IN THE SURPEME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 65,266

COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE PALM BEACHES,

Petitioner,

v.

RICHARD G. ORMAN and JOYCE W. ORMAN, his wife, et al.,

Respondents.

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BRIEF OF RESPONDENTS ORMAN ON THE MERITS

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INDEX

	PAGE
CITATIONS OF AUTHORITY	i
PREFACE	1
STATEMENT OF THE CASE	1-3
STATEMENT OF THE FACTS	3-5
QUESTIONS PRESENTED	6
ARGUMENT	6-9
POINT I	
DID THE COURT ERRE IN DENYING FORECLOSURE OF A MORTGAGE BECAUSE THE OBLIGOR ENTRUSTED HIS SECRETARY TO KEEP THE MORTGAGE CURRENT AND THE SECRETARY, INSTEAD OF MAKING THE PAYMENTS, EMBEZZLED THE FUNDS?	6-15
POINT II	
DID THE COURT ERR IN DENYING COMMUNITY FEDERAL ATTORNEY'S FEES ON APPEAL?	15-16
CONCLUSION	16
CERTIFICATE OF SERVICE	16

CITATIONS OF AUTHORITY

ALTHOUSE v. KENNEY 182 So.2d 270 (Fla. 2d DCA 1966)	10
AUGUST TOBLER, INC. v. GOOLSBY 67 So.2d 537 (Fla. 1953)	13
BRADY v. EDGAR 415 So.2d 141 (Fla. 5th DCA 1982)	9
CAMPBELL v. WERNER 232 So.2d 252 (Fla. 3d DCA 1970)	11
CLARK v. LACHENMEIER 237 So.2d 583 (Fla. 2d DCA 1970)	9
DAVID v. SUN FEDERAL SAV. & LOAN ASS'N. 429 So.2d 1277 (Fla. 1st DCA 1983)	12
H.S.A., INC. v. HARRIS-IN-HOLLYWOOD, INC. 285 So.2d 690 (Fla. 4th DCA 1973)	14
HOME OWNERS LOAN CORP. v. WILKES 178 So.2d 161 (Fla. 1938)	12
LaBOUTIQUE OF BEAUTY ACADEMY, INC. v. MELOY 436 So.2d 396 (Fla. 2d DCA 1983)	10
NEW ENGLAND MUTUAL LIFE INS CO. v. LUXURY HOME BUILDERS, INC. 311 So.2d 160 (Fla. 3d DCA 1975)	12

INDEX(CONT)

PAGE

OVERHOLSER v. THEROUX
149 So.2d 582 (Fla. 3d DCA 1963) 10

PURVIS v. AMARA
49 So.2d 1023 (Fla. 1980) 16

RICE v. CAMPISI
3d DCA, 9 FLW 496 10

RIVERS v. AMARA
47 So.2d 364 (Fla. 1949) 16

ROCKWOOD v. DeROSA
279 So.2d 54 (Fla. 4th DCA 1973) 16

SCHECHTMAN v. GROBBELL
226 So.2d 1 (Fla. 2d DCA 1969) 16

THORNTON v. THORNTON
433 So.2d 682 (Fla. 5th DCA 1983) 15

37 Fla.Jur.2d Mortgages, §332 16

PREFACE

This Court has accepted jurisdiction of Petitioner's Petition to Invoke Discretionary Jurisdiction based upon "conflict". Petitioner was the Appellant/Plaintiff (hereinafter "the Federal") in the lower courts and Respondents were Appellees/Defendants (hereinafter the "Ormans"). The following symbol will be used:

(R)-Record-on-Appeal

STATEMENT OF THE CASE

The Federal sued the Ormans to foreclose a first mortgage on their former marital homeplace occupied by Mrs. Orman. Th Ormans pled affirmative defenses that the court ought to exercise its equitable jurisdiction to deny acceleration of maturity (R140-41,142-44,417). The Ormans alleged that the Ormans' homestead was worth far in excess of the mortgage balance (the property was worth $110,000 to $120,000 and the parties' equity was $50,000); that Mr. Orman had entrusted the responsibility of drawing checks to make the mortgage payments to his secretary who wrote out the checks which he signed but she threw those checks away and drew checks payable to herself so as to embezzle the money which should have been used to pay the mortgage payments; when Mr. Orman learned of his secretary's criminal actions, he tendered payment of the mortgage payments in arrears, but the Federal had refused the tender unless he would agreed to execute a renewal note with an interest rate of fourteen percent, when

the interest rate in the note in foreclosure was only eight and a half percent.

