Daniel J. Treuden, Cal. St. Bar # 269351
The Bernhoft Law Firm, S.C.
207 E. Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
Attorney for the Petitioner, James King

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO

JAMES KING, Plaintiff, v. MARKHAM ROBINSON, Defendant,	Case No. FCS034452 Dept. 10 before the Hon. Michael Mattice **Hearing: March 11, 2011** **9:00 a.m. PDT**

MEMORANDUM IN OPPOSITION TO
ROBINSON'S DEMURRER TO COMPLAINT

James King ("King"), the plaintiff in this action, hereby files this memorandum of points and authorities in opposition to the Defendant Markham Robinson's ("Robinson"), demurrer to complaint. This motion and memorandum is filed pursuant to Cal. Code of Civil P. § 1005(b).

INTRODUCTION

Robinson filed his first demurrer to complaint on or about April 5, 2010, alleging, among other things, that (1) *collateral estoppel* barred the suit, and (2) King failed to serve several indispensible parties. The *collateral estoppel* argument was based on the fact that King had filed suit during the 2008 campaign

season. As has been the common practice by Robinson, he failed in his supporting memorandum to point out a relevant material fact, mainly that the prior case had been dismissed *without prejudice*. Here again, Robinson set forth two supporting exhibits to his Demurrer, but failed to include the relevant exhibit, mainly that on December 19, 2008, the Hon. Judge Michael Kenny issued a minute order in which he said: "As [King's] petition was dismissed without prejudice, Mr. King remains free to file another petition or other civil action to resolve the internal party dispute." (Decl. of Daniel J. Treuden, ¶ 3, Ex. A) (hereinafter "Treuden Decl.").

This document was provided in the opposition memorandum to the *collateral estoppel* argument in the first Demurrer, so there is no reason Robinson should have forgotten it again, unless the intent was to corrupt the otherwise impartial perception of the new Court since this case has rotated from Judge William C. Harrison. In this second Demurrer, Robinson does not specifically argue *collateral estoppel* as a basis to dismiss the suit, but the obvious reason for mentioning the various lawsuits preceding this case in the manner in which Robinson did so was to corrupt the otherwise impartial perception of the parties by inserting the false idea that the merits were adjudicated in a fair and open proceeding. Therefore, a brief explanation of each of those cases is necessary and the Court can make its own judgment about how this case was brought here today.

These factual statements are set forth in the Complaint, and at this procedural posture, are to be deemed undisputed. The dispute goes back to the 2008 campaign. (Compl., p. 1.) Edward Noonan ("Noonan") was then the Chairman of the American Independent Party ("AIP"). *Id.*, p. 2. The AIP was also then associated with a national party named the Constitution Party. *Id.*, ¶ 6. The Constitution Party chose a man from Florida to run for President in 2008 named Chuck Baldwin ("Baldwin"). *Id.* The support for Baldwin was widespread

throughout the AIP, but Noonan opposed Baldwin.[1] *Id.* Therefore, Noonan refused to issue any notice to call a state convention because if he did, Baldwin would certainly be chosen by the convention to be the AIP candidate for President. *Id.* Using the AIP bylaws, a majority of the state party committee members signed a document calling the convention. *Id.*, ¶¶ 10-11. Shortly after that, Noonan called his own convention, without proper notice as required by the by-laws. *Id.*, ¶ 25. Therefore, two conventions were held which resulted in two Presidential candidates and two new slates of party officers and national committeemen. Robinson was elected by the convention improperly called by Noonan and King was elected chairman by the convention properly called by the party state committee members. *Id.*, ¶ Ever since, these two factions (the "Robinson-faction" and the "King-faction") have continued to operate as best they can under the circumstances and this instant suit is about which faction's convention was properly constituted in 2008.[2] *Id.*, ¶¶ 15 and 30.

