IN THE SUPREME COURT OF FLORIDA

EDMUND MADY **Fla. S. Ct. No. SC08-808**

DCA No. 07-842

Petitioner,

v.

DAIMLERCHRYSLER CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

On Review From The

Fourth District Court Of Appeal

State Of Florida

Aaron D. Radbil
Florida Bar No. 0047117
Krohn & Moss, Ltd.
120 West Madison Street
10th Floor
Chicago, Illinois 60602
Phone: (312) 578-9428 ext. 281
Facsimile: (866) 431-5576
Counsel for the Plaintiff / Petitioner

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I. THE TRIAL COURT'S FACTUAL AND LEGAL DETERMINATION BASED UPON MATTERS OF RECORD, IN EFFORT TO REVIEW THE AGREEMENT OF THE PARTIES AND DECIDE THE ISSUE OF ATTORNEY'S FEES, ILLUSTRATES A HIGH LEVEL OF JUDICIAL INVOLVEMENT IN THE SETTLEMENT PROCESS, REFLECTING THE JUDICIAL STAMP OF APPROVAL NECESSARY FOR AN OFFICIAL COURT DECREE.

The level of judicial imprimatur regarding resolution of litigation varies according to the manner in which a matter concludes. Where litigation culminates with a verdict, the prevailing party is readily ascertainable because the judgment on the merits bears full judicial sanction. Where litigation is resolved through settlement, judicial imprimatur arises in varying degree as a result of the manner in which settlement is contemplated. Parties may intend that their accord is entered as an official judgment of the court or consent decree, parties may desire that a contractual arrangement remain purely private, and parties may opt for resolution somewhere between consent decree and purely private settlement. A consent decree understandably bears the highest level of judicial involvement, where a purely private settlement agreement bears the least judicial imprimatur.

Detailed through Plaintiff's Initial Brief on the Merits, a consent decree is essentially a settlement agreement subject to continued judicial policing. *U.S. v. City of Miami, Fla.*, 664 F. 2d 435 (5th Cir. 1981). Although effective without judicial intervention, a consent decree memorializes the bargained for positions of the parties and places the authority of the court behind compromise of the parties.

City of Miami, 664. F. 2d at 441. Important, accord on all issues is not indispensible with regard to a consent decree. *Id*. at 440. Parties may agree on as much as they can and call upon the court to decide issues that they cannot resolve. *See Pettway v. American Cast Iron Pipe Co*., 576 F 2d 1157 (5th Cir. 1978), *cert denied*, 439 U.S. 1115 (1979). A consent decree may be "partially consensual and partially litigated." *High v. Braniff airways, Inc*., 592 F. 2d 1330 (5th Cir. 1979).

Defendant, in the matter at hand, served Plaintiff with a proposal for settlement, pursuant to Section 768.79 of the Florida Statues, and Florida Rule of Civil Procedure 1.442, in the amount of $8,500.00, *exclusive* of all interest, costs, and attorney's fees. (Vol. 1, pp. 150). Defendant's proposal for settlement included language reading: "DaimlerChrysler concedes that Plaintiff may seek to prove entitlement to attorney's fees through a hearing before this Court. (Vol. 1, pp. 194-200). The release accompanying Defendant's proposal for settlement specified: "Plaintiff's attorney reserves the right to motion the court for attorney's fees that he contends he is entitled to as a result of his representation of Plaintiff in this case." (See App. A-1). Defendant also included in its Release and Confidentially Agreement a provision mandating that Plaintiff agrees to file a notice of dismissal with prejudice only "once the [attorney's fees] issues outlined in section 3.0 infra, have been resolved." On or about January 6, 2006 Plaintiff filed his "Notice of Acceptance of Proposal of Settlement." (Vol. 1, pp. 155-157).

On June 30, 2006 Plaintiff filed his Motion for Entitlement to Attorneys' Fees and Costs, based upon Defendant's proposal for settlement.[1] (Vol. 1, pp. 169-200).

