

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA  
CIVIL DIVISION

WILLIAM S. "BILL" ABRAMSON,  
candidate for election to the Office  
of Circuit Judge, in and for the  
Fifteenth Judicial Circuit, Group 23,

CASE NO.: 2008-CA-002944

Plaintiff,

vs.

ELECTIONS CANVASSING COMMISSION  
OF THE STATE OF FLORIDA; KURT S.  
BROWNING, as SECRETARY OF STATE;  
DEPARTMENT OF STATE, DIVISION OF  
ELECTIONS; PALM BEACH COUNTY  
CANVASSING BOARD; ARTHUR ANDERSON,  
as PALM BEACH COUNTY SUPERVISOR OF  
ELECTIONS; and RICHARD I. WENNET,  
Candidate for election to the office  
of Circuit Court Judge, in and for the  
Fifteenth Judicial Circuit, Group 23,

CLERK OF CIRCUIT COURT  
LEON COUNTY, FLORIDA

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FILED

Defendants.

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RICHARD I. WENNET,

Counter-Plaintiff,

vs.

WILLIAM S. "BILL" ABRAMSON, et al.,

Counter-Defendants.

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THE PALM BEACH COUNTY CANVASSING BOARD'S  
AND ARTHUR ANDERSON'S MEMORANDUM OF LAW IN RESPONSE TO  
WENNET'S MOTION FOR NEW ELECTION AND INCORPORATED  
MEMORANDUM OF LAW

Defendants, the Palm Beach County Canvassing Board (the  
"Canvassing Board") and Arthur Anderson, as Palm Beach County

Supervisor of Elections (the "Supervisor") (collectively referred to as the "County Defendants"), pursuant to the Court's instructions and by and through undersigned counsel hereby submits this Memorandum of Law in response to Wennet's Motion for New Election and Incorporated Memorandum of Law ("Wennet's Motion").

### Introduction

The County Defendants take no position with regard to the legal arguments raised in Wennet's Motion. However, Wennet's motion contains certain misstatements, distortions and mischaracterizations of the underlying factual record to which the County Defendants hereby respond. As a threshold issue, the County Defendants note that the Court instructed the parties to brief the narrow legal issue of

whether the judicial branch has the authority to grant equitable relief in the form of ordering a recount of election results after the statutorily prescribed canvassing and recount procedures have been exhausted and the Elections Canvassing Commission has certified under Florida law that it is unable to determine the true vote for the office at issue.

Wennet's Motion at 2. Wennet's lengthy characterizations of his view of the underlying facts of this case are wholly irrelevant to the Court's consideration of the narrow legal issue before it.

## The County's Ballot Reconciliation Effort

On September 10, 2008, at the request of the Supervisor, Palm Beach County (the "County") began its efforts to reconcile the discrepancy between the total ballot count that was reported from the August 26, 2008 primary election and the total ballot count from the recount conducted August 29-30, 2008. As a preliminary matter, it should be noted that the County's ballot reconciliation effort was commenced after this action was filed and with the full knowledge of all the parties to this action including Wennet. Accordingly, if Wennet had concerns as to whether the County's reconciliation efforts were being conducted with "unfettered discretion" or that the process was "devoid of statutory authority, guidance or structure," he could have sought relief from this Court.<sup>1</sup> Wennet did not do so.

The County's ballot reconciliation efforts are described in detail in the Memorandum from Brad Merriman to the Supervisor, attached to Wennet's Motion as Exhibit B. As described in the memorandum, the County did the following:

Following [the Supervisor's] request, I assembled a team of approximately 25 County and Supervisor of Elections employees to proceed with the reconciliation. Included on the team were two Certified Public Accountants; Joe Doucette, County Budget Director, and Mike Simmons, Deputy Director of Airports for Finance and

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<sup>1</sup> For example, Wennet could have requested that the Court enter an order similar to the Anti-Spoliation Order entered by the Court on September 17, 2008.

Administration, and two representatives from Sequoia, the manufacturer of the voting equipment. On the morning of September 10, 2008, we began the process.

It is noted that our process is being described as a reconciliation effort. There have been numerous references to the "missing", or "lost" ballots in describing this situation. To characterize the ballots as "missing" or "lost", assumes the election night count is correct. We did not make that assumption. Our goal was to determine the number of ballots currently on hand, compare the totals on a precinct-by-precinct basis, and analyze and attempt to reconcile the differences.

Our team met at the Supervisor of Elections tabulation center and began by consulting with key Supervisor of Elections staff to get an overview of the election process and key control points of the ballot management process. Many on the County team had not participated in the election night process or any of the recount efforts and it was critical for us to gain an understanding of the sequence of events in order to reconstruct what happened and where events may have occurred that led to the discrepancy. Elections staff gave us a detailed account of the systems in place and the intricacies of the election night and the recount events. I should add that the Elections staff was very cooperative in their assistance throughout the process.

