In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]
(Circuit Court Case No. [redacted])

[redacted]
Appellant,

v.

INDYMAC BANK F.S.B.,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

ICE LEGAL, P.A.
Counsel for Appellant
1015 N. State Road 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888

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ISSUE PRESENTED

Did Indymac demonstrate conclusively and to a certainty from the record that [redacted] could not plead or otherwise raise a genuine issue of material fact?

STATEMENT OF THE CASE AND FACTS

Indymac Bank F.S.B. ("Indymac") filed a complaint to foreclose an equity line of credit secured by a second mortgage[1] on the property of [redacted][2] The complaint alleged that Indymac was the holder of a lost mortgage note and a mortgage.[3] While no copy of a note is attached to the complaint, the attached mortgage lists Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee as nominee for Pacific Mutual Funding.[4] Also, attached is an assignment that purports to assign the mortgage from MERS as nominee for Impac Funding Corporation to Indymac.[5]

At the time that the complaint was filed by attorneys claiming to represent Indymac, the bank had already ceased to exist, having been seized by the Office of Thrift Supervision.[6]

[redacted] neither appeared nor filed an answer in the case, because, according to [redacted] she never received personal service of process.[7] Despite her absence from the litigation, no default was entered against her.

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[1] Notice of Filing, July 9, 2010 (R. 45-66).

[2] Complaint, filed November 10, 2008. (R. 1).

[3] Complaint, ¶ 4 (R. 2).

[4] Mortgage attached to Complaint (R. 8-15).

[5] Assignment of Mortgage attached to Complaint (R. 6).

[6] Exhibit B to Defendant, [redacted] Motion to Set Aside, Vacate and Reissue Final Judgment, served September 20, 2010 (R. 67-77).

Nevertheless, Indymac filed a summary judgment motion containing attorneys' fees affidavits and an affidavit of amounts due and owing.[8] The only document attached to the affidavits was an invoice for service of process.[9] The affidavit of indebtedness asserted, under oath, that Indymac was the servicer of the loan.[10] It did not assert that the defunct entity, Indymac, or anyone else, was the holder of the credit agreement and mortgage.

A few days before the summary judgment hearing, Indymac recanted its claim that the note was lost by dismissing the count for reestablishment of the lost note[11] and filing what its counsel claimed was the original credit agreement and mortgage.[12] Accompanying this notice of filing was an allonge that was not attached to the note.[13] The lower court granted summary judgment for Indymac.[14]

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[7] Defendant, [redacted] Motion to Set Aside, Vacate and Reissue Final Judgment, served September 20, 2010 (R. 67-77).

[8] Motion for Summary Judgment, dated July 22, 2009 (R. 18-28).

[9] *Id.*

[10] Affidavit of Amounts Due and Owing attached to Motion for Summary Judgment (R. 18-28).

[11] Notice of Voluntary Dismissal of Lost Note Count, served June 29, 2010 (R. 41).

[12] Notice of Filing, July 9, 2010 (R. 45-66).

[13] *Id.*

[14] Final Judgment, filed on July 9, 2010 (R. 32-37).

Upon learning of the judgment, [redacted] promptly moved to have it vacated and reissued because the clerk had delayed mailing it to her.[15] The lower court reissued the judgment on October 28, 2010.[16] [redacted] timely moved for rehearing of the judgment which was denied by the lower court.[17] This appeal followed.

[15] Defendant, [redacted] Motion to Set Aside, Vacate and Reissue Final Judgment, served September 20, 2010 (R. 67-77); Order Vacating and Reissuing Judgment, October 28, 2010 (R. 105-07).

[16] Reissued Judgment, October 28, 2010 (R. 108-13).

[17] Defendant [redacted] Motion for Rehearing, dated November 8, 2010 (R. 116-25); Order Denying Motion for Rehearing In Part, January 18, 2011 (R. 134-35).

