

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

CHRISTINE JENNINGS, nominee of the  
Democratic Party for Representative  
in Congress from the State of Florida's  
Thirteenth Congressional District,

Plaintiff,

vs.

CASE NO. 2006 CA 002973

ELECTIONS CANVASSING COMMISSION OF  
THE STATE OF FLORIDA, et al.,

Defendants.

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ELLEN FEDDER, et al.,

Plaintiffs,

vs.

CASE NO. 2006 CA 002996  
(Consolidated)

TOM GALLAGHER, et al.,

Defendants.

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DEFENDANT DENT'S RESPONSE TO VOTER PLAINTIFFS'  
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

COMES NOW, by and through undersigned counsel,  
Defendant Kathy Dent as Supervisor of Elections in Sarasota  
County, Florida ("Dent"), and responds to the Emergency Motion  
for Preliminary Injunction filed herein by Plaintiffs Ellen  
Fedder, et al. With respect thereto Defendant Dent states as  
follows:

CLERK OF CIRCUIT COURT  
LEON COUNTY, FLORIDA

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## FACTS

1. The Supervisor of Elections in Sarasota County is not in the process of destroying evidence by proceeding to prepare voting machines and equipment for the countywide Sarasota County March 13, 2007 election, which involves all 156 precincts.

2. These Plaintiffs assert that preparation of the 800 voting machines necessary for this upcoming election is destroying evidence in this case. This Court has previously ruled that the voting machines in question were not relevant evidence in this case and denied Plaintiffs' Motion to Compel production of certain voting machines. (See Order dated December 29, 2006.) (See attached Appendix 1).

3. These Plaintiffs previously filed in the First District Court of Appeal of Florida an Emergency Petition for Extraordinary Writ and Renewed Emergency Motion to Expedite Petition on January 24, 2007. In that Emergency Petition, the Plaintiffs argued to the First District Court of Appeal that it should intervene in basically the same issue raised herein. These Plaintiffs sought from the First District Court of Appeal, immediate action precluding this Defendant from taking actions with respect to the voting machines in Sarasota County and the March 13, 2007 Sarasota election. (See attached Appendix 6).

4. On January 25, 2007, the First District Court of Appeal denied the Emergency Petition for Extraordinary Writ. (See attached Appendix 7).

5. Before arguing the merits of the Plaintiffs Request for the Preliminary Injunction, Defendant feels it is necessary to advise the Court concerning the communications that occurred between various parties in this case prior to the filing of this Emergency Motion. Defendant believes the Court will see that the Fedder Plaintiffs have been advised of the actions of the various parties as they progressed and that the request of Plaintiff Jennings in this matter, which the Fedder Plaintiffs state is consistent with their own, should presumably satisfy the Fedder Plaintiffs. However, the filing of this Motion demonstrates that the request of the Fedder Plaintiffs is neither consistent with Plaintiff Jennings, nor been approved by any other party in this matter.

6. Sarasota County requires 800 voting machines to carry out this March 13, 2007 election. By combining the request of the Fedder Plaintiffs with that of the Jennings (which was initially agreed to by all of the parties other than Fedder Plaintiffs), in addition to the request of the United States House of Representatives, Sarasota County will be significantly limited in its voting machines by several hundred, and will not be able to meet the demands of the election.

7. The Plaintiffs' assertion on page 2 of their Motion that Defendant Dent has unilaterally attempted to resolve this matter, ignoring their suit, which is combined with that of Plaintiff Jennings, obviously could not happen. This Court has the authority to make determinations concerning issues in this case, and these Plaintiffs certainly have, as they have demonstrated here, the ability to request this Court's assistance if they feel it is necessary.

8. On the evening of January 18, 2007, counsel for Jennings presented to counsel for Dent, what they described as "Principles", which they would like to see considered in the preparation of the voting equipment for the March 2007 election. As reflected in the email of that date (see attached Appendix 2), counsel for the Plaintiffs were not readily available the following day, which was Friday, January 19, 2007. Staff at the Sarasota County Supervisor of Elections office also needed to evaluate the request to determine its impact on the availability of voting machines and other equipment necessary to carry out the election.

