

REPLY TO:
WEST PALM BEACH OFFICE

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Adam M. Myron
Ethan J. Wall
Joshua L. Spont
Yolyvee Y. Rivera
Grasford W. Smith

November 17, 2012

Via Facsimile Transmission to (772) 462-1722

Honorable Circuit Court Judge Larry Schack
Nineteenth Judicial Circuit in and for St. Lucie County, Florida
316 Courthouse Addition
218 South Second Street
Fort Pierce, Florida 34950

Steven Naclerio, Of Counsel
Manuel Farach, Of Counsel

Subject: West, et al. v. St. Lucie County Supervisor of Elections, Case No.: 56 2012 CA 004319 HC
Our File No: 9074-1

Ray H. Pearson
Robert L. Floyd
Kenneth J. Weil

Dear Judge Schack:

*Certified in Civil Trial Law
By The Florida Bar*

Enclosed is an emergency petition for injunctive relief on behalf of Patrick Murphy. The purpose is to stop a recount of early votes cast in the race to represent District 18 in the United States Congress. This recount, which is contrary to clearly established Florida law, is scheduled to begin at 9 am today. The affidavits enclosed will be executed by the time of any hearing.

*Certified in Marital & Family Law
By The Florida Bar*

*Certified in Wills, Trusts & Estates
By The Florida Bar*

*Also, Certified Public Accountant
in Florida*

*Certified in Business Litigation
By The Florida Bar*

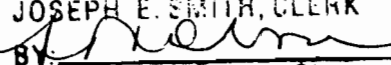
*Florida Supreme Court
Certified Civil Court Mediator*

Certified in Real Estate

Sincerely,


GERALD F. RICHMAN

2012 NOV 17 PM 4: 22
ST. LUCIE COUNTY
CLERK OF CIRCUIT COURT

FILED IN OPEN COURT THIS THE
17th DAY OF NOV 2012
JOSEPH E. SMITH, CLERK
BY 
Deputy Clerk

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT, IN
AND FOR ST. LUCIE COUNTY,
FLORIDA

ALLEN WEST, et al.,

Case No.: 56 2012 CA 004319 HC

Plaintiff,

v.

GERTRUDE WALKER, in her
official capacity as St. Lucie County
Supervisor of Elections and the
ST. LUCIE COUNTY
CANVASSING BOARD, in its official
Capacity,

Defendants.

FILED IN OPEN COURT THIS
17th DAY OF Nov
BY: *[Signature]*
JOSEPH E. SMITH, CLERK
Deputy Clerk
ST. LUCIE COUNTY
CLERK OF CIRCUIT COURT
2012 NOV 17 PM 4:21

**INTERVENOR, PATRICK MURPHY'S CORRECTED EMERGENCY MOTION FOR
TEMPORARY INJUNCTION**

Intervenor, Patrick Murphy, pursuant to Fla.R.Civ.P. 1.610, hereby moves for preliminary and permanent injunctive relief against defendants and, in support, states as follows:

INTRODUCTION

1. Although Fla. Stat. § 102.141 only gives the power to re-tabulate those ballots that are believed to be affected by a tabulation error, at a meeting held on November 16, 2012, the St. Lucie County Canvassing Board voted to approve and, by a two to one vote, did approve re-tabulating the entire early voting period in St. Lucie County for the November 6, 2012 General Election. This decision was made even though the Board was presented with no evidence whatsoever to justify re-tabulation of the entire early voting period. This is an emergency because the re-tabulation begins at 9:00 a.m. on Saturday, November 17, 2012.

PERTINENT FACTS¹

2.. Prior to November 16, 2012, the Supervisor of Elections had expressed her intention to retabulate all of the early voting votes in St. Lucie County that are believed to be affected by a tabulating error are those early votes cast in the first three (3) days of early voting.

3. On Sunday, November 11, 2012, the St. Lucie County Canvassing Board having been made aware of a malfunction with the memory card used in some of the early voting machines and that votes that had been properly cast had not been counted, ordered a re-tabulation of early votes for November 1, November 2 and November 3. This order was carried out by the St Lucie County Supervisor of Elections

.4. On November 16, 2012, the St. Lucie County Canvassing Board met to consider the extent of re-tabulation that would occur for early voting in the November 6, 2012 General Election. At the November 16, 2012 meeting, among other things, the Board was asked by its counsel to decide whether to re-tabulate votes for the other five days of early voting. The canvassing board's counsel advised the Board that it only had authority under the law to re-tabulate affected ballots and cited as authority Fla. Stat. § 102.141(6).

5. There was a spirited and emotional group of Allen West supporters in the room during the public meeting that were very vocal and offered strong opinions of their feelings that re-tabulation of the full early voting period was required to retain their trust in the system.

6. An auditor apparently sent to review the proceedings by the State of Florida, was unable to identify any votes on any day, other than the three days already recounted, that weren't

¹ The facts set forth below are based on the sworn affidavits filed by Gerald F. Richman and Sean C. Domnick.

counted as required under law. Although he recommended, In his personal opinion, not in his official position, a recount of early voting, when asked the factual basis of this assertion he could not present one. He then told a reporter that the opinion was not based on the law but a desire for transparency and to satisfy concerned Allen West voters.

7. The tabulation equipment indicates a green arrow if there are no problems with the tabulation of the votes, a yellow arrow if there may be a problem and a red arrow if there is a definite problem. St. Lucie County Commissioner/Board Member Todd Mowery stated they he had been present for the tabulation of the early votes by the machines, and stated that the ballots from the early voting days, other than Nov 1, 2 and 3 (the days already re-tabulated) had all been green arrowhead by the machines, indicating that the information had been successfully counted and uploaded into the system.

