IN THE SUPREME COURT OF FLORIDA

Case No. SC03-896

LEWIS B. FREEMAN, as Receiver of Unique Gems Int'l Corp., and LUCY MARTINEZ, individually and on behalf of all others similarly situated,

Appellants,

vs.

FIRST UNION NATIONAL BANK, a national banking association, f/k/a First Union National Bank of Florida,

Appellee.

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ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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# REPLY BRIEF OF APPELLANTS

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Scott A. Silver, Esq.
Silver, Garvett & Henkel, P.A.
1110 Brickell Avenue - PH One
Miami, Florida 33131

Ervin Gonzalez, Esq.
Colson, Hicks, et al
255 Aragon Avenue -2nd Floor
Coral Gables, Florida 33134

Robert C. Josefsberg, Esq.
Podhurst, Orseck, Josefsberg, et al
25 West Flagler Street - Suite 800
Miami, Florida 33131

Steven Mishan, Esq.
Steven Mishan, P.A.
1110 Brickell Avenue - PH One
Miami, Florida 33131

Hersch & Talisman, P.A.
1110 Brickell Avenue
Penthouse One
Miami, Florida 33131

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## REPLY TO ARGUMENT

This appeal asks this Court to determine whether Florida recognizes a cause of action for aiding and abetting a fraudulent transfer – in this case, whether the creditors of Unique Gems, who were defrauded of forty million dollars by that company's principals, have an action against First Union National Bank for knowingly providing substantial assistance to Unique Gems' principals in wire-transferring nineteen million dollars of that stolen money to Liechtenstein so that the funds would be available for the looters, but not the creditors.

First Union now admits that Florida recognizes aider and abettor liability; that the Florida courts have allowed actions for conspiracy to commit fraudulent transfers; and that the courts have not limited the availability of such to actions against "transferees." First Union does not even attempt to explain why an action alleging a conspiracy to fraudulently convey should be allowed, but not one based on aiding and abetting such a conveyance. Rather, the Bank argues that the Florida Uniform Fraudulent Transfer Act (UFTA) only creates a remedy against a "transferee" and not a tort action and, therefore, there can be no liability for aiding and abetting a fraudulent transfer (or presumably conspiring to commit one). As will be shown below, the premises underlying First Union's argument are incorrect. Therefore, the argument itself has no merit.

**A. Relief under the UFTA is not limited to cancellation of the transfer.**

Contrary to First Union's contention, the Florida UFTA does not limit the relief a creditor may receive to cancellation of the transfer or disgorgement from the transferee. Rather, §726.108, Fla. Stat., expressly provides that a court may grant *any* relief the circumstances may require:

> (1) In an action for relief against a transfer or obligation under ss. 726.101-726.112, a creditor, subject to the limitations in s. 726.109 may obtain:
>
> * * *
>
> (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
>
> *3. Any other relief the circumstances may require.*[1]

The Fourth District expressly held in *Hansard Construction Corp. v. Rite Aid of Fla., Inc.*, 783 So. 2d 307 (Fla. 4th DCA 2001), that this section is broad enough to allow a claim for money damages against a transferor:

> Section 726.108(1)(c)(3) provides that a movant may, in addition to the remedies specifically enumerated, be entitled to "[a]ny other relief the circumstances may require." Despite the fact that the other remedies set forth in the [Uniform Fraudulent Transfer] Act are equitable in nature, we find this catchall provision sufficiently broad to encompass the monetary judgment sought by appellants. Section 726.112 provides that Florida's Uniform Fraudulent

[1]Unless otherwise indicated, all emphasis is supplied.

> Transfer Act "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the law among states enacting it." At least one other jurisdiction which has considered the issue head-on concluded, as we have, that *a plaintiff may recover money damages against the* ***transferor*** *under the so-called catchall provision*, section 726.108(1)(c)(3), of the Uniform Fraudulent Transfer Act. *See Profeta v. Lombardo*, 75 Ohio App. 3d 621, 600 N.E.2d 360 (1991).

