IN THE DISTRICT COURT OF APPEAL
THIRD APPELLATE DISTRICT

CASE NO.: 3D19-139
Florida Bar No. 607071

VME GROUP INTERNATIONAL, LLC,
a Florida limited liability company, and
OMNI PROPERTY MANAGEMENT, LLC,
a Florida limited liability company,

Appellants,

vs.

THE GRAND CONDOMINIUM ASSOCIATION,
INC., a Florida corporation, STUART R. KALB,
an individual, et al

Appellees.
_____/

MOTION TO STAY ISSUANCE OF MANDATE AND VACATE AND REVERSE OPINION IN THE INTERESTS OF JUSTICE, OR TO STAY MANDATE PENDING REVIEW BY THE FLORIDA SUPREME COURT

Appellants/Plaintiffs, VME GROUP INTERNATIONAL, LLC and OMNI PROPERTY MANAGEMENT, LLC (hereinafter "VME GROUP"), by and through their undersigned counsel, hereby move pursuant to Section 43.44, Florida Statutes and Rule 9.340(a), Florida Rules of Appellate Procedure, to stay issuance of mandate not yet issued so as to vacate, and reverse or enter new opinion, in the interests of justice. Alternatively, Appellants move to delay issuance of the Mandate pending possible review by the Florida Supreme Court. In support

thereof, Appellants rely upon the Affidavit of Jean-Paul Brunois, the President of VME GROUP (A.34), this Court's own records in three unrelated cases, public records of a fourth unrelated case, an article appearing in the Daily Business Review, and the record in this cause. Appellants state:

1. This Court on September 25, 2019, entered an Opinion affirming the trial court's Order denying Plaintiffs, VME GROUP'S Amended Renewed Verified Motion for Temporary Injunction against Defendant, THE GRAND CONDOMINIUM ASSOCIATION, INC. ("THE ASSOCIATION"). (A.27).

2. The Mandate issued November 20, 2019 but was withdrawn the same day as "inadvertently entered." (A.25).

3. An appellate court may, as the circumstances and justice of the case require, reconsider, revise, reform, or modify its own opinions and orders for the purpose of making the same accord with law and justice. The power of the court to delay issuance of the mandate, with or without motion, has been made express.

4. Appellants have newly acquired information that would probably produce a different result had it been considered by this Court. Appellants regret the timing of this motion and the unfortunate fact that it comes after expenditure of time and effort by this Court and the parties, but had the trial judge recused herself or disclosed to Appellants a relationship that could affect her impartiality prior to making pivotal rulings in this case, this Motion would not be necessary.

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5. The initial trial judge, the Honorable Bronwyn Miller, entered Orders from March 9, 2018 until, on December 21, 2018, the Order Denying Plaintiffs VME GROUP'S Motion for Temporary Injunction that is the subject of this appeal. (A.6). Appellants recently learned that, before, during, and presently, Judge Miller failed to recuse or disclose that the defense/appellate attorney, Roniel Rodriguez, IV, Esq. and Roniel Rodriguez, IV, P.A. (Rodriguez), who represents Defendant, STUART R. KALB (KALB), President of the Board of Directors for the ASSOCIATION, has a continuing business relationship with her husband, Maury L. Udell, Esq. (Udell),[1] and through him the ability to affect Judge Miller's household income. Obviously, Judge Miller does not use her husband's last name.

6. While it may be known to some in the legal community that Judge Miller is married to Maury Udell, the pertinent fact is that neither Plaintiffs/Appellants, nor their attorneys knew.

7. The burden of disclosure rests with the judge and defense counsel, and should have been dealt with immediately upon the judge's assumption of duties in this case. At no time did either disclose to Plaintiffs the relationship between Judge Miller's husband and KALB'S counsel. Even during this appeal, neither (appellate) Judge Miller, nor Rodriguez, disclosed to Appellants that "Appellee," KALB's counsel, Rodriguez, was also currently co-counsel with her husband in a

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[1] Of Beighley, Myrick, Udell & Lynne, P.A.

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pending class action.[2]

8. Recusal is appropriate where one of the parties or their counsel have dealings with a judge's relation. See, Fla. Stat. Code of Jud. Conduct Canon 3(E)(1)(2006). Disclosure of the relationship is necessary even if recusal or disqualification are not required. Failure to disclose may itself require disqualification. The judge and defense/appellate counsel's silence deprived Plaintiffs of the opportunity to move to disqualify and to request reconsideration of prior orders pursuant to Rule 2.330(h), Florida Rule of Judicial Administration.

9. The purpose of Canon 3 is to "promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." "The test to determine whether a judge might reasonably be impartial is an objective one: "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." Appellants suggest an objective lay observer, armed with the relevant facts of this case, would reasonably question the impartiality of Judge Miller.

10. It is not relevant at this stage if the appearance of impropriety emanates from apparent financial conflict of interest, or apparent intimidation and coercion

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[2] As appellate judge, Judge Miller did recuse herself after the written Opinion, for the Motion for Rehearing En Banc, presumably because it involved her own trial court order.

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of the judge and/or her husband.[3] *It is the appearance of either that matters.* Either way, Rodriguez has a continuing business relationship with her husband, Udell, and through him the ability to affect Judge Miller's household income. Further, not only was Judge Miller making rulings on critical motions in this case, but in other cases that **Rodriguez** was involved in, both in the trial court and on appeal.

11. Appellants only recently[4] became aware of the significance of this Court's own records and matters appearing in the public record.

