IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, STATE OF FLORIDA
CIRCUIT CIVIL DIVISION

HARRY STOLTZFUS,

Plaintiff/Appellant,

vs. CASE NO: 2010-CA-004620

ROBERT E. "BOB" CARTER, as Chair of the Committee to Recall Harry Stoltzfus, ALICE BAIRD, CMC, as City Clerk of Anna Maria, Florida; ROBERT "BOB" SWEAT, as Manatee County Supervisor of Elections,

Defendants/Appellees.
_________________________________/

COMMISSIONER HARRY STOLTZFUS' EMERGENCY MOTION TO CONFIRM AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR STAY PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

Plaintiff/Appellant, HARRY STOLTZFUS ("Stoltzfus"), the duly elected Commissioner of the City of Anna Maria, Florida, by and through his undersigned counsel and pursuant to Fla, R. App. P. 9.310(a) and (b), hereby moves the Court for entry of an order confirming the application and scope of the automatic stay provided for in Fla. R. App. P. 9.310(b) as it relates to these proceedings or, in the alternative, for entry of a stay pending appeal, and as grounds for the Motion states as follows:

Essential Facts Warranting a Stay Pending Appeal

1. Stoltzfus is the duly elected Commissioner of the City of Anna Maria, Florida, having been elected to said office in November 2009. This matter arises out of the ongoing attempt to recall Stoltzfus from office pursuant to the provisions of Fla. Stat. §100.361.

2. Pursuant to Fla. Stat. §100.361(4) and the Order dated July 15, 2010, entered by the Chief Judge of the Twelfth Judicial Circuit, a recall election is scheduled to take place on Tuesday, September 7, 2010. See Exhibit A.

3. By that final Order rendered on August 24, 2010, in this cause, the Court denied Stoltzfus' request for declaratory and injunctive relief to determine that the recall petition was and is legally insufficient and to enjoin the recall process, including the election. See Exhibit B.

4. Stoltzfus filed his Notice of Appeal of the final Order on August 25, 2010. See Exhibit C.

5. Unless the automatic stay for public officials provided for in Fla. R. App. P. 9.310(b)(2) applies to stay the recall election or an appropriate stay pending appeal is otherwise entered, the recall election will proceed on September 7, 2010. The City Clerk of the City of Anna Maria (Defendant Baird) and the Manatee County Supervisor of Elections (Defendant Sweat) will perform their statutory duties in connection with the recall election, including counting the votes cast and certifying the results of the election.

6. If the votes cast on in the September 7, 2010, election (including any absentee ballots) are in favor of recalling and replacing Stoltzfus and such result is certified according to law, then Stoltzfus will be ousted from the office to which he was duly elected and deprived of any meaningful appellate review of this Court's final Order and the issues concerning the legal sufficiency of the recall petition. Such a result is untenable.

7. As was once observed in another election dispute in the State of Florida, "Count first and rule upon legality afterwards is not a recipe for producing election

results that have the public acceptance democratic stability requires." *Bush v. Gore*, 531 U.S. 1046, 1047, 121 S. Ct. 512 (2000)(Scalia, J., concurring with opinion in grant of stay pending review).

8. A stay is required in this case to preserve the status quo to the extent necessary to permit Stoltzfus to obtain the meaningful appellate review to which he is entitled, while causing the least disruption possible to the ongoing electoral process.

9. In fact, under identical circumstances the trial court and the Fifth District Court of Appeal entered and extended, respectively, a stay pending appeal in the seminal municipal recall case in Florida, *Garvin v. Jerome*, 721 So.2d 1224 (Fla. 5 DCA 1998)(continuing stay pending appeal after entry of stay by trial court), *rev'd on other grounds*, 767 So.2d 1190 (Fla. 2000).

10. Because the recall election is scheduled for September 7 and Monday September 6 is a legal holiday (Labor Day), the Court must act expeditiously to grant a stay pending appeal in this matter.

11. As discussed in more detail below, the potential permanent and irreparable harm to Stoltzfus that may result from the denial of a stay pending appeal outweighs any temporary harm to Carter, the other Defendants or the City of Anna Maria at large that might ensue from the granting of a stay. There are also a number of bona fide legal issues raised by the recall petition and the Court's Order that require thoughtful and careful consideration by the Second District Court of Appeal.

12. This Court may impose appropriate conditions on the issuance of a stay pursuant to Fla. R. App. P. 9.310(a), and Stoltzfus does not object to the Court requiring, as a condition of any stay, that Stoltzfus file a motion in the Second District Court of Appeal requesting expedited appellate review of the case.

13. Counsel for Stoltzfus has conferred in good faith with counsel for all other parties in this action but the parties have not come to any agreement with respect to the issue of a stay pending appeal.

