No. 07-1092

In The

Supreme Court of the United States

JUAN PEREZ,

Petitioner,

v.

CITY OF MIAMI BEACH,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEAN K. OLIN, Special Counsel
Counsel of Record
SHERI SACK, First Assistant
City Attorney
JOSE SMITH, City Attorney
CITY OF MIAMI BEACH
1700 Convention Center Dr.
Miami Beach, Florida 33139
Telephone: (305) 673-7470
Counsel for Respondent
City of Miami Beach

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

With limited exceptions not relevant here, Congress vested the Courts of Appeals with jurisdiction "of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The questions presented are:

1. Whether the Eleventh Circuit correctly adhered to the same bright-line rule as the other circuits holding that unserved defendants do not interfere with finality under § 1291.

2. Whether the Eleventh Circuit correctly adhered to the rule that appellate jurisdiction over a judgment adjudicating some claims cannot be created by dismissing the remaining claims without prejudice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

1. On January 26, 2007, the district court entered a final judgment in the City's favor. At the time, two other defendants who Petitioner had added to the lawsuit in his First Amended Complaint, remained unserved. Petitioner did not seek from the district court a Fed. R. Civ. P. 54(b) certification of that judgment.

2. On February 23, 2007, Petitioner filed his first notice of appeal. On March 23, 2007, the Eleventh Circuit sought advice (Res. App. 1-3)[1] regarding whether the two unserved defendants interfered with the finality of the final judgment from which he was appealing.

3. The request for advice cited *Insinga v. LaBella*, 817 F.2d 1469 (11th Cir. 1987) and *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers*, 817 F.2d 1533 (11th Cir. 1987), Eleventh Circuit precedent holding that unserved defendants were not considered parties under Rule 54(b) and would not affect the finality of a final judgment disposing of the remainder of the case.

4. On April 4, 2007, Petitioner filed his response to the request for advice (entitled "Position Regarding Jurisdictional Question"). Rather than merely confirming in that response, however, that Petitioner did

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[1] (Res. App. ___) refers to Respondent's Appendix attached hereto.

not intend to proceed against the two subsequently added but unserved defendants and that appellate jurisdiction was proper under *Insinga*, Petitioner voluntarily dismissed without prejudice the two unserved defendants. Petitioner admitted in his response that he refused the City's urging that the dismissals be with prejudice because Petitioner did not want to waive certain claims against the two unserved defendants.

5. On May 31, 2007, the Eleventh Circuit Court of Appeals dismissed Petitioner's appeal citing, *inter alia*, *Mesa v. United States*, 61 F.3d 20 (11th Cir. 1995) and *Druhan v. American Mut. Life*, 166 F.3d 1324 (11th Cir. 1999), its authority holding that dismissals without prejudice as to some defendants interfered with the finality of a judgment as to the other defendants.

6. Apparently perceiving (albeit incorrectly) that the issue interfering with finality was the district court's failure to issue an order recognizing the voluntary dismissals without prejudice, Petitioner sought and on August 7, 2007 obtained a second order of final judgment from the district court recognizing the voluntary dismissals of the two remaining defendants. Petitioner did not seek a Rule 54(b) certification of that final judgment. On September 1, 2007, Petitioner filed a notice of appeal from the new August 7th final judgment.

7. On September 14, 2007, the Eleventh Circuit again asked for advice regarding the finality of the

final judgment and again cited, *inter alia*, *Mesa* and *Druhan*. (Res. App. 4-6)[2]

8. On September 27, 2007, apparently realizing that only dismissals with prejudice of the two defendants would create finality for appellate review, Petitioner voluntarily dismissed with prejudice the two remaining defendants. Those defendants, however, had already been dismissed from the case (albeit without prejudice) and Petitioner did not first seek to have his claims against them reinstated. On November 23, 2007, the Eleventh Circuit again dismissed Petitioner's appeal.[3]

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[2] The City filed responses to both requests for advice stating that it believed that the Eleventh Circuit had jurisdiction. Upon further analysis, the City believes that the Eleventh Circuit was correct that it did not have jurisdiction. The City's responses to the contrary, however, are inconsequential because parties cannot stipulate to jurisdiction. *Matter of Kutner*, 656 F.2d 1107 (5th Cir. 1981).

