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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-988
L.T. NO. 3D11-2129 & 3D11-2141

PATRICIA YOUNG et. al.,

Petitioners,

vs.

NORVA L. ACHENBAUCH et al.,

Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT
L.T. NO. 3D11-2141

HUNTER, WILLIAMS & LYNCH, P.A.
Steven K. Hunter, Esq.
Christopher J. Lynch, Esq.
The Monarch Grove Building
2977 McFarlane Road, Suite 301
Miami, Florida 33133

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INTRODUCTION

Petitioners have not limited their brief to the narrow legal issue before this Court - whether the Third District's conclusion that Respondents' counsel were not in violation of Rules 4-1.7 and 4-1.9 of the Rules of Professional Conduct was correct. Rather, as in the trial court and in their brief to the Third District, the Rosenblatts and FAMRI have launched into extensive personal attacks on Respondents' collective counsel alleging ethical violations beyond those addressed by the Third District. Accordingly, this Respondent is compelled to outline the history of the events leading up to the filing of the subject petition to enforce the *Ramos* mandate. See *Ramos v. Philip Morris et al.*, 743 So.2d 24 (Fla. 3rd DCA 1999). As the following demonstrates, at issue is a $300 million class action settlement fund which, despite guarantees from class counsel, Stanley and Susan Rosenblatt, and the Attorney Ad Litem for the *Broin* flight attendants, has gone without the mandated court supervision for more than a decade.

I. STATEMENT OF THE CASE AND FACTS

A. BACKGROUND - *BROIN, RAMOS* AND FAMRI[1]

_____The present action arises from the 1991 class action filed on behalf of flight attendants against several tobacco companies and styled *Broin v. Philip Morris*

[1]References to the Record on Appeal will be by the symbol R, and references to the Appendix to this brief will be by the symbol App. Finally, all emphasis is supplied by counsel unless otherwise indicated.

Company, Inc. et. al. The class action complaint alleged exposure to second hand smoke in aircraft cabins and the complaint prayed for compensatory and punitive damages on behalf of the class members. (R. IV: 708-21; App. 1).

In 1997, following the advice of class counsel, Stanley and Susan Rosenblatt, the class representatives entered into a written settlement agreement with the tobacco companies. The agreement did not provide for any money damages to be paid to the class members. Rather, the settlement authorized the class members to bring individual actions for compensatory damages only, within certain conditions and limitations. Further, under the agreement, all claims for punitive damages were in effect dismissed and could not be asserted by class members in their subsequent individual actions. *Ramos*, 743 So.2d at 26.

The Rosenblatts, as class counsel, were paid an attorney fee of $46 million dollars and a litigation costs reimbursement of $3 million. As the order of the trial court approving the *Broin* settlement recognizes, as partial consideration for said award of fees and costs:

> Class counsel [Rosenblatts] [have] also agreed to provide continuing assistance in all individual claims filed throughout the United States **and appear as additional counsel**, without charge to class members or their counsel.[2]

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[2]To gain approval of the settlement, the Rosenblatts represented to the trial court that additional lawyers were available who would try the individual *Broin* cases. The

(R. 1: 128).

In addition, the settlement agreement provided for the payment of the sum of $300 million dollars from the tobacco company defendants. According to the agreement, the funds would not be paid to individual flight attendant class members, but instead would be use "solely" to "establish a foundation whose purpose would be to sponsor scientific research with respect to the early detection and cure of diseases associated with cigarette smoking," which "would be governed in accordance with a trust instrument, subject to approval by the Court." (R.1: 103).

In his order of February 5, 1998, approving the settlement agreement, the presiding judge, the Honorable Robert Kaye, outlined the purpose of the settlement fund and the entity it would fund:

> The purpose of the Settlement Fund is to establish a Flight Attendant Research Foundation **whose purpose would be to sponsor scientific research for the early detection and cure of diseases of flight attendants caused from cigarette smoke, the diseases that were at issue in the Broin litigation.** The Settlement Agreement provides that the Foundation be managed and directed by a Board of Trustees and governed by a trust instrument, subject to approval by the Court.

Rosenblatts then recruited several local attorneys including Miles McGrane, Hunter and Gerson to assume responsibility for some of the *Broin* individual cases. McGrane ultimately agreed to represent approximately 590 flight attendants, Hunter and Gerson several hundred more. (R. 3: 426).

> This Court finds that the Flight Attendant Research Foundation would provide benefits to all class members. The purpose of the Foundation is **research for the early detection and cure of diseases suffered by class members**. Class members with diseases would benefit from the early detection of diseases for which they are at risk of developing.

(R1: 143).

The *Broin* settlement, which provided no monetary benefits to class members, was highly unusual. Objectors to the settlement challenged, amongst other things, the use of the $300 million settlement fund to establish a research foundation rather than making a direct payment to flight attendants for their damages and they also maintained that the settlement agreement lacked sufficient details regarding the structure and operation of the foundation. (R1: 143).

Judge Kaye rejected these objections, stating in his order approving the settlement, that administration of the fund should not be a concern because the "[C]ourt shall retain continuing jurisdiction in connection of the formation, management and direction of the flight attendant foundation, as recommended in the report and presentation of the Attorney Ad Litem." (*Id*).

The court then entered its final judgment indicating:

> ¶ 11. Without affecting the finality of this judgment in any way, the court retains jurisdiction over the settlement, including the

> administration and consummation of this settlement agreement.

(RXII: 2277).

Subsequently, in *Ramos v. Philip Morris et al.*, 743 So.2d 24 (Fla. 3rd DCA 1999), the Third District approved the *Broin* settlement expressly indicating that its approval turned on several key guarantees. Specifically, to overcome objections to the settlement, the Rosenblatts represented to the trial court and to the Third District that there would be extensive supervision of the settlement funds and that diagnostic equipment and curative treatments would be available to class members. As outlined in the underlying petition to enforce the mandate, (App. 1), as an example, the Rosenblatts in their brief to the Third District indicated that ". . .**research centers dedicated to class members. . . would be located in major cities throughout the United States and would provide multi-disciplinary care for class members.**" [3] This was joined by the promises of the Attorney Ad Litem for the class, John Ostrow,

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[3]Similarly, during the pendency of the appeal in *Ramos*, Stanley Rosenblatt wrote to lead counsel for the tobacco defendants, confirming the trial court's continuing jurisdiction over the settlement funds:

> Let me remind you that Judge Kaye did modify the settlement agreement as to the foundation. He found in his memorandum opinion that the court would be involved in the foundation to insure that **benefits are provided to class members and this involvement will be ongoing, including the formation and running of the foundation**.

(R. XXII: 4027).

who indicated ". . . **the foundation is not a charitable** [institution]" and ". . .**the foundation (will) be directed and supervised by the trial court - not class counsel. . . Just as guardianship(s) proceed under the continuing supervision of the Dade County Circuit Court, the $300 million flight attendant foundation would be under the continuing jurisdiction guidance and direction of the Dade County Circuit Court."** (App. 1, pg. 5, ¶15, emphasis in original document).

Based on these guarantees, in *Ramos*, the Third District affirmed the trial court's ruling approving the settlement and creation of the foundation; accepted the Attorney Ad Litem's and the Rosenblatts' guarantees regarding the use of the flight attendant settlement funds; and accepted the representations regarding continuing court supervision over the flight attendants' fund. In so ruling, the Third District expressed its confidence that the settlement agreement would benefit the class:

> **Furthermore, the medical foundation would provide treatment to mitigate diseases affecting many class members, such as chronic bronchitis and chronic sinusitis, in addition to providing early detection and treatment for diseases such as lung cancer.**

Ramos at 33.

Despite the assurances by the Rosenblatts and the Attorney Ad Litem to the Third District, and despite the Third District's express holding stated above, once *Ramos* was decided, the settlement approved and the funds paid, the guarantees and

representations made to the Third District regarding the use and supervision of the settlement funds were ignored.