SUMMARY OF THE ARGUMENT

Indymac had the burden of demonstrating conclusively and to a certainty from the record that the defendant could not plead or otherwise raise a genuine issue of material fact. It failed to meet its burden for the following reasons:

1) Indymac ceased to exist before the suit was even filed;
2) Indymac did not prove the notice provisions were met;
3) The credit agreement is not a negotiable instrument;
4) The credit agreement was not endorsed to Indymac;
5) No documents were authenticated to be summary judgment evidence;
6) The amount of the indebtedness is subject to dispute.

Additionally, Indymac's affidavits do not comply with Florida Rule of Civil Procedure 1.510(e) by attaching affidavits that were referred to or relied on, rendering the bald statements of affiant hearsay. The court erred in failing to strike the affidavit and in relying upon inadmissible evidence to enter judgment against [redacted]

Accordingly, Indymac failed to prove to a certainty that [redacted] could not raise genuine issues of material fact. This Court should reverse the final summary judgment and remand to the trial court for further proceedings.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Reeves v. North Broward Hosp. Dist.*, 821 So. 2d 319, 321 (Fla. 4th DCA 2002); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2002). A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). It is well settled that if a plaintiff moves for summary judgment prior to defendant's filing an answer, the movant must demonstrate conclusively and to a certainty from the record that the defendant cannot plead or otherwise raise a genuine issue of material fact. *Hodkin v. Ledbetter*, 487 So. 2d 1214, 1217 (Fla. 4th DCA 1986) (reversing final judgment of foreclosure because it would be impossible to determine whether an alleged affirmative defense might give rise to a genuine issue of material fact); *Burch v. Kibler*, 643 So. 2d 1120, 1121-22 (Fla. 4th DCA 1994); *BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936, 937-38 (Fla. 2d DCA 2010).

ARGUMENT

I. [redacted] possible affirmative defenses would have given rise to genuine issues of material fact.

Indymac moved for summary judgment prior to the filing of an answer, therefore, Indymac had the burden of demonstrating conclusively and to a certainty from the record that [redacted] could not plead or otherwise raise a genuine issue of material fact. *Hodkin*, 487 So. 2d at 1217; *Burch*, 643 So. 2d at 1121-22; *BAC Funding*, 28 So. 3d at 937-38. It utterly failed to meet that burden.

A. Indymac did not exist when the case was filed.

The style of this case named Indymac Bank F.S.B. as the plaintiff. Indymac Bank, F.S.B., however, ceased to exist prior to the filing of this suit.[18] Indymac is a non-entity. As such, it was not capable of bringing suit and certainly not entitled to a judgment.

"[T]he matter of the existence of the person named as plaintiff goes to the existence of a cause of action, relates to substance rather than procedure, and is jurisdictional." 59 Am.Jur. 2d § 239 (1987). While there is no case law in Florida on this issue, other states hold that "[a] judgment for a legally nonexistent entity is a nullity." *Causey v. Carpenters S. Nev. Vacation Trust*, 600 P. 2d 244, 245 (Nev. 1979). In *Niesz v. Gorsuch*, 295 F. 2d 909, 913-14 (9th Cir. 1961) the court held

[18] Exhibit B to Defendant, [redacted] Motion to Set Aside, Vacate and Reissue Final Judgment, served September 20, 2010 (R. 67-77).

that a company which had merged into another company did not continue to have capacity to be a party and to obtain and enforce a judgment. Furthermore, "while there are cases which hold that a substitution may be made where the action has begun in the name of a nonexistent plaintiff, none of them hold that an action may be maintained by a nonexistent plaintiff." *Loffler v. University of Texas System*, 610 S.W. 2d 188, 189 (Tex. Civ. App. Houston 1980). Because Indymac ceased to exist even before the complaint was filed, it was not entitled to maintain the suit and incapable of serving as the holder of a final judgment. Summary judgment should have been denied because it was not conclusively shown that the affirmative defense of Indymac's nonexistence could not have been raised in an answer.