After the dispute, both factions sent the name of their Presidential nominees to the Secretary of State's office in accordance with state statutes governing Presidential ballots. *Id.*, ¶ 22 and 29. The Secretary of State Debra Bowen,

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[1] The basis for Noonan's displeasure with Baldwin was religious. Baldwin was a pastor by occupation and, based on information and belief, Baldwin had publicly said that the Mormon religion was either a cult or not a true Christian religion. Noonan is a Mormon, based on information and belief, and therefore could not support Baldwin for religious reasons.

[2] It should be noted that each faction held a biennial convention in the summer of 2010. While it would have been nice to have a fair and open election by both factions, the Robinson-faction refused to seat all of the proper delegates. Traditionally, the Constitution Party would hold the bienniel convention in August or so, several weeks after the summer primary because the by-laws and statutes governing the convention held that the winners of the party primary elections were to control the nominations of delegates to the convention.

Knowing the Robinson-faction is in the minority, the Robinson-faction scheduled the 2010 convention before the primary vote could be certified by the Secretary of State, and then refused to sit any of the primary winners or allow them to nominate their delegates, even in cases where the election results were not in dispute. A more detailed discussion of the Robinson-faction's underhanded tactics is found in King's Motion for Preliminary Injunction and the related papers filed for and against that motion.

decided she had not the discretion to adjudicate the internal party dispute. Noonan's name was on file as the then-current Chairman, so she placed the Noonan-faction's Presidential nominee on the ballot and accepted the Noonan-faction's notification that Robinson was the new chairman. *Id.*, ¶ 29.

A. The Sacramento County Matter.

King filed suit, in his capacity as Chairman of the AIP, against Secretary of State Debra Bowen in August of 2008. The case was styled *King v. Bowen*, Case No. 34-2008-80000016-CU-WM-GDS and was filed in Sacramento County. The primary basis for the suit was to seek a mandate ordering Debra Bowen to place the King-faction's Presidential nominee on the ballot. Judge Michael Kenny held that the suit was filed too late, and also held that the candidates and committeemen nominated by the Robinson-faction were indispensible parties. *See* Ex. A to the Mot. for Demurrer. In that suit, King also sought a declaration that his faction was properly constituted and King and his slate of party officers were the party officers *de jure*. (Treuden Decl., Ex. A.) Rather than determine the party issue separately, the case was dismissed on the indispensible party grounds. *See* Ex. A to the Mot. for Demurrer.

Because the ballots were printed, the Presidential-nominee issue was moot. King filed a motion for a new trial on the party-control issue arguing that the dismissal on indispensible party grounds should not have applied to which party had control. Judge Kenny denied the motion noting that the case was dismissed without prejudice and the King-faction was at liberty to file that suit separately. (Treuden Decl., Ex. A.) Rather than file an appeal, the King-faction decided to file a new lawsuit.

B. The Solano County Matters.

In the spring of 2009, King, as the leader of the King-faction, filed suit against Robinson, as the leader of the Robinson-faction. *See King v. Robinson*, Case No. FCS033119 (before Judge Power). Robinson avoided service to such an extent that private investigators were hired to locate him. Ultimately, King's counsel decided that the best way to serve him would be to lull Robinson into thinking that time had expired to serve him so he would feel safe to come out in public again.

King served Robinson by publication with the first Solano County lawsuit, let the time period to serve the summons expire, and then filed a second Solano County lawsuit. Within a couple days, a private investigator sat outside Robinson's home with the second lawsuit. (Treuden Decl., ¶ 4, Ex. B, p. 2.) None of the traditional attempts were made to serve Robinson since he had deliberately avoided service in the past. Robinson and his wife ventured out of there home. When they did, the private investigator exited his car, approached the Robinsons and called their name. The Robinsons fled the process server and ran into their house. This is insufficient to avoid service, however, as Judge Harrison held when denying a motion to dismiss for insufficient service. King voluntarily dismissed the first Solano County lawsuit and it was dismissed *without prejudice.*

In this lawsuit, Robinson has continued in his contemptuous conduct by doing things like calling depositions and failing to show up at them and filing frivolous motions to dismiss among other things. Yet, because this Court has access to the entire record of this litigation, a complete review of the unethical, unconscionable conduct Robinson had displayed in this case is unnecessary.

