OA 5-29-96

SUPREME COURT OF FLORIDA

CASE NO. 86,913

HTP, LTD., etc., et al.,

Petitioners

v.

LINEAS AERAS COSTARRICENSES, S.A., etc., et al.,

Respondents.

On Review of a Decision of the Third District Court of Appeal of Florida, Case No. 94-2779

AMICUS CURIAE BRIEF ON BEHALF OF FLORIDA CONSUMER ACTION NETWORK

PAUL J. SCHWIEP, ESQ.
Florida Bar No. 823244
ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
Office in the Grove, Penthouse
2699 South Bayshore Drive
Miami, Florida 33133
Telephone: (305) 858-2900
Facsimile: (305) 858-5261

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LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

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LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

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INTRODUCTION AND STATEMENT OF INTEREST

The Florida Consumer Action Network is a non-profit, grassroots consumer and environmental advocacy organization with more than 40,000 members reaching from Key West to Tallahassee. The Florida Consumer Action Network's mission is to empower citizens to influence public policy by organizing and educating in areas where consumer voices are underrepresented. With offices in Tampa, Fort Lauderdale and Tallahassee, Florida Consumer Action Network represents consumers throughout the State of Florida, a substantial number of whom, approximately 12,000 members, live in South Florida.

The Florida Consumer Action Network has a unique interest in protecting the rights and remedies of consumers in the State of Florida who are fraudulently induced into entering agreements. The Florida Consumer Action Network urges the Court to permit fraudulent inducement claims, which claims are neither logically or historically barred by the economic loss rule.

Because this Court's ruling might affect the interest of consumers in seeking full compensation for wrongs committed against them, particularly in the case of one-sided contracts of adhesion, this amicus brief is submitted in general support of the position of Respondents.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On September 13, 1995, the Third District Court of Appeal of Florida affirmed the judgment of the Circuit Court for the Eleventh Circuit in favor of Respondents (who were Plaintiffs below) Lineas Aeras Costarricenses, S.A., et al. ("Respondents"). On November 20, 1995, Petitioners (the Defendants below) HTP, Ltd., et al. ("Petitioners") invoked the discretionary jurisdiction of this Court. This matter is before this Court upon the discretionary review of the Third District Court of Appeal decision of September 13, 1995.

The background to the parties' dispute, at least as concerns the fraudulent inducement issue, is straightforward. In essence, Respondents filed an amended complaint against Petitioners alleging, inter alia, that Respondents were fraudulently induced into entering into a Settlement Agreement. Petitioners counterclaimed that Respondents were in breach of the Settlement Agreement. The Petitioners sought the dismissal of Respondents' fraudulent inducement count on the ground that Florida's economic loss rule bars the claim.

The Third District Court of Appeal rejected Petitioners' argument. The Third District found that a "cause of action for fraud in the inducement [is] an independent tort that [is] not barred by the economic loss rule." That decision conflicts with a recent en banc ruling from the Second District Court of Appeal to the effect that fraudulent inducement claims have been implicitly eliminated by this Court's decision in Casa Clara

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993). See Woodson v. Martin, 20 Fla. L. Weekly D2556 (Fla. 2d DCA Nov. 17, 1995); see also Linn-Well Dev. Corp. v. Preston & Farley, Inc., 21 Fla. L. Weekly D63 (Fla. 2d DCA Dec. 20, 1995) (same).

Meanwhile, the Fourth District Court of Appeal has adopted the Third District's view, and held fraudulent inducement claims are not barred. See TGI Dev., Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996) ("Fraud in the inducement, even when only economic losses are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule."); see also Jarmco, Inc. v. Polygard, Inc., 668 So. 2d 300 (Fla. 4th DCA 1996) (same).