The trial court did not merely rubber stamp the agreement of the parties to this matter. Rather, the court in ruling on Plaintiff's Motion for Entitlement to Attorneys' Fees and Costs reviewed the settlement agreement, made factual and legal determinations based upon matters of record, and decided the issue of attorney's fees pursuant to the contractual provision included in Defendant's Proposal for Settlement. The trial court in fact included in its order on Plaintiff's Motion for Entitlement to Attorneys' Fees and Costs commentary regarding the term "finally prevails" and the manner in which such term "has been defined by the Courts under the fee shifting provisions of the Federal Statutes which form a basis for the suit." (Vol. 2, pp. 213). The trial court considered the nature of the litigation and the purposes to be served by the settlement agreement, and made a decision regarding congressional policy objectives. The trial court's efforts illustrate a high level of judicial involvement in the settlement process, and constitute judicial approval. *See Dufresne v. DaimlerChrysler Corp*., 975 So. 2d 555 (Fla. 2d DCA 2008); *San Martin and Nelson v. DaimlerChrysler Corporation*, 983 So.2d 620 (Fla. 3d DCA 2008).

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[1] Defendant's "Proposal of Settlement Exclusive of Attorneys Fees" and Plaintiff's "Notice of Acceptance of Proposal of Settlement" were referenced by, attached to, and served as a basis for Plaintiff's Motion for Entitlement to Attorneys' Fees and Costs, filed with the trial court.

II. PURSUANT TO SECTION 768.79 OF THE FLORIDA STATUTES, A TRIAL COURT MAY IMPOSE JUDICIAL SANCTION, INCLUDING CONTEMPT AND THE LIKE, UNAVAILABLE AS A RESULT OF PURELY PRIVATE SETTLEMENT, THUS MATERIALLY ALTERING THE LEGAL RELATIONSHIP OF THE PARTIES INVOLVED.

Defendant, in effort to convince this Court that acceptance of a proposal for settlement pursuant to section 768.79 of the Florida Statutes does not materially alter the legal relationship of the parties involved, states: "Indeed, courts are entitled to enforce all settlement agreements to at least some minimal extent because settlement agreements are interpreted according to contract law."[2] (See Defendant's Answer Brief at page 22). Contrary to Defendant's assertion, absent an independent basis for jurisdiction courts are unable to enforce purely private settlement excepting independent litigation. Although resolving a dispute, private settlement does not confer upon a court the authority to enforce the settlement. Rather, federal, as well as Florida precedent, establishes that breach of the terms of

[2] In support of its conclusion, Defendant cites to *Spiegel v. H. Allen Holmes, Inc.*, 834 So. 2d 295 (Fla. 4th DCA 2002). The court, however, in *Spiegel v. H. Allen Holmes, Inc.*, fails to hold that a court maintains blanket authority to enforce a purely private settlement agreement, but rather analyzes the enforceability of a disputed settlement where a party to the purported agreement asserts a defense that the settlement terms are not of mutual or reciprocal assent. *See Id*. In particular, the court in *Spiegel v. H. Allen Holmes, Inc*. details only that a "[t]he party seeking to enforce a settlement agreement bears the burden of showing the opposing party assented to the terms of the agreement," and that "[t]o compel enforcement of a settlement agreement, its terms must be sufficiently specific and mutually agreed upon as to every essential element." *Id*. at 297.

a private settlement gives rise to a claim for breach of contract, but not judicial sanction.

Settlement pursuant to section 768.79 of the Florida Statutes, however, confers upon the trial court "full jurisdiction to enforce the settlement and agreement." Fla. Stat. §768.79(4). Where a court is otherwise unable to enforce a private settlement agreement, section 768.79 of the Florida Statutes vests a trial court with authority to do so. Thus, agreement pursuant to section 768.79 of the Florida Statutes materially alters the relationship of the parties to the settlement.

Divergent from Defendant's assertion federal precedent demonstrates that absent an independent basis for jurisdiction courts are unable to enforce purely private settlement excepting independent litigation. Supreme Court precedent establishes that a federal court's inherent authority does not support "an assertion of jurisdiction to enforce a settlement agreement entered into by the parties and resulting in dismissal of the case pursuant to a stipulation by the parties." *Smyth ex rel. Smyth v. Rivero*, 282 F. 3d 268 (4th Cir. 2002), citing *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375 (1994).[3] Absent an independent basis for jurisdiction, a court does not maintain jurisdiction to enforce a private settlement.