B. Indymac failed to prove that the notice requirements of the credit agreement were met.

The credit agreement requires the lender to "mail or deliver written notice" to the borrower if it suspends her account because of a default.[19] It also gives [redacted] the opportunity to cure the default.[20] Indymac never even attempted to prove that notice that the account was suspended or of an opportunity to cure was

[19] 12B. of the Credit Agreement, p. 7 (R.). Section 18I. of the agreement contains a general waiver of notice clause that is inconsistent with the notice requirement. Any inconsistency or ambiguity, however, should be read against the lender that drafted the agreement. *Finlayson v. Broward County*, 471 So. 2d 67, 68 (Fla. 4th DCA 1985) (construing any ambiguity in a contract against the drafting party).

[20] *Id.*

provided. *See e.g., Lazuran v. Citimortgage, Inc.*, 35 So. 3d 189 (Fla. 4th DCA 2010); *Frost v. Regions Bank*, 15 So. 3d 905, 906 (Fla. 4th DCA 2009); *Goncharuk v. HSBC Mortgage Servs., Inc.*, 62 So. 3d 680, 682 (Fla. 2d DCA 2011); *Sandoro v. HSBC Bank*, 55 So. 3d 730, 732 (Fla. 2d DCA 2011). Accordingly, it failed to disprove this potential affirmative defense.

C. The credit line agreement is not a negotiable instrument, and therefore, cannot be transferred by endorsement.

1. The agreement does not contain an obligation to pay a sum certain.

For an instrument to be negotiable under Florida's Uniform Commercial Code ("UCC"), it must contain an unconditional promise to pay a sum certain. § 673.1041(1), Fla. Stat. (2008); *Nagel v. Cronebaugh*, 782 So. 2d 436, 439 (Fla. 5th DCA 2001). Here the credit agreement does not provide a fixed principal amount. Indeed, the operative "pay to the order" language does not state any particular amount:

> A. I promise to pay to your order, when and as due, all loans made under this Agreement, plus all unpaid finance charges, insurance premiums, collection costs and other charges I owe to you now or in the future.[21]

The principal amount of the loan, therefore, cannot be determined without reference to separate documentation of any loans or "draws" made under the

[21] Notice of Filing, July 9, 2010, p. 3 of the Home Equity Line of Credit Agreemnt (R. 45-66).

agreement. Hence, an agreement to extend credit as needed is not a negotiable instrument and section 673.1081(3) does not apply.

Other courts have also concluded that an agreement to extend a line of credit is not a negotiable instrument. For example, in *Resolution Trust Corp. v. Oaks Apts. Joint Venture,* 966 F.2d 995, 1001 (5th Cir. 1992), *reh. denied*, the Fifth Circuit agreed with a district court's opinion that "[t]he note in this case does not contain an obligation to pay a 'sum certain,' but rather 'the sum of TWO MILLION AND NO/100 DOLLARS ($2,000,000) or so much thereof as may be advanced . . . .' " *Id.* at 1001. The amount actually borrowed or "advanced" to the borrower could not be determined absent an inquiry to other documents. *See Yin v. Soc'y Nat'l Bank Indiana,* 665 N.E.2d 58, 62 (Ind. Ct. App. 1996) (line of credit was not a negotiable instrument); *Cadle Co. v. Richardson,* 597 So.2d 1052, 1055-56 (La. Ct. App. 1992) (a revolving loan account was not an unconditional promise to pay a sum certain); *Shepherd Mall State Bank v. Johnson,* 603 P.2d 1115, 1117 (Okla. 1991) (an unconditional guarantee did not contain a promise to pay a sum certain in money because the principal amount was adjustable); *In re 1301 Connecticut Ave. Assocs. v. Resolution Trust Corp.*, 126 B.R. 823, 831 (Bankr. D.C. 1991) (a construction loan, containing a condition whereby the principal could increase, was not a negotiable instrument because it was not an unconditional promise to pay a sum certain).

