IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

GALLEON BAY CORPORATION, a Florida corporation,

Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, and the STATE of FLORIDA

Defendants, and

The STATE of FLORIDA,

Third-Party Defendant.

CASE NO. CA-K-02-595

MOTION FOR RECONSIDERATION OF DISQUALIFIED JUDGE DAVID AUDLIN'S ACTIONS IN THIS CASE PRIOR TO HIS DISQUALIFICATION

Pursuant to Fla. R. Jud. Admin. 2.330(h), Plaintiffs move for reconsideration of all of Judge David Audlin's rulings in this case during the period January 1, 2007, and April 1, 2009, when said judge granted Plaintiff's Motion for Disqualification.

TIMELINESS OF MOTION AND/OR GOOD CAUSE FOR DELAY

1. Pursuant to Rule 2.330(h):

> Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

2. Following Judge Audlin's disqualification on April 1, 2009, this case was reassigned to Acting Circuit Judge Wayne Miller. On learning that Judge Miller had been assigned the case, Plaintiff served its motion to disqualify Judge Miller on April 6, 2009. Judge Miller denied the motion on April 16, 2009. On May 6, 2009, Judge Miller disqualified himself on "for reasons not mentioned in Plaintiff's previous motions to disqualify."

3. Judge Miller's May 6, 2009, Order was sent to the Chief Judge, who reassigned this case to Judge Mark Jones on May 15, 2009. Plaintiff's counsel received a copy of that order on May 16, 2009.

4. Plaintiff submits that its motion to disqualify Judge Miller, five days after this case was assigned to him, tolled the time to move for reconsideration by Judge Miller.

5. Plaintiffs also submit that, in light of Judge Miller's subsequent disqualification, exactly 20 days after he had denied Plaintiff's motion to disqualify, the 20-day delay could be viewed as intended to exhaust the 20-day window in Rule 2.330(h). Otherwise, why wait 20 days if the judge had "other reasons" to disqualify himself? There was no contact between the judge and Plaintiff during that period, so what other reason could there be to wait 20 days?

6. This motion was served on May 23, 2009, seven days after the reassignment of the case to Judge Mark Jones. Plaintiff submits that (a) this motion is either timely or good cause has been shown for not filing it before Judge Miller, and (b) this motion is properly addressed to reconsideration of the rulings of Judge Audlin.

RULINGS TO BE REVIEWED

7. January 15, 2008, Order Vacating Summary Judgment of January 30, 2006. The order vacated, is an amended summary judgment on liability, on Counts I and II, rendered by Chief Judge Richard Payne, after extended oral argument, on January 30, 2006. This amended partial summary judgment amended a prior, similar order on Counts I and II, rendered on November 10, 2003. Judge Audlin's Order did not vacate the 2003 summary judgment on liability.

8. August 7, 2007, Order Granting State of Florida's Motion to Reconsider …. Amended Summary Judgment …. This Order preceded the Order Vacating Summary Judgment of January 30, 2006. Attached to this motion.

9. Attached to this motion is a copy of Plaintiff's President's affidavit in support of Plaintiff's Motion to Disqualify Judge Audlin. This affidavit raises Plaintiff's concerns regarding the apparent knowledge of defense counsel that, once Judge Payne retired, "things would be different" when Judge Audlin took over the case. Plaintiff would argue that its concerns are sufficient to review all of Judge Audlin's actions in this case.

ORAL ARGUMENT REQUESTED

This is a complicated, old case that dates back to the first Galleon Bay plat approval in 1991. An earlier certiorari proceeding, on Galleon Bay's vested rights, was filed in 1999, reversing a decision of the Monroe County Commission on April 14, 1999. Monroe County appealed Judge Payne's grant of certiorari, and the Third District Court of Appeal affirmed. This regulatory taking action was filed on May 21, 2002, and a summary judgment on liability granted on November 10, 2003. This case went to trial on compensation in June 2006, and a jury verdict was obtained. Plaintiff moved for a new trial, in light of spurious testimony by the government's appraiser, and Judge Payne granted the motion. The government appealed to the Third District Court of Appeal, and lost again. The case came back to the trial court, for a new trial, in 2007. That was two years ago, and Judge Audlin's actions in this case require extraordinary scrutiny.

