IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case Nos.: SC11-2208
SC11-2336

L.T. Case No.: 3D11-34

MYRIAM AMPUERO-MARTINEZ,
as Personal Representative of the
ESTATE OF SERGIO AMPUERO,

Petitioner/Cross-Respondent,

v.

CEDARS HEATHCARE GROUP, LTD. d/b/a
CEDARS MEDICAL CENTER,

Respondent/Cross-Petitioner.
_____/

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT

Lincoln J. Connolly
Fla. Bar No.: 0084719
ROSSMAN BAUMBERGER, REBOSO
SPIER & CONNOLLY, P.A.
Counsel for the Petitioner/Cross-Respondent,
Myriam Ampuero-Martinez
44 West Flagler Street, 23rd Floor
Miami, FL 33130-1808
Ph: (305) 373-0708
Fax: (305) 577-4370
ljc@rbrlaw.com

PRELIMINARY STATEMENT

The Petitioner/Cross-Respondent, MYRIAM AMPUERO-MARTINEZ, as Personal Representative of the ESTATE OF SERGIO AMPUERO, is referred to as "Mrs. Ampuero".

The Respondent/Cross-Petitioner, CEDARS HEATHCARE GROUP, LTD. d/b/a CEDARS MEDICAL CENTER, is referred to as "Cedars".

The Patient's Right to Know Amendment, Article 10, section 25, Fla. Const., is generally referred to by its ballot numeration as "Amendment 7".

There record prepared by the Clerk of the Third District Court of Appeal is designated as "R. __" followed by page number.

All emphasis in quotations is supplied by the undersigned.

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ARGUMENT

I. THE PARTIES AGREE THAT THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *BUSTER II*

As it did below post-decision, the Respondent/Cross-Petitioner, Cedars, commendably confesses error in the Third District's decision, acknowledging that "[t]he Third District's opinion conflicts with *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 492-93 (Fla. 2008), which held that section 381.028(7)(a), was invalid." Cedars' Answer Brief on the Merits, at 7. This Court should thus quash the Third District's decision holding that the trial court departed from the essential requirements of the law in refusing to "limit the production of [Amendment 7] records to the same or substantially similar condition, treatment, or diagnosis as the patient requesting access," *Cedars Healthcare Group, Ltd. v. Martinez*, 88 So.3d 190 (Fla. 3d DCA 2011) (citing § 381.028(7)(a), Fla. Stat. (2010)), but otherwise leave untouched the Third District's decision denying "the petition for certiorari on all other grounds raised in the petition as . . . the trial court's ruling on these grounds did not depart from the essential requirements of the law." *Id.* at 191 n.1.

But having confessed error, Cedars then seeks to invoke the tipsy coachman doctrine asking the Court to reverse the Third District's entire decision (which otherwise upheld the trial court's order), not to affirm it on different grounds. Our

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research fails to show that the tipsy coachman doctrine may be used to in effect *reverse* a lower court.[1] And this Court should decline to do for several reasons.[2]

First, this Court presumably accepted jurisdiction based upon both parties' agreement that the Third District had inexplicably erred in applying a statute this Court had struck down as unconstitutional three years earlier in *Florida Hosp. Waterman, Inc. v. Buster* ("*Buster II*"), 984 So.2d 478 (Fla. 2008). Of course, such an errant decision is apt to lead to confusion and delay in citizens' ability to promptly exercise their rights under the Florida Constitution. *See* Mrs. Ampuero's Initial Brief, at 7 & n.6. The Court, in accepting jurisdiction, dispensed with oral argument, presumably concluding this simple, clear-cut issue could be decided without much judicial labor or jurisprudential inquiry. Cedars' effort to induce this Court to consider numerous bases for reversal runs afoul of such a course, if it was the Court's intended plan.

Second, Mrs. Ampuero and Cedars have settled the case between them. Mrs.

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[1]*See, e.g., Robertson v. State*, 829 So.2d 901, 906 (Fla. 2002) ("the 'tipsy coachman' doctrine . . . allows an appellate court to *affirm* a trial court that 'reaches the *right result*, but for the wrong reasons'") (citation omitted).