[3] In addition to the foregoing Statement of the Case, the City corrects Petitioner's statement that he is a former employee of the City. (Petition at 2.) Petitioner is currently employed by the City. (App. at 6.)

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT ADHERED TO THE SAME BRIGHT-LINE RULE AS THE OTHER CIRCUITS REGARDING UNSERVED DEFENDANTS

Without merit is Petitioner's argument that the Eleventh Circuit disregards the bright-line rule followed by the other circuits that unserved defendants are not parties for Rule 54(b) purposes and do not interfere with the finality of a judgment entered against the other defendants. In *Insinga v. LaBella*, 817 F.2d 1469 (11th Cir. 1987), the Eleventh Circuit made its position clear:

> All other circuits which have addressed this issue have held that where an action is dismissed as to all defendants who have been served and only unserved defendants remain, the district court's judgment may be considered a final appealable order. *See Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986); *Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir. 1984); *Leonhard v. United States,* 633 F.2d 599, 608 (2d Cir. 1980), *cert. denied*, 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981); *United States v. Studivant,* 529 F.2d 673, 674 n. 2 (3d Cir. 1976). These courts reason that a defendant who has not been served with process is not a party for purposes of Fed.R.Civ.P. 54(b). With only an unserved defendant remaining, there is no reason to assume that there will be any further

> adjudication of the action. *We find this unanimous authority to be persuasive.*

Insinga, 817 F.2d at 1470 (emphasis added). And, the Eleventh Circuit disavowed earlier binding authority to the contrary:

> We acknowledge that a decision of the former Fifth Circuit, *Lohr v. United States,* 264 F.2d 619 (5th Cir. 1959), might appear to dictate a different result. *Lohr* involved a single claim against multiple defendants, two of whom were never served with process. The court held that the existence of the unserved defendants destroyed the finality of a judgment which disposed of the plaintiff's claims against the served defendants, therefore the plaintiff's appeal was dismissed. We note, however, that *Lohr* was decided nearly thirty years ago, without the benefit of the thoughtful analyses provided by our sister circuits. Moreover, *Lohr* was decided under the pre-1961 version of Rule 54(b), which addressed only multiple claims but was silent as to multiple parties. *See* Fed. R. Civ. P. 54(b) (advisory committee note to 1961 amendments). For these reasons, we are convinced that *Lohr* is no longer good law on the question of the appealability of the district court judgment in this case.

Insinga, 817 F.2d at 1470, n. 3.

Moreover, *FSLIC v. Tullos-Pierremont*, 894 F.2d 1469 (5th Cir. 1990), the opinion which Petitioner cites (and extensively quotes) as the authority

properly applying the correct bright-line rule regarding unserved defendants, specifically relies on *Insinga*. *FSLIC*, 894 F.2d at 1471-72. Further, footnote 2 in *Insinga*, which Petitioner cites as establishing that the Eleventh Circuit takes an *ad hoc* (not bright-line) approach to unserved defendants, in fact establishes the opposite. That footnote provides:

> Of course, if the district court is given reason to believe that it is premature to assume that service will not be made on the currently unserved parties, it can direct that final judgment under Fed. R. Civ. P. 58 not be entered until further order of the court. *See Leonhard,* 633 F.2d at 608 n. 9; *cf. Patchick,* 743 F.2d at 677 (action not final for purposes of appeal where dispute over service of process not yet resolved by district court).

Insinga, 817 F.2d at 1470, n. 2. Thus, the Eleventh Circuit confirms in that footnote that if an *ad hoc* determination regarding the likelihood of further litigation against unserved defendants is necessary, it must occur in the district court, not the circuit court. *FSLIC v. Tullos-Pierremont* is again in accord with *Insinga* on this proposition, containing a similar footnote:

> Other courts agree that the district court, which is in a much better position than this Court to make a "further adjudication" decision, can always direct (under Fed. R. Civ. P. 58) that there be no entry of judgment or other dispositive order involving the served defendants if it believes that this is appropriate

> because within a reasonable time service will likely be obtained and further adjudication will occur as to the unserved defendants. *See, e.g., Insinga*, 817 F.2d at 1470 n. 2; *Leonhard,* 633 F.2d at 609 n. 9; *cf. Patchik,* 743 F.2d at 677.

