IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA FOURTH DISTRICT

On Appeal from the Nineteenth Judicial Circuit
in and for Martin County, Florida

MAGGY HURCHALLA,

Appellant,

vs.

CASE NO.: 4D18-1221
L.T. CASE NO.: 2013-001321-CA

LAKE POINT PHASE I, LLC,
and LAKE POINT PHASE II, LLC,
Florida limited liability companies,

Appellees.
_____/

AMICUS CURIAE BRIEF OF THE FLORIDA WILDLIFE FEDERATION, INC., BULLSUGAR.ORG AND THE PEGASUS FOUNDATION IN SUPPORT OF APPELLANT MAGGY HURCHALLA'S MOTION FOR REHEARING EN BANC OR CERTIFICATION

Richard Grosso, Esq.
Florida Bar No. 592978
Richard Grosso, P.A.
6919 W. Broward Blvd.
Plantation, FL 33317
Mailbox 142
grosso.richard@yahoo.com
954-801-5662

Counsel to Florida Wildlife Federation, Inc., Bullsugar.org and the Pegasus Foundation

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici represent the very type of civic-minded citizens whose communications to government and about governmental policy will be stifled by the rulings and reasoning of the panel decision in this matter.

Florida Wildlife Federation, Inc. ("FWF") is a Florida non-profit corporation, with approximately 60,000 members and supporters in Florida. FWF pursues its mission to conserve the natural resources of the state, advance environmental education, ethical outdoor recreation and sustainability by informing and advocating before governmental bodies. FWF often relies on technical and scientific information produced by others to support its positions. Potential tort liability resulting from good faith statements would greatly restrict FWF's advocacy.

The Pegasus Foundation ("Foundation") is a not for profit Massachusetts corporation with a mission to improve animal welfare in the United States, the Caribbean, on Native American lands, and in Africa. In Florida, the Foundation helps homeless and abandoned dogs and cats with medical needs. It advocates for better services for animals and for preserving wildlife habitats. The Foundation is currently advocating to stop ongoing pollution that is harming the Indian River Lagoon and its human and animal inhabitants. Participation in environmental policy issues is critical to the goals of the Foundation and would be thwarted if it faced legal liability for its

scientifically supported statements.

Bullsugar.org ("Bullsugar") is a Florida non-profit membership organization. Its mission is to educate the public about water quality and related environmental issues, and advocate for policies that further this mission. Bullsugar informs citizens and public officials about threats to clean water, and advocates for policies to improve water quality. Its mission also includes discouraging dredging and filling of wetlands because of the crucial functions wetlands provide to the environment, including flood protection and water quality enhancement. Environmental policies are often the subject of competing scientific opinion and perspectives. Bullsugar's communications with public officials would be greatly hindered should it face potential legal liability for good faith advocacy statements made to government decision-makers about actions Bullsugar perceives as environmentally-damaging.

As environmental advocates who regularly advance their organizations' positions by speaking to and before governmental bodies and courts, all Amici have experience with and important perspectives on the complex, debatable, and ever-changing nature of environmental issues, like those involved in this case.

SUMMARY OF THE ARGUMENT

The issues raised in this matter are of great public importance. If statements made by citizens about complex, scientific, debatable, opinion-laden matters can

be deemed tortious falsehoods if a judge or jury subsequently disagrees with their complete accuracy, free speech on such matters will end for all but the wealthiest of citizens. Under the panel decision's reasoning, a citizen's qualified right of free speech requires that citizen, prior to speaking out, to perform an analysis of his or her standing in the community, relationship with the intended target of the speech, the target's depth of knowledge about the matter, and the potential that a future judge or jury might deem the intended statement to lack full accuracy, context and fairness. The panel decision places an unconstitutional burden on citizens, whether lay or expert, experienced or newly engaged in government advocacy. It places an egregious barrier of uncertainty and overbearing responsibility to conduct intensive research and to meticulously craft any oral or written statement before being allowed to participate in government decision-making, with dire financial consequences for a miscalculation.