783 So. 2d at 308-309 (emphasis in original).

That is exactly the relief plaintiffs in this case seek. First Union had the nineteen million dollars in its possession before it wire-transferred that money to Liechtenstein; and, it admits that it was the transferor in regard to these transfers. Accordingly, under *Hansard*, the UFTA is broad enough to support plaintiffs' claim for damages against First Union.

Indeed, since the Fifth District merely held in *Bankfirst v. UBS Paine Webber, Inc.*, 842 So. 2d 155 (Fla. 5th DCA 2003), that there is no "cause of action against a party who allegedly assists a debtor in a fraudulent conversion or transfer of property, *where the person does not come into possession of the property*," recovery is also allowable under this case because First Union had possession of the property. Accordingly, recognition of plaintiffs' cause of action against First Union in this case would be in full accord with all prior Florida authority. [2]

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[2]The Third District merely followed *Bankfirst* in *Danzas Taiwan, Ltd. v. Freeman*, 28 Fla. L. Weekly D 1163 (Fla. 3d DCA May 14, 2003). Therefore, plaintiffs have stated a cause of action under *Danzas* as well – even assuming that

**B. Violation of the UFTA is a tort.**

First Union's contention that a conveyance made in violation of the UFTA is not a tort is also contrary to the prior law of this state and illogical.[3] Even before the UFTA was adopted, this Court held that, where property had been fraudulently transferred by a debtor and could not be reached, the court had the right to enter a personal decree for damages. *Winn & Lovett Grocery Co. v. Saffold Brothers Produce Co.*, 164 So. 681 (Fla. 1936). In *Winn & Lovett*, a money judgment in the value of all of the property transferred was entered against the debtor and two different transferees, seemingly without regard to which transferee received which property. 164 So. at 682-683. Thus, the Court recognized that a fraudulent transfer supports an award of damages.[4]

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the Third District does not grant the pending motion for rehearing and rehearing *en banc*. It should be noted in this regard that the decision in *Danzas* is contrary to the Third District's earlier decision in *Invo Florida, Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263, 1266 (Fla. 3d DCA 2000). There, the Court held that the elements required to pursue a claim for conspiracy to effect fraudulent transfers were different from the elements required to pursue a claim for breach of contract and, therefore, the conspiracy claim was not barred by the economic loss rule. Thus, the Third District recognized the existence of a cause of action for conspiracy to effect fraudulent transfers.

[3]Plaintiffs realize that this was the holding of the Court in *Beta Real Corp. v. Graham*, 839 So. 2d 890 (Fla. 3d DCA 2003). They respectfully submit that, as will be shown in detail in this section, this decision is erroneous.

[4]Section 726.111, Fla. Stat., expressly provides that "the principles of law and equity . . . supplement these provisions." Thus, the UFTA incorporates the common law of this state.

Further, this Court held in *Execu-Tech Business System, Inc. v. New Oji Paper Co., Ltd.,* 752 So. 2d 582, 585 (Fla. 2000), that defendants who violated the Florida Deceptive and Unfair Trade Practices Act had "committed a tortious act (i.e., a violation of the Act) . . . ." There is no reason why an unfair or deceptive act in the conduct of trade would be a tort and yet a transfer that was made with the intent to hinder, delay, or defraud a creditor would not. Both are actions declared improper by the legislature and for which the legislature has authorized a private cause of action.

Therefore, a fraudulent transfer is also a tort. This conclusion is in accord with the common law of this state as recognized by this Court in *Winn & Lovett, supra,* and as incorporated into the UFTA by §726.111, Fla. Stat. Accordingly, this Court should declare that a fraudulent transfer is a tort.[5]

This was the conclusion the Wisconsin Supreme Court reached in *Dalton v. Meister,* 239 N.W.2d 9 (Wis. 1976). In that case, Dalton sued a bank for conspiracy to commit fraudulent conveyances in violation of the Uniform Fraudulent Conveyance Act. 239 N.W.2d at 13, 20. The bank contended that this claim failed to state a cause of action because "no action for conspiracy to defraud by fraudulent conveyance is possible." 239 N.W.2d at 20. The bank relied on the principle that a "general