As an example, prior to the filing of this petition, the class members **did not** receive the medical care and treatment guaranteed by the Rosenblatts and the Attorney Ad Litem to the trial court and the Third District . Further, substantial FAMRI funds were spent both inside and outside the United States for purposes unrelated to the class members - the beneficial owners of the settlement funds (App. 1, ¶23).[4] In addition, there has been no direction or supervision by the trial court, and no report, disclosure or accounting to the trial court has occurred. Instead, as indicated in the recently filed class action, FAMRI operated as a 501(c)(3) charitable organization. (App. 1, ¶s 13-14, 16-18; App. 2 ¶ 46-50).[5]

Further, FAMRI did not attempt to communicate with the flight attendant class members and get feedback or input regarding its direction; most *Broin* class members have never heard of FAMRI and have not received a letter, report, flyer, e-mail, or

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[4]In November of 2011 a class action complaint seeking certification of a class consisting of the *Broin* class members was brought against, amongst others, FAMRI and the Rosenblatts. The class action complaint sets forth in great detail the alleged misuse of the flight attendants' money. (RXXIII: 4163-4425, also attached as App.2). On August 8, 2012, the circuit court dismissed the class action with prejudice agreeing with FAMRI and the Rosenblatts that the flight attendants had no standing to sue FAMRI.

[5]The Rosenblatts' position, that they, as class counsel and through FAMRI, can have unrestricted control over the use of a $300 million dollar class action settlement fund, without any court supervision, is astounding and unprecedented. Yet, this is exactly what has occurred. Clearly, *Broin* was not a *cy pres* settlement since there was a specific identifiable class whose members were to receive guaranteed benefits.

phone call from FAMRI. Thus, they had no way of knowing how FAMRI was spending the settlement funds until alerted by counsel working on the *Broin* progeny cases. (App. 2 ¶s 51-53).

In their brief to this Court, the Petitioners rely on the FAMRI 2010 Monograph to refute any argument that FAMRI is not adhering to the Third District's Mandate. (R. V: 849). They assert:

> The 2010 monograph in the record describes the foundation's "Decade of Progress" funding science at top institutions to prevent, treat, and cure these diseases. (R.1: 182-3: 422.). FAMRI "provide[s] the flight attendants with medical screening centers throughout the United States for the early detection of diseases." (R. 12: 2182); see also, www.famri.org (last visited February 28, 2013).

(Initial Brief, pg. 8, n.2).

The issue of whether FAMRI and the Rosenblatts have complied with the Third District mandate by providing medical screening centers throughout the United States and by otherwise using the settlement funds as intended, was not an issue to be resolved on the motion to disqualify.[6] Yet the Rosenblatts and FAMRI cite to the trial court's conclusion that such centers were operating for the benefit of the flight

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[6]During the hearing on the motion to disqualify, Respondents' counsel objected to any consideration of the Monograph since it had nothing to do with the motion to disqualify. The court overruled the objection. (R V: 849).

attendants. (R. 2182). This assertion, is directly contradicted by the individuals who were to benefit from such medical treatment - flight attendant class members - as stated in the petition to enforce the mandate and the recently filed class action.

In the trial court, FAMRI resisted all efforts by the complaining flight attendants to conduct any discovery directed to the merits of their complaints and the Rosenblatts and FAMRI's representation that *Ramos* has been followed, that the required medical care has been provided and, that the flight attendants' funds have all been properly spent, is pure fiction.

Specifically, in its brief to the Third District, FAMRI relied upon the 2010 Monograph, and a letter from a flight attendant to the Attorney Ad Litem, in support of the argument that care and treatment had been made available to the flight attendants. The letter from the flight attendant, who was a client of the Gerson firm, indicated that he had:

> [J]ust completed a day's evaluation at the UCSF FAMRI Program, including respiratory tests and CT scans. He was very impressed with the thoroughness of the examinations, as well as the very courteous, first class attention from each of the program employees. This screening service is undoubtedly worth thousands of dollars in value, and is much appreciated by Philip Mumler and his family for its invaluable preventative value.

(R. 4059).

As the Respondents indicated to the Third District, the aforementioned letter is dated approximately 1 month after the trial court's ruling disqualifying Respondents' counsel and it was a result of FAMRI's contacting clients of the Gerson and Hunter firms and arranging for free medical treatment to be made available. FAMRI then supplemented the record in the trial court, and in its brief to the Third District, FAMRI cited the letter as a basis for the trial court's ruling. (RXXII: 4039-40).

The 2010 Monograph filed with the trial court and the Third District was also an amateurish attempt by FAMRI and the Rosenblatts to refute the flight attendants' contentions that the mandate in *Ramos* and the requirements of the settlement had been ignored. The 2010 Monograph is telling in two principal respects and it should be compared with the 2009 Monograph which was prepared before the issue of FAMRI's shortcomings was raised.[7]

The petition filed by the Respondents as well as the recently filed class action complaint raise two serious issues regarding FAMRI's handling of the settlement funds. First, the *Broin* class members have not received the invaluable medical care

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[7]The 2009 Monograph is attached to the Petition to Enforce and Administrate Mandate as Exhibit J. The Respondents would request that the Court supplement the record with the limited portions of the monograph referred to herein since it was contained in the trial court record and since FAMRI is now asserting that it has provided medical care to the Respondents. See *Trytek v. Gale Industries Inc.*, So.3d 1194, 1202 (Fla. 2009) (the Supreme Court may supplement the record with facts in either the trial or appellate record).

guaranteed by *Ramos*. Second, notwithstanding that the mandate only permitted expenditures to fund scientific research for the early detection and cure of diseases of flight attendants caused from cigarette smoke, substantial sums have been expended on unrelated subjects, and significant funds have been **paid to individuals** under the guise of "Distinguished Professor Awards."

With respect to the latter point, some of the non-related studies outlined in the class action complaint are:

> (a) 2001 - Scientific study of tobacco use among young adults. $651,000.00.
>
> (b) 2003 - Book documenting Tobacco Industry Propaganda $217,000.00.
>
> (c) 2004 - Tobacco Inst. tobacco research collection development - $227,000.00.
>
> (d) 2005 - Research & Education on smoke free air for Pets - $321,000.00.
>
> (g) 2005 - Promoting smoke free air policy in Mexican American Homes - $298,000.00.
>
> (h) 2006 - Reversing Tobacco Market Research on Young Adults - $216,000.00.
>
> (k) 2007 - Health Impact studies Smoke free policies in Latin American - $108,000.00.

(App. 2., pg. 11-12).

The complaint also outlines donations to organizations unrelated to the flight attendants and certainly unrelated to any research into the diseases affecting flight attendants. These include:

> Donation to the Dade Community Foundation - $3 million dollars.
>
> Donation to Dartmouth College Cardiovascular Imaging Center - $1,085,000.00.
>
> Donation to George Washington Law School - $651,000.00.

(App. 2, pg. 13).

As to the Distinguished Professor awards, one "Distinguished Professor" was John Banzhaf who was paid at least $600,000. Banzhaf is an attorney who filed a brief with the Third District Court of Appeal in support of the settlement and the award of fees to the Rosenblatts. (R. XII: 2275). In addition, as mentioned above, the law school which employed Banzhaf, George Washington Law School, was given an additional sum of $650,000.[8] (R. XXII: 4061).

The 2009 Monograph, outlines the Distinguished Professor Awards and the individuals who obtained those awards. However, when the 2010 Monograph was

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[8]As the class complaint filed against FAMRI and the Rosenblatts indicates, several of the Distinguished Professors testified for the Rosenblatts in the *Broin* and *Engle* class actions. The sums given to them were in the multiple millions of dollars. (App. 2, pg. 12-13).

prepared, it deleted all references to Distinguished Professors and Distinguished Professor Awards. (Compare Tables of Contents for the 2009 Monograph App. 3 and the 2010 Monograph App. 4).

Apparently, unknowingly, however, when FAMRI prepared the 2010 Monograph, references to the Distinguished Professor Awards and the individuals who received those awards, such as John Banzhaf were not deleted from the index. The index references Distinguished Professor Awards, and the individuals who received them, but does not list any pages within the Monograph, other than the index page itself, where the awards and those individuals are discussed. FAMRI, in other words, attempted to erase all references to these disbursements in the Monograph which was submitted to the trial court.