[2]In the same spirit of candor shown by Cedars, Mrs. Ampuero would mention that Cedars did file its own notice of invoking this Court's discretionary review jurisdiction, and this Court consolidated both cases, with Cedars as respondent/cross-petitioner. Thus Cedars could have presumably argued directly for reversal without invoking the ill-suited tipsy coachman doctrine.

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Ampuero notified the Court of the settlement, but moved it to retain the case to decide this important issue where the Third District clearly erred contrary to this Court's decision in *Buster II*. Cedars opposed that motion, arguing that this Court had already decided the important issues in this case in *West Fla. Reg. Med. Ctr., Inc. v. See*, 79 So.3d 1 (Fla. 2012), such that the issues here "are no longer . . . of great public importance" and the case should be dismissed.[3] Now Cedars contends that this Court should decide those numerous other issues, despite having already professed otherwise.

Third, this case comes to this Court after a certiorari proceeding in which Cedars had to demonstrate that the trial court departed from the essential requirements of the law and caused Cedars irreparable harm in the process. *See, e.g., Belair v. Drew*, 770 So.2d 1164, 1166 (Fla. 2000). None of the issues Cedars raises themselves supply a basis for conflict of decisions review jurisdiction, although admittedly once taking jurisdiction, this Court has the power to review any ruling from below that it wishes. *E.g., Price v. State*, 995 So.2d 401, 406 (Fla. 2008). In addition, the trial court's ruling over which certiorari review was otherwise denied by the Third District will not subject Cedars to irreparable harm at all, as was required

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[3]Respondent's Opposition to Petitioner's Motion for the Court to Retain Jurisdiction of the Case, at 3 ¶ 4.

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to obtain review there. Amendment 7 has been the law of our land since its adoption in 2004[4] (so any harm to Cedars arose at its adoption, not from the Third District's decision), and Cedars no longer has a hospital with medical staff which could be chilled in their peer review and risk management activities, which no longer take place at Cedars.[5] Thus, where the issues Cedars raises were insufficient to justify the exercise of certiorari jurisdiction below, they should not command this Court's attention on discretionary review now.

Thus, Mrs. Ampuero respectfully submits, this Court should quash the Third District's decision to the extent that it limits her (and other patients') rights under Amendment 7, but otherwise decline to address the issues raised by Cedars in its Answer Brief.

II. CEDARS IS REQUIRED TO PRODUCE RECORDS OF ADVERSE MEDICAL INCIDENTS UNDER AMENDMENT 7

Should the Court elect to reach this issue, it should reject Cedars' argument and approve the Third District's summary decision finding no departure from the essential requirements of law. The trial court properly found that records in Cedars'

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[4]*See, e.g., Amisub North Ridge Hosp., Inc. v. Sonaglia*, 995 So.2d 999, 1001 (Fla. 4th DCA 2008) ("Amendment 7 removed any barrier to a patient's discovery of adverse medical incident information"), *rev. denied*, 13 So.3d 57 (Fla. 2009).

[5]For a more detailed discussion of this issue, *see* Mrs. Ampuero's Response to Cedars Healthcare Group, Ltd.'s Petition for Writ of Certiorari, at 3-4 (R. 374-75).

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possession are subject to Amendment 7. At the time the subject records were created, Cedars was a licensed health care facility. At the time Mrs. Ampuero's father was a patient at Cedars, Cedars was a licensed health care facility. *E.g.*, R. 55-56. Amendment 7 provides that "[i]n addition to any other similar rights provided herein or by general law, patients have a right to have access to any records *made or received in the course of business by a health care facility* or provider relating to any adverse medical incident." Art. X, § 25(a), Fla. Const. And the records sought in discovery from Cedars were "made or received in the course of business by a health care facility," *id.*, to wit: Cedars.