Facing the spectre of millions of dollars in damages, the exercise of First Amendment rights will be effectively eliminated. The very citizens impacted by government's decisions concerning human health, the environment and other issues of importance to Floridians would be afraid to speak up.

The panel decision is particularly important because of the unique nature of inherently complex and debatable environmental and scientific "facts,"

inappropriately treating them as the same as objectively verifiable facts. Whether an area is a "wetland" or whether a proposed environmental restoration project has been shown by rigorous scientific analysis to benefit the environment are categorically different from "facts" which are, "objectively verifiable."[1] Courts have consistently recognized the scientific uncertainties that inherently underlie environmental issues and that disputes about environmental facts are more appropriately resolved in scientific and non-judicial forums where the non-prevailing party suffers an adverse government policy outcome–not a multi-million dollar damage award. If a non-prevailing citizen can be considered to have uttered an actionable "falsehood" when good faith statements about complex, scientific issues are not ultimately credited by judge or jury in a tort action, citizen participation in government environmental and human health decisions will cease.

ARGUMENT

I. The Questions Posed By Appellant Are of Great Public Importance

Amici agree with the Appellant that the issues raised in this matter are of great public importance[2] and write to share with the Court their perspective as

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[1] *Faltas v. State Newspaper*, 928 F. Supp. 637, 648 (D.S.C. 1996), aff'd 155 F.3d 557 (4th Cir. 1998)(unpublished).

[2] Fla. R. App. P. 9.030(a)(2)(A)(v)

advocacy organizations who regularly speak publicly about scientific and environmental matters of public importance. Amici address the questions raised by Appellant from the perspective of advocates whose communications concerning public matters about which they are passionate, alarmed, angry, influential, and perhaps even flippant, might now expose them to severe financial liability. The panel decision, as binding precedent governing the affairs of the millions of citizens throughout the Fourth District, and persuasive precedent beyond, appears to require citizens to seek legal counsel prior to sending an email or other written statement or making any oral statement on a public matter that could potentially have a financial impact on another person. The decision raises troubling questions for citizens who seek to be heard by their government. Questions and uncertainty as to the extent of considerations and research a citizen must conduct and explain in any communication about the facts, context and nature of the subject, and the level of expertise, experience and understanding of both speaker and recipient will, as a practical matter, stifle or silence nearly all citizen speech.

A. Emailing and Exerting Influence Over and Educating Government Officials Are Not Improper Means of Communication

Important to the panel decision was its characterization that the methods of

speech employed by Hurchalla were "improper." Op.12. The decision found it improper that Hurchalla encouraged her elected officials to express her view of the facts as their own, and instructed them as to how they should go about achieving the policy outcome she desired. Op 4. The panel also found relevant that some of her verbal and written statements were made "outside of normal public meetings." Op. 5. The decision noted, with disfavor, Hurchallas's position of influence over two "close friends" who had been newly-elected to the County Commission, and their lack of knowledge about the circumstances. It deemed it:

> significant that the false statements were emailed to two recently elected commissioners, … who each admitted at trial that they had not read the permits or studies conducted on the Project, indicating that they were unfamiliar with the details about the Project (establishing reckless disregard for the truth) (citation omitted). Op 9.

Putting aside for the moment the accuracy of the statements, the suggestion that these circumstances are relevant to support a finding of improper conduct by a concerned citizen is impossible to reconcile with the right to petition government. It simply cannot be improper for a citizen to communicate to a governmental official other than via the mechanism of a three-minute statement during a public hearing. Whether due to hesitancy to speak in public, inability to summarize concerns to a three-minute presentation, desire to avoid conflict or maintain one's privacy, or other reasons, a citizen might find an email or a letter to a government

official to be the preferred form of communication. The suggestion that this common form of communication could prove an improper motive is dangerous and creates an unprecedented litmus test for acceptable versus unacceptable methods of citizen communication with elected officials.

The importance placed on the relationship between Hurchalla and two of the elected officials with whom she communicated introduces another unprecedented restriction on a citizen's free speech rights. The panel thought it relevant that Hurchalla had "significant influence with a majority of the commissioners." Op. 12. The panel decision's implication that citizens with personal or friendly relationships with government officials enjoy less First Amendment protection than others is of great public importance. Are those who contribute to electoral campaigns also so limited when communicating with the recipients of their contributions? In small towns and rural counties, where personal relationships abound among citizens and government officials, are First Amendment protections less than those in a big city?

