IN THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

CASE NO. 4D09-1805

RICHARD S. LEHMAN, and RICHARD S. LEHMAN, P.A.,

Appellants,

VS.

HILDA PIZA LUCOM, ET AL.,

Appellees.

On Appeal from a Final Judgment of the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED JULY 15, 2010

BRUCE S. ROGOW CYNTHIA E. GUNTHER BRUCE S. ROGOW, P.A. Broward Financial Centre, Suite 1930 500 East Broward Blvd. Fort Lauderdale, FL 33394 (954) 767-8909

Counsel for Appellants

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ARGUMENT

THE FINAL JUDGMENT AND THE ORDER DENYING RELIEF FROM JUDGMENT SHOULD BE REVERSED

A. INTRODUCTION

On July 15, 2010, the Court entered an Order authorizing the filing of a supplemental brief "to address issues presented by the proceedings on the relinquishment of jurisdiction" The Court had relinquished jurisdiction on April 20, 2010 to the trial court to consider a motion to vacate the judgment. The trial court conducted the Rule 1.540(b) motion hearing on June 4, 2010, which included the presentation of Panama court orders, deposition testimony taken by the parties, memoranda of law, and oral argument based on the newly discovered evidence that was the basis of the motion to vacate.

The pertinent evidence was "new orders of the courts in Panama that overruled or overturned prior Panamanian court orders relied upon by Judge Phillips [the original trial judge] in rendering the Final Judgment, thus causing a legal error that would require that the Final Judgment be vacated." *See* Appendix A, the June 7, 2010 "Order Denying Richard S. Lehman and Richard S. Lehman, P.A.'s Amended Motion

The Panama court orders were attached as Appendices to Lehman's Motion to Vacate. The most relevant are appended here.

for Relief from Judgment Pursuant to Rule 1.540(b), Fla. R.Civ.P." That Order was issued by Judge Colin, who handled the case after this Court relinquished jurisdiction to consider the 1.540(b) proceedings.

Lehman and Lehman P.A., filed an Amended Notice of Appeal vis a vis that June 7, 2010 Order, and then sought leave to file this Supplemental Brief.

The importance of the "new orders of the courts in Panama that overruled or overturned prior Panamanian court orders relied upon by Judge Phillips" (Appendix A, p. 1) is evidenced by Judge Phillips' first finding in the original Final Judgment; a finding that sets the stage for these appellate proceedings:

The decedent, Wilson Charles Lucom, died on June 2, 2006, Mr. Lucom died as an expatriate American having renounced his United States citizenship. He was domiciled in the Republic of Panama at the time of his death. Lehman was the decedent's lawyer for more than 30 years, until decedent's death. Lehman has a masters degree in tax law, has been a Florida attorney for 40 years and claims to specialize in tax-oriented international law, and estates and gift planning issues. Lehman opened Mr. Lucom's Panama domiciliary estate with assets between \$25 and \$50 million on July 5, 2006. The Order opening the Panama estate, dated July 5, 2006, appointed Lehman as sole Executor ("Albacea") of the Panama Domiciliary Estate, despite the fact that the Decedent's Last Will and Testament names Hilda Piza Lucom, Christopher Ruddy, and Lehman as co-Albaceas, Lehman failed to give to notice to these interested parties of the Panama proceedings, resulting in the July 5, 2006 Order appointing him the sole Albacea. On July 18, 2006, Hilda Piza Lucom appealed the July 5, 2006 Order. Unequivocal evidence received at trial proved the July 5, 2006 Panama Order appointing Lehman "Excecutor" of the domiciliary estate (from the English translation of the Order) was automatically and immediately null and void when Hilda P. Lucom filed her appeal of that Order on July 18, 2006. At all times material to the action before this court, Lehman was not installed or properly serving as the Albacea of the Panama Estate.

Appendix B, p. 2, March 5, 2009 Final Judgment. As a result, Judge Phillips concluded that Lehman's appointment as ancillary personal representative in Florida was improper as well. *Id.* at 3.