Memorandum of Law

The fundamental purpose of a stay pending appeal is to maintain the status quo in the trial court while the order of the lower tribunal is being reviewed on appeal. *Hathaway v. Munroe*, 97 Fla. 28, 119 So. 149 (1929); *Perez v. Perez*, 769 So.2d 389 (Fla. 3 DCA 1999); *see also*, Florida Appellate Practice §17.2 (The Florida Bar, 7th ed. 2010). A stay should be granted if it will preserve the rights of the parties pending appellate review and if the record presents "a substantial debatable question" materially affecting the rights of the parties. *Hathaway*, 97 Fla. at 32-33, 119 So. at 150. The factors generally considered in deciding whether to grant a stay pending appeal include the moving party's likelihood of success on the merits, the likelihood of harm should a stay not be granted and whether such harm is later remediable. *Perez*, 769 So. 2d at 391 n.4; *State ex rel. Price v. McCord*, 380 So.2d 1037, 1038 n.3 (Fla. 1980).

Stays pending appeal are governed by Fla. R. App. P. 9.310. As a general rule, the party seeking a stay pending appeal must file the request with the lower tribunal. Fla. R. App. P. 9.310(a).

An automatic stay arises in favor of a public officer, however, pursuant to Fla. R. App. P. 9.310(b)(2). The rule provides for the automatic stay in cases where review is sought by "any public officer in an official capacity." Although it would appear that the automatic stay should be applicable in the case of a municipal official appealing an order in a recall matter, Stoltzfus must advise the Court that the only reported decision considering that question holds to the contrary. In *Garvin v. Jerome*, 721 So.2d 1224

(Fla. 5 DCA 1998), *rev'd on other grounds*, 767 So.2d 1190 (Fla. 2000), the Fifth District expressly concluded under factually indistinguishable circumstances that "It does not appear to us that the automatic stay exception of Florida Rule of Appellate Procedure 9.310(b)(2) is intended to apply to prevent the recall election from proceeding." *Garvin*, 721 So. 2d at 1229.

The Fifth District's decision in *Garvin* does not explain why the court held the automatic stay inapplicable in that case, perhaps because, as discussed below, the court approved and extended the stay otherwise entered by the trial court (that is, a stay granted *not* under the provisions of Rule 9.310(b)(2)). In the later case of *Fouts v. Bolay*, 769 So.2d 504 (Fla. 5 DCA 2000), the same court held that the automatic stay provisions did not apply in favor of a candidate challenging the results of an election in the first instance. The Fifth District explained that under those circumstances, the candidate was not appealing in his official capacity as a public official seeking to enforce some public right, but "merely to establish himself as a public official." *Fouts*, 769 So. 2d at 505. In contrast, there is no question here that Stoltzfus is indeed the duly elected Commissioner of the City of Anna Maria, and thus a public official. By the express language of Fla. R. App. P. 9.310(b)(2), he ought to be entitled to the protection of the automatic stay, subject to any lawful conditions imposed by the trial court pursuant to the rule. In this matter, the Court should enter an order confirming the application and effect of the automatic stay and detailing any conditions thereon to avoid confusion and clarify the rights and duties of the parties, including those parties charged with carrying out the recall election.

If the Court determines that the automatic stay provisions of Fla. R. App. P. 9.310(b)(2) do not apply, then the Court should grant a stay pending appeal under Rule

9.310(a). Indeed, the reported decisions involving municipal recall matters in Florida appear to universally recognize the appropriateness of and necessity for a stay in such circumstances. In *Williams v. Keyes*, 135 Fla. 769, 186 So. 250 (1939), the trial court ordered a recall election to be held as to a number of city commissioners of the City of Miami, but granted a stay of the order requiring the election pending appeal. *See, Williams v. City of Miami*, 42 So.2d 582 (Fla. 1949)(subsequent proceedings discussing underlying case and entry of stay pending appeal of recall order).

Likewise, in *In re the Recall of Koretsky*, 541 So.2d 1362 (Fla. 4 DCA 1989), *aff'd,* 557 So.2d 24 (Fla. 1990), the Fourth District granted a stay pending appellate review of the trial court's order scheduling a recall election as to the Mayor of Pembroke Park, Florida. The Fourth District reversed the trial court's determination that the municipal recall statute in effect at that time applied to the City, but certified the case to the Florida Supreme Court as a matter of great public importance and granted a stay of the recall election during the pendency of that appeal.