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[3] The Supreme Court, in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Res*., cites to *Kokkonen v. Guardian Life Ins. Co. of Am*. for the proposition that: "Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal."

Id. Purely private settlement does not confer upon a court the authority to enforce the settlement. *Smyth ex rel. Smyth*, 282 F. 3d at 280.

Florida precedent similarly establishes that breach of the terms of a private settlement give rise to a claim for breach of contract, but not judicial sanction. *U.S. v. City of Miami*, 664 F. 2d 435 (5th Cir. 1981) ("If the parties agree to compose their differences by a settlement agreement, however, the only penalty for failure to abide by the agreement is another suit."). Where parties to litigation resolve a dispute purely through private settlement "a party will not be able to obtain enforcement of the settlement agreement by merely filing a motion in the now-dismissed case if one of the other parties to the agreement objects." *Paulucci v. General Dynamics Corp*., 842 So. 2d 797 (Fla. 2003). By voluntarily dismissing a suit without more a party removes a dispute from the court's consideration. *Id*. In such a circumstance, "the parties would ordinarily have to pursue a new breach of contract action to enforce the settlement agreement." *Id*. at 802.

Where a court is otherwise unable to enforce a private settlement agreement, section 768.79 of the Florida Statutes vests a trial court with authority to do so. Thus, agreement pursuant to section 768.79 of the Florida Statutes materially alters the relationship of the parties to the settlement. Simply, absent the authority provided by section 768.79 of the Florida Statutes, a party is required to bring an additional action to enforce a settlement agreement where a failure to

abide by the settlement agreement arises. As a result of judicial oversight and jurisdiction arising from settlement pursuant to section 768.79 of the Florida Statutes, a trial court may impose judicial sanction, including contempt and the like, unavailable as a result of purely private settlement.

III. DEFENDANT FAILS TO BRING TO THE ATTENTION OF THIS COURT A SINGLE SCENARIO UNDER ITS THEORY IN WHICH PLAINTIFF WOULD BE ABLE TO OBTAIN ATTORNEY'S FEES PURSUANT TO DEFENDANT'S PROPOSAL FOR SETTLEMENT, DESPITE EXPRESS LANGUAGE IN ITS PROPOSAL FOR SETTLEMENT TO THE CONTRARY.

Plaintiff, through his Initial Brief on the Merits, details the language of Defendant's proposal for settlement reading: "Plaintiff may seek to prove entitlement to attorney's fees through a hearing before this Court." (Vol. 1. pp. 194-200). Plaintiff further notes similar language included in Defendant's accompanying release: "Plaintiff's attorney reserves the right to motion the court for attorney's fees that he contends he is entitled to as a result of his representation of Plaintiff in this case." (App. A-1). As well, Plaintiff outlines that Defendant's Release and Confidentiality Agreement in fact call for dismissal with prejudice only after the issue of entitlement to, and amount of, an award of attorney's fees to Plaintiff has been determined by the trial court. (App. A-1). Accordingly, Plaintiff suggested in his Initial Brief on the Merits:" Despite Defendant's proposal for settlement *exclusive* of attorney's fees and Plaintiff's acceptance of the same, under no circumstances could Plaintiff ever had recovered attorney's fees under

Defendant's proposal and position taken below. As there does not exist a scenario in which a plaintiff would be able to obtain attorney's fees under such a proposal, the offer fails for lack of consideration." (See Plaintiff's Initial Brief on the Merits at page 39).

