IN THE SUPREME COURT OF FLORIDA

Supreme Court Case Nos. SC16-1006 and SC16-1009

THE FLORIDA BAR,

Complainant,

vs.

STEVEN KENT HUNTER and PHILIP MAURICE GERSON,

Respondents.

RESPONDENT PHILIP GERSON'S ANSWER BRIEF AND BRIEF IN SUPPORT OF CROSS-NOTICE FOR REVIEW OF REPORT OF REFEREE

On Review from the Report of Referee, Honorable Michael A. Hanzman

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STATEMENT OF THE CASE AND OF THE FACTS[1]

I. The *Broin* Litigation and Settlement

The seeds of this disciplinary proceeding were planted in the settlement of the 90s-era non-smoker flight-attendant class action against the major tobacco companies. In 1991, Stanley and Susan Rosenblatt filed the nation-wide class action styled *Broin v. Phillip Morris*, 91-49738 CA (22) on behalf of a putative class of non-smoking flight attendants who alleged that they were afflicted with illnesses caused by their exposure to second-hand smoke in the cabins of commercial airliners. ROR 8, 9. Six years later, mid-trial, the case settled. *Id*.

Although the class action sought money damages for the class members' bodily injuries, the Settlement Agreement (TE 1) did not provide any monetary compensation to the class members. It did provide that if class members were to bring individual claims (so-called progeny actions) for compensatory damages against the settling tobacco companies during the year following the final approval of the Settlement Agreement, the tobacco companies could not raise a statute of limitation defense; but the flight attendants waived their right to sue for punitive damages. TE 1 at 9, ¶12(a), (b). The Settlement Agreement also provided that in any such progeny case, the tobacco companies would have the burden of proof on

[1] We adopt all of the abbreviations that The Florida Bar used in its Brief. See that Brief ("BR") at 1.

general causation (i.e., whether exposure to second-hand smoke can cause the disease), but the plaintiff non-smoking flight attendant would have the burden of proof on specific causation (i.e., whether exposure to second-hand smoke caused the plaintiff's illness). TE 1 at 10, ¶12(d).

The Settlement Agreement also required the defendants to pay $300,000,000 "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," *id*. at 7, ¶8, which Foundation was to be "managed and directed by a Board of Trustees nominated by Class Counsel, and shall be governed in accordance with the terms of a trust instrument, subject to approval by the Court." *Id.* In addition, the defendants agreed not to object to class counsel's fee petition in the amount of $46,000,000 and to reimburse costs in the amount of $3,000,000. *Id.* at 8, ¶10.

Finally, the Settlement Agreement provided that if the trial court failed to approve the Settlement Agreement, or if the trial court's approval were to be modified or set aside on appeal, or if the trial court did not enter the agreed final judgment, or the agreed final judgment were to be entered but not affirmed, "then this Settlement Agreement shall be canceled and terminated, and shall become null and void, and the parties shall be restored to their original positions." *Id*. at 14, 15, ¶16.

The trial court granted Final Approval of the Settlement Agreement "in its entirety," TE 2 at 53, and that approval order was affirmed by the Third District Court of Appeal in *Ramos v. Philip Morris Companies, Inc.*, 743 So. 2d 24 (Fla. 3d DCA 1999). TE 3. In its opinion, the Third District overruled objections that the $300,000,000 that the tobacco companies would pay to establish the foundation did not provide a substantial benefit to the class and should be paid directly to class members.

> There is nothing to indicate that the tobacco companies would agree to settle if the money is to be directly paid to the class members. As defense counsel argued, *none* of the defendant tobacco companies have ever *voluntarily* or through *successful litigation* paid any compensation to any individual plaintiff in *any* lawsuit to date.

Ramos, 743 So. 2d at 32 (emphases in original). *Ramos* affirmed the trial court's order approving the Settlement Agreement "without modification." *See Philip Morris Inc. v. French*, 897 So. 2d 480, 482-483 (Fla. 3d DCA 2004). The Flight Attendant Medical Research Institute ("FAMRI") was established with the $300,000,000 the tobacco companies paid under the settlement. TE 1 at 7, ¶7, 8; TE 4.

II. The *Broin* Progeny Cases

Stanley Rosenblatt recruited south Florida personal injury lawyers to file progeny suits on a contingent fee basis on behalf of individual class members

before the one-year suspension of the statute of limitations would expire. ROR 11. Among the lawyers that Mr. Rosenblatt recruited who filed progeny suits were Miles McGrane, Gary Paige, Bill Hoppe, Marvin Weinstein, Stuart Silver, and respondents Philip Gerson and Steven Hunter. ROR 11; TR I 66 (Gerson testimony). Others, including Alex Alvarez, later took over some of the progeny suits. ROR 11. All told, some 3,000 *Broin* progeny cases were filed in Miami-Dade County Circuit Court. ROR 11, 12. Gerson himself filed approximately 600 cases when Rosenblatt recruited him, just one week before the statute-of-limitations-waiver window closed. ROR 12 n.10; TR I 63, 64 (Gerson).

Over the next seven years, eleven *Broin* progeny cases were tried, four by Gerson (alone or with co-counsel). ROR 12; TR I 70-80 (Gerson). Ten of the trials resulted in defense verdicts. ROR 12. The tobacco companies successfully pursued judgments for attorneys' fees against two of the unsuccessful plaintiffs whom Gerson represented (James Seal and Lorraine Swaty) for rejecting their nominal proposals for settlement. TR I 74-78 (Gerson). Mrs. Swaty, who was retired, had to take a job as a greeter in a Wal-Mart store to pay the judgment. TR I 76-78 (Gerson).

When the progeny lawyers told their flight attendant clients about the judgments that the tobacco companies had enforced against unsuccessful plaintiffs, it discouraged them from proceeding to trial. TR I 85 (Gerson) (none of the

lawyers had "anybody who wanted to go forward with their cases"); TR II 204 (Alvarez) ("It was very difficult to get flight attendants to commit to a trial because, I explained to them . . . the tobacco companies will seek a fees and costs judgment against you if you lose.").

In short, the *Broin* progeny cases "proved to be expensive, time consuming, extremely risky and wholly unsuccessful." ROR 12. The lawyers looked for a "Plan B." *Id.*

III. Plan B

Miles McGrane conceived the idea of negotiating a payment to class members from FAMRI subject to the approval of the *Broin* court, and his office drafted a petition seeking that relief. ROR 12, 13. From its inception, FAMRI has been managed by Mr. and Mrs. Rosenblatt, flight attendant trustees they designated, and John Ostrow, a lawyer whom the *Broin* court had appointed attorney ad litem for absent class members. ROR 12; TE 4 at 3, 4. The lawyers hoped to persuade the Rosenblatts, whom the lawyers perceived to control FAMRI and who remained (and still remain) class counsel, to support their idea to distribute money from FAMRI to the class members who had filed individual cases, and to file the petition seeking the court's approval for such distributions. ROR 13.

The progeny lawyers selected Alex Alvarez to approach Mr. Rosenblatt with

the idea. At a meeting in early February 2010, Alvarez gave Rosenblatt a draft of the proposed petition and followed up with an email "reiterat[ing]" that "we want to ensure that this proposal is done with the 3 goals I told you were paramount of: 1. ***FAMRI's continued existence and good work***." 2. Closure for the Flight Attendant Litigation and 3. Eliminate any exposure to the parties and their counsel. TE 7 (emphasis added). As we show below, FAMRI's continued existence was a constant for the progeny lawyers.

Lawyers for the progeny plaintiffs met with the Rosenblatts on many occasions throughout 2010 to negotiate the amount to be distributed and to try to resolve issues of tax and trust law that would be implicated by such a distribution. ROR 14. Having brought the *Broin* class action for money damages, the Rosenblatts were originally receptive to the idea of distributing some FAMRI funds to compensate class members. ROR 13 and n.11 thereat.

IV. Two of Gerson's Clients Object to the Plan

Months into their discussions, the Rosenblatts and the progeny lawyers agreed to mediate before Andrew Hall, a prominent commercial litigator in Miami, to try to resolve differences over the amount of money to be distributed to the progeny plaintiffs and how best to accomplish that goal. The mediation took place at Mr. Hall's offices on April 28, 2010. ROR 14. Soon after the progeny lawyers arrived, Mr. Hall handed Mr. Gerson emails from Gerson clients Peggy Spurgeon

and Raiti Waerness, each dated April 27, 2010, i.e., the previous day, addressed to FAMRI's Executive Director Elizabeth Kress, requesting that Ms. Kress deliver the email to Mr. Gerson. Ms. Spurgeon wrote:

> I oppose any action against FAMRI as its good work is very important to me and other flight attendants.
>
> I do not wish for you, as my lawyer, to sue FAMRI under any circumstances when doing so adversely impacts me, your client, and other flight attendant clients.

TE 8. Ms. Waerness wrote:

> As a former flight attendant and member of the suit that was filed against the tobacco industry, I have not authorized anyone to represent me in this action against FAMRI and I am strongly against any legal action that would undercut the good works that FAMRI is doing. As my lawyer you should not proceed against FAMRI under any circumstances.

TE 9.

