

IN THE SUPREME COURT OF FLORIDA

CASE No. SC10-2438

COMMERCIAL JET, INC.,)	DISTRICT CASE No. 3D10-619
)	
Petitioner,)	
)	
v.)	LOWER
)	TRIBUNAL No. 2009-CA-31984-0
U.S. BANK, N.A.,)	Judge: Hon. Scott J. Silverman
)	
Respondent.)	
_____)	

ON REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT U.S. BANK, N.A.

Eric B. Wolff
Pro Hac Vice
Chief Counsel
The Boeing Company
1301 S.W. 16th Street
Renton, Washington 98055
Telephone: (206) 662-3484
Facsimile: (205) 662-3287

Rachel Sullivan
Florida Bar No. 815640
WHITE & CASE LLP
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

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INTRODUCTION

Petitioner Commercial Jet, Inc. (“Commercial Jet”) provided repair and maintenance services totaling \$57,273.95 on a Boeing 767 for Silver Jet, a company that was leasing the plane, and Silver Jet apparently did not pay. Commercial Jet did not require or forfeit a deposit from Silver Jet. Commercial Jet did not hold the aircraft until Silver Jet paid. And Commercial Jet has not pursued legal action against Silver Jet. Instead, Commercial Jet recorded a purported lien against the aircraft in Miami-Dade County and then brought suit against the owner of the aircraft, Respondent U.S. Bank, N.A. (“U.S. Bank”).¹ In defending its unorthodox strategy for payment, Commercial Jet seeks special rights for aircraft servicers under Florida’s lien statutes. The trial court and the court of appeal correctly rejected Commercial Jet’s arguments.

Commercial Jet could have held the aircraft and insisted on payment from Silver Jet. But when it released the aircraft without payment, by the plain terms of section 713.58, Florida Statutes, Commercial Jet “released” and “relinquished” and “lost” any claim to a “possessory lien.” Filing a piece of paper in Miami-Dade County recording a purported lien does not get it back. And that is how it should

¹ At all times relevant to this litigation, the aircraft in question was owned by a trust with U.S. Bank, N.A. as the trustee. The beneficiary of that trust is a subsidiary of Boeing Capital Corporation. Boeing Capital Corporation is a wholly-owned subsidiary of The Boeing Company.

be. Possessory liens require possession, and the leverage of possession resolves disputes over payment. Commercial Jet would have this Court create a new category of non-possessory “possessory liens” and permit clouds on title up to 90 days after services are provided. Nothing in the text or history of the statute supports that interpretation, and there is no reasonable policy justification in favor of it. Commercial Jet’s proposition will not help resolve disputes; it will instead create headaches for purchasers downstream. Commercial Jet absolutely has rights against Silver Jet. But it has no right to spring a lien on the aircraft’s owner merely by attempting to record a lien for Silver Jet’s unpaid bills.

The decision of the Third District Court of Appeal rejecting Commercial Jet’s arguments should be affirmed.

STATEMENT OF THE CASE

This case involves Commercial Jet’s suit in Miami-Dade County attempting to foreclose a lien on a Boeing 767 owned by U.S. Bank because of an unpaid repair bill by a different company (Silver Jet) that had leased the aircraft. Commercial Jet had released the aircraft to Silver Jet without first insisting on full payment. Months later, Commercial Jet attempted to place a lien on the aircraft by recording a purported lien in Miami-Dade County, then a year later brought this action. Both the trial court (Silverman, J.) and a majority panel of the Third District Court of Appeal agreed with U.S. Bank that “[a]s Commercial Jet did not

have possession of the aircraft when it attempted to claim a possessory lien under section 713.58, it cannot proceed in its attempt to foreclose on the purported lien.” (App. A-1.)² Summary judgment for U.S. Bank was granted and affirmed. This Court granted Commercial Jet’s petition for review.

STATEMENT OF FACTS

The facts in this matter are simple and undisputed. Silver Jet is a British corporation that operated a Boeing 767 under a commercial lease with Respondent U.S. Bank, the owner of the 767. (App. A-3 ¶ 2.) Petitioner Commercial Jet provided maintenance and repairs to Silver Jet. Silver Jet did not pay. Silver Jet is not a party to this action. Commercial Jet instead took the unusual route of attempting to place a lien on the aircraft.