12. In the interest of justice, and pursuant to their ethical obligations as members of the Florida Bar,[5] undersigned counsel are compelled to bring this matter to this Court's attention, so this Court may respond appropriately.[6]

13. Appellants submit the appearance of impropriety is so great the only remedy is to vacate and reverse this Court's Opinion dated September 25, 2019

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[3]For instance, of interest would be whether, in a class action with Rodriguez, Udell was receiving payment as co-counsel, or had been forced to be co-counsel in a case without payment that was later dismissed, as without basis in fact or law. (A.196,201).

[4]Notwithstanding the Covid-19 emergency and related circumstances.

[5]Rule 4-8.3(a),(b), Florida Rules Regulating the Florida Bar (2019).

[6]The Code of Judicial Conduct provides:

> (1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

Fla. Stat. Code of Jud. Conduct Canon 3(D)(1)(2006).

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affirming Judge Miller's Order dated December 21, 2018 denying VME GROUP'S Motion for Temporary Injunction, and remand with instructions to enter the injunction and reconsider two other pivotal orders of Judge Miller granting Defendant, KALB's Motions to Compel dated June 5, 2018 and August 1, 2018, which continue to prejudice Plaintiffs/Appellants to date. Alternatively, Appellants request that this Court vacate its Opinion, and order rebriefing.

I. RELEVANT FACTS

This is a case by residential condominium[7] unit owners who sought an injunction against an association for alleged ongoing violations of obligations required by Chapter 718, Florida Statutes,"the Condominium Act," the condominium rules, and Section 718.303(1), Florida Statutes, authorizing

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[7]The Grand Condominium is a mixed-use condominium comprising 810 residential units, 259 commercial hotel units, and 141 retail units. The residential units are isolated from the hotel and store units. A seven-member board of directors governs the Association, with two members each elected by the residential unit owners, commercial hotel unit owners, and retail unit owners, with the seventh member elected at-large. (A.29).

The Association has enacted rules and policies as to the 810 residential units that discriminate based upon who owns or manages the residential unit. The owners of the 259 commercial hotel units have been acquiring units in the 810 residential units. The Association has enacted rules as to short term rentals on residential units that are strictly and disparately enforced as to all residential unit owners/managers, including VME Group, while the residential units acquired by the commercial hotel owners/managers are exempt. The rules permit the commercial hotel owners/managers to transfer the rights and privileges of its 259 commercial hotel units to any of the 810 residential units. (A.59).

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particularized injunctive relief against an association.

The initial trial judge, the Honorable Bronwyn Miller, presided over this case from October 26, 2017 until December 21, 2018, during which time she entered three pivotal Orders: two Orders Granting Defendant, KALB'S Motions to Compel dated June 6, 2018 (A.12) and August 1, 2018 (A.13), and Order denying Plaintiff's Renewed Verified Amended Motion for Temporary Injunction dated December 21, 2018 (A.6). Neither the June 6, 2018 or August 1, 2018 Orders specify what is to be produced; nor at the August 1, 2018 hearing were Plaintiffs permitted to argue their work product objection, which was summarily overruled. (A.125,131). Plaintiff's Renewed Verified Amended Motion for Temporary Injunction was pending from July 20, 2018 to December 20, 2018. Hearings on that motion included three hours on September 4, 2018 and six hours on December 20, 2018. (A.78,80).

On December 13, 2018, Governor Rick Scott appointed Judge Bronwyn Miller to the Third District Court of Appeal to fill a vacancy. On December 21, 2018, Judge Miller entered the Order denying the injunction. (A.6). The trial court's Order focused on whether the Board's course of regulation was "reasonable," and denied the injunction. (A.6-11).

The Order is flawed for two reasons. First, upon Judge Miller's assumption of duties in this case, she failed to recuse herself, and neither she nor defense

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counsel disclosed to Plaintiffs the business relationship of the judge's husband, Udell, with Defendant, KALB'S attorney, an apparent conflict of interest.

Second, the Order relies upon a generic standard for injunctive relief rather than the particularized injunctive standard per the Condominium Act and long-established condominium caselaw. Consistent with the Legislature's enactment of Chapter 718, Florida Statutes,"the Condominium Act," the establishment of a violation of the condominium's Declaration and/or Bylaws, is sufficient per Section 718.303(1), Florida Statutes, to authorize particularized injunctive relief.

On September 25, 2019, this Court affirmed Judge Miller's Order, reproducing and approving it as setting "forth the operative facts and the correct legal conclusions," only relying upon generic elements for a temporary injunction as enunciated in five cases not involving condominiums or the Condominium Act, or the particularized injunctive standard per the Condominium Act and long-established condominium caselaw. (A.27-35).

Condominiums are a critical component of this State's economy and its residents' well-being. Jurisdictional briefs have been submitted to the Florida Supreme Court, in *VME Group International, LLC, et al v. The Grand Condominium Association, Inc.,*Case No.: SC19-1984. (A.77). Petitioners allege direct conflict with decisions from two courts of appeal; application of the wrong legal standard for an injunction in an action by unit owners against a condominium

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association; and conflict with a Florida Supreme Court decision.[8] (A.55-69).

Since denial of the Temporary Injunction, other judges have presided over the case. On January 7, 2020, the Honorable Thomas J. Rebull denied Defendant KALB and the other individual Association Directors' Motions to Dismiss the Second Amended Complaint, granting leave to amend. (A.14). The case is now before the Honorable Victoria Diaz.

