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A Limited Liability
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July 12, 2011

VIA HAND DELIVERY

Honorable Maryann Sumi
Dane County Courthouse, Br. #2
215 South Hamilton Street, #7105
Madison, WI 53703-3285

Re: State of Wisconsin, *ex. rel.* v. Jeff Fitzgerald, *et al.*
Case No. 2011-CV-1244

Dear Judge Sumi:

Enclosed please find Defendant Mark Miller's Motion for Attorney Fees and Expenses Pursuant to Wis. Stat. § 895.46(1)(a) in the above-referenced matter.

I certify by copy of this letter and enclosure, copies of the same have been served on all counsel of record this date.

Sincerely,

CULLEN WESTON PINES & BACH LLP



Susan M. Crawford

SMC:kc

DAKE COUNTY
CLERK OF COURT
11 JUL 13 AM 11:06

/

Honorable Maryann Sumi
July 12, 2011
Page 2

Cullen Weston Pines & Bach LLP

Enclosures

cc: Mark Miller
AAG Maria S. Lazar
AAG Steven C. Kilpatrick
Ismael R. Ozanne
Robert J. Jambois
Roger A. Sage

STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE,

Plaintiff,

Case No.: 11CV1244

v.

Jeff Fitzgerald,
Scott Fitzgerald,
Michael Ellis,
Scott Suder,
Douglas La Follette,
Mark Miller,
Peter Barca,
Joint Committee of Conference,
Wisconsin State Senate, and
Wisconsin State Assembly,
Defendants.

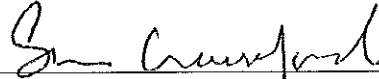
**Defendant Mark Miller’s Motion for Attorney Fees and Expenses
Pursuant to Wis. Stat. § 895.46(1)(a)**

Defendant Mark Miller, by Cullen Weston Pines & Bach LLP, his attorneys, hereby moves the Court pursuant to Wis. Stat. § 895.46(1)(a) for an order directing the State of Wisconsin to pay the attorney fees and expenses incurred by the defendant in the above-captioned action.

The grounds for this motion are set forth in the attached Memorandum in Support of Defendant Miller’s Motion for Attorney Fees and Expenses and the Affidavit of Mark Miller, which are filed herewith and incorporated herein by reference.

Dated this 12th day of July, 2011.

CULLEN WESTON PINES & BACH LLP



Susan Crawford, SBN 1030716
Attorney for Plaintiff

Mailing Address:

122 West Washington Avenue, Suite 900

Madison, WI 53703

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STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE,

Plaintiff,

Case No.: 11CV1244

v.

Jeff Fitzgerald,
Scott Fitzgerald,
Michael Ellis,
Scott Suder,
Douglas La Follette,
Mark Miller,
Peter Barca,
Joint Committee of Conference,
Wisconsin State Senate, and
Wisconsin State Assembly,
Defendants.

**Memorandum in Support of Defendant Mark Miller's Motion
for Attorney Fees and Costs Pursuant to Wis. Stat. § 895.46(1)(a)**

I. STATEMENT OF FACTS

Defendant Mark Miller, an elected member of the Wisconsin Senate representing Senate District 16, was named as a defendant, in his official capacity, in the above-captioned case by the amended complaint filed and served on March 23, 2011 (Affidavit of Mark Miller, filed herewith). By a letter dated March 23, 2011, Senate

Chief Clerk Robert J. Marchant requested the Department of Justice to provide Senator Miller with legal representation (Aff. Exh. A).

By a letter dated March 25, 2011, Deputy Attorney General Kevin M. St. John advised Mr. Marchant that the Department of Justice was declining representation of Senator Miller: "the Department of Justice ("Department") believes that our representation of Senator Miller would materially limit the representation of four previously named legislators currently represented by the Department in this action. It is our opinion that the simultaneous representation of Senator Miller and these defendants presents a conflict of interest under Supreme Court Rule ("SCR") 20:1.7(a)(2). The Department therefore declines to represent Senator Miller in this action." (Aff. Exh. B).