A. Petitioner Commercial Jet performs services for Silver Jet; Silver Jet does not pay; Commercial Jet does not pursue Silver Jet.

In March 2008, Silver Jet contracted with Commercial Jet to have Commercial Jet perform maintenance and repairs on the aircraft. A copy of that agreement appears at App. A-3 Ex. A. Commercial Jet performed the work from

² Citations to “App.” refer to Petitioner Commercial Jet’s Appendix to Initial Brief, filed on June 2, 2011. Citations to “R. App.” refer to Respondent U.S. Bank’s Appendix to Answer Brief, which was filed with this brief. Citations to “R.” followed by a page number are citations to the Record compiled by the clerk of the lower court.

April 17 to April 20, 2008. (App. A-3 Ex. B.) The total price of the services was \$57,273.95. (*Id.* ¶ 12.) Silver Jet apparently did not pay. (*Id.*)

By not paying for the services, Silver Jet obviously breached its agreement with Commercial Jet. The agreement includes dispute resolution provisions. Among other things, it expressly chooses Florida law, both parties consent to suit in any “local, State or Federal Court located within Dade County,” and both parties waive personal service of “any and all process.” (App. A-3 Ex. A ¶ 16.1.) The agreement also expressly limits the liens that may be sought by Commercial Jet to a mechanic’s lien requiring possession. The agreement expressly provides that Commercial Jet “shall not suffer or permit any lien or encumbrance to be created or exist against the Aircraft by reason of the Services performed hereunder, other than [Commercial Jet’s] mechanics lien, if any, and [Commercial Jet] agrees to immediately release the Aircraft to Customer upon completion of the Services and payment of all charges in accordance with this Agreement.” (*Id.* Ex A. ¶ 8.4)

Notwithstanding that the agreement expressly recognizes Commercial Jet’s right to hold the aircraft under a mechanic’s lien and insist on full payment, Commercial Jet released the aircraft to Silver Jet without payment. (R. 26 ¶ 3, 27 ¶¶ 6, 7, 33 ¶¶ 6, 7.) And notwithstanding that the agreement expressly contemplates and contains the parties’ mutual consent to suit in Miami-Dade

County for breach of the agreement, Commercial Jet has not pursued any action against Silver Jet. (App. A-3 Ex. A ¶ 16.1, A-5 ¶ 5.)

B. Instead of pursuing Silver Jet, Commercial Jet attempts to file a lien on the 767 and pursue its owner, U.S. Bank.

On July 2, 2008—over two months after the work was performed—Commercial Jet recorded in Miami-Dade County a claim of lien on the 767 for \$57,273.95. On August 14, 2008—over a month after recording the lien in Miami-Dade County and nearly four months after performing the work—Commercial Jet filed its claim of lien with the Federal Aviation Administration (“FAA”). A copy of the attempted lien, as it was recorded in Miami-Dade County and filed with the FAA, appears at App. A-3 Ex. B.

Commercial Jet sued U.S. Bank in Miami-Dade County on June 30, 2009, one year after attempting to record the lien. (App. A-3.) Commercial Jet did not contend that it had given notice to U.S. Bank before filing the claim of lien or that U.S. Bank was aware of the repairs made on the aircraft or of Silver Jet’s default. (*Id.*; Appellant’s Initial Brief (“Initial Br.”) at 2.)

Commercial Jet asserted that it had a valid, enforceable lien against the 767 and its owner by operation of sections 713.58 and 329.51, Florida Statutes. (App. A-3 ¶ 8 & Ex. B.; Initial Br. at 2.) Section 713.58 creates possessory lien rights in personal property. Section 329.51 sets forth the procedure to record and perfect such claims. Since section 713.58 grants lien rights only to one in possession of

the property on which a lien is claimed, and since it was undisputed that Commercial Jet had returned the aircraft to Silver Jet before the claim of lien was recorded, U.S. Bank moved for summary judgment. (App. A-5.) After reviewing memoranda of law and hearing argument of counsel, the trial court granted U.S. Bank's motion. (App. A-2, A-9.) Commercial Jet moved for reconsideration, which the trial court denied. (R. 43-45.)

