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**IN THE SUPREME COURT OF FLORIDA**

PATRICIA YOUNG et. al.,
Petitioners,

v.

Case No. SC12-988
L.T. Nos. 3D11-2129 &
3D11-2141

NORVA L. ACHENBAUCH et. al.,
Respondents.

_____/

ON NOTICE OF DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

# RESPONDENTS'BRIEF ON THE MERITS -

# LOWER TRIBUNAL CASE 3D11-2129

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## STATEMENT OF THE CASE AND FACTS

In 1991, a putative class of non-smoking flight attendants filed suit against the major United States tobacco companies for injuries suffered because of occupational exposure to second hand smoke in commercial airline cabins. The complaint demanded both compensatory and punitive damages for class members. The class as certified included:

> [a]ll non-smoking flight attendants who are or have been employed by airlines based in the United States and are suffering from diseases and disorders caused by their exposure to second hand cigarette smoke in airline cabins.

*Ramos v. Philip Morris Cos*, 743 So.2d 24, 26 (Fla. 3d DCA 1999); (SA. V, 4). *See Broin v. Philip Morris Cos.*, 641 So.2d 888 (Fla. 3d DCA 1994). (R. 100).1

Class counsel were and remain Stanley and Susan Rosenblatt. No other lawyers ever represented the class; and no order relieving the Rosenblatts from their duties as class counsel was ever entered. As recently as 2010, the Rosenblatts referred to themselves in publications as "class counsel."(R.201). The lawyers disqualified by the trial court admittedly had no role in prosecuting or settling the class action law suit in *Broin*; and did not file an appearance in *Broin* until they filed the "Petition to Enforce and Administer Mandate" in December of

1 In this brief, the record will be cited using the notation "R." and the cited page numbers for the record on appeal, and the notation "SA," the item number, and internal page number for citations to the accompanying supplemental appendix.

2010. (SA. I; R. 510-21, 708, 711-21, 916-27, 1823-34, 1905-16, 3689-3700, 4105-4116).

In 1997, during jury trial of the class action, the Rosenblatts advised the class representatives to settle. The class representatives followed class counsels' advice and entered into a written settlement agreement with the defendant tobacco companies. (SA. III; R. 97-114, 929-946).

The settlement agreement did not provide for any money damages to be paid to the class members. Paragraph 12 of the settlement agreement authorized class member flight attendants to bring individual actions for compensatory damages under specific conditions and limitations. Class members filing individual actions received limited benefits such as a waiver of statute of limitations defenses, choice of venue, and a finding that second hand smoke in airline cabins caused certain listed diseases in general (although individual disease causation remained as part of each flight attendant's burden of proof). The settlement agreement prohibited individual flight attendants from consolidating or aggregating individual trials; nor could any of them plead claims for fraud or intentional torts, or claim punitive damages under any legal theory. (SA. III, 9-11; R. 105-07, 937-39; *Ramos*, 743 So.2d at 27). These limitations

and prohibitions did not apply in the class action being tried when the settlement was reached.

Paragraph 10 the settlement agreement provided for payment to the Rosenblatts of attorney's fees of $46,000,000.00 and a further reimbursement of $3,000,000.00 for the "approximate level of costs" as "estimate[d]" by class counsel. (SA. III, 8; R. 104, 936). The fees and costs were approved and paid. (R. 155-67; *Ramos*, 743 So.2d at 32-34).

Paragraphs 7 and 8 of the settlement agreement required three annual $100,000,000.00 payments, totaling $300,000,000.00, from the tobacco company defendants. The agreement provided the funds would not be paid to individual flight attendants. Instead, the agreement stated the funds would be used "solely" to "establish a Foundation whose purpose will 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." (SA. III, 7; R. 103, 935). No provision explained how this would benefit the class members, who were all non-smokers according to the class definition.

The trial court approved the settlement. However, in his Memorandum Opinion and Order of February 5, 1998, Judge Robert Kaye narrowed the settlement agreement language. In the order

approving the settlement the judge said the purpose of the proposed $300,000,000.00 settlement funds and the foundation was as follows:

> The purpose of the Settlement Fund is to establish a Flight Attendant Research Foundation whose purpose will be to sponsor scientific research for the early detection and cure of diseases of **flight attendants** caused from [second hand] 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.
>
> This Court finds that the Flight Attendant Research Foundation will 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 disease will benefit from the early detection of diseases for which they are at risk of developing.
> (SA. IV, 13-14, 28; R. 128-29, 143)(emphasis by bolding added; underlining in original).

Objectors disputed the court's approval of the settlement, challenging among other things the use of the $300,000,000.00 to establish a research entity instead of making direct payment to the class members for the damages sued for in the complaint. Objectors also asserted that the settlement agreement lacked sufficient detail regarding the structure and operation of the proposed foundation. Judge Kaye rejected these objections, stating in his February 5, 1998 order that administration of the settlement fund should not be a concern because the "Court shall **retain continuing jurisdiction** in connection with the formation,

**management and direction** of the Flight Attendant Research Foundation, as recommended in the Report and presentation of the Attorney Ad Litem." (SA IV, 32; R. 147)(emphasis added).

The Third District Court of Appeal rejected the objections and affirmed Judge Kaye's order approving the settlement, as modified in its opinion. The Court also approved the payment to class counsel of $49,000,000.00 in attorney's fees and costs. *Ramos*, 743 So.2d at 32-33. Further, describing the "Flight Attendant Research Foundation" to be established pursuant to the Settlement Agreement and trial court orders approving the agreement, the *Ramos* Court added to Judge Kaye's order, consistent with the recommendation of Attorney ad Litem John Ostrow, that

> the medical **foundation will provide treatment** to mitigate diseases afflicting 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*, 743 So.2d at 33; SA. V, 10(emphasis added).

After the trial court approval of the settlement as modified and after the further refinements by the Third District Court of Appeal in *Ramos*, the defendant tobacco companies paid the three annual $100,000,000.00 payments. The money was transferred to the "Flight Attendant Medical Research Institute" (FAMRI), a Florida not for profit corporation formed by attorney

Roderick Petrey, who was selected as FAMRI's counsel by Stanley and Susan Rosenblatt.

Notwithstanding the requirement for "continuing" court supervision in Judge Kaye's order, since its incorporation, FAMRI operations have not been court supervised. In fact, no information was ever provided to the trial court about FAMRI operations or expenditures. At no time did FAMRI request or obtain any "guidance" or "direction" from the *Broin* trial court. Instead FAMRI has operated autonomously without court direction or supervision, notwithstanding the representations its board members made to obtain trial court approval and contrary to the plain and specific requirements of the order of approval and *Ramos* mandate. (SA. I, 5-6; R. 514-15, 714-15, 920-21, 1827-28, 1909-10, 3693-94, 4109-10).