The panel decision raises the question of whether the following actions, to raise just a few examples, are protected free speech or actionable torts:

– Submittal by a lobbyist or a citizen of a proposed ordinance or law, based

on an incorrect factual basis, that results in some natural person or business entity suffering a reduction of expected profit.

– Submittal of talking points or a briefing paper in support of that proposal.

– Transmittal of an email or written statement to a government official by any citizen with any level of familiarity with the official, if the substance of the communication is repeated later in whole or in part by the public official, but later found to contain a statement deemed not to be entirely accurate.

– Utterance of an oral statement to the same effect.

Amici submit that such activities are protected by the right to petition government so that government officials hear from and are positively influenced by the citizens they serve. When that occurs, it demonstrates that representative democracy is working as intended, not that something "surreptitious" is afoot.

B. The Use of Flippant or Sarcastic Language Does Not Imply an Improper Motive

The panel decision threatens grave violence to freedom of speech by assigning weight to monikers used by Hurchalla as email signatures - including

emails entirely unrelated to this matter.[3] It simply cannot be that sarcastic, flip, colorful, intemperate, or even offensive language or self-identification can give rise to tort liability. Consider, for example, the parent who signs an email *"Fathers Against Cancer"*, expressing reasonable but ultimately incorrect concerns about whether a private entity is leaching carcinogenic compounds into his community's groundwater. Should that parent be liable for any reduction of profit resulting from investigation and negative publicity about the discharges?

If his email referenced media or other reports about the potential for activities like those conducted by the company to cause cancer, is he liable for his failure to conduct extensive research to identify any potentially conflicting science? Perhaps he sent his email in haste after reading a media report[4] raising the potential issue of cancer – causing chemicals leaching from the plant. Is this parent liable if, out of alarm, fear, and love for his child, he casts the company in

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[3] The panel decision found that Hurchalla's use of sarcastic email monikers "was sufficient to support an inference of malevolent intent to harm Lake Point" when "coupled with evidence of her significant influence with a majority of the commissioners and her ability over time to have them assert oppositional positions on a project they knew little-to-nothing about." Op. 12

[4] The panel decision explained that Hurchalla's statements were prompted by her "alarm" about "a plan by Lake Point to convert the Project into one that would supply water to the City of West Palm Beach for consumptive use." Op. 4

an unfavorable light, expresses a desire for it to shut down, neglects to explain the company's side of the story or detail the research he conducted before speaking?[5]

C. The Decision Places an Unconstitutional Investigative Prerequisite Upon Free Speech.

The panel decision notes that statements that resulted in liability were made after Hurchalla became "alarmed" by an article published by local media "about a plan by Lake Point to convert the Project into one that would supply water to the City of West Palm Beach for consumptive use." Op. 4. The decision explains that, "[p]rompted by the news article … Hurchalla became vehemently opposed to the Project" and "began expressing her disagreement with the Project in a series of emails sent to … close friends" who had been newly-elected to the County Commission. Id. The panel deemed it:

> significant that the false statements were emailed to two recently elected commissioners, … who each admitted at trial that they had not read the permits or studies conducted on the Project, indicating that they were unfamiliar with the details about the Project (establishing reckless disregard for the truth).(citation omitted). Op. 9

The panel decision found this to be "sufficient clear and convincing

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[5] "Strong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that the speaker used his privileged position 'to gratify his malevolence.'" *Nodar v. Galbreath*, 462 So.2d 803, 811 (Fla. 1984)