At the hearing, the Federal admitted there had been no impairment of its security (R106):

> THE COURT: Equitably speaking. And how is the bank going to be the loser if the court requires as a condition of the nonacceleration that all of the bank's costs be paid, including your attorney's fees and the costs and all the rest of it? Is there any real impairment of security?
>
> MR. BARNER: I can't say that there is because we have the first mortgage of about 50, a little over $50,000 and the property is probably worth more than that. I can't say that there's any impairment.

The trial court entered a final judgment dismissing the mortgage foreclosure, conditioned upon the Ormans paying all principal, interest, penalty interest, and late charges, real estate taxes, and insurance in the amount of $9,491, paying attorney's fees of $5,100, and costs of $1,005.39, all of which they paid (R228-29). The Federal appealed to the Fourth District which affirmed the trial court stating:

> . . .we are of the opinion that the cumulative effects of the facts and circumstances of this case support affirmance. First of all, the decision of the trial court inevitably comes to us clothed with a presumption of correctness. Second, this is an equitable proceeding and the trial judge's findings and conclusion comport with fairness and good conscience. Thus, as the Supreme Court noted in DELGADO v. STRONG, 360 So.2d 73 (Fla. 1978), the trial court having exercised its discretion in denying a mortgage foreclosure, it would be error for a district court to reverse it, absent an

abuse of discretion. Third, the occasion of an embezzlement by a third party employee is most unusual and compelling. Fourth, one of the co-tenants, who resides on this property, was utterly blameless and could not even be held responsible for the obviously poor choice of bookkeeper. Fifth, and perhaps most important, there is competent substantial evidence in the record to support the theory that both the borrowers were without knowledge of any arrearage for most of the period of the default. Last, there had been a long unblemished record of timely monthly payments.

STATEMENT OF THE FACTS

When this incident arose, the parties were separated and the Wife was residing in the marital home. The order for temporary relief entered in the divorce action required Mr. Orman to make the mortgage payment on the homestead (R19). Mr. Orman's secretary would draw the checks to pay his creditors, including the Federal. She also picked up his mail from the mailbox at the former marital homeplace (R20, 25, 45, 95).

In November, 1981, Mr. Orman became aware that his secretary had for several months drawn checks to pay his $380.81 monthly mortgage payments, and other creditors, and after he had signed the checks, she had thrown them away and embezzled the money (R20-23, 25). Mr. Orman contacted all of his creditors and asked them to permit him to make up the defaults, which had been occasioned by the embezzlement, by January, 1982. All of his other creditors, including a bank which held a second mortgage on the marital home, acceded to that request (R23).

In early December, 1981, Mr. Orman wrote the Federal asking for permission to bring the mortgage current around the first of

January, 1982 (R24, 215-16). In the meantime, the Federal wrote the Ormans requesting that the mortgage be brought current. Apparently Mr. Orman's secretary purloined those letters, which were not sent by certified mail, because the Ormans never received them (R93, 99).

The Ormans did receive an acceleration notice dated December 14, 1981, which was the first certified mail sent the Ormans by the Federal. Thereafter, Mr. Orman attempted to bring the mortgage current by tendering all arrearages, plus payments due through January 10, 1982, but the Federal would not accept the payments (R28,34).

Mr. Orman denied that his secretary's estranged husband told him that his secretary was taking his money (R94). Her estranged husband had only asked Mr. Orman if he was giving her any money and Mr. Orman said he was not (R94). Mr. Orman knew Karla was living with another man and assumed she was getting money from him (R94).

Mrs. Orman was not represented by counsel at the hearing on the Motion to Dismiss the foreclosure because her prior counsel had withdrawn when she was unable to pay him (R11). Mrs. Orman testified that she was an innocent victim of circumstances. She is an elementary school teacher and a responsible person. During the parties' marriage and during their separation, she had made all the mortgage payments on the home prior to the temporary relief order being entered (R15,26,42). She had wanted to make the mortgage payments on the marital homeplace herself but the judge in their domestic relations proceeding had ordered the

husband to make the payments instead (R39-40). She was unaware that the payments had not been made until she received the acceleration notice (R40). If she had been sent a notice by certified mail from the Federal she would have known the mortgage payments were in default and could have made the payments herself (R41).