The FAMRI board has always consisted of *Broin* class counsel Stanley and Susan Rosenblatt, Attorney ad Litem John Ostrow, and since 2007 three (originally four) class representative flight attendants. (SA. I, 5; R. 201, 514, 714, 920, 1827, 1909, 3693, 4109). The Rosenblatts never sought nor otherwise obtained an order relieving them of their responsibilities as class counsel, and continued, at least through 2010, to refer to themselves in FAMRI publications as "class counsel." (R. 201).

Without any involvement by FAMRI, some flight attendants filed individual civil actions for compensatory damages against the tobacco companies pursuant to Paragraph 12 of the Settlement Agreement. Despite the assertion below by Respondents that there are approximately 60,000 class members, no comprehensive list of names is in the record, and fewer than 3,000 flight attendants actually filed individual compensatory damage actions. (*Philip Morris, Inc. v. French*, 897 So.2d 480, 481, 483-84 (Fla. 3d DCA 2004); R. 1920). In 2000 Stanley Rosenblatt recruited Steven Hunter, Philip Gerson and others to act as plaintiffs' counsel for these individual actions.

The Memorandum Opinion and Order of the trial court approving the settlement agreement recites that Stanley and Susan Rosenblatt, as class counsel, "agreed to provide continuing assistance in all individual claims filed throughout the United States and to appear as additional counsel, without charge to class members or their counsel." (R. 128). Notwithstanding this promise, neither of the Rosenblatts filed any pleading, made any appearance, or otherwise participated in any of the individual damage cases except the cases of those who were FAMRI board members or who were class representatives prior to the settlement agreement.

Of the eleven civil damage suits which were tried before

juries, one resulted in a plaintiff's verdict and final judgment, another in a mistrial, and the rest were defense verdicts, one of which was reversed on appeal. Cost and attorney's fee judgments were entered against some flight attendant plaintiffs. (SA. V, 8; R. 517, 717, 923, 1912, 1830, 3696, 4112).

According to the affidavit of FAMRI board member Patricia Young, the disqualified lawyers for individual flight attendants requested FAMRI to fund proposed scientific research on the medical causation of second hand smoke and disease, and also requested advice about FAMRI's funding process and policies so that researchers could apply for FAMRI funding. FAMRI refused to fund this research. (R. 501). FAMRI also refused to fund or advance litigation expenses for the individual flight attendants or to reimburse the flight attendants for the attorney's fee and cost judgments being entered against them when individual cases resulted in defense judgments. (R. 477,501).

Through their disqualified attorneys, many of the flight attendants who filed individual cases also asked FAMRI to apply its assets directly for the benefit of class members as mandated in *Ramos*. The disqualified lawyers for these flight attendants attempted to get this assistance from FAMRI for years. These attempts culminated in formal negotiations including voluntary

mediation with class counsel Stanley and Susan Rosenblatt as well as the other FAMRI board members during 2009 and 2010 addressing possible measures which could be undertaken to accomplish the expectations approved in *Ramos*. A draft petition for relief was sent to class counsel on February 2, 2010. (R. 552-60, 980-88).

Attorney Miles McGrane represented approximately 590 flight attendants in their individual compensatory damage actions, including FAMRI board member and "movant" Patricia Young. (R. 426, 500). He participated actively in the discussions among flight attendants' disqualified lawyers concerning potential changes in FAMRI practices and policies which could benefit the class members. Mr. McGrane hosted meetings of the flight attendants' disqualified lawyers at his office, including the initial petitioning lawyers, Steven Hunter, Philip Gerson, and Alex Alvarez. (R. 1037). The meetings were held because there was a consensus FAMRI as operated was not benefiting the class as required by the trial court and the district court of appeal. In fact, in late 2009, Mr. McGrane drafted and circulated the earliest versions of a proposed petition among the flight attendants' counsel, suggesting various measures which might be undertaken to resolve the failure of FAMRI to function as agreed and approved to

benefit class members. (R. 1037, 1061-62). Ultimately, class counsel and the FAMRI board refused all requests for any changes to benefit class members, just as FAMRI had rejected the requests for assistance with the flight attendants' individual actions.

On December 1, 2010, individual class member flight attendants, (referred to as the Petitioners in the trial court and Respondents in this court) filed a "Petition to Enforce and Administer Mandate," seeking among other potential judicial relief an "accounting of all funds received and expended" by FAMRI and an injunction against "further expenditures of sums not expressly approved by this court." (SA. I, 10; R. 519, 719, 925, 1832, 1914, 3698, 4114). The Petition sought relief neither limited to nor requiring the dissolution of FAMRI; the prayer for relief proposed alternative remedies. (SA. I, 10; R. 519, 719, 925, 1832, 1914, 3698, 4114). Despite the Petitioners' characterization of the Petition as an effort to "destroy FAMRI" and similar disparagements, the central feature of the relief sought has always been an accounting with other possible judicial remedies being applied as warranted thereafter.

Attorneys for the Petitioners included the law firms of Gerson & Schwartz P.A., Hunter, Williams and Lynch P.A., and The

Alvarez Law Firm P.A. (SA. I, 11; R. 520, 720, 926, 1833, 1915, 3699). Soon after the filing of the petition, attorneys Ramon Abadin, Philip Freidin, Hector Lombana, and H.T. Smith all appeared as co-counsel in support of the Petition.

On December 13 and 14, 2010, within two weeks after filing the petition, three of the petitioning flight attendants' attorneys, Alex Alvarez, Philip Gerson, and Steven Hunter, filed notices naming 53 of the flight attendants (16 in one notice and 37 in the other) as "a sampling number of the Petitioners." (SA. II; R. 64-69, 583-87, 2090-92, 2094-95). The filing demonstrated a significant number of class members who did want court supervision over the settlement money.

On February 14, 2011, some two months after the Petition to Enforce and Administer Mandate was filed, FAMRI and the FAMRI board members moved to disqualify the assigned trial judge and transfer the case to the Honorable David Miller, filing a so-called "Joint" motion to transfer, even though the petitioning attorneys were not consulted and did not join in the motion. (R. 3989-4013). Class counsel Stanley and Susan Rosenblatt had previously litigated in front of Judge Miller disposition of a $710,000,000 trust fund created in the *Engle* smokers' litigation2. (R. 3994; 4030-31). The administrative judge denied

2 *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

this request, but the assigned judge, the Honorable Ellen Venzer, recused herself (R. 1106, 2393). The case was eventually assigned to the Honorable Gerald Bagley.

On May 23, 2011, more than five months after the Petition was filed, and at least 18 months after they knew of the class member requests for accountability and court supervision, Alani Blissard and Patricia Young, both *Broin* class representatives and board members since the creation of FAMRI, moved to disqualify all seven law firms for the Petitioners. Roderick Petrey, as counsel for FAMRI, filed the motion on behalf of Ms. Blissard, while Ms. Young's counsel Miles McGrane filed the motion on her behalf. (R. 72-93). FAMRI joined in the disqualification motion. (R. 792). Other lawyers as identified in the certificate of service also filed notices of appearance for FAMRI.