Other progeny counsel also received emails from clients objecting to their taking any action against FAMRI. Alani Blissard, a FAMRI board member, advised her lawyer, Mr. Hunter, that she objected to his bringing "any claim against FAMRI," and Patricia Young, also a FAMRI board member, communicated a similar message to her lawyer, Miles McGrane. ROR 15, 16.[2]

[2] McGrane responded, via email, that "[b]ased on the conflict you have raised, I will file a motion to withdraw as your counsel immediately." TE 11 He later decided not to sign the petition out of his expressed loyalty to the Rosenblatts who had helped McGrane's wife's family in a lawsuit against tobacco companies and because some of his clients were opposed to his doing so. ROR 16.

Neither of those board members communicated anything to Mr. Gerson.

The unproductive mediation ended soon after Mr. Hall delivered the emails. Afterwards the progeny lawyers had lunch together, discussed the emails, and decided to go back to their respective offices, look at their files, read the conflict Rules, "and then decide what the right thing to do was." TR I 104 (Gerson). Mr. Gerson and his partner Edward Schwartz both read the conflict Rules and discussed the issue together. *Id*. at 105. Mr. Gerson "concluded that there was no conflict," [t]hat there was nothing that we were doing that was adverse to [the clients'] interest," *id*. at 105-106, and that the proposed petition was "not substantially related in any way" to the progeny suits against the tobacco companies. *Id*. at 110. *See also* ROR 15.

Consequently, Mr. Gerson wrote to Ms. Spurgeon and Ms. Waerness that he was prepared to withdraw if they were dissatisfied with his services, TE 12, 13, and moved to withdraw as Ms. Waerness's counsel. TE 16. That motion was granted. TE 27.[3] Hunter also withdrew as counsel for those of his progeny clients who had objected to the proposed Petition. ROR 16.

V. Continued Negotiations with the Rosenblatts

Notwithstanding the unsuccessful attempt to mediate and the emailed

[3] Mr. Gerson did not move to withdraw as Ms. Spurgeon's counsel because her case had been dismissed for lack of prosecution. *See infra* at n.8 and accompanying text.

objections from certain clients, the negotiations between the progeny lawyers and the Rosenblatts continued. Mr. Alvarez testified that the negotiations were promising for much of the balance of 2010. ROR 16. Class counsel (the Rosenblatts) and progeny case counsel each retained experts in taxation and trust matters. *Id*. In July 2010, Mr. Rosenblatt sent emails to Gary Paige (one of the progeny lawyers) in which he wrote that "no [FAMRI] trustee had a problem with that concept [of seeking a private IRS ruling]," asked to see the "proposed IRS submission," and agreed to "cooperate fully for you [plaintiff's counsel] to obtain a ruling from the IRS as to your concept." TE 17.

In August 2010, Mr. Paige met with Mr. Rosenblatt and his counsel Bruce Rogow. ROR 17. In his August 18, 2010 email to other progeny counsel, Paige reported that Rosenblatt and Rogow were going to meet with FAMRI's board to seek approval of "a commitment of "$X? to Flight Attendant[s] IF our letter is approved by IRS and Attorney General." TE 17.

Unfortunately, the negotiations ended without agreement. In November 2010, Rogow advised Alvarez that the parties had reached an impasse. ROR 18.

VI. The Petition

On December 1, 2010 Alvarez, Gerson and Hunter filed the "Petition to Enforce and Administer Mandate." TE 18. The Petition asked the court to "exercise its retained jurisdiction to administer the settlement," to find that "the

approved purposes of the settlement had not been fulfilled" and that further use of settlement funds must be under court supervision, an accounting, and "distribution of the settlement funds to class members." *Id.* at ¶34. The Petition also requested an accounting of "all funds received and expended," and an injunction prohibiting "further expenditures of sums not expressly approved" by the court. *Id.* at ¶33-35.

The lawyers for the individual class members never intended that all of FAMRI's remaining funds would be transferred to the plaintiffs in the *Broin* progeny suits. Mr. Alvarez was the principal drafter of the Petition, including the paragraph in the prayer for relief that asked the court to "order distribution of the settlement funds to class members." TR II 248 (Alvarez). Mr. Alvarez testified that if he had intended to ask the court to order distribution of all the funds remaining in FAMRI, "I would have said that. That's not what I said." *Id*. *See also* TR I 139 (Gerson) ("never" sought to transfer all funds out of FAMRI), TR II 151-155 (Gerson), TR III 300 ("complete dissipation of FAMRI's funds or corpus" was "never a concept, ever.") (Hunter).

Indeed, throughout the negotiations preceding the Petition, progeny counsel had always made clear that their goal was to secure a distribution of an amount far less than FAMRI's remaining corpus. ROR 20. The Referee found that the Petition's language was not so limited and despite progeny counsel's "true intent" and as the result of "inadvertent drafting," the Petition asked that "the settlement

funds" be distributed to the progeny plaintiffs. ROR 20, 21.

VII. The Motion to Disqualify

On May 23, 2011, almost six months after the Petition was filed, Ms. Blissard and Ms. Young filed their Motion to Disqualify. TE 19. The motion was supported by affidavits from (among others) Young (TE 23), McGrane (TE 24), and Blissard (TE 22). We summarize below the material assertions about Gerson in those affidavits, and the material portions of the affidavit that Gerson submitted in opposition to The Bar's Motion for Summary Judgment in this proceeding.[4]

Young (TE 23):

- "My case was filed in court by attorney Miles McGrane and I regularly met with Miles and the lawyers jointly handling my case and the other cases, particularly Philip Gerson . . . ."

- "I shared my confidences and very confidential information regarding myself, the litigation and FAMRI with my attorney, Miles McGrane, and with the other attorneys working with Miles, particularly Steven Hunter and Philip Gerson."

[4] Gerson also submitted a substantially similar affidavit in opposition to the Motion to Disqualify. TE 28. Messrs. Hunter and Alvarez also submitted affidavits in opposition to the Motion to Disqualify. TE 30, 31. Hunter attested that after Blissard objected to any action to enforce the Settlement Agreement, he withdrew as her counsel; that he did not represent her "with respect to her role as a member of the Board of Directors of FAMRI" and had not "acquired any confidential Information material to Blissard's dealings with FAMRI"; that he had never represented or received any confidential Information from Young; and that when Chambers objected to the Petition he "immediately filed a motion to withdraw." ROR 27. Like Gerson's affidavit, Alvarez's "contradict[ed] all material allegations made by Young, Blissard and McGrane." *Id*.

- "The meetings and numerous conversations with Hunter and Gerson occurred over the past eleven or twelve years."

Gerson re Young (APP A)[5]:

- "I did not 'regularly' meet with Ms. Young or have 'numerous' conversations with her; I did not jointly handle her case with Mr. McGrane; Ms. Young never told me any confidential information about her case, herself, FAMRI, or any other subject; and I never learned any such confidential information from any other source."

- "Ms. Young never asked or told me anything about her case, never indicated any intention to hire me as her lawyer, and, until she asserted in her affidavit that she believed I was her lawyer, she never said that or anything that even hinted at that to me."

- "I never . . . filed any paper on her behalf, or appeared for her at a hearing. We never communicated with each other by phone or in writing. I had brief, casual social conversations with Ms. Young from time to time at FAMRI-sponsored symposia or Stanley and Susan Rosenblatt family events, all attended by hundreds of people. I barely know Ms. Young."

McGrane (TE 24):

- "Board members Patty Young, Lani Blissard and the late Bland Lane, shared many confidences with Philip Gerson and Steven Hunter . . . about themselves, their claims, and FAMRI."

- "Patty and Lani were very giving of their time and spoke freely to us about themselves, their claims, their experiences working for airlines when smoking was permitted and confided in us about FAMRI and their work with FAMRI."

Gerson re McGrane (APP A):

[5] Gerson's affidavit submitted in opposition to The Bar's Motion for Summary Judgment is Appendix Exhibit A (APP A) to this Brief.

- "Neither Patty Young, Lani Blissard, nor Bland Lane ever confided in me about FAMRI, their work with FAMRI, their cases, or anything else and I never learned any such confidential information from any source."

Blissard (TE 22):

- "I and other class representatives, Patty Young and Bland Lane, shared many confidences with . . . Steven Hunter and Philip Gerson, whom we truly trusted and confided in about ourselves and FAMRI."

Gerson re Blissard (APP A):

- "Ms. Blissard never shared any confidences with me about herself, her case, or FAMRI, and I never learned any such confidential information from any source."

The Motion to Disqualify was argued June 30, 2011. Gerson, Hunter, and Alvarez, along with Ramon Abadin, Philip Freidin, Hector Lombana, and HT Smith (each of whom appeared as Petitioners' counsel after the Petition was filed) were represented at the hearing by retired Circuit Court Judge Israel Reyes. No testimony was taken, and the matter was "adjudicated in a paper mini-trial consisting of conflicting affidavits" and argument of counsel. ROR 28. On July 13, 2011, the trial court entered its order granting the Motion to Disqualify on the basis that all of the lawyers for the petitioners had a conflict of interest and that their representation of the petitioning flight attendants was precluded by Rules 4-1.7 and 4-1.9. TE 33.