Finally, as noted above, the Fifth District in *Garvin* extended the stay of granted by the trial court in a recall matter, even though it decided that the automatic stay provisions of Fla. R. App. P. 9.310(b)(2) were not applicable. In *Garvin*, the trial court entered a stay order that allowed the scheduled recall election to take place, but that sealed the election results for a sufficient period of time to allow Garvin to seek a further stay from the appellate court. *Garvin*, 721 So.2d at 1225. When she sought that stay from the appellate court, the Fifth District extended the stay order entered by the trial court – thus permitting the election to take place but ensuring that the results of the election would remain sealed pending appellate review of the matter. *Id.*

The necessity for a stay pending appeal under such circumstances is evident: absent a stay, the certification of the results of a recall election may result in the immediate ouster of a duly elected municipal official. Once that official is deemed recalled and his successor takes office, there is simply no possible remedy that can be granted by the appellate court. As succinctly expressed by the Florida Supreme Court in the context of a different type of election:

> [U]nless supersedeas is granted, the election will be held and [the petitioner's] right to have a decision on the question of whether the decree was erroneous in this respect will become moot and the object of its appeal defeated. Certainly, no sounder reason for the granting of supersedeas can be imagined.

Thomas Jefferson, Inc. v. Hotel Employees Union, Local 255, 81 So.2d 731 (Fla. 1955).

In fact, Stoltzfus' counsel has not found *any* reported municipal recall case in Florida in which some form of a stay pending appellate review was not granted. The reasons, again, are apparent. Even assuming that some form of "harm," in the abstract sense, may result to the Recall Committee or even to the City of Anna Maria at large from a delay in certifying or revealing the outcome of a recall election while the matter is under consideration in the appellate court, any such "harm" is both temporary and remediable at the conclusion of the appeal: the results of the election can be promptly certified and carried out. On the other hand, the harm that may result to Stoltzfus by the failure to grant a stay pending appeal is both far more tangible -- he may be removed immediately from office and replaced by a successor -- and absolutely irreparable once it occurs. The simple fact is that if Stoltzfus is removed immediately from office by virtue of the recall election, nothing the Second District may eventually decide in the appeal

can restore him to the position of City Commissioner. The right to meaningful appellate review will have been thwarted.

In the context of election matters generally, the courts have also routinely granted relief by way of stays pending appeal in order to preserve meaningful appellate review and to balance the competing interests of the parties. *See, e.g., Palm Beach County Canvassing Board v. Harris*, 2000 WL 1716480 (Fla. Nov. 17, 2000)(issuing stay order enjoining the certification of election results until further order of the court to maintain the status quo pending appeal); *Bush v. Gore*, 531 U.S. 1046, 121 S. Ct. 512 (2000)(granting stay of mandate of Florida Supreme Court pending certiorari review); *Reform Party of Florida v. Black*, 885 So.2d 303, 307 (Fla. 2004)(reinstating stay, in part, to preserve the rights of the parties).

The municipal recall decisions discussing the matter of a stay pending appeal do not incorporate into the discussion any apparent consideration of the likelihood of success in the appeal. There is no presumption of correctness that attaches to the trial court's Order in this case, because the legal sufficiency of the recall petition is a matter of law that will be reviewed *de novo* on appeal. *State ex rel. Landis v. Tedder*, 106 Fla. 140, 143 So.2d 148, 150 (1932)(compliance with recall statute is a judicial question for determination by the court); *Jividen v. McDonald*, 541 So.2d 1276 (Fla. 2 DCA 1989)(authority to determine sufficiency of recall petition is reserved solely to the courts); *Moultrie v. Davis*, 498 So.2d 993, 997 (Fla. 4 DCA 1986)(sufficiency of recall petition is determined by matter contained within four corners of the petition). There is no doubt, however, that the case presents "a substantial debatable question" materially affecting the rights of the parties.

To the extent the Court deems it necessary to consider the likelihood of success on the appeal, Stoltzfus would observe preliminarily and non-exclusively that, among other issues to be considered on appeal:

a. The Order now on appeal finds the recall petition to be legally sufficient in part based on what the trial court found to be allegations of the violation by Stoltzfus of the City of Anna Maria Code of Conduct, reference to which appears nowhere in the recall petition;

b. The Order now on appeal finds the recall petition to be legally sufficient in part based on what the trial court found to be allegations of the violation by Stoltzfus of the City of Anna Maria Resolution 95-536, reference to which appears nowhere in the recall petition;

c. The Order now on appeal finds the recall petition to be legally sufficient in part based on the trial court's apparent conclusion that "making statements," as alleged in the recall petition, can constitute a violation of Resolution 95-536 (and, presumably, Fla. Stat. §286.0115, upon which the Resolution is founded), even though neither the Resolution nor the underlying statute prohibit the "making" of "statements" by municipal officials;

d. The Order now on appeal finds the recall petition to be legally sufficient in part based on the trial court's apparent conclusion that a violation of Resolution 95-536 (or, presumably, Fla. Stat. §286.0115, which underlies it) would constitute misfeasance, even though neither the Resolution nor the statute prohibits the "making of statements" at all. The Resolution and the underlying statute only permit (but do not require) that ex parte communications affecting a quasi-judicial proceeding be disclosed as a means to erase the statutorily presumed prejudicial nature of such communications. Even

assuming the disclosure of ex parte communications was required by either the Resolution or the statute, the failure to disclose cannot be misfeasance (which requires a positive act) but would instead by nonfeasance or neglect of duty, an authorized ground for recall but one not alleged as grounds for recall in the petition;

e. The Order now on appeal finds the recall petition to be legally sufficient in part based on the trial court's express consideration of "the petition as a whole" and the improper "bootstrapping" of one alleged ground for recall upon another, all in contravention of the clear requirement set forth in *Garvin* that *each* of the alleged grounds for recall must be legally sufficient.