Commercial Jet appealed. The Third District Court of Appeal affirmed. (App. A-1.) The majority explained that the lien right at issue—as conceded by Commercial Jet—is a possessory lien: “[T]here is no question that the lien right afforded by section 713.58 is possessory in nature and that a repairman’s right to claim a lien under section 713.58 is extinguished when he relinquishes possession of the property on which the lien is asserted.” (*Id.*) The Court of Appeal cited multiple cases for that proposition. *State v. Miller*, 373 So. 2d 677, 680 (Fla. 1979); *E. Airlines Emps. Fed. Credit Union v. Lauderdale Yacht Basin, Inc.*, 334 So. 2d 175, 177 (Fla. 4th DCA 1976); *see also In re Tradewinds Airlines, Inc.*, 394 B.R. 614, 622 (Bankr. S.D. Fla. 2008); *Archive Am., Inc. v. Variety Children’s Hosp.*, 873 So. 2d 359, 362 (Fla. 3d DCA 2004).

The Court of Appeal rejected the argument that a valid lien could be obtained under section 329.51 merely by recording a claim of lien after possession had been relinquished. Possession is required for a possessory lien to be valid:

“As Commercial Jet did not have possession of the aircraft when it attempted to claim a possessory lien under section 713.58, it cannot proceed in its attempt to foreclose on the purported lien.” (App. A-1.) Senior Judge Schwartz dissented because in his view the “plain meaning” of section 329.51 granted a right to enforcement upon recording a lien. (*Id.*) Senior Judge Schwartz did not discuss how it was that Commercial Jet had a valid possessory lien at the time of recording when Commercial Jet no longer had possession of the aircraft.

SUMMARY OF ARGUMENT

The Court of Appeal’s application of sections 713.58 and 329.51 is correct and should be affirmed. As an initial matter, there is no dispute that section 713.58 creates a possessory lien right. In most circumstances, possession alone is the easiest path toward payment. That is precisely what Commercial Jet had a right to insist upon—by Florida statute and by its agreement with Silver Jet—before releasing the aircraft. Hold the aircraft. Demand payment. If Commercial Jet had done that, *as its own services agreement sets forth*, there would have been no dispute here.

Section 329.51, by its plain terms, sets forth the procedures by which a valid 713.58 lien may be recorded and thereby enforced against third parties. It does not create a lien right, nor does it permit a lien claimant to relinquish possession of the property on which it purports to have a lien under section 713.58 and still keep its

lien. Commercial Jet could have held the aircraft and recorded a possessory lien, but it did not. It released the aircraft, thus relinquishing its lien right, and then months later sought to record a lien. By that time, however, there was no valid lien to record.

Applying the statutes in that manner is consistent with their text and with precedent for possessory liens. But to the extent there is any ambiguity, there is no reasonable basis for construing the statutes any other way. Aircraft service providers like Commercial Jet do not require any special lien rights. They already have the same contractual rights that any other service provider has. As other courts have recognized, the most efficient way to ensure payment is for the service provider to demand payment before release of the aircraft. In the alternative, deposits can be sought and then forfeited if payment is not made.

What is not reasonable is what Commercial Jet seeks as a matter of law. Allowing service providers to wait 90 days and then seek liens on aircraft that are routinely bought and sold and moved on and off leases is a recipe for clouded title and aggrieved bona fide purchasers. This case is a good illustration. Silver Jet may know full well that it has not paid its bill, but there was no way—and, quite frankly, recording in Miami-Dade County does not assist much—for the owner of the aircraft to know that title has been clouded. If the aircraft is then moved to a new owner, the new owner likewise has no warning. Indeed, given the 90-day

window that Commercial Jet thinks ought to apply, a sale could occur and then months after the transaction a lien could appear on the recently purchased aircraft.

The statutes do not require such absurd results, and there is no rational reason to construe them to achieve such absurdity. On their face, the statutes operate reasonably. The Court of Appeal applied the statutes correctly and should be affirmed.