Senator Miller subsequently contacted undersigned counsel and requested representation in the matter (Miller Aff.). Undersigned counsel agreed to represent Senator Miller and appeared in court on his behalf in a preliminary injunction hearing on March 29, 2011, and April 1, 2011 (Miller Aff.).

In a letter dated April 28, 2011, Senator Miller wrote to Governor Scott Walker requesting the Governor to approve special counsel from Cullen Weston Pines & Bach, LLC to represent him in the action, pursuant to Wis. Stat. §14.11(2)(a) (Aff. Exh. C). He received no response from the Governor's Office (Miller Aff.).

Neither the Attorney General nor the Governor's Office ever offered Senator Miller legal counsel to represent him in this action (Miller Aff.). Accordingly, Senator Miller never refused legal counsel offered by the state to represent him. Undersigned counsel represented Senator Miller in all of the legal proceedings in this matter, with no objection from the State of Wisconsin. (Miller Aff.).

II. THE STATE IS REQUIRED TO PAY THE ATTORNEY FEES AND COSTS INCURRED IN THIS ACTION BY SENATOR MILLER.

Pursuant to Wis. Stat. §895.46(1), if a defendant in any action or proceeding is a public officer or employee who is proceeded against in an official capacity, the state, "if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment." Wis. Stat. §895.46(1)(a).

Wis. Stat. §895.46(1)(a) requires the following positive elements (facts which must be present) and negative elements (facts which must *not* be present) for a state officer to be entitled to have his or her attorney fees paid by the State:

- The defendant in the action is a public officer or employee.
- The defendant is proceeded against in an official capacity (or as an individual acting in the scope of employment).
- The state did not provide legal counsel to the defendant officer or employee.
- The officer or employee did not fail to give prompt notice to his or her department head of the commencement of the action.
- The officer or employee did not refuse legal counsel offered by the state.
- The officer or employee did not refuse to cooperate in the defense of the litigation.

Wis. Stat. §895.46(1)(a). If the required facts are present, the defendant is entitled to have his attorney fees paid by the State "regardless of the results of the litigation." Wis. Stat. §895.46(1)(a).

All of the required elements are present in this case with respect to Senator Miller. First, Senator Miller is an elected member of the Wisconsin Senate and is clearly a public officer of the state. He was proceeded against in his official capacity. The amended complaint named Senator Miller a defendant in his official capacity as a state senator and appointed member of the Joint Committee of Conference, the meeting of which was alleged by the complaint to have been held in violation of the Open Meetings Law.

The state did not provide legal counsel for Senator Miller. The Attorney General, in declining representation, did not dispute that Senator Miller was sued in his official capacity or that he was entitled to be provided with legal counsel by the State. Rather, he declined to represent Senator Miller based on a perceived conflict of interest between Senator Miller and the four legislative defendants whom the Attorney General had agreed to represent, in light of the "substantial possibility that Senator Miller's interests are directly opposed to currently represented legislator-defendants, particularly in light of the fact that he does not face any exposure to forfeitures because he did not attend the meeting in question." (Aff. Exh. B, p. 2.).

Typically, when the Department of Justice declines to represent a state officer or employee due to a conflict of interest with another client or party, the Governor appoints

special counsel to represent the officer or employee under Wis. Stat. §14.11. In this case, however, the Governor at no time provided legal counsel to Senator Miller pursuant to §14.11, even though Senator Miller requested that the Governor appoint special counsel to represent him. The Governor made no response at all to Senator Miller's request that he appoint special counsel to represent him.

Section 14.11 does not *mandate* that the Governor employ special counsel to represent an officer or employee whom the Department of Justice declines to represent due to a conflict of interest. It merely states that the Governor *may* employ special counsel in the following cases:

1. To assist the attorney general in any action or proceeding;
2. To act instead of the attorney general in any action or proceeding, if the attorney general is in any way interested adversely to the state;
3. To defend any action instituted by the attorney general against any officer of the state; [or]
4. To institute and prosecute an action or proceeding which the attorney general, by reason of the attorney general's opinion as to the validity of any law, or for any other reason, deems it the duty of the attorney general to defend rather than prosecute.

