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I. STATEMENT OF THE CASE AND FACTS

A. PROCEEDINGS BELOW

Plaintiff/Petitioner, PNR, Inc. (Petitioner or PNR) filed this action against Defendant/Respondents Beacon Property Management, Inc. (Beacon) and Ernest W. Willis (Willis) in March of 1996. Following an eight day jury trial in Palm Beach County Circuit Court, before the Honorable Moses Baker, Jr., on December 17, 1998 the jury returned an award of $1,200,000.00 against Willis individually and $540,000.00 in damages against Beacon. The award included $500,000.00 in punitive damages against Willis and $140,000.00 in punitive damages against Beacon.

Following the trial court's denial of Beacon and Willis' (collectively Respondents) post trial motions, an appeal was taken to the Fourth District Court of Appeals (Fourth District). On April 4, 2001, the Fourth District reversed both the compensatory and punitive damages awards which were based upon fraud, deceptive and unfair trade practices, tortious interference and wrongful eviction.[1] On June 5, 2001 the Fourth District denied Petitioner's motions for rehearing, rehearing en banc and request for certification of conflict. On July 5, 2001, Petitioner filed its notice to invoke the discretionary jurisdiction of this Court. Petitioner only sought review of the Fourth District's decision as it relates to the application of Florida's Deceptive and Unfair Trade Practices Act (DUTPA or Act) Fla. Stat. § 501.201 et seq. (1993). On

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[1] In its opinion the Fourth District incorrectly states that Petitioner's case was submitted to the jury on, *inter alia*, a claim for "negligent misrepresentation" when, in fact, this count was dropped at the close of Petitioner's case.

April 12, 2002 this Court entered an order accepting jurisdiction in this matter and setting oral argument.

B. STATEMENT OF FACTS[2]

In September 1994 PNR purchased Goodfellas Italian restaurant and acquired a long-term lease for the restaurant premises. (T-431). When PNR purchased Goodfellas it was a well established going concern with the same chef for the previous four (4) years. (T-426, 406-07). Goodfellas was located on the third floor of a building owned by Ocean One North, Inc. (Ocean One) in a very desirable beachfront location on the corner of Palmetto Park Road and State Road A1A in Boca Raton, Florida. (T-395-96). Ocean One was owned equally by Willis and Matthew Giacomino (Giacomino). Willis is also the owner and principal officer of Beacon and was the only Beacon representative with whom PNR had any contact. (T-784, 1408).

PNR's decision to purchase Goodfellas was based, in large part, on the statements and representations of Giacomino and Willis regarding a planned renovation of the building. (T-412). Giacomino showed PNR's president, James Robinson (Robinson) an artist's rendering which depicted what the building would look like once the renovations were complete. (T-412-413, PX 60A-R-1275). He also told Robinson that the renovations would cost approximately three hundred thousand dollars ($300,000.00). (T-417).

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[2] Although the issues raised in this appeal are almost purely legal, a brief factual background will help this Court appreciate the gravamen of the error committed below.

After his meeting with Giacomino, Robinson met with Willis to verify and confirm what Giacomino told him. (T-419-20). Willis verified everything that Giacomino said regarding the improvements and assured Robinson that PNR would not be responsible for any CAM charges resulting from the improvements. (T-421).

Ocean One hired Beacon as the management company, and it was responsible for all aspects of the daily maintenance, repair and upkeep of the property. (T-791-93, 798). Beacon actually performed these duties during the beginning of its contract term. (T-801, 1030-31).[3]

Shortly after Beacon took over the management and maintenance of the property the building began to receive code violations from the City of Boca Raton. The building continuously received code violations while under Beacon's management and control. (T-801). A city representative testified that the building amassed some $280,400.00 in fines from code violations; more than any building in the history of Boca Raton. (T-755).