On June 13, 2011 the "movants" and Miles McGrane filed affidavits and a memorandum of law arguing for disqualification. Ms. Blissard and Ms. Young alleged that conflicts of interest required disqualification of Steven Hunter, Philip Gerson, and Alex Alvarez, and that the asserted conflicts should be imputed to disqualify the other four Petitioners' law firms. (R. 592-628). The Petitioners, through independent counsel Israel Reyes, responded on June 22, 2011. (R. 681-707, 1835-61, 3661-

87).

Ms. Young's and Ms. Blissard's motion was based on affidavits and legal argument. The class member flight attendant's counsel submitted affidavits from attorneys Hunter, Gerson and Alvarez which specifically and expressly disputed the movants' factual assertions.

For example, in his affidavit Miles McGrane swore under oath that all attorneys representing flight attendants in their individual civil damages cases against tobacco companies had worked on the cases "jointly" as a "team effort," so that Steven Hunter, Philip Gerson and he "jointly represent[ed]" FAMRI board members Patricia Young and Lani (Alani) Blissard (R. 428). He asserted that "Commencing in 1998 there were a series of weekly meetings with flight attendants' counsel that included Steven Hunter and Philip Gerson," even though Mr. Gerson and Mr. Hunter admittedly had no involvement in the case until after the approval of the settlement in *Ramos*, during the year 2000. (R. 427). He claimed that the participants in these meetings "freely exchanged information about each case..." (R. 428). He also asserted that Patricia Young and Alani Blissard met with "our legal team" "whenever we requested" to discuss "how we would collectively pursue the flight attendants' cases through our legal team" and "spoke freely" at those meetings about "their

experiences working for airlines when smoking was permitted," as well as "their work with FAMRI." (R. 428). He indicated that the attorneys "shared discovery and costs" and "jointly argued all legal issues that would apply across-the-board in all cases." (R. 427).

In her affidavit Alani Blissard claimed that "all of the initial attorneys in the individual damages lawsuits worked closely together" and "acted as a team,"; that she shared "many confidences with them,"; and that while she had only retained Steven Hunter as her attorney for her civil damages suit she also considered Philip Gerson to be a member of her "legal team." (R. 475-77). She related that she testified in flight attendants' trials against the tobacco companies about "the truth of our cabin conditions" and recruited other flight attendants as witnesses. (R. 476). She also stated FAMRI had sent the "initial attorneys" "relevant published research ... to help with the flight attendant cases." (R. 476).

In her affidavit, Patricia Young said that her individual case had been "filed in Court by attorney Miles McGrane," whom she admitted was "my attorney," but that Miles McGrane was "jointly handling" her case and other flight attendant cases with Mr. Gerson and other attorneys and that she "considered all the attorneys my attorneys...." (R. 500). She claimed she shared

(unspecified) "confidences" and "confidential information" regarding "myself, the litigation and FAMRI," both with her attorney Miles McGrane and with Mr. Gerson. (R. 500). She also claimed she discussed matters relating to the administration of FAMRI with Mr. Gerson and Steven Hunter, who asked her "many questions about the criteria FAMRI used to fund research, the peer-review process, and whether their experts could bypass peer review." (R. 501). She said that Mr. Gerson and Mr. Hunter wanted information about FAMRI funding criteria and procedures in order to "help their experts who wanted funding from FAMRI." (R. 501). Ms. Young also asserted that "Gerson and Hunter" asked her "to ask the FAMRI board for funding for the flight attendant litigation" or "to cover any [adverse cost] judgments against flight attendants." (R. 501). She acknowledged that FAMRI denied all of these requests. (R. 501). She also pointed out that Steve Hunter had spoken at a FAMRI sponsored event and that Mr. Gerson had also attended some FAMRI symposia. (R. 501).

Philip Gerson submitted an affidavit directly denying the assertions Ms. Blissard and Ms. Young made in their affidavits concerning their relationship and dealings with him. He stated that he had "never been retained" by Alani Blissard, had "never provided any legal services" for her, and had "never" "filed any pleading or Court paper on her behalf or appeared for her as

counsel at any hearing." Furthermore, he denied that Ms. Blissard ever "disclosed any information to me about the operations of the Board of Directors of FAMRI" and further denied ever having any written or telephonic communication at all with Ms. Blissard. (SA. VI, 3; R. 767, 1004, 1921). His dealings with her were limited to seeing her at some social events, such as weddings in the Rosenblatt family, and seeking her assistance as a generic fact witness in some of the flight attendant trials concerning generally prevalent conditions on airplanes when smoking was allowed. (SA. VI, 3; R. 767, 1004,1921).

Similarly, Mr. Gerson stated that he had "never been retained" by Ms. Young, had "never provided any legal services" for her, and had never filed any legal papers or appeared in court on her behalf. He denied that she had ever "disclosed any information to me about the operations of the Board of Directors of FAMRI" and specifically denied that he had discussed with her either the possibility of FAMRI's funding costs of individual flight attendant suits or of FAMRI's reimbursing flight attendants for adverse judgments as she had asserted in her affidavit. (SA. VI, 3; R. 767, 1004, 1921). He unambiguously stated that he never had written or telephonic communications with Ms. Young and that his only contact with her was in "casual

five minute conversations" at FAMRI events (symposia), during which they did not discuss the facts of her damages law suit, "nor were the workings of FAMRI or its Board of Directors even mentioned." (SA. VI, 3R. 767, 1004, 1921).

In his affidavit Philip Gerson directly contradicted Ms. Young's and Ms. Blissard's assertions that he had represented them jointly in the flight attendant litigation or had provided any legal services to either. He also contested their descriptions of the extent of his contact with them and discussions with them of assistance FAMRI might offer the flight attendants in their individual damage cases. His description of his relationship with Ms. Young and Ms. Blissard also directly contradicted Miles McGrane's sworn assertions that he was part of their legal team.

Mr. Gerson filed an individual damage case for flight attendant Raiti Waerness. On April 27, 2010, he attended a voluntary mediation with disqualified flight attendants' counsel, class counsel, and other FAMRI board members. At this meeting, after almost ten years with no contact from Ms. Waerness, Mr. Gerson was given a copy of an e-mail from Ms. Waerness to Elizabeth Kress, the executive director of FAMRI. In her e-mail to Ms. Kress, Ms. Waerness stated her disapproval of any proposed proceeding against FAMRI. (R. 1751).

Inexplicably, she did not contact Mr. Gerson directly to express her concerns; Mr. Gerson learned of her objection only when handed the copy of the e-mail. (SA. VI, 4; R. 768, 1005, 1751, 1922). One week after the e-mail to Ms. Kress was delivered to Mr. Gerson, he responded by letter to Ms. Waerness, offering to withdraw as her counsel. (R. 1026). Shortly thereafter, not having received any reply to this letter from Ms. Waerness either directly or through class counsel or FAMRI, Mr. Gerson filed a motion to withdraw from her individual damages action. (SA. VI, 4; R. 669-70, 768, 1005, 1922). He wrote to inform Ms. Waerness of the motion, and asked her to advise him if she wished to attend the hearing on the motion to withdraw in person, given that she resided in the state of Washington. (SA. VI, 4; R. 768, 1005, 1922). Ms. Waerness neither responded nor attempted to contact Mr. Gerson. A year later an affidavit from Ms. Waerness was included as an exhibit in the Respondents' filing in support of disqualification. (R. 530-32).