Undersigned successor counsel appeared in the trial case January 12, 2020 and immediately were blind-sided with three important hearings unilaterally set by Rodriguez for KALB. It became apparent Rodriguez was blatantly misrepresenting the facts[9] and law, and from those three hearings came two appeals.[10] In

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[8]Petitioner's brief alleges direct conflict with *Amelio v. Marilyn Pines Unit II Condominium Ass'n, Inc.*, 173 So.3d 1037 (Fla. 2nd DCA 2015); *Hobbs v. Weinkauf*, 940 So.2d 1151 (Fla. 2nd DCA 2006); *Hollywood Towers Condominium Ass'n, Inc. v. Hampton*, 40 So.3d 784 (Fla. 4th DCA 2010); *Mitchell v. Beach Club of Hallandale Condominium Ass'n, Inc.*, 17 So.3d 1265 (Fla. 4th DCA 2009). It also alleges the wrong legal standard and conflict with the Florida Supreme Court's opinion in *Cohn v. Grand Condominium Ass'n. Inc.*,62 So.3d 1120 (Fla. 2011), holding that condominium founding documents operate as a contract among unit owners and the association, and per Article I, section 10 of the Florida Constitution, those obligations may not be retroactively impaired. (A.55-69).

[9]Astoundingly, KALB'S Counts I and III of the Counterclaim/Third Party Complaint misrepresented the terms of the Association's founding documents as to Section 23.1 of the Declaration by omitting the modifier "third," changing the actual language of the contract for the conditions of any sale or conveyance from "**any third person**" (person not already a Unit Owner and Member of the Association) to "**any person.**" This was a blatant attempt to illegally seize millions of dollars worth of real estate for the benefit of a few select Board Members' personal benefit.

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The identical misrepresentation and strategy was repeated three times: in Richard Buccellato's Cross-Claim/Third Party Complaint; and the two derivative action Complaints, *Stuart Kalb v.Phoenix Grand Associates, LLC and HRK2 Holdngs, LLC,* Case No. 19-001564-CA-01 and *Credo, LLC v. Omni Property Management, LLC, Global Grand Management, LLC, and Jean Pierre Brunois, President of VME Group International and Omni Property Management, LLC, et al,* Case No. 2019-010258-CA-01, where **Rodriguez** represents *Kalb* and *Credo, LLC*, respectively.

[10]Upon denying the temporary injunction appeal, this Court on September 25, 2019 entered an Order granting attorney's fees and costs in favor of Appellee, KALB, and "remanded to the trial court to fix the amount." Even had a mandate issued, that Order on an interlocutory appeal would be conditional on Appellee being the prevailing party at the conclusion of the case. With no mandate issued, the trial court had no jurisdiction to enter what appeared to be a Final Judgment.

Yet, on January 13, 2020, Judge Diaz entered an Order Awarding Appellate Attorney's Fees and Costs of $ 38,250 to KALB, adding, "For Which Let Execution Issue." On January 17, 2020, sums were garnished from Plaintiffs' bank account *in the amount of $ 77,125.*

A Motion for Review of Appellate Attorney's Fees and Costs is pending, asserting the Order is also unsupported by the evidence and testimony of the witnesses. After, Plaintiffs learned that expert witness Guy Spiegelman, Esq. has been the Registered Agent since 2012 for Credo, LLC, whom Rodriguez represents in a derivative action against these Plaintiffs.

As to the newest appeal, Judge Millers's two Orders granting KALB'S Motions to Compel dated June 5, 2018 and August 1, 2018 led, on January 13, 2020, to an oral pronouncement of contempt against VME GROUP on Defendants' Renewed Motion to for Rule to Show Cause. The oral pronouncement fails to specify what exactly VME GROUP failed to do, and how they might purge themselves. The trial court later entered Orders on February 27, 2020 and March 5, 2020, failing to conform to the oral pronouncements. Those Orders were appealed March 30, 2020 in Case No. 3D20-629. Rodriguez unilaterally submitted the latter Order, signed by Judge Diaz, finding Plaintiffs in contempt, when in fact she merely granted his motion to compel (for discovery originally granted by Judge Miller).

researching those appeals, it was determined that these Orders were cascading effects of Orders that had originated with Judge Miller. But for the excesses of KALB'S counsel, none of the facts leading to this motion would have been discovered.

Appellants rely upon the Affidavit of Jean-Paul Brunois, the President of VME GROUP, this Court's own records in three unrelated appeals, public records of a fourth unrelated case, and an article appearing in the Daily Business Review. The three unrelated appeals involve **Rodriguez, KALB,** and/or **Credo, LLC,** a **KALB** owned and/or controlled entity, and party currently suing Plaintiffs in a related derivative action.[11] KALB and Credo, LLC are generally represented by Rodriguez. Both Rodriguez and KALB have a history with this Court, and the Florida Bar, of misrepresentations and failure to disclose.[12]

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[11]**KALB,** as Trustee of *Credo, LLC,* appeared in an unrelated appeal of *Young Land USA, Inc. v. Credo, LLC* as **Credo's representative** at a deposition of the representative from Credo with the most knowledge concerning its complaint. (A.44). The derivative action is *Credo, LLC v. Omni Property Management, LLC, Global Grand Management, LLC, and Jean Pierre Brunois, President of VME Group International and Omni Property Management, LLC, et al,* Case No. 2019-010258-CA-01, and **Rodriguez** represents ***Credo, LLC.***

[12]See, Credo LLC v. Speyside Investments Corporation, 259 So.3d 893 (Fla. 3d DCA 2018)(misrepresentation as to mandate in Wells Fargo Bank, Nat. Ass'n v. Sawh, 194 So.3d at 475, 481 (Fla. 3d DCA 2016)); Nack Holdings, LLC v. Kalb, 13 So.3d 92 (Fla. 3d DCA 2009)(unauthorized use of a foreclosure judgment as a device to secure post-judgment loans); Florida Bar v. Roniel Rodriguez, Admonishment 11/02/2016, Reference #201470709.