Thus the crux of this case is whether, at the times material to Lehman's appointment as personal representative in Florida, he was properly serving as the Albacea in the Panama Estate. Judge Phillips' finding that he was not, was at the heart of the adverse March 5, 2009 Final Judgment and infected that Judgment.²

On August 6, 2010 in an appeal by Hilda Piza [Lucom], the Supreme Court of Justice – Civil Division – Panama, rendered an Opinion that resolved the question of who was Lucom's executor. The Court decided that the widow – Hilda – is the executor. See Appendix C. The fact that we now know who the executor is does not detract from the argument we make: that when Judge Phillips ruled against Lehman on March 5, 2009, he was mistaken in his belief that Lehman was not the Albacea of the Lucom Estate. Because that error infected all of Judge Phillips' findings, his judgment should be reversed. The recent clarification by the Panama Supreme Court does not vitiate the error that permeated the Final Judgment. Although that August 6, 2010 Order is not in the record on appeal because it was issued after Judge Colin's Order, we are supplementing the record with it and are sure that the Appellees will not contest it's relevancy.

B. THE ORDER DENYING THE MOTION TO VACATE THE FINAL JUDGMENT

Judge Colin's June 7, 2010 Order, despite denying the Motion to Vacate, confirms that "There is no dispute that on or about July 5, 2006, Lehman secured an order in Panama installing himself as Albacea of the estate of Wilson C. Lucom, who died a Panama resident on June 2, 2006." Appendix A, p. 2.

Judge Colin also confirmed that the evidence submitted at the motion to vacate belied Judge Phillips' finding that "[u]nequivocal evidence received at trial proved the July 5, 2006 Panama Order appointing Lehman "Executor" of the domiciliary estate . . . was automatically and immediately null and void when Hilda P. Lucom filed her appeal of that Order on July 18, 2006." Appendix B, p. 2.

Judge Colin recognized that "null and void" was not true. He recognized that Panamanian Order 952, the August 29, 2008 Order on Hilda Lucom's appeal, that Judge Phillips believed nullified all of Lehman's actions, did not have that effect. Indeed, even Hilda's lawyer recognized that "null and void" may have been a misnomer:

The parties dispute the status of those appeals with Lehman asserting that order 952 has been overruled while Hilda arguing that Order 952 is at worse suspended pending Panama Supreme Court review.

Appendix A, p. 3. Judge Colin opined that Judge Phillips would still have been adverse to Lehman "even if Judge Phillips was informed that the appeal in Panama by Lehman's appointment as Albacea [was] only suspended or stayed Lehman's status as A.P.R. " *Id*.

C. THE CONSEQUENCES OF JUDGE COLIN'S RECOGNIZING THAT "NULL AND VOID" WAS NEGATED BY THE EVIDENCE

We show below that the evidence clearly established that Lehman was the duly appointed and sole Albacea of the Panama estate at all relevant times, but even if one utilizes Judge Colin's construct – that Order 952 was overruled or at least stayed – one has to conclude that Judge Phillips' repeated condemnation of Lehman was the product of a complete misunderstanding of Panamanian law. Paragraph after paragraph of the erroneous Final Judgment was built on the notion that Lehman's appointment in Panama was "null and void."

- "At all times material to the action before this court Lehman was not installed or properly serving as the Albacea of the Panama Estate." App. B, p. 2, ¶ 1.
- Because Lehman was not Albacea in Panama as of July 19, 2006 The appointment as APR and Letters of Administration [in Florida] were issued by the Florida Court, based on false information in Lehman's Petition." *Id.*, ¶ 2.
- "On July 19, 2006 Lehman was not qualified to act as APR of the Florida Ancillary estate [H]e was

not the foreign personal representative of the Panama domiciliary estate . . . Thus all actions taken by Lehman in the Florida Ancillary estate were those of an intermeddling volunteer." Id., ¶ 3.

