

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM  
BEACH, FL 33401

CASE NO.: 4D16-0222

L.T. No.: 502014CP003698XXXXNB;

L.T. No.: 2011CP000653 XXXXSB

ELIOT IVAN BERNSTEIN v. Ted Bernstein, acting as alleged Trustee of  
the Shirley Bernstein Trust, et al

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Appellant / Petitioner(s)

Appellee / Respondent(s)

**APPELLANT'S MOTION FOR REHEARING, CLARIFICATION,  
WRITTEN DECISION AND CERTIFICATION UNDER FLORIDA RULES  
OF APPELLATE PROCEDURE 9.330**

COMES NOW Eliot Bernstein, Appellant Pro se, who respectfully pleads and  
prays before this Court as follows:

1. I am the Appellant pro se and file this motion for Rehearing, clarification, for a written decision and to certify this matter to the Florida Supreme Court.
2. Respectfully, this Court has overlooked or misapprehended material facts and misapplied the law to the case and the Per Curiam Affirmance must now be reversed and the Final Judgment vacated and remanded to the Lower Tribunal for further proceedings including a New Trial.

3. There are multiple key facts overlooked by this Court and rehearing must be granted.
4. The mere fact that “missing Witness” Donald Tescher who was one lead Estate Planning Partner and drafter in both Shirley and Simon’s Estate and Trust cases and also was Co-Trustee and Co-Pr of the Estate and Trust of Simon until removed after admissions of fraud and forgery by their law firm was not available, never had a proper pre-trial Deposition but who further authored a resignation Letter claiming the Shirley Trust was not what was presented during the Trial by Appellees made Tescher an indispensable Witness and the fact that the pre-determined artificial “limit” to a one day Trial did not provide adequate time for this Witness to be called necessitates a New trial. See, Jan. 2014 Tescher Spallina Resignation Letter, ROA \_\_\_\_\_. (**Note: Lower Tribunal Judge Scher has now issued an Order of April 27, 2017 showing Appellant as a “Beneficiary” in the Simon Bernstein Estate making the entire Validity Trial proceedings subject to being vacated under fraud and misconduct standards as well due to Appellee and Attorney Alan Rose conduct before Judge Phillips in the proceedings Scheduling the Validity Trial**).
5. Courts should not countenance or tolerate actions during litigation that are not forthright and that are designed to delay and obfuscate the discovery process. See, Bainter v. League of Women Voters of Fla., 150 So. 3d 1115, 1129 (Fla. 2014).

An orderly trial is most likely to occur when the judge enforces discovery and pretrial orders strictly and requires each party to make full and proper disclosure before trial. **The Record on Appeal in this case shows repeated denial of Discovery to Appellant spanning years.**

6. The Fourth District Court of Appeal in *Central Square Tarragon LLC v. Great Divide Insurance Company*, reiterated the need to “strictly enforce” provisions of pretrial stipulations. This prevents last minute gamesmanship, and makes disruption of the trial and error on appeal less likely. Generally, last-minute additions of witnesses and substantial changes to testimony should not be admissible at trial. Failure to exclude such testimony prejudices the opposing party and constitutes reversible error.
7. In this case, there was no Orderly pre-trial procedures which were abandoned in their entirety by the lower tribunal who Ordered a Trial in a case not even Noticed for Case Management.
8. There was no inspection of evidence pre-trial despite last minute “originals” offered by Alan Rose See (ROA2 Pages #001560 - #001577 -Motion for Continuance and Stay.)
9. With fraud shown in dispositive documents by fiduciaries and no Originals being made available the Court abused its discretion in formulating improper pre-trial truth seeking procedures, failing to determine outstanding discovery and records

and the need for Experts and pre-trial Depositions.

10. Appellees never produced several of the Trusts expressly named in the Shirley Trust such as the Family Trust, Marital Trust and Eliot Family Trust which have never been produced to this day. Clearly these documents were relevant to determine the overall Estate planning scheme and validity of the main document itself.
11. There are alleged subtrusts that are alleged beneficiaries of the Simon Bernstein Trust dated 9/13/2012 for 10 grandchildren that neither the Simon Bernstein Trust dated 9/13/2012 has never been produced nor were produced at the Validity Hearing, nor any subtrusts for the alleged beneficiaries. Thus, more “missing documents” and “missing evidence”, “missing Discovery” which was clearly relevant at Trial and a new Trial must be ordered. ( Note: Appellee’s Attorney Alan Rose has now filed recent documents in the Lower Tribunal claiming the Trusts were of a DIFFERENT DATE, 7/25/12, NOT 9/13/12 but have not disclosed either set ).
12. That Eliot Bernstein was sued as the Trustee of the Simon Bernstein Trust dated 9/13/2012 as Trustee of trusts for his children in the Shirley Bernstein Trust action before this Court and to date this Simon Bernstein Trust and the children’s subtrusts that are alleged beneficiaries of the Shirley Bernstein IRREVOCABLE Trust were never produced to the Lower Court at the Validity Trial and to date

have never been produced.