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WORKING RELATIONSHIP: Two unrelated cases show a continuous working relationship and shared financial interest between the judge's husband and Rodriguez. One is an unrelated appeal (*Harvard*), and one is a trial case (*Bacardi*):

1) Unrelated 1st Appeal (*Harvard*): *Harvard Financial Services, LLC (Harvard), RJR Charitable Holdings, LLC (RJR), and Tessa Iacoboni (Iacoboni), Appellants v. Astra Remy-Calixte (Remy-Calixte), Appellee*, Case Nos. 3D17-0795 & 3D17-0794. Lower Tribunal Nos. 07-13137, 16-7194 & 16-2863.[13] The cases involve the same piece of property and were consolidated below and in this Court. **Udell** and **Rodriguez** represent different parties with **identical financial interests**, working so closely in the trial court they joined in each others pleadings, and in this appellate court joined in the appeal and Appellants' brief. On appeal, Udell and Rodriguez worked together from *April 13, 2017 to September 17, 2017*:

> April 10, 2017 – Rodriguez files Notices of Appeal in 3D17-0794 and 3D17-0795
> April 13, 2017 – Udell files Notice of Joinder in 3D17-0794 and 3D17-0795
> May 1, 2017 – Order consolidating 3D17-0794 and 3D17-0795
> September 17, 2017 – Initial Brief filed for Rodriguez's client; Maury Udell files Notice of Joinder in Initial Brief

(A.138). Similarly in one of the underlying trial court cases, part of the record on

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[13]*Residential Funding Co., LLC, Plaintiff v. Janice Gessa, Ramon Garcia, et al, Defendants,* Miami-Dade County Case No. 2007-13137 CA 01 (A.146).

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appeal, the two were working together *from February 1, 2017*:

> *Residential Funding*
> February 1, 2017 – Udell files Response to Co-Defendants' Motion to Correct...or Vacate Summary Judgment
> February 1, 2017 – Rodriguez files Notice of Joinder in Response to Co-Defendant's Motion to Correct...or Vacate
> February 10, 2017, Rodriguez files Urgent Motion to Vouch for Authority to Represent
> February 11, 2017, Udell files Notice of Joinder and Supplemental Memorandum in Support of Urgent Motion to Vouch

(A.146,153,169,170,176).

Both Rodriguez for *Harvard* and *RJR*, and Udell for *Iacoboni* had shared financial interests in seeking to invalidate *Remy-Calixte's* Certificate of Title, and a $ 508,515 mortgage owned by Rodriguez and/or KALB,[14] and a $ 24,424 mortgage held by Maury Udell's client, *Iacoboni.*

On the same date, *September 25, 2019,* this Court decided the instant appeal for VME GROUP (and granted "Appellee" Rodriguez appellate attorney's fees), it also handed a win on appeal for Rodriguez and Udell as Appellants in *Harvard, RJR*, and *Iacoboni*, reversing and remanding the order granting *Remy-Calixte's* motions for relief from the mortgages.

2) Unrelated Class Action: On *August 9, 2019*, **Rodriguez** and **Udell**, co-

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[14]Guy Spiegelman, KALB and Rodriguez's "expert" witness for appellate attorney's fees in this case at the hearing January 13, 2020, .is also the registered agent for *Harvard, RJR Holdings,* and *Credo, LLC.* A Motion for Review of Appellate Attorney's Fees and Costs is pending before this Court. (*Infra,* n.10).

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counsel for Plaintiff, **filed a class action case** in Miami-Dade of *Uri Marrache, individually and on behalf of all others similarly situated, Plaintiff v. Bacardi, U.S.A., Inc., a Delaware corporation d/b/a The Bombay Spirits Company, U.S.A.; and Winn-Dixie Supermarkets, Inc. d/b/a Winn Dixie Liquors, Defendants*, Case No. 2019-023668-CA-01 (hereinafter *Bacardi)*. (A.179). The case made the front page of the Daily Business Review. (A.192-95). It was removed to federal court on September 16, 2019, in Case No. 2019-023856-RNS.[15] On January 28, 2020, the Honorable Robert N. Scola found federal preemption and failure to state claims for Florida Deceptive and Unfair Trade Practices Act and unjust enrichment, and dismissed the case with prejudice. (A.196,201).

The Affidavit of Jean-Pierre Brunois shows that when he learned of the *Bacardi* class action where Udell and Rodriguez were co-counsel for Plaintiff, he became aware that the judge's husband had a continuous relationship and shared financial interests with KALB'S defense attorney. (A.36). But not until he became aware of the earlier case of *Harvard Financial Services, RJR, and Iacoboni,* in which the parties had identical financial interests and their lawyers worked together so closely they joined in each others pleadings in the trial court and brief on appeal, did he realize the judge's husband had this business

[15]A question for discovery below is whether KALB, a litigation funder for Rodriguez, also funded *Bacardi*.

relationship and shared financial interests with defense attorney Mr. Rodriguez, Esq. ***while presiding over his case.*** (A.36-37).

Note that on January 24, 2019, Rodriguez filed his Notice of Appearance in this appeal, but did not disclose his relationship with the judge's husband to this Court. On August 9, 2019, Rodriguez and Udell filed their *Bacardi* class action. Again, Rodriguez did not disclose that to Plaintiffs/Appellants or this Court.