- "Lehman used his wrongly issued Letters of Administration" *Id.*, ¶ 4.
- "Panama Court Orders denied Lehman access to the money . . . " *Id.*, ¶ 5.
- "Using his invalid APR Letters" *Id.*, ¶ 8.
- "[He was] a covetous opportunist using the Ancillary estate assets to thwart the Orders of the Panama Court in the domiciliary estate" Id., ¶ 9.

Even in the paragraph providing an alternative reason for the Final Judgment ("[s]hould another Court hold that Lehman was properly appointed APR") Judge Phillips harkened back to his conclusion that Lehman was acting malignantly under Panama law: "He sought to avoid or circumvent legitimate Orders of the Panama Court" Id., ¶ 13.

Any doubt that "null and void" drove the Final Judgment outcome is negated by the very first decretal portion of the Final Judgment:

"1. Richard S. Lehman's Appointment as Florida Ancillary Personal Representative is declared *void ab initio*; . . ."

Id., p. 8.

In the Initial Brief we set forth the testimony of Hilda's proffered Panamanian law expert, Ruben Avilar, who testified that Lehman's "installation as Albacea is a

nullity" and that the installation is abated "until the appeal that was filed is resolved." Initial Brief, pp. 3, 8. We argued that the testimony misapplied the very law upon which Avilar relied (*id.*), and pointed out that "Order No. 952, entered on August 29, 2008 . . . [did not] render Lehman a nullity at the time he filed the petition to be appointed ancillary representative [in Florida] in July 2006." *Id.*, p. 8, n.3. And, we presciently noted the advent of Panama Court Orders that neutralized the nullity testimony (*id.*, p. 24, n.3); Orders that now leave no doubt that Judge Phillips was wrong when he held that "[u]nequivocal evidence received at trial proved (that Lehman's Panama appointment) was automatically null and void when Hilda Lucom filed her appeal " Appendix B, p. 2.

Judge Phillips' Final Judgment portrayed Lehman as a fraud; that he was not the Albacea. That fundamental error so permeated the proceedings and the Judgment that it cannot stand. Judge Colin's *assumption* that Judge Phillip would not have reached a different result had he been properly informed (Appendix A, p. 3) cannot be countenanced where the overwhelming documentary evidence presented in support of the Motion to Vacate left no doubt that the Final Judgment was constructed on a terribly flawed premise. And, as we have noted at n.1, *supra*, the advent of the August

2010 Panama Supreme Court decision cannot cure the March 2009 mistake.3

As we show in more detail below, the extant post Final Judgment Panama Court orders established:

- Lehman was appointed Albacea of Lucom's estate on July 5, 2006.
- He was the sole Albacea when he applied for appointment as ancillary personal representative in Florida. His appointment had not been suspended when Lehman received his letters of appointment in Florida.
- Hilda Lucom's appeal of Lehman's appointment did not overturn or suspend the order appointing Lehman.
- Neither Hilda or Christopher Ruddy were coexecutors or co-trustees when Lehman was appointed Albacea and when he sought appointment in Florida, therefore they were not necessary advisees.
- Hilda's recent August 10, 2010 retroactive installation as sole executor does not alter the fact that Lehman was the Albacea on July 5,

Nor can that recent decision be used against Lehman because he cannot be held to have acted improperly based on a subsequent decision changing what the law was when he was appointed Albacea. "Throughout history, courts and legal commentators have generally looked with disapproval and extreme caution at the retroactive application of laws." *Raphael v. Schecter*, 18 So. 3d 1152, 1155 (Fla. 4th DCA 2009).

2006 in Panama and on July 19, 2006, Hilda's appeal did not affect his right to serve as Albacea in Panama or Personal Representative in Florida.

