Electronically Filed 12/17/2013 03:33:51 PM ET

RECEIVED, 12/17/2013 15:38:35, John A. Tomasino, Clerk, Supreme Court

Case No. SC12-1401

IN THE SUPREME COURT OF FLORIDA

PHILIP MORRIS USA INC., *ET AL.*,

Petitioners,

v.

TINA RUSSO, AS EXECUTOR DE SON TORT FOR THE ESTATE OF PHYLLIS FRAZIER,

Respondent.

On Discretionary Review of a Decision of
the Third District Court of Appeal

REPLY BRIEF OF PETITIONERS

Benjamine Reid
FL Bar No. 183522
Alina Alonso Rodriguez
FL Bar No. 178985
CARLTON FIELDS, P.A.
Miami Tower
100 S.E. Second Street, Suite 4200
Miami, Fla. 33131

Gregory G. Katsas
FL Bar No. 89091
JONES DAY
51 Louisiana Avenue
Washington, D.C. 20001

Counsel for Defendant/Petitioner
R.J. Reynolds Tobacco Co.

Raoul G. Cantero
FL Bar No. 552356
WHITE & CASE LLP
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Fla. 33131

Lauren R. Goldman (*pro hac vice*)
Scott A. Chesin (*pro hac vice*)
MAYER BROWN LLP
1675 Broadway
New York, N.Y. 10019

Counsel for Defendant/Petitioner
Philip Morris USA Inc.

DECEMBER 17, 2013

William Geraghty
FL Bar No. 0089508
Frank Cruz-Alvarez
FL Bar No. 0499803
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 2400
201 South Biscayne Boulevard
Miami, Fla. 33131

Counsel for Defendant/Petitioner
Philip Morris USA Inc.

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PRELIMINARY STATEMENT

Florida's fraud statute of repose requires a plaintiff to bring an "action for fraud" no more than twelve years "after the date of the commission of the alleged fraud." The only sensible reading of the phrase "the alleged fraud" is that it refers to the fraud alleged in the plaintiff's own "action," which cannot be "committed" absent reliance by that particular plaintiff. We therefore argued that the fraud statute of repose requires proof that the plaintiff detrimentally relied upon a fraudulent act or omission occurring within the twelve-year period before filing suit. Ms. Russo makes three main points in response, all of which are meritless.

First, Ms. Russo asserts that the statute of repose focuses exclusively on the acts or omissions of the defendant (or its co-conspirators). She appears to agree with us that the "commission" of the fraud must occur within the twelve-year actionable period. Where we part company is with Ms. Russo's further assertion that the plaintiff's reliance and injury have "nothing to do with" the statute of repose, so that an act can constitute "the alleged fraud," and thus delay the running of the statute of repose, even if it had no impact whatsoever on the plaintiff.

That proposition is inconsistent with the text and purpose of the repose statute. From a textual standpoint, a deceptive act or omission can constitute "the alleged fraud," and can be "committed" against a plaintiff, only if that plaintiff detrimentally relies upon it. And the purpose of the statute—to alleviate the

difficulties involved in defending against "stale" fraud claims—can be served only if claims are barred where the plaintiff did not detrimentally rely on a misstatement or omission within the twelve-year period.

Ms. Russo argues that "Petitioners' concern" about stale fraud claims—which is actually the *Legislature*'s concern—is "misplaced" because (1) the statute of limitations is sufficient to deal with the problem of stale claims; and (2) "proof of the last stages of the conspiracy would require no resort to remote evidence." But of course, it is not for this Court to second-guess the Legislature's policy judgments, and the Legislature enacted the statute of repose precisely because it concluded that the statute of limitations provided insufficient protection against stale fraud claims. Moreover, the concern about staleness relates not to "proof of the *last* stages of the conspiracy"—which in the absence of reliance would be totally irrelevant to the plaintiff's fraud claim—but the *much older* evidence bearing on the defendant's state of mind and, especially, the plaintiff's reliance.