2. The terms of the agreement may only be determined by reference to other documents not before the court.

Furthermore, pages 4, 5, and 6 of the credit agreement reference an addendum that was apparently never filed much less authenticated as summary judgment evidence. A reference in a note to some extrinsic agreement destroys its negotiability if it indicates that the paper is to be burdened with the conditions of that agreement. *See Voges v. Ward*, 123 So. 785, 788 (1929). Since the addendum contains additional terms of the agreement, the credit agreement is not negotiable and incomplete as it stands.

In the absence of negotiability, Indymac cannot avail itself of the UCC's evidentiary shortcut (§ 673.3081(1)) to proper authentication of the agreement. Since the agreement was never authenticated, there was no admissible evidence of the debt before the court. Even if it had been authenticated, there would still be no evidence of the debt, because the credit agreement is not itself evidence of indebtedness, but rather the potential for indebtedness. Because such agreements are not themselves loans, the entity entitled to enforce the agreement must prove what draws were made against the credit line and the amounts of those draws.

Additionally, because the credit agreement is not a negotiable instrument, it cannot be transferred by a simple endorsement and Indymac—to the extent that a deceased corporation could "possess" anything—could not be its holder. Even if it could own the credit agreement, Indymac would be required to demonstrate the

right to enforce the credit agreement through some other means, such as a contract in which it purchased the credit agreement. Reversal is required because Indymac failed to conclusively show that an answer could not have asserted the defense that the agreement is not negotiable.

D. The credit agreement was not endorsed to Indymac.

Even if the credit line agreement were negotiable, it was never negotiated to Indymac because the document itself is neither specially endorsed to Indymac, nor endorsed in blank. Nor does the allonge in the court file operate as an endorsement to Indymac or in blank because it is not attached to the credit agreement.

"An allonge is a piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself." Black's Law Dictionary 76 (6th ed.1990); *see Booker v. Sarasota, Inc.,* 707 So. 2d 886, 887 (1st DCA 1998). An allonge "*must be so firmly affixed* [to the note] as to become a part thereof." Black's Law Dictionary 76 (6th ed.1990) (emphasis added). The UCC also notes that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is part of the instrument." § 673.2041(1), Fla. Stat.; *see also Booker v. Sarasota, Inc.,* 707 So. 2d at 889, n. 1.

The allonge in this case was not permanently affixed to the agreement. In fact, the allonge was located after the service list of the notice of filing.[22] As it stands, the agreement did not have any endorsements on it or on any allonge attached to it. Therefore, the credit agreement cannot, by itself, establish that Indymac is entitled to enforce its terms.

E. There are no authenticated documents showing Indymac owns the credit agreement.

Under Florida law documents must be sworn or certified in order to qualify as summary judgment evidence. *See Servedio v. U.S. Indymac Nat'l Ass'n*, 46 So. 3d 1105, 1108 (Fla. 4th DCA 2010) (noting that documents must be "*authenticated*, filed, and served more than twenty days before hearing); *see also Bifulco v. State Farm Auto. Ins. Co.*, 693 So. 2d 707, 709-11 (Fla. 4th DCA 1997) ("[m]erely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla. R. Civ. P. 1.510(e).").

Here, Indymac and its affidavit did not authenticate any documents. Nothing was sworn to or certified as a true and correct copy or original. Accordingly, the unauthenticated credit agreement, mortgage and assignment could never be "summary judgment evidence" upon which the lower court could

[22] Notice of Filing, July 9, 2010 (R. 45-66).

base its judgment. *See* Fla. R. Civ. P. Rule 1.510(c). Therefore, Indymac did not provide any admissible evidence to show it owned and held the note and mortgage.[23] Once again, Indymac did not conclusively show that a factual dispute on this issue could not have been raised in an answer.