ARGUMENT

I. Standard of review.

The facts are undisputed and summary judgment was granted. The standard of review is *de novo*. See *Kasischke v. State*, 991 So. 2d 803, 807 (Fla. 2008).

II. Section 713.58 creates a “possessory lien.” When possession ceases, there is no lien.

The plain terms of section 713.58, Florida Statutes establish that the lien exists only so long as the person claiming the lien retains possession of the property on which the lien is claimed. Section 713.58 grants a lien as follows:

(1) In favor of persons performing labor or services for any other person, upon the personal property of the latter upon which the labor or services is performed, or which is used in the business, occupation, or employment in which the labor or services is performed.

§ 713.58(1), Fla. Stat. (2009).³ Subpart (3) then says in clear prose that the lien ends when possession ends:

³ The full text of section 713.58, Florida Statutes is included in U.S. Bank’s Appendix at R. App.-1.

(3) the *possessory* right and lien of the person performing labor or services under this section is *released, relinquished, and lost* by the removal of such property upon which a lien has accrued

Id. § 713.58(3) (emphasis added).

The lien granted by section 713.58 is possessory in nature. By the plain terms of subpart (3) it is “released” and “relinquished” and “lost” upon “the removal of such property.” No possession, no lien. As long as Commercial Jet holds the aircraft, it may insist upon full payment. Section 713.58 permits that. Commercial Jet’s agreement with Silver Jet also permitted that. (App. A-3 Ex. A ¶ 8.4.) The statute creates a “possessory lien,” a “possessory lien” requires possession, and with possession comes the lien right to insist upon payment.⁴ And that is precisely what the cases cited by the Third District Court of Appeal hold. *See State v. Miller*, 373 So. 2d 677, 678 (Fla. 1979) (“appellee invoked the provisions of section 713.58, Florida Statutes, which grants a possessory lien in favor of persons providing labor and services on personal property”); *Archive Am., Inc. v. Variety Children’s Hosp.*, 873 So. 2d 359, 362 (Fla. 3d DCA 2004) (referencing a “possessory lien established by section 713.58”); *see also Eastern*

⁴ “Possessory lien” is defined only once in the Florida Statutes. Section 679.333—which addresses the perfection of certain liens arising by operation of law—defines “possessory lien” to mean “an interest . . . [w]hich secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person’s business[,] . . . [w]hich is created by statute or rule of law in favor of the person[,] and . . . [t]he effectiveness of which *depends on the person’s possession of the goods.*” § 679.333, Fla. Stat. (2009) (emphasis added).

Airlines Emps. Fed. Credit Union v. Lauderdale Yacht Basin, Inc., 334 So. 2d 175, 177 (Fla. 4th DCA 1976) (describing section 713.58 lien as “a mechanic’s possessory lien against personal property”).

Commercial Jet *concedes*—as it has to concede—that it relinquished possession of the aircraft before recording the claim of lien. (Initial Br. at 2; R. 33 ¶¶ 6, 7.) No possession, no lien. *See* § 713.58(3), Fla. Stat. (2009); *Miller*, 373 So. 2d at 678. Commercial Jet had no right to a section 713.58 lien when it purported to record its claim of lien.

III. Section 329.51 assumes that a valid lien is being recorded. If there is no valid lien in operation, section 329.51 does not allow one to be created merely by filing a piece of paper with a Florida county.

Commercial Jet argues that section 329.51 somehow permits a “possessory lien” without possession, merely by recording a lien on an aircraft. That is simply not what section 329.51 says. Section 329.51 applies to claims of liens created by other statutes. Its procedures apply to “[a]ny lien claimed on an aircraft under s. 329.41 or s. 713.58... .” § 329.51, Fla. Stat. (2009).⁵

Section 329.51 works hand-in-hand with sections 713.58 and 329.41.⁶ If a repairperson has a possessory lien on an aircraft under section 713.58, he may

⁵ The full text of section 329.51, Florida Statutes is included in U.S. Bank’s Appendix at R. App.-2.