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

ISSUE PRESENTED

Whether the Court should reverse decades of precedent and eliminate fraudulent inducement as a tort.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

SUMMARY OF ARGUMENT

This Court has never deployed the economic loss rule, as Petitioners wrongly assert, as a complete and total bar on tort claims of every variety for economic losses. Rather, this Court has invoked the rule with discretion as shorthand for a conclusion that the defendant in certain cases does not owe the plaintiff a duty in tort to avoid economic losses. Thus, the Court has held that where the plaintiff and defendant embark on a contractual relationship, then that contract will control the rights and liabilities of the parties, absent an independent tort. See AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181-82 (Fla. 1987) (holding that tort claims for economic losses are permitted if "distinguishable from or independent of [the] breach of contract") (quoting Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982)).

Fraudulent inducement claims have for decades been permitted in Florida precisely because the tort is premised on conduct independent from any contractual breach; viz., a defendant's misstatement designed to elicit reliance, and reasonably doing so, so as to trick the plaintiff into entering an agreement. See Isom v. Equitable Life Assurance Soc., 189 So. 259 (Fla. 1939) ("It is elementary that fraud in its procurement is ground for rescission and cancellation of any contract."). Fraudulent inducement is a separate and independent tort because it requires proof of facts completely distinct from a breach of contract count.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

Further, to prohibit, as Petitioners would, a party deceived into entering into a contract to raise that deceit, is to reward charlatans and shylocks who can through misrepresentations procure a contract. Florida courts condemn such practices, and afford a remedy against them. See Oceanic Villas v. Godson, 4 So. 2d 689, 690 (Fla. 1941) ("To hold that by the terms of the contract which is alleged to have been procured by fraud, the lessor could bind the lessee in such a manner that lessee would be bound by the fraud of the lessor, would be against the fundamental principles of law, equity, good morals, public policy and fair dealing.") The economic loss rule is not designed to achieve the draconian result Petitioners urge.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

ARGUMENT

FRAUD IN THE INDUCEMENT SHOULD NOT BE ELIMINATED AS A TORT

For a century, Florida courts have granted one induced into entering into a contract by another's intentional misrepresentations a remedy for that fraud. See Martyn v. J.E. Arnold & Co., 36 Fla. 446 (1895) (granting rescission of a fraudulently procured agreement). Because a necessary predicate to a fraudulent inducement claim is the existence of a contractual relationship, it goes without saying that the tort exists without regard to the contractual relationship. Id. The issue presented in this case is whether the Court should reverse decades of precedent and wholesale eliminate fraudulent inducement as a tort.

The Amici represented here, consumers in the State of Florida, argue that this Court should not embark on the unwarranted and dramatic expansion of the economic loss rule proposed by Petitioners for two reasons. First, the rationale that supports the economic loss rule, that is, that contracting parties have negotiated an allocation of rights and liabilities which should not be disturbed by tort law, cannot be logically applied where one of those parties enters into that negotiation process with deceit in its heart. Second, as a public policy matter, to do away with fraudulent inducement claims would remove an important deterrent to intentional (and negligent) misstatements, and indeed will reward fraud. After a brief

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

discussion of the development of Florida's economic loss rule, these two arguments are developed in further detail below.

A. THE HISTORICAL DEVELOPMENT OF THE FLORIDA ECONOMIC LOSS RULE.

The historical underpinnings of Florida's economic loss rule illustrate that the doctrine cannot be stretched so far so as to bar fraudulent inducement claims, which logically and historically are excepted from the rule. The following review of the historical development of the rule also establishes that the rule should be understood as shorthand for a finding that in certain specific instances, tort duties should not be extended so as to gap shortcomings in contractual rights where only economic damages are sought. In sum, the rule is historically, and as utilized by this Court, a "no duty" rule that applies in only limited circumstances where historically no tort-premised duties have existed.