After seeing the affidavit from Ms. Waerness, Mr. Gerson scheduled a hearing as quickly as possible on the long pending motion to withdraw from the civil damages case. (SA. VI, 4; R. 666-68, 768-69, 1005-06, 1922-23). At a hearing on June 14, 2011, the motion was granted. (SA. VI, 4-5; R. 768-69, 1005-06, 1008, 1028,1922-23, 1924). Ms. Waerness did not attend in person

or by telephone. Nor did she ever attempt any communication with Mr. Gerson. Strangely, FAMRI board member John Ostrow appeared at the hearing and objected to the motion to withdraw. When asked by the division judge what his standing was to object, Mr. Ostrow expressly denied that he represented her and denied any intent to represent Ms. Waerness in any capacity as her attorney in the future, or even to represent her for the limited purpose of objecting to the motion. (SA VI, 5; R. 769, 823-24, 1006, 1923). After the order granting the motion to withdraw was signed Ms. Waerness has not attempted any contact with Mr. Gerson. (SA. VI, 5; R. 769, 1006, 1923).

The movants filed another affidavit from flight attendant Peggy Spurgeon. While Mr. Gerson did file an individual action for Ms. Spurgeon, as a courtesy at the request of Mr. Rosenblatt on the eve of the expiration of the statute of limitations, Ms. Spurgeon never executed a retainer agreement sent to her by Mr. Gerson nor ever attempted any communication with him over the next ten years. She never retained Mr. Gerson as her attorney. (SA. VI, 5; R. 769, 1006, 1923).

On June 30, 2011, the trial court conducted a hearing on the motion to disqualify. (R. 835-909, 1942-2016). The hearing was neither noticed nor conducted as an evidentiary hearing. The court received some exhibits, including the contradictory

affidavits and documents, into evidence. (R. 839-40, 1946-47). However the court took no testimony. Despite the burden of proof on the present Petitioners as movants, the hearing proceeded only upon legal argument of counsel and proffers without witnesses. The trial court alerted all counsel at several points that the taking of testimony would be warranted to resolve the disputed issues of fact:

> (The Court) What evidence that you can point to or proffer for this Court, and perhaps later by the way of evidence, that shows that the conduct of petitioner counsel warrant their disqualification?
> (R. 850, 1957).
>
> (The Court) So I would like for you to address that issue because I really want to advance forward into some legal argument. I'm allowing you to proffer your evidence. Then, if need be, I'm prepared to take testimony.
> (R. 860, 1967).
>
> (By Mr. Sales for Respondents) If Your Honor wants to take testimony on it, we can do that. They don't want this strike payment of however many few thousand dollars it's going to be.
> (R. 871, 1978).

After the hearing on July 5, 2011, the movants filed a post-hearing memorandum. In this memorandum they claimed uncertainty as to whom Mr. Gerson represented, notwithstanding the notices filed in December 2010 identifying sample petitioners and notwithstanding Mr. Gerson's affidavit clearly stating that he had never represented Alani Blissard or Patricia Young. (R. 1753-63).

On July 13, 2011, the trial court entered the order under review, disqualifying all attorneys for petitioners. (R. 1805-22, 4765-82). The trial court resolved all disputed issues of fact on the basis of the affidavits and proffers, without testimony and without acknowledging in the order a need to take testimony. (R. 1805-22, 4765-82).

The present Respondents sought certiorari review of the disqualification order, the correct procedure for reviewing such orders since an erroneous disqualification causes material harm that cannot be remedied upon a plenary appeal. *Event Firm, LLC, v. Augustin*, 985 So.2d 1174, 1175 (Fla. 3d DCA 2008). On review, the Third District acknowledged the applicability of the governing Rules 4-1.7 and 4-1.9 regulating the Florida Bar. *Broin v. Philip Morris Companies, Inc.*, 84 So.3d 1107, 1109 (Fla. 3d DCA 2012). The Third District held that these rules did not warrant disqualification under the facts of the case. The appellate court expressly found the disqualified counsel had withdrawn from representation of those objecting to the Petition To Enforce and Administer Mandate, so there was no concurrent representation of conflicting clients and thus no basis for disqualification under Rule 4-1.7. *Broin*, 84 So.3d at 1112. Moreover, the appellate court concluded that the flight attendant's individual compensatory damages law suits against

tobacco companies had no substantial relationship to the operations of FAMRI, so counsel's representation of flight attendants seeking relief in the Petition to Enforce and Administer Mandate pertained to a "different issue" than the individual actions. *Broin*, 84 So.3d at 1112. Therefore no violation of Rule 4-1.9 occurred.

The present Petitioners moved, initially with success, for a stay of the Third District Mandate. (R. 4722-32, 4812-13, 4839). Months later, the Third District vacated the stay. (R. 4955). The Petitioners then moved for and obtained a stay order from this Court which remains in effect. Therefore, there has been no progress in litigating the merits of the Petition to Enforce and Administer Mandate since the filing of the disqualification motions.

## SUMMARY OF ARGUMENT

**THE HOLDING OF THE DECISION BELOW IS THE CORRECT APPLICATION OF ESTABLISHED FLORIDA LAW REGARDING ATTORNEY DISQUALIFICATION.**

In the decision below, the Third District Court of Appeal correctly applied the applicable case law regarding disqualification of attorneys based on the applicable Florida Bar rules pertaining to alleged conflicts of interest. Contrary to the assertions in Petitioners' brief, the Third District

neither ignored the applicable law nor attempted to create new law.

Both Florida and federal courts recognize that disqualification is an extraordinary remedy that should be applied sparingly, since by depriving clients of counsel of their choice it strikes at the heart of one of the most important associational rights. As noted by the Third District, federal courts apply a balancing test and do not mechanically and automatically disqualify even in cases where counsel arguably has a conflict. This federal balancing test applies in non-class as well as class actions, contrary to the suggestion in Petitioners' brief. Under any view of the law, the burden of proving grounds for disqualification remains on the movants, in this case the Petitioners in this Court.

The Florida Bar rule regarding conflicts of interest with former clients, and the associated comment, indicate that conflict of interest with a former client occurs only when the attorney representing the current client represented the former client in a substantially related matter. Two matters are "substantially" related for purposes of this rule when they involve the same transaction or dispute, or when an attorney's representation of the current client would require the attorney to attack work performed for the former client.