9. Coincidentally, on January 22, 2007, the United States House of Representatives, Committee on House Administration, directed a letter to Kathy Dent, the Supervisor of Elections in Sarasota County, concerning maintaining certain records related

to the November 2006 General Election. (See attached Appendix 3).

10. On January 22, 2007, counsel for Dent sent a letter to Mark Herron, attorney for Plaintiff Jennings, advising of the evaluation of the Jennings comments and the possible impact on the preparations for the March 2007 election and "hopefully, the foregoing can be resolved quickly and I would suggest we advise the other parties, particularly the other Plaintiff parties and prepare a stipulation for submission to Judge Gary. (See attached Appendix 4).

11. On the morning of January 23, 2007, counsel for Defendant Dent sent a letter, with attachments, to Reginald Mitchell, one of the attorneys for the Fedder Plaintiffs, advising of the Defendant's letter to Mark Herron of January 22, 2007 and requesting their input concerning the proposal put forward by Plaintiff Jennings. (See attached Appendix 5).

12. On January 24, 2007, Rebecca Steele, one of the attorneys for the Fedder Plaintiffs, spoke with counsel for Defendant Dent and advised that they would be responding to Dent's Notice to Court and Motion for Authorization providing suggestions concerning matters that they would like to see be retained, related to the Sarasota County election. Counsel for Defendant Dent indicated that they would be awaiting any

comments and would attempt to prepare a stipulation for Judge Gary's consideration. (See attached Appendix 8).

13. On January 26, 2007, counsel for Defendant Dent advised Charles Howell, General Counsel to the Committee on House Administration of the United States House of Representatives concerning the status of the legal matters that were ongoing in Leon County. (See attached Appendix 9).

14. On January 31, 2007, counsel for Defendant Dent prepared a proposed Stipulation for execution by the parties and sent that to counsel for Plaintiff Jennings, the Sarasota County Canvassing Board, the Department of State and other State Defendants, ES&S, and Defendant Buchanan. As reflected in the memorandum to those counsel, counsel to Fedder was not included, as they had yet to provide any substantive response to the Jennings proposal. As reflected in that memorandum, Judge Gary's office had been contacted concerning possible hearing times if such was necessary. (See attached Appendix 10).

15. On January 31, 2007, counsel for Defendant Dent forwarded the foregoing proposed Stipulation and Memo to the attorney for the Fedder Plaintiffs, advising that since nothing had been received from the Fedder Plaintiffs, they were not included in the draft, but they were certainly welcome to adopt it or join in. (See attached Appendix 11).

16. The proposed Stipulation submitted to the parties on January 31, 2007, of course, consisted of the proposal from Plaintiff Jennings, who obviously agreed to that, as did the Supervisor of Elections in Sarasota County, Defendant Dent, and subsequently the attorneys for the Department of State and other State Defendants and Defendant Buchanan advised that the proposal was acceptable. (See attached Appendices 15, 16 and 20). The attorneys for ES&S advised that they did not care to participate in any stipulation, regardless of its contents. (See attached Appendix 17).

17. On January 31, 2007, Zeina Salam, attorney for the Fedder Plaintiffs in this case, sent a proposed Parties' Stipulation Agreement on Defendant Kathy Dent's Notice and Motion for Authorization and Voter Plaintiffs' Motion for Entry of Anti-Spoliation Order that they had prepared. (See attached Appendix 12).

18. Thereafter, Rebecca Steele, attorney for Fedder Plaintiffs sent an email to all parties asking for a copy of the Dent proposed Stipulation, which had been sent earlier in the day. (See attached Appendix 13).

19. On the evening of January 31, 2007, Rebecca Steele forwarded an email to all counsel attaching "a revised proposed Stipulation that blends Ms. Dent's proposal and ours." She

requested the parties to advise whether this is acceptable to all. (See attached Appendix 14).