This Court's first real foray into the economic loss rule was in Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987). There, the Court rejected plaintiff FPL's negligence claim which grew out of a contract between FPL and defendant Westinghouse pursuant to which FPL purchased steam generators from Westinghouse. FPL simultaneously claimed that the steam generators (i) failed to satisfy Westinghouse's contractual commitment, giving rise to a contract claim, and (ii) were negligently constructed and installed, giving rise to a tort claim. FPL sought recovery for economic losses only; no personal injury or property damages were sought.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

This Court disposed of FPL's tort claim on the ground that Westinghouse had "no duty under either a negligence or a strict products liability theory to prevent a product from [causing economic loss only]." Id. at 901 (quoting East River Steamship Corp. v. Transamerica Deleval, Inc., 476 U.S. 858, 871 (1986)). This Court noted, in contrast, that had FPL suffered personal injuries or property damages, tort remedies would be available because, due to a public safety concern, tort duties arise to avoid harm to persons and property. Id. Indeed, where personal injuries are suffered not only does tort law impose a duty, it also sharpens the standard for finding liability such that strict liability is imposed. Id.

Without expanding the jurisprudential reach of the economic loss rule, in AFM Corporation, this Court held that the economic loss rule bars tort claims among contracting parties for economic losses only, even where the contract concerns the provision of services rather than the sale of goods or products.

Finally, in Casa Clara, this Court found that even individuals not in privity of contract may be subject to the economic loss rule in certain circumstances. The Court held that homeowners had no tort claim for economic losses only against a concrete supplier who negligently manufactured the concrete used to build their homes. The Court explained that notwithstanding the lack of privity, the economic loss rule serves to bar claims in tort "for purely economic losses." Id. at 1247.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

What can be said of Florida Power & Light, AFM Corporation and Casa Clara? It seems clear that careful analysis of these opinions reveals that the Florida Supreme Court has utilized the label "economic loss rule" to describe a series of cases where tort duties do not provide a remedy. For example, in Florida Power & Light, the parties had contractually allocated rights and liabilities. To allow FPL to turn to negligence theories for recovery would be to remake the contract and allow FPL to obtain more than it bargained for. The duties and rights of each of FPL and Westinghouse were negotiated in detail (and in good faith -- no inducement claim was raised) in their agreement. To topple the agreement through a negligence claim would do violence to the agreement.

Similarly, in AFM Corporation, a contract was negotiated between the seller of a service and the plaintiff buyer. The Court explained that the agreement's division of rights and liabilities resolves all disputes regarding economic losses. Tort law cannot be drawn into play to remake the contract, unless personal injury or property damage is suffered or unless the tort is "separate and distinguishable" from the breach. AFM Corp., 515 So. 2d at 181. In the case of injury to person or property, the greater societal interest in avoiding such harms gives rise to tort claims. But in both Florida Power & Light and AFM Corporation, the fundamental premise is that tort duties do not exist to avoid economic losses among contracting parties. Those parties are bound (or stuck, as the case may be) to the contract.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

Casa Clara is different because there the parties had no contractual relationship. The opinion is clear reflection, however, of the view that no duty exists in tort to avoid economic losses only, absent some independent tort. See Schwiep, The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts, Fla. B. J., Nov. 1995, at 40. No duty existed in Casa Clara for various reasons, including the foreseeability of the plaintiffs, the closeness of the connection between the defendant's conduct and the harm suffered, and the degree of certainty that the plaintiff would suffer harm. Id. at 42.

In sum, the "economic loss rule" means that in certain kinds of cases, as delineated by the Florida Supreme Court, no tort duty is imposed on the defendant to avoid economic harm to the plaintiff. In those certain circumstances, contractual remedies may exist (or not, depending on how well the plaintiff negotiated), but tort claims do not arise.