FSLIC v. Tullos-Pierremont, 894 F.2d at 1474, n. 4.

The foregoing establishes that the Eleventh Circuit adheres to the bright-line rule of the other circuits regarding unserved defendants. Adherence to that bright-line rule, however, does not relieve the circuit court of its duty to inquire about the existence of jurisdiction over a judgment affecting less than all of the parties. *See Nagle v. Lee*, 807 F.2d 435 (5th Cir. 1985) (failure of the district court to dispose of all claims imposes upon the circuit court a duty to examine its appellate jurisdiction); *see also Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) (court must consider *sua sponte* whether it has jurisdiction to entertain an appeal).

In the present case, that is just what the Eleventh Circuit did – inquire. But rather than merely confirm that the two defendants, although subsequently added were and would remain unserved, Petitioner voluntarily dismissed them without prejudice thereby implicating and running afoul of Eleventh Circuit authority on dismissals affecting finality (discussed below). Thus it was the Petitioner's actions, not a rogue position of the Eleventh Circuit, that interfered with the applicability of the rule

regarding unserved defendants. Review of that issue by this Court is unwarranted.

II. THE ELEVENTH CIRCUIT ADHERED TO THE RULE THAT APPELLATE JURISDICTION OVER A JUDGMENT ADJUDICATING SOME CLAIMS CANNOT BE CREATED BY DISMISSING THE REMAINING CLAIMS WITHOUT PREJUDICE

In *State Treasurer of the State of Michigan v. Barry*, 168 F.3d 8 (11th Cir. 1999), the Eleventh Circuit articulated its position that appellate jurisdiction over an order adjudicating some claims cannot be created by dismissing the remaining claims without prejudice, but jurisdiction will lie where the remaining claims are dismissed with prejudice. The court held that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice." *Barry* at 11. But "[a]ll that defendant must do to appeal the partial summary judgment is have its remaining claims dismissed with prejudice". *Barry* at 12, *quoting Construction Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334, 1337 (11th Cir. 1998), *cert. denied*, 526 U.S. 1039 (1999).

In justifying its holding, the court stated:

> [T]his Circuit has followed [this] rule for almost 25 years. . . . The final decision rule is well known and longstanding. It is clear, easy to follow, and promotes judicial efficiency,

> avoiding piecemeal appeals. Most importantly, the rule as it stands today is consistent with Rule 54(b), is faithful to the statutory language and policies underlying § 1291, and allows the district courts to retain control of their dockets.

Barry, 168 F.3d at 16. *Accord*, *Swope v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002); *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652 (2d Cir. 1996); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147 (10th Cir. 1992).[4]

Contrary to the definitive holding of *Barry*, Petitioner argues that the Eleventh Circuit stands alone in its view that jurisdiction is wanting even if the claimant has voluntarily dismissed his remaining claims with prejudice. (Petition at 9). In support of that theory, Petitioner does not and cannot cite *Barry*

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[4] As Petitioner states (Petition at 8), the First, Second, and Third Circuits are also in this "camp" requiring that a voluntary dismissal be with prejudice or its equivalent to create finality. *E.g.*, *Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207 (2d Cir. 2005); *John's Insulation, Inc. v. L. Addison & Assocs. Inc.*, 156 F.3d 101 (1st Cir. 1998); *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874 (3rd Cir. 1990). Petitioner also states that the Seventh, Eighth, and Ninth Circuits are in the "other camp" holding that a voluntary dismissal without prejudice is enough to confer appellate jurisdiction. *James v. Price Stern Sloan*, 283 F.3d 1064 (9th Cir. 2002); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1990); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976). Those cases, however, provide little analysis as to how finality under § 1291 is satisfied where the dismissed claims may be filed again.

(which holds to the contrary) but instead relies upon *Druhan v. American Mut. Life*, 166 F.3d 1324 (11th Cir. 1999). *Druhan*, however, is significantly different. There, an insurance company which had been sued for fraud successfully removed the action arguing that it was preempted by the Employee Retirement Income Security Act (ERISA), and the plaintiff's motion for remand was denied. Believing the remand denial was wrong and not wanting to try her case under ERISA, plaintiff moved for and was granted a voluntary dismissal of her *entire claim* with prejudice, and then took an appeal. The Eleventh Circuit dismissed the appeal for lack of jurisdiction finding no adverseness because plaintiff was attempting to appeal the judgment she had requested.