Cedars argues that because Amendment 7 directs that the terms "'health care facility' and 'health care provider' have the meaning given in general law related to a patient's rights and responsibilities," *id.*, § 25(c)(1), and because § 381.026, Fla. Stat. (the Florida Patient's Bill of Rights and Responsibilities), defines a health care facility as "a facility licensed under chapter 395," *id.*, § 381.026(2)(b), it was not a "health care facility" at the time Mrs. Ampuero requested Amendment 7 records from it, and Amendment 7 thus did not apply to it then. But Cedars cannot rely upon that statute here, for the statute also provides that "[t]his section *shall not be used for any purpose* in *any civil . . . action* and neither expands *nor limits any rights* or remedies

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provided under any other law." *Id.*, § 381.026(3).[6]

Moreover, such a restrictive interpretation, even if available, should be rejected. As noted by the Fifth District, courts must broadly construe this constitutional provision, particularly where it was adopted directly by the citizen electorate. *See, e.g., Florida Hosp. Waterman, Inc. v. Buster* ("*Buster I*"), 932 So.2d 344, 350 (Fla. 5th DCA 2006) ("[u]nlike statutory construction, 'we have an obligation to provide "a broader and more liberal construction" of constitutional provisions'") (citation omitted), *approved in part and quashed in unrelated part*, 984 So.2d at 478.

Below, the trial court correctly observed that accepting Cedars' argument:

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[6]None of the nursing home cases cited by Cedars invoking the statute reference this odd but clear self-immolation preventing its use in a civil action such as this malpractice case. Importantly, the Legislature's prohibition on the use of this statute has no effect on patients' rights to obtain records under Amendment 7. Numerous other definitions for "health care provider" do exist under general law relating to a patient's rights and responsibilities. For example, Mrs. Ampuero had the "responsibility" to presuit Cedars as a health care provider in order to bring this very civil action under general law. *See* §§ 766.106(2)(a), Fla. Stat. (requiring presuit "prior to filing a complaint for medical negligence"); 766.102(1) (implicitly defining medical negligence actions as those against "health care providers" as defined in 766.202(4) (which defines a hospital as a "health care provider")), and she likewise had "rights" against Cedars as a healthcare provider as a patient under Chapter 766. *See, e.g.,* §§ 766.106(3)(b), Fla. Stat.; 766.204(1); 766.207(3). Clearly Cedars is a "health care provider" under "general law relating to a patient's rights and responsibilities," Art. X, § 25(c)(1), Fla. Const., without need to "unlawfully" refer to § 381.026 in this civil action.

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> would be [inapposite] to the enactment of [Amendment 7] that gives patients the right to know about adverse incidents. The ability to have a healthcare facility decertify itself as a healthcare facility [and thereby no longer have to produce records under Amendment 7 is rejected] in spite of my esteem[ed circuit court] colleagues that have ruled otherwise.... The Court holds that the [amendment] means exactly what it says[:] That if you were a healthcare facility that had adverse medical information you are to turn it over to the Plaintiffs in a case like this. So the Court so rules.

R. 60-61. Allowing hospitals to "re-shroud" records of adverse medical incidents from discovery or informal request by de-licensing would eviscerate patients' rights to discover their actual or potential healthcare providers' *history of adverse medical incidents*[7] under Amendment 7.

The General Magistrate also ruled in the alternative that Cedars waived its threshold objections by objecting and moving for a protective order, yet partially responding to the Amendment 7 discovery anyway. Circuit Judge Donner properly refused to credit Cedars' exception to this alternate ruling, and the Third District

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[7]As noted by this Court in *Buster II*, Amendment 7's "clear purpose was to do away with existing restrictions on a patient's right to access a medical provider's *history of adverse medical incidents* and to provide a clear path to access those records." 984 So.2d at 489. This Court thereby rejected the argument that Amendment 7 only applies to records created after its adoption in 2004, noting that to do so "would leave a permanent gap in the disclosure granted, consisting of the medical provider's *history* prior to the amendment's passage," *id.*, and rejected that hospital's "strained reading" of Amendment 7, because "a patient would never gain access to the medical provider's actual 'history of acts, neglects or defaults'...." *Id.* at 490 n.6.

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properly declined to find a departure from the essential requirements of law.[8] Regardless, Mrs. Ampuero submits that this waiver issue is not of the sort justifying this Court's labors on discretionary review in a settled case.