evidence to refute Hurchalla's … privilege to petition her government…." Id. This emphasis on the knowledge level of the governmental officials to whom Hurchalla spoke breaks extremely troubling new ground in First Amendment law. The fact that newly elected officials had either not had the time or not taken the time to come up to speed on one of many matters of concern to their constituents should have no bearing as to whether statements made to those officials are constitutionally protected. The knowledge level, experience, and perhaps even the intelligence level of governmental recipients of citizen speech is now seemingly relevant to whether a citizen's debatable or potentially unprovable statement is sanctionable as a tort. Before communicating with a public official a citizen now might be required to investigate that official's level of background knowledge and capacity to understand, process or critique the substance of the communication. The panel decision's analysis might require citizens to quiz their elected officials to ascertain their familiarity regarding an issue before making any statements to them. The decision may also require a citizen to provide extensive background information, including all competing scientific study or schools of thought, and unknowns, to ensure the recipient of the statement is fully educated as to the full range of what is known, unknown and disputed about the subject. The panel decision unconstitutionally imposes onerous demands upon citizen advocates –

who now must seemingly investigate the knowledge level and sophistication of persons to whom they communicate. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

D. Intent As To a Public Policy Matter Is Not Malice Toward An Involved Person

The panel decision's analysis of the "malice" towards Lake Point presumably demonstrated by Hurchalla has grave implications for the ability of citizens to speak on public policy matters in which others have a financial stake. The decision's characterization was that "Hurchalla started to engage in surreptitious activities targeted to interfere with Lake Point's interests." Op. 5. The panel decision identified the relevant rule of law:

> Express malice under the common law of Florida, necessary to overcome the common-law qualified privilege, is present where the primary motive for the statement is shown to have been **an intention to injure the plaintiff.** Op. 6. (emphasis added)

The failure to distinguish between a citizen's intent regarding the public policy outcome from that concerning the plaintiff is of great public importance to

free speech rights. In the environmental context, it is fair to assume that a citizen who is alarmed about potential pollution or poisoning of their community's drinking water would intend with zeal to prevent that outcome. The same is true of a citizen intent upon preventing the loss of a treasured natural resource, recreation area or community character at the hands of a land developer.

The panel decision appears to unreasonably and inappropriately transfer the intent to achieve a public policy outcome, and any attendant anger or malice, into an intent to harm the interests of some private actor with a financial stake in the outcome. However, in order for a citizen to lose their freedom to speak freely, the plaintiff must prove that express malice was the speaker's **sole** motivation; if the speech was "made for a proper purpose … there can be no recovery", even if the speaker "also in fact feels hostility or ill will toward the plaintiff." *Nodar v. Galbreath*, 462 So. 2d 803, 811-812 (Fla. 1984); *see also Boehm v. American Bankers Ins. Grp., Inc.*, 557 So. 2d 91, 95 (Fla. 3d DCA 1990); *Alexis v. Ventura*, 66 So. 3d 986, 988 (Fla. 3d DCA 2011)

In the absence of evidence that a citizen is using a public policy debate as a guise to harm the interests of another, any statements made, even if false, cannot be said to be motivated by malice towards that private person. Express malice exists where a speaker is motivated by a desire to harm the plaintiff– not to protect

the personal or social interest at issue. *Nodar*, 462 So. 2d at 811 (Fla. 1984).

In the Hurchalla case, there was no evidence of prior malice towards Lake Point prior to its mining operations becoming a matter of public interest. Any malice the jury may have found to exist was about the action, not the actor. Such is to be expected in virtually all matters of public concern, but the public must now be concerned that any statements or suggestion of anger, passion, mistrust that, in hindsight, might be made to appear as malice towards a party with a financial stake in the outcome of a government decision, would expose them to tort liability should anything they say later be seen as not completely accurate.

E. The Panel Decision Failed to Recognize the Complex, Opinion-Based Nature of Scientific / Environmental Facts.

The ruling is devastating to the free speech rights of those concerned with scientific and environmental matters. Moreover, the panel's ruling ignores the inherently complex, uncertain and debatable nature of scientific and environmental facts. The two debated "factual" issues below were:

1. Whether Lake Point's mining activities impacted "wetlands"; and

2. Whether the mining pits left when mining was done would serve as "beneficial" components of an environmental restoration project.