D. THE EVIDENCE SUPPORTED VACATING THE FINAL JUDGMENT

1. The Prologue

These facts are undisputed. Wilson Lucom died in June 2006 in Panama. Lehman was appointed as Albacea in July 5, 2006 by Judge Solange de Booker in the civil probate court in Panama. On July 14, 2006 Hilda filed an appeal of that appointment with the First Superior Court of Panama. Shortly after filing her appeal Hilda also sought to nullify the will and award her everything. In May 2007, that appellate court held that the will was validly admitted to probate and that Lehman was the duly appointed personal representative along with two others. Hilda appealed that order to the Panama Supreme Court, where it was pending, until a fortnight ago.

After his July 5, 2006 Panama appointment by Judge de Booker, Lehman opened a Florida estate because Lucom had Florida assets, and Lehman was appointed Ancillary Personal Representative in Florida on July 19, 2006. Hilda sought to remove Lehman from that position and at the 2009 trial before Judge Phillips relied upon an August 28, 2008 order entered by a civil court judge who replaced Judge de Booker after she was disqualified. That order, by Judge Molina, was Order 952. It held that

Lehman's appointment as Albacea by Judge de Booker was a nullity. It was that Order that Hilda's expert – Mr. Avilar – used to opine that Lehman was devoid of any authority from the outset. Lehman contested Avilar's testimony at the trial. Nevertheless, Judge Phillips credited Avilar's opinion that under Panama law, Lehman's appointment was a nullity, and entered the March 5, 2009 Final Judgment.

2. The Post Final Judgment Panama Orders

After the entry of Judge Phillips' Final Judgment, the Panama courts entered a half-dozen orders which destroyed Avilar's testimony about Panama law vis a vis Lehman's appointment, and make it clear that Lehman, was, and remained, until a few days ago, Albacea of the Lucom estate.

First, Lehman appealed Order 952 and on July 15, 2009, Judge Eva Cal held that 952 was not appealable:

As we have noted, Order No. 952 from the judge under appeal rules on a motion to declare null and void the installation of Mr. RICHARD SAM LEHMAN in the office of executor and, as consequence, it renders without effect all which he might have done by virtue of said office. Although it is true that said Motion has no legal foundations whatever and it nullifies legal matters without specifying what matters are those and without hearing the opposing party in those matters, it is no less true that it is an order issued in connection with a motion filed in estate proceedings and

that, consequently, said Order No. 952 was issued in non-adversarial proceedings, as estate proceedings are not adversarial.

And as it happens, in non-adversarial proceedings the filing and decision of all appeals shall be subject to the procedures summary proceedings, for established according to the provisions of paragraph 11 of Article 1423 of the Judicial Code; and, pursuant to paragraph 9 of Article 1436, ibidem, in summary proceedings only a resolution dismissing the complaint or the answer or a resolution involving their dismissal. resolution denying a commencement of discovery, or a resolution putting an end to the proceedings or making it impossible to pursue them is appealable. Moreover, in estate proceedings specifically, only the order declaring heirs, the order of adjudication, the order to partition the estate, and the order to sell estate property are subject to appeal, according to Articles 1510, 1520, 1565, and 1580 of the Judicial Code, respectively.

It is clear from the foregoing, therefore, that Order No. 952 does fit any of those resolutions. This means, then, that Order No. 952 is not appealable.

Appendix D. The Motion was "return[ed] . . . to the lower court." Id.4

On August 12, 2009, Judge Eva Cal set aside an order of Judge Molina

The translations from Spanish were not contested as to their accuracy.

appointing a Ms. Marta Lucia Cañola as administrator. Judge Cal recognized that when Judge Molina appointed Ms. Cañola, "there already exhibited a resolution designation Richard Sam Lehman as executor . . ." (*id.* at 12) and that "there is no reason to allow the judge, in violation of the will of the testator, to designate another administrator and, consequently, to violate Article 1582" *Id.* at 12. The August 12, 2009 appellate decree was unambiguous in recognizing Lehman and removing Ms. Cañola:

We shall also dispense with Ms. Marta Lucia Cañola's defense, *i.e.*, we will not take into account the strenuous efforts which, according to her and to the Judge hearing the case, Ms. Marta Lucia Cañola has been making. It should also be made clear that we will pay no attention to Ms. Marta Lucia Cañola's comments about Mr. Richard S. Lehman, for what is at issue here is not that gentleman's behavior.