⁶ Section 329.41 creates lien rights to one who furnishes aircraft fuel and has no application here. *See* § 329.41, Fla. Stat. (2009).

perfect his lien so as to render it enforceable by following the procedures set forth in section 329.51. That statute provides:

329.51 Liens for labor, services, fuel, or material expended on aircraft; notice.—Any lien *claimed on an aircraft under s. 329.41 or s. 713.58* is enforceable when the lienor records a verified lien notice with the clerk of the circuit court in the county where the aircraft was located at the time the labor, services, fuel, or material was last furnished. The lienor must record such lien notice within 90 days after the time the labor, services, fuel, or material was last furnished ... This section does not affect the priority of competing interests in any aircraft or the lienor’s obligation to records the lien under s. 329.01.

§ 329.51, Fla. Stat. (2009) (emphasis in italics added). By its plain language, section 329.51 assumes a lien is in place. A lien under section 713.58 requires possession. No possession, no lien under section 713.58. No lien under section 713.58, no resort to section 329.51. That is the unimpeachable logic of the Third District Court of Appeal’s decision, and it is correct.

The plain language of section 329.51 provides that a person claiming a possessory lien under section 713.58 on an aircraft may render his lien “enforceable” by recording a lien notice with the clerk of court in the appropriate county. *See id.* Section 329.51 does not *grant* a lien right as Commercial Jet claims; it merely sets forth the procedure by which persons claiming liens under sections 329.41 and 713.58 may *perfect* claims of lien. But the antecedent question—the question neither Commercial Jet nor Senior Judge Schwartz answers—is whether there was any lien at all. A possessory lien requires

possession. There was no possession. There was, accordingly, no lien. Section 329.51 does not transform a non-lien into a lien. It merely provides the procedures for the enforcement of rights arising from liens that already exist.

Commercial Jet's arguments confuse the perfection of a lien with the right to make a lien claim. A lien is perfected to protect the lienor from third parties. Perfection of a lien has no effect on the owner of the property. *See, e.g., All Am. Holding Corp. v. Elgin State Bank*, 17 B.R. 926, 929 (S.D. Fla. 1982) (“perfection of a lien protects the lienor from third parties without knowledge, it does not involve the relationship of lienor and lienee”). A statute relating to the procedures needed to perfect a lien cannot be equated to a statute that creates the lien. Indeed, one need only contrast section 329.41, where a lien right is created, to section 329.51, where liens created by other statutes are perfected, to demonstrate how Commercial Jet's argument is incorrect.

Before passing go and moving to rights under section 329.51, Commercial Jet has to have a lien. When it released the aircraft, by the plain language of section 713.58(3), it “released” and “relinquished” and “lost” its possessory lien. No lien, no resort to section 329.51.

IV. There is no textual or legislative history basis for creating an aircraft-service-provider exception to the normal rules of possessory liens. Sound policy does not support Commercial Jet either.

Commercial Jet essentially does not contest that, in the non-aircraft realm, section 713.58 operates precisely as written. No possession, no lien. By invoking section 329.51 and arguing that possession is not required for a lien, Commercial Jet is seeking special rights with respect to aircraft services. Commercial Jet even suggests that the Florida Legislature provided this purported lien right in aircraft in order to *correct* the Florida judiciary's *characterization* of the lien granted by section 713.58 as a "possessory lien." (Initial Br. at 9-10).

Commercial Jet cites nothing to support that legislative history hypothesis. Here is the actual history. Before the enactment in 1983 of section 329.51, the Florida Statutes did not set forth any procedures by which one could record a mechanic's lien on an aircraft in Florida. (R. App-1.) The Federal Aviation Act, however, required the FAA to look to state law in determining the validity of claims of lien on aircraft that were recorded with the FAA. (*Id.*) Because Florida did not have an aircraft lien recording statute, the FAA determined that it could no longer record claims of lien for labor, services, or material furnished to aircraft in Florida. (*Id.*) As a result, the Florida legislature enacted section 329.51 to correct that situation by providing specific requirements for recording aircraft liens. (*Id.* at 1-2.) The Legislature was not creating any new lien rights. It was simply aligning

Florida law so that existing rights under Florida law—such as possessory liens under section 713.58—could be recorded and recognized by the FAA.