The Federal states at page 2 of its brief "The parties were married during this entire time, contrary to the statement in the opinion of the Fourth District that they were divorced." Although the Fourth District refers to the Ormans as the ex-husband and ex-wife, the Fourth District did not state, contrary to the Federal's insinuation, that the parties were divorced during the fall of 1981 when these mortgage payments were not made. At that time the parties were separated and the divorce proceeding was pending. The parties were divorced in July 1982 (R19). Therefore, at the time of the foreclosure hearing, here under review, the parties were in fact divorced.

At page 3-4 of its brief the Federal refers to testimony of Karla's husband that he told Mr. Orman that his secretary might be taking money from him. Mr. Orman testified that this never occurred and therefore the trial court was free to reject the testimony of Karla's husband.

QUESTIONS PRESENTED

POINT I

DID THE COURT ERR IN DENYING FORECLOSURE OF A MORTGAGE BECAUSE THE OBLIGOR ENTRUSTED HIS SECRETARY TO KEEP THE MORTGAGE CURRENT AND THE SECRETARY, INSTEAD OF MAKING THE PAYMENTS, EMBEZZLED THE FUNDS?

POINT II

DID THE COURT ERR IN DENYING COMMUNITY FEDERAL ATTORNEY'S FEES ON APPEAL?

ARGUMENT

POINT I

DID THE COURT ERR IN DENYING FORECLOSURE OF A MORTGAGE BECAUSE THE OBLIGOR ENTRUSTED HIS SECRETARY TO KEEP THE MORTGAGE CURRENT AND THE SECRETARY, INSTEAD OF MAKING THE PAYMENTS, EMBEZZLED THE FUNDS?

The Federal takes great liberties in mistating the evidence. Mr. Orman did not turn over the responsibility of his financial affairs to a woman "who had been working for him a few months" (Pet's Brief p.6). Mr. Orman testified that he had known Karla Carter for seven years (R95). She had worked for him before at his prior employment (R95). She had proven to be a responsible and diligent employee whom Mr. Orman trusted a great deal (R95).

The Federal also incorrectly states that "Mr. and Mrs. Orman both entrusted his secretary to go through their mail being opened and bills going unpaid". Mrs. Orman did not entrust his secretary with anything. Mrs. Orman, who worked and did not return home until 4:00 p.m. each day, testified that she was aware that their mail was being be picked up from their mailbox, gone through, her name was written on the mail that was to go to

her, and returned to the mailbox (R44). Mr. Orman would keep his mail (R44-45). Mrs. Orman testified that she did not "think anything about it" other than the fact that "Richard was taking things out that he needed" (R45). She testified that some of her utility payments had been late because of this procedure (R44). Contrary to the Federal's statement at page 6, Mrs. Orman's bills did not go unpaid, even the utility bills.

The Federal states at page 7 that Mr. Orman was warned by Karla's estranged husband that it was a mystery where Karla was getting money because he was not giving her any. First, that is not a warning. Secondly, Mr. Orman knew that Karla was living with another man and assumed she was getting money from him (R99). He certainly had no idea she was embezzling his money.

The Federal refers to letters and monthly notices it sent to the Ormans. The evidence was undisputed that these were never received by the Ormans. Mr. Orman signed checks paying the mortgage during the fall months of 1981 but his secretary failed to mail the payments, and instead embezzled the money. She apparently intercepted all letters and notices to the parties from the Federal about non-payment until the Federal sent a certified letter, which Mrs. Orman had to sign for, advising of acceleration.

Contrary to the Federal's statement, Mrs. Orman did not handle her affairs in a careless manner. She knew her husband was reviewing their mail before she got it, but there is nothing careless about that. She had always received her mail and paid her bills.

Contrary to the Federal's contention, the facts in this case support relieving the Ormans from acceleration. In fact, the Fourth District specifically limited its decision to the cumulative facts in the case at hand:

> . . .it must be stressed that this opinion is limited to all of its cumulative facts and circumstances, no one, or less than all, of which should be offered as excuses for failure to meet financial obligations in subsequent cases.