Ms. Russo's second point (which she did not raise below) is that, even if our reading of the statute is correct, petitioners' proposed instruction on repose "contain[ed] an improper evidentiary restriction" because it would have prevented the jury from considering petitioners' pre-1982 conduct. She is wrong, but it makes no difference at this stage. The trial court erred by refusing to include *any* question on the verdict form with the temporal limitation required by the statute of

repose. And in any event, this appeal does not seek a new trial based on instructional error; a new trial has *already* been ordered based on the Third DCA's ruling on the statute of limitations.

Finally, Ms. Russo argues that adoption of our reading of the statute of repose would violate her constitutional right of access to the courts. As the initial brief explains, every court that has considered this argument has rejected it, because (1) plaintiffs who allege a stale fraud claim based on a latent injury caused by a defendant's product have an alternative strict liability or negligence remedy; and (2) public necessity justifies cutting off stale fraud claims. Ms. Russo offers no valid response to these points.

ARGUMENT

I. TO AVOID APPLICATION OF THE FRAUD STATUTE OF REPOSE, A PLAINTIFF MUST PROVE DETRIMENTAL RELIANCE ON A MISLEADING STATEMENT OR OMISSION WITHIN THE ACTIONABLE TWELVE-YEAR PERIOD.

Ms. Russo contends that the "timing of a plaintiff's reliance is irrelevant" to the repose inquiry and that our position confuses the time when a fraud cause of action accrues for statute of limitations purposes with the time when the twelve-year actionable period commences under the statute of repose. Resp. Br. 10-23. Her position is inconsistent with the statutory text, decades of Florida case law, and the legislative purpose underlying the statute of repose.

A. The Statutory Text Requires A Plaintiff To Prove Reliance Upon A Misleading Statement Or Omission Within Twelve Years Before The Complaint.

The statute of repose requires that "an action for fraud" be brought no more than twelve years "after the date of the commission of the alleged fraud." § 95.031(2)(a), Fla. Stat. We argued in the initial brief that, because a plaintiff cannot bring an "action" seeking damages for a fraud committed against third parties, "the alleged fraud" relevant for purposes of the statute of repose must be the fraud claimed to have injured the *plaintiff*—not someone else. The "commission" of that fraud cannot occur without reliance by the plaintiff, because reliance is an element of the claim. Thus, the statute requires that a fraud claim be brought within twelve years after the occurrence of a fraudulent act or omission *on which the plaintiff relied.* *See* Pet. Br. 18-23. The Second and Fourth DCAs, and even (recently) the Third DCA, have all said as much. *See id.* at 12-13, 19-23, 28.

Ms. Russo asserts, however, that the statute allows the action to proceed so long as the defendant—or, in the case of a conspiracy, its co-conspirators—"committed" additional deceptive acts within the twelve-year period, regardless of whether the plaintiff or anyone else relied upon them. She is wrong: a deceptive act "in the air" is not an "alleged *fraud*," much less "*the* alleged fraud" for which a plaintiff can seek to recover. Rather, to be that "alleged fraud," the act must have affected the plaintiff who brought the action.

1. An "Alleged Fraud" Cannot Be "Committed" Without Reliance By The Plaintiff.

First, Ms. Russo argues that "[u]nlike a limitations period, a repose period runs from the date of some discrete act defined in the applicable repose statute, which may have nothing to do" with the acts that harmed the plaintiff and gave rise to her claim. Resp. Br. 5-6. Citing *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992), she asserts that we have "confused the date at which the fraud repose period begins to run . . . with the date on which Ms. Frazier's causes of action . . . accrued." Resp. Br. 11. But we suffer from no such confusion, and *Kush* holds no such thing. *See* Pet. Br. 43-45.

It is certainly true that unlike a statute of limitations, which "begins to run upon the accrual of a cause of action," a statute of repose "runs from the date of a discrete act on the part of the defendant, without regard to when the cause of action accrued." *Kush*, 616 So. 2d at 418. The point of the *Kush* decision is that the statute of repose cuts off all claims a specified number of years after the defendant's act. As a result, the Court held, the statute of repose may bar claims that have not yet accrued—and thus are not yet subject to the statute of limitations—if there is a long delay between the defendant's act and the plaintiff's injury. *Id.* But the act at issue in *Kush* (the defendant physician's poor advice) was alleged to have harmed the plaintiffs themselves. The decision nowhere suggests that the "discrete act" that triggers the statute of repose can be one that

had no effect on the plaintiff. As noted in our initial brief (*see* Pet. Br. 44-45), the *Kush* plaintiffs surely could not have avoided repose by showing that their doctor had given negligent medical advice to *someone else* within the actionable period. Ms. Russo offers no response to these arguments.