F. [redacted] could dispute the amount of indebtedness.

The credit agreement shows it was signed on February 28, 2006.[24] The complaint alleges a default starting August 15, 2007.[25] This means there were payments for the seventeen plus months from the execution of the loan until the alleged default. The affidavit as to amounts due and owing does not credit [redacted] for any of these payments it admits were made on the loan.[26] [redacted] could raise an issue as to the amount of indebtedness based on the lack of credit for the payments made on the loan. The trial court erred, therefore, in granting summary judgment where no answer had been filed.

II. Indymac's affidavits are insufficient.

Rule 1.510(e) clearly states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served

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[23] Even if the assignment was authenticated, it could not transfer the credit agreement. MERS admittedly never holds notes. Further, there is no evidence the credit agreement was ever transferred to MERS to subsequently assign.

[24] Complaint, filed November 10, 2008. (R. 1).

[25] *Id.*

[26] Affidavit as to Amounts Due and Owing (R. 18-28).

therewith." In other words, where an affiant's knowledge is based on a separate document, an admissible version of that document must be attached or otherwise provided to the court. Fla. R. Civ. P. 1.510(e), *CSX Transp. Inc. v. Pasco County*, 660 So. 2d 757 (Fla. 2d DCA 1995); *Crosby v. Paxon Elec. Co.*, 534 So. 2d 787 (Fla. 1st DCA 1988). Failure to comply with this rule is basis for a denial of summary judgment. *Bifulco*, 693 So. 2d at 711; *Mack v. Commercial Indus. Park Inc.*, 541 So. 2d 800 (Fla. 4th DCA 1989); *Ferris v. Nichols*, 245 So. 2d 660, 662 (Fla. 4th DCA 1971) (reversing summary judgment the affidavits failed to attach sworn or certified copies of all papers or parts thereof referred to in the affidavits).

Even when affiants do not specifically identify the documents which, by necessity, were reviewed or relied upon in the process of preparing the affidavit, the failure to produce those documents renders the affidavit a legal nullity. This is because mere conclusory statements about the information contained in those documents are hearsay. *See Zoda v. Hedden*, 596 So. 2d 1225, 1226 (Fla. 2d DCA 1992) (unauthenticated documents referred to in, but not attached to, the affidavit constituted incompetent hearsay not sufficient to support summary judgment). "[A] corporate officer's affidavit which merely states conclusions or opinion [is insufficient] even if it is based on personal knowledge." *Alvarez v. Florida Ins. Guar. Ass'n*, 661 So. 2d 1230, 1232 n. 2 (Fla. 3d DCA 1995); *Nour v. All State Pipe Supply Co.*, 487 So. 2d 1204, 1205 (Fla. 1st DCA 1986). Furthermore, an

affidavit in support of summary judgment that does no more than indicate that the documents appear in the files and records of a business is not sufficient to meet the business records exception to the hearsay rule. *Crosby*, 534 So. 2d at 789.

In this case, Indymac's affidavits refer to and rely on records that were not attached or served with the affidavit. In the affidavit of amounts due and owing, Mr. Garciano admits that he reviewed all the records kept by the Indymac on this loan: "I am familiar with the books of account and have examined all books, records, and documents kept by Indymac Bank F.S.B. concerning the transaction alleged in the Complaint."[27] The affidavit goes on to list the specific amount of principal balance and interest charged.[28]

The affidavit for costs lists amounts for service of process, title search report, title examination and recording.[29] These amounts would be supported by bills, receipts, and other supporting documentation. Despite the fact that the affidavits on their face rely upon these records, no records were attached, much less sworn to or certified records. The language of Rule 1.510(e) is clear and the trial court erred in refusing to enforce this rule.

Moreover, Indymac's affidavit of amounts due and owing is inconsistent on its face. It claims interest of $770.97 for an unspecified period calculated at a per

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[27] Affidavit as to Amounts Due and Owing (R. 18-28).