VIII. Post-Disqualification Proceedings

After entry of the disqualification order, The Florida Bar and certain of the complaining clients filed Bar Complaints against Gerson, Hunter, and Alvarez. The Bar referred the Complaints to a Grievance Committee in the Seventeenth Judicial Circuit, asserting that by filing the Petition, Gerson, Hunter, and Alvarez violated Rules 4-1.7 and 4-1.9. TE 40. On March 15, 2012, after an investigation and detailed findings by the investigating member,[6] the Grievance Committee notified all three lawyers that it "found no probable cause for disciplinary proceedings." TE 42, 43. The Bar did not pursue the matter further. ROR 4 n.4.

Meanwhile, Gerson and Hunter filed a petition for certiorari in the Third District Court of Appeal. Six days after the Grievance Committee issued its "no probable cause" letters, a unanimous panel of the Third District quashed the disqualification order. *Broin v. Phillip Morris Companies, Inc.*, 84 So. 3d 1107 (Fla. 3d DCA 2012). Notably, the Third District wrote that "Rule 4-1.7 does not

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[6] In his report to Bar Counsel (TE 40), the grievance committee's investigating member reported that Ms. Waerness told him "that Gerson had never been her counsel," "that she never filed an individual lawsuit against Tobacco," that "she had no ill effects from the cabin smoke to which she was exposed," *id*. at 8, and that she "filed a Bar complaint [against Gerson]" because Margaret Crane (a Rosenblatt client and "a cigarette smoke exposure analyst at Dartmouth Medical School" whose "research is funded by FAMRI") had sent her a copy of Gerson's letter to progeny clients regarding the Petition. *Id*. at 10. The investigating member's report concluded, *inter alia*, that Waerness's Bar complaint against Gerson (and Crane's against Hunter) "appear to have political motivations." *Id*. at 14.

apply because there is no evidence that Mr. Gerson and Mr. Hunter currently represent the respondents." *Id.* at 1112. And with regard to the claim of a prior-client conflict (Rule 4-1.9), the Third District noted that although it arose from the class action, "the Petition involves a different issue," *id.*, and hence is not "substantially related," *id.* at 1110. For these reasons and others (adoption of the federal courts' balancing approach in class action conflict situations), the Third District concluded that the trial court had departed from the essential requirements of law in disqualifying Respondents. *Id*. at 1112.

Young, Blissard, and FAMRI sought review in this Court, which accepted jurisdiction and quashed the Third District's decision. *Young v. Achenbauch*, 136 So. 3d 575 (Fla. 2014). The *Young* Court disagreed with the Third District's conclusion that Gerson did not have a current-client conflict, ruling that Gerson could not convert Waerness or Spurgeon from current clients to former clients by withdrawing and dropping them like a "hot potato." *Id.* at 581, 582. The *Young* opinion cited only non-Florida cases for this proposition. *Id*.[7]

The *Young* opinion also concluded that although Gerson was not counsel of record for Young, he would be treated as such "given the team approach to

[7] At the close of oral argument before this Court, Petitioners' counsel stated: "We provided a lot of cases in our brief from other jurisdictions that say a lawyer can't drop its clients like hot potatoes to avoid the current client conflict." Justice Pariente asked whether that wasn't clear under Florida law. Petitioners' counsel responded, "The Third District didn't think so."

representation by the flight attendants' counsel." *Id*. at 582. The Court held that because Young "shar[ed] information and confidences" with the lawyers, including Gerson, who were part of the "team," he became her lawyer for "the limited purpose of the 'pooled' information." *Id*. (citing *Visual Scene, Inc. v. Pilkington Bros., plc.*, 508 So. 2d 437, 440 n.3 (Fla. 3d DCA 1987)).

The Court also found that Gerson violated Rule 4-1.9 because "the petition against FAMRI, the individual progeny suits, and the original class action are substantially related because they involve the same transaction or legal dispute" and "the interests of the individuals participating in the action against FAMRI are materially adverse to the interests of Gerson's former clients who objected to the petition against FAMRI and did not give their informed consent." *Young*, 136 So. 3d at 583.

Without mentioning the "no probable cause" finding by the Grievance Committee that investigated The Florida Bar's complaint against Gerson (TE 42, 43), this Court asked "The Florida Bar to investigate whether any Florida Rules of Professional Conduct were violated during the underlying proceedings or during the presentation of this case to this Court." *Id.* at 577. "The Bar then commenced yet another investigation of 'possible' violations of Rules 4-1.7, 4-1.9, 4-3.3, and 4-8(c). TE-52, 53." ROR 7. On May 27, 2015, the Eleventh Judicial Circuit Grievance Committee to which The Bar had referred the matter notified Mr.

Gerson that it "found no probable cause for disciplinary proceedings." TE 59.

Approximately a month later, Michael Higer, The Florida Bar Board of Governor's Designated Reviewer, asked the Grievance Committee to reconsider. TE 60. On reconsideration, the Grievance Committee again "found no probable cause for disciplinary proceedings." TE 67, 68. Despite all of the "no probable cause" findings by the Grievance Committees, Mr. Higer referred the matter to the Board of Governors' Disciplinary Review Committee. TE 69, 70. The Disciplinary Review Committee recommended a finding of probable cause "as to Rules 4-1.7 and 4-1.9," but not as to the presentation of the case to the Supreme Court. The full Board of Governors confirmed the Review Committee's recommendations. TE 71. The Bar then filed its Complaints against Messrs. Gerson and Hunter in this Court.

IX. Trial

Unlike the disqualification motion, which was decided on conflicting affidavits and argument of counsel, witnesses testified live at the trial before the Referee. The Bar, however, did not call any witnesses on its case either live or by deposition. It merely offered into evidence the seventy-six agreed trial exhibits and rested. *See* TR I 47, 48.

Mr. Gerson testified on his own behalf. He detailed his history of service to The Florida Bar and to the profession more generally. He served on and chaired a

grievance committee, and served on The Florida Bar's Professionalism and CLE Committees. TR I 54, 55. Mr. Gerson is a member of the Florida Justice Association, the American Association for Justice, the National Crime Victim Bar Association (of which he is the Founding President), and the National Center for Victims of Crime as Board Chairman and a Board member, the Dade County Bar Association, and the Dade County Trial Lawyers Association, *id*. at 56-58, and serves on the Board of Advisors of the St. Thomas University School of Law, *id*. at 58.

Mr. Gerson then described how lawyers from the seven firms that were prosecuting the 3,000 or so progeny cases cooperated on common issues such as discovery, interpretation of the *Broin* Settlement Agreement, evidentiary issues, legal issues, and the like. TR I 67. He testified that at the urging of the progeny lawyers and the tobacco company lawyers, Administrative Judge Stuart Simons designated one of the cases, *Jett*, as the "exemplar case," meaning that a filing in *Jett* would be deemed to be a filing in each of the 3,000 cases. *Id*. at 68.[8]

Gerson was one of the lawyers who tried the first progeny case, for Marie Fontana, in 2001. It resulted in a defense verdict. *Id*. at 70, 71. The next case Gerson tried, this one with Bill Hoppe, was for Julia Tucker in 2003. It resulted in

[8] Not all of the judges abided by the *Jett* administrative order. Judge Esquiroz dismissed the Spurgeon case for lack of prosecution despite being advised of Judge Simon's administrative order. TR I 115-116 (Gerson).

a defense verdict. *Id*. at 72, 73. Gerson next tried, alone, the James Seal case. The idea was to show the tobacco companies that a progeny case could be tried by one lawyer only. It resulted in a defense verdict. *Id*. at 73, 74.

Gerson lost the Seal case on the issue of specific causation, *viz*, whether the inhalation of second-hand tobacco smoke caused Mr. Seal's condition (asthma). That was the same issue on which all the prior cases had been lost, those in which Gerson participated at trial and those tried by other progeny lawyers. *Id*.

After winning the Seal case, the tobacco companies sought, and won, a "significant judgment" against Seal based on Seal's rejection of the proposal for settlement they had made. *Id*. at 74, 75. The tobacco companies collected about $5,000 on their judgment against Seal, "which was a burden for him because he is a working man." *Id*. at 75.

Gerson's fourth and last progeny trial was for Lorraine Swaty in 2005. It resulted in another defense verdict and another judgment for the tobacco companies, this one for about $20,000, based on their rejected proposal for settlement. *Id*. at 76-77. Ms. Swaty, who had retired, had to take a job (she became a greeter at a Wal-Mart store) to pay the judgment. *Id*. at 77.

The progeny lawyers' combined trial record was 1-10. *Id*. at 79. The consensus of the trial lawyers was that two factors made the cases all but unwinnable – specific causation, and the provisions in the *Broin* Settlement

Agreement limiting the progeny plaintiffs to compensatory damages only, and waiving their claims based on "fraud . . . or any other alleged willful or intentional conduct" and claims for "punitive and exemplary damages." TE 1 at 9, ¶ 12(a). As progeny lawyer Alex Alvarez testified at trial:

> So there's no punitive damages. There's no conduct evidence at all that are being brought in these cases. So the only thing the jury is told is your scope of inquiry . . . has to be solely whether this flight attendant had a disease [as] the result of secondhand smoke.