III. *BUSTER II* WAS CORRECTLY DECIDED

Next, Cedars asks this Court to reconsider its decision in *Buster II* striking down § 381.028(7)(a), Fla. Stat., the very statute Cedars agrees the Third District wrongly applied below. Should the Court entertain this argument, it should be quickly rejected.

First, Cedars never argued this below, thereby foreclosing its ability to raise this argument for the first time now. *See, e.g., Aills v. Boemi*, 29 So.3d 1105, 1109 (Fla. 2010).

Second, *Buster II*, its forebears, and progeny, all correctly decided that Amendment 7's broad right of access to records of adverse medical incidents does not admit to legislative limitation, for a constitution always trumps a mere statutory enactment. *See, e.g., Henderson v. State*, 20 So.2d 649, 651 (Fla. 1945) ("[w]hen the provisions of statute collide with provisions of the Constitution the statute must give

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[8] *Accord, e.g., Waters Edge Living, LLC v. RSUI Indem. Co.*, 2008 WL 1816418, at *6 (N.D. Fla. 2008) ("it is improper to provide discovery subject to objections or 'without waiving' an objection.... If the discovery is provided, the objection is waived"); *Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 401 (S.D. Fla. 2008) (Brown, Mag. J.) (same).

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way"). Cedars argues that the trial court's order here would require it to sift through 22 years of records, but the Legislature has already measured these burdens and shifted them to patients requesting records under Amendment 7, requiring them to pay the "reasonable and actual cost of complying with the request...." § 381.028(7)(c)1., Fla. Stat. Thus, while Amendment 7 may make Cedars grouchy for the effort, it causes it no lasting or unreimbursed harm, particularly where hospitals are already in the business of producing large amounts of records to patients, health insurers, and other requesters. *E.g.*, § 395.3025, Fla. Stat.

Cedars claims that such broad discovery permitted by our statute constitution raises a "significant due process concern," Cedars' Answer Brief, at 13, without citation to authority or elaboration on how the federal due process clause[9] is offended by it. Such is not the making of a valid constitutional challenge. *Cf. Rollins v. Rollins*, 19 So.2d 562, 563 (Fla. 1944). Cedars cites to *Wellner v. East Pasco Med. Ctr., Inc.*, 975 So.2d 442, 444 (Fla. 2d DCA 2007), but that case was decided in the context of a trial date and a discovery cutoff, a week before trial. *Id.* at 443, 444. Neither are at issue here now that Cedars has settled with Mrs. Ampuero (nor were

[9]At best Cedars can only look to the federal constitution here, because Amendment 7, being in the Florida Constitution, cannot be "unconstitutional" under an earlier provision of our state's charter. *See, e.g., Sylvester v. Tindall*, 18 So.2d 892, 900-01 (Fla. 1944).

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they at the time the trial court made its ruling or when the Third District rendered its decision). *Wellner* offers no basis for this Court to foray into hypothetical due process considerations not even present here.

IV. AMENDMENT 7 IS NOT PREEMPTED BY THE HCQIA

Finally, Cedars argues that this Court wrongly decided last year that the federal Health Care Quality Improvement Act of 1986 ("HCQIA") did not preempt Amendment 7 in *West Fla. Reg. Med. Ctr., Inc. v. See*, 79 So.3d 1 (Fla. 2012), intending to preserve its rights to seek certiorari review from the Supreme Court of the United States. Mrs. Ampuero presumes that this Court will adhere to its unanimous judgment in *See* and thus does not wish to belabor her agreement with it here. She adopts it in full, as well as the other arguments she made in opposition to this argument below in her Response to the Petition for Writ of Certiorari. R. 380-85. But even were the Court to credit Cedars' argument, Cedars' Petition was overbroad on this point. The trial court compelled Cedars to produce all records of adverse medical incidents involving Sergio Ampuero and the physicians involved with his care. R. 49, 94-102. Even if the HCQIA preempted disclosure of *peer review records* under Amendment 7, it would not preempt disclosure of any other records such as risk management incident reports, quality assurance reports and records, or any other records of adverse medical incidents, all of which Cedars was compelled

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to produce.