JUDGE MILLER'S RULINGS: Not only was Judge Miller's husband working with defense counsel, Rodriguez, in close temporal proximity to the rulings in this case, but Judge Miller was making rulings on critical motions in two unrelated cases that benefitted **Rodriguez, KALB,** or **Credo, LLC** (*infra,* n.11). One was a Final Judgment on March 16, 2018 that this Court later reversed; another was an Opinion as an appellate judge dated August 7, 2019:

1) Unrelated Trial Judgment that Became 2nd Appeal (*Musi*): On *March 16, 2018*, **Judge Bronwyn Miller** entered Final Judgment after trial awarding $ 204,500 based on relief neither requested nor raised by the pleadings to ***Credo, LLC,*** represented by **Rodriguez,** in *Credo, LLC, a Florida Limited Liability Company, Plaintiff v. Juan Carlos Musi and Monica Musi, Defendant*, Case No. 2015-11310 CA 01. (A.202). Defendants appealed.

Opinion in 2nd Unrelated Appeal (*Musi*): On *January 23, 2019*, in *Juan Carlos Musi, Appellant v. Credo, LLC, etc., Appellee*, Case No. 3D18-583, this

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Court reversed the $ 204,500 Final Judgment for *Credo,LLC* entered by Judge Miller awarding damages based on relief neither requested nor raised by its pleadings, and remanded for entry of final judgment in MUSI'S favor. (A.204).

2) Opinion in 3rd Unrelated Appeal (*Young Land*): On *August 7, 2019*, **Judge Bronwyn Miller** wrote an Opinion in this Court **affirming** realty owned by ***Credo, LLC***, represented by **Rodriguez**, *Young Land USA, Inc. v. Credo, LLC,* Case No. 3D18-2146, was *not* encumbered by a $ 400,000 *Young Land* mortgage, holding that when *Credo, LLC* purchased the realty at various execution sales conducted by the sheriff, the lien was properly extinguished. (A.212). *Two days later, Udell and Rodriguez filed their Bacardi class action.* (A.179).

The Affidavit of Jean-Pierre Brunois shows that he just learned that in close temporal proximity to the Orders Judge Miller signed in this case, she entered a Final Judgment in an unrelated trial case (*Musi*), and wrote an Opinion in an unrelated appeal (*Young Land*), benefitting Rodriguez, KALB, and/or *Credo, LLC.* (A.37). At no time upon the judge's assumption of duties in this case, or after, did Judge Miller or Rodriguez disclose the relationship between the judge's husband and defense counsel for KALB. (A.35-36).

Had he known about the relationship when Judge Miller was presiding over his case, he would have moved to disqualify her, and for reconsideration of her Orders in the trial court. (A.36). When he learned these facts he reasonably feared

the appearance of impropriety on the part of the judge, and believes, as any reasonable person would, that the appearance of impropriety is so great that to prevent injustice in this case, the only solution is to revert the proceedings back to when Judge Miller ruled on KALB'S motions to compel and this temporary injunction. (A.38). Even during this appeal, neither (appellate) Judge Miller, nor Rodriguez, disclosed to Appellants that "Appellee," KALB's counsel, Rodriguez, was also currently co-counsel with her husband in a pending class action. With *no disclosure*, Appellants had *no remedy* until they independently discovered these facts.

II. ARGUMENT

A. THIS COURT HAS AUTHORITY TO ENLARGE THE TIME PERIOD FOR ISSUANCE OF THE MANDATE

This Court has the authority to enlarge the time period for the issuance of the mandate, especially where, as here, it has not issued. Section 43.44, Florida Statute provides:

> An appellate court may, as the circumstances and justice of the case may require, reconsider, revise, reform, or modify its own opinions and orders for the purpose of making the same accord with law and justice. Accordingly, an appellate court may recall its own mandate for the purpose of allowing it to exercise such jurisdiction and power in a proper case.

Fla. Stat. 43.44 (2014).[16] "The power of the court to expedite as well as delay

[16]The statute also provides that "A mandate may not be recalled more than 120 days after it has been issued," but of course that doesn't apply to this case as

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issuance of the mandate, with or without motion, has been made express." Fla. R. App. P. 9.340. Mandate, Committee Notes, 1977 Amendment.

Even where the mandate has issued, a court may on its own motion recall the mandate, **and reconsider its former judgment and the merits of the controversy**. See, Barth v. City of Miami, 146 Fla. 542, 1 So. 2d 574 (Fla. 1941)(setting aside and vacating former opinion and judgment of this court affirming the judgment, and on rehearing the judgment appealed from is reversed).

Here, Appellants show a new relevant matter that would probably produce a different result had it been considered by the court. In Blackhawk Heating & Plumbing Co., Inc. v. Data Lease...., 328 So.2d 825 (Fla. 1975), the Florida Supreme Court ruled that:

> In order to modify the mandate (which, in effect, would modify the prior decision), the party seeking permission must show some new relevant matter that would probably produce a different result had it been considered by the court. Upon such showing, this court may then amend its mandate or direct the lower court to make a factual determination on the question of whether such an amendment should be made.

328 So. 2d at 827. The new relevant matter is the appearance of impropriety of the trial judge who entered orders from March 9, 2018 until December 21, 2018 when she entered the Order appealed from, without recusing herself or disclosing that her husband, Udell had a continuing business relationship and shared financial

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the mandate never issued.

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interests with the defense attorney, Rodriguez, who represents KALB.