13. Lacking the Simon Bernstein Trust dated 9/13/2012 that Eliot Bernstein and his children were sued under the Lower Court and this Court lack jurisdiction over the parties sued in this matter.
14. The true and proper beneficiaries of the Shirley Bernstein Trust were not sued in the action, namely, Eliot Bernstein, Lisa Friedstein and Jill Iantoni as so defined in the alleged “Valid” trust on record with the Court.
15. Appellant’s May 2013 Emergency Motion was sufficient to be deemed a Petition to revoke probate Admin in both the Shirley and Simon Estate cases. The vast majority of the motion having never been addressed by the lower tribunals was not only an abuse of Discretion but also in violation of the State Court fraud policy rendering the Judgement void and should be vacated and reversed. See (ROA1 Pages 000560 - # - #001040 Emergency Motion and Statewide Court Fraud Policy already exhibited herein.)
16. As this Court has already made clear, “While the complaint at issue is not a model of clarity, we find that it adequately constituted a will contest. “A petition for revocation of probate shall state the interest of the petitioner in the estate and the facts constituting the grounds on which revocation is demanded.” Fla. Prob. R. 5.270(a). “All technical forms of pleadings are abolished” and “[n]o defect of forms impairs substantial rights.” Fla. Prob. R. 5.020(a). Though the complaint

does not specifically identify the 2005 will, count I challenges the validity of all testamentary documents executed after 2000[, thus by implication challenging the 2005 will] . . . Additionally, the complaint was filed in response to the notice of administration of the 2005 will, wherein the decedent completely revoked the Pasquales' interest in the trust. Compare Feather v. Sanko's Estate, 390 So.2d 746, 747 (Fla. 5th DCA 1980) (interpreting older version of probate code, finding that pleading filed by decedent's disinherited child, entitled "Notice of Appearance," was sufficient to contest will where pleading stated that she had interest in estate, and the will at issue disinherited her, making it clear that she opposed it)". . . . See, Pasquale v. Loving (Fla. 4th DCA March 21, 2012)

17. Non-Existent Entities were Sued such as Trusts allegedly created Sept. 13, 2012 on the date Simon Bernstein passed away, trusts which have never to this day been disclosed or produced.
18. There were Missing Indispensable Parties such as Minor children Beneficiaries which violated procedural and substantive due process and improper Notice making the Trial a "surprise" to such an extent the Judgement must be reversed entirely.
19. Ted Bernstein sued entities which do not exist, have never existed and thus lacked the capacity to be sued such as suing Eliot as Trustee of Trusts dated 9/13/12 which never existed and were never turned over and never shown to

Appellant.

20. Ted Bernstein also failed to sue indispensable parties such as Appellant's minor and adult children and the Court further abused its discretion in denying counsel for such Parties.
21. Generally, beneficiaries are necessary parties to a suit by or against a trustee relating to the trust or its property. In those cases where the issue is whether or not the trust instrument is valid, the law is clear in Florida that the beneficiaries are proper and necessary parties but here, the Minor children were not only not properly named but had no Representation at Trial and the Trial court abused its discretion in denying a Continuance for attorney Schwager to be admitted pro hac vice.
22. Yet all of these facts have been overlooked by this Court or disregarded.
23. "Florida has long followed the rule that the beneficiaries of a trust are indispensable parties to a suit having the termination of the beneficiaries' interest as its ultimate goal." *Fulmer v. N. Cent. Bank*, 386 So. 2d 856, 858 (Fla. 2d DCA 1980) (citing *Byers v. Beddow*, 142 So. 894, 896 (Fla. 1932), which held that a court called upon "to dissolve or terminate a trust . . . must decline to act when there are, or may be, persons interested in the trust who are not before the court"). "Indispensable parties are necessary parties so essential to a suit that no final decision can be rendered without their joinder." *Sudhoff v. Fed. Nat'l Mortgage*