Following PNR's purchase of Goodfellas, the renovations Giacomino and Willis told Robinson about, never began. (T-441). In fact, the condition of the property deteriorated rapidly. (T-442), During dinner hours, when the restaurant was busy, PNR would experience frequent water leaks through the ceiling, tar leaks through the air-conditioning vents, blackouts, elevator failures, power failures and other

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[3]On page one of its decision the Fourth District erroneously finds that Beacon was hired by the landlord to "superintend" the building. This word was never used during the eight day trial and is contrary to the Giacomino testimony that Ocean One hired Beacon to maintain the building.

adverse conditions. (T-443-448). PNR repeatedly notified the owners of the building including Giacomino, Willis, Ocean One and Beacon verbally and in writing about these deplorable conditions and failures. (T-449-451). Giacomino told Robinson to put his complaints in writing to Beacon since it was responsible the maintenance of the building. (T-452). This evidence confirms that Beacon's role was far more than "superintendent".

On July 1, 1995, as a result of years of neglect by Beacon and consequent dilapidation, the north wall of the building collapsed. (T-455, 727-8, 792-3, 798-802, 1299, 1305-6). Willis testified to having actual knowledge of the deterioration before the collapse. (T-1465, 1481, 653). The collapse caused the city to shut the building down and declare it an unsafe structure. This shutdown lasted more than seven months causing the eviction and subsequent closure of Goodfellas. (T-1188-89, 1206).

Important evidence was adduced at trial that Willis engaged in self dealing and other *ultra vires* acts which were <u>not</u> for the benefit of Ocean One. (T-863, 865-69). Giacomino himself sued Willis for self dealing and attempting to freeze him out of Ocean One. Willis ulterior motive was to foreclose the first mortgage he purchased, without Giacomino's consent, in order to freeze Giacomino out. (T-866-69, 879-80). Willis wanted to extinguish all of the tenants' leases since he wanted to sell the property and it was worth more vacant. Willis admitted to Giacomino that if he wanted to keep the building shut down following the collapse in order to destroy

PNR's business and end its lease. (T-847).

SUMMARY OF THE ARGUMENT

The Fourth District's holding that, in order to support a damages award under the DUTPA, a plaintiff must prove that the unfair or deceptive act or practice as the defendants "regular and systematic way of competition or a habitual or customary action or way of doing something" is contrary to the express Act's remedial purpose and the interpretive case law. The Fourth District's holding places an extremely onerous burden on claimants under the DUTPA which the statute does not contemplate. In so holding the Fourth District has re-written the DUTPA and eviscerated its protections.

The stated purpose of the Act and the broad definitions make it clear that it applies to commercial cases. The protections of the DUTPA have been applied to a variety of commercial cases and at least one residential landlord/tenant matter and it should be applied here. Even under the Fourth District's incorrect rationale for denying Petitioner's DUTPA claims, PNR is entitled to recover since it was proven that Respondent's acts were regular and systematic and were not a single occurrence. PNR's lack of contract remedy against Beacon illustrates why the Act is intended to cover PNR.

ARGUMENT

I. STANDARD OF REVIEW.

After diligent search, Petitioner was unable to find any Florida case directly on point regarding the applicable standard of review this Court applies in cases wherein jurisdiction has been accepted based upon express direct conflict between decisions of district courts of appeal on the same question of law. However, since the issues in this appeal are purely legal, not factual, it is believed that the applicable standard of review is *de novo*. Continental Concrete, Inc. v. Lakes at La Paz III, limited partnership, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000).

II THE FOURTH DISTRICT'S HOLDING IS CONTRARY TO THE DUTPA'S LIBERAL RULE OF CONSTRUCTION AND BROAD REMEDIAL PURPOSE

A. The 1993 Amendments Expanded the Act's Coverage.

In 1993 our Legislature made sweeping changes to the DUTPA which greatly expanded its reach and scope. The Act contains both a liberal rule of construction and an extremely broad remedial purpose. Section 501.202 provides:

> "The provisions of this part shall be construed liberally to promote the following policies:
>
> (1) To simplify, clarify and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive and unfair trade practices;
> (2) To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive or unfair acts or practices in the conduct of any trade or commerce.

> (3) To make state consumer protection and enforcement consistent with establish policies of federal law relating to consumer protection." Fla. Stat. § 501.202. (emphasis added).