And to preserve our record, we must explain how and why the HCQIA does not preempt Amendment 7. As correctly recognized in *See*, courts must start with a presumption against federal preemption of state law. 79 So.3d at 16 (citation omitted). There can be no implied conflict preemption because the purposes and objectives of both are not in conflict. *Id.* at 20. The HCQIA promotes effective peer review by immunizing participants from civil liability,[10] not by making peer review materials confidential from discovery. *Id.* at 17, 19. The legislative history of the HCQIA shows that Congress considered, but did not include, confidentiality of these records, speaking "loudly with its silence." *Id.* at 21. *See also id.* at 17-21.[11] And Congress specifically included three savings clauses, all of which indicate that

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[10]Florida law is consistent with the HCQIA by furnishing immunity from suit for honest reporting and participation in the peer review process. *See* §§ 395.0191(7); 395.0193(5); 766.101(3)(a) & (7)(e), Fla. Stat.; 42 U.S.C. § 11111.

[11]Notably, peer review records have been completely discoverable in Kentucky since before the HCQIA's adoption in 1986, *Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464, 466 (Ky. 1999), and have been discoverable in federal claims filed in federal court both before and after its adoption. *See e.g., Feminist Women's Health Ctr., Inc. v. Mohammad*, 586 F.2d 530, 544 n.9 (5th Cir. 1978), *cert. denied*, 100 S.Ct. 262 (1979); *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 903 (2008). The lack of congressional action despite these many decisions allowing discovery of peer review records is strongly suggestive that Congress does not believe that the courts are erring in allowing such discovery. *See, e.g., Etchu-Njang v. Gonzales*, 403 F.3d 577, 582 (8th Cir. 2005); *Zommer v. State*, 31 So.3d 733, 754 (Fla.), *cert. denied*, 131 S.Ct. 192 (2010).

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Congress did not intend to preempt state laws such as Amendment 7. *Id.* at 19, 20 (citing 42 U.S.C. §§ 11137(b)(1) ("[n]othing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure"); 11115(a) (preserving all liabilities and immunities except as otherwise affected); 11115(d) ("[n]othing in this chapter shall be construed as affecting in any matter the rights and remedies afforded patients under any provision of . . . State law to seek redress for any harm or injury suffered [due to medical malpractice]")).

Beyond this Court's reasoning in *See*, Mrs. Ampuero submits for her record that the presence of a savings clause should defeat any claim of preemption, including by implied conflict.[12] Moreover, Mrs. Ampuero would object to any application of preemption based upon an implied conflict "purposes and objectives" inquiry as being in violation of the Tenth Amendment to the U.S. Constitution,[13] principles of federalism and state sovereignty, fundamental notions of due process, the guarantee

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[12]*See Williamson v. Mazda Motor of America, Inc.*, 131 S.Ct. 1131, 1141-43, 2011 WL 611628, at *11 (2011) (Thomas, J., concurring in the judgment). *But see Geier v. American Honda Motor Co., Inc.*, 120 S.Ct. 1913 (2000) (holding otherwise in one circumstance).

[13]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Amend. X, U.S. Const.

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of a republican government, and as constituting an ultra vires misuse of the Supremacy Clause.[14]

Furthermore, although the Ninth Amendment[15] is oft deemed to bring little to the governing table of our federal republic,[16] if it is to have any meaning as each clause of our Constitution should,[17] that amendment should be accepted to apply here to restrain the federal legislature from preventing the decided will of a greater than 4 to 1 majority of a state's citizens from deciding such local issues particularly relevant to their own lives. *See Buster II*, 984 So.2d 478, 480 n.1 (Fla. 2008) (noting

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[14]*See, e.g., Williamson*, 131 S.Ct. at 1141-43, 2011 WL 611628, at *11-*13 (2011) (Thomas, J., concurring in the judgment) (rejecting "purposes and objectives" implied conflict preemption under the supremacy clause in the face of an explicit savings clause, noting that such preemption requires the court to engage in a constitutionally unjustified "'psychoanalysis' of the regulators") (citation omitted); *Wyeth v. Levine*, 129 S.Ct. 1187, 1217 (2009) (Thomas, J., concurring in the judgment) (arguing that the Court's implied preemption jurisprudence "leads to the illegitimate–and thus, unconstitutional– invalidation of state laws . . . merely because they 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law . . . as perceived by this Court") (citation omitted).