Plaintiff respectfully requests this motion be set down for at least one hour of oral argument, or better yet, two hours. The case is too long and complicated to analyze in a motion, particularly one with as short a time frame as this.

James S. Mattson, Esq.	Andrew M. Tobin, Esq.
Fla. Bar No. 360988	Fla. Bar No. 184825
Co-Counsel for Plaintiff	Co-Counsel for Plaintiff
JAMES S. MATTSON, P.A.	ANDREW M. TOBIN, P.A.
P. O. Box 586	P. O. Box 620
Key Largo, FL 33037	Tavernier, FL 33070
(305) 451-3951	(305) 852-3388

CERTIFICATE OF SERVICE

I certify I served copies of the foregoing by first class mail, postage prepaid, on **Robert Shillinger**, **Esq. and Derek Howard, Esq**., Assistant Monroe County Attorneys, P.O. Box 1026, Key West, FL 33041-1026, and **Jonathan A. Glogau, Esq.**, Special Counsel, PL-01 The Capitol, Tallahassee, FL 32399-1050, this 23rd day of May 2009.

James S. Mattson, Esq.
Florida Bar No. 360988
Co-Counsel for Plaintiffs

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CASE NO. CA-K-02-595

AFFIDAVIT OF VIVIENNE K. SCHLEU

STATE OF FLORIDA:
COUNTY OF MONROE:

1. I, Vivienne K. Schleu, am the President of Galleon Bay Corporation, Plaintiff in the above-styled case.

2. I have read and considered the March 9, 2009, Fact Affidavit of James S. Mattson, Esq., a copy of which is attached hereto.

3. On January 30, 2006, during a hearing on the governments' motions for summary judgment in *Galleon Bay Corp. v. Monroe County & the State of Florida*, before Chief Judge Richard Payne, I overheard an Assistant Monroe County Attorney make a statement to his defense colleagues, to the effect that the defendants could expect a different outcome from Judge Audlin … that "things would be different" after Judge Payne retired. I believe he made the statement after Judge Payne made his oral ruling against the defendants.

4. I know that my attorney, James S. Mattson, Esq., also heard the January 30, 2006, statement of the Assistant County Attorney, as Mr. Mattson and I discussed the Assistant County Attorney's remarks later in the day. At the time, I did not know anything about David Audlin, but we were taken aback by defendant's counsel's remarks.

5. At the conclusion of the January 30, 2006, hearing, Judge Payne signed an order denying the governments' motions for summary judgment and re-affirming Galleon Bay's summary judgment on liability that Judge Payne had rendered on November 10, 2003. Judge Payne asked whether the Defendants' had seen our proposed order. Mr. Mattson informed the Judge that he had served defense counsel with copies of the proposed order on September 30, 2005 – 122 days prior to the hearing – and had not received any comments from defense counsel.

6. On reading Mr. Mattson's Fact Affidavit, I learned that, on October 30, 2006, Defendants' counsel in the above-styled case, including some of the same officers of the court who were defending the government at the January 30, 2006, *Galleon Bay* hearing, engaged in mid-litigation "forum shopping" by remaining mute at a key hearing on Defendants' summary

judgment motions in the case of *Collins, et al., v. Monroe County and the State of Florida*. This hearing was also conducted by Chief Judge Richard Payne. I believe the defendants' purpose in this hearing was to re-submit their summary judgment motions before Judge Audlin who, since May 15, 2006, was the Circuit Judge-Designate for Judge Payne's seat.

7. After Judge David Audlin assumed Judge Payne's seat on January 1, 2007, he quickly demonstrated a zeal for dismissing regulatory taking claims by first dismissing *Collins, et al., v. Monroe County and the State of Florida* on June 6, 2007, and *Shands v. City of Marathon*, on November 30, 2007, on grounds similar to those he cited in dismissing *Collins*. Both of these dismissals were reversed by the Third District Court of Appeal on December 31, 2008.