The present proceedings seeking an accounting and potentially other relief from FAMRI have no substantial relationship either to the initial *Broin* class action proceedings or to individual flight attendants' actions against tobacco companies; they involve different transactions and disputes, while proceedings against FAMRI in no way attack any work done representing individual flight attendants. The individual suits have proceeded without reference to the activities or even existence of FAMRI, while the Petition to Enforce and Administer Mandate did not address any matter at issue in the individual lawsuits, such as individual medical causation and compensatory damages. The Petitioners themselves note that FAMRI flatly declined all requests for assistance from the flight attendants' attorneys, including requests for litigation funding, cost reimbursement for adverse cost judgments entered against unsuccessful flight attendants, and requests to fund research by experts as proposed by the attorneys. FAMRI operates as its board wishes, without the court supervision required in the order of approval and *Ramos* mandate and without any reference to the progress, or lack thereof, of the individual actions. The Third District correctly recognized the absence of a substantial relationship between the Petition to Administer and Enforce Mandate and other

proceedings, noting that proceedings against FAMRI involve a "different issue" than the *Broin* class proceedings or the proceedings by flight attendants against tobacco companies.

The Petitioners erroneously suggest that Mr. Gerson currently represents conflicting clients, so that the concurrent representation Bar rule, rather than the rule pertaining to conflicts with former clients, applies. The concurrent representation conflict rule, in its clarifying comment, advises counsel to withdraw from representation when a conflict with a current client develops. Mr. Gerson did this, moving to withdraw as Ms. Waerness' counsel in her individual flight attendant action once he learned, indirectly, of her objection to proceeding against FAMRI. After withdrawal she became a former client, and there was no remaining conflict with her since as noted above there was no substantial relationship between the proceedings against FAMRI and the individual flight attendants' actions.

Petitioners argue extensively that Mr. Gerson somehow represented FAMRI board members Alani Blissard and Patricia Young, even though they admittedly had other counsel for their individual flight attendant actions. Mr. Gerson never appeared at any hearing or filed any pleading for them. Even taking their affidavits, and the affidavit of Miles McGrane, at face

value, while totally discounting the conflicting affidavits submitted below by Mr. Gerson and others, the Petitioners can point to no concrete evidence of representation and no specific confidences exchanged. At most, Mr. Gerson discussed with their counsel certain "across-the-board" legal issues applying in all the flight attendants' cases against tobacco companies, asked Ms. Blissard and Ms. Young for assistance as witnesses in other flight attendants' trials, and requested assistance from FAMRI in funding litigation costs and research, which requests FAMRI denied. None of these acts constituted providing any legal advice to Ms. Blissard, Ms. Young, or FAMRI, or representing them as counsel under the applicable legal standards.

Thus, as a matter of law, there was no conflict warranting disqualification, even construing the evidence in the light most favorable to the Petitioners. The Respondents also note, however, that to the extent the conflicting affidavits submitted below created issues of fact, these were not resolved by an evidentiary hearing or testimony, and it remained the burden of Petitioners as movants to come forward with any necessary evidence.

## ARGUMENT

**THE HOLDING OF THE DECISION BELOW IS THE CORRECT APPLICATION OF ESTABLISHED FLORIDA LAW REGARDING ATTORNEY DISQUALIFICATION.**

The law of this state regarding attorney disqualification for an alleged conflict of interest fully supports the holding and result in the Third District opinion. The Third District correctly concluded there was no concurrent representation of conflicting clients requiring disqualification. The court also correctly concluded that there was no substantial relationship between the proceedings below, seeking an accounting, judicial supervision of the administration of FAMRI, and other relief, and either the prior class action proceedings or the individual compensatory damage law suits by flight attendants against the tobacco companies. Thus the court ruled that the extreme step of disqualification, depriving Respondents of counsel of their choice, was neither required nor appropriate. Contrary to the assertions in Petitioners' brief, the Third District neither ignored the applicable Rules Regulating the Florida Bar nor attempted to create new law; rather, the Third District acknowledged the applicability of the Bar rules and applied them properly to conclude that disqualification was not warranted under the facts.

Disqualification of a party's chosen counsel is an "extraordinary remedy" that should be "resorted to sparingly." *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 608 (Fla. 4th DCA 2004); *Coral Reef of Key Biscayne Developers, Inc. v. Lloyd's Underwriters at London*, 911 So.2d 155, 157 (Fla. 3rd DCA 2005), *review dismissed sub. nom. Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne Developers, Inc.*, 954 So.2d 1169 (Fla. 2007); *Kaplan v. Divosta Homes, L.P.*, 20 So.3d 459, 461 (Fla. 2nd DCA 2009); *Minakan v. Hunsted*, 27 So.3d 695, 698 (Fla. 4th DCA 2010). Since disqualification "impinges on a party's right to employ a lawyer of choice" and therefore "strikes at the heart of one of the most important associational rights," motions for disqualification are properly "viewed with skepticism" and should be granted "only when clearly necessary." *Coral Reef*, 911 So.2d at 157; *Health Care and Retirement Corp. v. Bradley*, 944 So.2d 508, 511 (Fla. 4th DCA 2006); *In Re: Jane Doe 06-C*, 948 So.2d 30, 32 (Fla. 1st DCA 2006). Disqualification "may impose extreme hardships on the client because this very valuable right [to choose one's own lawyer] is taken away." *Anderson Trucking Service, Inc. v. Gibson*, 884 So.2d 1046, 1049 (Fla. 5th DCA 2004). Attorneys "are not fungible items that can be removed and conveniently replaced..." Id. Since it is not possible to know "what different choices

the rejected counsel would have made" during the course of the litigation, or "to quantify the impact of those different choices on the outcome of the proceedings," an erroneous disqualification of counsel is in the nature of a structural error that can never be harmless. *In Re: Jane Doe*, 948 So.2d at 32, *citing United States v. Gonzalez-Lopez,* 126 S. Ct. 2557, 2565 (2006).

Florida courts have observed that disqualification motions are "often interposed for tactical purposes." *Alexander v. Tandem Staffing Solutions, Inc.,* 881 So. 2d 607, 608-09 (Fla. 4th DCA 2004); *Coral Reef*, 911 So.2d at 157; *Yang Enterprises, Inc. v. Georgalis*, 988 So.2d 1180, 1183 (Fla. 1st DCA 2008). Disqualification at a minimum delays the proceedings. *Anderson Trucking Service*, 884 So.2d at 1049.

Two rules regulating the Florida Bar, both cited, analyzed, and correctly applied by the Third District, govern the determination whether an attorney has a conflict of interest requiring the extraordinary remedy of disqualification.

Titled "Conflict of Interest; Current Clients," Rule 4-1.7 governs conflicts arising when an attorney represents two clients with conflicting interests at the same time, even in unrelated matters.

Titled "Conflict of Interest; Former Client," Rule 4-1.9

governs conflicts arising when an attorney's representation of a current client is adverse to a former client. However, Rule 4-1.9 conflicts may arise only if the current and former representations involve matters that are "substantially related." Rule 4-1.9(a), Rules Regulating the Florida Bar; *State Farm Mutual Automobile Inc. Co. v. K.A.W.*, 575 So.2d 630, 633 (Fla. 1991).