In addition to the aforementioned, in the 2010 Monograph, FAMRI and the Rosenblatts have added extensive references to the clinical treatment of flight attendants which was otherwise not available as per the particular center's description in the 2009 Monograph. As just one example, the 2009 Monograph reference to the FAMRI-IELCAP Collaborative Network 2007 was devoid of any reference to clinical treatment of flight attendants. (See App. 6). The 2010 monograph, on the other hand, contains extensive references to clinical treatment of flight attendants which is now available through FAMRI-IELCAP. (App. 7). Finally, the introduction to the 2009 Monograph (App. 8) contains no reference to clinical treatment of flight attendants

while the introduction to the 2010 Monograph does (App. 9).

The 2010 Monograph, to the extent it now indicates that flight attendants are being afforded some of the clinical care which was dictated by *Ramos* vindicates the filing of the petition to enforce the mandate since there could be little question that the availability of this care is a result of the filing of the petition and the discussions leading up to its filing. The guaranteed care, however, was an invaluable consideration for the settlement and should have been made available upon the payment of the initial settlement funds in 2000 and not in 2010. Further, the additional substantial alleged improper disbursements should never have occurred. The 2010 Monographs overflows with self aggrandizing statements regarding the extensive research done with the flight attendants' money. This begs the question, however, of what good is the research if the flight attendants are not receiving any care to which they are entitled and are not even aware of FAMRI or any of the products of the research undertaken with their money.

B. <u>The Petition To Enforce And Administer Mandate</u>

The aforementioned examples of what the flight attendants contend are improper expenditures of the flight attendants funds, is the Respondents believe, the proverbial tip of the iceberg. As a result, the flight attendants, through their attorneys, asked FAMRI to apply its assets directly for the benefit of class members and to account for it expenditures, as mandated by *Ramos*. Counsel for the majority

of the flight attendants, who have filed individual lawsuits, approached the Rosenblatts essentially leading to negotiations during 2009 and 2010 concerning possible remedies.

A draft petition was sent to the Rosenblatts and the FAMRI board in February of 2010. (R. 111: 554-60). Attorney Miles McGrane, who represents many flight attendants, and the movants, Blissard and Young, participated actively in the discussions among flight attendants' counsel concerning possible remedies. In fact, McGrane drafted and circulated the earliest versions of the proposed petition among flight attendants' counsel.[9] (R. 4068).

The Rosenblatts later rejected any attempts at compromise asserting that no one had standing to question FAMRI's use of the $300 million dollars. After their attempts to obtain the mandated benefits were rejected by the Rosenblatts, the Respondent flight attendants filed a petition to enforce and administer the *Ramos* mandate, seeking alternative relief, which included an accounting of all sums received and expended by FAMRI; an injunction against further expenditure of sums

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[9] McGrane's actions in this affair are, to put it mildly, disturbing, and are addressed in detail in the affidavit in opposition to the motion to disqualify filed by Alejandro Alvarez (App.10). It should be emphasized, that while accusing Respondents' collective counsel of conflicts of interest, McGrane, because of admitted loyalty to the Rosenblatts, has taken an extremely aggressive approach which is directly undermining the interests of his own current clients who were in support of the petition and who were represented by Alvarez and he jointly. The statements made by McGrane in his affidavits are directly contradicted by Alvarez's statements and by documents received by Alvarez from McGrane.

not approved by the trial court; and distribution of the settlement funds to class members. (App. 1).

Two days after filing the petition, attorneys Gerson, Hunter and Alvarez filed notices "identifying a sampling number of the Petitioners." (R1: 64-65; 67-69). The purpose of the filing was to demonstrate that there was a significant number of class members who were requesting the relief sought in the petition. In addition, in response to a court order on September 13, Hunter filed a complete list of all of his clients (151) who were supporting the petition. (App. 11). Counsel for the initial petitioners included Philip Gerson, Steven K. Hunter and Alejandro Alvarez. Soon after the filing of the petition, attorneys Ramon Abadin, Philip Frieden, Hector Lombana and H.T. Smith all appeared as co-counsel.

C. THE MOTION TO DISQUALIFY

_____Once the petition was filed, the Rosenblatts undertook a scorched earth approach to preclude judicial review of their actions. These efforts culminated in a motion to disqualify all lawyers who were then representing the underlying petitioners.[10] The motion was filed on May 23, 2011, five months after the initial

[10]In addition, Florida Bar complaints were filed against, amongst others, Steve Hunter and Philip Gerson, Florida Bar File Nos. 2011-71019; 2011-71-303; 2011-71024; 2012-70-088; and 2012-70,089. The complaints against Hunter 2011-71,019 and 2011-71024, were filed by third parties including a recipient of FAMRI funds. The Bar's investigator rendered a detailed report on the allegations and the Bar's Seventeenth Judicial Grievance Committee found no probable cause with respect to any of the aforementioned complaints. This Court may take judicial notice of the activities of the

petition was filed, and it was filed on behalf of two FAMRI board members, Alani Blissard and Patricia Young. FAMRI later joined in the motion.

With respect to attorney Hunter, Blissard, Young and FAMRI moved for disqualification based on Rule 4-1.7 of the Florida Rules of Professional Conduct entitled "Conflicts of Interest; Current Clients," and Florida Rule of Professional Conduct 4-1.9, entitled "Conflicts of Interest; Former Client."

Specifically, board member Blissard contended that at one point, Hunter had represented her and that because she was opposed to the proposed relief against FAMRI, Hunter was precluded under 4-1.7 from representing any additional flight attendants. Blissard also contended that 4-1.9 precluded Hunter from continuing to represent additional flight attendants because his earlier representation of her was in a substantially related matter such that one would reasonably conclude that confidential information adverse to Blissard's position would have been divulged and thus, disqualification was required. (R3: 475-86). The second board member, Patricia Young, also took a similar position. (R 3: 498-503).

In responding to the motion to disqualify, Respondents' counsel argued that the trial court was mandated to oversee and supervise the administration of the *Broin* settlement funds; the motion to disqualify was untimely; Respondents' counsel had no conflict with current or former clients; they were not and could not be any

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bar under §90.202(5) Fla. Stat.

confidences disclosed regarding FAMRI's activities, and finally, the motion for disqualification was being tactically employed to prevent the trial court from exercising its court order management function over the *Broin* settlement funds. (R. IV: 681).

D. THE HEARING ON THE MOTION TO DISQUALIFY AND THE TRIAL COURT'S ORDER

_____On June 30, 2011, the trial court held a scheduled hearing on the motion to disqualify. The hearing was never noticed as an evidentiary hearing so no discovery into the issues raised at the hearing was formally conducted prior to the hearing. Rather, the parties filed affidavits in support of the motion and in opposition to the motion.

In her affidavit in support of the motion for disqualification of Hunter, Blissard claimed that "all of the initial attorneys in the individual [Broin] lawsuits worked closely together" and "acted as a team" and that she "shared many confidences with them," and that while she has retained Hunter as her only attorney for her civil damage case she also considered Philip Gerson to be a member of her "legal team." She further indicated that she had testified in other flight attendant cases against the tobacco companies about "the truth of our cabin conditions," that Hunter had been a speaker at one of the FAMRI symposia and that FAMRI had sent the "initial attorneys" relevant published research "to help with the flight attendant

cases." (R. 3: 475-86).

In her affidavit, Patricia Young explained that her individual case had been "filed in court by attorney Miles McGrane." She admitted that McGrane is "my attorney" but that he was "jointly handling" her case and other flight attendant cases with Gerson and Hunter and other attorneys and that she "considered all the attorneys my attorneys. . ." (R. 3: 498-503).