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[5]Black's Law Dictionary, p. 1335, defines "tort" as "a private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction." (5th Ed. 1979).

creditor, without a lien, has no interest in the debtor's property, and is not legally injured by a conspiracy with the debtor to aid him in disposing of his property in order to evade payment of his general obligations, and that an action for damages cannot be based on such a conspiracy." 239 N.W.2d at 22-23.[6] The Wisconsin Supreme Court rejected this argument and held that the plaintiff's claim stated a cause of action in tort:

> *Dalton's first cause of action is in tort, for civil conspiracy to commit fraudulent conveyances*. This court has consistently defined a conspiracy as follows:
>
> . . . Conspiracy "is a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful.". . . [T]he word 'unlawful' employed in such definition is not confined to criminal acts but includes all wilful, actionable violations of civil rights."
>
> Here there is no question that fraudulent conveyances of Meister's property, if proved, would be unlawful.

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[6]As shown by this quote, the common law has always recognized the right of a debtor who has a lien to bring an action against a creditor and those who conspired with him to help him avoid the lien. *See Adler v. Fenton*, 65 U.S. 407 (1860); *Summers v. Hagen*, 852 P.2d 1165, 1169 n. 4 (Alaska 1993); *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806 (Tex. 1979). The courts merely held that any damages sustained by a debtor before he acquired a lien were too remote, indefinite and contingent to be the ground of an action. *Adler*, 65 U.S. at 412; *Summer*, 852 P.2d at 1169 n.4; *Stonecipher*, 591 S.W.2d at 808. *See also Duell v. Brewer*, 92 F.2d 59, 61 (2d Cir. 1937) (Judge Learned Hand wrote, citing to *Adler*, "courts have generally held as to fraudulent conveyances that a person who assists another to procure one, is not liable in tort to the insolvent's creditors. The reasons ordinarily given are the impossibility of proving any damages, *which scarcely seems sufficient . . . .*")

* * *

> ***To the extent that [prior] cases may hold that no actionable conspiracy exists as a result of conveyances of a debtor's property because creditors have suffered no legal wrong, their reasoning was demolished by the subsequent passage of the Uniform Fraudulent Conveyance Act, which makes conveyances of a debtor's property under conditions such as those alleged in the complaint a definite legal wrong. Such tortious conveyances may definitely be the subject of a civil conspiracy.***

*Dalton*, 239 N.W.2d at 18. Thus, the Court held that the legislature, through its adoption of the UFCA, had decreed that a creditor had a protectible interest in the assets of his debtor, even before he obtained a lien, and therefore, that such a creditor had the right to bring a tort action challenging a fraudulent conveyance.

Other courts across the country have also recognized that a suit based on a fraudulent conveyance is a tort action. *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406 (3d Cir. 2003) (New Jersey recognizes tort of creditor fraud – debtor's fraudulent interference with creditor's efforts to collect constitutes a tort entitling the creditor to damages); *Forum Ins. Co. v. Comparet*, 62 Fed. Appx. 151 (9th Cir. 2003) (California allows action for conspiracy to commit fraudulent transfers; a debtor and those who conspire with him to conceal his assets for the purpose of defrauding creditors are guilty of committing a tort and

each is liable in damages);[7] *In re Morse Tool*, 108 B.R. 384, 387 (Bankr. D. Mass. 1989) (fraudulent conveyance action is not a suit on a contract); *In re Penn Packing Co.*, 42 B.R. 502, 505 (Bankr. E.D. Pa. 1984) (fraudulent conveyance act claim is tort for purpose of choosing statute of limitations); *A.T. Stephens Enter., v. Johns*, 757 So. 2d 416 (Ala. 2000) (Alabama recognizes action for conspiracy to defraud a creditor).