Wis. Stat. §14.11. The Governor declined to appoint counsel to represent Senator Miller pursuant to Wis. Stat. § 14.11. Thus, Senator Miller, who was not offered legal counsel by the state, at no time refused legal counsel provided by the Governor, the Attorney General, or other arm of the state.

The requirement of providing prompt notice of the action to the "department head" is inapplicable to Senator Miller, who is not an employee in a state department, but rather an elected state senator.

Finally, Senator Miller did not refuse to participate in his defense. Once represented by counsel of his choosing, he actively participated in developing his legal position with respect to the declaratory judgment action as to which he was named a defendant.

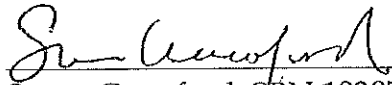
The Attorney General's letter declining to represent Senator Miller claims that, while Senator Miller "may wish to proceed on a separate legal theory," he "would not have the right to do so." He asserted that the Attorney General, in representing state officials, "has the authority to control such litigation, including the right to compromise or settle matters," citing Wis. Stat. §165.25(6). The Attorney General's authority to "compromise and settle" an action derives from his statutory duty to appear for and defend, upon request, any state department, officer, or employee for actions growing out of or committed in the lawful course of an officer's, employee's, or agent's duties. See Wis. Stat. § 165.26(6). Having declined to represent Senator Miller, however, the Attorney General ceded his authority under §165.25(6) to compromise, settle, or otherwise "control" Senator Miller's legal strategy. Given the Attorney General's admission that Senator Miller's interests were "directly opposed to currently represented legislator-defendants," his suggestion that Senator Miller was somehow

barred by §165.26(6) from pursuing a legal theory different than the one the Attorney General was pursuing for defendants with "directly opposed" interests, lacks any logic or merit.

In conclusion, defendant Senator Mark Miller respectfully requests that this court enter an order requiring the State of Wisconsin to pay his reasonable attorney fees and costs in the above-captioned action.

Dated this 12th day of July, 2011.

CULLEN WESTON PINES & BACH LLP



Susan Crawford, SBN 1030716
Attorney for Plaintiff

Mailing Address:

122 West Washington Avenue, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
crawford@cwpb.com

STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE,

Plaintiff,

Case No.: 11CV1244

v.

Jeff Fitzgerald,
Scott Fitzgerald,
Michael Ellis,
Scott Suder,
Douglas La Follette,
Mark Miller,
Peter Barca,
Joint Committee of Conference,
Wisconsin State Senate, and
Wisconsin State Assembly,
Defendants.

AFFIDAVIT OF MARK MILLER

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Mark Miller, being first duly sworn on oath, deposes and says:

1. I am an adult resident of the State of Wisconsin. The statements in this affidavit are made on my personal knowledge.

2. I am an elected member of the Wisconsin Senate representing Senate District 16.

3. On March 23, 2011, I accepted service of a complaint in the above-captioned case which was served at my Senate office, Room 206 South, State Capitol, Madison, Wisconsin.

4. I informed Senate Chief Clerk Robert J. Marchant that the complaint had been served on me.

5. By a letter dated March 23, 2011, on which I was copied, Senate Chief Clerk Robert J. Marchant requested the Department of Justice to provide me with legal representation. A copy of the letter is attached as Exhibit A.

6. By a letter dated March 25, 2011, Deputy Attorney General Kevin M. St. John advised Mr. Marchant that the Department of Justice was declining to represent me. Mr. Marchant furnished a copy of the letter to me. A copy of the letter is attached as Exhibit B.

7. On or about March 27, 2011, I asked Attorney Susan Crawford, Cullen Weston Pines & Bach LLP, to represent me in the above-captioned case.

8. Attorney Crawford appeared in Dane County Circuit Court on my behalf on March 29, 2011.

9. Attorneys from Cullen Weston Pines & Bach LLP, have represented me throughout the legal proceedings associated with the above-captioned case.

10. In a letter dated April 28, 2011, I requested that Governor Scott Walker appoint Cullen Weston Pines & Bach, LLC as special counsel, pursuant to Wis. Stat. §14.11(2)(a), to represent me in the above-captioned action. A copy of my letter is attached as Exhibit C.