Organizing and cataloging of all boxes of ballots on hand at the tabulation center, sorted by voting type and precinct was the fundamental basis of our reconciliation method. We found ballots from numerous precincts to be co-mingled with other precincts and many precinct ballots in multiple boxes. Precinct boxes were not physically stored in chronological order and a paper index (which we found to be inaccurate) was necessary for retrieval. As a result of these issues, we determined that a hand recount of the ballots in the precinct boxes was necessary.

Furthermore, it was necessary to combine or segregate precincts so that each precinct had only one ballot box and each ballot box contained only one precinct. The approximately 700 precinct boxes were then re-shelved into precinct order. The early voting precinct boxes, which had previously been hand counted but not stored in chronological order, were also resorted into chronological order. The absentee ballots had been previously sorted, hand counted, and stored chronologically by precinct. In an effort to minimize the human handling of early voting and absentee ballots, with the exception of a few boxes that had no hand count information affixed to the box, we relied on the results of the previous hand count to be entered into the data base. It is noted that there were many boxes of over vote/under vote ballots that had been reviewed by the Canvassing Board during the recount and then stored in separate boxes. These ballots and boxes had to be counted and cataloged. A complete description of the chain of custody and re-sorting process is contained in attachment 2.

Upon completion of the above process and data entry, we proceeded to do a precinct-by-precinct analysis of total ballots, by voting type, and compare the results to the election night totals. This analysis revealed specific discrepancies which further directed our efforts to pinpoint the causes.

On September 12, 2008, the Court issued its ore tenus Anti-Spoliation Order which effectively stopped the County's ballot reconciliation effort before it was completed. The Court then authorized the completion of the reconciliation process by its Anti-Spoliation Order dated September 17, 2008.

On September 15, 2008, the County completed its ballot reconciliation effort and determined that a total of 102,713

ballots had been cast in the August 26, 2008 primary election. The County Defendants would like to highlight several key points concerning the County's ballot reconciliation efforts: 1) the reconciliation did not involve the tabulation or counting of any votes; 2) the County prepared a detailed chain-of-custody narrative describing the reconciliation process; and, most importantly, 3) the County's ballot reconciliation efforts were successful -- the County located all the ballots that were cast in the August 26, 2008 primary election.

#### The Court-Ordered Recount

Wennet repeatedly asserts that the ballots from the election were counted nine times.<sup>2</sup> Wennet's Motion at 3, 8, 11 and Ex. A. This is a gross mischaracterization of the counting process. In fact, the ballots were counted at most five times: 1) the initial tabulation on election night; 2) the statutory machine recount and subsequent manual recount pursuant to Sections 102.141(7) and 102.166(1), Florida Statutes; 3) a reconciliation of the total number of ballots cast undertaken at the direction of the Canvassing Board between September 3 and September 5, 2008; 4) the County's ballot reconciliation effort

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<sup>2</sup> Under Wennet's view of what constitutes a separate and discrete recount, apparently any time a ballot is rerun through a counting or tabulation machine due to a misread or a damaged ballot, a separate "recount" has occurred.

(which included no tabulation of votes); and 5) the machine recount and subsequent manual recount conducted pursuant to the Court's Order Directing Recount of Ballots in Election for the Office of Circuit Court Judge, in and for the 15th Judicial Circuit, Group 23 of September 17, 2008.

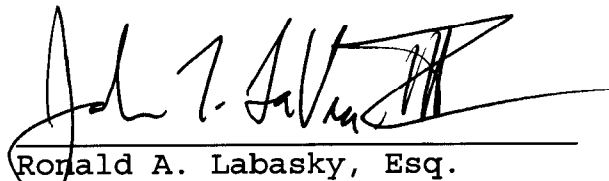
Wennet asserts that "the county simply stopped counting and certified the numbers reached in its last count . . ." Wennet's Motion at 3. Wennet's assertion is wrong. The County Defendants heeded the Court's instructions in the Order Directing Recount of Ballots in Election for the Office of Circuit Court Judge, in and for the 15th Judicial Circuit, Group 23 of September 17, 2008, and conducted a thorough and complete recount of all the ballots cast in this election. The County Defendants "stopped" only when all the ballots had been tabulated and the Canvassing Board's certification represents the Canvassing Board's determination that it successfully completed the Court-ordered recount.

#### Conclusion

In summary, in ruling on the narrow legal issue in dispute, the Court should not be misled by the many distortions and mischaracterizations of the underlying facts of this case. The County's ballot reconciliation efforts were successful in

locating the ballots cast in this election and the County  
Defendants fully completed the recount ordered by the Court.

Respectfully submitted this 2nd day of October, 2008.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Email on this 2nd day of October 2008, to:

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