Although there are decisions to the contrary, they make no sense when they are taken out of context – as First Union asks this Court to do. The context of most of those decisions was a ruling by the court allowing the action to set aside the fraudulent transfer to go forward by finding that it was subject to a longer statute of limitations. A good example is *United States v. Franklin National Bank*, 376 F. Supp. 378 (E.D. N.Y. 1973), upon which First Union places so much reliance. (Answer Brief, pp. 23-24). There, the court held that the complaint before it stated an equitable claim to set aside a fraudulent transfer and, therefore, the shorter statute of limitations applicable to actions founded upon a tort did not apply.[8] In so holding, the court relied on the

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[7]First Union cites at length the lower court's opinion in this case, *Forum Ins. Co. v. Devere, Ltd.*, 151 F. Supp. 2d 1145 (C.D. Cal. 2001), as supporting its position. (Answer Brief, pp. 27-29). Although the Bank provides a cite for the Ninth Circuit opinion, it does not disclose that the Court reversed the district court's holding that plaintiffs were not entitled to assert a claim for conspiracy to commit a fraudulent transfer.

[8]By contrast, the Fourth District has held that monetary damages are available under §726.108 and that, accordingly, the parties are entitled to a jury trial on such

earlier case of *Hearn 45 St. Corp. v. Jano*, 27 N.E.2d 814 (N.Y. 1940), in which the court had merely held that an equitable action seeking rescission of a fraudulent transfer was not an action based on actual fraud – although it might be an action based on constructive fraud.[9] This is clearly not a holding that a fraudulent transfer is not a tort and should not have been construed as such.

Yet, the district court in *F.D.I.C. v. S. Prawer & Co.*, 829 F. Supp. 453 (D.Me. 1993) – the other case relied on so heavily by the Third District and First Union – simply recited these earlier holdings and then held that an action to set aside a fraudulent conveyance was in the nature of a *contract* action, rather than a tort action. Of course, the court never even attempted to identify the contract. Here, there is no contract – not between plaintiffs and First Union, plaintiffs and Unique Gems or plaintiffs and Pearls and Gems. Accordingly, this Court should not hold that this suit

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claim – i.e., that it is a claim in law, not equity. *Hansard Constr. Corp.*, 783 So. 2d at 308-309.

[9]The issue in *Hearn* was whether the action was controlled by a statute that applied a six year limitations period to cases of actual fraud, or by another statute which applied a ten year period to all other types of fraud. 27 N.E. 2d at 141-142. Thus, First Union's argument that this Court should not worry about encouraging fraudulent transfers because they are not actually fraud has no merit. Even under New York law, it is an argument that this Court should encourage constructive fraud – also conduct contrary to public policy. Florida law is even stronger. In *Kneale v. Williams*, 30 So. 2d 284, 286 (Fla. 1947), this Court held that an attorney had to answer questions about funds received from his client, a debtor who had allegedly concealed the funds in fraud of creditors, because "the perpetration of a *fraud* is outside the scope of the professional duty of an attorney." Thus, Florida law clearly views fraudulent conveyances as fraud.

is a contract action. Instead, it should recognize that a fraudulent transfer is a tort.

**C. Whether a fraudulent transfer is characterized as a tort is irrelevant.**

Nevertheless, it does not matter whether a fraudulent transfer is characterized as a tort. As set forth in the Initial Brief, that an act be classified as a "tort" is not a necessary predicate for a conspiracy or aiding and abetting liability. The Courts of this state have clearly held that a cause of action for civil conspiracy exists if "the basis for the conspiracy is an independent wrong *or* tort which would constitute a cause of action if the wrong were done by one person." *Rivers v. Dillards Dept. Store,* 698 So. 2d 1328, 1333 (Fla. 1st DCA 1997). *See also Liappas v. Augoustis,* 47 So. 2d 582 (Fla.1950)("the gist of a civil action is not the conspiracy itself but the *civil wrong* which is done pursuant to the conspiracy and which results in damage to the plaintiff.*")*. Certainly, a fraudulent transfer is an "independent wrong" which constitutes a cause of action. The legislature has so declared it by adopting the UFTA. Therefore, there is liability for conspiring to commit such a wrong or aiding and abetting in its commission.

