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

**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

**SERVICE LIST**

|  |  |
| --- | --- |
| John P. Morrissey, Esq.330 Clematis Street, Suite 213West Palm Beach, FL 33401(561) 833-0766-Telephone(561) 833-0867 -FacsimileEmail: John P. Morrissey(iohn@jrnoiTisseylaw.com)  | Lisa Friedstein2142 Churchill Lane Highland Park, IL 60035lisa@friedsteins.com  |
| Peter M. Feaman, Esq.Peter M. Feaman, P.A.3695 West Boynton Beach Blvd., Suite 9Boynton Beach, FL 33436(561) 734-5552 -Telephone(561) 734-5554 -FacsimileEmail: service@feamanlaw.com:mkoskey@feamanlaw.com | Jill Iantoni2101 Magnolia Lane Highland Park, IL 60035jilliantoni@gmail.com |
| Gary R. Shendell, Esq.Kenneth S. Pollock, Esq.Shendell & Pollock, P.L.2700 N. Military Trail,Suite 150Boca Raton, FL 33431(561)241-2323 - Telephone (561)241-2330-FacsimileEmail: gary@shendellpollock.comken@shendellpollock.comestella@shendellpollock.combritt@shendellpollock.comgrs@shendellpollock.com | Counter DefendantRobert Spallina, Esq.Donald Tescher, Esq.Tescher & Spallina925 South Federal Hwy., Suite 500Boca Raton, Florida 33432  |
| Brian M. O'Connell, Esq.Joielle A. Foglietta, Esq.Ciklin Lubitz Martens & O'Connell515 N. Flagler Dr., 20th FloorWest Palm Beach, FL 33401561-832-5900-Telephone561-833-4209 - FacsimileEmail: boconnell@ciklinlubitz.com;ifoglietta@ciklinlubitz.com;service@ciklinlubitz.com;slobdell@ciklinliibitz.com | Counter DefendantJohn J. Pankauski, Esq.Pankauski Law Firm PLLC120 South Olive Avenue7th FloorWest Palm Beach, FL 33401courtfilings@pankauskilawfirm.comjohn@pankauskilawfirm.com |
| Counter DefendantMark R. Manceri, Esq., andMark R. Manceri, P.A.,2929 East Commercial BoulevardSuite 702Fort Lauderdale, FL 33308mrmlaw@comcast.net | Counter DefendantDonald Tescher, Esq.,Tescher & Spallina, P.A.Wells Fargo Plaza925 South Federal Hwy Suite 500Boca Raton, Florida 33432dtescher@tescherspallina.com |
| Theodore Stuart Bernstein880 BerkeleyBoca Raton, FL 33487tbernstein@lifeinsuranceconcepts.com | Counter DefendantTESCHER & SPALLINA, *P.A.*.Wells Fargo Plaza925 South Federal Hwy Suite 500Boca Raton, Florida 33432dtescher@tescherspallina.com |
| Theodore Stuart BernsteinLife Insurance Concepts, Inc.950 Peninsula Corporate CircleSuite 3010Boca Raton, FL 33487tbernstein@lifeinsuranceconcepts.com | Counter DefendantAlan B. Rose, Esq.PAGE, MRACHEK, FITZGERALD, ROSE, KONOPKA, THOMAS & WEISS, P.A.505 South Flagler Drive, Suite 600West Palm Beach, Florida 33401561-355-6991arose@pm-law.comarose@mrachek-law.com |
| Pamela Beth Simon950 N. Michigan AvenueApartment 2603Chicago, IL 60611psimon@stpcorp.com | Counter DefendantL. Louis Mrachek, Esq.PAGE, MRACHEK, FITZGERALD, ROSE, KONOPKA, THOMAS & WEISS, P.A.505 South Flagler Drive, Suite 600West Palm Beach, Florida 33401561-355-6991lmrachek@mrachek-law.com |
| Jill Iantoni2101 Magnolia LaneHighland Park, IL 60035jilliantoni@gmail.com | Counter DefendantPankauski Law Firm PLLC120 South Olive Avenue7th FloorWest Palm Beach, FL 33401 |
| Lisa Sue Friedstein2142 Churchill LaneHighland Park, IL 60035lisa.friedstein@gmail.comlisa@friedsteins.com | Dennis McNamaraExecutive Vice President and General Counsel Oppenheimer & Co. Inc.Corporate Headquarters125 Broad StreetNew York, NY 10004800-221-5588Dennis.mcnamara@opco.cominfo@opco.com  |