Responding to Blissard's and Young's affidavit, Hunter filed an affidavit in opposition to the motion to disqualify, stating:

> (2) On March 8, 2000, I was retained by Alani Blissard, along with hundreds of other flight attendants to represent them in their suits against the tobacco industry following the *Broin v. Philip Morris* class action. In June 2010, after being advised by Alani Blissard that she objected to any actions to enforce the mandate of the Third District Court of Appeal in the *Ramos v. Philip Morris* action, I filed a motion to withdraw as her counsel. The motion was granted on June 24, 2010.[11]
>
> (3) At no time during my representation of Alani Blissard with respect to her *Broin* suit, did I advise her with respect to her role as a member of the Board of Directors at FAMRI

[11]The Third District's opinion is not clear with respect to the timing of the motion to withdraw and the filing of the petition. Blissard's complaints to Hunter came during a period where there were discussions with the Rosenblatts about alternative relief. After the Rosenblatts indicated they would not agree to any relief, Blissard advised Hunter that she also objected. Hunter immediately filed the motion to withdraw which was granted on June 24, 2010. This was more than five months prior to the filing of the petition.

> and at no time did I represent Alani Blissard with respect to any of her dealings with FAMRI. Further, I have no involvement in the formation of FAMRI; the operations of FAMRI; nor am I familiar with the inter-workings of FAMRI. I have never attended any of FAMRI's board meetings; I have never been made privy to any of the dealings of FAMRI's board; nor I have I acquired any confidential information material to Blissard's dealings with FAMRI.
>
> (4) In addition, I never undertaken, at anytime, representation of Patricia Young, either with respect to her dealings with FAMRI or with respect to her individual Broin case, *Young v. Philip Morris*. I have never solicited Young's business; given her legal advice; nor have I acquired any confidential information, material to Young's dealings with FAMRI or any confidential information whatsoever. In addition, I have never appeared in *Young v. Philip Morris*, and I have never signed an agreement of representation with Young.

(R 3: 780-81).

On July 13, 2011, the trial court granted the motion to disqualify all of Respondents' counsel. Prior to issuing his written findings, the court conducted a hearing with all counsel to announce his findings. He indicated that he was granting the motion to disqualify because the petition was filed "[A]s I have determined, without the consent of the Movants, Blissard, Young **and many of the thousands of class members**." (R. 2202). In its order, the court then relied on both Rule 4-1.7 and

4-1.9:

> An examination of the detailed affidavits and other exhibits submitted by movants indicate that Petitioners' counsel filed a petition to vacate and/or modify the settlement agreement on behalf of the entire class plaintiffs, without the consent of the movants, Blissard and Young; the approximate 59,600 Broin class members and hundreds of petitioners' counsels own client class members; class members who filed suit but who are represented by other counsel who have not joined to the Petition; the vast majority of the former Broin class, class members who did not file individual lawsuits; and untold thousands of class members. This appears to be in conflict with Rule4-1.7; (a)(b) and 4-1.9(a).

(R.10: 1815).

While the lower court's reasoning is less than clear, it appears that the court found that there had been a violation of Rule 4-1.7 because the petition was filed without the consent of Blissard and Young and some unidentified *Broin* class members, apart from Blissard and Young, who may ultimately not agree with the relief sought in the underlying petition. The court further held that as a result of Hunter's former representation of Blissard and Young, disqualification was also warranted under 4-1.9(a). The court held:

> In determining whether Petitioners' counsel's former representation of Blissard and Young were related to the present litigation, the court

> considered that the initial class action case against Philip Morris ended when a settlement was reached, culminating in the execution of the Settlement Agreement. This agreement permitted Plaintiffs to retained [sic] claims for compensatory damages that would be pursued on an individual basis by class members. The same Agreement forms the basis for the instant litigation involving the movants and Petitioners' counsel. Therefore, at the core of Petitioners' counsels' prior representation of Blissard and Young are the funds that are essential to the current litigation.

(R. 10: 1817).

Following the court's granting of the motion for disqualification the court entered a stay of the order pending ruling on petitions for writ of certiorari filed by Gerson's and Hunter's clients to the Third District Court of Appeal.[12] (R. 4751-52).

E. PROCEEDINGS IN THE THIRD DISTRICT COURT OF APPEAL

In granting the petitions, and quashing the order of disqualification, see *Broin v. Philip Morris Cos.*, 84 So.3d 1107 (Fla. 3rd DCA 2012), the Third District outlined the applicable rules of professional conduct as follows:

> If a *rule 4-1.7* conflict arises "after representation has been undertaken, the lawyer should withdraw from the representation." *Rule 4-1.7* cmt; see also R.

[12]The trial court also disqualified the Respondents additional counsel, Alexander Alvarez, Ramon Abadin, Philip Frieden, Hector Lombana and H.T. Smith indicating that as Respondents' co-counsel, they would be tainted by the alleged grounds disqualifying Gerson and Hunter. (R. 10: 1821).

> *Regulating Fla. Bar. 4-1.6(a)(1)* ("[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from representation of a client if. . . the representation will result in violation of the Rules of Professional Conduct. . . . .") Afterward, whether the lawyer may continue to represent the other client is determined according to *Rule 4-1.9*.
>
> *Rule 4-1.9* governs conflicts with former clients and states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter. . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client once the former client gives informed consent.". . . "Whether two legal matters are substantially related depends upon the specific facts of each particular situation or transaction." *Dunagan*, 731 So.2d at 1240. As the comments to *Rule 4-1.9* state, "matters are 'substantially related for the purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking the work that the lawyer performed for the former client."

Id. at 1110.

Applying the aforementioned rules to the facts, the Third District then indicated:

> Here, *Rule 4-1.7* does not apply because there was no evidence that Mr. Gerson and Mr. Hunter currently represent the respondents. Regarding *Rule 4-1.9*, except for one flight attendant, from whom they withdrew

> representation upon notice of the client's objection, there is also no evidence that Mr. Gerson and Mr. Hunter personally represented the respondents.

Id. at 1111.

Finally, with respect to the one former client and thus, with respect to Rule 4-1.9, the Third District concluded: "[A]though arising from the prior litigation, the present action involves a different issue." In sum, the Third District found that the trial court departed from the essential requirements of law in disqualifying Respondents' counsel, pursuant to either Rule 4-1.7 or 4-1.9, since there was no conflict with either current clients or a former clients.

Following the Third District's ruling and its denial of motions for rehearing, rehearing en banc and a request for certification, the current Petitioners sought to invoke the conflict jurisdiction of this Court. On January 28, 2013, this Court entered its order accepting jurisdiction and this appeal follows.

SUMMARY OF THE ARGUMENT

_____The petition to enforce and administer mandate seeks to obtain, on behalf of extensive number of *Broin* class members, those benefits guaranteed by Class Counsel and the Attorney Ad Litem and mandated by *Ramos*. Because the petition raises issues involving an apparent serious breach of trust by that same Class Counsel, the petition has met with extreme resistence. Initially, that resistence has been in the form of a motion to disqualify collective counsel for hundreds of class

members.

The Third District Court of Appeal saw through the charade being mounted by the present Petitioners emphasizing in its opinion that "Disqualification of counsel strikes at a significant right, that of a party to choose his or her own lawyer, and that often motions for disqualification are filed for tactical purposes. Because it is such a harsh and drastic remedy, it should be resorted to sparingly." *Broin v. Philip Morris Co.*, 84 So.3d 1107, 1109 (Fla. 3rd DCA 2012) (cites omitted). The court then applied the clear and unambiguous Rules of Professional Conduct, correctly concluding that the trial court abused its discretion in disqualifying the seven law firms representing the flight attendants.

Because the present rules are clear, the Court should reject the Petitioners request that a new test be formulated based on precedent from the federal courts. There is no need for the Court to foster uncertainty by adopting or creating new rules which are contrary to the existing language of the rules relied upon by the Third District Court of Appeal.

As the Third District recognized, the trial court's conclusion that Hunter should be disqualified because his actions were in conflict with current clients is wrong. When Hunter was advised by Blissard that she did not agree with the actions undertaken on behalf of the hundreds of other clients of Hunter, Hunter did what was required, as per the Comment to Rule 4-1.7, he withdrew from representation.

In addition, the trial court's conclusion that Hunter had a responsibility to hundreds of other *Broin* class members, who are not his cleints, was simply incorrect as a matter of law. This is not a class action, the Rosenblatts are still class counsel and it is the Rosenblatts who have run afoul of the standards set forth in *The Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011).