As can be seen from this recitation, King has been extremely diligent in his attempt to bring the merits of his dispute before a Court for judicial disposition.

On the other hand, it has been Robinson who has ferociously, and at times frivolously, fought to avoid any review of the merits of this dispute.

King opposes this demurrer to complaint. The dispute is still ripe for adjudication because the Court can still give a remedy. Any successors to King and Robinson, including the chairmen elected at the two factions' 2010 conventions are successors-in-interest or transferees-in-interest to the original dispute. The primary issue to be determined, the answer to which will decide this entire litigation, is no less at issue now than it was when the litigation began: which faction properly held its convention in 2008.

THE COURT CAN GRANT REMEDY

Robinson bases his second demurrer on one set of facts, that since the filing of this suit, both Robinson and King, pursuant to the AIP by-laws, turned over their respective claims to the chairmanship to successors chosen at each separate factions' 2010 convention. But the two individuals chosen by the respective factions are successors-in-interest or transferees-in-interest and both would have been bound by the court's judgment, under controlling and persuasive authority governing litigation involving "factions" or other groups difficult to define. Therefore, their assent to the chairmanship does not change the fact that both Robinson and King have common unified interests with their factions and are well-able to defend their factions' respective interests.

While King asserts that Robinson and King are adequate to litigate this suit, the proper remedy should this court hold that the successors-in-interest must be made parties would be to change the names of the parties as successors-in-interest or a transferee-in-interest to King and Robinson. As the Code of Civil Procedure clearly holds:

> An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The

> action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

Cal. Code Civ. P. § 368.5

For the same reason that Judge Harrison determined that King had not failed to serve any indispensable parties, mainly, that Robinson can represent the interests of his faction and its members, is the same reason King and Robinson can continue to represent the interests of their factions. The threshold question here is still whether King or Robinson were elected Chairman in 2008 at a properly-called convention. Can the Court provide complete relief, namely by declaring which of these two men were properly elected in 2008? Of course it can. Here, too, complete relief can be afforded to the named parties.

This situation before the Court is similar to the situation set forth in *TG Oceanside, L.P. v. City of Oceanside*, 156 Cal.App.4th 1355 (Cal. Ct. App. 2007). In *Oceanside*, a third person to the lawsuit was held *not* to be a necessary and indispensable party because the third person's interest would be defended by a named party. *Id.* at 1367-69. *See also Hayes v. California Dept. of Developmental Services*, 138 Cal.App.4th 1523 (Cal. Ct. App. 2006).

> The court found OAH [the proposed indispensable party,] would not suffer harm if it were not joined since its only role was to provide a hearing officer and its only interest would be to uphold the ALJ's administrative decision, which interests were amply protected by the real party in interest, ***whose answer and opposing brief made clear it would vigorously defend the administrative decision.*** . . . [Here, as] in *Hayes*, the hearing officer's interest in his decision will not go unprotected because the City and the Commission here are seeking to uphold it, and they have presented a vigorous defense of that decision.

Oceanside, 156 Cal.App.4th at 1367-68 (citing *Hayes*, 138 Cal.App.4th at 1532-33) (emphases added).

Robinson is really suggesting that Nathan Sorenson's ("Sorenson") interests as the successor to Robinson are not properly defended in this action. But the reality is that Robinson is adequately representing the interests of his entire faction of the AIP and will defend the interests of its members including Sorenson's.

One of the factual scenarios found in the federal system most parallel to the instant case is *Green v. Brophy*, 110 F.2d 538 (D.C. Cir. 1940). In *Green*, there was a dispute over the disposition of certain funds from a labor union. *Id.* at 540. Two factions existed in the union, and consequently, the court found that only a representative of each faction is necessary to the action, but not every member of the faction. *Id.* at 543.