The import of the Federal's argument is that however compelling the circumstances may be in favor of a mortgagor, the court must always accelerate maturity, however harsh that would be, where the mortgagee has not been at fault. Case law generally provides:

> It is generally accepted that a court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause in a mortgage where the default of the mortgagor was the result of some unconscionable or inequitable conduct of the mortgagee. Some courts go further and relieve a mortgagor from the effect of the acceleration clause where the default was caused by an accident, or a mistake of the mortgagor, who was acting in good faith, or unusual circumstances beyond his control, or simply where the court is confronted with genuinely equitable grounds for such relief.
>
> In other cases, the position is taken that unless the mortgagor's default can be traced to some inequitable design or action of the mortgagee, equity will not relieve the mortgagor from the effect of an operative acceleration clause. 55 Am.Jur. 2d Mortgages, §315.

In line with the above law, Florida is one of those states that does not restrict relief from acceleration only to those

instances where the mortgagee is at fault but also allows relief from acceleration where the result would be unconscionable and inequitable. For example, in BRADY v. EDGAR, 415 So.2d 141 (Fla. 5th DCA 1982), the court held at page 142:

> This appeal challenges the trial court's denial of acceleration by the mortgagees in a foreclosure.
>
> On the facts of the case we find no abuse in the exercise of the trial court's discretion to deny acceleration and foreclosure where the security was not impaired, notwithstanding that the trial court found the mortgagors in default for failure to maintain hazard insurance and to timely pay real estate taxes. (Emphasis added)

In the present case, the Federal agreed that its security was never impaired (R106). Moreover, it was paid all sums in arrears, attorney's fees and costs. There are situations in which the trial court ought to exercise its discretion to deny acceleration of maturity on equitable grounds even though the mortgagee does not contribute to the default, and this is one. As the court stated in the present case:

> But how many situations do you have where the bookkeeper embezzles the money?

In OVERHOLSER v. THEROUX, 149 So.2d 582 (Fla. 3d DCA 1963) and CLARK v. LACHENMEIER, 237 So.2d 583 (Fla. 2d DCA 1970), the courts have made it clear that there are factual instances which would render foreclosure unconscionable and inequitable:

> A court of equity has the power of relieving a mortgagor from the effect of an operative acceleration clause in a mortgage where the default of the mortgagor is the result of some unconscionable or inequitable conduct of

> the mortgagee, <u>or</u> where no harm is done to the security by virtue of the default, and in view of the circumstances the court considers it to be unjust and inequitable to order foreclosure because of a merely unharmful breach of a condition of the mortgage. (Emphasis added)

In OVERHOLSER, the court also held:

> . . . The court may also relieve a mortgagor from the effect of the acceleration clause where the default is caused by the confusion or mistake of the mortgagor acting in good faith, <u>or</u> where the mortgagor is technically <u>in</u> default because of unusual circumstances. (Emphasis added)

In LaBOUTIQUE OF BEAUTY ACADEMY, INC. v. MELOY, 436 So.2d 396 (Fla. 2d DCA 1983) and ALTHOUSE v. KENNEY, 182 So.2d 270 (Fla. 2d DCA 1966), the court held that a court of equity may refuse to foreclose a mortgage when to do so would be unjust and unconscionable.

In RICE v. CAMPISI, 3d DCA, 9 FLW 496, the Third District affirmed denial of acceleration and foreclosure of a mortgage, based upon the particular facts in that case, stating:

> Our affirmance flows from the broader equitable considerations recognized in RIVER HOLDING CO. v. NICKEL, 62 So.2d 702 (Fla. 1952), LIEBERBAUM v. SURF-COMBER HOTEL CORP., 122 So.2d 28 (Fla. 3d DCA 1960), OVERHOLSER v. THEROUX, 149 So.2d 582 (Fla. 3d DCA 1963), and La BOUTIQUE OF BEAUTY ACADEMY, INC. v. MELOY, 436 So.2d 396 (Fla. 2d DCA 1983). If the payment in the present case was late, its tardiness was beyond the control and knowledge of the appellees; they should not, therefore, be made to bear the penalty of acceleration. In so holding we do not recede from the sound public policy contained in CAMPBELL v. WERNER, 232 So.2d 252 (Fla. 3d DCA 1970) we merely distinguish this case upon its extraordinary facts and the equitable principles espoused in the cited cases.