Defendant, through the entirety of its Answer Brief, fails to present a plausible scenario in which Plaintiff could recover attorney's fees under Defendant's proposal, and legal theory. Thus, should this Court accept Defendant's argument, Defendant's proposal for settlement is therefore ambiguous with respect to a fundamental provision of the agreement. The inherent contradiction included in Defendant's proposal for settlement, should this Court preclude Plaintiff from seeking an award of attorney's fees, would not only lack consideration, but would make it fundamentally impossible for Plaintiff to evaluate the true terms and conditions of Defendant's offer. Defendant's proposal would accordingly fail as a matter of procedure and law.[4]

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[4] Defendant includes within its Answer Brief sweeping statements regarding matters previously litigated by Plaintiff's counsel, filed pursuant to the Warranty Act against DaimlerChrysler Corporation. Neither the facts, nor underlying generalizations, are supported by the record in this matter nor relevant to any issue at hand. Defendant further suggests, without support, and with direct reference to Plaintiff's counsel, that "Krohn & Moss' [sic] single minded goal is to generate fees regardless of the amount they are able to recover for their clients." (See Defendant's Answer Brief at page 33).

Defendant also makes sweeping, unjustified and irrelevant accusations about the motivation of Plaintiff's counsel. Legal research reveals hundreds of reported and

IV. "PREVAILING PARTY" STATUS IS DETERMINED AS A MATTER OF LAW, ABSENT DISCRETION, AND SUBJECT TO *DE NOVO* REVIEW.

Defendant, referencing aspects of the fee shifting provision included in the Warranty Act, implies throughout its Answer Brief that the trial court maintains absolute discretion regarding an award of attorney's fees to a prevailing party under the Warranty Act. Defendant specifically quotes from section 2310(d)(2) of the Warranty Act: "…unless the court determines that an award of attorneys' fees is inappropriate." (See Defendant's Answer Brief at page 8). Defendant further includes citation, without context, to a number of state and federal cases from jurisdictions spanning the country in effort to persuade this Court that "an award of MMWA attorneys' fees is discretionary." (See Defendant's Answer Brief at page 8). In doing so, Defendant distorts the necessary intricacies embodied by the fee shifting provision included in the Warranty Act, and elicits a determination from this Court regarding issues not yet ripe for adjudication.

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unreported decisions, for which Krohn & Moss was counsel of record, regarding matters of significant consumer interest. Krohn & Moss's success includes six (6) favorable decisions before state supreme courts, as well as numerous advantageous opinions throughout the state of Florida. State supreme court decisions in which Krohn & Moss prevailed include: *Mayberry v. Volkswagen of America, Inc.*, 692 N.W. 2d 226 (Wis. 2005); *Hyundai Motor America, Inc. v. Goodin*, 822 N.E. 2d 947 (Ind. 2005); *Peterson v. Volkswagen of America, Inc.,* 697 N.W. 2d 61 (Wis. 2005); *Razor v. Hyundai Motor America, Inc.*, 222 Ill. 2d 75 (2006); *American Honda Motor Company, Inc. v. Cerasani*, 955 So. 2d 543 (Fla. 2007); and *Mydlach v. DaimlerChrysler Corporation,* 875 N.E.2d 1047 (Ill. 2007).

There are currently over one hundred-fifty (150) statutes containing fee-shifting provisions available to litigants in the United States. Chief Justice Rehnquist, opining on behalf of the majority in *Buckhannon*, in fact cited to Justice Brennan's dissenting opinion in *Marek v. Chesny*, which cataloged over one-hundred fee shifting statutes containing virtually every variation of fee shifting language. *Buckhannon,* 532 U.S. at 602-03, citing *Marek v. Chesny,* 473 U.S. 1 (1985) (appendix to opinion of Brennan, J., dissenting). While the language that grants an award of attorney's fees to a successful litigant varies from statute to statute, a typical fee-shifting provision includes two elements: (1) the type of success a petitioning litigant must achieve, and (2) the level of discretion given to the court to award such fees. *See Union of Needlestrades, Indus. and Textile Employees, AFL-CIO, CLC v. U.S. Immigration and Naturalization Serv*., 202 F. Supp. 2d 265 (S.D.N.Y. 2002).

Pertinent to Plaintiff's claim for attorney's fees and costs, the Warranty Act provides in relevant part: "If a consumer prevails on an action brought under paragraph 1 of this subsection, he may be allowed as part of the judgment a sum equal to the amount of aggregate costs and expenses (including reasonable attorneys fees based upon the actual time expended) determined by the court to have been reasonably incurred by the Plaintiff for, or in connection with the commencement and prosecution of such action, unless the court in its discretion

shall determine that determine that such an award of attorneys' fees would be inappropriate." 15 U.S.C §2310(d)(2).