11. I received no response from the Governor's Office to my letter dated April 28, 2011.

12. I make this affidavit in support of the Motion for Attorney Fees filed on my behalf.

Dated this 11 day of July, 2011.



Mark Miller

Subscribed and sworn before me
this 11th day of July, 2011.



Notary Public, State of Wisconsin

My commission expires: June 7, 2015



Robert J. Marchant

Chief Clerk
Director of Operations
Wisconsin State Senate

March 23, 2011

J.B. Van Hollen
Attorney General
State of Wisconsin
114 East, State Capitol
Madison, WI 53702

Re: *State ex rel. Ozanne v. Fitzgerald, et al.*
Dane County Case No. 11CV1244

Dear Attorney General Van Hollen:

Today, a Dane County Sheriff's deputy provided me with an amended Summons and Complaint in the above-referenced case. The amended Summons and Complaint adds Senator Miller, Representative Barca, a "Joint Committee of Conference," the Wisconsin State Senate, and the Wisconsin State Assembly as defendants. I have provided Steve Kilpatrick of the Department of Justice with a copy of the amended Summons and Complaint.

Senator Miller has indicated to me that he has accepted service of the amended Summons and Complaint and has asked that I seek representation for him from the Department of Justice. I do not know the legal status of service on the other Senator defendants, "Joint Committee of Conference," or the Wisconsin State Senate. I made it clear to the Dane County Sheriff's deputy that I was not accepting service on behalf of any defendants because it was not clear to me that I had authority to accept service for them.

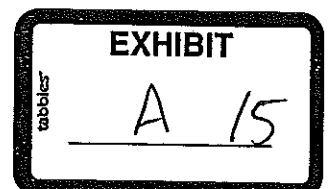
The allegations in the Complaint may relate to acts growing out of or committed in the course of duties in the Senate. I am writing to request that the Department of Justice provide the defendants with legal representation in defense of the above-referenced matter, if the defendants are entitled to such representation under the law.

If you have any questions or concerns, please feel free to contact me.

Sincerely,

Robert J. Marchant

Cc: Majority Leader Fitzgerald
President Ellis
Minority Leader Miller
Pat Fuller





STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

March 25, 2011

Mr. Robert J. Marchant
Wisconsin State Senate
B20 Southeast, State Capitol
Madison, WI 53702

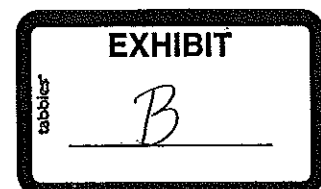
Re: *State of Wisconsin ex rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.*
Dane County Case No. 11-CV-1244

Dear Mr. Marchant:

I am responding to your letter dated March 23, 2011, in which you state that Senator Mark Miller has been named as a defendant in the above-referenced open meetings enforcement action. You state that Senator Miller has accepted service of the amended summons and complaint adding Senator Miller, among others, as a defendant in the action. You ask that the Wisconsin Department of Justice provide Senator Miller with legal representation in the action.

For the reasons set forth below, the Department of Justice ("Department") believes that our representation of Senator Miller would materially limit the representation of four previously named legislators currently represented by the Department in the action. It is our opinion that the simultaneous representation of Senator Miller and these defendants presents a conflict of interest under Supreme Court Rule ("SCR") 20:1.7(a)(2). The Department therefore declines to represent Senator Miller in this action.

On March 16, 2011, Dane County District Attorney Ismael Ozanne filed a complaint against Senator Scott Fitzgerald, Senator Michael Ellis, Representative Jeff Fitzgerald, Representative Scott Suder, and Secretary of State Douglas La Follette. Among other things, the complaint seeks forfeitures against Senator Fitzgerald, Senator Ellis, Representative Fitzgerald, and Representative Suder (the "Original Defendants") for alleged violations of the Open Meetings Law resulting from their attendance at a meeting of the Joint Committee of Conference on March 9, 2011. All of the named defendants were sued in their official capacities. Only Secretary La Follette has been served; the remaining four defendants enjoy immunity from service and have elected not to waive that immunity. While the four original legislator-defendants have not been served and have not waived legislative immunity, they have sought from the Department of Justice and we have provided representation. In sum, all five of the



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Mr. Robert J. Marchant
Page 2

originally named defendants are currently being represented by the Department of Justice under the authority conferred in Wis. Stat. § 165.25(6)(a).