The panel "focus[ed]" on two statements in an email sent by Hurchalla:

> [T]he [So. Fla. Water Management Dist.] staff continued to suggest some vague storage value but changed the emphasis to the [stormwater treatment area] that would be built on site as the completion of the project in 20 years. A study was to follow that *documented the benefits* .... That study has not been provided.
>
> Neither the storage nor the treatment benefits have been documented. R.8056-57

The panel decision focused on these statements as "competent substantial evidence that clearly and convincingly proved that Hurchalla demonstrated actual malice … by making statements she either knew were false or with reckless disregard as to whether they were false." Op. 8. In the view of the panel, the statements were "false" because Hurchalla was aware of the existence of a report that concluded that environmental benefits would result from the project. *Id.* The decision dismissed Hurchalla's opinion (and that of an expert) that the preliminary report's conclusion was unconvincing due to the lack of peer review, and that that additional study should be done to demonstrate the claimed benefits.[6] *Id.* The decision apparently deemed irrelevant another sentence in the email in which Hurchalla explained "[t]here does not appear to be any peer review by the CERP team to verify benefits from the rockpit."[7]

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[6] *See* Tr. 1511, 1550-1551.

[7] CERP is the acronym for Comprehensive Everglades Restoration Plan. *See Teitelbaum v. S. Fla. Water Mgmt. Dist.*, 176 So.3d 998 (Fla. 3rd DCA 2015)

Nevertheless, the panel found that merely because Hurchalla was aware of the disputed study upon which Lake Point relied, her statements in which she expressed her opinion questioning the benefits of storing water in mining pits were a "tortious falsehood." Op. 8. According to the decision:

> Hurchalla's comments were represented as statements of fact, as opposed to statements of pure opinion. Even if we viewed the statements as 'mixed opinions,' the statements would not be privileged under the First Amendment. (citation omitted).

The panel's sanctioning of Hurchalla for her failure to accede to Lake Point's view of what was required to "document" environmental benefits will silence virtually all free speech on complex environmental and scientific issues. The panel's insistence that Hurchalla was required to caveat her assertion that the study documenting the environmental benefits of the mining project was not done by explaining that there was a study, but she believed the importance of the matter required a peer review that confirmed that study's assertions, sets an unconstitutionally high bar for citizen advocates on scientific matters.

Courts recognize that scientific conclusions are inherently subject to good faith debate, and that judges are ill - suited to resolve these disputes.[8]

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[8] *Haire v. Fla. Dep't of Agriculture & Consumer Services*, 870 So.2d 774, 777 (Fla. 2004); *Island Harbor Beach Club v. DNR*, 495 So.2d 209, 223 (Fla. 1st DCA 1986); *Graham v. Estuary Props*., 399 So.2d 1374, 1379 (Fla. 1981); *Davis v. Sails*, 318 So.2d 214, 222 (Fla. 1st DCA 1975); *Ocean Advocates v. U.S.A.C.E.*,

Statements made about a scientifically – debatable issue do not constitute grounds for liability. The panel decision in this case will have a devastating effect on every citizen who will now have to live in fear of facing a substantial judgment whenever an agency, court, or jury "finds" to the contrary of an environmental conclusion asserted while seeking to influence their government. Public participation in the agency decision-making process will cease on these matters of crucial public importance. Citizens' fears of tortious liability will result in a gross imbalance of the equities in agency decision making and will effectively silence a crucial perspective and information source in these types of decisions.[9]

If the panel decision is not reversed, environmental advocacy in Florida will likely cease.

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361 F. 3d 1108, 1119 (9th Cir. 2004), amended by 402 F. 3d 846 (9th Cir. 2005); *Lands Council v. McNair*, 537 F. 3d 981, 987 (9th Cir. 2008); *Balt. Gas & Elec. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Ecology Center v. Castaneda*, 574 F. 3d 652, 659 (9th Cir. 2009)("It is not our role to weigh competing scientific analyses."); *Ethyl Corp. v. U.S. Envtl. Prot. Agency*, 541 F. 2d 1, 24-25 (D.C. Cir. 1976)("Questions involving the environment are particularly prone to uncertainty.")

[9] *See, e.g., Pinecrest Lakes v. Shidel*, 795 So.2d 191, 207-208 (fla. 4th DCA 2001), *rev. den.* 821 So.2d 300 (Fla. 2002)(explaining that the financial interests of a developer will tend to outweigh those of an opposing neighbor seeking to protect the intangible benefits of homestead, neighborhood, and sense of community).