Given that the proponents of the recall bear the heavy burden of overturning the results of the regularly conducted election that installed Stoltzfus as City Commissioner, *Garvin v. Jerome*, 767 So.2d 1190 (Fla. 2000), these and numerous other bona fide legal issues raised by the recall petition and the Court's final Order denying relief warrant careful and thoughtful consideration by the Second District. That opportunity for meaningful appellate review will be thwarted if the recall election proceeds and the results thereof are certified and implemented, as they will be in the absence of a stay pending appeal.

WHEREFORE, Stoltzfus prays the Court for entry of an order granting a stay of the Order rendered August 24, 2010, pending appeal as follows:

a. Stay the recall election scheduled for September 7, 2010, in its entirety; or

b. Permit the recall election scheduled for September 7, 2010, to proceed as scheduled, but stay the counting of votes and the certification of the results of said election and require that all ballots (including absentee ballots) be sealed indefinitely

pending appeal and until further order of the Court or the Second District Court of Appeal; or

c. Permit the recall election scheduled for September 7, 2010, to proceed as scheduled, but stay the counting of votes and the certification of the results of said election and require that all ballots (including absentee ballots) be sealed for a specified period of time not less than fifteen (15) days after the election, so as to permit Stoltzfus to seek an extension of the stay or other relief from the Second District Court of Appeal; or

d. Stay the Order upon such other terms and conditions as the Court deems appropriate to preserve Stoltzfus' right to meaningful appellate review and to avoid the substantial and irreparable harm that might otherwise ensue from the failure to grant a stay pending appeal.

Dated this 30th day of August, 2010.

/s/ *Richard A. Harrison*
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Board Certified in City, County & Local Government Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

furnished via First Class U.S. Mail, facsimile and electronic mail this 30th day of August, 2010 to:

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Florida Bar No: 0602493

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DESOTO, MANATEE, AND SARASOTA COUNTIES

IN RE: The Recall Election of City of Anna Maria Commissioner Harry Stoltzfus

BY ORDER OF THE CHIEF JUDGE

The court having been advised that a petition for the recall of Anna Maria City Commissioner Harry Stoltzfus has been duly filed, and that pursuant to Section 100.361 (4), Florida Statutes, the Chief Judge is mandated to fix the day for holding a recall election. It appearing that the 5-day period set forth in the statute for the resignation of the commissioner subject to recall has expired,

NOW, THEREFORE, IT IS ORDERED:

1. The date for the recall election is fixed on **TUESDAY, SEPTEMBER 7, 2010.**

2. The qualifying period for candidates seeking election to the office shall be as follows:

Commencing at 9:00 a.m., WEDNESDAY, JULY 21, 2010, and ending at 12:00 p.m., FRIDAY, JULY 30, 2010.

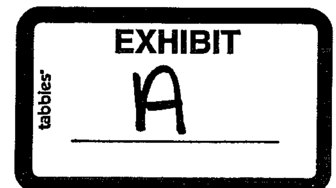
3. There is litigation pending in Manatee Circuit Court which may affect the dates set forth in paragraphs 1 and 2. This includes Barfield v. Stoltzfus, Manatee Circuit Court Case 2010 CA 3221, and Stoltzfus v. Robert E. "BOB" Carter, Manatee Circuit Court Case 2010 CA 4620. These cases are currently before the Honorable Edward Nicholas, presiding. The Chief Judge may modify this order to accommodate rulings in these cases by Judge Nicholas, and may take such action thereafter as may be necessary to effectuate the provisions of Chapter 100. This order does not determine or adjudicate any of the issues under consideration by Judge Nicholas.

4. Judge Nicholas shall promptly provide the Chief Judge with copies of any orders entered by him which may impact the schedule set forth herein. A copy of this order shall be filed by the Clerk in Barfield v. Stoltzfus, Manatee Circuit Court Case 2010 CA 3221, and Stoltzfus v. Robert E. "BOB" Carter, Manatee Circuit Court Case 2010 CA 4620.

DONE AND ORDERED in Bradenton, Manatee County, Florida, this 15th day of July, 2010.