B. RECUSAL/DISCLOSURE OF TRIAL JUDGE WAS REQUIRED

Recusal is appropriate where one of the parties or their counsel had dealings with a relative of the judge. See, Aurigemma v. State, 964 So.2d 224 (Fla. 4th DCA 2007)(trial counsel had ongoing business relationship with trial judge's husband, in that he had hired him multiple times as expert witness); McQueen v. Roye, 785 So. 2d 512 (Fla. 3d DCA 2000)(plaintiff's counsel provided legal services and gave advice to judge's brother); Lytle v. Rosado, 711 So. 2d 213 (Fla. 3d DCA 1998)(judge's stepson had active claim against insurance company defending one of the parties).

The standard for disclosure is lower than the standard for disqualification. In re Frank, 753 So. 2d 1228, 1238-39 (Fla. 2000)(failing to disclose attorney was directly involved in the representation of member of judge's immediate family). **Failure of the trial court to disclose may itself require disqualification,** as it creates objectively reasonable fears of bias and that a party would not receive a fair and impartial proceeding, as this Court has noted:

> Nor are we articulating any blanket rule requiring that a trial judge recuse or disqualify himself or herself in all instances where one of the parties is represented by an attorney who previously represented the trial judge in a legal matter. It is, however, incumbent upon the trial court to disclose a prior attorney-client relationship with an attorney. The trial judge's failure to disclose the prior attorney-client relationship with the wife's attorney created, in this case, *objectively reasonable fears of bias and that the husband would not receive a fair and impartial proceeding.* (Emphasis

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added).

Becker v. Becker, 279 So.3d 813 (Fla. 3d DCA 2019)(wife's counsel had represented trial judge in trial judge's own contested divorce case approximately 3 years prior); Mulligan v. Mulligan, 877 So. 2d 791 (Fla. 4th DCA 2004)(judge's failure to disclose close relationship with opposing counsel creates suspicion that he is concealing his friendship and reinforces the fear that the judge is not impartial).

Failure to recuse or disclose gives rise to the appearance of impropriety in violation of Canon 3(E)(1), Florida Code of Judicial Conduct:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> ...
>
> (c) the judge knows that ... *the judge's spouse*... or any other member of the judge's family residing in the judge's household *has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding*... (Emphasis added).

Fla. Stat. Code of Jud. Conduct Canon 3(E)(1)(c)(2006). Note that a judge **has a duty** to keep informed and make a reasonable effort to keep informed of the economic interests of her spouse, as that Canon further provides:

> (2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

Fla. Stat. Code of Jud. Conduct Canon 3(E)(2)(2006). The Commentary provides:

> **Canon 3E(1).** *Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned,* regardless of whether any of the specific rules in Section 3E(1) apply... *A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification...*
>
> ...
>
> **Canon 3E(1)(d).** The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. *Under appropriate circumstances, the fact that 'the judge's impartiality might reasonably be questioned' under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Section 3E(1)(d)(iii) may require the judge's disqualification.* (Emphasis added).

Fla. Stat. Code of Jud. Conduct Canon 3, Commentary (2006).

The question of disqualification of a trial judge focuses on those matters from which a litigant may reasonably question a judge's impartiality, rather than the court's own perception of its ability to act fairly and impartially. Fla. Stat. § 38.10; Valdes-Fauli v. Valdes-Fauli, 903 So.2d 214 (Fla. 3d DCA 2005). Here, a litigant may reasonably question the judge's impartiality, and that is what matters.

C. THE APPEARANCE OF IMPROPRIETY APPEARS IN THE PUBLIC RECORD, PLAINTIFFS' AFFIDAVIT, AND THIS APPELLATE COURT'S OWN FILES

An appellate court may take judicial notice of its own files. Buckley v. City of Miami Beach, 559 So. 2d 310, n.1 (Fla. 1990); Hillsborough County Bd. of County Com'rs v. Public Employees Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982).

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This Court may also, in determining whether disqualification of the judge is warranted, **consider unrelated orders of the judge signed in close temporal proximity to hearings in the underlying case.** See, JJN FLB, LLC v. CFLB Partnership, LLC, 283 So.3d 922,926 (Fla. 3d DCA 2019)(granting three separate petitions for writ of prohibition for law firm asserting they were afraid they would not receive a fair trial after trial judge issued order against them in unrelated case).

Not only did the judge's husband have a continuous relationship and shared financial interests with KALB'S defense attorney while making rulings on critical motions in this case, but the judge, in close temporal proximity, was also making rulings in unrelated cases that benefitted **Rodriguez, KALB**, or **Credo, LLC**. The merged timeline of the two Rodriguez/Udell relationship cases, this appeal, and Judge Miller's rulings in two unrelated cases shows:

- From April 13, 2017, Rodriguez and Udell had shared financial interests and were working together in the *Harvard* appeal.

- On March 16, 2018, Judge Miller entered a Final Judgment after trial in *Musi* awarding $ 204,500 to *Credo, LLC*, a KALB owned or controlled entity represented by Rodriguez.

- From June 6, 2018 and August 1, 2018 (granting KALB'S motions to compel), and on December 21, 2018 (denying the temporary injunction), Judge Miller entered Orders in this case against VME GROUP.

• On January 23, 2019, this Court reversed the $ 204,500 Final Judgment in *Musi* entered by Judge Miller awarding damages to *Credo,LLC,* represented by Rodriguez, as it was based on relief neither requested nor raised by its pleadings.

• On January 24, 2019, VME GROUP filed this appeal. Rodriguez filed his Notice of Appearance, but did not disclose his relationship with the judge's husband to this Court.