Second, and relatedly, Ms. Russo argues that a plaintiff's reliance is irrelevant to "the date of the commission of the alleged fraud" because "[c]onspirators who conceal information commit a new act of fraudulent concealment each time they conceal information with the intent to induce others to rely on the misinformation created by their concealment . . . regardless of when or whether any person relies on the concealment." Resp. Br. 16. That argument ignores the statutory text. The Legislature did not say that the complaint must be filed within twelve years after the defendant "ceases to engage in fraudulent activity of the kind alleged to have injured the plaintiff." Instead, it used the phrase "commission of the alleged fraud," which can only be a fraud that harmed the plaintiff herself.

Nor does *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So. 2d 201 (Fla. 2003), support Ms. Russo's reading of the statute. *See* Resp. Br. 13. Ms. Russo notes that in *Nehme*, this Court stated that "'[f]raud' is generally defined as [ ] a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." 863 So. 2d at 205.

But *Nehme* involved the medical-malpractice statute of repose, which is tolled where "fraud, concealment, or intentional misrepresentations of fact prevented the discovery of the injury." § 95.11(4)(b), Fla. Stat.; *Nehme*, 863 So. 2d at 205. The plaintiff invoked that provision to excuse her otherwise untimely filing of a malpractice action; there was no fraud *claim*, and no dispute about the existence of detrimental reliance. The narrow issue before the Court was whether the term "concealment" encompassed a negligent diagnosis; the Court held that it did not. 863 So. 2d at 204. The Court did not consider whether reliance was a necessary element of a cause of action for fraud; much less whether the necessary concealment and reliance must occur within the repose period. *Nehme* is simply irrelevant to the issue in this case.

2. The Allegation Of A Conspiracy Does Not Change The Reliance Requirement.

An allegation of an ongoing conspiracy does not alter the requirement of reliance on an act occurring within the twelve-year period; it simply permits that reliance to be on an act of a co-conspirator rather than that of the defendant itself.

As explained in our initial brief (*see* Pet. Br. 18-19), it has been settled law for decades that detrimental reliance by the plaintiff is an element of *any* fraud-based claim, whether it involves a single perpetrator or multiple perpetrators acting in concert. For that reason, the Fourth DCA has held that the statute of repose applies in the same manner to both single-actor frauds and conspiracies: the

actionable period is measured by the date of commission of a fraud on which the plaintiff can base her cause of action. *See Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1151 (Fla. 4th DCA 2012).

That result makes perfect sense. A claim of conspiracy to conceal is derivative of the underlying concealment claim. *See Loeb v. Geronemus*, 66 So. 2d 241, 243 (Fla. 1953). The existence of a conspiracy makes a defendant liable to the plaintiff for the acts of the defendant's co-conspirators that harmed *that plaintiff*, not for co-conspirator acts that may (or may not) have harmed *others*. *See Liappas v. Augoustis*, 47 So. 2d 582, 582 (Fla. 1950) ("The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy and which *results in damage to the plaintiff*.") (emphasis added). Thus, because a claim for conspiracy to conceal, like a claim for concealment itself, "cannot be committed absent detrimental reliance by the plaintiff, whether a fraudulent act was committed within twelve years of the filing of an action can only be determined based on the timing of a particular plaintiff's alleged reliance." *Kayton*, 104 So. 3d at 1151 (citation omitted).