The 1993 Amendments also greatly expanded the Act's definitions. For example, the term "violation" was expanded to include violations of any rule, regulation or standard of unfairness established by the Federal Trade Commission Act, 15 U.S.C. § 41, the FTC or the federal courts. Fla. Stat. § 501.203(3). Likewise the definition of a "consumer" was broadened to include every possible individual, entity, business organization or combination thereof. Fla. Stat. § 501.203(7). Clearly PNR, a corporation, falls within this broad definition and respondents can not dispute this point.

Finally, "trade or commerce" is defined by the Act to include "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." Trade or commerce also includes the conduct of "any trade or commerce, however denominated, including any non-profit or not-for-profit person or activity". Fla. Stat. § 501.203(8) (emphasis added).

"The legislative purpose of the 1993 amendments was to strengthen rather than diminish the original goal of the DUTPA which was to protect consumers from those who engage in unfair and deceptive trade practices and acts." Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602, 605 (Fla. 2nd DCA 1997).

The Fourth District's holding in this case is directly opposed to the legislative intent and courts' liberal application of the Act. The Fourth District has essentially re-written the Act by imposing an evidentiary burden on plaintiffs which is not contained in or contemplated by the Act. The decision is contrary to the Act's express remedial purpose. The Fourth District's decision, requires plaintiffs to prove that the unfair act or practice was the defendants "regular and systematic way of competition", or "a habitual or customary action or way of doing something." This requirement was not included by the legislature and makes it much more difficult for potential plaintiff's to allege and prove a claim. Likewise, the decision makes it easier for the unscrupulous to "engage in unfair methods of competition or unconscionable, deceptive or unfair acts or practices…" The limiting effects of this requirement are obvious.

III. FLORIDA COURTS HAVE INTERPRETED THE ACT EXPANSIVELY

Consistent with the 1993 amendments and the broad definitions, Florida courts interpreting DUTPA have found the concept of "unfair and deceptive" to be extremely broad. Day v. Le-Jo Enterprises, 521 So.2d 175, 178 (Fla. 3rd DCA. 1988), (*citing*, Urling v. Helms Exterminators, Inc., 468 So.2d 451 (Fla. 1st DCA 1985)) and have relied upon the provisions of the Federal Trade Commission Act, 15 U.S.C.A. § 45(a)(1) in concluding that "a practice is unfair" when it "offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602 (Fla. 2nd DCA. 1997), Suris v. Gilmore Liquidating, Inc., 651

So.2d 1282, 1283, (Fla. 3rd DCA 1995) (*citing* Spiegel, Inc. v. Federal Trade Comm'n, 540 F.2d 287, 293 (7th Cir.1976)). It is obvious that the court intended to include a broad range of conduct within the definition of "unfair".

As recognized by the Fourth District itself, in D.L.A. v. Father & Son Moving & Storage, 643 So.2d 22, 24 (Fla. 4th DCA 1994) "a specific rule or regulation is not necessary to the determination of what constitutes an unfair or deceptive practice under section 504.204(1). Rather, "the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction. . .the proscriptions against unfair and deceptive acts are flexible and are to be defined with flexibility by the myriad of cases from the field of business." D.L.A. v. Father & Son, supra, (*citing* F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 85 S.Ct. 1035 (1965))(emphasis added).

Unlike its decision in the case at bar, the rationale expressed by the Fourth District in Father and Son, is consistent with the Act's liberal rule of construction and the expansive definitions. In this case the Fourth District decision goes in the opposite direction. It places significant restrictions on the scope of the act requiring plaintiffs to prove that the unfair act or practice complained of was the defendants "regular and systematic way of competition", or "a habitual or customary action or way of doing something." No Florida court has ever interpreted the Act as imposing such an evidentiary burden. Following the Fourth District's reasoning, it is no longer enough to prove that the defendant engaged in or committed deceptive and unfair trade

practices in connection with the aggrieved party's business deal or transaction. Now Plaintiffs must prove that the defendant violates the DUTPA as a regular business practice. This is like requiring every plaintiff to prove a "mini" class action.