• On August 7, 2019, Judge Miller wrote an Opinion affirming that realty owned by *Credo, LLC,* represented by Rodriguez, was not encumbered by a $ 400,000 *Young Land* mortgage.

• On August 9, 2019, co-counsel Rodriguez and Udell jointly filed the *Bacardi* class action. Again, Rodriguez did not disclose his relationship with the judge's husband to this Court.

• On August 19, 2019, a front page article about the *Bacardi* class action appeared in the Daily Business Review featuring Rodriguez and Udell.[17]

• On September 25, 2019, this Court affirms Judge Miller's Order Denying

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[17]The objective facts are that Judge Miller wrote an Opinion awarding Rodriguez and KALB hundreds of thousands of dollars. **Two days later,** Rodriguez and Judge Miller's husband filed their *Bacardi* class action. Upon discovering the Daily Business Review front page article, and knowing the relevant facts, it appears especially improper that Rodriguez was promoting a class action as co-counsel with the judge's spouse, while failing to disclose that connection to Appellants or this Court. It is impossible to know who else in the South Florida legal community may have made that connection before Appellants.

Plaintiffs' Motion for Temporary Injunction in the instant appeal. That ruling and two others by Judge Miller appear to be compromised by the judge's financial entanglement with Rodriguez through her husband.

D. THE TRIAL COURT'S ORDER AND TWO OTHERS APPEAR TO BE TAINTED BY THE JUDGE'S FINANCIAL ENTANGLEMENT WITH RODRIGUEZ THROUGH HER HUSBAND; THE REMEDY IS TO VACATE AND REVERT THE CASE BACK PRIOR TO THE JUDGE'S INVOLVEMENT

Two recent Orders in federal court reversing and remanding for new trial on similar facts offer this Court **the remedy of vacating and reverting the case back prior to the judge's involvement in the case.** Clark as Trustee for Matthew Wortley Trust v. Kapila, Trustee in Bankruptcy for For Trafford Distributing Center, Inc., 2019 WL 7987972, --- B. R. ---- (S.D. Fla. 2019); Liberty Props. at Trafford LLC, et al. v. Kapila, No. 18-24579 (S.D. Fla. Aug. 9, 2019)(A.217).

In *Clark*, Appellant argued to the District Court that the initial bankruptcy judge who presided over the case failed to timely recuse himself due to the fact that his fiancé had been recently hired by the law firm representing Appellee. The court found in favor of Appellant and held that *the initial bankruptcy judge should have recused himself before adjudicating the merits of the case.*

Despite the case "unfortunately spanning more than ten years and numerous appeals," **the court reverted the proceedings back to the summary judgment phase the judge ruled upon while his "personal and financial entanglement"**

with the defense firm "through his fiancé, appeared to be compromised."

2019 WL 7987972, pp.1,8. The facts were:

> In August, 2010, Appellant discovered that during the summer of 2009, when motions for summary judgment were under consideration by Judge Olson, Appellee's counsel, the Ruden McClosky law firm, made contact with, negotiated with, and ultimately hired the judge's fiancé: George Fender...
>
> Defendants argued that Fender *'works closely with'* – essentially for – Mr. Bakst,"and *as proof pointed to cases where the two had served as co-counsel in the past.* In one case, defendants noted, both Fender and Bakst represented the same trustee appearing in the present case. (Emphasis added).

Supra at 2-3. *The relationship between Judge Olson and Fender* ***was "never disclosed*** by Mr. Bakst or the Court to counsel, nor to any of the Defendants in any related cases." Eventually, following appeal to the District Court, Judge Olson recused himself, but a successor judge denied Defendants' motion to vacate orders. *Supra* at 3. On appeal to the District Court, Appellant argued:

> [T]he first bankruptcy judge should have recused himself as soon as his fiancé was contacted by, and negotiated with, Appellee's counsel while motions for summary judgment were pending. As a result of these actions, Appellant contends there was an appearance of impropriety pursuant to 28 U.S.C. § 455(a). **Appellant argues the appearance was so great that the only remedy is vacatur of the entire 'tainted' proceeding.**

Id. The District Court agreed, holding "Judge Olson abused his discretion in failing to recuse himself as soon as his fiancé was contacted by and engaged in recruitment discussions with Appellee's counsel, reasoning:

> 28 U.S.C. § 455(a) mandates disqualification of a judge 'in any proceeding

> in which his impartiality might reasonably be questioned...'. The purpose of section 455(a), as the Supreme Court of the United States explained, is to 'promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.' *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). *'Inherent in § 455(a)'s requirement that a judge disqualify himself if his impartiality might reasonably be questioned is the principle that our system of 'justice must satisfy the appearance of justice...' The test to determine whether a judge might reasonably be impartial is an objective one: 'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality...'* (Emphasis added).

Supra at 4. Note that the federal disqualification statute, 28 U.S.C. §455, is very similar in language and intent to the Florida requirements. See, Fla. Stat. §38.10; Rule 2.330, Fla. R. Jud. Admin.[18] The District Court found "a reasonable observer, armed with the relevant facts of this case, would reasonably question the impartiality of Judge Olson."

It matters that Bakst was in a position to "affect Judge Olsen's household income" via the fiancé. Augmenting the appearance of bias and prejudice is that shortly after the judge's fiancé began working with Bakst, Judge Olsen ruled conclusively in Appellee's favor in his summary judgment motion and awarded nearly $ 80,000 in attorney's fees as a sanction for a "continuing" violation that arguably never was a violation in the first place, much less continuing. "These

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[18]Canon 3(E)(1), Florida Code of Judicial Conduct, contains identical language to 28 U.S.C. §455(a), namely, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

facts create the inescapable and obvious appearance of impropriety:"

> The judge, an observer would note, transformed from independent judicial officer to suppliant for employment upon the contacting and recruiting of his fiancé while litigation was pending...
>
> Judge Olsen was disqualified as soon as the firm offered a thing of value to him during the course of litigation.