Both the decision below and Ms. Russo's brief rely heavily on a single sentence from an earlier decision of the Second DCA, *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076 (Fla. 2d DCA 2000), which stated that "the critical date for statute of repose purposes should be the last act done in

furtherance of the conspiracy." *Id.* at 1079; *see* Resp. Br. 15. As we explained in our initial brief, however, *Laschke* did not hold that proof of reliance on a fraudulent or misleading statement within the actionable period was unnecessary. *See* Pet. Br. 28-29. It held simply that two of the alleged co-conspirators whose products the plaintiff had stopped using more than twelve years before bringing suit would remain liable for the acts of the other two conspirators within the twelve-year actionable period, *if* the plaintiff could prove that she detrimentally relied upon those acts. *See Laschke*, 766 So. 2d at 1078-79. The Second DCA later cited *Laschke* for that very principle. *See Philip Morris USA, Inc. v. Hallgren*, __ So. 3d __, No. 2D12-2549, 2013 WL 5663188, at *2 (Fla. 2d DCA Oct. 18, 2013) (citing *Laschke*, 766 So. 2d at 1079).[1] Ms. Russo offers no response to this argument. Nor did she respond to our argument that any "continuing fraud" exception purportedly created by *Laschke* would effectively read a tolling provision into the fraud statute of repose, contrary to the Legislature's clear decision to add a tolling provision to the *product-liability* statute of repose but *not* the fraud provision. *See* Pet. Br. 32-37.

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[1] Contrary to Ms. Russo's assertion, *Hallgren*'s statement about reliance was not "dicta." Resp. Br. 18. The fact that "the *Hallgren* court found the record to contain 'abundant, adequate evidence . . . of Mrs. Hallgren's direct reliance on [defendants'] misleading advertising'" during the 1990s (*id.* (quoting *Hallgren*, 2013 WL 5663188, at *2)) was essential to the court's determination that the plaintiff had satisfied her burden of proof. But even if *Hallgren*'s statement had been dictum, it nonetheless confirms petitioners' reading of *Laschke*.

B. Ms. Russo's Position Is Contrary To Legislative Intent.

We argued in the initial brief (at 23-27) that Ms. Russo's position would vitiate the express purpose of the statute of repose: to protect defendants against "the difficulties of defending against a stale fraud claim." *Carr v. Broward Cnty.*, 541 So. 2d 92, 95 (Fla. 1989). Ms. Russo argues that this "concern is misplaced" for two reasons. Resp. Br. 20-23. Neither is convincing.

First, Ms. Russo argues that in general, the statute of limitations "adequately protect[s]" defendants against the difficulties of "defending 'stale' claims." Resp. Br. 21. But that was not the view of the Legislature, which saw fit to enact a statute of repose precisely to deal with the problem of stale claims that would *not* be barred by the statute of limitations. *See Kush*, 616 So. 2d at 418; Pet. Br. 23-24. Statutes of repose "represent[] a legislative determination that there must be an outer limit beyond which . . . suits may not be instituted." *Kush*, 616 So. 2d at 421. Ms. Russo would have this Court nullify that determination.

Second, Ms. Russo argues that "there is nothing stale about the claims" in this case because "the ongoing conspiracy ended, if at all, at the soonest just before the *Engle* complaint was filed in May of 1994," and thus "proof of the last stages of the conspiracy would require no resort to remote evidence." Resp. Br. 21-22. That argument misses the point. Where there is no detrimental reliance on conduct that took place in "the last stages of the conspiracy," evidence of such conduct is

not even relevant to the plaintiff's cause of action. What *is* relevant, and stale, is evidence about the circumstances and states of mind of the plaintiff and other witnesses many years earlier. *See* Pet. Br. 25-26. If the timing of the plaintiff's reliance were factored out of the statute of repose, *Engle* defendants would have to rebut a plaintiff's assertions about what the plaintiff knew or believed about the hazards of smoking *decades* before the suit was filed. That is precisely why the statute of repose exists: to give defendants a fair chance to develop their case before the evidence becomes stale.

In short, the text of the statute of repose, the underlying legislative intent, and every DCA decision on the issue other than the decision below support petitioners' view: a plaintiff must prove that he or she was injured by a fraud committed within the actionable period.