Wisconsin Stat. § 165.25(6)(a) authorizes the Attorney General to represent state officers sued in their official capacities. We agree that the face of the complaint indicates Senator Miller has been named in his official capacity. Thus, this prerequisite for representation has been satisfied.

The Department of Justice must, however, decline representation because in its judgment a conflict of interest exists.

SCR 20:1.7(a) provides that a lawyer shall not represent a client if the representation involves a "concurrent conflict of interest." A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client[.]" SCR 20:1.7(a)(2). The simultaneous representation of Senator Miller and the Original Defendants presents a concurrent conflict of interest under SCR 20:1.7(a)(2) because there is a significant risk that the representation of the other the defendants would be materially limited by the Department's responsibilities to Senator Miller.

An important factor in declining to undertake common representation in this case is the effect on client-lawyer confidentiality and the attorney-client privilege. Among commonly represented clients, information disclosed to the attorney may not be privileged. Each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. In a case such as this, there is the potential that information gained from an existing client in the scope of the attorney client relationship will be detrimental to the interests and representation of Senator Miller, or that information learned from Senator Miller will be detrimental to the interests and representation of existing clients. If that were to happen, neither the interests of the Department's existing clients nor the interests of Senator Miller would be adequately protected.

"Generally, if the relationship between the parties has already assumed antagonism, the possibility that [multiple] clients' interests can be adequately served by common representation is not very good." SCR 20:1.7, ABA comment [29]. The level of antagonism between Senator Miller and existing defendants relating to this Budget Repair Act, which included a finding of contempt against Senator Miller, is well known and need not be detailed. We also believe that there is a substantial possibility that Senator Miller's interests are directly opposed to currently represented legislator-defendants, particularly in light of the fact that he does not face any exposure to forfeitures because he did not attend the meeting in question. Wis. Stat. § 19.96.

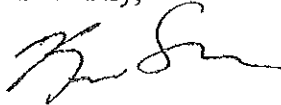
Last, we wish to make clear that this conflict is not because legislative defendants are of a different party or because Mr. Barca or Mr. Miller may wish to proceed on a separate legal

Mr. Robert J. Marchant
Page 3

theory. They would not have the right to do so. As I am sure you are aware, the Attorney General's representation of state officials in this capacity is not like a typical attorney-client relationship. The Attorney General has the authority to control such litigation, including the right to compromise or settle matters, as he determined to be in the best interest of the state, not individual defendants. Wis. Stat. § 165.25(6). However, because there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client," it is not in the best interests of the state for the Department to provide representation.

For these reasons, we believe it is necessary to decline Senator Miller's representation request. If you need any further information, please contact me.

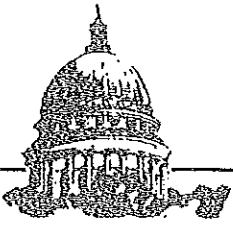
Sincerely,



KEVIN M. ST. JOHN
Deputy Attorney General

KMS:SLT:cla

c: Kevin Potter
Maria Lazar
Steve Kilpatrick



MARK MILLER

WISCONSIN STATE SENATOR

P.O. Box 7882 Madison, WI 53707-7882

April 28, 2011

Governor Scott Walker
State Capitol
115 East
Madison, WI 53702

Re: *State of Wisconsin es rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.*
Dane County Case No. 11-CV-1244

Dear Governor Scott Walker:

As you may be aware, I have been named in my official capacity as a defendant in the above lawsuit. Pursuant to s. 165.26(6)(a), stats., I requested representation by the Department of Justice. That request was denied due to a perceived conflict of interest. Please see the enclosed letter denying my request.

Pursuant to s. 14.11(2)(a), stats., I am requesting you approve the use of special council to represent me from Cullen, Weston, Pines, and Bach LLC. Given I was named as a defendant in my official capacity, I believe the public interest would require approval of the use of special counsel.

Thank you for your immediate attention to this matter.

Sincerely,

Mark Miller
State Senator
16th Senate District