Ass'n, 942 So. 2d 425, 427 (Fla. 5th DCA 2006)...Crescenze v. Bothe, et al, 34 Fla.L.Weekly D284a (Fla.2nd DCA Case 2D08-2202, February 4, 2009)/

24. There was sufficient proof in the Record existed to Raise Undue Influence at least in the Simon Bernstein case and it was error to not shift the burden and further error to deny proper pre-trial procedures and limit the Trial to “one day”.
25. F.S. §733.107(2) specifically mandates that the “presumption of undue influence implements public policy . . . and is therefore a presumption shifting the burden of proof under ss. 90.301–90.304.” Accordingly, when the presumption of undue influence arises, the alleged wrongdoer bears the burden of proving there was no undue influence.
26. Undue influence is rarely susceptible of direct proof because of secret or private dealings between the decedent and the alleged wrongdoer; the latter typically testifies that he did nothing wrong, and the decedent never testifies to the contrary. Self-serving testimony of the alleged wrongdoer is inherently suspect, but is often difficult to overcome for lack of more compelling direct evidence.
27. The April 9, 2012 document alone shows facial undue influence of Simon Bernstein as assuming arguendo this was his signature, it was clearly done fraudulently as Simon knew the Waivers had not been signed for the Petition for Discharge. See ROA1 \_\_\_\_ .
28. Further is the very need for the “May 2012” family meeting and Simon’s fiduciary



Spallina communicating confidential information to Pam Simon about being cut out of the Wills and Trusts which presumably was communicated to Ted Bernstein who had a long standing business relationship with Spallina and brought Spallina and Tescher into Simon's life.

29. Further, if Simon was truly so "poor" as Ted Bernstein would suggest while the Appellee and Estate have failed to account for literally millions of dollars of assets documented, this would be reflective of undue influence on Simon as well and so is the alleged "absence" of all of Simon's records reflective of undue influence that should have been fully heard and a new trial is needed.
30. The face of the Records such as the April 9, 2012 Petition for Discharge in the Shirley Bernstein Estate case, clearly fraudulent document signed by Fiduciary Spallina and allegedly signed by Simon Bernstein created sufficient presumption of undue influence on Simon prior to any alleged changed to his Will and Trust in July 2012. Ted Bernstein did not rebut said undue influence nor was one day sufficient for such a trial. The missing mail, missing records, missing discovery, missing account statements and missing millions are sufficient to support and bolster the undue influence Simon Bernstein was under rendering any changes to his Will and Trust in 2012 invalid. The Court abused its discretion by not applying adverse inferences against Ted Bernstein for missing and spoliation of evidence and records and failure to call the other witnesses at Trial.

31. The Court abused its discretion by not structuring pre-trial procedures to establish this challenge to the Wills and Trusts and by limiting the Trial to one day.
32. Moreover, for Shirley to allegedly have made Ted a “trustee” when otherwise making him “pre-deceased” is reflective of some improper influence particularly where Simon’s 2008 documents named William Stansbury to all fiduciary positions and the documents were supposed to “mirror” each other. A new trial must be ordered.
33. Moreover, there being no basis legally to alter Shirley’s Trust after it became “irrevocable”, the great efforts of Ted and Spallina to allegedly due so through an alleged Power of Appointment is reflective of the undue influence on Simon.
34. Further, denial of proper discovery of all the missing records, mails, accounts and monies improperly precluded this challenge to the Wills and Trusts.
35. Florida Rules of Civil Procedure 1.200 provides in part that, “PRETRIAL PROCEDURE (a) Case Management Conference. At any time after responsive pleadings or motions are due, the court may order, or a party, by serving a notice, may convene, a case management conference. The matter to be considered shall be specified in the order or notice setting the conference.” ( emphasis added ).
36. In this case, the lower tribunal clearly Ordered a Trial in a case that was not noticed for Case-Management in violation of the Rules of Procedure, procedural due process and then denying Appellant a fair opportunity to be heard to clarify the

matter violating substantive due process. See, (Appendix #14 - September 15th, 2015 Transcript.) See further, (APPENDIX #24 - Case-Management Notice in the Simon Bernstein Estate case.)