8. In our case, *Galleon Bay Corp. v. Monroe County & the State of Florida*, Judge Audlin invited the defendants to seek reconsideration of Judge Payne's January 30, 2006, order denying defendants' summary judgment motions. On January 15, 2008 – as predicted by the Assistant County Attorney a year earlier – Judge Audlin rescinded Judge Payne's order denying defendants' summary judgment motions.

9. I believe from the January 2006 statement of the Assistant County Attorney, and the actions of defense counsel on October 30, 2006 – at which hearing the same Assistant County Attorney was one of about four attorneys representing the County – that the Assistant County Attorney had extra-record knowledge of Judge Audlin's intentions to establish a biased, pro-government court.

10. I believe there is an apparent relationship between Judge Audlin and the County Attorney's officers, and that Judge Audlin's judicial predisposition in favor of government is a denial of proper access to fair and impartial consideration by the court on our claims.

11. Without question, the conduct and comments of the Assistant County Attorney created an appearance of unfairness, and prejudgment of our claims.

12. I no longer reside nor work in Monroe County, and have no interest in Monroe County elections. I was not aware, until I read Mr. Mattson's March 9, 2009 Fact Affidavit, that David Audlin had effectively preempted any competition for Judge Payne's seat by depositing $50,000 in his campaign account in 2003 – more than three years before the 2006 election – and had increased his campaign loan to $102,000 prior to our January 30, 2006, hearing before Judge Payne. Having grown up in Monroe County, I know that a $102,000 campaign fund, particularly for a judgeship, is extremely unusual.

13. The tactic used by Candidate David Audlin to ascend to the bench causes me to fear that he sought that position to advance one or more personal agendas. One such agenda may have been demonstrated on August 29, 2008, when Judge Audlin (according to the Key West Citizen archives) entered a 67-page order allowing a gay man to adopt a child, ignoring binding precedent to the contrary.

14. I fear that another one of Judge Audlin's agendas is to stop, or at least slow down, the numerous regulatory taking claims that have been made against Monroe County, and thereby "protect" the public fisc. Judge Audlin also ignored binding precedent in the *Collins* and *Shands* cases, and in the other cases mentioned in Mr. Mattson's affidavit, and is likely to do so in *Galleon Bay* if he continues to stay on the case.

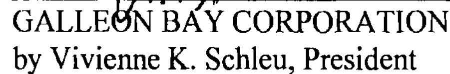
15. I believe and feel that the unusual conduct of the defense attorneys at the October 30, 2006, hearing in *Collins* proves not only my fears, but also believe it proves Defendants' beliefs in the January 30, 2006, statement regarding what Judge Audlin would do (and, in fact did). Why else would the defendants remain mute at a key hearing where they abandoned arguments and

the opportunity to make a record? What could have so encouraged these attorneys to risk malpractice and perhaps even contempt if not for their certainty of the outcome later when "things would be different"?

16. These events, combined with my knowledge of how David Audlin campaigned for office, and his practice of ignoring binding precedent, have destroyed any faith I had in being treated fairly in this case before Judge David Audlin.

17. The later behavior of Judge Audlin and the refusal of defense counsel to mediate at all, much less "in good faith" makes it clear to me that the defendants enjoy a preemptive advantage before Judge Audlin. I do not believe that this judge can do anything to overcome the devastating implication of unfairness, if not corruption, conveyed by the statement of fact (proven true) that "Things will be different"! What about 'things will be fair?"

18. I seriously believe, and greatly fear, that Circuit Judge David Audlin will not give Galleon Bay Corporation a fair trial in this matter, and believe he should be disqualified from any further proceedings in this case.



GALLEON BAY CORPORATION
by Vivienne K. Schleu, President

Sworn to, or affirmed, and subscribed before me this 18th day of March 2009, by Vivienne K. Schleu, who is personally known to me __x__ OR produced identification ______. Type of identification produced ____________.