For the purposes of Rule 4-1.9, two matters have a "substantial" relationship if they "involve the same transaction or legal dispute," or if an attorney's representation in a subsequent matter "would involve the lawyer attacking work that the lawyer performed for the former client." Rule 4-1.9, comment; *Health Care and Retirement Corp. of America, Inc. v. Bradley*, 961 So.2d 1071, 1073 (Fla. 4th DCA 2007).

In this case, there is no substantial relationship under the Rule 4-1.9 standard between the individual compensatory damages law suits against tobacco companies and the activities of FAMRI; the individual cases and FAMRI's activities involve different transactions and different disputes. The individual flight attendant actions have two issues common to each; medical causation of disease by second hand smoke and individual damages. The Petition to Enforce and Administer Mandate addresses the administration of FAMRI and raises matters totally

unrelated to the medical causation and damage issues in the individual law suits. Moreover, criticism of the operations or administration of FAMRI does not involve an attack on the work performed in representing individual flight attendants in their own cases against tobacco companies.

As all parties agree, counsel disqualified below had no involvement whatsoever in the original *Broin* class action. Class counsel Stanley and Susan Rosenblatt alone represented the flight attendant class in *Broin* action throughout the litigation, including the drafting of the settlement agreement, its court approvals, and both the formation and operation of FAMRI. The Rosenblatts remain class counsel since no court order ever relieved them of their responsibilities to all class members, and continued as recently as 2010 to be identified in FAMRI publications as "Class Counsel."

Given that disqualified counsel admittedly did not represent the class and had no role in the class action, Petitioners' continued references to the ethical principles pertaining to class counsel set forth in *Florida Bar v. Adorno,* 60 So.3d 1016 (Fla. 2011), is puzzling. *Adorno* dealt with the obligation of counsel representing a class to serve the interests of all class members, not merely a favored few. In this case, disqualified counsel never represented the class,

have received no fees or other funds from class representation, and have exercised no control over the $300,000,000.00 settlement fund for the class. Their ethical obligations ran only to their own clients, not the *Broin* class. If the admonishments of *Adorno* apply at all, it is to the actual and continuing class counsel, Stanley and Susan Rosenblatt, who do have the obligations explained in *Adorno* to serve the entire class rather than themselves and a favored subset of class representatives.

The mere existence of the settlement agreement does not make all matters thereafter related for purposes of disqualification under Rule 4-1.9, as Petitioners erroneously suggest. *See Frank, Weinberg & Black, P.A. v. Effman*, 916 So.2d 971, 973 (Fla. 4th DCA 2005)(1991 and 2003 actions were not substantially related, even though they were based on the same shareholders' agreement, where the actions involved "entirely different facts."). The *Broin* settlement agreement contained three different sections providing distinct remedies for various parties. The individual actions proceeded without any reference to FAMRI's activities and regardless of the manner in which FAMRI chose to expend its assets, while FAMRI operated without regard to the progress, or lack thereof, of the individual flight attendants' actions. No legal issue or evidence in the

compensatory damage cases against tobacco companies referenced the settlement funds or FAMRI in any way. The FAMRI board administered the settlement funds through FAMRI as they chose, without any input from the disqualified lawyers and notably absent the court supervision required in the order approving the settlement and the *Ramos* opinion. Furthermore, as the Petitioners themselves note, FAMRI refused to consider any request for assistance by the attorneys pursuing the individual actions; either to reimburse the flight attendants for litigation costs or adverse cost judgments or to fund expert research proposed by the flight attendants' counsel.

Florida law is clear that for purposes of Rule 4-1.9, proceedings to acquire a fund or asset have no substantial relationship to proceedings challenging the administration of the fund or asset once it is acquired. The acquisition of an asset and its management once obtained are two entirely distinct matters, involving different transactions and disputes; furthermore, a challenge to the administration of an asset is not an attack upon the work performed in acquiring the asset originally. *See Bartholomew v. Bartholomew*, 611 So.2d 85, 87 (Fla. 2d DCA 1992)("It is one thing to have acquired assets with a lawyer's assistance, and quite another to have dissipated those assets once acquired, as is alleged in petitioner's

complaint."); *see also Eggers v. Eggers*, 776 So.2d 1096, 1099 (Fla. 5th DCA 2001) ("The advice Fitzpatrick gave to Frederick in 1991 concerned return to Ellen of monies Ellen had previously gifted to Frederick's children. Frederick testified he returned these monies to his mother. Any claim of conversion by Frederick of Ellen's assets is entirely distinct from this earlier advice."). Were the rule otherwise, no attorney involved in proceedings to acquire the asset could later participate in proceedings to challenge its administration, no matter how legitimate the grounds and urgent the need for inquiry.

The opinion below included a routine application of the substantial relationship test of Rule 4-1.9 and *K.A.W.* The Third District succinctly noted that "although arising from the prior litigation, the present action [about FAMRI conduct] involves a different issue." *Broin v. Philip Morris Companies, Inc.*, 84 So.3d 1107, 1112 (Fla. 3d DCA 2012). Since the pending action seeking relief from FAMRI bore no substantial relationship either to the original class action or to the flight attendants' individual actions against tobacco companies, neither Rule 4-1.9 nor *K.A.W.* warranted disqualification. The Third District's holding on this point was correct in light of the analysis above.

The Petitioners suggest that Rule 4-1.7, pertaining to

conflicts involving current clients, rather than Rule 4-1.9, applies. However, in order for any Rule 4-1.7 conflict to exist, an attorney client relationship must first exist between the attorney and a current client. While the Petitioners go to great lengths in their brief to suggest that some attorney client relationship exists or existed at one time between Mr. Gerson and FAMRI board members Alani Blissard and Patricia Young, they can point to no concrete evidence supporting that assertion sufficient to sustain their burden of proof for disqualification.

The existence of an attorney-client relationship depends upon "the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice." *Bartholomew*, 611 So.2d at 86, *citing Green v. Montgomery County, Ala.*, 784 F. Supp. 841, 845-6 (M.D. Ala. 1992); *Mansur v. Podhurst Orseck*, 994 So.2d 435, 438 (Fla. 3rd DCA 2008). While the client's belief that he or she is consulting an attorney may be subjective, this belief must nonetheless be "a reasonable one." *General Electric Real Estate Corp. v. S.A. Weisberg, Inc.*, 605 So.2d 955, 956 (Fla. 4th DCA 1992); *Bartholomew*, 611 So.2d at 86; *see Mansur*, 994 So.2d at 438, *citing* Restatement (Third) of the Law Governing Lawyers (2000), §14.