Unlike the present case or *Barry*, *Druhan* does not involve the appealability of an order which adjudicates some claims where the remainder of the claims are voluntarily dismissed.[5] Indeed, in *Barry*, *Druhan* is specifically distinguished because of those different facts:

> Dismissing a single, remaining claim with prejudice for the purpose of making final a prior adverse ruling on a separate and

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[5] *Druhan* does contain a lengthy footnote citing the Eleventh Circuit authority holding that it has no jurisdiction to hear appeals where the remaining claims are dismissed without prejudice, but then distinguishes that authority as inapposite there because Druhan had dismissed her *entire complaint*. *Id.* at 1325, n. 4.

> distinct claim is different from dismissing an entire complaint with prejudice which leaves no case or controversy to appeal. *See Druhan v. American Mutual Life,* 166 F.3d 1324 (11th Cir. 1999).

Barry, 168 F.3d at 15, n. 11. Accordingly, *Druhan* does not support, and *Barry* belies Petitioner's theory that the Eleventh Circuit will deny jurisdiction over an order adjudicating some claims even where the remaining claims are dismissed with prejudice.

In the present case, appellate jurisdiction was found lacking because of Petitioner's tactical decisions. His first notice of appeal was dismissed for lack of jurisdiction because his voluntary dismissal of the remaining claims was without prejudice (*see Barry*), and indeed his admission of refusing to dismiss with prejudice in order to preserve his remaining claims smacked of manufacturing jurisdiction. His second notice of appeal was dismissed for lack of jurisdiction because Petitioner's dismissal with prejudice had no legal effect since it was filed after the claims had already been dismissed and Petitioner did not first seek to have the claims reinstated in the district court. *See Barry*, 168 F.3d at 16 ("When such an attempt to craft jurisdiction [with a dismissal without prejudice] fails, the case is returned to the district court and the parties may seek to reopen the case and to reinstate the claim dismissed without prejudice.")

Indeed, Petitioner had several opportunities in this case to properly obtain appellate review. He could have sought a Rule 54(b) certification of the January

26th final judgment.[6] He could have merely confirmed upon the Eleventh Circuit's first request for advice on jurisdiction that the two subsequently added but yet unserved defendants would remain unserved and jurisdiction was proper under *Insinga*. He could have from the outset dismissed the unserved defendants with prejudice (as the City had requested). He could have sought a Rule 54(b) certification of the August 7th final judgment. And he could have sought to reinstate the claims he dismissed without prejudice before he attempted to dismiss them with prejudice.

Because the Eleventh Circuit's position on this issue, as articulated in *Barry*, is well-reasoned and consistent with several other circuits, and any inability to obtain appellate review resulted from Petitioner's tactical decisions, review of this case by this Court is unwarranted.

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[6] Contrary to Petitioner's claim, this Court rejected the notion that a Rule 54(b) certification should be granted only in the "infrequent harsh case," holding instead that "the decision to certify is with good reason left to the sound judicial discretion of the district court and should not be disturbed unless clearly unreasonable." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980).

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

JEAN K. OLIN, Special Counsel
Counsel of Record
SHERI SACK, First Assistant City Attorney
JOSE SMITH, City Attorney
CITY OF MIAMI BEACH
1700 Convention Center Dr.
Miami Beach, Florida 33139
Telephone: (305) 673-7470
Counsel for Respondent City of Miami Beach

March 2008

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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March 23, 2007

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 07-11021-JJ
Case Style: Juan M. Perez v. City of Miami Beach
District Court Number: 05-21545 CV-JLK

NOTICE OF APPEAL FILED: February 23, 2007

After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). Please note that the issuance of a jurisdictional question does *not* stay the time for filing appellant's briefs otherwise provided by 11th Cir. R. 31-1.