III. THE FOURTH DISTRICT ERRED IN HOLDING THAT A SINGLE DECEPTIVE ACT OR PRACTICE IS INSUFFICIENT TO SUPPORT A DAMAGES AWARD THE DUTPA

The Fourth District's holding expressly and directly conflicts with the decisions of other district courts of appeal. For example, in Suris v. Gilmore Liquidating, Inc., 651 So. 2d 1282 (Fla. 3d DCA 1995), an automobile buyer sued a dealer for fraud and violations of the DUTPA in connection with a single car purchase. The Third District Court of Appeals, reversing the trial court, concluded that sufficient evidence existed to create a jury question precluding a directed verdict under the DUTPA. Nowhere did the court opine that more than a single car purchase or a single aggrieved consumer is required to maintain an action under the DUTPA. Nor did the Court hold that the plaintiff was required to prove that the defendant's deceptive or unfair acts and practices were "regular and systematic" or "habitual and customary."

In Sarkis v. Pafford Oil Company, Inc., 697 So. 2d 524 (Fla. 1st DCA 1997) gas station lessees sued a gasoline company and its sales representative alleging that the company conspired to supply lessees with inferior grades of gasoline at higher grade prices. The lessees sued for, among other things, violations of the DUTPA. The Court held that "a party who asserts a claim under the statute must prove the existence of an unfair or deceptive act or practice." Id. at 528 (emphasis added). In so holding

the First District Court of Appeals noted that "the purpose of the statute is not merely to provide a remedy for an individual but to protect consumers at large from unfair trade practices." Id. Speaking in the singular, the Court expressly acknowledged that an single individual is afforded remedies by the DUTPA. It follows that the same is true for a single transaction.[4]

In Nieman v. Dryclean USA Franchise Company, Inc., 178 F.3d 1126 (11th Cir. 1999), the Eleventh Circuit Court of Appeals held that a single franchise purchaser could sue a Florida franchisor under the DUTPA for violating the FTC's Franchise Rule in connection with a single franchise purchase.

In Rollins, Inc. v. Heller, 454 So.2d 580 (Fla. 3d DCA 1984), it was held that homeowners could recover actual damages against a burglar alarm company for violations of the DUTPA in connection with a single purchase of a home alarm system. Again, this was a single transaction and the plaintiff was not required to prove that the defendant's deceptive and unfair acts were "regular and systematic" or "habitual and customary".

The Fourth District's decision in this case is even at odds with its own prior decisions. See e.g., Schauer v. General Motors Acceptance Corp., 2002 WL 429271 (Fla. 4th DCA 2002)(plaintiff's allegations that the defendant willfully harassed him with respect to collection of its debt were sufficient to state a claim under the

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[4] It seems the Fourth District has read the plural terms "acts" and "practices" too literally. The opinion seems to suggest that because these terms are in the plural that the legislature must have intended to require more than a single act or practice. It is respectfully submitted that the plural is used as a result of the many types of acts or practices which may be deceptive or unfair.

DUTPA); Samuels v. King Motor Company of Fort Lauderdale, 782 So.2d 489 (Fla. 4th DCA 2001)(buyer's allegation that auto dealer falsely represented that buyer was not entering into contract and misrepresented dealer's right to dispose of buyer's trade-in were sufficient to state a claim under DUTPA); Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati, 715 So.2d 311 (Fla. 4th DCA 1998)(individual automobile purchaser was entitled to damages under the DUTPA resulting from the dealer's false representations in connection with a single transaction); Cummings v. Warren Henry Motors, Inc., 648 So.2d 1230 (Fla. 4th DCA 1995)(automobile purchaser who alleged that the dealer used bait and switch tactics in representing the transaction as a sale when it was, in fact, a lease was sufficient to state a claim under the DUTPA).

All of the foregoing Fourth District cases involved a single automobile purchase/lease transaction and none required the purchaser to prove that it was the automobile dealer's regular or customary practice to commit deceptive and unfair acts in connection with its automobile sales. Requiring claimants to show a patter of behavior by the Defendant, beyond their own transaction, frustrates and severely limits the purpose of the Act and consumer's rights. The effect of the Court's holding will be to eviscerate the very protections the Act is intended to provide and to turn the DUTPA from an individual remedy into a *de-facto* class based remedy.