37. “The goals of these procedural rules are "to eliminate surprise, to encourage settlement, and to assist in arriving at the truth." *Spencer v. Beverly*, 307 So.2d 461, 462 (Fla. 4th DCA 1975) (Downey, J., concurring), cert. denied, 314 So.2d 590 (Fla. 1975). We recently reiterated those goals. “A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics. *Dodson v. Persell*, 390 So.2d 704, 707 (Fla. 1980).” See, *BINGER v. KING PEST CONTROL*, 401 So.2d 1310 (1981).
38. As the Florida Supreme Court said in *Dodson v. Persell*, 390 So.2d 704, 707 (Fla. 1980), “The goals underlying discovery practice are readily apparent in Florida Rules of Civil Procedure 1.200(c), which provides that a trial court's pretrial order detailing the agreements made by the parties "shall control the subsequent course of the action unless modified at the trial to prevent injustice." Consistent with this rule, we now hold that a pretrial order directing the parties to exchange the names of witnesses requires a listing or notification of all witnesses that the parties reasonably foresee will be called to testify, whether for substantive, corroborative, impeachment or rebuttal purposes. Obviously, a general reference to "any and all

necessary" impeachment or rebuttal witnesses, as was the case here, constitutes inadequate disclosure.”

39. These procedures were lacking herein and the Final Judgement must now be vacated and reversed on grounds of Due Process, violation of Procedural Rules, violation of standard 15th Judicial Pre Trial Order requirements, abusing discretion by denying lack of time for Necessary witnesses such as Donald Tescher, Traci Kratish, Kimberly Moran and others, failure to have Original documents or allow inspection, failure to have pre-trial depositions, failure to Name and serve Beneficiaries and indispensable parties.
40. The parties and public as a whole would benefit from a written decision and clarification on all of these matters.
41. The Decision herein directly conflicts with the mandates of the Florida Supreme Court in *Dodson v. Persell*, 390 So.2d 704, 707 (Fla. 1980).” and *BINGER v. KING PEST CONTROL*, 401 So.2d 1310 (1981) and the other District Courts of Appeal such as *Vollmer v, Key Dev. Props.*, 966 So.2d 1022, 1027 (Fla. 2nd DCA 2007) and ”*K.G. v. Fla. Dep’t of Children & Families*, 66 So. 3d 366 (Fla. 1st DCA 2011) and *Fulmer v. N. Cent. Bank*, 386 So. 2d 856, 858 (Fla. 2d DCA 1980) (citing *Byers v. Beddow*, 142 So. 894, 896 (Fla. 1932).
42. Thus, this case must otherwise be Certified for review to the Florida Supreme Court.

The Judgment must now be reversed and vacated.

WHEREFORE, it is respectfully prayed for an Order granting the rehearing, reversing and vacating the Per Curiam affirmance and Final Judgment of the lower court, and remanding the case to the Lower Tribunal for further proceedings and new Trial or alternatively issuing a detailed written decision and clarification of the Order and certifying the matter to the Florida Supreme Court and for such other and further relief as may be just and proper.

Dated: May 27th, 2017

**/s/ Eliot Ivan Bernstein**

Eliot Ivan Bernstein

2753 NW 34th St.

Boca Raton, FL 33434

561-245-8588

[iviewit@iviewit.tv](mailto:iviewit@iviewit.tv)

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the within has been served upon all parties on the attached Service List by E-Mail Electronic Transmission, Court ECF on this 27th day of May, 2017.

**/s/ Eliot Ivan Bernstein**

Eliot Ivan Bernstein

2753 NW 34th St.

Boca Raton, FL 33434

561-245-8588

[iviewit@iviewit.tv](mailto:iviewit@iviewit.tv)

### **SERVICE LIST**

<p>John P. Morrissey, Esq.  330 Clematis Street, Suite 213  West Palm Beach, FL 33401  (561) 833-0766-Telephone  (561) 833-0867 -Facsimile  Email: John P. Morrissey  (iohn@jrnoiTisseylaw.com)</p>	<p>Lisa Friedstein  2142 Churchill Lane Highland Park, IL 60035  lisa@friedsteins.com</p>
<p>Peter M. Feaman, Esq.  Peter M. Feaman, P.A.  3695 West Boynton Beach Blvd., Suite 9  Boynton Beach, FL 33436  (561) 734-5552 -Telephone  (561) 734-5554 -Facsimile  Email: service@feamanlaw.com:  mkoskey@feamanlaw.com</p>	<p>Jill Iantoni  2101 Magnolia Lane Highland Park, IL 60035  jilliantoni@gmail.com</p>
<p>Gary R. Shendell, Esq.  Kenneth S. Pollock, Esq.  Shendell &amp; Pollock, P.L.  2700 N. Military Trail,  Suite 150  Boca Raton, FL 33431  (561)241-2323 - Telephone (561)241-2330-Facsimile  Email: gary@shendellpollock.com  ken@shendellpollock.com  estella@shendellpollock.com  britt@shendellpollock.com  grs@shendellpollock.com</p>	<p>Counter Defendant  Robert Spallina, Esq.  Donald Tescher, Esq.  Tescher &amp; Spallina  925 South Federal Hwy., Suite 500  Boca Raton, Florida 33432</p>