TR II 206. *See* also TR I 80 (Gerson) ("the evidence that we – that the settlement agreement gave away, that we couldn't get in.").[9] And on specific causation, the tobacco companies were winning on "the science and the medicine." TR II 207 (Alvarez). *See* also TR I 83 (Gerson):

> I told him [Rosenblatt] that we are losing the cases because we couldn't prove causation, that there was no science out there to support us and the tobacco companies were hiring very distinguished expert witnesses who came in and said just that, there was no science.

On the stand, Mr. Gerson also directly refuted the affidavits that Young and Blissard submitted in support of their Motion to Disqualify him, and which were admitted into evidence at trial. *See* TE 20 and TE 22-24. Mr. Gerson testified as follows:

[9] The lone trial victory might have been attributable to the lawyers' introducing "some of the evidence of what the tobacco companies had done, some of the dirty deeds." TR I 79, 80 (Gerson).

- Neither Ms. Young nor Ms. Blissard ever shared any confidences with him and that neither they nor Bland Lane ever told him anything about themselves or their claims or FAMRI. TR II 158, 159.

- He never met with Ms. Young or attended a meeting at which Ms. Young was discussed. *Id*. at 162.

- Ms. Young's affidavit that she shared confidential information with Gerson when he (Gerson) was working with her lawyer Miles McGrane was "[a]bsolutely not" true. *Id.* at 162, 163.

- The only times he ever saw Ms. Young were at a FAMRI symposium and at Rosenblatt family occasions, where they would exchange casual greetings but "I didn't discuss anything with her." *Id*. at 163.

- Ms. Young never asked Mr. Gerson to be her lawyer or consulted with him about anything; she never asked for and he never gave her legal advice; she never told him that she considered him to be her lawyer; he never filed any paper for her; and she never said anything to him from which he concluded that she considered him to be her lawyer. *Id*. at 161-166.

The Referee credited that testimony (and the equivalent testimony that Messrs. Hunter and Alvarez gave at trial).

> [T]he Bar relies upon the affidavits of Blissard, Young and McGrane – witnesses it did not call live and subject to cross-examination. Instead the Bar chose to try its case by "affidavits" even though credibility was clearly at issue. . . . In contrast, Gerson, Hunter and Alvarez appeared live and unequivocally testified that Young never disclosed to them any information let alone confidential information about FAMRI.
>
> While Young by affidavit *only* [emphasis in original]– testified in broad strokes that such confidences and information were shared, not a single detail was provided, such as the date of any meeting, the identity of those participating, or the substance of any discussion. Nor was a single document tending to prove that such

> "confidences" were shared admitted into evidence . . . . Nor did any of the witnesses supporting this claim appear and subject themselves to cross-examination. ***Gerson and Hunter did, however, appear – subject themselves to cross-examination – and testify clearly, convincingly and credibly*** that: (a) Young never consulted with either of them; (b) Young never sought legal advice from either of them; (c) Young never shared any confidential information with them; and (c) [sic] Young never claimed to be confiding in – or relying on – either of them prior to filing her affidavit in support of disqualification. ***Their testimony was supported by Alvarez, who also appeared live and whose testimony the Referee finds credible***. [Emphases added.]

ROR at 40-42.

X. The Report of Referee

The Referee's Report is a thorough and scholarly examination and analysis of the evidence, the law, and the Rules. As they relate to Gerson, the Referee's recommended findings are:

- Gerson did not violate Rule 4-1.9 because as a matter of logic and the Rules, at the time of the alleged violations, his clients (Waerness and Spurgeon) were either current clients or former clients and could not be both at the same time. ROR 33-37.
- Gerson did not become Young's lawyer on account of the team effort of the progeny lawyers, did not have a duty of loyalty to her, and did not violate Rule 4-1.7 as to her by filing the Petition. ROR 37-43.
- Gerson violated Rule 4-1.7 as to his clients Spurgeon and Waerness

> because the Petition was directly adverse to their "legal interest in FAMRI and the work they believed it was doing for their benefit and the benefit of others similarly situated." ROR 46.

The Bar asked for a ninety-one day suspension. The Referee rejected that requested discipline as too harsh, finding that the suspension cases on which The Bar relied were distinguishable because they involved "particularly egregious conduct," ROR 48, that was "dishonest and deceitful." *Id*. at 49. By contrast, the Referee found that Gerson's conduct was motivated principally by the desire to help his clients to secure judicial oversight of FAMRI and its expenditure of settlement funds, and to obtain some monetary benefit for those clients, who suffered illness caused by the inhalation of second-hand cigarette smoke. ROR 49.

The Referee also found that the conflict issues Gerson confronted were unsettled. This Court first adopted the "hot potato" rule in its *Young* opinion; before that, "the comment to Rule 4-1.7 seemed to support [the] protocol" of withdrawing and converting a current client into a former client. ROR 51.

Moreover, whether the Petition and the progeny cases were "substantially related' for purposes of applying our conflict rules was by no means open and shut. In fact the Third District concluded that the matters were not 'substantially related' because [they] involved totally distinct legal and factual issues." *Id*.

Finally, whether the Petition was "directly adverse" to Gerson's clients'

legal interests or only to their expressed wishes was "[a]lso fairly debatable." *Id*. at 52. There does not appear to be a single published appellate opinion on the issue; hence, "the issue of 'direct adversity' was undoubtedly debatable." *Id*. at 52, 53.

In sum, Gerson had a "good faith" basis for "resisting disqualification based on objections from Waerness [and] Spurgeon." *Id*. at 53. Based on the foregoing, and finding that Gerson is "no risk to the public, or current or future clients," the Referee recommended admonishment as the appropriate discipline. ROR 56.

XI. The Bar's Brief

The Bar asks this Court to reject the Referee's finding that Gerson did not violate Rule 4-1.9, characterizing that finding as "clearly erroneous." The Bar also asks this Court to reject the Referee's recommended discipline of admonishment and to impose, instead, a thirty-day suspension. The Bar does not seek review of the Referee's finding that Gerson did not become Young's lawyer and did not violate Rule 4-1.7 as to her.

SUMMARY OF ARGUMENT

The Bar's complaint asserted that by filing the Petition, Gerson violated both the current-client conflict Rule (4-1.7) and the former-client conflict Rule (4-1.9). The basis of the asserted current-client conflict is that certain relief requested in the Petition was directly adverse to the interests of Gerson's ***current*** clients Waerness

and Spurgeon. The basis of the asserted former-client conflict is that the very same requested relief was materially adverse to the interests of Gerson's ***former*** clients Waerness and Spurgeon, and that the Petition and Waerness's and Spurgeon's progeny suits were substantially related. There is an inherent illogic in claiming that Waerness and Spurgeon were, at the same instant and regarding the same conduct, both current and former clients of Gerson.

The *Young* opinion answers the question as to which they were, current or former clients. The hot potato rule prevented Gerson from converting them to former clients by withdrawing from his representation; they remained current clients for purposes of the conflict analysis. Hence, Gerson cannot have violated Rule 4-1.9.

The Court should reject the Referee's finding of a violation of Rule 4-1.7. While against Waerness's and Spurgeon's express wishes, the Petition was not directly adverse to the legal or economic interest of either. Moreover, that key issue – direct adversity – was, as the Referee expressly acknowledged, open to serious debate.

Even if the Court were to confirm the Referee's finding of a violation of Rule 4-1.7, it should not impose discipline. A lawyer should not be sanctioned for a highly debatable violation of a Rule of Professional Conduct, especially where, as here, the lawyer researched the issue and formed a good-faith judgment that his

conduct did not violate the Rule. Alternatively, the Court should confirm the Referee's recommended discipline of admonishment. Gerson not only has a spotless disciplinary history throughout his 46-year career as a trial lawyer in Florida, he has been a significant contributor to The Bar and the legal profession. There would be no risk to the public or his clients if his practice were to continue uninterrupted by a suspension. His supposed lack of remorse is, rather, a good faith defense of his conduct. It should not be counted against him.

ARGUMENT

I. THE REFEREE CORRECTLY FOUND THAT GERSON DID NOT VIOLATE RULE 4-1.9.

A. Rule 4-1.9 is inapplicable to the record facts.

Rule 4-1.9(a)(1) prohibits a lawyer who formerly represented a client from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Rule 4-1.7 is more exacting; it prohibits a lawyer's representing one client against another client even if the matters are completely unrelated.

Because Rule 4-1.9 is less rigid, "attorneys faced with a conflict involving two or more current clients would sometimes: (a) withdraw from one client's continued representation; (b) assert that the complainant was then a 'former client'; and (c) claim that the disqualification question was therefore governed by the

'former' client conflict rule." ROR 35. As the Referee noted, pre-*Young*, the comment to Rule 4-1.7 supported this approach, ROR 51, and in *Broin*, the Third District acknowledged the comment's application: "Rule 4-1.7 does not apply because there is no evidence that Mr. Gerson and Mr. Hunter currently represent the respondents." 84 So. 3d at 1112.