By contrast, when the Legislature sought to create new lien rights, it was clear in doing so. In the two sections preceding section 329.51 — sections 329.40 and 329.41 — the Legislature clearly and unambiguously *did* create a lien right for providers of aircraft facilities and of aircraft fuel. Section 329.40 provides, in pertinent part:

(1) The governing body of a publicly owned and operated airport *has a lien* upon all aircraft landing upon any airport owned and operated by it for all fees and charges for the use of the facilities of such airport by any aircraft when payment of such charges and fees is not made immediately upon demand to the operator or owner of the aircraft by an authorized employee of the airport.

§ 329.40, Fla. Stat. (2009) (emphasis added).

Section 329.41 similarly provides:

A person who has furnished fuel to an aircraft *has a lien* upon the aircraft for any unpaid fuel charges. *The lien is enforceable in the same manner as provided in s. 329.51.*

Id. § 329.41 (emphasis added).

Both section 329.40 and section 329.41 create lien rights on aircraft in plain terms by providing that a certain class of persons “has a lien upon” aircraft for certain unpaid charges. *See id.* §§ 329.40, 329.41. No such language can be found in section 329.51. This Court cannot, as Commercial Jet urges, simply create a

substantive right where the statutory language is clear. There is no compelling textual or legislative history basis for what Commercial Jet is arguing.

As a final matter, there is no practical or policy basis for it either. At times, Commercial Jet has argued—without any citation—that Florida would be unique in not allowing the lien Commercial Jet seeks. That is an easily verifiable proposition, and Commercial Jet has never offered evidence that the normal operation of possessory liens in Florida is somehow out-of-step when it comes to others states and aircraft services.

In fact, other states require possession to perfect similar liens. *See, e.g., In re S. Air Transp., Inc.*, 511 F.3d 526, 533 (6th Cir. 2007) (noting, under North Carolina law, “[t]he state-law artisan’s lien in this case requires possession, rather than filing, to be valid and retain priority”). Texas requires *owner*-consent to have a valid mechanic’s lien on an aircraft. *See Astraeva Aviation Servs., Inc. v. Nations Air Inc.*, 172 F.3d 390, 393-95 (5th Cir. 1999). The incentive of a possessory lien where possession is *required* is obvious. Possession will not be resolved until payment is resolved. As this Court has recognized, it is a “form of leverage.” *State v. Miller*, 373 So. 2d 677, 680 (Fla. 1979).

The type of regime that Commercial Jet is advancing, by contrast, is not sensible. Commercial Jet contends that a provider can obtain a non-possession “possessory lien” backed up by the remedy of foreclosure on an airplane *up to 90*

days after the completion of services. No one is disputing that service providers have a contractual right to payment. But Commercial Jet offers no sound reason why Florida or any other state should want a system that does so little to incentivize payment up front or prompt resolution, and also practically guarantees surprise clouds on airplane title.

Commercial Jet's implausible reading of the applicable statutes achieves no useful public policy. The far better norm is that a possessory lien requires possession, which is supported by both the plain language of section 713.58 and existing precedent. Commercial Jet should have held the aircraft and insisted upon payment or required a deposit that could have been forfeited. Imposing lax rules on seeking liens against aircraft owners is not a reasonable solution. It is unfair to parties who had nothing to do with the non-payment for services, and it does not foster efficient dispute resolution. There is no reason to bend the rules of possessory liens in Florida from what appears on the face of section 713.58 and what cases have recognized for decades: no possession, no possessory lien.

CONCLUSION

Respondent U.S. Bank, N.A. respectfully requests the Court affirm the Third District Court of Appeal.

Respectfully submitted,

By: _____
Eric B. Wolff (admitted *pro hac vice*)
Chief Counsel
The Boeing Company
1301 S.W. 16th Street
Renton, Washington 98055
Telephone: (206) 662-3484
Facsimile: (206) 662-3287

Rachel Sullivan
Florida Bar No. 815640
WHITE & CASE LLP
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

Attorneys for Respondent U.S. Bank, N.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 15th day of July, 2011, to David M. McDonald, Esq., McDonald & McDonald, 1393 Southwest 1st Street, Suite 200, Miami, Florida 33135-2321.

Rachel Sullivan

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief was prepared in Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Rachel Sullivan