Finally, the Third District correctly applied 4-1.9, concluding that the present action involved a different issue than the initial *Broin* personal injury suit which Hunter brought on behalf of Blissard. Blissard and Young are simply not entitled to any presumption that confidences were disclosed since the issues are different. In addition, Young and Blissard had a fiduciary duty to all the class members so there could not possibly have been any information that they could properly withhold from the underlying petitioners.

In sum, to date, despite the filing of thousands of pieces of paper, the Petitioners have failed to advance any logical argument why Hunter's continued representation of his hundreds of other flight attendant clients can somehow prejudice the Petitioners with respect to the present action. For these reasons, the Third District's ruling finding that the trial court departed from the essential requirements of law in disqualifying Respondents' counsel should be approved.

ARGUMENT

AS THE THIRD DISTRICT CORRECTLY RECOGNIZED, THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT MISAPPLIED THE FLORIDA RULES OF PROFESSIONAL CONDUCT AND DISQUALIFIED RESPONDENTS' COUNSEL

A. Disqualification Is An Extraordinary Remedy

Florida courts have consistently held that disqualification of a party's chosen counsel is an extraordinary remedy. *Coral Reef of Key Biscayne Developers, Inc. v. Lloyds Underwriters at London*, 911 So.2d 155 (Fla. 3rd DCA 2005); *Whitener v. First Union Nat'l Bank Fla.*, 901 So.2d 366 (Fla. 5th DCA 2005); *Alexander v. Tandem Staffing Solutions, Inc.* 881 So.2d 607 (Fla. 4th DCA 2004). Moreover, motions for disqualification are viewed with skepticism because disqualification impinges on a party's right to employ a lawyer of choice and such motions are often brought for tactical purposes. *Broin,* 84 So.3d at 1108; *Coral Reef of Key Biscayne Developers, Inc.*, 911 So.2d at 157; *Alexander*, 881 So.2d at 609. See also, *Manning v. Waring*, *Cox, James, Skalar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988) (observing that the ability to deny one's opponents the services of capable counsel, is a potent weapon). In sum, since the remedy of disqualification strikes at the heart of one of the most important associational rights, it must be employed only in extremely limited circumstances. See *Coral Reef of Key Biscayne Developers, Inc.*, 911 So.2d at 157; *Kusch v. Ballard*, 654 So.2d 1035 (Fla. 4th DCA 1994).

The party filing a motion to disqualify bears the burden of proving the grounds for disqualification and if such grounds exist, the motion to disqualify should be made promptly after discovery of the facts that lead to the motion, since failure to make the motion within a reasonable time may be a waiver of the right to seek disqualification. *Balda v. Sorchych*, 616 So.2d 1114, 1116 (Fla. 1993); *Trans Mart, USA v. State*, 631 So.2d 1112, 1116 (Fla. 1st DCA 1994).

In employing the tactic of disqualification, FAMRI and the individuals who moved for disqualification - the custodians of the *Broin* settlement funds - have been successful in thwarting judicial review and oversight of their actions as custodians. There is no question that the Rules of Professional Conduct have been employed as a sword to keep the Repondent Broin class members who seek the judicial review and oversight to which they are entitled, at bay, by preventing any scrutiny of FAMRI's uninhibited use of the settlement funds.

B. There Is No Basis For Disqualifying Steven K. Hunter Under Rule 4-1.7

The disqualification order entered by the trial court was premised upon a conclusion that there has been a violation of Rules 4-1.7(a) and (b) and 4-1.9 (a). These findings will be addressed in order.

Rule 4-1.7(a) and (b) reads as follows:

> Rule 4-1.7. Conflict of Interest; Current Clients
>
> (a) Representing Adverse Interests. - Except as

> provided in subdivision (b) a lawyer shall not represent a client if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or by a personal interest of the lawyer.

The Rule goes on to indicate, in subsection (b), that notwithstanding the existence of a conflict under subdivision (a), a lawyer may continue to represent a client if each affected client gives informed consent.

As the Third District recognized, the trial court's reliance on Rule 4-1.7, as the basis of its disqualification order, was misplaced because the court failed to identify any current clients of the Hunter firm that had any interests directly adverse to the Petitioners. While it may be true that at one point Hunter represented Blissard, the only Movant identified in the Court's order who Hunter ever represented, upon being advised by Blissard that she did not agree with the position espoused by her companion Broin class members, Hunter did what was required – he withdrew from representation of Blissard.

As the Comment to Rule 4-1.7 indicates;

> An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should

> withdraw from the representation. See Rule 4-1.6. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 4-1.9. . .[13]

Petitioners request that the court ignore these comments to the applicable rule and adopt the version of the so called "hot potato rule," adopted by several federal courts, which states that a lawyer cannot drop one client for purposes of resolving a conflict of interest and for purposes of representing a second client. The hot potato doctrine had its origin in the case of *Picker Int'l Inc. v. Varian Assocs. Inc.* 670 F. Supp. 1363, 1366 (M.D. Ohio 1987) aff'd 869 F.2d 578 (Fed. Cir. 1989) and the doctrine's central and original purpose was to sanction firms that seek to accept new representations inconsistent with existing representations. See *Conflicts of Interest: Slicing The Hot Potato Doctrine*, 48 San Diego L. Rev. 251, 267. However, as the aforementioned article indicates, acceptance of the hot potato doctrine is not universal and there are numerous exceptions. See also, *Microsoft Corporation v. Toshiba American Information Systems Inc.*, 2007 U.S. Dist. Lexis 91550 *16 (E.D. Tx. 2007).

As an example, as articulated by the Co-Respondents in their brief, there is extensive federal case law indicating that courts will employ a "balancing test" in

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[13]As the preamble to the Rules of Professional Conduct indicates, a Comment to a Rule "explains and illustrates the meaning and purpose of the rule," and it is intended as a "guide to interpretation."

situations where there is a conflict with a current or former client. Other cases indicate that the application of the hot potato doctrine turns on whether the conflict arose after the attorney was representing two clients or whether it arose when the attorney agreed to represent a new client. Under the former situation the former client rule, such as that set forth in 4-1.9 would apply, while under the latter situation, if the lawyer agrees to take on a new client, creating a conflict with existing client, the rule set forth in 4-1.7 would apply. See *Postcard v. Discover Card Services*, *Inc*., 1994 U.S. Dist. Lexis 19635 *9 (D.C. Ka. 1994) and cases cited therein.

As the Third District found, however, the Comments to the Florida Rules of Professional Conduct specifically address a situation where a conflict arises after representation. In the present case, at the time the alleged conflict arose, Hunter had represented Blissard, the Respondent Adams and several other hundred other flight attendants for a period of approximately 9 years. Once Hunter was advised that Blissard disagreed with any attempts to enforce the *Ramos* mandate, Hunter immediately withdrew from representation, more than five months before the petition was filed.

This is not a case where Hunter dropped an existing client in order to obtain a new more lucrative client and there is no logical reason why hundreds of other flight attendants should go without counsel of their choice because one of their group disagrees with a particular course of action. There is no conflict because Hunter no

longer represents Blissard and he has done was what is dictated by the Florida rules.

The Florida rule addresses the situation at bar and there is no need for the Court to choose among numerous alternatives, some of which would also preclude disqualification, which have been adopted by various federal courts. The Florida standard is clear and unambiguous and there is no reason why this Court should look outside the State of Florida and the rules adopted in Florida, to create uncertainty.[14]

The additional individual Movant identified in the Court's order, Patricia Young, also sought disqualification on the basis that, amongst other attorneys, Hunter and Gerson were her lawyers and that they were prohibited by Rule 4-1.7 from representing any interest that was adverse to her position as a FAMRI board member. Young's claim of representation was directly contradicted by the affidavits of Hunter, and Gerson as well as Alejandro Alvarez, which plainly demonstrated that neither of the three had, at any time, undertaken representation of Young, either with respect to her dealings with FAMRI or with respect to her individual *Broin* progeny case, *Young v. Philip Morris*. As the affidavits indicate, neither Hunter, Gerson or Alvarez ever solicited Young's business; gave her legal advice; nor did they acquire any confidential information material to Young's dealings with FAMRI, or indeed any

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[14]In addition, federal cases are not binding since motions to disqualify in federal court are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal and state law. *In re*: *Dresser Indus. Inc.,* 972 F.2d 540, 544 (5th Cir. 1992).

confidential information whatsoever.