See also, Anden v. Litinsky, 472 So. 2d 825 (Fla. 4th DCA 1985) (corporate home builder and its principal held liable for damages under DUTPA in connection with a single residential real estate transaction);

IV. THE DUTPA APPLIES TO COMMERCIAL CASES[5]

There are several important points which clearly demonstrate that the Act applies to commercial cases. First, as stated above, the expanded definition of "consumer," includes corporations, partnerships and all other business entities. Second, the stated purpose of the Act is to protect the consuming public and "legitimate business enterprises". Third, the legislature clearly defined trade or commerce expansively and did not exclude leases or real property. To the contrary, the legislature deliberately included every type of trade or commerce. Fourth, by proscribing "unfair methods of competition", it is clear the legislature intended to protect business interests.

The crux of Respondents argument below was that the DUTPA does not apply to commercial leases. However, Respondents could offer no authority for this overly restrictive reading of the DUTPA. In fact, such a restrictive application is inconsistent with the clear legislative intent and the liberal approach taken by Florida Courts in previous cases.

As a practical matter, the DUTPA has been applied in a variety of commercial cases. Mack v. Bristol-Myers Squibb Co., 673 So.2d. 100 (Fla. 1st DCA 1996) (holding that antitrust violations are actionable under DUTPA); Laboratorios Roldan

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[5] Curiously, although in its opinion the Fourth District expressly recognizes that the DUTPA is not limited to consumer transactions, it refers for support of its conclusion to cases which stand for the opposite position. However, the cases the Court cites all pre-date the 1993 amendments, which make them of no precedential value.

v. Tex International, Inc., 902 F.Supp. 1555, 1569-70 (S.D. Fla. 1995) (Lanham Act violations are also actionable under DUTPA). Sarkis v. Pafford Oil Co., Inc., 697 So.2d 524 (Fla. 1st DCA 1997) (commercial lessee of gas station could maintain action against oil company under DUTPA for selling inferior grades of gasoline at higher grade prices). Millennium Communications & Fulfillment, Inc. v. Office of Attorney General, 761 So.2d 1256, 1260-61 (Fla. 3rd DCA 2000)(holding that DUTPA applies to commercial transactions between Florida corporations and non-resident consumers).

The closest case to the one at bar, which addressed the issue of the applying the DUTPA to a landlord/tenant action, which PNR offered and the trial court relied upon in denying respondents motion for directed verdict, is Kingston Square Tenants Association v. Tuskegee Gardens, Ltd., 792 F.Supp. 1566 (S.D. Fla. 1992). There it was held that a landlord is liable under the DUTPA for failing to maintain the leased premises in compliance with applicable building, housing and health codes. Id. at 1574-1575. Respondents could offer no contrary authority. The facts of Kingston are the same as this case, save the commercial/residential distinction. In light of its broad remedial purpose, its application to legitimate business interests and its previous application in commercial cases, there is no rational basis to limit DUTPA's application to residential leases.

Here the leased premises not only failed to comply with the provisions of the building code, but was allowed to become so dilapidated that it created a genuine risk

to the health and safety of the tenants. In fact, it was only by pure luck that the collapse of the wall did not occur during regular business hours and cause injury or death to PNR's employees, its consumers or the other tenants.

Petitioner does not advocate application of the Act to every landlord tenant case, commercial or residential. However, where a landlord and a property management company, through the acts of its officer, engage in clearly unscrupulous, unconscionable and deceptive acts, by intentionally causing the leased property to become so dilapidated that it violates nearly every basic building code and becomes a threat to public safety, as Respondents did here, then those individuals must be held liable under the DUTPA. (T-755, 801-02, 831-33, 837-42, 1182-89). Especially where, as here, it is proven that the unfair and deceptive acts were committed intentionally and with malice sufficient to justify the award of substantial punitive damages. Accordingly, since Willis participated in the violations of the DUTPA he is personally liable for damages. See, Anden v. Litinsky, 472 So.2d 825 (Fla. 4th DCA 1985). P.V. Construction Corp. v Sidney Kovner, 538 So. 2d 502, 594 (Fla. 4th DCA 1989).

