican Party of Florida and the Republican Party of Broward, hereby certifies that this Motion for Disqualification and the Affidavit of Judge Miller have been made in good faith.



WE HEREBY CERTIFY that a copy of the above and foregoing has been mailed this 20th day of November, 2000 to all parties on the attached Service List.

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