<p>Brian M. O'Connell, Esq.  Joielle A. Foglietta, Esq.  Ciklin Lubitz Martens &amp; O'Connell  515 N. Flagler Dr., 20th Floor  West Palm Beach, FL 33401  561-832-5900-Telephone  561-833-4209 - Facsimile  Email: boconnell@ciklinlubitz.com;  ifoglietta@ciklinlubitz.com;  service@ciklinlubitz.com;  slobdell@ciklinliibitz.com</p>	<p>Counter Defendant  John J. Pankauski, Esq.  Pankauski Law Firm PLLC  120 South Olive Avenue  7th Floor  West Palm Beach, FL 33401  courtfilings@pankauskilawfirm.com  john@pankauskilawfirm.com</p>
<p>Counter Defendant  Mark R. Manceri, Esq., and  Mark R. Manceri, P.A.,  2929 East Commercial Boulevard  Suite 702  Fort Lauderdale, FL 33308  mrmlaw@comcast.net</p>	<p>Counter Defendant  Donald Tescher, Esq.,  Tescher &amp; Spallina, P.A.  Wells Fargo Plaza  925 South Federal Hwy Suite 500  Boca Raton, Florida 33432  dtescher@tescherspallina.com</p>
<p>Theodore Stuart Bernstein  880 Berkeley  Boca Raton, FL 33487  tbernstein@lifeinsuranceconcepts.com</p>	<p>Counter Defendant  TESCHER &amp; SPALLINA, P.A..  Wells Fargo Plaza  925 South Federal Hwy Suite 500  Boca Raton, Florida 33432  dtescher@tescherspallina.com</p>
<p>Theodore Stuart Bernstein  Life Insurance Concepts, Inc.  950 Peninsula Corporate Circle  Suite 3010  Boca Raton, FL 33487  tbernstein@lifeinsuranceconcepts.com</p>	<p>Counter Defendant  Alan B. Rose, Esq.  PAGE, MRACHEK, FITZGERALD, ROSE,  KONOPKA, THOMAS &amp; WEISS, P.A.  505 South Flagler Drive, Suite 600  West Palm Beach, Florida 33401  561-355-6991  arose@pm-law.com  arose@mrachek-law.com</p>

<p>Pamela Beth Simon  950 N. Michigan Avenue  Apartment 2603  Chicago, IL 60611  psimon@stpcorp.com</p>	<p>Counter Defendant  L. Louis Mrachek, Esq.  PAGE, MRACHEK, FITZGERALD, ROSE,  KONOPKA, THOMAS &amp; WEISS, P.A.  505 South Flagler Drive, Suite 600  West Palm Beach, Florida 33401  561-355-6991  lmrachek@mrachek-law.com</p>
<p>Jill Iantoni  2101 Magnolia Lane  Highland Park, IL 60035  jilliantoni@gmail.com</p>	<p>Counter Defendant  Pankauski Law Firm PLLC  120 South Olive Avenue  7th Floor  West Palm Beach, FL 33401</p>
<p>Lisa Sue Friedstein  2142 Churchill Lane  Highland Park, IL 60035  lisa.friedstein@gmail.com  lisa@friedsteins.com</p>	<p>Dennis McNamara  Executive Vice President and General Counsel  Oppenheimer &amp; Co. Inc.  Corporate Headquarters  125 Broad Street  New York, NY 10004  800-221-5588  Dennis.mcnamara@opco.com  info@opco.com</p>
<p>Dennis G. Bedley  Chairman of the Board, Director and Chief Executive Officer  Legacy Bank of Florida  Glades Twin Plaza  2300 Glades Road  Suite 120 West – Executive Office  Boca Raton, FL 33431  info@legacybankfl.com  DBedley@LegacyBankFL.com</p>	<p>Hunt Worth, Esq.  President  Oppenheimer Trust Company of Delaware  405 Silverside Road  Wilmington, DE 19809  302-792-3500  hunt.worth@opco.com</p>