II. MS. RUSSO'S ARGUMENT ABOUT PETITIONERS' PROPOSED INSTRUCTION IS BOTH WRONG AND IRRELEVANT.

The trial court rejected petitioners' proposed instruction that, "[i]n making your determination regarding Plaintiff's fraudulent concealment and agreement to conceal claims, you may not consider evidence of alleged concealment, statements, or other conduct before . . . May 5, 1982." Pet. Br. 9. Ms. Russo argues that "even if . . . the timing of reliance is relevant to the repose determination, the Petitioners'

proposed instruction would still be inaccurate and misleading, because it contains an improper evidentiary restriction." Resp. Br. 24.[2]

Petitioners' proposed instruction was correct. Indeed, the Fourth DCA has specifically held that a trial court commits reversible error by failing to give an instruction—substantively identical to the one proposed in this case—that the jury must disregard "evidence of alleged statements, concealment or other conduct that occurred before May 5, 1982" when resolving a plaintiff's fraud claim. *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 15 (Fla. 4th DCA 2012).

In any event, the correctness of petitioners' proposed instruction is a moot point. The trial court's principal error was refusing to include on the verdict form petitioners' requested question whether any concealment that injured Ms. Frazier occurred after May 5, 1982. *See* Pet. Br. 10-11. More fundamentally, the correctness of the instruction would matter at this stage only if petitioners were seeking reversal and a new trial based on the failure to give the instruction. But the Third DCA has already reversed and remanded for a new trial based on its rejection of petitioners' statute-of-limitations defense, a ruling petitioners have not

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[2] Ms. Russo also argues briefly that the instruction was incorrect because "[t]he statute of repose is an affirmative defense as to which the Petitioners have the burden of proof." Resp. Br. 24-25 & n.12. This is wrong for the reasons discussed at length in the respondent's answer brief in *Hess*, at pages 31-35: the statute of repose leaves the plaintiff's burden of proof undisturbed and simply sets a time frame within which the plaintiff must prove the deceptive act and reliance elements of the claim.

appealed. There will be a new trial regardless of the outcome of this appeal. The only question for this Court is whether the plaintiff can prevail at this new trial without proving that Ms. Frazier was injured by a fraud committed after May 5, 1982. Once this Court determines what sort of proof is required by the statute of repose, the trial court can formulate an appropriate jury instruction.

III. THE STATUTE OF REPOSE IS CONSTITUTIONAL.

Finally, Ms. Russo argues (but did not argue below) that adoption of petitioners' reading of the statute of repose "would violate her right of access to courts under Article I, section 21 of the Florida constitution." Resp. Br. 27. As explained in the opening brief (at pp. 38-40), both DCAs that have considered a right-of-access challenge to the fraud statute of repose have rejected it. *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 706-07 (Fla. 3d DCA 2006); *Koulianos v. Metro. Life Ins. Co.*, 962 So. 2d 357, 357 (Fla. 4th DCA 2007) (summary affirmance citing *Kish*). They did so for two independently sufficient reasons: (1) plaintiffs who allege a "stale fraud claim" based on a latent injury from use of a manufacturer's product may bring a strict liability or negligence claim against that manufacturer as a "'reasonable alternative'";[3] and (2) "'overpowering public necessity' . . . justifies cutting off a stale fraud claim." *Kish*, 930 So. 3d at 706-07

[3] The product-liability statute of repose includes an exception for injuries that are latent and undiscoverable within the repose period. *See* § 95.031(3)(c), Fla. Stat.; *see generally* Pet. Br. 33-38.

(quoting *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)). Ms. Russo contests these conclusions, but her position lacks both authority and merit.

Ms. Russo argues that strict liability and negligence claims are not a "reasonable alternative" because plaintiffs may not be able to "seek punitive damages" for these claims and because "the application of comparative negligence as a defense to intentional fraud is restricted." Resp. Br. 30-31. But no plaintiff has a right (constitutional or otherwise) either to punitive damages or to a full damages award where she is found partially at fault; if the Legislature wants to abolish punitive damages or require comparative-fault reductions for all claims, it is empowered to do so. *See, e.g., Fla. E. Coast Ry. Co. v. McRoberts*, 111 Fla. 278, 282 (1933) ("Actual damages are recoverable at law out of a wrongdoer by the injured party as a matter of right. . . . It is not so as to punitive damages."). The Florida Constitution forbids leaving plaintiffs with "*no judicial forum*" to pursue damages for their injuries. *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So. 2d 671, 672 (Fla. 1981) (emphasis added). The fraud statute of repose plainly does not do this.