It is equally clear and appropriate, however, that there exist a whole host of other areas in which tort duties do exist, and thus tort claims are viable, even though the plaintiff only suffers economic harms, and even where a contractual relationship exists. Thus, Florida courts have long recognized a malpractice claim for the economic damages of an intended will beneficiary negligently omitted from the will. See McAbee v. Edwards, 340 So. 2d 1167 (Fla. 4th DCA 1976). Florida also permits a home buyer to maintain a tort claim for the economic losses suffered when a seller fails to disclose a material defect. Johnson v.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

Davis, 480 So. 2d 625 (Fla. 1985). Defamation claims also seek compensation in tort for purely economic losses. Other examples abound (e.g., attorney and accountant malpractice claims, conversion, slander of title, civil theft) to illustrate that the economic loss rule cannot for a moment be considered a total bar on all tort claims for economic losses. The "rule" is merely a label given certain cases wherein courts have concluded that the defendant did not owe to plaintiff a duty to avoid the type of harm for which the plaintiff seeks recovery. There is nothing new here except the label, which had led to some confusion. See, e.g., Sandarac Ass'n v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352 (Fla. 2d DCA 1992) ("The economic loss rule is stated with great ease, but applied with great difficulty.").

B. FRAUDULENT INDUCEMENT IS A SEPARATE AND INDEPENDENT TORT THAT IS NOT LOGICALLY OR HISTORICALLY SUBJECT TO THE ECONOMIC LOSS RULE.

When contracting parties resort to litigation to recover for economic losses flowing from a contractual breach, it is only natural that the contract would form the basis for determining rights and liabilities. As the Court stated in Florida Power & Light, such a rule "encourages the parties to negotiate economic risks through warranty provisions and price." Florida Power & Light, 510 So. 2d at 901.

But central to the reasoning that parties ought to be held to their contractual allocation of rights and duties is the implicit finding that contracting parties embark on that process in good faith. Indeed, Florida is equally committed to the

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

notion that implicit in every contract is a covenant of good faith and fair dealing.

When one of those contracting parties peppers its negotiations with misrepresentations, the reasoning of Florida Power & Light and other economic loss rule cases breaks down. If one party misrepresents the facts, then the rationale that the parties are in good faith allocating rights simply makes no sense.

The tort of fraudulent inducement recognizes, as do all tort claims, a societal belief that individuals entering into agreements with one another owe each other a duty. The specific duty raised by fraudulent inducement claims is the duty to speak honestly (or not at all) as concerns facts that are material to the making of the contract. In terms of a tort-driven duty analysis, fraudulent inducement claims make sense: (i) the class of plaintiffs is wholly foreseeable -- the individuals involved in the negotiations and ultimately entering into a contract; (ii) the class of plaintiffs is limited; (iii) the conduct of the defendant is not societally valuable -- society has no interest in protecting frauds; and, (iv) the harms visited on the plaintiff are not otherwise compensable (if the contract provided a remedy the tort claim would not exist).

Moreover, the tort of fraudulent inducement arises out of common law notions of equity and fairness that society should, and historically has, protected. The Petitioner cannot seriously contest that members of the contracting public of Florida, be

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

they uninformed consumers or sophisticated bankers, expect that those with whom they enter into contracts will honestly describe the material facts represented so as to procure the contract. Tort law is keenly designed to protect these reasonable expectations.

It is equally important to bear in mind that the tort of fraudulent inducement requires as an element that the plaintiff's reliance on the defendant's statements be reasonable. See Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985). Absent reasonable reliance, no tort claim exists. This element ensures that the defendant will not be liable in tort for statements made that the defendant could not have expected the plaintiff to rely on.

It is also important to note that a defendant troubled over a potential fraudulent inducement claim can address that potential in his or her contract. Clauses specifically addressing the disclosures made (or, perhaps more importantly, not made) to procure the contract can be included in the contract. Similarly, a clause limiting the facts on which the parties rely in entering into the contract may be added. Admittedly, and appropriately, such clauses, if fraudulently obtained, may not be invoked to defeat an inducement claim, but the plaintiff will be put to the proof of establishing such a clause was fraudulently procured.