Therefore, the Third District in RICE has distinguished its prior decision in CAMPBELL v. WERNER, 232 So.2d 252 (Fla. 3d DCA 1970), cited by the Amicus Curiae. CAMPBELL v. WERNER, supra, held that because of the essentiality of safeguarding the validity of contracts and their enforcement, a contract for acceleration of a mortgage should not be impaired except upon proof of certain facts or circumstances sufficient to deny acceleration. The court set forth in its decision conduct that had been held in certain cases to be sufficient. The court did not state that those were the only situations that would support denial of acceleration. Once again, that this is true is supported by the Third District's later decision in RICE v. CAMPISI, supra. In any event, CAMPBELL v. WERNER does not hold that there must be fault on the part of the mortgagee.

In BROOKS v. BROOKS, 2d DCA, 9 FLW 1901, the court reversed a summary judgment of foreclosure finding that there were existing factual issues as to "whether the circumstances of this case would render the foreclosure unconscionable or inequitable".

Under the above cases, it is submitted that the courts in this State sitting in equity can deny acceleration under the following factual circumstances: where the security has not been impaired and it would be unjust and inequitable to order foreclosure because of an unharmful breach; where the default is caused by the confusion or mistake of the mortgagor acting in good faith; where the mortgagor is technically in default because of unusual circumstances; where the mortgagor is in default because of circumstances beyond his control and knowledge; and,

where to accelerate would be unconscionable and inequitable. The present case falls into several of these categories, either of which the trial court sitting in equity could determine was sufficient to deny acceleration.

The Federal's reliance upon DAVID v. SUN FEDERAL SAV. AND LOAN ASS'N., 429 So.2d 1277 (Fla. 1st DCA 1983) is misplaced because DAVID is a case in which the trial court exercised its discretion to accelerate maturity and the appellate court upheld the exercise of that discretion. In the present case, the trial court exercised its discretion in refusing to accelerate, and that exercise of discretion should be upheld. The trial court has the discretion to accelerate maturity or not based on the equities presented.

The Federal also relies upon HOME OWNERS LOAN CORP. v. WILKES, 178 So.2d 161 (Fla. 1938). The present case is distinguishable because it did not concern, as did WILKES, a denial of acceleration because of the "borrower's health, good fortune, or ill fortune, or the regularity of his employment". The present case does not concern the mortgagor's inability to pay, as in WILKES, which has never been a valid reason for denying acceleration. Rather, the present case falls within BRADY, CLARK, OVERHOLSER, MELOY, and RICE, <u>supra</u>, which set forth factual circumstances allowing a trial court to grant relief from acceleration.

NEW ENGLAND MUTUAL LIFE INS. CO. v. LUXURY HOME BUILDERS, INC., 311 So.2d 160 (Fla. 3d DCA 1975) is likewise inapplicable because it concerned the financial inability of the mortgagor to

pay the mortgage resulting from personal or business misfortune. The present case does not concern whether the mortgagor's inability to pay the mortgage will excuse acceleration. The mortgagors were all times able to pay the mortgage.

Both the Federal and the Amicus Curiae argue that since the Fourth District recognized that death of the breadwinner, loss of employment, bankruptcy and serious family illnesses cannot serve as the basis for granting relief from acceleration, the Fourth District should not have found what happened to the Ormans deserving of relief. But death of the breadwinner, loss of employment, bankruptcy and serious family illness go to the inability of the mortgagor to make the mortgage payment. In the present case, the mortgagors had the ability to pay, and thought they were paying, the mortgage payments and only later found that the money was embezzled by Mr. Orman's secretary.

In AUGUST TOBLER, INC. v. GOOLSBY, 67 So.2d 537 (Fla. 1953), cited by the Federal, the Court in fact recognized that the issue was one of unconscionability by stating, "But are there special equities in this case which render the result so unconscionable that the chancellor was in error in reaching it?"

