IN THE SUPREME COURT OF FLORIDA

CHEMROCK CORPORATION,

Petitioner,

v.

Case No. SC09-2263
DCA Case No. 1D08-4895

TAMPA ELECTRIC COMPANY d/b/a TECO PEOPLES GAS COMPANY,

Respondent.
______________________________________/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent, Tampa Electric Company d/b/a TECO Peoples Gas Co. submits this Statement of the Case and Facts to narrow the facts in the record relevant to the jurisdictional issue being addressed. [1]

Respondent filed and served a notice of lack of prosecution on Petitioner, Chemrock Corporation under Florida Rule of Civil Procedure 1.420(e) (2008) after over 10-months of record inactivity. *Chemrock Corp. v. Tampa Electric Co.*, 23 So. 2d 759 (Fla. 1st DCA 2009). Within the 60-day grace period following the notice as set forth in the Rule as amended in 2005, Petitioner responded by filing a document it called a "motion in opposition." *Id.* As noted by the First District, Petitioner's response was essentially a notice or objection as opposed to a "motion" *(Id.* at n.1), and did not indicate that Petitioner was attempting to re-commence prosecution of its case. *Id* at 759. Petitioner's filing simply acknowledged the 10-month period inactivity but blamed Respondent for the delay. *Id.* Sixteen months after Petitioner's filing, Respondent moved to dismiss the action based on lack of prosecution. *Id.* Following argument at the hearing on Respondent's motion to dismiss for lack of

[1] Petitioner's Statement of the Case and Facts improperly includes facts outside the four corners of the First District's decision. The only facts relevant to the Court's decision to accept or reject jurisdiction are those facts contained within the four corners of the decision allegedly in conflict. *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986).

prosecution, the trial court granted the motion and dismissed the action against Respondent. *Id.*

On appeal, the First District considered the question of whether any filing served during the 60-day grace period is sufficient to avoid dismissal under the amended version of the Rule. *Id.* In affirming the trial court's order of dismissal, the First District explained that the bright-line test for record activity enunciated in *Wilson v. Salamon*, 923 So. 2d 363, 368 (Fla. 2005) still applied under the amended version of the Rule and that any filing was considered record activity, but the relevant time period in which to apply the bright-line test was shortened from 12-months to 10-months. *Id*. The First District then explained that the 60-day grace period following the notice requires more than just any filing to avoid dismissal. *Id*. Noting that the appeal focused on the grace period only, the First District found that under the amended version of the Rule, Petitioner could have averted dismissal during the grace period in one of three ways: (1) move for and obtain a stay; (2) show "good cause" as to why the action should remain pending; or (3) recommence prosecution by taking action to move the case toward conclusion. *Id.*

In its analysis, the First District first pointed out that the 2005 committee notes to the Rule recognized the Rule's intent that the 60-day grace period provided to re-commence prosecution would be frustrated by allowing a party to file any document, however inconsequential to the progress of the case, during this period to avoid

dismissal. *Id*. It further acknowledged that under this scenario, the cycle of a 10-month notice followed by <u>any</u> filing could continue in perpetuity, rendering the Rule meaningless and permitting Petitioner to maintain its lawsuit without taking any meaningful activity to progress the case toward resolution. *Id*. The First District further noted that, in the Committee notes, for the first time, the Petitioner was allowed an opportunity to recommence prosecution during the grace period- a right created by the amended rule that was not present under the prior version of the Rule. *Id.*

In addition to the intent of the Rule, the First District also relied on the language of the amended Rule itself to defeat Petitioner's argument that <u>any</u> filing during the 60-day grace period defeats dismissal. *Id*. The First District pointed out that the Rule identifies two examples of filings, that if made during the 60-day grace period, do not automatically result in dismissal avoidance: (1) a motion or stipulation for stay that is <u>not</u> issued or approved during the grace period; and (2) a filing attempting to demonstrate good cause as to why the action should remain pending which would, of course, be unnecessary if <u>any</u> filing was sufficient to avoid dismissal. *Id.*

Accordingly, because Petitioner's filing during the grace period did not request a stay (nor was one issued or approved), and did not convince the trial court that good

cause had been shown to avoid dismissal, the First District found that the trial court properly dismissed the case for lack of prosecution.