NOTARY PUBLIC

SEAL

JAMES S. MATTSON
MY COMMISSION # DD 852860
EXPIRES: February 12, 2013
Bonded Thru Budget Notary Services

FACT AFFIDAVIT OF JAMES S. MATTSON, ESQ.

STATE OF FLORIDA:
COUNTY OF MONROE:

1. I am co-counsel for the Plaintiffs in *Collins, et al., v. Monroe County*, Case No. CA-M-04-379, and the Plaintiff in *Galleon Bay Corp. v. Monroe County*, Case No CA-K-02-595. *Galleon Bay* was filed in 2002 and *Collins* in 2004. Both were assigned to Chief Judge Richard Payne, who retired on December 31, 2006. *Collins* was dismissed by successor Circuit Judge David Audlin, on June 6, 2007. That dismissal was reversed by the Third District Court of Appeal on December 31, 2008.

2. On January 30, 2006, a hearing was had before Judge Payne in *Galleon Bay*. It was a re-argument of Galleon Bay's Summary Judgment motion (on liability) that Judge Payne had previously granted in 2003. During a break in the hearing, Galleon Bay's President, Vivienne Schleu, and I, heard the Chief Assistant Monroe County Attorney make a statement to his colleagues on the Defendants' side, to the effect that they should not worry because things would be very different when Judge Audlin takes over.

3. On March 7, 2009, I queried the Secretary of State's campaign finance records. On December 18, 2003, David Audlin opened a campaign account for the 2006 Circuit Judge election by loaning it $50,000. By January 30, 2006, Candidate Audlin had received $3,625 in campaign contributions and had expended $426.43. By January 30, 2006, the date of the *Galleon Bay* hearing in the previous paragraph, Candidate Audlin had loaned his campaign account $102,000 – and had incurred $470.10 in in-kind expenditures.

4. As of January 30, 2006, Circuit Judge Candidate David Audlin had drawn no opposition, and he had more than $105,000 in his campaign account. That is a very large sum for a judicial race in Monroe County. As a member of the Key West legal community, it is not surprising that the Chief Assistant County Attorney would have known that nobody was running against Mr. Audlin, and that he would very likely take Judge Payne's seat on January 1, 2007.

5. On March 6, 2009, I located the attached May 17, 2006, Key West Citizen article about David Audlin. The writer noted that, from the time Mr. Audlin moved to Florida in 1984, he was either a government lawyer or represented government entities. He was a public defender in Key West from 1984-88, an assistant attorney general, assistant statewide prosecutor and later chief statewide prosecutor, based in Tallahassee, from 1988 to 1996. The article states that from 1996 to 2006, his clients included the City of Key West, the State of Florida, and the Florida DOT.

6. The following statements of fact are from the Initial Brief in *Collins, et al., v. Monroe County and the State of Florida*, Case No. 3D07-1603.

> On November 30, 2005, former Chief Judge Richard Payne presided over a five-hour hearing on Defendants' cross-motions for Summary Judgment. Following that hearing, Judge Payne requested Memoranda of Law on two Statute of Limitations issues. On February 3, 2006, Landowners filed affidavits opposing Defendants' cross-motions for Summary Judgment. *RIV: 637-690.*
>
> Judge Payne held a case management conference on September 26, 2006, at which he set a second hearing on Defendants' motions for Summary Judgment for October 30, 2006. *RV: 851*. Five days before that hearing, Defendants attempted to withdraw their once-argued Summary Judgment motions. *RV: 852-53*. Judge Payne would not allow

Defendants to withdraw their motions at this point in the case. Monroe County's *pro hac vice* counsel filed a Joint Emergency Petition for Writ of Prohibition in the Third District Court of Appeal on September 27, 2006. Said Petition was dismissed before the end of the day. Case No. 3D06-2660, *petition denied*, October 27, 2006.