Nearly four years after Gerson researched the issue and concluded that he could withdraw from representing Waerness and thereby convert her to a former client, *Young* held that a lawyer may not avoid Rule 4-1.7 in that way. Adopting the "hot potato" rule recognized in a few other jurisdictions, the *Young* Court explained, "a lawyer or law firm may not simply [choose] to drop one client 'like a hot potato' in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute." *Young*, 136 So. 3d at 581 (quoting *ValuePart, Inc. v. Clements*, No. 06C2709, 2006 WL 2252541, at *2 (N.D. Ill. Aug. 2, 2006)).

Finding that Gerson did not violate Rule 4-1.9, the Referee applied *Youn*g to find that even after Gerson withdrew as Waerness's lawyer and thereby made her into a former client, the issue of whether Gerson had a conflict would be analyzed under the current-client conflict Rule, 4-1.7. Logically, the Referee concluded that "the same person cannot be both a 'current' and 'former' client for purposes of analyzing whether the same conduct by counsel (filing and prosecuting the Petition

against FAMRI) violated the [current-client conflict and former-client conflict] Rules." ROR 36.

The Bar's argument to the contrary is difficult to parse. The Bar acknowledges the hot-potato rule that *Young* adopted and yet argues that Waerness remained Gerson's current client for conflict purposes *and* was converted into a former client for conflict purposes. Nothing in *Young* or in the cases The Bar cites supports that construction. Importantly, each of those cases was decided pre-*Young* and none involved a lawyer who had withdrawn from a representation in order to convert a client to a former client for conflict analysis purposes.

In *The Florida Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999), Dunagan represented Mr. and Mrs. Leucht in the acquisition of a business and then represented both the Leuchts and the business in a series of disputes and business deals. Dunagan then took positions in favor of Mr. Leucht and adverse to Mrs. Leucht in the business, and filed a dissolution of marriage action on behalf of Mr. Leucht. *Id.* at 1240.

Without discussing when Mrs. Leucht became Dunagan's former client, this Court upheld the Referee's finding that Dunagan violated Rule 4-1.9 when he filed the dissolution action, which put into contention ownership of the business in which he had represented Mrs. Leucht. *Id.*

In *The Florida Bar v. Marke*, 669 So. 2d 247 (Fla. 1996), attorney Marke

represented Mr. and Mrs. Sadik-Ogli in forming a travel-agency business, during their operation of it, and in the sale of all of Mrs. Sadik-Ogli's and some of Mr. Sadik-Ogli's stock to an acquirer that became the majority shareholder and hired Mr. Sadik-Ogli to run the business. Representing the Sadik-Oglis, Marke drafted the Purchase and Sale, Shareholders', and Employment Agreements. *Id.* at 248. Marke then switched sides and represented the new majority shareholder in terminating Mr. Sadik-Ogli's employment. *Id.* at 249.

Thereafter, Marke terminated his relationship with the Sadik-Oglis but continued to take actions materially adverse to them. *Id.* Without discussion of the current-versus-former client issue, this Court upheld the Referee's findings that Marke had violated both 4-1.7 and 4-1.9, but for different actions, some taken while the Sadik-Oglis remained his clients, some taken after Marke terminated their lawyer-client relationship. *Id*.

The Florida Bar v. Scott, 39 So. 3d 309, 316 (Fla. 2010), involved multiple conflicts regarding several clients Scott represented in the same matter – "claims for ICEC's assets in one way or another." The *Scott* opinion does not describe which conduct violated the current-client conflict Rule and which the former. Fortunately, the referee's report does identify which conduct violated 4-1.7 and which violated 4-1.9. *See* Amended Report of Referee in *The Florida Bar v. William Sumner Scott*, Case No. SC05-1145 at, e.g., p. 10, 12 ("I find that

Respondent's foregoing dual representation of both ICEC and its individual investors . . . constitutes a violation of Rule 4-1.7(a). . . . . I also find a violation of Rule 4-1.9(a) in that Respondent formerly represented Maseri in the negotiation of the ICEC venture, as well as his company, Private Research, in the underlying CFTC action which resulted in the freezing of the ICEC assets.").[10]

Hence, The Bar's cases stand for the unremarkable proposition that a lawyer may be found to have violated both 4-1.7 and 4-1.9 in the representation of the same client. But unlike the position that The Bar takes about Gerson, none of those cases involved the hot potato rule and none held that the very same conduct violated both Rule 4-1.7 and Rule 4-1.9. Under the hot potato rule first adopted in *Young*, the lawyer's conflict is adjudged under the current-client Rule, not both the current-client and former-client Rules.

The Bar makes a separate argument as to Spurgeon, *viz*, that she became a former client when her case was dismissed for lack of prosecution in 2008. BR 32-33. Unsurprisingly, The Bar cites no authority for the proposition that an involuntary dismissal converts a current client to a former one, and we could not find any such authority. To the contrary, "the attorney-client relationship does not conclude until the client knows (discovers) that the lawyer has completed his

[10] The Court may take judicial notice of papers in the files of its cases. *See* Fla. Stat. § 90.202(6). In aid of judicial notice, we submit at Appendix Exhibit B to this Brief, a copy of the referee's report in *Scott*.

representation." 3 RONALD E. MALLEN, LEGAL MALPRACTICE § 23.47, Westlaw (Jan. 2017)); *see Riccio v. Heitner*, 559 So. 2d 609, 610 (Fla. 3d DCA 1990) (finding that law firm was estopped from asserting that its representation had terminated where it had failed to advise its clients of its dissolution and the dissolved firm's lawyers continued to represent the clients); *see also* Cmt. to R. Regulating Fla. Bar 4-1.3 ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.").

The evidence at trial showed that despite Gerson's objection, Spurgeon's case was involuntarily dismissed for lack of prosecution, TE 6, when Judge Esquiroz failed to adhere to Judge Simon's administrative order in the *Jett* case. TR I 68, 115-116 (Gerson). Gerson did not tell Spurgeon about the dismissal order or that his representation of her had ended. TR II 185-186. Hence, when Spurgeon emailed Kress regarding her objection to the Petition in April 2010 (nearly two years after the dismissal order was entered) she identified Gerson as "my lawyer". *See* TE 8 ("I have recently learned that you, as my lawyer ….") Thus, The Bar failed to prove that Spurgeon was Gerson's former client.

B. Regardless, The Bar did not prove a Rule 4-1.9 violation by clear and convincing evidence.

The Bar had the burden of proving by clear and convincing evidence: (1) that the Petition was "substantially related" to Waerness's and Spurgeon's progeny suits against big tobacco, and (2) that the Petition was "materially adverse" to Spurgeon's and Waerness's legal interests. It proved neither.

1. The Petition was not substantially related to the progeny suits.

The Petition was not "substantially related" to Waerness's and Spurgeon's suits against the tobacco companies. "As used in Rule 4-1.9, the term 'substantially related' is narrowly defined." *Brown v. Blue Cross & Blue Shield of Florida, Inc.*, 2011 WL 11532078, at *5 (S.D. Fla. Aug. 8, 2011).

> Matters are 'substantially related' for purposes of [Rule 4-1.9] if they involve the ***same transaction or legal dispute***, ***or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client***.

Cmt. to R. Regulating Fla. Bar 4-1.9 (emphasis added).

The Petition was not "substantially related" to the progeny suits because they are not "the same legal dispute." The Petition sought an accounting and disbursement of funds from FAMRI; the progeny suits sought money damages from the tobacco companies for medical conditions caused by the inhalation of second-hand cigarette smoke in airplane cabins. And nothing in the Petition

attacked the work Gerson did for Spurgeon or Waerness, that is, filing their progeny suits.

The Bar's argument that the Petition and the individual suits are substantially related because they both arise from the same settlement agreement is wrong. *See, e.g.*, *Frank, Weinberg & Black, P.A. v. Effman*, 916 So. 2d 971 (Fla. 4th DCA 2005), in which the District Court denied a certiorari petition to review a trial court order denying a law firm's motion to disqualify lawyer Jan Atlas from representing the firm's former partner Steven Effman in a dispute over his departure from the firm. Atlas had previously represented the firm in an action against a different departed partner. *Id.* at 972. The District Court found that the two suits were not "substantially related" within the meaning of Rule 4-1.9 "even though the underlying document governing the relationship is the same" because "[t]he lawsuits involved entirely different facts." *Id*. at 973.

The matters in *Effman* were much more interrelated than the matters here, the outcome of both cases depending in material part on the same shareholders agreement. By contrast, the outcomes of the progeny actions were dependent on the evidence on specific causation (whether the plaintiff-flight attendants' medical condition was caused by inhaling second-hand tobacco smoke). The outcome of the Petition was dependent upon the Court's construction of the *Broin* Settlement Agreement and view of FAMRI's compliance, or not, with the terms of that

agreement. Waerness's and Spurgeon's suits and the Petition were related only in a general, insubstantial way.

The Bar also argues that Gerson's letter to his clients evidences substantial relatedness because Gerson wrote that the Petition was "the best way to bring this litigation to a successful conclusion and finally provide you with monetary compensation we believe you deserve." BR 34. The argument ignores the real issue: were the Petition and the progeny suits the "same legal dispute"? Cmt. to R. Regulating Fla. Bar 4-1.9. That the Petition might result in the flight attendants' receiving money they were not going to get from their progeny suits is no evidence at all that the Petition was substantially related to those suits. Moreover, even had it been granted, the Petition would not have prevented a flight attendant from pursuing her or his progeny suit. TR II 157:8-24 (Gerson).