V. THE DUTPA PROVIDES PNR WITH A STATUTORY REMEDY WHERE NO CONTRACT REMEDY EXISTS[6]

Respondents, in their brief on jurisdiction to this Court, strenuously argued that Petitioner "misapprehended" the Fourth District's holding. Respondent would have

[6] PNR did not recover against Beacon for breach of its management contract with the landlord as an intended third party beneficiary and therefore was without any contract remedy against Beacon.

this court believe that the holding was strictly limited to the finding that only a landlord is chargeable with breaches of a lease and, since neither Respondent was the landlord, neither could be liable. (Respondents Brief p. 5). If this was truly the Court's holding it would never have reached any discussion of the application of the DUTPA to this case.

Similarly, Respondents would also have this Court believe, that the more than two page discussion of the application of the DUTPA to this case, which consumed the bulk of the opinion, was purely "superfluous discussion". (Respondents Brief p. 6). Petitioner respectfully questions the intellectual honesty of Respondents position in this regard. The opinion itself proves this position is wrong. The Fourth District states that it granted oral argument primarily to consider the application of the DUTPA to PNR's claims and whether they constitute a consumer transaction as defined by DUTPA. Beacon, at 567.

While it is true that the opinion places some emphasis on the fact that Beacon was not the landlord, this point actually highlights the Fourth District's error. Since PNR had no contract rights *vis a vis* Beacon, but for the protections of the DUTPA, Petitioner would have had no remedy against Beacon at all. Naturally, in order to hold Beacon liable under the DUTPA, the jury had to believe the evidence that Beacon was responsible for maintenance of the property and disbelieve Respondents claims to the contrary. The jury, by its verdict, made its beliefs well known. It is respectfully submitted that, as a threshold matter, the Fourth District should not have replaced the

jury's fact finding with its own.

VI. EVEN IF THE FOURTH DISTRICT'S HOLDING WERE CORRECT PNR PROVED THAT BEACON'S DECEPTIVE AND UNFAIR ACTS AND PRACTICES WERE REGULAR AND SYSTEMATIC

PNR adduced undisputed evidence at trial that the severe dilapidation of the building took at least five years to occur. (T-455, 727-8, 792-3, 798-802, 1299, 1305-6) The collapse of the wall which precipitated PNR's eviction was a culmination of years of intentional refusal to perform even basic maintenance. It is also undisputed that Beacon's management contract term was for the five years preceding the collapse. Therefore it cannot reasonably be argued that Beacon's deceptive acts and practices were a one time occurrence. The opposite is true. All of the evidence at trial proved that Beacon engaged in a multi-year pattern of refusing to perform maintenance in order to force the tenant out of the building. PNR proved that Beacon actions were deliberate and calculated, since Willis wanted to get rid of all the tenants and sell the property. Therefore Beacon Willis not only committed a pattern of deceptive acts against PNR but also against the other tenants in the building who were also evicted by the collapse.

CONCLUSION

For the forgoing reasons Petitioner respectfully requests this Honorable Court reverse the decision and/or quash the opinion of the Fourth District in this case as it relates to Petitioners DUTPA claims, reinstate Petitioner's damages award against Respondents, find Petitioner to be the prevailing party, and award Petitioner all attorneys fees and costs incurred herein including fees and costs of appeal, and grant

all such other and further relief as the Court deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served regular mail on David Maher, Esquire, Harke & Clasby, LLP, Miami Center, Suite 1050, 201 South Biscayne Boulevard, Miami, Florida 33131 and Harry J. Ross, Esquire, Law Office of Harry J. Ross, 6100 Glades Road, Suite 211, Boca Raton, Florida 33434, this ______ day of May, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the rules relating to font size contained in Fla.R.App.P. 9.210. and is typed in Times New Roman 14 point.

By:________________________________
C. VINCENT LoCURTO
Florida Bar No. 41040

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