In sum, as a public policy matter, the rationale supporting the economic loss rule so far as it applies to contracting

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

parties, that is, that the parties' contractual allocation of rights should not be disturbed by tort law when only economic losses are suffered, is of needs premised on the notion that the allocation was made in good faith. If one of the contracting parties embarked on the negotiations with larceny in its heart, and procured the contract through misrepresentations reasonably relied upon, then the economic loss rule cannot be logically applied. Tort law appropriately protects societal expectations that in entering into negotiations that lead to the execution of an agreement, the parties are not defrauding one another.

C. FRAUDULENT INDUCEMENT CLAIMS SERVE AN IMPORTANT FUNCTION IN DETERRING THE FRAUDULENT PROCUREMENT OF AGREEMENTS.

As with all tort claims, fraudulent inducement is, as stated, a reflection of societal expectations: In entering into a contract, one expects he is not being lied to, and (more important for purposes of the instant point) one expects that he cannot lie with impunity. It is often the case that fraud is the exception, and so here. Cf., e.g., Baggett v. Electrical Local 915 Credit Union, 620 So. 2d 784 (Fla. 2d DCA 1993) (fraud is an exception to the parol evidence rule).

In this capacity, the tort of fraudulent inducement naturally serves a deterrent function. If the rule were such that one could obtain a binding agreement through lies, charlatans would rule and shylocks be rewarded. There would be no disincentive (beyond sheer morality) to lie to obtain a signature on a written agreement or a handshake in the case of an

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

oral contract. Once the agreement is executed, the defrauder could rely on the contract and escape scrutiny from his misrepresentations.

In the real world of consumer transactions and adhesion contracts, such a rule would be unacceptably harsh. A seller could lie to a consumer to obtain an agreement, the consumer could reasonably and expectedly rely on the misstatement, and yet be bound to the fraudulently procured agreement. Florida law has not and should not countenance such an inequitable rule. As this court stated in Beset v. Basnett, 389 So. 2d 995, 998 (Fla. 1980): "A person guilty of fraud should not be permitted to use the law as his shield."

Concededly, and unfortunately, the existence of the tort of fraudulent inducement adds some element of risk into contractual relationships. But it must be emphasized that the risk is outweighed by the inequity of allowing a wrong to occur without providing a remedy.

LAW OFFICES ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
OFFICE IN THE GROVE, 2699 SOUTH BAYSHORE DR., PENTHOUSE, MIAMI, FL. 33133 / TEL: (305) 858-2900 / TELEFAX: (305) 858-5261

CONCLUSION

This Court should reject Petitioner's request that years of Florida law defining and fine-tuning the law of fraudulent inducement be dashed on the rocks of the economic loss rule. The Third District Court of Appeal should be affirmed.

Respectfully submitted,

PAUL J. SCHWIEP, ESQ.
Florida Bar No. 823244
ARAGON, BURLINGTON, WEIL & CROCKETT, P.A.
On behalf of Florida Consumer Action Network
Office in the Grove, Penthouse
2699 South Bayshore Drive
Miami, Florida 33133
Telephone: (305) 858-2900

By: Paul J. Schwiep
Paul J. Schwiep
Florida Bar No. 823244

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via United States Mail, this 12th day of April, 1996, upon the following:

Lester M. Bridgeman, Esq.
Miller, Hamilton, Snider & Odom, L.L.C.
Post Office Box 46
Mobile, Alabama 36601

Lawrence R. Metsch, Esq.
Metsch & Metsch, P.A.
19 West Flagler Street
Suite 416
Miami, Florida 33130

Richard Hyland, Esq.
William J. Brown, Esq.
777 Brickell Avenue
Suite 1114
Miami, Florida 33131

Carl M. Hoffman, Esq.
Hoffman and Hertzig
241 Sevilla Avenue
Suite 900
Coral Gables, Florida 33134

By: Paul J. Schwiep
Paul J. Schwiep