2. The Petition was not materially adverse to the legal interests of Waerness or Spurgeon.

In addition to failing to prove that the Petition and the progeny actions were "substantially related," The Bar also failed to prove that the Petition was "materially adverse to the interests of the former client." R. Regulating Fla. Bar 4-1.9(a). "The principles in rule 4-1.7 determine whether the interests of the present and former client are adverse." *See id.* at Cmt. We show below that the Petition was not directly adverse to the legal interests of Gerson's progeny clients

Waerness and Spurgeon.

II. GERSON DID NOT VIOLATE RULE 4-1.7 BECAUSE THE PETITION WAS NOT DIRECTLY ADVERSE TO THE INTERESTS OF WAERNESS AND SPURGEON.[11]

The Court should reject the Referee's finding that Gerson violated Rule 4-1.7 because it is unsupported by the record evidence or law. *See The Florida Bar v. Shoureas*, 913 So. 2d 554, 557–58 (Fla. 2005) ("[T]he referee's factual findings must be sufficient under the applicable rules to support the recommendations as to guilt.").

The Bar's Complaint alleged that the Petition was "directly adverse" to the "stated interests" of Waerness and Spurgeon. *See* Complaint at ¶¶ 28-30. Waerness and Spurgeon "stated" their interests in emails they sent to FAMRI's Executive Director Kress for re-delivery to Gerson (TE 8, 9) and Waerness's affidavit in support of Blissard's and Young's Motion to Disqualify Gerson (TE 20). At trial, those three pieces of paper were the only evidence The Bar introduced on direct adverseness.

The Comment to Rule 4-1.7 explicates the meaning of "directly adverse to another client":

> As a general proposition, ***loyalty to a client prohibits undertaking representation directly adverse to that client's . . . interests*** without the affected client's consent. Subdivision (a)(1) expresses that

[11] The Referee found that Gerson did not violate Rule 4-1.7 vis-à-vis Young and The Bar does not seek review of that finding.

> general rule. Thus, a lawyer ordinarily ***may not act as advocate against a person the lawyer represents in some other matter*** . . . . [Emphasis added]

The Petition did not "advocate against" Waerness or Spurgeon; it advocated for judicial supervision of FAMRI's use of the settlement funds and distribution of some of those funds to the progeny plaintiffs. To be sure, Waerness and Spurgeon expressed their wishes that Gerson not sign the Petition, but by going against their wishes he did not violate Rule 4-1.7.

A simple analogy illustrates why this is so. Assume that Waerness told Gerson that she did not want him to sue Tesla Motors on behalf of a person who suffered bodily injuries in an accident caused by the failure of the car's auto-drive system because Teslas do not emit carbon into the atmosphere (the equivalent of her referring to FAMRI's "good works"). TE 9. Gerson's representation of the accident victim would be contrary to Waerness's expressed preferences, but her interest in the condition of the atmosphere is too remote to make the representation directly adverse to her interests for Rule 4-1.7 purposes. So, too, is Waerness' interest in FAMRI's good works.

As used in the Rule, "interests" means the "legal rights and duties of the two clients vis-à-vis one another." American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Op. 05–434, at 1201:155 (Dec. 8, 2004) (ABA Op. 05–434); *see also In re Ellis V.N.*, No. W10CP07014999A, 2008

WL 725195, *2 (Conn. Super Ct. Feb. 26, 2008) (finding no concurrent conflict of interest absent showing that "parents' respective ***legal interests*** in the termination proceeding will be directly adverse to each other") (emphasis added). Gerson's progeny clients' legal interests were not adverse to Waerness's (and vice versa).

Simpson Performance Products, Inc. v. Robert W. Horn, P.C., 92 P. 3d 283 (Wy. 2004) is the case with the most closely analogous facts. Simpson Performance Products ("SPP") hired attorney Horn to counsel it on whether to sue NASCAR for claiming that the failure of a seatbelt that SPP manufactured had caused Dale Earnhardt's death in a crash during the Daytona 500. *Id.* at 285. To the consternation of SPP's founding shareholder Bill Simpson, SPP decided not to sue NASCAR. *Id.* Simpson resigned from SPP and hired Horn to sue NASCAR on his behalf. *Id.*

SPP claimed that Horn's representation of Simpson was materially adverse to SPP and hence violated Wyoming's version of our Rule 4-1.9 (identical save for using "shall not thereafter" instead of "must not afterwards"). *Id.* at 285-286. As required by the Comment to the Wyoming equivalent to Rule 4-1.9, the Wyoming Supreme Court analyzed the case under the current-client conflict standard, *id.* at 287, undertaking a "case-specific inquiry to determine the degree to which the current representation may actually be harmful" to SPP, "focus[ing] on whether the current representation may cause ***legal, financial, or other identifiable detriment***

to [SPP]." *Id*. at 288 (emphasis added).

SPP argued that Horn's representation of Simpson would damage SPP's relationship with NASCAR, but "SPP fails to … point to any facts in the record demonstrating any harm the company has suffered or will suffer as a result of Horn's representation of Simpson." *Id*. Thus, the court decided that Horn did not have a conflict.

> We refuse to speculate as to the possible effects, adverse or otherwise, that Horn's representation of Simpson may have had, or could have, on SPP. Based on the facts as they exist in the record, we hold that Horn's representation of Simpson was not "materially" or "directly" adverse to SPP.

Id.

We do not have to speculate. We know that at the trial, The Bar did not prove that Waerness or Spurgeon would suffer any "actual[] harm[]" or "legal, financial, or other identifiable detriment" on account of Gerson's representation of the petitioning flight attendants. *Id*. The Referee wrote, regarding the Petition, "***Nor could any outcome of that litigation directly impact them financially or legally***." ROR 43 (emphasis added). *See* also ROR at 53: "[A]ny adverse interest these flight attendants may have possessed was remote and speculative at best."

Given those conclusions, one struggles to understand how the Referee also concluded that the Petition was directly adverse to Waerness and Spurgeon. The Report asserts that because all of the members of the *Broin* class "had a direct

interest in the operation of FAMRI" and believed that "its work would benefit them," they "had a direct legal interest in FAMRI." ROR 45, 46. Hence (the Report continues), they had the right to insist that their lawyer not participate in the Petition because it "could be 'directly adverse' to their interests regardless of whether they could 'prove' that a likely outcome could cause them direct and quantifiable harm." *Id*. at 46.

That explanation does not provide a basis on which to predicate a finding of direct adversity and a consequent violation of Rule 4-1.7. That Rule provides that "a lawyer must not represent a client if: the representation of 1 client ***will be*** directly adverse to another client." R. Regulating Fla. Bar 4-1.7(1)(b) (emphasis added.)

Thus, the Referee's findings that the Petition "*could* be" directly adverse to Waerness and Spurgeon, or that a "possible conclusion" of the Petition "could have dismantled (or at least severely disrupted)" FAMRI, ROR 46, does not meet the test that the Rule establishes for disqualification – that the representation "***will be***" directly adverse. R. Regulating Fla. Bar 4-1.7(a)(1) (emphasis added).[12]

[12] *See In re Jaeger*, 213 B.R. 578, 584 (Bankr. C.D. Cal. 1997) ("More than a remote possibility of a conflict is required before an attorney has an obligation to obtain the informed written consent of each affected client.") (citing Model Rules of Professional Conduct Rule 1.7 Cmt. upon which the Cmt. to Rule 4-1.7 is based); *Tagle v. MacDonalds Indus. Prods., Inc.*, 2000 WL 33421280, at *8 (Mich. Ct. App. 2000) (finding allegations of conflict were too vague and speculative to establish a conflict of interest or violation of conflict of interest rules); *Kidney*

Moreover, it is contradicted by the Referee's conclusion that "success on the claims asserted in the Petition could not have possibly caused any class member (other than Blissard and Young) financial or legal harm." ROR 53.

As the Referee found and the above discussion shows, whether Gerson's representation of the petitioners was directly adverse to the interests of Waerness and Spurgeon was a close, arguable question. It necessarily follows that The Bar did not carry its burden of proving, ***by clear and convincing evidence***, that Gerson violated Rule 4-1.7. The Bar did not call a single witness to testify live at trial, relying solely on hearsay (in the form of affidavits) that Messrs. Gerson, Hunter, and Alvarez refuted in their cogent, credible trial testimony. That testimony was not, and could not have been, clearly and convincingly outweighed by the six-year old, non-specific affidavits The Bar tendered.

III. DISCIPLINE IS NOT WARRANTED.

Even if the Court were to conclude that the Petition and the progeny suits

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Ass'n of Oregon, Inc. v. Ferguson, 843 P.2d 442, 448-49 (Or. 1992) (finding that petitioner did not violate conflict-of-interest rule, even though "[it] was conceivable at the outset that a conflict could develop," since "a theoretical potential for conflict is not a *likely* conflict" for the rule to apply)(emphasis in original).