20. On February 1, 2007, Defendant Dent advised Rebecca Steele, attorney for Fedder Plaintiffs, that pursuant to their proposed stipulation, Sarasota County would need to know immediately the 700 particular machines which were mentioned, in order to determine whether the proposal was workable and whether the County would also have sufficient PEB's to run the County election. The letter requested that the Plaintiffs provide by Friday, 5:00 p.m., February 2, 2007, the serial numbers of the described machines so that those could be evaluated in the context of the other two requests that had been made. (See attached Appendix 18).

21. In addition, on February 1, 2007, counsel for Defendant Dent advised concerning additional modifications to the Fedder Plaintiffs' proposed Stipulation. (See attached Appendix 19).

22. On Friday afternoon February 2, 2007, as a follow up to previous correspondence, the General Counsel for the United States House of Representatives, Committee on House Administration, Charles Howell, spoke with Defendant Dent and her counsel and advised of specific matters that they would like to see maintained in conjunction with the use of the 800 voting machines for this Sarasota County election. By Monday, February

5, 2007, staff for Defendant Dent evaluated the Jennings proposal and the Congressional proposal and determined that there would be only 799 machines available for the County's election.

23. On February 5, 2007, the Fedder Plaintiffs forwarded a letter to counsel for Defendant Dent advising that they would be able to specify the 700 machines described in their proposal by close of business on Tuesday, February 6, 2007. (See attached Appendix 21).

24. On February 6, 2007, counsel for Defendant Dent advised counsel for Fedder Plaintiffs, that based upon the exiting request of Plaintiff Jennings and the United States Congress, Sarasota County would have available 799 of the necessary 800 touchscreen voting machines and were struggling to ensure the disability voting equipment that is required by law. (See attached Appendix 22).

25. On February 6, 2007, counsel for Fedder Plaintiffs sent a list of 700 voting machines that they requested not be used in this election, requesting whether complying with their proposed Stipulation would render it impossible for Dent to conduct the March 2007 elections. (See attached Appendix 23).

26. On February 7, 2007, Defendant Dent, after evaluating the proposal from the Fedder Plaintiffs, in conjunction with the other two previously presented proposals, determined that there

would be approximately 550 of the necessary 800 machines remaining for use in the elections and that the Fedder Plaintiffs' request related to PEB's would not provide sufficient PEB's to undertake the preparations for the election or the election itself. (See attached Appendix 24).

27. On February 8, 2007, counsel for Defendant Dent received from the Committee on House Administration of the United States House of Representatives, their letter confirming the specific request made February 2, 2007, that certain voting machines not be used in the March election but recognizing and agreeing with the need for the 800 machines needed to conduct the election. (See attached Appendix 25).

#### ARGUMENT

28. As reflected in the foregoing and the Appendix items, the communications between all counsel involved in this case, including Dent's and Fedder Plaintiffs has been continuous and exhaustive. While all parties have not agreed on various issues, or reached closure on a proposed stipulation, it is because of the conflict between the collective requests presented by the three requesting parties. The last to be received was that of the Fedder Plaintiffs, and as reflected in the evaluation of that request, in conjunction with the other parties' request, sufficient voting equipment does not exist to carry out the Sarasota County elections on March 13, 2007.

29. To warrant the issuance of a preliminary injunction as requested by the Fedder Plaintiffs herein, they must demonstrate: (a) the likelihood of irreparable harm; (b) the lack of the adequate remedy at law; (c) the substantial likelihood of success on the merits; and (d) the granting of the injunction would serve the public interest. Tom v. Russ, 752 So. 2d 1250 (Fla. 1st DCA 2000).

(A) Irreparable Harm. A review of the foregoing and the composite requests of the various parties and the efforts of Sarasota County to segregate all but the necessary 800 voting machines, leaving in excess of 700, which would be available for either of the Plaintiffs or for the Congressional Committee, demonstrates that there is no irreparable harm. The various parties have requested different equipment, which is not possible to completely reconcile and thereby allow the election to go forward. The substantial nature of the remaining unused voting equipment should provide more than sufficient voting equipment or machines for analysis of their claims in this matter, if such is granted.