> We are constrained to conclude that the plaintiff has failed to establish the presence of any party in this proceeding qualified to represent the two factions of the membership of the union as of the date of the transfer of the funds in question, and the union itself. We hold, therefore, that such persons, *or proper representatives thereof*, are indispensable parties to this litigation. Compare the disposition of the famous controversy between two rival factions in the Presbyterian Church, where it was stated that the indispensable parties to that litigation were representatives of the two rival factions, while trustees of the property in question were characterized as merely nominal parties.

Id. at 544 (citing *Helm v. Zarecor*, 222 U.S. 32 (1911); *Sharpe v. Bonham*, 224 U.S. 241 (1912); *Helm v. Zarecor*, 213 F. 648 (M.D. Tenn. 1913); and *Sharp v. Bonham*, 213 F. 660 (M.D. Tenn. 1913)) (emphasis added).

The rule has not changed with regard to political party factions. Robinson has failed to assert any disunity of interest between any of the members of his faction and himself. Based on this strong persuasive authority, this Court should follow the rule set forth in *Oceanside* and look to the "practical realities" of this situation. *Oceanside*, 156 Cal.App.4th at 1366.

There was also a recent case out of the Eastern District of New York that is persuasive in this regard. The case involved rival factions vying for control of the Reform Party. *MacKay v. Crews*, 2009 WL 5062119 (E.D.N.Y. 2009) (slip copy). While case is not published, the underlying factual similarities, mainly that there were rival factions of a political party, and how the federal court handled the analysis of party-privity, is persuasive and directly relevant to determining whether privity exists between Robinson, Sorenson and the Robinson-faction, and King, Don Grundmann ("Grundmann"), and the King-faction.[3] If privity does exist, then the suit may continue in King's and Robinson's names, or, alternatively, the suit may continue in the successors-in-interest's names: Grundmann and Sorenson.

In *MacKay*, there were rival Reform Party conventions held in 2005. *Id.* at *1. A lawsuit quickly followed in Tampa, Florida, and "[t]he district court determined that the validity of the elections at the Tampa convention was a threshold issue." *Id.* at *2. (Interestingly, that is exactly the threshold issue in this case: mainly whether Robinson-faction's convention or whether the King-faction's convention in 2008 were the properly-called convention.) That Tampa litigation went to a jury trial, and the jury decided whether the first convention was valid or invalid. Judgment was entered. *Id.*

The *MacKay* lawsuit occurred in New York after the Tampa lawsuit was over, and the question to be determined was whether the *collateral estoppel* barred the subsequent suit. The district court in New York determined that the case was barred because the individual members of each faction, although not specifically named in the first suit, were in privity with the Tampa litigants. *See id.* at *8-10

[3] Robinson argues that because Don Grundmann filed papers organizing another party – the Constituton Party of California – that he has somehow foreclosed any claim that faction has involving the AIP. A party cannot be disposed of a claim because he takes preventative action to protect against an adverse legal decision.

(discussing the privity of parties in a section entitled "Identity of Parties or Those in Privity with Them"). Similarly in this case, Sorenson is in privity with Robinson and the Robinson-faction just as Grundmann is in privity with King and the King-faction. The factions are well-established and sufficiently identifiable. Their interests are unified and consequently, this court may enter judgment which binds both factions, including Grundmann and Sorenson, and all other members of each faction.

For all of the foregoing reasons, the lawsuit may continue in the name of King and Robinson because King and Robinson are adequately able and have shown exceptional passion and ability to represent their respective factions. Alternatively, the suit may continue in the names of King's and Robinson's successors-in-interest or transferees-in-interest. *See* Cal. Code Civ. P. § 368.5.

CONCLUSION

Based on the foregoing, King prays this Court deny Robinson's demurrer.

Respectfully submitted this 28th day of February, 2011.

THE BERNHOFT LAW FIRM, P.C.
Attorneys for the Plaintiff, James King

Daniel J. Treuden
207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
djtreuden@bernhoftlaw.com