LEE E. HAWORTH, CHIEF JUDGE

Original: Clerk of Court, Manatee County



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The Honorable Alice Baird
Clerk, City of Anna Maria
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Anna Maria, FL 34216

The Honorable Bob Sweat
Manatee County Supervisor of Elections
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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

HARRY STOLTZFUS,
Plaintiff,

CASE NO.: 2010-CA-004620

v.

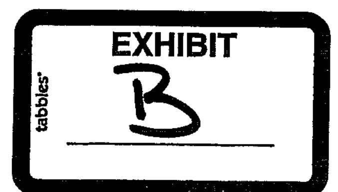
ROBERT E. "BOB" CARTER, as
Chair of the Committee to Recall
Harry Stolzfus; ALICE BAIRD, CMC,
as City Clerk of Anna Maria, Florida;
and ROBERT "BOB" SWEAT, as
Manatee County Supervisor of Elections.
Defendants.
_______________________________/

FILED FOR RECORD
R.B. SHORE
2010 AUG 24 AM 9:40
CLERK CIRCUIT C.
MANATEE CO. FLO.

Order

THIS CAUSE having come to be heard upon the Plaintiff's Amended Complaint, and the Court having reviewed said complaint, having considered the Defendant's Memorandum of Law in Opposition to Claims Asserted by Plaintiff, having considered the argument of counsel at the hearing in this cause and the case law provided by each, and being otherwise fully advised in the premises, finds as follows:

As the Florida Supreme Court made clear in Garvin vs. Jerome, 767 So. 2d 1190 (Fla. 2000), election recall is an extraordinary process. The Court made clear that the burden rests solely on those seeking to overturn an election upon lawful and sufficient grounds. Even as far back as 1959, the Second District Court noted in Joyner vs. Shannon, 116 So. 2d 472 (2nd DCA 1959), that there must be a "real foundation" for such a "harsh test" as a recall. As was aptly pointed out by Justice Lewis in his dissent in Garvin, however, the statutory recall procedure "involves a delicate balance between the important property rights of the office holder (and the participatory and representative rights of those voters who originally elected him or her) and the rights of the dissatisfied electorate (which may include those same voters) which must be respected" . Id at 1192.



This State's recall statute is accusatory in nature and requires that a recall petition allege conduct by the elected official that would constitute one of the seven grounds for removal outlined in Section 100.361(1)(b). The truth or falsity of an allegation is ultimately for the electorate to determine and is not subject to judicial inquiry. The mere recital of a statutory ground, however, without a sufficient allegation of conduct constituting that ground, is improper. Section 100.361(1)(b), states that the grounds for removal of elected municipal officials shall, for the purposes of this act, be limited to the following:

1. Malfeasance
2. Misfeasance
3. Neglect of duty
4. Drunkenness
5. Incompetence
6. Permanent inability to perform official duties
7. Conviction of a felony involving moral turpitude

Turning, then, to the Petition in this cause, this Court will find as follows:

Ground One alleges that "Public records evidences that Stoltzfus violated Government-in-the-Sunshine Law by holding electronic meetings and using liaisons to discuss public business, which has not been advertised to the public". Quite clearly, compliance with Florida's Sunshine Law is required by all elected officials and, thus, Commissioner Stoltzfus' alleged failure to so comply would be unlawful. The language set forth in ground one of the recall petition is sufficient to adequately allege a cause of action for potential recall based upon a statutory claim of malfeasance. More specifically, this ground clearly and sufficiently alleges a violation of Florida's Sunshine Law, and, as such, if true, this language

constitutes a lawful ground for recall pursuant to section 100.361(1)(b)(1). Commissioner Stoltzfus's argument that this ground is vague, and does not provide him with a fair, reasonable and adequate notice is not well taken. Based upon the foregoing, this ground may proceed.

The second ground states: "Stoltzfus' email communications contain libelous and inflammatory remarks concerning city staff, citizens, and professional consultants, in violation of the City's stated policy against such attacks, which expose the City to significant legal expense". This Court finds, as in ground one, that the language here is clear and definite and constitutes sufficient statutory ground for recall. The alleged conduct is both potentially unlawful and improper and, assuming its truth, constitutes both malfeasance and misfeasance under the very definition of those terms. Such conduct, at its worst, affords a basis for suit by those to whom the alleged "libelous" emails were directed, and, at its very least, would constitute a violation of the City of Anna Maria's Code of Conduct, approved and adopted by the City Commission on July 24, 2004. This charge, with its language of both improper and potentially unlawful conduct, constitutes a sufficient ground for recall, is legally adequate, and shall be permitted to proceed.