Where Florida courts are silent on the interpretation of the Rules, the Court may look to decisions of other states also adopting the Model Rules of Professional Conduct for guidance. *See Pharma Supply, Inc. v. Stein*, No. 14-80374-CIV, *3 n.1 (S.D. Fla. Aug. 28, 2014).

were substantially related and that the Petition was materially adverse to Waerness's or Spurgeon's legal interests, it should not impose discipline on Gerson. As this Court has recognized, the disqualification of a lawyer in a civil proceeding on account of a client conflict does not imply that the lawyer should be disciplined for that Rule violation. *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630 (Fla. 1991). In ruling that the trial court should have disqualified the law firm, this Court wrote: "In reaching our decision, we do not imply any misconduct on the part of the . . . firm." *Id*. at 634.

Moreover, a lawyer should not be punished for acting in accordance with a reasoned decision on a highly-debatable issue even if a court later decides that the action violated an ethical rule. *See Arden v. State Bar of Cal.*, 341 P.2d 6, 11 (Cal. 1959) (where "[n]o clear-cut rule on the subject has been announced," it is improper "to discipline an attorney for a violation of a claimed principle that was and is so highly debatable."). *See also Matter of Evans*, 556 P.2d 792, 796-97 (Ariz. 1976) (finding that attorney would not be disciplined because there was "a respectable division of authority"); *Matter of Disciplinary Proceedings Against Kinast*, 530 N.W. 2d 387, 391 (Wis. 1995)(finding discipline to be unwarranted because of the "prevailing erroneous practice of attorneys" in the county and the "uncertainty" of whether the ethical rule at issue was applicable); *see also* 2 RONALD E. MALLEN, LEGAL MALPRACTICE § 19.18, Westlaw (Jan. 2017) ("Even in

the context of disciplinary proceedings, the debatable nature of a proposition can preclude discipline.").

Gerson researched and analyzed the purported conflict following the unsuccessful mediation on April 28, 2010, at which Gerson received the emails from Spurgeon and Waerness. The notion of a conflict came as a surprise to Gerson and the other progeny lawyers. *See* TR I 104. Gerson testified:

> We weren't expecting this and so what we decided that we should do is to go back and look at the files. I didn't know who Raiti Waerness was or Peggy Spurgeon, certainly not from memory. I'd had no contact with either one of them, that I remembered, and we wanted to read the rule and it was obvious that, to me, that this was a strategy to assert a claim of conflict of interest. And so everybody wanted to go back and look at their file and read the rule and then decide what the right thing to do was.

Id. at 104:14-25.

Gerson did just that. He reviewed his files and saw that he had filed complaints for Waerness and Spurgeon. *Id*. at 105. He and his partner, Edward Schwartz, "read the rule" and discussed it as they often did with "legal issues that come[] up at our practice." *Id*. They "concluded that there was no conflict," *id*. at 105, 106, because "there was nothing that we were doing that was adverse to her interest in any way." *Id*. at 106.

Even though this Court and the trial court found Gerson's conclusion to have been incorrect, it was at least debatable, i.e., arguably correct, when Gerson

reached it, as the Referee found.

> Counsel was faced with a number of issues that – quite frankly – were unsettled prior to our Supreme Court's decision in *Young*. … At that time, the Comment to Rule 4-1.7 seemed to support that protocol [of withdrawing and converting a current client to a former client] and no Florida appellate court had adopted the so-called "hot potato" rule. Furthermore, the question of whether the Petition and individual personal injury lawsuits were "substantially related" . . . was clearly debatable. . . . [T]he Third District concluded that the matters were not "substantially related because each case involved totally different legal and factual issues. . . .
>
> Also fairly debatable was the question of whether the Petition sought any relief "directly adverse" to those objecting class members who were *not* members of FAMRI's board. [T]he law addressing the question of when a particular course of action will be deemed "directly adverse" to a client's interest is far from well developed. In fact . . . This Court could not locate a single Florida appellate case that discusses the issue.

ROR 51, 52.

Hence, Gerson was operating in an area without "clear-cut rule[s] on the subject." *Arden*, 341 P.2d at 11. It would be improper "to discipline an attorney for a violation of a claimed principle that was and is so highly debatable"), *id.*, especially an attorney who, like Gerson, researched the issue and reached a reasoned decision.[13]

[13] We recognize that principle as judgmental immunity in the civil context. *See Crosby v. Jones*, 705 So. 2d 1356, 1358 (Fla. 1998) ("[A]n attorney, who acts in good faith and makes a diligent inquiry into an area of law, should not be held liable for providing advice or taking action in an unsettled area of law."); *see also Kaufman v. Stephen Cahen, P.A.*, 507 So. 2d 1152, 1153 (Fla. 3d DCA 1987) ("An attorney who acts in good faith and in honest belief that his advice and acts are

Gerson's conclusion was supported by the other six lawyers who also engaged former judge Reyes to oppose Young's and Blissard's Motion to Disqualify (TE 19), and the advice of the respected appellate lawyers Chris Lynch and Robert Glazier, with whom Gerson and the others also consulted after being served with that Motion. All expressed their view that the Motion to Disqualify was defensible and, specifically, that the Petition and the progeny cases were not substantially related. *See* TR II 237-244 (Alvarez).

IV. IF THE COURT FINDS DISCIPLINE IS WARRANTED, IT SHOULD CONFIRM THE REFEREE'S RECOMMENDATION OF AN ADMONISHMENT

The Bar asks the Court to reject the Referee's recommended discipline of an admonishment in favor of a thirty-day suspension. BR 35-36. In reviewing a referee's recommended discipline, this Court's scope of review is "broader than that afforded to the referee's findings of fact," but the Court should not "second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the Florida Standards for Imposing Lawyer Sanctions." *The Florida Bar v. Dupee*, 160 So. 3d 838, 852 (Fla. 2015). Without question, the Referee's

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well-founded and in the best interest of his client is not answerable for a mere error in judgment or for a mistake in a point of law which has not been settled by the court of last resort in his state and on which reasonable doubt may be entertained by well-informed lawyers.").

recommendation has a reasonable basis in existing caselaw and in the Florida Standards for Imposing Lawyer Sanctions.

A. The Recommended Discipline of an Admonishment is Supported by Florida's Standards for Imposing Lawyer Sanctions

Standard 4.34 of Florida's Standards for Imposing Lawyer Sanctions provides: "Admonishment is appropriate when a lawyer is ***negligent in determining*** whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and ***causes little or no injury or potential injury*** to a client." (Emphasis added).

The Standards define negligence as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." Florida's Standards for Imposing Lawyer Sanctions, Section III, A., Definitions.

As discussed extensively above, this matter involves a debatable conflict about which reasonable lawyers (and judges) differed. The issue of direct adversity as it related to Waerness and Spurgeon was open to serious debate. *See* ROR 43 ("Turning to progeny clients Waerness, Spurgeon and Chambers, the issue of 'direct adversity' presents with far more play in the joints."). In addition, more

than 260 of Gerson's progeny clients backed the filing of the petition, versus only the two (Waerness and Spurgeon) who opposed it. TE 37. Gerson's reasoned conclusion was without fault or, at worst, negligent.

Further, the conflict caused "little or no injury or potential injury." The Standards define "injury" as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct."

The Bar does not argue that Gerson's conduct posed injury to the public, the legal system, or the profession, and failed to prove at trial that it posed any injury to Waerness or Spurgeon, "financially or legally." ROR 43. To the contrary, the Referee found, vis-à-vis Spurgeon and Waerness: "***Nor could any outcome of that litigation directly impact them financially or legally***." ROR 43 (emphasis added). *See* also ROR at 53: "[A]ny adverse interest these flight attendants may have possessed was remote and speculative at best."

In its brief, The Bar does not identify any actual or potential "injury" to Gerson's clients. Instead, it argues that "had the Petition been successful, it ran the risk of undoing the very settlement responsible for providing class members with any benefits, FAMRI-related or otherwise." BR 39.

The Bar's argument is wrong as a matter of fact; even if the Petition had resulted in distributions to the progeny plaintiffs, it could not have "undone" or otherwise affected the finality of the settlement. The Settlement Agreement

permitted the tobacco companies to void the settlement only in certain limited circumstances, to wit:

> If the Court fails to approve this Settlement Agreement or any part hereof, or if such approval is modified or set aside on appeal, or if the Court does not enter the final judgment as provided for in paragraph 5, or if the Court enters the final judgment and appellate review is sought, and on such review, such final judgment is not affirmed, then this Settlement Agreement shall be canceled and terminated, and shall become null and void, and the parties shall be restored to their original positions.

TE 1 ¶16. Eventual payment to class members of funds the tobacco companies originally paid to establish FAMRI is not a circumstance that could result in the tobacco companies' rescission of the Settlement Agreement.

Because Gerson's conduct in determining whether the Petition would be adverse to Waerness and Spurgeon caused "little or no injury or potential injury," admonishment would be the appropriate sanction if this Court were to impose any sanction at all on Mr. Gerson.[14]

[14] Even if the Court were to find that the Petition caused injury *greater than* "little or no" injury, a public reprimand, ***not suspension***, would be the appropriate discipline. Standard 4.33 of Florida's Standards for Imposing Lawyer Sanctions provides: "Public reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and ***causes injury or potential injury*** to a client." (Emphasis added).