| Dennis G. BedleyChairman of the Board, Director and Chief Executive OfficerLegacy Bank of FloridaGlades Twin Plaza2300 Glades RoadSuite 120 West – Executive OfficeBoca Raton, FL 33431info@legacybankfl.comDBedley@LegacyBankFL.com | Hunt Worth, Esq.PresidentOppenheimer Trust Company of Delaware405 Silverside RoadWilmington, DE 19809302-792-3500hunt.worth@opco.com |
| James DimonChairman of the Board and Chief Executive OfficerJP Morgan Chase & CO.270 Park Ave. New York, NY 10017-2070Jamie.dimon@jpmchase.com | Neil WolfsonPresident & Chief Executive OfficerWilmington Trust Company1100 North Market StreetWilmington, DE 19890-0001nwolfson@wilmingtontrust.com |
| William McCabeOppenheimer & Co., Inc.85 Broad St Fl 25New York, NY 10004William.McCabe@opco.com | STP Enterprises, Inc.303 East Wacker DriveSuite 210Chicago IL 60601-5210psimon@stpcorp.com |
| Charles D. RubinManaging PartnerGutter Chaves Josepher Rubin Forman Fleisher Miller PABoca Corporate Center2101 NW Corporate Blvd., Suite 107Boca Raton, FL 33431-7343crubin@floridatax.com | Ralph S. JanveyKrage & Janvey, L.L.P.Federal Court Appointed ReceiverStanford Financial Group2100 Ross Ave, Dallas, TX 75201rjanvey@kjllp.com |
| Kimberly MoranTescher & Spallina, P.A.Wells Fargo Plaza925 South Federal Hwy Suite 500Boca Raton, Florida 33432kmoran@tescherspallina.com | Lindsay Baxley aka Lindsay GilesLife Insurance Concepts950 Peninsula Corporate CircleSuite 3010Boca Raton, FL 33487lindsay@lifeinsuranceconcepts.com |
| Gerald R. LewinCBIZ MHM, LLC1675 N Military TrailFifth FloorBoca Raton, FL 33486 | CBIZ MHM, LLCGeneral Counsel6480 Rockside Woods Blvd. SouthSuite 330Cleveland, OH 44131ATTN: General Counselgeneralcounsel@cbiz.com(216)447-9000 |
| Albert Gortz, Esq.Proskauer Rose LLPOne Boca Place2255 Glades RoadSuite 421 AtriumBoca Raton, FL 33431-7360agortz@proskauer.com | Heritage Union Life Insurance CompanyA member of WiltonRe Group of Companies187 Danbury RoadWilton, CT 06897cstroup@wiltonre.com |
| Estate of Simon BernsteinBrian M O'Connell Pa515 N Flagler DriveWest Palm Beach, FL 33401boconnell@ciklinlubitz.com | Counter DefendantSteven Lessne, Esq.Gray Robinson, PA225 NE Mizner Blvd #500Boca Raton, FL 33432steven.lessne@gray-robinson.com |
| Byrd F. "Biff" Marshall, Jr.President & Managing DirectorGray Robinson, PA225 NE Mizner Blvd #500Boca Raton, FL 33432 biff.marshall@gray-robinson.com | Steven A. Lessne, Esq.Gunster, Yoakley & Stewart, P.A.777 South Flagler Drive, Suite 500 EastWest Palm Beach, FL 33401Telephone: (561) 650-0545Facsimile: (561) 655-5677E-Mail Designations:slessne@gunster.comjhoppel@gunster.comeservice@gunster.com |
| T&S Registered Agents, LLCWells Fargo Plaza925 South Federal Hwy Suite 500Boca Raton, Florida 33432dtescher@tescherspallina.com | David LanciottiExecutive VP and General CounselLaSalle National Trust NACHICAGO TITLE LAND TRUST COMPANY, as Successor10 South LaSalle StreetSuite 2750Chicago, IL 60603David.Lanciotti@ctt.com |
| Joseph M. LecceseChairmanProskauer Rose LLPEleven Times SquareNew York, NY 10036jleccese@proskauer.com | Brian MoynihanChairman of the Board and Chief Executive Officer100 N Tryon St #170, Charlotte, NC 28202Phone:(980) 335-3561 |
| ADR & MEDIATIONS SERVICES, LLCDiana Lewis2765 Tecumseh DriveWest Palm Beach, FL 33409(561) 758-3017 TelephoneEmail: dzlewis@aol.com(Fla. Bar No. 351350)  |   |