Ground three alleges: "[Commissioner Stoltzus] has also made numerous statements in violation of the requirement for a fair hearing in a quasi judicial proceeding, thus abusing his authority in order to achieve a desired result". It is true that the alleged "numerous statements" nor the "quasi judicial proceeding" are not specifically identified. Having said that, Resolution 95-536 of the City of Anna Maria establishes procedures for ex-parte communications in quasi-judicial proceedings, requiring, among other things, specific disclosure. The allegation that the Plaintiff here has pre-judged a matter to come before him as Commissioner in an effort to "achieve a desired result," in light of Resolution 95-0536, would constitute misfeasance, as that term is defined. It is not the province of the Court to determine the truth or falsity of the claims (see Moultrie vs. Davis, 498 So. 2d 993 (Fla. 4th DCA 1986), but simply to

determine their legal sufficiency. As with charge one and two, the Plaintiff claims that the language here is vague, conclusory and not definite enough to provide him with fair notice and enable him to adequate defend his actions before the public. As with ground one and two, however, this Court does not agree. The language in this ground, if true, constitutes misfeasance, "the performance, in an official capacity, of a legal act in an improper or illegal manner". Black's Law Dictionary, 1151 (rev. 4th ed. 1986). The language here describes actions that, if true, provides a legally sufficient ground, is more than a vague and general allegation of bad behavior, and may proceed.

Ground four indicates: "Public records reveal that Stoltzfus employed 'evasive devices' in order to intentionally circumvent state statutes". There is no indication within the petition as to exactly what were the "evasive devices" allegedly engaged in nor what specific statutes were "circumvented". Part of the challenge here, however, is that the grounds are not individually numbered or separated in any way other than by the period between the sentences. Under these circumstances then, is that to say that the Court is unable to consider the petition as a whole? Is that to say, for instance, that the Court cannot consider whether the Plaintiff's alleged violation of public records laws (sentence one) might result in "potentially harmful and expensive legal action against the City" (sentence five)? Is that to say, for instance, that the Court cannot consider whether the Commissioner's alleged violation of Florida's Sunshine Law (sentence one) could be considered an "evasive device" (sentence four) designed to circumvent full disclosure under said statute? This Court is well aware that *each* ground must be legally sufficient and that, as indicated in Garvin, the fact that despite the validity of four of the five grounds, one invalid ground will prevent recall. Having said that, this Court will find that the language in ground four, particularly in light of the non-numbered petition as a whole, is legally sufficient. The language here describes behavior that, if true, could constitute a violation of Anna Maria City Code of Conduct, and could be considered malfeasance. The Comissioner's alleged intentional circumvention of a state statute, i.e. Florida's Sunshine Law, is sufficiently specific and will support the recall effort. The language

here describes behavior and conduct that, if true, constitutes misfeasance and provides a legally sufficient basis for statutory recall.

Ground five states: "[Commissioner Stotlzfus] conspired with others to deceive citizens and bring financial harm to the City of Anna Maria by encouraging potentially harmful and expensive legal action against the City while hiding his own involvement". As is the case with grounds three and four, this is no definitive indication as to exactly what the alleged conspiracy consisted of, with whom the Commissioner is alleged to have conspired, and the exact nature of the "harmful and expensive legal action" that is potential here. Having said that, however, an elected official's encouraging a private citizen's lawsuit against the very City upon who's council he or she sits, if true, would certainly be improper as it relates to his official duties. While not disclosing specifically the nature of the "legal action", a Commissioner encouraging a lawsuit against his City would be violative of the public trust and would constitute misfeasance. The truth of the alleged "conspiracy", and whether or not he did, indeed, encourage others to engage in litigation against the City, is not of this Court's concern. Of concern, of course, is the legal sufficiency of the language. This Court will find that the conduct described and language here is legally sufficient and may proceed.

As an aside, this Court does not find that the final sentence of the Petition which states that Commissioner Stoltzfus' "conduct cannot be legally justified and conflicts with state law" is an independent and distinct ground, as suggested by the Plaintiff. The Court determines that such conclusory language refers to all the grounds alleged and is not a separate charge, subject to review.

Ultimately, then, the recall grounds here, as stated, are sufficiently definitive to enable the Plaintiff, as the public official charged, to respond to and meet the allegations before the public. The allegations are concise, clear and contain valid grounds of either malfeasance, misfeasance or both to support the

recall process. The petition is legally sufficient and, as such, the Plaintiff's requested relief is DENIED.

This recall shall proceed.

DONE AND ORDERED in Chambers at Bradenton, Manatee County, Florida, this 24th day of

August, 2010.

CIRCUIT JUDGE

Copies to:

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

HARRY STOLTZFUS,

Plaintiff/Appellant,

v. CASE NO.: 2010-CA-004620

ROBERT E. "BOB" CARTER, as Chair of the Committee to Recall Harry Stoltzfus; ALICE BAIRD, CMC, as City Clerk of Anna Maria, Florida; and ROBERT "BOB" SWEAT, as Manatee County Supervisor of Elections,

Defendants/Appellees.