Recovery of attorney's fees and costs under the Warranty Act depends first upon whether a plaintiff qualifies as a "prevailing party" pursuant to the language of section 2310(d)(2) of the Warranty Act. Should a plaintiff not surmount the "prevailing" threshold, that plaintiff is subject to the "American Rule," requiring each party in litigation to bear its own attorney's fees and costs. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975). Stated otherwise, and particular to the Warranty Act, if a party prevails as a matter of law he may then be allowed a discretionary award of attorneys' fees and costs.

Discretion to award attorney's fees and costs, appropriate with regard to the amount of an award of attorney's fees and costs, is notably absent specific to a court's determination as to whether a plaintiff "prevails." Indeed, such a determination is to be made as a matter of law. "If the district court denies a prevailing party's motion for attorneys' fees, we review such denial for abuse of discretion." *Reinbold v. Evers,* 187 F. 3d 348 (4th Cir.1999), citing *McDonnell v. Miller Oil Co.,* 134 F.3d 638 (4th Cir.1998). "However, if the district court determines, as a matter of law, that a party is not a prevailing party, we review the district court's determination *de novo*." *Reinbold*, 187 F.3d at 362, citing *Shaw v. Hunt,* 154 F.3d 161 (4th Cir.1998).

The two elements necessarily considered by a trial court regarding an award of attorney's fees under the Warranty Act operate independently of each other. *See Brickwood Contractors, Inc., v. United States*, 288 F. 3d 1371 (Fed Cir. 2002). A trial court must first analyze a petitioner's level of success. Following legal determination regarding the success of a party, only then may a trial court weigh appropriate variables to correctly exercise its congressional grant of discretion.[5] The issue before this Court is whether a plaintiff who accepts a proposal for settlement pursuant to section 768.79 of the Florida Statutes is precluded from seeking an award of attorney's fees based solely upon level of success, to be determined as a matter of law. Whether the "court in its discretion shall determine that such an award if attorneys' fees would be inappropriate," is not ripe for adjudication. *See* 15 U.S.C. §2310(d)(2).

[5] Defendant contends that the settlement in the instant matter constitutes a *de minimus* recovery for Plaintiff. The trial court, however, found neither that Plaintiff's recovery was *de minimus*, nor that Plaintiff's action was improper, frivolous, or warranted a finding that an award of fees would not be appropriate. The trial court simply held that Plaintiff was precluded from seeking an award of fees from the trial court as a result of Plaintiff's acceptance of Defendant's proposal for settlement. Notwithstanding, the Supreme Court has noted that even nominal damages suffice under the test that a party prevail on the merits of at least some of its claims. *Hensley v. Eckerhart*, 461 U.S. 424 (1983), citing *Nadeau v. Helgemoe,* 581 F. 2d 275 (1st Cir. 1978); *see also Farrar v. Hobby*, 506 U.S. 103 (1992).

V. NOTWITHSTANDING, A TRIAL COURT PROPERLY AWARDS STATUTORILY AUTHORIZED ATTORNEY'S FEES TO A PREVAILING PARTY AS THE RULE RATHER THAN THE EXCEPTION, AND DISCRETION TO DISALLOW FEES RESULTS ONLY FROM THE SITUATION WHERE "THE ACT HAS BEEN MISUSED."

In drafting the Warranty Act, Congress recognized its virtual unenforceability absent a fee shifting provision. Senator Magnuson, a sponsor of the Warranty Act, lobbied for the inclusion of a fee shifting provision in the Warranty Act in effort to promote private enforcement. In accord with Senator Magnuson's statements before congressional committee, Congress included a fee shifting provision in the Warranty Act. 15 U.S.C. § 2310 (d)(2).