Florida courts recognize that "the test for an attorney/client relationship" is a subjective one and hinges upon the client's belief that he/she is consulting a lawyer in that capacity and his/her manifested intention is to seek professional legal advice. However, the subjective belief "must be a reasonable one." *Mansur v. Podhurst Orscck, P.A.,* 994 So.2d 435, 438 (Fla. 3rd DCA 2008). Furthermore, a party's subjective thoughts that an attorney-client relationship exists, in the absence of facts clearly showing such a belief is reasonable, is insufficient to support disqualification. See *Gen. Elec. Real Estate Corp. V. Weisberg Inc.,* 605 So.2d 955, 956 (Fla. 4th DCA 1992). *Bartholomew v. Bartholomew,* 611 So.2d 85, 86 (Fla. 2nd DCA 1992*).*

The case law stresses that an attorney/client relationship cannot be formed when the attorney has literally no basis to know that a putative client thinks the lawyer has been retained. Thus, while Young may, in conclusory terms, have stated that it was her subjective belief that Hunter and Gerson may have been representing her, she pointed to no facts that can raise even an inference that she manifested her intention to retain any of them as her counsel. See *Bartholomew,* 611 So.2d at 86. See also *Jackson v. Bellsouth Telecommunications,* 372 F.3d 1250, 1281 (11th Cir. 2004)("We believe that giving effect to the requirement that a putative client manifest an intention to retain a lawyer is consonant both with Florida case law and with common sense. Otherwise, a lawyer will have no reason to know of the client's

subjective belief.”).

To overcome the demonstrable lack of an attorney client relationship between Young and Hunter, Young contends, based on *Visual Scene, Inc. v. Pilkington Brothers*, 508 So.2d 437 (Fla. 3rd DCA 1987), that there was, in effect, an “implied” attorney client relationship between Hunter and Young since all of the *Broin* class members coordinated their efforts in suing the tobacco companies. Young’s reliance on *Visual Scene Inc.* and similar cases applying what is known as the “pooled information” or a “joint defense” theory, to support disqualification in this case, is misplaced.

The first case to address the issue of whether attorneys representing different clients who are participating as a members of a pooled information or joint defense team involving other clients, are subject to disqualification, pursuant to a motion raised by the other clients, was *Wilson P. Abraham Constr Corp: v. Armco Steel Corp.*, 599 So.2d 250, 253 (5th Cir. 1977). In that case the Fifth Circuit set the test for disqualification as follows:

> Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matter to which the attorney was

> previously involved, and where confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.

Id. at 253.

Thus, where as here, there is no direct existing attorney-client relationship between Young and Hunter, Young was required to demonstrate that the subject matter of the original *Broin* actions against the tobacco companies, in which all the lawyers allegedly jointly pooled information was substantially related to the present suit against FAMRI. As the Third District held, however, the *Broin* litigation and the current action against FAMRI seeking to enforce the *Ramos* mandate "involves a different issue." *Broin*, 84 So.3d at 1112. Accordingly, the implied attorney-client relationship cases relying on pooled information or a common defense do not support disqualification.[15]

With respect to Young's affidavit, while the Respondents submit that the affidavit on its face is insufficient is a matter of law to objectively demonstrate an attorney client relationship between Hunter and Young, to the extent there were any

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[15]As indicated previously, McGrane's actions in this case are in direct conflict with his numerous existing clients, who were also represented by Alejandro Alvarez and who joined in the petition. In addition, if as McGrane argues, Repondents' counsel should be disqualified because there was an implied attorney client relationship as a result of the collective actions in the *Broin* litigation, then the current Respondents would be considered his clients and his actions against them in this proceeding violate the exact rules of conduct he so vigorously asserts against Respondents' counsel. Perhaps, Mr. McGrane can explain in his reply brief why he is not governed by these standards.

disputes of material fact relating to the motion for disqualification, an evidentiary hearing was required. As the transcript of the hearing on the motion for disqualification demonstrates, at the time of the hearing, the parties submitted affidavits and exhibits. Further, in pretrial memoranda, the parties argued that the exhibits and affidavits alone supported their positions regarding disqualification. The hearing was not noticed as an evidentiary hearing, which would have permitted the Respondents to conduct discovery regarding the affidavits submitted in support of the motion, and in fact FAMRI resisted all efforts at discovery prior to the hearing.

As the case law uniformly indicates, when the court resolves a disqualification issue and does not conduct an evidentiary hearing on a material issue of fact, the court departs from the essential requirements of law. *Misakan v. Husted*, 27 So.3d 695, 698 (Fla. 5th DCA 2010); *The Event Firm, LLC., Inc. v. Augustin*, 985 So.2d 1174, 1175 (Fla. 3rd DCA 2008).

Finally, as stated previously, in its discussion of its finding that a violation of Rule 4-1.7 had occurred, the trial court concluded: that the petition had been improperly filed without the consent of thousands of class members. (R. 10: 1815).

In effect, the court found that there had been a violation of Rule 4-1.7 because some unidentified class members, apart from Blissard and Young, may ultimately not agree with the relief sought in the underlying Petition. However, the only client of the Hunter firm who moved for disqualification would be Blissard. A second Hunter

client, Olivia Chambers, objected to any actions regarding FAMRI. As with Blissard, once advised, Hunter immediately withdrew as Chambers' lawyer and she was not discussed in the Third District's opinion.

Apart from Blissard and Chambers, out of the hundreds of clients represented by Hunter no one disagreed with an attempt to enforce the *Ramos* mandate. The near unanimous support for the petition demonstrates the sense of betrayal and incredulity felt by the flight attendants as a result of the Rosenblatts' handling of their settlement fund.

Further, there is simply no legal basis for disqualifying Hunter, pursuant Rule 4-1.7, based on the theoretical argument that unidentified *Broin* class members, including some who may be represented by other counsel, may not agree with the relief sought in the petition. This petition is being opposed by the Rosenblatts and two board members and there is no evidence that there is any meaningful level of support, amongst the beneficiaries of FAMRI, for the Rosenblatts' handling of their settlement fund.

The trial court's conclusion that Respondents' counsel have claimed to represent a class, and that many of their own clients and hundreds of other class members oppose their actions and that Respondents' counsel's actions were unauthorized, has no basis in fact. The first words out of the mouth of Israel Reyes, Esq., who represented the Respondents at the hearing to disqualify was:

> Good afternoon your Honor. Unfortunately Judge, I cannot introduce all of the people that are here that my clients represent because they have authorizations from over 400 flight attendants that want them to go forward with this petition.
>
> So they're the ones that would be disenfranchised if the court grants this motion. There are over 400 that have said that they want to look at this.

(R. V: 880).

The issue of client authorizations was not a factual issue to be decided by the trial court and in any event, Reyes, a former circuit court judge and an officer of the court, put the issue to rest. Also, client authorization was simply not an issue in front of the Third District. Similarly, during the same hearing on the motion to disqualify, Mr. Reyes also clearly indicated to the court that Respondents' counsel did not represent a class:

> Judge, just so its clear, the petition is being brought on behalf of individual petitioners who are part of the class action. They are not bringing this petition forward on behalf of the entire class. . .

(R. V: 891).

Respondents' counsel never claimed to represent a class and could not possibly represent the class because the Rosenblatts are class counsel, the class has never been decertified, and the petition did not seek class certification status. The petition only indicated that it was brought on behalf of flight attendant class members, not the class

itself, and a sample list of those class members was immediately filed with the court.

Respondents' counsel do not owe a fiduciary duty to clients they do not represent. It is the Rosenblatts, as class counsel, who have violated the dictates of *The Florida Bar v. Adorno*, *supra*, since it is they who have fiduciary obligations to the class as a whole.