_______________________________________/

FILED FOR RECORD
R.B. SHORE
2010 AUG 25 AM 11:16
CLERK OF CIRCUIT COURT
MANATEE CO., FLORIDA

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff/Appellant, Harry Stoltzfus, appeals to the Second District Court of Appeal the order of this Court rendered on August 24, 2010, a conformed copy of which is attached to this Notice. The nature of the order is a final order denying all relief requested by the Plaintiff/Appellant.

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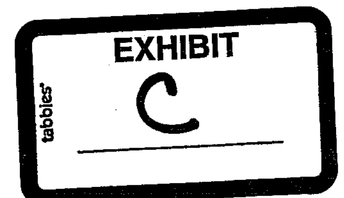

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail on this 25th day of August, 2010, to:

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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

HARRY STOLTZFUS,
Plaintiff,

CASE NO.: 2010-CA-004620

v.

ROBERT E. "BOB" CARTER, as
Chair of the Committee to Recall
Harry Stolzfus; ALICE BAIRD, CMC,
as City Clerk of Anna Maria, Florida;
and ROBERT "BOB" SWEAT, as
Manatee County Supervisor of Elections.
Defendants.
_______________________________/

FILED FOR RECORD
R.B. SHORE
2010 AUG 24 AM 9:40
CLERK CIRCUIT C.
MANATEE CO. FLOR.

Order

THIS CAUSE having come to be heard upon the Plaintiff's Amended Complaint, and the Court having reviewed said complaint, having considered the Defendant's Memorandum of Law in Opposition to Claims Asserted by Plaintiff, having considered the argument of counsel at the hearing in this cause and the case law provided by each, and being otherwise fully advised in the premises, finds as follows:

As the Florida Supreme Court made clear in Garvin vs. Jerome, 767 So. 2d 1190 (Fla. 2000), election recall is an extraordinary process. The Court made clear that the burden rests solely on those seeking to overturn an election upon lawful and sufficient grounds. Even as far back as 1959, the Second District Court noted in Joyner vs. Shannon, 116 So. 2d 472 (2nd DCA 1959), that there must be a "real foundation" for such a "harsh test" as a recall. As was aptly pointed out by Justice Lewis in his dissent in Garvin, however, the statutory recall procedure "involves a delicate balance between the important property rights of the office holder (and the participatory and representative rights of those voters who originally elected him or her) and the rights of the dissatisfied electorate (which may include those same voters) which must be respected" . Id at 1192.

This State's recall statute is accusatory in nature and requires that a recall petition allege conduct by the elected official that would constitute one of the seven grounds for removal outlined in Section 100.361(1)(b). The truth or falsity of an allegation is ultimately for the electorate to determine and is not subject to judicial inquiry. The mere recital of a statutory ground, however, without a sufficient allegation of conduct constituting that ground, is improper. Section 100.361(1)(b), states that the grounds for removal of elected municipal officials shall, for the purposes of this act, be limited to the following:

1. Malfeasance
2. Misfeasance
3. Neglect of duty
4. Drunkenness
5. Incompetence
6. Permanent inability to perform official duties
7. Conviction of a felony involving moral turpitude

Turning, then, to the Petition in this cause, this Court will find as follows:

Ground One alleges that "Public records evidences that Stoltzfus violated Government-in-the-Sunshine Law by holding electronic meetings and using liaisons to discuss public business, which has not been advertised to the public". Quite clearly, compliance with Florida's Sunshine Law is required by all elected officials and, thus, Commissioner Stoltzfus' alleged failure to so comply would be unlawful. The language set forth in ground one of the recall petition is sufficient to adequately allege a cause of action for potential recall based upon a statutory claim of malfeasance. More specifically, this ground clearly and sufficiently alleges a violation of Florida's Sunshine Law, and, as such, if true, this language

constitutes a lawful ground for recall pursuant to section 100.361(1)(b)(1). Commissioner Stoltzfus's argument that this ground is vague, and does not provide him with a fair, reasonable and adequate notice is not well taken. Based upon the foregoing, this ground may proceed.

The second ground states: "Stoltzfus' email communications contain libelous and inflammatory remarks concerning city staff, citizens, and professional consultants, in violation of the City's stated policy against such attacks, which expose the City to significant legal expense". This Court finds, as in ground one, that the language here is clear and definite and constitutes sufficient statutory ground for recall. The alleged conduct is both potentially unlawful and improper and, assuming its truth, constitutes both malfeasance and misfeasance under the very definition of those terms. Such conduct, at its worst, affords a basis for suit by those to whom the alleged "libelous" emails were directed, and, at its very least, would constitute a violation of the City of Anna Maria's Code of Conduct, approved and adopted by the City Commission on July 24, 2004. This charge, with its language of both improper and potentially unlawful conduct, constitutes a sufficient ground for recall, is legally adequate, and shall be permitted to proceed.