Supra, 4-5. The appropriate test to determine the remedy per the United States Supreme Court case of *Liljeberg* is:

> [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process. *Liljeberg*, 486 U.S. at 864.

Supra at 5. The District Court determined there was a substantial risk of injustice to Appellant, and review of these factors mandated **vacatur of the final judgment and orders on appeal, and reversal and remand to the summary judgment phase.**

In this case, per *Liljeberg*, 486 U.S. at 868, providing relief will not produce injustice in other cases; to the contrary, this Court's willingness to enforce Canon 3(E)(1), Florida Code of Judicial Conduct, may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and promptly disclose them when discovered. Judge Miller should have disclosed, if not recused, the moment defense attorney Rodriguez worked closely with her husband, Udell, and through

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him had the ability to affect Judge Miller's household income. Yet the relationship between the judge's spouse and Rodriguez was never disclosed by the judge or Rodriguez to counsel, neither in the trial court nor during this appeal. Additionally, Judge Miller was making rulings in unrelated cases, in close temporal proximity, that benefitted **Rodriguez, KALB**, or **Credo, LLC**. In this case, to an objective observer, the rulings benefitting **Rodriguez** and **KALB** were tainted from the inescapable and obvious appearance of impropriety and conflict of interest so great that the only remedy is **vacatur of the "tainted" proceedings and reversal and remand.**

Anything less than **reverting the proceedings back to when the judge's rulings while her "personal and financial entanglement" with the defense attorney, through her husband, appeared to be compromised** is a serious injustice. *Justice must satisfy the appearance of justice.* To quote from *Clark as Trustee, supra* at 6, the judge's "personal and financial entanglement" with defense attorney Rodriguez through her husband:

> appeared to 'compromise[ ] what Edmund Burke justly regarded as *the 'cold neutrality of an impartial judge...' Public trust and confidence in the judiciary depend upon the appearance of integrity and independence of judges, which must be carefully safeguarded.* Only reversal and remand in this case will restore that appearance. (Emphasis added).

So too in this case, only vacatur, reversal and remand will restore the appearance of integrity and independence of judges.

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E. ALTERNATIVELY, THIS COURT HAS DISCRETION TO WITHHOLD ISSUANCE OF ITS MANDATE WHILE APPELLANTS SEEK FURTHER REVIEW

Alternatively or additionally, the issuance of a mandate is not a ministerial act, and this Court has the discretion to withhold issuance of its mandate while Appellants seek further review from the Florida Supreme Court. State v. Miyasato, 805 So.2d 818 (Fla. 2d DCA 2001)(issuing stay of mandate where there was a possibility of conflict between the Court's decision and other Fourth Amendment decisions in the state and the State had arguments that it could present to the Supreme Court in good faith).

In this case, Appellants have shown a possibility of conflict between this Court's decision and other cases addressing the standard for injunctive relief in a condominium unit owner/association case and Appellants have arguments they can present to the Florida Supreme Court in good faith.

III. RELIEF REQUESTED

Appellants/Plaintiffs respectfully request that this Court vacate its Opinion dated September 25, 2019 and Judge Miller's Order dated December 21, 2018, and:

1) Stay issuance of the mandate until this Court reverses and remands with instructions to grant VME GROUP'S Amended Renewed Verified Motion for Temporary Injunction against THE ASSOCIATION, INC., and vacates Judge

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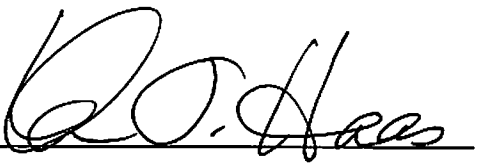
Miller's trial court orders granting KALB'S Motions to Compel dated June 6, 2018 and August 1, 2018, and remands for reconsideration of those two orders.

2) Alternatively, stay issuance of the mandate so that this Court may order new briefing based upon the recent discovery of a relevant matter that would probably produce a different result had it been considered by this Court, pending rebriefing and decision.

3) Alternatively, delay issuance of the Mandate pending possible review by the Florida Supreme Court.

By: 

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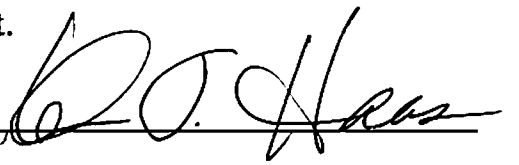
CERTIFICATE OF SERVICE AND OF COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the State of Florida Case Filing Portal this 22nd day of April, 2020 to Melinda S. Thornton, Esq., Attorney for Appellees, Cole, Scott & Kissane, P.A., 9150 S. Dadeland Blvd., Suite 1400, P.O. Box 569015, Miami, Florida 33256, E-mail: melinda.thornton@csklegal.com and Roniel Rodriguez, IV, P.A., Attorney for Appellee, Stuart R. Kalb, Keystone Executive Plaza, 12555 Biscayne Blvd., 915, N. Miami, Florida 33181, E-mail: Ron@RJRfirm.com, Primary: Service@RJRfirm.

I HEREBY CERTIFY that this motion is submitted in either Times New Roman 14-point font or Courier New 12-point font.

By: 

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