The second hearing on Defendants' Summary Judgment motions went forward as scheduled, on October 30, 2006. *RV: 859-60.* Judge Payne observed that, if Defendants could withdraw their Summary Judgment motions at any time, they could just as easily re-file them in January after the Judge retired from the bench. The Court invited oral argument from the parties but Defendants' counsel refused to speak, stating only that they had properly withdrawn their Summary Judgment motions. The transcript of the October 30, 2006, hearing was filed and is included in the Record on Appeal. *RVI: 1079-1184.*

On November 9, 2006, Judge Payne denied Defendants' Motions for Summary Judgment. *RV: 867-73.* That was the last action taken by Judge Payne in this case. He retired on December 31, 2006. On January 1, 2007, Judge Payne was succeeded by Judge David Audlin. On February 20, 2007, Judge Audlin set the bench trial on liability for June 18, 2007. *RV: 874-78.*

On March 27, 2007, Judge Audlin conducted a brief case management conference, *RV: 890*, during which he intimated that he was prepared to reconsider all non-final orders rendered by Judge Payne. Defendants' counsel interpreted Judge Audlin's remarks as an invitation to re-file their Summary Judgment motions, without the need to move for reconsideration, setting out what had happened since November 9, 2006, that should prompt a successor judge to reconsider his predecessor's orders. The State and County re-filed their Summary Judgment motions on April 27, 2007. *RV: 927-970.*

Judge Audlin presided over a two-hour case management conference on May 15, 2007, at which numerous pre-trial motions – including Defendants' re-filed Summary Judgment motions – were argued. Landowners objected to the Court entertaining said motions without notices and motions for reconsideration.

The May 15, 2007, case management conference can best be described as log-rolling. The Court paid scant attention to the pretrial motions, including an emergency motion filed a month earlier by Landowners, asking the Court to require Monroe County to reduce its witness list from the 102 named witnesses (including 14 experts), so that the 3-day trial set by the Court could go forward. *RV: 898-911.* In the event the Court did not rule on the pretrial motions, Landowners had also moved for a continuance of the trial.

Landowners' counsel filled a 3-ring binder with previously filed memoranda of law in opposition to Defendants' summary judgment motions, as well as Judge Payne's November 6, 2006, order denying same, and sent the binder by overnight mail to Judge Audlin. The package was received by the Judge's Judicial Assistant on May 20, 2007. The cover letter and table of contents was filed with the Clerk, and was served on opposing counsel on May 19, 2007. *See also RVI: 1017-37.*

On June 6, 2007, Judge Audlin entered an order granting Summary Judgment to Defendants on "ripeness" grounds, *and* dismissing the case, an appealable order. *RVI: 1208-10.* Landowners appealed.

7. The above reference to the transcript of the October 30, 2006, hearing at which the Defendants sought to "withdraw" their summary judgment motions, includes the following remarks of Chief Judge Richard Payne.

THE COURT: Of course, I have had the benefit of four hours of argument already so I don't have to reinvent the wheel so it's just a question should I permit you to withdraw and it just seems like I should not permit the withdrawal of the motions if -- with leaving the door open that you can resubmit these motions and we go deja vu into this again. That is my problem because it is part of your affirmative defenses so it's not some issue you didn't raise in your pleading and how are we going to resolve matters of law as opposed to matters of fact. It's not going to be a jury's decision on matters of law.

MR. GLOGAU: It's a bench trial.

THE COURT: Yeah, so you know and the court has done research unbeknownst to both sides. I have looked at your briefs and studied it. I have done some research and read the cases and, you know, I have got other times that I have put in so far that on the motion. I probably have some on the Plaintiff's motion too so that is the only thing whether I should grant you leave to withdraw your motions at this stage. Keep in mind and then it's exacerbated by the fact that I am not going to be the Judge in a few months. So the new guy is going to have to get up to snuff on everything which these issues may appear to be totally unplowed ground and everything that has been done up to date would be wasted. In other words, all this information and arguments and research and everything is all going to have to be done again by both sides to present it to a new finder of fact as far as the issue of liability and so that is another factor that I have to consider here is this a waste of money that both sides have been putting time and energy in by both sides on these various points to basically say let's throw out the baby with the bath water and let the brand new Judge have to go from day one and get up to speed on all these issues. [Emphasis added.]