Let us see, then, why it is proper to revoke the appealed order.

Appendix E, p. 11. Judge Cal recognized that when Judge Molina appointed Ms. Cañola, "there already existed a resolution designating RICHARD SAM LEHMAN as executor . . ." (*id.* at 12) and that "there is no reason to allow the judge, in violation of the will of the testator, to designate another administrator and, consequently, to violate Article 1582" *Id.* at 12. The August 12, 2009 appellate decree was unambiguous

in recognizing Lehman and removing Ms. Cañola:

Therefore, on the basis of the foregoing, the FIRST SUPERIOR COURT OF THE FIRST JUDICIAL CIRCUIT, administering justice in the name of the Republic and by the authority vested in it by law, REVOKES Order No. 203 of February 19, 2009, issued by the Fifth Civil Circuit Judge of the First Judicial Circuit of Panama in the Motion to Remove the Administrator filed by RICHARD SAM LEHMAN and LUCOM WORLD PEACE LIMITED in the Testamentary Estate Proceedings of the late WILSON CHARLES LUCOM and, in its stead, REMOVES Ms. Marta Lucia Cañola as administrator of the aforesaid Testamentary Estate inasmuch as her appointment violated the provisions of Article 1582 of the Judicial Code as well as of paragraph 3 of Article 1138 of the Judicial Code.

Id. at 13.

On October 12, 2009, the First Superior Court made it clear that Judge Molina's Order 952 lacked vitality. It ordered Judge Molina "to forward to this office the proceedings or, alternatively, a report on the facts that are the subject of the action within two (2) hours following receipt of the present request for production," closing with this decree:

You are also advised that **Order No. 952, dated August 29, 2008,** issued by the Fifth Civil Court of the First
Judicial Circuit in the testate estate proceedings of
CHARLES WILSON LUCOM has been stayed.

Appendix F (emphasis in original).

The First Superior Court further confirmed that Order 952 was not a final nullification when it dismissed its October 9, 2009 Order because appellate review other than constitutional writ review was available: "As was shown, available still is the procedure established by procedural rules to Appeal Order No. 952 issued on August 29, 2008; *that court order is not yet final or firm*, which implies there is the underlying possibility of a review of its lawfulness within the regular jurisdictional level." Appendix G, p. 63 (emphasis supplied).

Lehman's appeal to the Supreme Court of Panama of the declination of appellate jurisdiction was granted, and Order 952, the purported nullification—of—Lehman order, remained suspended:

The appeal filed by Attorney VICTOR ANTONIO CROSBIE CASTILLERO, legal counsel for RICHARD SAM LEHMAN in this Action for Constitutional Relief is **GRANTED** under the **SUSPENSIVE** effect.

Therefore, remit the proceeding to the Honorable Supreme Court of Justice for the appeal to have force and effect.

So ordered.

/s/ Judge M.A. Espino G.
/s/ JUDGE N. Jaramillo
/s/ JUDGE N.H. Ruiz C.
/s/ M. MADRID – SENIOR CLERK III
FOR THE CLERK.

Appendix G, p. 73 (emphasis in original).

The hearing below on the Motion to Vacate thus established that The Supreme Court of Justice in Panama had not ruled on Lehman's appeal, and therefore, Order 952 remained, until the other day, without force and effect. Judge Phillips' "void ab initio" ruling was clearly erroneous. Since Lehman was the Albacea when he opened the Florida estate he cannot be accused of bad faith or misdeeds in seeking to be personal representative and protecting Lucom's Florida estate.