The Petitioners extensive arguments that Hunter and Gerson had conflicts with other flight attendants, who have not moved for disqualification, points to one inescapable conclusion - that the motion to disqualify, filed by the custodians of the flight attendants money, has been filed for no other purpose than to obtain a tactical advantage and preclude any inquiry into the Rosenblatt's and FAMRI's uninhibited depletion of the flight attendants' fund. Admittedly, the Comments to the Rule of Professional Conduct indicate that under certain circumstances, someone other than the client may request disqualification.[16] Thus, where the conflict is such as to clearly call into question the fair and efficient administration of justice, opposing counsel may properly raise the question. See Comments to Rules Regulating the Florida Bar 4-1.7. However, as stressed in *Anderson Trucking Service v. Gibson*, 884 So.2d 1046 (Fla. 5th DCA 2004), such a motion for disqualification "should be viewed with

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[16]As a general proposition a party such as FAMRI does not have standing to seek disqualification, where, as here, there is no privity of contract between either Hunter or Gerson and FAMRI. *THI Holdings LLC v. Shattuck*, 93 So.3d 419, 424 (Fla. 2nd DCA 2012); *Continental Cas. Co. v. Przewoznik*, 55 So.3d 691, 691 (Fla. 3rd DCA 2011).

caution, however, or it can be misused as a technique of harassment." (Citing Comment to Rule 4-1.7).

In the present case, the facts do not support any conclusion that the fair administration of justice would be compromised because of Hunter's representation of the Respondent Adams or any other flight attendants. Specifically, the Petitioners have completely failed to articulate any comprehensible argument why Hunter's representation of Adams or any other flight attendants, who have not seen fit to move for disqualification, could inappropriately prejudice the Petitioners in addressing the merits of the underlying petition.

Obviously, if the lower court case ultimately proceeds to a resolution of the merits of the relief sought in the petition, the trial court would make conclusions based on what is best for the class as a whole.[17] However, at this point, there is no basis for disqualifying Hunter or the Hunter firm because of the possibility that there may be some individuals, not even represented by the Hunter firm, who may ultimately not agree with the relief that is being sought. There is simply no authority requiring disqualification under Rule 4-1.7 based on such an argument.

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[17]If, as the Rosenblatts repeatedly argue, the structure of FAMRI cannot be changed because it would violate the settlement agreement, obviously this will not occur. The primary goal, however, is an accounting of where the money has gone and affirmative action in the form of the medical care and treatment guaranteed by *Ramos*.

C. There Is No Basis For Disqualifying Steven K. Hunter Under Rule 4-1.9.

Rule 4-1.9, governing conflicts of interest with former clients, provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known.

To invoke the aforementioned Rule, as the basis for disqualification, the party seeking disqualification must show that:

> (1) An attorney/client relationship once existed; and
>
> (2) The lawyer previously represented the moving party in a legal matter that is the same or substantially related to the matter presently in controversy in which the lawyer's present client's interests are materially adverse to those of the former client.

State Farm Mutual Automobile Ins. Co. v. K.A.W., 575 So.2d 630 (Fla. 1991*)*.

Waldrep v. Waldrep, 585 So.2d 700 (Fla. 4th DCA 2008*)*.

Florida courts define substantially related narrowly, as the same transaction or legal dispute. The courts also consider a matter substantially related if the current matter requires the lawyer to attack work he performed for the former client. See *Healthcare & Ret. Corp. of Am., Inc. v. Bradley,* 961 So.2d 1071, 1073 (4th DCA 2007)(citing the Comment to Rule 4-1.9).

While there is no question, that at one point, Hunter represented Blissard, his representation was limited to her action brought against the tobacco defendants in the *Broin* progeny suits after the *Broin* settlement had been reached. In no sense of the word did his representation of her involve a legal dispute between the class members and FAMRI.

The trial court's conclusion, that Hunter had represented Blissard and Young in the same or a substantially related matter as the current Petition, because "[A]t the core of Petitioners' counsels' prior representation of Blissard and Young are the funds that are central to the current litigation" is a clear misapplication of Rule 4-1.9.

The subject matter, issues and causes of action present in Hunter's former representation of Blissard are not related to the present proceedings. Hunter represented Blissard in a personal injury action against tobacco corporate clients. Here, he was representing *Broin* class members in an action to enforce a court order.

Finally, as the Comment to Rule 4-1.9 further states, in determining whether a lawyer formerly represented a client in a substantially related matter in which the

lawyer's current client had taken an adverse position:

> The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

There is no evidence that Hunter represented the Movants, Blissard or Young, with respect to any of their dealings with FAMRI. All of FAMRI's matters have been handled by class counsel the Rosenblatts, and FAMRI's own lawyer, Roderick Petrey, Esq. As the Hunter affidavit attests, he had no involvement in the formation of FAMRI; the operations of FAMRI; nor is he familiar with the inner workings of FAMRI. There is no evidence that he attended any of the FAMRI board meetings or that he was privy to any of the dealings with the FAMRI Board.

While the Comment to Rule 4-1.9 states:

> A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in a subsequent matter,

the Comment further indicates that:

> A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

There was no evidence presented below, and there can be no reasonable inference, that Hunter's prior representation of Blissard or his alleged prior

representation of Young, with respect to Blissard's and Young's *Broin* progeny suits, was involved in any way with the underlying petition such that one could reasonably conclude that confidential information adverse to the Movants present position would have been divulged. Accordingly, there was no factual basis for disqualifying counsel based on any prior representation or alleged prior representation of the Movants in the *Broin* progeny suits.

Finally, because the lower court's finding that there had been a violation of Rule 4-1.9 is apparently based on the conclusion that there were or could have been confidences disclosed to Hunter by Blissard and Young which could be adverse to their present position, it is important to emphasize the nature of the *Broin* class action. As an example, it is well established that the *Broin* class representatives, such as Blissard and Young, owe a fiduciary duty to the other class members, such as the present clients of Hunter. See *Cohen v. Beneficial Indus. Loan Corp.,* 227 U.S. 541, 549; 93 L.Ed.1528, 69 S.Ct. 1221 (1949). See also, *Rule 1.220 (a)(4) Fla. R. Civ. P.* (requiring that the representative party fairly and adequately protect the interests of each member of the class.).

Further, as subsequent board members of FAMRI, the Blissard and Young could not have had any information, regarding FAMRI, that could be secreted from the Respondents and the other beneficiaries of FAMRI, or more specifically, the beneficiaries of the *Broin* settlement. In addition, as the underlying petition amply

demonstrates, FAMRI was to be under the continued supervision of the trial court and every single class member and their attorneys had a right to be informed about any and all dealings involving FAMRI. Thus, Blissard and Young had a fiduciary duty to assist the Petitioners and the representatives of the other class members, and not to oppose them in seeking to have the trial court exercise its management and supervisory function over the *Broin* settlement proceeds and their usage. Simply put, no information about FAMRI's dealings should be or can be secreted from the court or from the *Broin* class members.

The trial court which approved the *Broin* settlement noted that it was going to retain continuing jurisdiction in connection with the formation, management and direction of the research foundation as recommended in the report or presentation of the Attorney Ad Litem. Further, the specific portion of the report of the Attorney Ad Litem, referred to by the trial court, reads:

> **Foundation Provisions Need Tightening**
>
> **The provisions concerning the establishment of the foundation, its mission, manner of operation, life and supervision should be determined under the court's supervision and guidance, and the class members should always be informed of the foundation's activities and its achievements.**..

(R. X: 1796).

In sum, if as Blissard and Young contend, Hunter served as either Blissard's or Young's lawyer with respect to their FAMRI dealings, because FAMRI owed a duty of full disclosure to the class members, as a matter of law none of the alleged communications divulged to any of Respondents' counsel could be privileged or confidential as to the class members. Young and Blissard, for their part, make general allegations regarding confidential information but these are conclusory statements. Blissard and Young do not elaborate in how the information they allegedly disclosed to Hunter could possibly be used to FAMRI's disadvantage in this case. To put it another way, even if such information was discussed, there was no indication that any such information would be relevant to the dispute at bar. In sum, as emphasized previously, Petitioners have not even begun to logically articulate how Hunter's representation of Blissard in her *Broin* progeny suit has anything to do with whether or not FAMRI breached its obligations to the flight attendants.