8. It is very unusual for a successor judge to *announce* that he will be reconsidering all of his predecessor's non-final orders. Third District Court of Appeal Chief Judge David Gersten made a similar observation in a question to government counsel during the *Collins* oral argument on June 30, 2008. The governments' attorneys did not answer Judge Gersten's question.

9. On May 15, 2007, Judge Audlin ordered the Plaintiffs to personally appear at a mediation session that was to be conducted within a few days. When Judge Audlin adjourned the hearing, he turned to Mr. Tobin and me, and stated something to the effect that: "you should tell your clients to seriously consider settling their cases." This was also an unusual statement from a judge, particularly from a judge who had been on the bench less than six months, and in a case in which a highly experienced judge had ruled in favor of the Plaintiffs the previous November.

10. I have practiced law for 30 years, in the U.S. District Court for the Southern District of Florida, the U.S. Court of Federal Claims in Washington, DC, and in this Circuit,. If what Judge Audlin stated on March 27, 2007, *was* an invitation to the Defendants to re-file their summary judgment motions, without a motion for reconsideration having been filed, such an invitation was one that I have never known a judge to make.

11. If what Judge Audlin stated on March 27, 2007, was *not* an invitation to the Defendants to re-file their summary judgment motions, his acceptance and ruling on those motions – in light of Plaintiffs' objections to his doing so under the circumstances – was also extraordinary.

12. On May 15, 2007, Judge Audlin ignored our concerns that Plaintiffs were not going to have a fair trial. As we noted in the *Collins* Initial Brief, the government Defendants were jerking the Plaintiffs around by such ploys as producing a trial witness list with 102 witnesses – including 14 expert witnesses – for a three-day trial. Judge Audlin refused to consider Plaintiffs' emergency motion to require the government to trim its witness list, and again refused to do so at the May 15, 2007 "pretrial conference" – most likely because he had already decided to dismiss the case.

13. Following Judge Audlin's dismissal of the *Collins* case on June 6, 2007, he dismissed another regulatory taking case, *Shands v. City of Marathon*, on November 30, 2007, on grounds similar to those he cited in dismissing *Collins*. (We did not represent the landowners in *Shands*.) The *Shands* decision was also reversed by the District Court of Appeal on December 31, 2008.

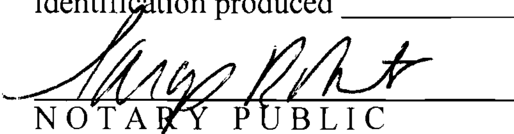
14. On December 11, 2007, after the County brought the *Collins* dismissal to the Court's attention, 16th Circuit Judge Luis Garcia granted the County's motion to dismiss *Sutton v Monroe County*, another of our regulatory taking cases, on the same statute of limitation ground that Judge Audlin used in *Collins* and *Shands*. Judge Garcia allowed the *Sutton* Complaint to be amended by adding a Due Process Count, preventing a dismissal. We later dismissed the Due Process Count; Judge Garcia dismissed *Sutton* on December 3, 2008; and we appealed.

15. Following the *Collins*, *Shands*, and *Sutton* dismissals, Judge Audlin dismissed two more of our regulatory taking cases, *Beyer v. City of Marathon & the State*, and *McCole v. City of Marathon & the State*, on the same statute of limitation grounds he employed in *Collins* and *Shands*. We appealed again, in both cases.

16. On February 9, 2009, we filed motions to remand *Beyer*, *McCole*, and *Sutton* with the District Court of Appeal. The City of Marathon conceded *Beyer* was erroneously dismissed, and agreed to the remand. The City filed an opposition to the *McCole* remand. Monroe County did not respond to our motion to remand *Sutton*.

JAMES S. MATTSON, ESQ.

Sworn to, or affirmed, and subscribed before me this 9th day of March 2009, by JAMES S. MATTSON, who is personally known to me ✓ OR produced identification _. Type of identification produced ____________________.



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