In construing the Warranty Act, courts across the country have recognized the importance of the fee shifting provision. The United States Court of Appeals for the Seventh Circuit noted that "statutory fee-shifting provisions reflect the intent of Congress to encourage private enforcement of the statutory substantive rights, be they economic or non-economic, through the judicial process." *Skelton v. General Motors Corporation*, 860 F.2d 250 (7th Cir. 1988), *quoting Report of the Third Circuit Task Force, Court Awarded Attorney Fees* (Oct. 8, 1988). Noting congressional intent, the Seventh Circuit continued: "this provision [fee shifting] would make it economically feasible for consumers to pursue their remedies in state courts…[and] is designed to make it economically feasible to pursue consumer rights involving inexpensive consumer products." *Id*. at 256.

Similarly, the Illinois Second District Court of Appeal acknowledged that the fee the shifting provision included in the Warranty Act "was intended to encourage consumers to pursue their legal remedies by providing them with access to legal assistance." *State Farm Fire and Casualty v. Miller Electric Co,*, 231 Ill. App.3d 355 (2nd Dist. 1992). The court in *State Farm Fire and Casualty v. Miller Electric Co*. further declared that "without such assistance, consumers would frequently be unable to vindicate their warranty rights accorded by law." *Id*. at 359.

The fee shifting provision included in the Warranty Act is in accord with celebrated federal public policy, as well as public policy for the state of Florida. The Florida Fourth District Court of Appeal in fact held that failing to award attorney's fees to the prevailing consumer would result in their "suffering an additional loss for which they would receive no reimbursement." *BMW of North America, Inc. v. Krathen*, 510 So.2d 366 (4th DCA 1987). The Fourth District detailed that "the legislative purpose would not be served because [the plaintiffs] would not be fully compensated for their attorneys' fees as envisioned by the statute." *Id*. "Clearly", the Court proclaimed, "the legislative purpose would not be served by forcing [the plaintiffs] to bear the costs of attorneys' fees…." *Id*; *see also Viewig v. Friedman*, 173 III. App. 3d 471 (2nd Dist. 1988); *General Motors Acceptance Corporation v. Jankowitz*, 230 N.J. Super. 555 (N.J. App. 1989).

Significant, "[w]here a statutory provision authorizes a fee award, such an award becomes the rule rather than the exception and should be awarded routinely." *Seybold v. Francis P. Dean, Inc.*, 628 F. Supp 912 (W.D. Pa. 1986). Where a statute authorizes attorneys' fees, attorney's fees "should be awarded as routinely as costs." *Engel v. Teleprompter Corp.*, 732 F. 2d 1238 (5th Cir. 1984). Akin to the doctrine articulated in *Newman v. Piggie Park Enters., Inc.*, which states that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," the Warranty Act clearly specifies that attorney's fees are to be awarded to a prevailing party "unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate." *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968); 15 U.S.C §2310(d)(2). Florida courts have suggested that only where "the Act has been misused" is an award of attorney's fees inappropriate. *San Martin and Nelson v. DaimlerChrysler Corp.*, 983 So. 2d at 624. Simply, an award of attorney's fees to a plaintiff who prevails under the Warranty Act is the rule, and not merely the exception.

CONCLUSION

Plaintiff-Appellant-Petitioner, EDMUND MADY, prays that this Honorable Court reverse the judgment of the trial court, and remand this cause for proceedings consistent with such an order.

RESPECTFULLY SUBMITTED,

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Aaron D. Radbil
Florida Bar No. 0047117
Krohn & Moss, Ltd.
120 West Madison Street
10th Floor
Chicago, Illinois 60602
Phone: (312) 578-9428 ext. 281
Facsimile: (866) 431-5576
Counsel for the Plaintiff / Petitioner

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was furnished via the U.S. mail to: Mr. John Glenn, AndersonGlenn, LLC, 2201 NW Corporate Blvd., Ste 100, Boca Raton FL 33431, and Theodore F. Greene, Law Offices of Theodore F. Greene, LC, PO Box 720157, Orlando FL 32872, on January 16, 2009.

____

Aaron D. Radbil
Florida Bar No. 0047117
Krohn & Moss, Ltd.
120 West Madison Street
10th Floor
Chicago, Illinois 60602
Phone: (312) 578-9428 ext. 281
Facsimile: (866) 431-5576
Counsel for the Plaintiff / Petitioner