[15]"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Amend. IX, U.S. Const.

[16]*See, e.g., Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) ("[t]he Ninth Amendment, it has been said, states but a truism. But that truism goes to the very core of the constitutional relationship between the individual and governmental authority, and, indeed, between sovereigns exercising authority over the individual") (Stevens, J., concurring in the judgment).

[17]*Griswold v. Connecticut*, 381 U.S. 479, 490-91 (1965) (Goldberg, J., concurring) (citing *Marbury v. Madison*, 1 Cranch 137, 174 (1803)).

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that Amendment 7 passed 81.2% to 18.8%) (citation omitted). Congress should not be at liberty to override (*ex ante* even) a popularly-adopted state constitutional amendment in which a state's citizens directly decided how to regulate their access to critical information created in the state by their own healthcare providers, whether pursuant to the restraints and protections of the Ninth or the Tenth Amendments, or both. *Cf. Griswold*, 381 U.S. at 531 (Stewart, J., dissenting) ("[i]f . . . the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it").

CONCLUSION

For the foregoing reasons, Mrs. Ampuero respectfully requests that this Court quash the decision below on the issue of the application of the unconstitutional § 381.028(7)(a), Fla. Stat., but leave untouched the remainder of the Third District's decision properly upholding the trial court's rulings.

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1 (800) 775-6511

Respectfully submitted,

ROSSMAN BAUMBERGER, REBOSO
SPIER & CONNOLLY, P.A.
Counsel for the Petitioner/Cross-Respondent,
Myriam Ampuero-Martinez
44 West Flagler Street
Courthouse Tower, 23rd Floor
Miami, FL 33130-1808
Ph: (305) 373-0708
Fax: (305) 577-4370
ljc@rbrlaw.com

By: _____
Lincoln J. Connolly
Fla. Bar No.: 0084719

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on January 18, 2013 on all counsel on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

WE HEREBY CERTIFY that the foregoing Initial Brief was printed in 14-point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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SERVICE LIST

AMPUERO-MARTINEZ v. CEDARS

Matthew R. Bernier, Esq.
Stephen J. Bronis, Esq.
Cristina Alonso, Esq.
CARLTON FIELDS, P.A.
Counsel for Respondent/Cross-Petitioner,
Cedars Healthcare Group, LTD.
Miami Tower
100 SE 2nd Street, Suite 4200
Miami, FL 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

Oscar J. Cabanas, Esq.
WICKER SMITH
Counsel for Respondents,
Adrian Legaspi, M.D. and
21st Century Oncology, LLC
2900 S.W. 28th Terrace
Grove Plaza Building, 5th Floor
Miami, FL 33133
Telephone: (305) 448-3939
Facsimile: (305) 441-1745

Kenneth J. Miller, Esq.
HALICZER, PETTIS & SCHWAMM, P.A.
Co-counsel for Respondent/Cross-Petitioner,
Cedars Healthcare Group, Ltd.
One Financial Plaza, 7th Floor
100 S.E. Third Avenue
Fort Lauderdale, FL 33394
Telephone: (954) 523-9922
Facsimile: (954) 522-2512

Benjamin L. Bedard, Esq.
ROBERTS, REYNOLDS,
BEDARD & TUZZO, P.A.
Counsel for Respondent,
Manuel M. Gonzalez, M.D.
470 Columbia Drive, Bldg. C-101
West Palm Beach, FL 33409
Telephone: (561) 688-6560
Facsimile: (561) 688-2343

Rolando Diaz, Esq.
KUBICKI DRAPER
Counsel for Respondent,
Alejandro J. Vilasuso, M.D.
25 West Flagler Street, Penthouse
Miami, FL 33130
Telephone: (305) 374-1212
Facsimile: (305) 374-7846