<p style="text-align: center;">James Dimon  Chairman of the Board and Chief Executive Officer  JP Morgan Chase &amp; CO.  270 Park Ave. New York, NY 10017-2070  Jamie.dimon@jpmchase.com</p>	<p style="text-align: center;">Neil Wolfson  President &amp; Chief Executive Officer  Wilmington Trust Company  1100 North Market Street  Wilmington, DE 19890-0001  nwolfson@wilmingtontrust.com</p>
<p style="text-align: center;">William McCabe  Oppenheimer &amp; Co., Inc.  85 Broad St Fl 25  New York, NY 10004  William.McCabe@opco.com</p>	<p style="text-align: center;">STP Enterprises, Inc.  303 East Wacker Drive  Suite 210  Chicago IL 60601-5210  psimon@stpcorp.com</p>
<p style="text-align: center;">Charles D. Rubin  Managing Partner  Gutter Chaves Josepher Rubin Forman Fleisher Miller  PA  Boca Corporate Center  2101 NW Corporate Blvd., Suite 107  Boca Raton, FL 33431-7343  crubin@floridatx.com</p>	<p style="text-align: center;">Ralph S. Janvey  Krage &amp; Janvey, L.L.P.  Federal Court Appointed Receiver  Stanford Financial Group  2100 Ross Ave, Dallas, TX 75201  rjanvey@kjllp.com</p>
<p style="text-align: center;">Kimberly Moran  Tescher &amp; Spallina, P.A.  Wells Fargo Plaza  925 South Federal Hwy Suite 500  Boca Raton, Florida 33432  kmoran@tescherspallina.com</p>	<p style="text-align: center;">Lindsay Baxley aka Lindsay Giles  Life Insurance Concepts  950 Peninsula Corporate Circle  Suite 3010  Boca Raton, FL 33487  lindsay@lifeinsuranceconcepts.com</p>

Gerald R. Lewin  
CBIZ MHM, LLC  
1675 N Military Trail  
Fifth Floor  
Boca Raton, FL 33486

CBIZ MHM, LLC  
General Counsel  
6480 Rockside Woods Blvd. South  
Suite 330  
Cleveland, OH 44131  
ATTN: General Counsel  
generalcounsel@cbiz.com  
(216)447-9000

Albert Gortz, Esq.  
Proskauer Rose LLP  
One Boca Place  
2255 Glades Road  
Suite 421 Atrium  
Boca Raton, FL 33431-7360  
agortz@proskauer.com

Heritage Union Life Insurance Company  
A member of WiltonRe Group of Companies  
187 Danbury Road  
Wilton, CT 06897  
cstroup@wiltonre.com

Estate of Simon Bernstein  
Brian M O'Connell Pa  
515 N Flagler Drive  
West Palm Beach, FL 33401  
boconnell@ciklinlubitz.com

Counter Defendant  
Steven Lessne, Esq.  
Gray Robinson, PA  
225 NE Mizner Blvd #500  
Boca Raton, FL 33432  
steven.lessne@gray-robinson.com

Byrd F. "Biff" Marshall, Jr.  
President & Managing Director  
Gray Robinson, PA  
225 NE Mizner Blvd #500  
Boca Raton, FL 33432  
biff.marshall@gray-robinson.com

Steven A. Lessne, Esq.  
Gunster, Yoakley & Stewart, P.A.  
777 South Flagler Drive, Suite 500 East  
West Palm Beach, FL 33401  
Telephone: (561) 650-0545  
Facsimile: (561) 655-5677  
E-Mail Designations:  
slessne@gunster.com  
jhoppel@gunster.com  
eservice@gunster.com

<p>T&amp;S Registered Agents, LLC Wells Fargo Plaza 925 South Federal Hwy Suite 500 Boca Raton, Florida 33432 dtescher@tescherspallina.com</p>	<p>David Lanciotti Executive VP and General Counsel LaSalle National Trust NA CHICAGO TITLE LAND TRUST COMPANY, as Successor 10 South LaSalle Street Suite 2750 Chicago, IL 60603 David.Lanciotti@ctt.com</p>
<p>Joseph M. Leccese Chairman Proskauer Rose LLP Eleven Times Square New York, NY 10036 jleccese@proskauer.com</p>	<p>Brian Moynihan Chairman of the Board and Chief Executive Officer 100 N Tryon St #170, Charlotte, NC 28202 Phone:(980) 335-3561</p>
<p>ADR &amp; MEDIATIONS SERVICES, LLC Diana Lewis 2765 Tecumseh Drive West Palm Beach, FL 33409 (561) 758-3017 Telephone Email: dzlewis@aol.com (Fla. Bar No. 351350)</p>	