Petitioner now asks this Court to review this case under direct conflict jurisdiction, asserting that *Chemrock* conflicts with decisions of the Second and Third Districts in *Pagan v. Facilicorp, Inc.*, 989 So. 2d 21, 23 (Fla. 2d DCA 2008); *Padron v. Alonso*, 970 So. 2d 399, 401 (Fla. 3d DCA 2007); *Edwards v. City of St. Petersburg*, 961 So. 2d 1048, 1049-50 (Fla. 2d DCA 2007) which it argues extended *Wilson*'s bright line test for record activity to any filings made during the 60-day grace period.

SUMMARY OF THE ARGUMENT

There is no direct conflict between this case and those of other Florida appellate courts, as required by Section 3(b)(3) of Article V of the Florida Constitution. This case involves Petitioner's failure to comply with the requirements set forth under the Rule to avoid dismissal for failure to prosecute. Unlike this case, it is not clear whether the opinions from the Second and Third Districts indicate that those Courts were convinced that the plaintiffs had made the requisite showing of good cause sufficient to avert dismissal or whether the filings in those cases were sufficient to recommence prosecution. Because the basis of the conflict must appear within the four corners of a district court's decision, no direct

conflict exists between this case and the decisions of those appellate courts sufficient to confer jurisdiction.

ARGUMENT

THIS CASE DOES NOT CONFLICT WITH *PAGAN, PADRON, AND EDWARDS*, WHICH ADDRESS DIFFERENT FACTUAL SCENARIOS AND ISSUES.

A. Standard of Review.

This Court does not have jurisdiction to review the First District's opinion because the opinion does not conflict with a decision of this Court or another district court on the same question of law. Fla. Const. art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv); *Persaud v. State*, 838 So. 2d 529, 532-33 (Fla. 2003). The asserted conflict cases address different facts and issues.

B. The First District's Opinions In This Case Do Not Conflict With Any Other Florida Appellate Decisions.

Under the Rule, a notice of lack of prosecution may be filed and served when there has been no record activity for a period of 10-months. Fla. R. Civ. P. 1.420(e) (2009). Immediately following service of the notice, the Rule then provides for a 60-day grace period in which record activity resulting in a stay being issued or approved prior to the end of the grace period will avert dismissal for failure to prosecute. *Id*. Under the Rule, the only other way to avert dismissal is for the non-moving party to show good cause in writing at least 5 days before the hearing on the motion to dismiss why the action should remain pending. *Id*.

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In this case, the First District found that the trial court properly dismissed the case for lack of prosecution because Petitioner's filing during the grace period did not result in a stay being issued or approved during the grace period, and did not convince the trial court that good cause had been shown to avoid dismissal. *Chemrock,* 23 So. 3d at 759.

Petitioner now asks this Court to review this case under direct conflict jurisdiction, asserting that *Chemrock* directly conflicts with decisions of the Second and Third Districts in *Pagan, Padron* and *Edwards* which it argues extended *Wilson*'s bright line test for record activity to any filings made during the 60-day grace period. Petitioner's jurisdictional argument relies, in part, on the First District's statement in its opinion that "[t]o the extent that *Pagan, Padron* and *Edwards* hold differently, we certify conflict." *Id.* Petitioner argues that the First District expressly certified conflict while ignoring the First District's qualifying "to the extent" language. However, as set forth below, the Second and Third District decisions *Pagan, Padron* and *Edwards* do not directly conflict with the First District's holding in this case. Accordingly, the First District did not expressly certify direct conflict.