CONCLUSION

The panel decision allowed the jury verdict to stand because, in its view, the totality of the circumstances could have reasonably supported a finding of malice towards Lake Point. However, fundamentally, the "falsehoods" upon which liability was premised were judgment calls over whether the lands impacted by the mining retained the wetland characteristics of their natural state and whether the analysis of the claimed environmental restoration benefits of the company's mining pits had been adequately investigated. This case reveals the need for great caution in applying false claims-related liabilities to statements concerning environmental issues. When supported by any rational basis, statements made in furtherance of environmental protection do not constitute "tortious interference."

Next, the objective of Hurchalla's action was a public policy result, not to cause harm to Lake Point.

Finally, methods used by Hurchalla to advocate her views, labelled "surreptitious" by the panel, are the exact modes of communication used every day by citizens in this country to express themselves. Sending emails to personal accounts of friends in government asking them to make your positions theirs, sarcasm, puffery, advocacy, anger, passion and alarm are the rights of free speech to which all Americans are entitled.

Respectfully submitted this 23rd day of July 2019.

/s/Richard Grosso
Richard Grosso, Esq.
Florida Bar No. 592978
Richard Grosso, P.A.
6919 W. Broward Blvd.
Plantation, FL 33317
Mailbox 142
grosso.richard@yahoo.com
954-801-5662

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2019, the foregoing was electronically filed with the Clerk of Courts using the Florida Courts E-filing Portal, which will send a notice of electronic filing to the service list below:

/s/Richard Grosso

Richard Grosso, Esq.
Florida Bar No. 592978
Richard Grosso, P.A.
6919 W. Broward Blvd.
Plantation, FL 33317
Mailbox 142
grosso.richard@yahoo.com
954-801-5662

Service List :

Counsel for Appellant:

Virginia P. Sherlock, Esq.
Howard K. Heims, Esq.

Littman, Sherlock & Heims, P.A.
P.O. Box 1197
Stuart, Florida 34995
(772) 287-0200
LSHLawfirm@gmail.com

Richard J. Ovelmen, Esq.
Rachel A. Oostendorp, Esq.
Dorothy Kafka, Esq.
CARLTON FIELDS JORDEN BURT, P.A.
Suite 4200 – Miami Tower
100 S.E. Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
rovelmen@carltonfields.com
roostendorp@carltonfields.com
dkafka@carltonfields.com

Jamie S. Gorelick, Esq.
David W. Ogden, Esq.
David Lehn, Esq.
Justin Baxenberg, Esq.
WILMER CUTLER PICKERING HALE AND DORR, LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
Telephone: (202) 663-6000
jamie.gorelick@wilmerhale.com
david.ogden@wilmerhale.com
david.lehn@wilmerhale.com
justin.baxenberg@wilmerhale.com

Counsel for Appellees:

Ethan J. Loeb, Esq.
Jon P. Tasso, Esq.
E. Colin Thompson, Esq.
Michael Labbee, Esq.
Smolker Bartlett Loeb Hinds & Sheppard, P.A.
100 N. Tampa Street, Suite 2050
Tampa, FL 33602
(813) 223-3888
EthanL@smolkerbartlett.com
SusanM@smolkerbartlett.com
JonT@smolkerbartlett.com
cynthiam@smolkerbartlett.com
ColinT@smolkerbartlett.com
MichaelL@smolkerbartlett.com

Dan Bishop, Esq.
Bishop London & Dodds
3701 Bee Cave Road, Suite 200
Austin, TX 78746
dbishop@bishoplondon.com

Christina Carlson Dodds, Esq.
Christina Dodds, PLLC
2506 Hillview Road
Austin, TX 78703
cdodds61@gmail.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Richard Grosso
Richard Grosso, Esq.
Florida Bar No. 592978
Richard Grosso, P.A.
6919 W. Broward Blvd.
Plantation, FL 33317
Mailbox 142
grosso.richard@yahoo.com
954-801-5662