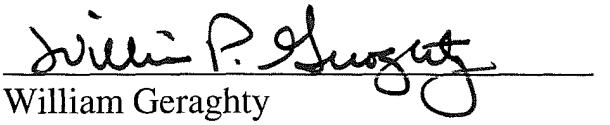
Ms. Russo argues further that there is no "public necessity" justifying cutting off stale fraud claims because of "the operation of an independent statute of limitations to bar old claims, and the equal access to and use by all parties in *Engle* litigation of the historical evidence." Resp. Br. 29. She is wrong for the reasons

already discussed. *See* pp. 10-11 *supra*. Because "the legislature [could] properly take into account the difficulties of defending against a stale fraud claim" in enacting the statute of repose, *Carr*, 541 So. 2d at 95, it is constitutional.

CONCLUSION

The Court should quash the Third DCA's holding and require the Plaintiff to demonstrate reliance on a fraud committed after May 5, 1982.

Respectfully submitted,



William Geraghty
FL Bar No. 0089508
Frank Cruz-Alvarez
FL Bar No. 0499803
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 2400
201 South Biscayne Boulevard
Miami, Fla. 33131
Phone: (305) 358-5171
Facsimile: (305) 358-7470
E-mail: SHBPMAttyMiami@shb.com

Lauren R. Goldman
(*pro hac vice*)
Scott A. Chesin
(*pro hac vice*)
MAYER BROWN LLP
1675 Broadway
New York, N.Y. 10019
Phone: (212) 506-2500
Facsimile: (212) 262-1910
E-mail: lrgoldman@mayerbrown.com
schesin@mayerbrown.com

Raoul G. Cantero
FL Bar No. 552356
WHITE & CASE LLP
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Fla. 33131
Phone: (305) 995-5290
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com

Counsel for Defendant/Petitioner
Philip Morris USA Inc.

Gregory G. Katsas
FL Bar No. 89091
JONES DAY
51 Louisiana Avenue
Washington, D.C. 20001
Phone: (202) 879-3939
Facsimile: (202) 626-1700
E-mail: ggkatsas@jonesday.com

Benjamine Reid
FL Bar No. 183522
Alina Alonso Rodriguez
FL Bar No. 178985
CARLTON FIELDS, P.A.
Miami Tower
100 S.E. Second Street, Suite 4200
Miami, Fla. 33131
Phone: (305) 530-0050
Facsimile: (305) 530-0055
E-mail: breid@carltonfields.com
arodriguez@carltonfields.com

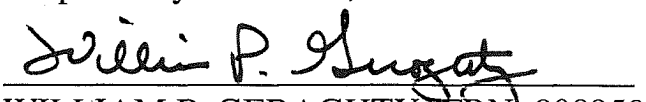
Counsel for Defendant/Petitioner
R.J. Reynolds Tobacco Co.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail and through the Florida Court's E-Filing Portal on all counsel listed below this 17th day of December 2013:

Philip M. Gerson
Edward S. Schwartz
Gerson & Schwartz, P.A.
1980 Coral Way
Miami, Fla. 33145
Telephone: (305) 371-6000
Facsimile: (305) 371-5749
pgerson@gslawusa.com
eschwartz@gslawusa.com
zdiaz@gslawusa.com

Respectfully submitted,



WILLIAM P. GERAGHTY (FBN: 0089508)
SHBPMAttyMiami@shb.com
wgeraghty@shb.com
FRANK CRUZ-ALVAREZ (FBN: 0499803)
SHBPMAttyMiami@shb.com
falvarez@shb.com
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 3200
201 South Biscayne Boulevard,
Miami, FL 33131
Telephone: (305) 358-5171
Facsimile: (305) 358-7470

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for petitioners hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: December 17, 2013

WILLIAM P. GERAGHTY (FBN: 0089508)
SHBPMAttyMiami@shb.com
wgeraghty@shb.com
FRANK CRUZ-ALVAREZ (FBN: 0499803)
SHBPMAttyMiami@shb.com
falvarez@shb.com
SHOOK, HARDY & BACON L.L.P.
Miami Center, Suite 3200
201 South Biscayne Boulevard,
Miami, FL 33131
Telephone: (305) 358-5171
Facsimile: (305) 358-7470