This was the holding in *McElhanon v. Hing,* 728 P. 2d 256 (Ariz. App. 1985), *aff'd in part, vacated in part on other grounds,* 728 P.2d 273 (Ariz. 1986). There, the plaintiff sued an attorney for conspiring with his client to defraud a creditor. The Court rejected the attorney's argument that there was no cause of action for participating in a fraudulent conveyance against one not a party to the conveyance:

> *We disagree . . . that there is no cause of action against one not a party to an allegedly fraudulent conveyance. When a civil wrong occurs as the result of concerted action, the participants in the common plan are equally liable.*
>
> The next question then is whether there was a wrongful act. [Attorney] suggests that a cause of action for participating in a fraudulent conveyance should be limited, as other courts have done, to instances where a creditor has an actual, present lien against a debtor. . . .
>
> [*A*]*lien is not necessary before there is an actionable wrong. Arizona's adoption of the Uniform Fraudulent Conveyance Act, A.R.S. §§44-1001 to 44-1013 (UFCA) is particularly persuasive on this point. The UFCA makes such transfers unlawful as against creditors without a lien and even as to creditors without a judgment.*
> . . .
>
> *We therefore have concluded that a fraudulent conveyance against a judgment creditor is a legal wrong which may be the subject of a complaint for damages arising out of a conspiracy to commit a fraudulent conveyance.*

*McElhanon*, 728 P.2d at 262-263. The Supreme Court of Alaska followed this decision in *Summers*, 852 P.2d at 1165, finding it to be the better reasoned.

Since Florida law is consistent with that of Alaska and Wisconsin and allows a conspiracy action based on commission of a civil wrong, it should also recognize that a fraudulent conveyance is a legal "wrong" which may be the subject of an actionable conspiracy.[10] Further, if the Court approves a conspiracy action under

[10]Maine law, on the other hand, requires a tort as the basis for conspiracy or aiding and abetting claims. *S. Prawer*, 829 F. Supp. at 455, 457. This may explain

such circumstances, it should also allow one based on aiding and abetting. There is no principled distinction between allowing a cause of action for conspiracy to violate the UFTA, as has been allowed in other Florida cases, and allowing a claim for aiding and abetting such a violation. *See Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983).

Such a conclusion is in accord with the modern trend. Plaintiffs have found cases in at least eight states that expressly allow actions for conspiracy to commit a fraudulent transfer or for aiding and abetting such a transfer. *A.T. Stephens Enter.*, 757 So. 2d 416 (Alabama recognizes action for conspiracy to defraud a creditor); *Summers, supra* (Alaska recognizes action for conspiracy to fraudulently convey property); *McElhanon, supra* (Arizona recognizes action for conspiracy to fraudulently convey property); *Forum Ins. Co., supra* (California recognizes action for conspiracy to commit fraudulent transfers); *Time Warner Entertainment Co. v. Six Flags Over Georgia*, 537 S.E.2d 397, 407 (Ga. App. 2000) (Georgia has "explicitly acknowledged an aiding and abetting cause of action in. . . fraudulent conveyances."); *Morganroth, supra* (New Jersey recognizes action for conspiracy to commit and aiding and abetting creditor fraud); *Joel v. Weber*, 602 N.Y.S.2d 383 (N.Y. App. Div. 1993) (complaint stated cause of action against attorney for aiding and abetting violation of Debtor and Creditor Law); *Dalton, supra* (Wisconsin

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the different result in that case than in *McElhanon* and *Summers.*

recognizes action for conspiracy to fraudulently convey property). *See also Nastro v. D'Onofrio,* 2003 WL 21212215 (D. Conn. 2003) (holding that there is no cause of action against an attorney for aiding a fraudulent transfer solely because "such liability had the potential of interfering with the ethical obligations owed by an attorney to his or her client"). Florida should follow this trend and expressly recognize a cause of action for aiding and abetting a fraudulent transfer, even if the defendant is not a transferee. It certainly should not endorse and encourage the making of fraudulent transfers by holding that participants therein are immunized from liability.