8. A vote was eventually taken and Board Member/Circuit Judge Kathryn Nelson agreed with a presentation from the Murphy Campaign that there was no evidence of tabulation errors that would give the legal authority to re-tabulate further or otherwise justify a re-tabulation of any additional days. She unequivocally voted against any further re-tabulation.

9. A second member of the board Chief Deputy Court Administrator Mark Traum, stated that he was concerned about potential problems with early voting but articulated no evidence that would justify any additional re-tabulation. Nevertheless, this board member voted to re-tabulate five additional days with no evidentiary justification to do so.

10. The third and final member of the board, Commissioner Mowery, specifically stated that there was “no evidence“ to justify a re-tabulation of additional days but cited a concern about “public trust” and nevertheless voted to re-tabulate additional days. Further, when

asked directly to point to one vote that met the standard for a re-tabulation, Commissioner Mowery was unable to do so.

11. Subsequent to the meeting, it was discovered that the early voting cards had been commingled in a way that they could no longer be separated by the day they were cast. Then, apparently without a new motion or revote, the Board decided to recount all of the early votes, including those that had already been recounted on November 11th.

12. The Board plans to begin re-tabulating all early voting at 9:00 a.m. on Saturday, November 17, 2012.

MEMORANDUM OF LAW

13. Specifically, Fla. Stat. § 101.142(6) states:

(6) If the county canvassing board determines that the unofficial returns may contain a counting error in which the vote tabulation system failed to count votes that were properly marked in accordance with the instructions on the ballot, the county canvassing board shall:

(a) Correct the error and *retabulate the affected ballots* with the vote tabulation system; or

(b) Request that the Department of State verify the tabulation software.

Fla. Stat. § 102.141(6) (West 2012) (Emphasis added).

14. To obtain an injunction, Murphy must prove:

- (1) irreparable harm;
- (2) no adequate remedy at law;
- (3) a likelihood of success on the merits; and
- (4) the public interest favors injunctive relief.

Hatfiled v. AutoNation, Inc., 939 So. 2d 155 (Fla. 4th DCA 2006).

15. In Wexler v. LePore, 878 So. 2d 1276 (Fla. 4th DCA 2004), the Court held that, in the context of an election dispute, a request for injunction requires a clear likelihood of success on the merits, which requires a showing that an election law that is being violated.

16. If the Supervisor or Canvassing Board were to re-tabulate votes in violation of Florida election law, the harm would be irreparable and could not be compensated by money damages.

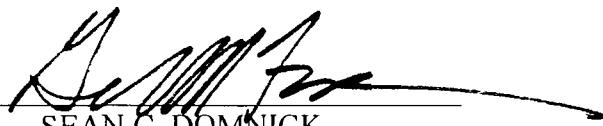
17. Because Florida Statutes are clear and the lack of evidence to justify a full re-tabulation of all early vote days has been admitted by the canvassing board, the likelihood of Murphy's success on the merits is also clear.

18. The public interest favors the Supervisor of Elections and canvassing board following the law in the conduct of elections.

WHEREFORE, Murphy respectfully requests that the Court enter a preliminary and permanent injunction that enjoins the Supervisor of Elections and Canvassing Board from re-tabulating any ballots and for any other relief that the Court considers just and appropriate.

Respectfully submitted,

By:



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Tele: (561) 630-5363

CERTIFICATE OF NON-NOTICE

WE HEREBY CERTIFY pursuant to Fla.R.Civ.P. 1.610 that full notice of this motion is impossible because the meeting at which the illegal action was taken concluded after 9:00 p.m. on Friday, November 16, 2012 and the re-tabulation which is deemed illegal will begin at 9:00 a.m. on Saturday, November 17, 2012. Undersigned counsel will deliver this motion to counsel for plaintiffs via electronic mail and will advise plaintiffs' counsel of any action taken in this matter.


GERALD F. RICHMAN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Intervenor, Patrick Murphy's Motion for Temporary Injunction has been furnished via electronic mail this 12th day of November 2012 to: Mark Miller, Esq., App. Law Office of Mark Miller, P.A. 50 SE Ocean Blvd. #202, Stuart, FL 34994-2222, email: mark@millerappellate.com; Jason Torchinsky, Esq., and P. Christopher Winkelman, Holtzman Vogel Josefiak PLLC, 45 North Hill Drive, Suite 100, Warrenton, VA 20186 cwinkelman@hvjlaw.com, jtorchinsky@hvjlaw.com, Heather Young, Esq., Administration Annex, FL 3, 2300 Virginia Ave., Fort Pierce, FL 34982-5632, email: youngh@stlucieco.org; Cynthia Angelos, Esq., P.O. Box 9163, Port St. Lucie, FL 34985, email: cynthia@jangeloslaw.com.


GERALD F. RICHMAN

7. An auditor apparently sent to review the proceedings by the State of Florida, was unable to identify any votes on any day, other than the three days already recounted, that weren't counted as required under law. Although he recommended, In his personal opinion, not in his official position, a recount of early voting, when asked the factual basis of this assertion he could not present one. He then told a reporter that the opinion was not based on the law but a desire for transparency and to satisfy concerned Allen West voters.

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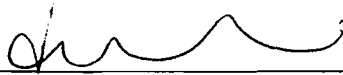
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13. The Board plans to begin re-tabulating all early voting at 9:00 a.m. on Saturday, November 17, 2012.

THIS CONCLUDES MY AFFIDAVIT.


GERALD F. RICHMAN

The foregoing instrument was acknowledged before me this 17th day of November 2012 by Gerald F. Richman who is personally known to me produced _____ as identification.


NOTARY PUBLIC
Diana Rennie
Printed Name of Notary
Commission No.: EE 194014
My commission expires: 8/19/2016