The Standards provide that in fashioning a sanction, the Court may consider mitigating and aggravating circumstances, *see* Florida's Standards for Imposing Lawyer Sanctions, Section II, Theoretical Framework, and recognizes that "[e]ach disciplinary case involves unique facts and circumstances" *id*. at Standard 9.1. The Referee correctly found the following mitigating factors apply here:

- Gerson is an experienced lawyer who has practiced for decades without incident. (Standard 9.32(a))
- Gerson was not impelled by a "dishonest or deceitful motivation." (Standard 9.32(b))
- Gerson fully cooperated in all grievance proceedings. (Standard 9.32(e)).
- Gerson enjoys a strong reputation in the community, as testified to by Alex Alvarez and Judge James Lawrence King. (Standard 9.32(g)).

See ROR 55. The Referee appreciated that this is not a case involving a "pattern of misconduct," "multiple offenses," a "dishonest" motive, "bad faith obstruction" within a disqualification proceeding or related civil case, or other "deceptive practices." ROR 54-55.

The Referee found that only two aggravating factors were "in play" −9.22(g), refusal to acknowledge wrongful nature of conduct, and 9.22(i), substantial experience in the practice of law. ROR 54. The Bar seizes on the first

of those factors, correctly asserting that Gerson has never wavered from his positions that the Petition was not directly adverse to Waerness's or Spurgeon's legal or financial interests and that their objections to his participation was a strategy devised by the Rosenblatts to derail the Petition. BR 42.

Although Gerson has never acknowledged that what he did was wrong, the "refusal to acknowledge wrongdoing" factor does not apply to him. To the contrary, "it is improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct" where a lawyer disputes "the factual findings" that he or she engaged in unethical conduct. *The Florida Bar v. Germain*, 957 So. 2d 613, 622 (Fla. 2007)[15]; *see also The Florida Bar v. Karten*, 829 So. 2d 883, 889-90 (Fla. 2002) (finding "referee erred by considering [respondent]'s refusal to acknowledge the wrongful nature of his conduct as an aggravating factor" where respondent "steadfastly declared his innocence at all phases of this action, and his claim of innocence should not be used against him"); *The Florida Bar v. Mogil*, 763 So. 2d 303, 312 (Fla. 2000) (refusing to accept, as aggravating circumstance, respondent's lack of remorse

[15] In *Germain*, The Florida Supreme Court did apply the aggravating factor of refusal to acknowledge one's conduct because the lawyer had "stipulated to most of the facts" and did "not dispute that he engaged in the conduct," which rested on a "legal question." 957 So. 2d at 622. The Court explained, "With a minimum of legal research, Germain could have discovered that his conduct did constitute unethical conduct and either curtailed his activities or avoided them altogether." *Id.* By contrast, Gerson did do the research and reached a reasoned conclusion in an area of the law of client conflicts that is undeveloped and debatable.

where the respondent "always denied (and continue[d] to deny) the misconduct at issue."); *The Florida Bar. v. Corbin*, 701 So. 2d 334, 337 (Fla. 1997) (noting that "[i]t was improper for the referee to consider in aggravation the fact that [respondent] refused to acknowledge the wrongful nature of his conduct" because respondent's "claim of innocence cannot be used against him").

B. The Recommended Discipline of an Admonishment is Supported by the Case Law

Even in conflict cases in which the lawyer's conduct was far worse than Gerson's, the Court reprimanded, rather than suspended, the lawyer.

- *The Florida Bar v. Ethier*, 261 So. 2d 817 (Fla. 1972) (imposing public reprimand where attorney accepted retainer from husband to initiate a divorce against the husband's wife and prepared dissolution documents, but when the case did not progress, attorney accepted a retainer from the wife and filed an action against the husband);
- *The Florida Bar v. Hagglund*, 372 So. 2d 76 (Fla. 1979) (imposing public reprimand and declining to impose suspension where attorney failed to inform client of substantial conflict of interest and submitted a false affidavit in suit against former client);
- *The Florida Bar v. Madsen*, 400 So. 2d 947 (Fla. 1981) (imposing public reprimand where attorney represented a couple in attempt to

obtain replacement motor home and then represented the seller in action adverse to the couple in matter based on the same transaction);

- *The Florida Bar v. Dunagan*, 509 So. 2d 291 (Fla. 1987) (imposing public reprimand and six-month probation for lawyer who entered into business transaction with a client wherein they had conflicting interests without advising the client to obtain independent legal counsel);
- *The Florida Bar v. Milin*, 502 So. 2d 900 (Fla. 1987) (imposing public reprimand on attorney for multiple rule violations including representation of client in an unemployment compensation suit which arose from the termination of the client's employment with a home health agency and then later representing the home health agency in a related action brought by her client);
- *The Florida Bar v. Stone*, 538 So. 2d 460 (Fla. 1989) (imposing public reprimand on attorney for inadequate preparation, representing clients with conflicting interests and arranging a usurious loan);

The cases that The Bar cites in support of suspension, BR 44, are in no way factually like the facts before this Court, as they involved egregious, deceitful, or dishonest conduct.

- *The Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011) (imposing three-year suspension for abandoning class and secretly negotiating settlement for named plaintiffs only and $2 million in fees for the lawyer's firm);
- *The Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010) (discussed in Section I *supra*) (imposing three-year suspension for attorney who had multiple conflicts with several clients and made material misrepresentations to them);
- *The Florida Bar v. Wilson*, 714 So. 2d 381 (Fla. 1998) (imposing one-year suspension for "clear" conflict where attorney represented wife in dissolution proceedings after previously representing both husband and wife with respect to lottery winnings, engaged in conduct prejudicial to the administration of justice, and had been suspended for threatening a witness in a separate case);
- *The Florida Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009) (imposing eighteen-month suspension for attorney who represented company and his own competing company and engaged in dishonest and deceitful conduct);
- *The Florida Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999) (discussed in Section I *supra*) (imposing ninety-one day suspension for attorney

> who represented both husband and wife in a series of disputes and business deals and later represented husband adverse to wife in business transaction and dissolution of marriage action, and who had been previously disciplined twice for misconduct involving conflicts).

The Bar concedes that the lawyers in those cases engaged in conduct far worse than Gerson's.

> Unlike *Adorno* and *Scott*, there are no findings that Respondents engaged in dishonesty, fraud, deceit or misrepresentation … [U]nlike *Wilson*, there are no findings that Respondents engaged in conduct prejudicial to the administration of justice … [U]nlike the attorney in *Dunagan*, who had been previously disciplined twice for misconduct involving conflicts of interests, Respondents have no formal disciplinary history … [T]here is no evidence in the record establishing that either Hunter or Gerson actually used any confidential information disclosed by their progeny clients in the preparation or prosecution of the Petition.

BR 45.

The Bar argues that one case, *The Florida Bar v. Marke*, 669 So. 2d 247 (Fla. 1996), "fits the mark for purposes of sanctions," BR 45, but it too is readily distinguishable. Unlike Gerson's, Marke's conflict of interest was unmistakable and involved a "***pattern of misconduct***." 669 So. 2d at 249 (emphasis added). As discussed *supra*, Marke represented a husband and wife during the formation, operation, and sale of their business, *id*. at 248, then switched sides and represented the new owner of the business adverse to the husband. *Id*. at 249. After

terminating his relationship with the husband and wife, Marke continued to take actions materially adverse to them. *Id*.

The Bar has not cited, and we could not find, a single Florida case in which this Court suspended a lawyer for conduct remotely similar to Gerson's.

Finally, the "purposes of attorney discipline" would not be served by suspending Gerson. They are: "(1) to protect the public from unethical conduct without undue harshness towards the attorney; (2) to punish misconduct while encouraging reformation and rehabilitation; and (3) to deter other lawyers from engaging in similar misconduct." *The Florida Bar v. Dupee*, 160 So. 3d 838, 853 (Fla. 2015). The Referee correctly found that suspension was unwarranted to "protect the public, encourage rehabilitation, or deter others who might be prone to becoming involved in like conduct." ROR 55. He aptly stated:

> This Referee has no doubt that this was a one-time transgression; that the circumstances presented here were highly unusual; that the disqualification question presented novel and unsettled legal issues; … and that the question of whether the Petition sought relief "directly adverse" to all class members other than Young and Blissard was a close call. In sum, the case was – in this Court's opinion – a proverbial black swan and outlier, both procedurally and substantively. And while this Court does not condone counsel's conduct, and finds that they exercised poor judgment, it concludes that given the totality of the circumstances presented the sanction of an "admonishment" is warranted and appropriate.

ROR 56.

The Bar's request for a suspension is entirely inappropriate in these circumstances. The Court should reject it.

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, this Court should accept the Referee's finding that Gerson did not violate Rule 4-1.9; reject the Referee's finding that Gerson violated Rule 4-1.7 and find that he did not; reject the Referee's recommended discipline of admonishment and find that disciplining Gerson would not be appropriate in the circumstances; and enter such other relief as it deems just and proper.

REQUEST FOR ORAL ARGUMENT

Pursuant to R. Regulating Fla. Bar 3-7.7(c)(4), Gerson respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is submitted in Times New Roman 14-point font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2017, I filed a true and correct copy of the foregoing document with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida through the E-filing Portal. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List via e-mail.

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