**D. Dismissal of plaintiffs' other claims has no bearing on this appeal.**

First Union has also argued that the dismissal of plaintiffs' conspiracy claim and of those claims which alleged that the Bank had direct liability under the UFTA show that their aiding and abetting claim has no merit. These arguments also fail.

As First Union admits, the direct liability claims were dismissed on the ground that First Union was not a transferee. This dismissal has no bearing on the validity of plaintiffs' aiding and abetting count – aiding and abetting liability attaches if one "knows that [another's] conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Section 876(b), *Restatement (Second) of Torts.* Thus, a defendant may be liable for aiding and abetting a breach of fiduciary duty even though that defendant is not himself the fiduciary. *See, e.g., Nerbonne, N.V. v. Lake Bryan International Properties,* 689 So.

2d 322, 325 (Fla. 5th DCA 1997); *Ft. Meyers Development Corp. v. J.W. McWilliams Co.*, 122 So. 264, 268 (Fla. 1929).

Further, dismissal of these claims did not establish that there were no fraudulent transfers. The record clearly shows such transfers – as the Complaint alleges, Unique Gems' principals, with the assistance of First Union, wire-transferred nineteen million dollars to the Liechtenstein bank account of Pearls and Gems in payment of fraudulent invoices. (R2-46-7-8, 26-27, 35-36). The lower court even admitted that these transfers might be fraudulent; it held only that First Union was not liable for them because it was not the transferee. (R8-247-6). As shown, that holding is irrelevant to plaintiffs' aiding and abetting claim. Therefore, dismissal of the direct liability counts does not require dismissal of the aiding and abetting claim.

Nor did dismissal of the conspiracy claim. As shown by §876, *supra*, the elements of conspiracy and aiding and abetting are different. Since the Second Amended Complaint alleges in a factually detailed manner that fraudulent transfers were committed and that defendant First Union aided and abetted in their commission, the count should not have been dismissed for failure to state a cause of action.

## CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that this Court should answer the certified question in the affirmative and hold that, under Florida law, there is a cause of action for aiding and abetting a fraudulent

transfer, whether or not the alleged aider-abettor is a transferee.

Respectfully submitted,


Scott Silver, Esq.
Silver, Garvett & Henkel
1110 Brickell Ave - Penthouse One
Miami, Florida 33131

Ervin Gonzalez, Esq.
Colson, Hicks, Eidson, et al
255 Aragon Avenue - 2nd Floor
Coral Gables, Florida 33134

Robert C. Josefsberg, Esq.
800 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

Steven Mishan, Esq.
Steven Mishan, P.A.
1110 Brickell Avenue- PH One
Miami, Florida 33131

-and-

HERSCH & TALISMAN, P.A.
1110 Brickell Avenue
Penthouse One
Miami, Florida 33131
Tel: (305) 358-0570
Fax: (305) 358-1916

_____
PATRICE A. TALISMAN
Florida Bar No. 314511


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this ____ day of August, 2003 to: Elliot Scherker, Esq., Greenberg, Traurig, et al., 1221 Brickell Avenue, Miami, Florida 33131, Stephen B.

Gillman, Esq., Gallway Gillman Curtis Vento & Horn, P.A., Suite 1100, Ocean Bank Building, 200 S.E. First Street, Miami, Florida 33131 and Stanley H. Wakshlag, Esq., Akerman, Senterfitt & Eidson, P.A., One S.E. Third Avenue, 28th Floor, Miami, Florida 33131.

_____
PATRICE A. TALISMAN

**CERTIFICATE OF FONT SIZE**

I hereby certify that the size and style of type used in this Brief is: Times New Roman Font in 14 Point Type.

_____
PATRICE A. TALISMAN