In *Pagan*, the trial court, *sua sponte*, sent the *pro se* plaintiff a notice of intent to dismiss for lack of prosecution after over a year of record inactivity. *Pagan*, 989 So. 2d at 22. During the 60-day grace period, the plaintiff filed a

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motion to stay the proceedings. *Id.* The trial court dismissed the action for failure to prosecute. *Id*. at 23. On appeal, the Second District reversed stating that there was record activity during the applicable time period. *Id*. However, the opinion does not indicate whether the reversal was based on the Second District's simple misapplication of the Rule concerning record activity during the 60-day grace period, or whether the Second District was convinced that the *pro se* plaintiff had made a showing of good cause by his grace period filing that was sufficient to avert dismissal and provided him with an additional opportunity to recommence prosecution. Since the basis of the conflict must appear within the four corners of a district court's decision, and since the Second District's reasoning is not entirely clear, no direct conflict exists between *Pagan* and this case sufficient to confer jurisdiction.

Just as in *Pagan*, the trial court in *Edwards*, *sua sponte*, sent the *pro se* plaintiff a notice of intent to dismiss for lack of prosecution after over a year of record inactivity. *Edwards*, 961 So. 2d at 1049. During the 60-day grace period, the plaintiff filed a motion for hearing and for witness attendance. *Id.* The trial court dismissed the action for failure to prosecute. *Id*. Again, it is unclear whether the Second District was convinced that the *pro se* plaintiff had made a showing of good cause by his grace period filing that was sufficient to avert dismissal.

The facts in *Padron* are also unclear except that it appears that there was some sort of record activity during the grace period. *Padron*, 970 So. 2d at 400. It is not known whether a stay was issued or approved, whether good cause was shown, or whether anything else was considered. Furthermore, the cases cited in *Padron* in support of the Third District's decision were all decided under the prior version of the Rule. *See, e.g., Norman v. Darville*, 964 So. 2d 864, 865 (Fla. 2d DCA 2007); *London v. Baxter Healthcare Corp.*, 965 So. 2d 307 (Fla. 3d DCA 2007); *Miami-Dade County v. Walker*, 948 So. 2d 68, 70 (Fla. 3d DCA 2007). As a result, *Padron* fails to establish the requisite direct conflict needed to confer discretionary jurisdiction.

Petitioner also cites to *Mickens v. Damron*, 1 So. 3d 1160 (Fla. 2d DCA 2009) as directly conflicting with the First District. In *Mickens*, the plaintiffs filed a motion to amend complaint along with the proposed amended complaint within days of receiving the notice of dismissal for failure to prosecute. At the hearing on the plaintiffs' motion to amend, the trial court indicated that it was also "considering a 'motion to dismiss for failure to prosecute by the defense,' " and ultimately the court dismissed the case on that basis. *Id*. at 1161. However, the record reflected that the defense never filed a motion to dismiss for failure to prosecute. *Id*. In reversing the trial court's dismissal, the Second District noted that the trial judge did not understand that the Rule had been amended and reversed

the order dismissing the case because a motion to amend had been filed by plaintiffs and because there was no motion to dismiss pending. *Id*. Once again, it is unclear whether the Second District was convinced that the plaintiffs had made a showing of good cause by their grace period filing that was sufficient to avert dismissal. As a result, *Mickens* fails to establish the requisite direct conflict needed to confer discretionary jurisdiction.

Finally, even if jurisdiction exists, this matter does not warrant this Court's discretionary review. The language of the amended Rule is plain and unambiguous, and this case does not warrant this Court expending its limited resources to review and consider the First District's decision.

CONCLUSION

For these reasons, Respondent requests that this Court decline to exercise jurisdiction in this proceeding.

Respectfully submitted,

/s Pedro F. Bajo, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was furnished by U.S. mail this 9th day of February, 2010, to: Jamie P. Yadgaroff, Esq., 1 Bala Avenue, Suite 310, Bala Cynwyd, Pennsylvania 19004, and Norwood S. Wilner, Esq., Wilner Block, P.A., 444 East Duval St., 3rd Floor, Jacksonville, FL 32202 (Attorney for Petitioner).

/s Pedro F. Bajo, Jr.
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

/s Pedro F. Bajo, Jr.
PEDRO F. BAJO, JR.