A mere passing discussion of legal issues in a social context does not amount to seeking legal advice. *See Bartholomew*, 611 So.2d at 86 (Bartholomew's speaking with an attorney "several times on the golf course" during which time he felt free "to talk just business in general" was insufficient to substantiate a reasonable belief that Bartholomew was consulting the attorney for professional legal advice). Furthermore, a person's discussing potential legal matters with an attorney representing someone else, whom the person knows or should know is not his or her attorney, does not create a "reasonable" belief that the person is seeking legal advice from that other person's attorney. *See Bartholomew*, 611 So.2d at 86-87 (where husband and wife had separate attorneys representing them in sale of assets of a family business, the husband had no reasonable basis for believing that he was being represented by the wife's separate attorney in addition to his own attorney); *Eggers*, 776 So.2d at 1099 (where the attorney for Ellen Eggers gave advice to Frederick Eggers only "at the request of Ellen," and "no agreement for representation was discussed much less reached" between them, Frederick had no reasonable basis to believe that Ellen's attorney was also his attorney).

Even taking the affidavits of Ms. Blissard, Ms. Young and Miles McGrane at face value and totally discounting the

conflicting affidavits submitted by Mr. Gerson, Mr. Hunter and Alex Alvarez, it is clear that Ms. Blissard and Ms. Young had their own counsel in their individual actions, who was not Mr. Gerson. While Mr. Gerson may have discussed with other counsel "legal issues that would apply across-the-board" to all the flight attendant cases, he never participated in Ms. Blissard's or Ms. Young's individual cases. The "common interests" doctrine referenced in Petitioners' brief applies only to information exchanged "for the limited purpose of assisting in [the aligned parties'] common cause." *Visual Scene, Inc. v. Pilkington*, 508 So.2d 437, 441 (Fla. 3d DCA 1987), *citing In re LTV Securities Litigation*, 89 F.R.D. 595, 604 (N.D. Tex 1981). Thus, discussion of legal "across-the-board" issues, even if it occurred, did not make Mr. Gerson counsel for Ms. Blissard or Ms. Young in their individual cases. He never filed any pleadings or participated in hearings on their behalf, never appeared in their individual actions, and never consulted with them about their individual actions. Mr. Gerson merely asked them to testify as generic witnesses in trials on behalf of other flight attendants suing tobacco companies.

Mr. Gerson also indisputably never represented either FAMRI as an entity or the FAMRI board members in their capacity as board members, making it unclear how FAMRI had standing to move

for his disqualification. *See Continental Casualty Co. v. Przewoznik*, 55 So.3d 690, 691 (Fla. 3d DCA 2011)("a party generally does not have standing to seek disqualification where, as here, there is no privity of contract between the attorney and the party claiming a conflict of interest."). FAMRI consulted its own counsel regarding FAMRI's creation and operations and the requests for assistance FAMRI denied. Mr. Gerson's only involvement with FAMRI was attendance as a guest at some FAMRI symposia and passing discussions with board members at these symposia and Rosenblatt family celebrations.

Neither requests for FAMRI board members' assistance as witnesses nor unsuccessful requests for financial assistance from FAMRI would make Mr. Gerson an attorney for FAMRI or the individual FAMRI board members. Ms. Blissard and Ms. Young had no more reason to believe that Mr. Gerson was acting as their lawyer than any other person from whom financial assistance or cooperation as a witness is requested.

The Petitioners also point to Mr. Gerson's prior representation of Raeti Waerness in her individual action as creating a Rule 4-1.7 conflict. Rule 4-1.7, however, allows counsel to cure conflicts by withdrawing from representation of the conflicting client. Specifically, a comment to Rule 4-1.7 states:

> If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation... Where 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.
>
> Rule 4-1.7, comment.

As explained in the Rule 4-1.7 comment, after an attorney becomes aware of a potential conflict and withdraws, the client from whose representation the attorney has withdrawn becomes a former client, not a current client, so that the substantial relationship test of Rule 4-1.9 controls. The attorney may continue to represent another client if the representation of the current or continuing client involves matters not substantially related to the representation of the former client.

In this case, Mr. Gerson became aware of Ms. Waerness' objections to his questioning FAMRI's use of settlement funds indirectly, at a mediation when FAMRI representatives gave him a copy of an email Ms. Waerness had sent to FAMRI's executive director, not to him. He promptly moved to withdraw as Rule 4-1.7 required. Delays in setting the motion for hearing occurred because Ms. Waerness resided in Washington State and Mr. Gerson attempted to accommodate her convenience in setting the hearing. After a long period during which she did not respond to the

motion to withdraw he did, however, proceed with the hearing and the division judge entered an order granting the motion to withdraw from representing her.

The Petitioners point to federal case law which, they argue, prohibits counsel from curing a conflict by withdrawing from the conflicted client's representation, even though the Rule 4-1.7 comment provides that this is the appropriate course of action under Florida Bar rules. They cite no Florida decision adopting what they argue is this federal view or suggesting that the Rule 4-1.7 comment does not mean what it plainly says; the Petitioners make the unwarranted assumption that the Supreme Court should ignore the Rule 4-1.7 comment and follow their selective interpretation of federal case law regarding disqualification. Ironically, Petitioners rely on federal case law to support this argument but repeatedly criticize the Third District for discussing other federal case law which does not support the outcome they seek.

Review of federal case law regarding disqualification demonstrates that Petitioners' summarization of that law is incomplete and self-serving. Federal courts, like Florida courts, have acknowledged that "disqualification...is a drastic measure which courts should hesitate to impose except when absolutely necessary," since it results in "depriving a party of

representation of their own choosing" and is "a blunt device" for rule enforcement, which "foists substantial costs upon innocent third parties." *SWS Financial Fund A v. Salomon Brothers, Inc.*, 790 F. Supp. 1392, 1400 (N.D. Ill. 1992), *citing Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982). In federal courts, as in Florida courts, disqualification motions are often used as "dilatory tactics" to "divert the litigation from attention to the merits." *SWS*, 790 F. Supp. at 1401, *citing Bobbit v. Victorian House, Inc.*, 545 F. Supp. 1124, 1128 (N.D. Ill. 1982); *Prudential Co. v. Anodyne, Inc.*, 365 F. Supp. 2d 1232, 1237 (S.D. Fla. 2005)(following *SWS*).

For these reasons, a number of federal courts have adopted the position that while disqualification "ordinarily" results from a finding of conflict, "disqualification is never automatic," even in cases where counsel arguably does have a conflict. *SWS*, 790 F. Supp. at 1400; *see Research Corporation Technologies, Inc. v. Hewlett-Packard Co.*, 936 F. Supp. 697, 701 (D. Ariz. 1996) (the "purposes behind the ethical rules favor an approach which does not automatically require disqualification"); *Anodyne*, 365 F. Supp. 2d at 1236 (following *SWS* and *Research Corporation Technologies*). The court in *Anodyne* concluded that rather than "reflexively requiring

disqualification" for conflicts either with current or former clients, "the better approach is to employ a balancing test." *Anodyne*, 365 F. Supp. 2d at 1237. This balancing test includes consideration of factors such as,

> the nature of the ethical violation; the prejudice to the parties; the effectiveness of counsel in light of the violations; the public's perception of the profession; and whether or not the attempt to disqualify an attorney is used as a tactical device or a means of harassment.