The bottom line is that the lower court's conclusion, adopting the disqualification Movants' claim that confidences were disclosed to Hunter, which would prejudice the Movants' present position, were Hunter and the additional Respondents' counsel to proceed on behalf of their clients, should be rejected as a matter of law. The contention that the motion to disqualify was tactically motivated, draws support from the fact that the Petitioners have entirely failed to demonstrate that their interests in this case would be improperly and adversely affected by

Hunter's prior representation of Blissard in her Broin progeny suit. For this reason, and for the additional reasons, addressed above, that Hunter never represented either Blissard or Young with respect to their dealings in FAMRI, there is no basis for disqualifying him under Rule 4-1.9.

D. Hunter Has Not Been Dilatory And There Has Been No Improper Solicitation

Petitioners also make excessive and unfounded statements that Hunter was dilatory in the handling of his *Broin* clients cases and that in some manner there were improper solicitations. First, these issues were not before the Third District and they were not and could not be the basis of the order of disqualification. Second, the accusations are a smokescreen to divert attention from the Rosenblatts' handling of the flight attendants' money. Third, as indicated to the Third District, Hunter and Gerson have tried, at great expense, more secondhand *Broin* progeny than all of the collective lawyers who took on the cases have combined. (R. XXII: 4042-43). Fourth, the Rosenblatts assured the original *Broin* trial court, the Third District and the lawyers who took on this significant burden, that they would be co-counsel in the handling of the cases. However, they have abandoned their clients and these lawyers and have not appeared in a single *Broin* progeny case and certainly have not rendered any financial assistance. (*Id*). This is in violation of the order approving the settlement. Finally, Miles McGrane one of the chief accusers, has 590 *Broin* cases **and has not tried a single *Broin* case**. (*Id*).

With respect to solicitation, the letters were sent to existing clients. As Rule 4-7.9(g) of the Rules of Professional Conduct indicates: "Subchapter 4-7 shall not apply to communication between a lawyer and that lawyer's own current and former clients." Finally, as the Preamble to the Rules of Professional Conduct indicates:

> As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

Obviously, the Rosenblatts would have preferred that Hunter not communicate with his clients and advise them of the issues raised by the petition. However, the contacts were not improper, and this, once again, was not an issue before the Third District.

E. <u>The Motion For Disqualification Was Untimely And The Petitioners Waived Their Right To Move For Disqualification</u>

As stated above, a motion to disqualify should be made with reasonable promptness after a party discovers the facts which led to the motion. See *Balda v. Sorchych*, 616 So.2d at 1116; *Transmark USA v. State*, 631 So.2d at 1116. The underlying petition was filed on December 1, 2010 and the motion to disqualify was filed more then six months later on May 31, 2011. In addition, prior to the actual filing of the petition, the Rosenblatts as well as the other representatives of FAMRI were well aware of Petitioners' claim that the mandate and the *Broin* settlement

agreement conditions were being ignored. This occurred in April of 2010 more than 13 months before the filing of the motion.

Further, prior to filing the motion to disqualify, the Petitioners sought extensive relief in the trial court including:

> ● A motion to transfer the case to another circuit court judge and a *de facto* motion to recuse;
>
> ● Objections to extensive third-party subpoenas filed by the Respondents.
>
> ● Objections to a motion to open and recreate the court file in the original Broin litigation.
>
> ● An objection to declare the case complex;
>
> ● FAMRI files a motion to dismiss for lack of court jurisdiction and standing.

(R. XXII: 4051).

Respondents waited more than five months after the filing of the petition, and more than thirteen months after they were aware of the Respondents' claim that the *Ramos* mandate and the *Broin* settlement condition were being ignored, to move for disqualification. It was only after various motions which were intended to thwart the petition were filed and that they were unable to transfer the case to a another judge, that the Petitioners moved for disqualification. This inactivity should be held to constitute a waiver of any grounds for disqualification. See *Concerned Parents of*

Jordan Park v. Housing Authority of City of St. Petersburg, Fla., 934 F. Supp. 406-408 (N.D. (Fla. 1996) (a waiver occurred where the defendant waited five months after the case was filed to move for disqualification of opposing counsel); *Quail Cruise Ship Mgmt Ltd. v. Agencia de Viagens CMS Limitada, et. al.* 2010 U.S. Dist. Lexis 84593 *14 (S.D. Fla. 2010) (waiver where defendants waited until six months after the complaint was filed to move for disqualification of opposing counsel).

The claim of waiver should be viewed in light of the repeated admonition of Florida appellate courts that motions to disqualify should be viewed with skepticism because they are often brought for tactical purposes. *Coral Reef of Key Biscayne Developers, Inc.* at 157; *Alexander*, at 609. It is perfectly apparent to Petitioners that the disqualification of Respondents' lawyers, after the extensive work undertaken on behalf of the Respondents and additional flight attendant clients of Respondents' counsel, will seriously hamper if not ultimately preclude the resolution of the issues raised by the underlying petition. For these reasons, the Petitioners should be held to have waived the alleged grounds for disqualification.

CONCLUSION

_____For the reasons set forth above, the Respondent respectfully requests that the Court approve the decision of Third District Court of Appeal.

Respectfully submitted,

/s/ Steven K. Hunter

Steven K. Hunter
FBN: 219223
shunter@hunterwilliamslaw.com
Christopher J. Lynch
FBN: 331041
clynch@hunterwilliamslaw.com
HUNTER, WILLIAMS & LYNCH, P.A.
The Monarch Grove Building
2977 McFarlane Road, Suite 301
Miami, Florida 33133
Telephone (305) 443-6200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 2013, a true and correct copy of the foregoing was furnished by e-mail to all parties on the attached service list.

/s/ Steven K. Hunter
Steven K. Hunter
FBN: 219223
shunter@hunterwilliamslaw.com
Christopher J. Lynch
FBN: 331041
clynch@hunterwilliamslaw.com
HUNTER, WILLIAMS & LYNCH, P.A.
The Monarch Grove Building
2977 McFarlane Road, Suite 301
Miami, Florida 33133
Telephone (305) 443-6200

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Respondent Adams' Answer Brief complies with the font requirements set forth in Rule 9.210(2), Fla. R. app. Pro. (2010). The font type in the Answer Brief is "Times New Roman" 14 point.

s/ Steven K. Hunter
Steven K. Hunter
FBN: 219223
shunter@hunterwilliamslaw.com
Christopher J. Lynch
FBN: 331041
clynch@hunterwilliamslaw.com

John S. Mills, Esq.
jmills@mills-appeals.com
Counsel for Petitioners

Christian D. Searcy, Esq.
ksx@searcylaw.com
Counsel for FAMRI

John W. Kozyak, Esq.
jk@kttlaw.com
Counsel for FAMRI

Miles A. McGrane III, Esq.
miles@mcgranelaw.com
Counsel for Patricia Young

Roderick N. Petry, Esq.
rmpetrey@aol.com
Counsel for Alani Blissard

Philip M. Gerson, Esq.
pgerson@gslawusa.com
Edward S. Schwartz, Esq.
eschwartz@gslawusa.com
Counsel for Respondents (3D11-2129)

Marvin Weinstein, Esq.
michele@gwtatlaw.com
Counsel for FAMRI

Edward A. Moss, Esq.
emoss@shb.com
Kenneth Reilly, Esq.
kreilly@shb.com
Counsel for Philip Morris USA Inc.

Kelly Anne Luther, Esq.
kluther@kasowitz.com
Counsel for Liggett Group

Douglas Chumbley, Esq.
dchumbley@carltonfields.com
Counsel for R.J. Reynolds Tobacco Co.

Stephanie E. Parker, Esq.
separker@jonesday.com
Counsel for R.J. Reynolds Tobacco Co.