(B) Inadequate Remedy at Law. As this matter is not for damages, this issue appears to be moot.

(C) Substantial Likelihood of Success on the Merits. This Court has already determined that the Plaintiffs have

not submitted sufficient evidence or proof to be entitled to have access to the voting machines in question herein. The initial matter before this Court, which the Court denied, was a request from Plaintiff Jennings to have access to approximately eight (8) voting machines. In slightly more than a month, that has now evolved into a request that at least 700 voting machines not be used in the upcoming election, presumably to be later evaluated if this Court's Order is overturned.

Section 101.545, Florida Statutes, speaks for itself as to what must be maintained following an election. A Supervisor of Elections does this after each and every election and the specifics of that section are complied with in maintaining ballots, forms and other materials used in this election. All the election data, ballots and other information on all of the voting machines used in November 2006 herein has already been preserved to a storage media as is done after every election. Section 101.545, Florida Statutes, does not mention elections equipment or voting systems, as such are regularly cleared following the conclusion of each election to be used thereafter. Therefore, Sarasota County has, and will comply, with the provisions of Section 101.545, Florida Statutes, as it is

done after every election and will preserve those same records described therein.

Based upon the facts and discussions of the parties, Sarasota County does not seek to engage in "willy nilly" destruction of evidence. The argument presented by the Fedder Plaintiffs appears to be that their request should be paramount to the request of Plaintiff Jennings or the Congressional Committee, which has Jennings election contest filed with it. Defendant Dent had no problem with all the Plaintiffs or parties agreeing to equipment, which they would like to not be used in this election, provided that the necessary 800 voting machines are available. Unfortunately, based upon the individual requests of the parties, that has not been possible. If, as the Fedder Plaintiffs state that their request is consistent with what Jennings has requested, then there is no issue to be resolved. However, Sarasota County's evaluation of the two requests indicates that such is not, in fact, the case.

This Defendant welcomes this Court's wisdom, advice and direction on this issue. However, based on this Court's previous decision, the likelihood of Plaintiffs' success appears small and the election should not be impaired.

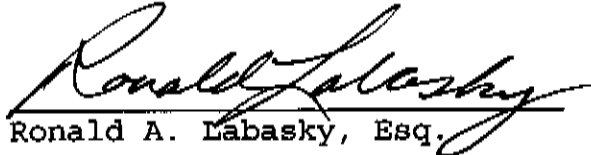
(D) Public Interest. While these Plaintiffs have an interest in this issue and have a statutory authorization to bring this contest of election, the question of public interest does not weigh in these Plaintiffs' favor. Defendant would submit and as Plaintiffs have suggested that they desire this election to go forward, the public interest favors the County being allowed to undertake its elections for its citizens in a timely and well-organized manner. Such is paramount to the particular or special interests of the candidate who lost this election or the parties who seek to challenge the voting equipment that is the subject of this issue.

#### CONCLUSION

Based upon the foregoing, it is clear that the Plaintiffs filing this motion will not be irreparably harmed, that their likelihood of success on the merits is small and has been previously determined by this Court. The First District Court of Appeal sought not to intervene when requested by the Plaintiffs. Finally, the paramount public interest in this case, as compared to the interest of these Plaintiffs, is that the citizens of Sarasota County have the opportunity to have their elections proceed in a timely and efficient manner. Granting Plaintiffs' motion and effectively canceling the election is not proper and should not be granted.

WHEREFORE, based upon the foregoing, Defendant would submit that the preliminary injunction be denied.

Respectfully submitted this 9th day of February, 2007.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery\*, Electronic Transmission or Facsimile and U.S. Mail on this 9th day of February, 2007, to:

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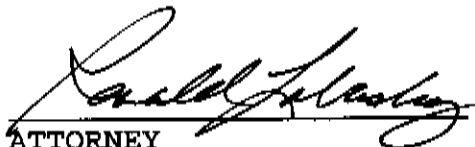
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