Ground three alleges: "[Commissioner Stoltzus] has also made numerous statements in violation of the requirement for a fair hearing in a quasi judicial proceeding, thus abusing his authority in order to achieve a desired result". It is true that the alleged "numerous statements" nor the "quasi judicial proceeding" are not specifically identified. Having said that, Resolution 95-536 of the City of Anna Maria establishes procedures for ex-parte communications in quasi-judicial proceedings, requiring, among other things, specific disclosure. The allegation that the Plaintiff here has pre-judged a matter to come before him as Commissioner in an effort to "achieve a desired result," in light of Resolution 95-0536, would constitute misfeasance, as that term is defined. It is not the province of the Court to determine the truth or falsity of the claims (see Moultrie vs. Davis, 498 So. 2d 993 (Fla. 4th DCA 1986), but simply to

determine their legal sufficiency. As with charge one and two, the Plaintiff claims that the language here is vague, conclusory and not definite enough to provide him with fair notice and enable him to adequate defend his actions before the public. As with ground one and two, however, this Court does not agree. The language in this ground, if true, constitutes misfeasance, "the performance, in an official capacity, of a legal act in an improper or illegal manner". Black's Law Dictionary, 1151 (rev. 4th ed. 1986). The language here describes actions that, if true, provides a legally sufficient ground, is more than a vague and general allegation of bad behavior, and may proceed.

Ground four indicates: "Public records reveal that Stoltzfus employed 'evasive devices' in order to intentionally circumvent state statutes". There is no indication within the petition as to exactly what were the "evasive devices" allegedly engaged in nor what specific statutes were "circumvented". Part of the challenge here, however, is that the grounds are not individually numbered or separated in any way other than by the period between the sentences. Under these circumstances then, is that to say that the Court is unable to consider the petition as a whole? Is that to say, for instance, that the Court cannot consider whether the Plaintiff's alleged violation of public records laws (sentence one) might result in "potentially harmful and expensive legal action against the City" (sentence five)? Is that to say, for instance, that the Court cannot consider whether the Commissioner's alleged violation of Florida's Sunshine Law (sentence one) could be considered an "evasive device" (sentence four) designed to circumvent full disclosure under said statute? This Court is well aware that *each* ground must be legally sufficient and that, as indicated in Garvin, the fact that despite the validity of four of the five grounds, one invalid ground will prevent recall. Having said that, this Court will find that the language in ground four, particularly in light of the non-numbered petition as a whole, is legally sufficient. The language here describes behavior that, if true, could constitute a violation of Anna Maria City Code of Conduct, and could be considered malfeasance. The Comissioner's alleged intentional circumvention of a state statute, i.e. Florida's Sunshine Law, is sufficiently specific and will support the recall effort. The language

here describes behavior and conduct that, if true, constitutes misfeasance and provides a legally sufficient basis for statutory recall.

Ground five states: "[Commissioner Stotlzfus] conspired with others to deceive citizens and bring financial harm to the City of Anna Maria by encouraging potentially harmful and expensive legal action against the City while hiding his own involvement". As is the case with grounds three and four, this is no definitive indication as to exactly what the alleged conspiracy consisted of, with whom the Commissioner is alleged to have conspired, and the exact nature of the "harmful and expensive legal action" that is potential here. Having said that, however, an elected official's encouraging a private citizen's lawsuit against the very City upon who's council he or she sits, if true, would certainly be improper as it relates to his official duties. While not disclosing specifically the nature of the "legal action", a Commissioner encouraging a lawsuit against his City would be violative of the public trust and would constitute misfeasance. The truth of the alleged "conspiracy", and whether or not he did, indeed, encourage others to engage in litigation against the City, is not of this Court's concern. Of concern, of course, is the legal sufficiency of the language. This Court will find that the conduct described and language here is legally sufficient and may proceed.

As an aside, this Court does not find that the final sentence of the Petition which states that Commissioner Stoltzfus' "conduct cannot be legally justified and conflicts with state law" is an independent and distinct ground, as suggested by the Plaintiff. The Court determines that such conclusory language refers to all the grounds alleged and is not a separate charge, subject to review.

Ultimately, then, the recall grounds here, as stated, are sufficiently definitive to enable the Plaintiff, as the public official charged, to respond to and meet the allegations before the public. The allegations are concise, clear and contain valid grounds of either malfeasance, misfeasance or both to support the

recall process. The petition is legally sufficient and, as such, the Plaintiff's requested relief is DENIED.

This recall shall proceed.

DONE AND ORDERED in Chambers at Bradenton, Manatee County, Florida, this 24th day of August, 2010.

CIRCUIT JUDGE

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