E. JUDGE COLIN'S CHANNELING OF JUDGE PHILLIPS' THINKING WAS ERROR, BOTH PROCEDURALLY AND SUBSTANTIVELY

In this Supplemental Brief we have brought to the Court's attention the error that caused Judge Phillips to believe that Lehman had no role in the Lucom Estate in Panama. The denial of the Motion to Vacate by Judge Colin was based upon Judge Colin's belief that Judge Phillips would have ruled against Lehman even if Lehman was the Panamanian Albacea. But a successor judge should not guess at what his or her predecessor would have done had he or she been informed of the true state of facts. See Tingle v. Dade County Board of County Commissioners, 245 So. 2d 76, 78 (Fla. 1971), holding that if "subsequent events may defeat the prior judgment, the successor does have authority [under 1.540(b)] even after final judgment to make such further order as may be necessary to effectuate the judgment." But Judge Colin did not seek to "effectuate the judgment" after he recognized that "subsequent events" could have

defeated the judgment; he sought to affirm the judgment by opining that the subsequent events would not have changed the final judgment outcome. He was seeking to address what Lehman has claimed on appeal was a "judicial error" by Judge Phillips. That error correction was a job for this Court, not the successor judge. "[J]udicial errors must be corrected on appeal." *Paladin Properties v. Family Investment Enterprises*, 952 So. 2d 560, 562 (Fla. 2d DCA 2007), citing *In re Estate of Beeman*, 391 So. 2d 276, 280-81 (Fla. 4th DCA 1980) ("If the pronouncement reflects a deliberate choice on the part of the court, the act is judicial; errors of this nature are to be cured by appeal."").

Indeed, Judge Colin's list of the reasons why he thought Judge Phillips would have stuck to his Final Judgment "even if Judge Phillips was informed that the appeal in Panama of Lehman's appointment as Albacea only suspended or stayed Lehman's status as P.R. (instead of rendering it automatically and immediately null and void)" (Appendix A, p. 3), underscores the substantive errors of both Judge Phillips and Judge Colin. Judge Colin gave four reasons why he thought Judge Phillips would have reaffirmed his Final Judgment in the face of the newly discovered evidence that Lehman had not been nullified:

a. The finding that Lehman did not give proper notice to Hilda or Ruddy in the initial Panamanian probate proceeding.

- b. The finding that Lehman failed to give proper notice per Rule 5.201 and Rule 5.470, Fla. Probate Rules to Hilda and Ruddy when he filed the Florida Probate Petition.
- c. The finding that Lehman's petition to be appointed in Florida as A.P.R. did not reveal to the Court the challenge to his appointment in Panama as albacea.
- d. The multiple findings in paragraphs 13, 14 and 15 of the Final Judgment indicating that even if Lehman was properly appointed as Lucom's A.P.R., Lehman's conduct was nonetheless improper.

Id.

As to "a," the initial Panama probate proceeding, that court had Lucom's will before it and required no notice to Hilda or Ruddy, therefore no bad motive can be ascribed to Lehman. As to "b," since Lehman was the appointed Albacea, he was "entitled to preference of appointment" and "no notice need be given" under Rule 5.201, nor under Rule 5.470, because Lehman's appointment negated the notion that Hilda or Ruddy were "equal to or greater than" Lehman's right to appointment.

As to "c," Lehman's Florida application was not affected by the appeal of Hilda.

As to both (a) and "b" above, it has been shown that Lehman's Florida appointment did not require him on that date to advise Ruddy, Hilda or the Panama probate court. The

Avilar evidence introduced at the original trial, which we now know was incorrect, was presciently belied by Lehman's Panamanian lawyer's opinion. *See* Initial Brief, p. 6, recounting Avilar's disagreement with Lehman's lawyer's opinion that Lehman was "legal," and not a nullity.

As to "d," the paragraphs in the Final Judgment accusing Lehman of bad faith and commingling even if he "was properly appointed as Florida APR" (Appendix B, p. 8), Lehman's Initial Brief, Point II, pp. 27-37, addressed the errors that infected those paragraphs of the Final Judgment under this argumentative heading:

II.