The Federal argues at page 10 of its brief that "the trial court and the Fourth District have either overlooked or ignored the fact that the conduct of Mr. Orman's agent is attributable to him". The real reason this was never addressed by either court is because the Federal has never before advanced this apparent agency argument. It is being raised for the first time on appeal and for that reason alone should be disregarded. In any event,

the Ormans are not bound by the criminal acts of Mr. Orman's secretary, which were totally outside the scope of her authority. There are at least three elements of the doctrine of apparent authority: (1) a representation by a principal; (2) reliance upon that particular representation by a third person; and (3) a change of position by such third person in reliance upon such representation. H.S.A., INC. v. HARRIS-IN-HOLLYWOOD, INC., 285 So.2d 690 (Fla. 4th DCA 1973). All of these elements are lacking as to the Federal. There was no representation by Mr. Orman to the Federal as to his secretary's scope of authority, no reliance by the Federal on such representation and no resulting change in position by the Federal. "Apparent authority" is totally inapplicable to this case and cannot be used to impute the criminal acts of Mr. Orman's secretary to the Ormans.

The Federal argues that the trial court erred in denying acceleration because of a delay by Mr. Orman in attempting to bring the mortgage current. Whether there was any delay under the circumstances of this case and what effect, if any, it would have on the Ormans' right to relief under the above case law was an issue for the trial court. As soon as Mr. Orman found out about the embezzlement in November 1981, he wrote all his creditors and advised them of the embezzlement and that he would bring everything current by January , 1982. He heard no objection from the Federal. Any subsequent correspondence sent to the Ormans by the Federal was apparently intercepted and destroyed by Mr. Orman's secretary. The first notice the Ormans had that the Federal, unlike all their other creditors, had

refused to allow them to bring the mortgage current by January was when they received the December 14, 1981 certified notice of acceleration. Mr. Orman thereafter made full payment, including payment for January, 1982, to the Federal, but payment was rejected.

In conclusion, fault of the lender is not required. The present case falls within the cases cited, supra, which allow the trial court, sitting in equity, to relieve a mortgagor from acceleration under certain circumstances. Under those cases the trial court could legally relieve the Ormans from acceleration. And factually, there was competent substantial evidence to support doing so. The Federal is merely rearguing the facts, in a light most favorable to it.

POINT II

DID THE COURT ERR IN DENYING COMMUNITY FEDERAL ATTORNEY'S FEES ON APPEAL?

The Federal was awarded attorney's fees in the trial court. The Federal chose to appeal, thus forcing the Ormans to pay attorney's fees to defend the appeal. The Federal was unsuccessful in its appeal. Certainly the appellate court had the sound discretion to refuse to award attorney's fees to the Federal under those circumstances. The issue of attorney's fees on appeal is not controlled by the fact that attorney's fees were awarded in the trial court, but is addressed to the appellate court's sound discretion. THORNTON v. THORNTON, 433 So.2d 682 (Fla. 5th DCA 1983). In this case as stated, supra, although the Ormans were in default and therefore the Federal was entitled to

attorney's fees in the trial court, the Federal chose to appeal further, and unsuccessfully. Therefore, the appellate court had the discretion to deny attorney's fees.

In addition, attorney's fees provided for in a mortgage may be disallowed by the Court if recovery of them would be inequitable or unconscionable, 37 Fla.Jur.2d, Mortgages, §332; PURVIS v. FRANK, 49 So.2d 1023 (Fla. 1980); RIVERS v. AMARA, 47 So.2d 364 (Fla. 1949), as in this case. Therefore, even if the Fourth District had ruled against the Ormans, it could have denied the Federal attorney's fees under the mortgage.

In SCHECHTMAN v. GROBBELL, 226 So.2d 1 (Fla. 2d DCA 1969) and ROCKWOOD v. DeROSA, 279 So.2d 54 (Fla. 4th DCA 1973), cited by the Federal, the appellate court merely held that the mortgagee should have been awarded attorney's fees in the trial court. In the present case, the Federal was awarded attorney's fees in the trial court. In BRADY v. EDGAR, supra, another case cited by the Federal, the appellate court merely exercised its jurisdiction to award attorney's fees on appeal. BRADY did not hold that attorney's fees had to be awarded in every instance.

CONCLUSION

The Fourth District Court of Appeal's decision should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: FREEMAN W. BARNER, 2001 Broadway, 6th Floor, Riviera Beach, FL 33404; EVAN I. FETTERMAN, 321 Northlake Blvd., NPB, FL

33408; CHARLES PIGOTT, Plaza 1551, Bldg. 100, 1551 Forum Place, WPB, FL 33401; and to JACK M. SKELDING, JR., 318 North Monroe Street, Tallahassee, FL 32301, this 26th day of DECEMBER, 1984.

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