*Anodyne*, 365 F. Supp. 2d at 1237; *see Research Corporation Technologies*, 936 F. Supp. at 703 (court should consider the facts and circumstances of each case).

The *Anodyne* court, after applying this balancing test, concluded that disqualification was not warranted. Indeed, in *Anodyne* a law firm moved to withdraw, acknowledging a concurrent representation conflict, but the court declined on the basis of the balancing test to grant leave to withdraw.

Contrary to the suggestion in Petitioners' brief, federal courts do not apply the balancing test exclusively in the context of class actions. The opinions in *SWS*, *Research Corporation Technologies*, and *Anodyne* do not discuss class action law or the application of disqualification standards to class actions specifically. Also contrary to the Petitioners' suggestion, the federal balancing test has been applied in cases of concurrent representation conflict; *SWS*, *Research Corporation*

*Technologies* and *Anodyne* were all cases in which concurrent conflicting representation was alleged.

Applying the *Anodyne* balancing test to this case, the effect of the disqualification motion has certainly been to divert attention and delay any examination of FAMRI operations on the merits. The motion has been a tactical success. The disqualification has deprived flight attendants of the ability to proceed with counsel of their choice, a right recognized by both Florida and federal as "one of the most important associational rights," and thereby has prejudiced them with almost two years of delay to date.

These costs to the flight attendants have not been balanced by any tangible benefits. As noted above, despite the lengthy affidavits and extensive argument presented by the Petitioners, they point to no concrete example of prejudice through counsel's representation of flight attendants in the pending petition, no specific instances in which Mr. Gerson represented FAMRI board members or gave them legal advice, and no specific confidences exchanged. Indeed, any information FAMRI board members divulged to flight attendants' counsel about FAMRI operations could hardly be "confidential," due to the FAMRI organizers' self selected status as a nonprofit corporation and FAMRI's concomitant duty of transparency to the flight attendants. *Cf.*

*Kaplan v. Divosta Homes, L.P.*, 20 So.3d 459, 463 (Fla. 2nd DCA 2009) (the "communication between the Kaplan's and their neighbor's relatives does not constitute confidential communication because the Kaplan's had no reasonable expectation of privacy during the conversations.").

Two more important points must be made. First, there was no evidentiary hearing at the trial court level to resolve the factual disputes reflected in the affidavits. An evidentiary hearing is necessary to resolve any disputes of fact material to a disqualification motion; a trial court may not simply credit one set of affidavits and discount others. *Boca Investors Group, Inc. v. Potash*, 728 So.2d 825 (Fla. 3rd DCA 1999); *Simon DeBartolo Group, Inc. v. Bratley*, 741 So.2d 1254 (Fla. 1st DCA 1999); *Akrey v. Kindred Nursing Centers East, LLC*, 837 So.2d 1142, 1145 (Fla. 2nd DCA 2003)("the trial court departed from the essential requirements of law when it ordered disqualification of the Bales Weinstein firm based only upon those affidavits."); *Bon Secours-Maria Manor Nursing Care Center v. Seaman*, 959 So.2d 774, 778-79 (Fla. 2d DCA 2007)("The circuit court could hardly have evaluated the credibility of Mr. Dinan and Mr. Santa Lucia when it heard only unsworn representations from Mr. Dinan and accepted an affidavit from Mr. Santa Lucia in lieu of his live testimony.") *Event Firm, LLC, Inc. v. Augustin*,

985 So.2d 1174, 1175 (Fla. 3rd DCA 2008) (where "material facts, necessary to determine disqualification, are in dispute, a trial court should hold an evidentiary hearing."); *see Minakan v. Husted*, 27 So.3d 695, 698 (Fla. 4th DCA 2010) (failure to allow party to present testimony regarding factual issues relevant to disqualification was a violation of due process and "fundamental error"). Furthermore, the burden of proof on any issues of fact relating to the disqualification motion was on the movants, not on the Respondents or disqualified counsel; "the movant seeking disqualification must prove the necessity for this remedy." *Herschowsky v. Guardianship of Herschowsky*, 890 So.2d 1246, 1247 (Fla. 4th DCA 2005).

The Petitioners suggest that the Respondents waived the requirement for an evidentiary hearing. The record of the motion hearing before the trial court, however, reflects that Respondents agreed to the admission of the Petitioners' proffered exhibit binder but not that the binder would constitute the totality of the evidence and not that it was a legally sufficient basis to support disqualification. The Petitioners also point to a letter written by counsel below after the hearing in which he indicated that he would rest on the written submissions. This letter was written in response to the present Petitioners' Post-hearing Memorandum, and was merely

an indication that the present Respondents would not be submitting their own supplemental post-hearing written memorandum of law. Counsel did not say that he was waiving the Petitioners' burden of proof or the fundamental right to have factual issues resolved on the basis of evidence. Respondent's position in the trial court was and still is that the motion for disqualification should be denied as a matter of law, on any view of the record facts.

Finally, the Petitioners delayed for five months after the Petition to Enforce and Administer Mandate was filed before moving for disqualification of counsel; the Petition was filed in December of 2010, but the disqualification motion was not filed until May of 2011. "A motion to disqualify should be made with reasonable promptness after the party discovers the facts which lead to the motion." *Zayas-Bazan v. Marcelin*, 40 So.3d 870, 872 (Fla. 3rd DCA 2010), *citing Case v. City of Miami,* 756 So. 2d 259, 260-61 (Fla. 3d DCA 2000); *Transmark, USA, Inc. v. State, Dep't of Ins.,* 631 So. 2d 1112, 1116 (Fla. 1st DCA 1994).

The Petitioners assert that their first opportunity to move for disqualification in front of judge Jerald Bagley occurred only in May of 2011, but do not explain in their brief that the delay in transferring the case to Judge Bagley occurred because the Petitioners, not the present Respondents, moved to transfer

the case to another trial judge, the Honorable David Miller. Only after that motion was denied was the case transferred to Judge Bagley, and only then did the Petitioners file their motion. No excuse has been shown as to why the motion to disqualify could not be filed until after a correct division assignment had been made by the administrative judge. Moreover, the Petitioners were well aware of the identity of the lawyers for the complaining flight attendants at least since February of 2010, and longer in the case of Mr. McGrane.

## CONCLUSION

The opinion below correctly applied established Florida law on disqualification, including the substantial relationship test, and is not in any express or direct conflict with that law. Accordingly, the Court should affirm.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing was served by e-mail, pursuant to Rule 2.516, Florida Rules of Judicial Administration, this 1st day of April, 2013 upon counsel listed on the attached service list.

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**CERTIFICATE OF FONT COMPLIANCE**

**I HEREBY CERTIFY**, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that the foregoing complies with the font requirements of the rule, having been prepared in 12 point New Courier font.

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