IT WAS A CLEAR ABUSE OF DISCRETION TO **FROM** PRECLUDE LEHMAN EXPERT TESTIMONY REGARDING THE DUTIES AND FUNCTIONS OF AN ANCILLARY PERSONAL REPRESENTATIVE AND FROM PRESENTING THE REFLECTING **EVIDENCE** DOCUMENTARY LEHMAN'S FINAL ACCOUNTING; AND THE BY **FAILING COURT ERRED EXCLUDE PREJUDICIAL HEARSAY TESTIMONY** FAILING TO PROVIDE SPECIFIC AND BY FACTUAL BASES FOR ITS CONCLUSIONARY FINDINGS OF BAD FAITH AND RECKLESS **INDIFFERENCE**

Judge Colin's references to, and reliances upon, Final Judgment paragraphs 13, 14 and 15 were not a basis, either procedurally or substantively, to deny the Motion to Vacate. Whether Judge Phillips would have hewed to his Final Judgment in light of

evidence that totally undermined the focal point of that Final Judgment is speculative, despite his alternative finding.

Where, as here, the fundamental legal theory upon which the Final Judgment was premised has been shown to be erroneous, a new trial should be ordered.

CONCLUSION

For the reasons advanced in the Initial Brief, and in this Supplemental Brief, this Court should reverse the Final Judgment, reverse the Order Denying the Motion to Vacate, and remand for a new trial. This case has spawned litigation in two countries. Lehman had been named by Lucom as his executor. He sought to discharge his obligations consistent with Lucom's wishes. He used his resources, both financial and physical, to accomplish that goal. His Panama adversaries failed, until two weeks ago, to prevent him from protecting and carrying out Lucom's wishes. Judge Phillips was influenced by misadvice on Panama law. A new trial should be accorded so that Lehman can be heard on a record devoid of that misinformation. Although we now know that Lehman is not the executor because the Panama Supreme Court has said so, he should not be penalized for doing that which, under Panama (and Florida) law, he was entitled to do.

Respectfully submitted,

BRUCE S. ROGOW
Florida Bar No. 067999
CYNTHIA E. GUNTHER
Florida Bar No. 0554812
BRUCE S. ROGOW, P.A.
Broward Financial Centre
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394

Ph: (954) 767-8909 Fax: (954) 764-1530 guntherc@rogowlaw.com

By:

BRUCE ROGOW

Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by Federal

Express this 23rd day of August, 2010 to the following counsel:

PHILIP BURLINGTON
BURLINGTON & ROCKENBACH
444 West Railroad Avenue
West Palm Beach, FL 33401

CHARLES WEISS THOMAS N. SILVERMAN, P.A. 3801 PGA Blvd., Suite 902 Palm Beach Gardens, FL 33410

MATIAS DORTA TEW CARDENAS, LLP Four Seasons Tower, 15th Floor 1441 Brickell Avenue Miami, FL 33131

ROBERT LEE McELROY, IV DOWNEY & DOWNEY 3601 PGA Blvd., Suite 302 Palm Beach Gardens, FL 33410

LAWRENCE J. MILLER MILLER & O'NEILL, P.L. 2300 Glades Rd. #400-East Boca Raton, FL 33431 LAWRENCE D. SMITH WALTON LANTAFF ET AL. 9350 Financial Centre, 10th Fl. 9350 South Dixie Hwy. Miami, FL 33156

BENJAMIN P. BROWN MATWICZYK & BROWN, LLP 625 N. Flagler Dr., Suite 401 West Palm Beach, FL 33401

LIZA Z. HAUSER COMITER, SINGER & BASEMAN 3801 PGA Blvd., Suite 604 Palm Beach Gardens, FL 33410

STEVEN M. KATZMAN CHARLES J. BENNARDINI KATZMAN WASSERMAN, ET AL. 7900 Glades Road, Suite 140 Boca Raton, FL 33434

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210,

Fla.R.App.P., and is prepared in Times New Roman 14 point font

BRUCE S. RÖGOW