[28] *Id.*

[29] *Id.*

diem rate of eleven dollars and ninety-five cents ($11.95).[30] Since there is no time period for the interest, it is impossible to determine if the interest is properly calculated. Further, the pier diem rate does not divide evenly into the amount charged. Meaning, there is no amount of days charging the per diem rate that equals $770.97. Accordingly, the interest in the affidavit is inconsistent with the listed per diem rate. The same is true for the final judgment. The $11.95 per diem rate of interest does not divide evenly into the amount charged.[31]

Also, the principal amount listed in the complaint and affidavit exceeds the credit limit by almost $4,000 and is different from the amount listed in the final judgment.[32] Specifically, the complaint and affidavit list the principal at $40, 570.05.[33] The credit limit in the agreement is $36,900.[34] Indymac could not prove these allegations.

Furthermore, the affidavit conflicts with Indymac's pleadings. Throughout the course of the case, Indymac's pleadings have alleged but one theory as to its standing to enforce the note and mortgage. Specifically, Indymac's Complaint

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[30] *Id.*

[31] *See* Reissued Judgment, October 28, 2010 (R. 108-13).

[32] Complaint, ¶ 8 (R. 2); Affidavit as to Amounts Due and Owing (R. 18-28); Reissued Judgment, October 28, 2010 (R. 108-13).

[33] Complaint, ¶ 8 (R. 2); Affidavit as to Amounts Due and Owing (R. 18-28).

[34] Notice of Filing, July 9, 2010 (R. 45-66).

states only that Indymac "is now the holder of the Mortgage Note and Mortgage."[35] Indymac's affidavit as to amounts due and owing, however, states that Indymac "is the servicer of the loan"[36] implying that it is merely acting in a representative capacity for some unidentified owner of the loan. The affidavit is completely silent as to who, if anyone, is the holder of the note and mortgage.

At summary judgment the movant's affidavits are to be strictly read. *See Holl v. Talcott*, 191 So. 2d 40, 46 (Fla. 1966). This presumption continues to apply on rehearing. *Id.* Having adduced evidence that it is the mere servicer (while remaining silent as to who the owner or holder might be), it must be presumed that Indymac is not, as it alleged, the "holder of the Mortgage Note and Mortgage." At best, Indymac's affidavit presented evidence that conflicted with its own allegations of standing to enforce the note, thus creating a material issue of fact.

Accordingly, Indymac's affidavit is insufficient and created an issue of fact on its face. It was error to grant summary judgment based on this legally deficient affidavit.

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[35] Complaint, ¶ 4 (R. 2).

[36] Affidavit of Amounts Due and Owing attached to Motion for Summary Judgment (R. 18-28).

CONCLUSION

Indymac failed to demonstrate conclusively that [redacted] could not plead or otherwise raise a genuine issue of material fact. A review of the record makes this clear. Indymac ceased to exist before the suit was even filed. Indymac did not prove the notice provisions were met. The agreement is not a negotiable instrument and not endorsed to Indymac. No documents were authenticated to be summary judgment evidence. The amount of indebtedness is subject to dispute. And lastly, Indymac's affidavits do not comply with Florida Rule of Civil Procedure 1.510(e) by failing to attach documents that were referred to or relied on.

Accordingly, this Court should reverse the final summary judgment and remand to the trial court for further proceedings.

Dated September 19, 2011

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Rd. 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: 
ENRIQUE NIEVES III
Florida Bar No. 41736

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this September 19, 2011 on all parties on the attached service list.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Rd. 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: ENRIQUE NIEVES III
Florida Bar No. 41736

SERVICE LIST

Travis Harvey, Esq.
FLORIDA DEFAULT LAW GROUP, P.L.
P.O. Box 25018
Tampa, FL 33622
Phone (813) 251-4766
Facsimile (813) 251-1541
Appellee's counsel

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

ICE LEGAL, P.A.
Counsel for Appellants
1015 N. State Rd. 7, Suite D
Royal Palm Beach, FL 33411
Telephone: (561) 729-0530
Facsimile: (866) 507-9888
Email: mail@icelegal.com

By: 
ENRIQUE NIEVES III
Florida Bar No. 41736