Counsel who wish to participate in this appeal and who have not yet filed an appearance form must complete and return an appearance form within fourteen (14) days. Appearance forms are available on the Internet at www.ca11.uscourts.gov. The clerk may not accept motions or other filings from an attorney until that attorney files an appearance form. *See* 11th Cir. R. 46-1(e). Pro se parties and court-appointed attorneys are not required to file an appearance form.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Carol P. Lewis
(404) 335-6179

c: District Court Clerk

No. 07-11021-JJ

JURISDICTIONAL QUESTION(S)

Whether the district court's January 29, 2007, final judgment – which dismisses "the entire Complaint" with prejudice – is final and appealable, in light of the fact that summary judgment was entered only against the City of Miami Beach, while two other

defendants, Jorge Gonzalez and Patricia Walker, were added as defendants in the first amended complaint but otherwise were never served and did not appear in the case? *See* Fed.R.Civ.P. 54(b); *Insinga v. La-Bella*, 817 F.2d 1469, 1470 (11th Cir. 1987); *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers*, 817 F.2d 1533, 1536 (11th Cir. 1987).

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
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September 14, 2007

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 07-14141-FF
Case Style: Juan M. Perez v. City of Miami Beach
District Court Number: 05-21545 CV-JLK

NOTICE OF APPEAL FILED: September 1, 2007

After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). Please note that the issuance of a jurisdictional question does *not* stay the time for filing appellant's briefs otherwise provided by 11th Cir. R. 31-1.

Counsel who wish to participate in this appeal and who have not yet filed an appearance form must complete and return an appearance form within fourteen (14) days. Appearance forms are available on the Internet at www.call.uscourts.gov. The clerk may not accept motions or other filings from an attorney until that attorney files an appearance form. *See* 11th Cir. R. 46-1(e). Pro se parties and court-appointed attorneys are not required to file an appearance form.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Marcus Simmons
(404) 335-6175

c: District Court Clerk

No. 07-14141-FF

JURISDICTIONAL QUESTION

Whether the district court's August 7, 2007, judgment granting summary judgment in favor of Defendant City of Miami Beach, is final and immediately appealable in light of (1) the plaintiff's voluntary dismissal of his claims against the remaining defendants

without prejudice; and (2) the district court's failure to certify the August 7 judgment for immediate appeal pursuant to Fed.R.Civ.P. 54(b)? *See* 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); *State Treasurer of the State of Michigan v. Barry*, 168 F.3d 8, 11-16 (11th Cir. 1999); *Constr. Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334, 1336-37 (11th Cir. 1998); *Mesa v. United States*, 61 F.3d 20, 22 (11th Cir. 1995); *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984); *Lex Tex Ltd. v. Unifi. Inc. (In re Yarn Processing Patent Validity Litig.)*, 680 F.2d 1338, 1340 (11th Cir. 1982).

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No. 07-1092

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AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 26 day of MARCH, 2008, send out from Omaha, NE 3 package(s) containing * copies of the BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served either by U.S. Mail, no less than first class postage prepaid or by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

JEAN K. OLIN, Special Counsel
Counsel of Record
SHERI SACK, First Assistant
City Attorney
JOSE SMITH, City Attorney
CITY OF MIAMI BEACH
1700 Convention Center Dr.
Miami Beach, Florida 33139
Telephone: (305) 673-7470
Counsel for Respondent
City of Miami Beach

Subscribed and sworn to before me this 26 day of MARCH, 2008.
I am duly authorized under the laws of the State of Nebraska
to administer oaths.

20572

ANDREW COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2010

Andrew Cockle
Notary Public

Patricia C. Billotte
Affiant

JOEL S. PERWIN
JOEL S. PERWIN, P.A.
169 East Flagler Street,
Suite 1422
Miami, Florida 33131
(305) 779-6090
1 Copy

JOHN DE LEON
CHAVEZ & DE LEON, P.A.
5975 Sunset Drive, Suite 605
South Miami, Florida 33143
(305) 740-5347
1 Copy

RICHARD B. ROSENTHAL
Counsel of Record
THE LAW OFFICES OF
RICHARD B. ROSENTHAL, P.A.
169 East Flagler Street,
Suite 1422
Miami, Florida 33131
(305) 779-6097
3 Copies

Counsel for Petitioner
Juan Perez

2311 Douglas Street
Omaha, Nebraska 68102-1283

1-800-225-6964
(402) 342-2831
Fax: (402) 342-4850

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No. 07-1092

JUAN PEREZ,
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Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 2,728 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 26 day of MARCH, 2008.
I am duly authorized under the laws of the State of Nebraska
to administer oaths.

20572

ANDREW COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2010

Notary Public

Affiant