No. SC2024-0547

In the Supreme Court of Florida

RJ'S INTERNATIONAL TRADING, LLC,
Petitioner,
v.
CROWN CASTLE SOUTH, LLC, ET AL.,
Respondent.

ON CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT, CASE NO. 22-11977

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent Crown Castle asserts that, as a matter of law, an attorneys' fees provision in a recorded easement can bind only the original grantor and grantee. A holding for Respondent would invalidate attorneys' fee provisions that homeowners, developers, or other property owners recorded in easements throughout Florida for anyone except the initial covenanting parties. This Court should reject that untenable position and answer the certified question in the affirmative by holding that fee provisions such as the one at issue here may run with the land.

In addition, or in the alternative, this Court should hold that Crown Castle was a party to the Easement Agreement. It is the law of this case that Crown Castle is a successor to the original grantee, BellSouth Mobility, Inc., and is thus bound to the agreement's terms.

ARGUMENT

I. The Attorneys' Fees Provision Runs with the Land.

We agree with Crown Castle that the mere inclusion of an attorneys' fees provision in an easement agreement does not, per se, create a real covenant that runs with the land. Ans.Br. at 4. As stated in our Initial Brief, "RJI does not contend that an attorneys' fees

provision compensating a party for a personal covenant runs with the land. But in this instance, where the clause at issue remedies an injury to a real covenant or the property itself, the covenant runs with the land." Initial.Br. at 24; *see also id.* at 2–3.

Crown Castle contends that the fee provision does not run with the land, citing decisions from other jurisdictions. It ignores the split of authority on this issue, and in any event, the fee provisions in those cases generally did not pertain to vindicating covenants that ran with the land, so most of Crown Castle's cited authorities are not on point. *See infra Part* I.A.

To the extent that this Court looks to the law of other states, the case of *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P. 2d 618 (Utah 1989), cited by Crown Castle, provides an appropriate analytical framework and supports RJI's position here. *See infra* Part I.B.

Finally, we show below that, contrary to Crown Castle's reasoning, the instant fees provision ***does*** touch and concern the land. *See infra* Part I.C.

A. American Courts Are Split and Do Not Otherwise Support Crown Castle's Position on Attorneys' Fees.

U.S. courts do not uniformly treat attorneys' fee provisions as personal covenants that may never run with the land. *Compare* Ans.Br. at 19–21 (collecting cases only on one side) *with e.g.*, *Solky v. Smith*, 129 Nev. 1152, *3 & n.4 (2013) (collecting cases upholding attorneys' fees authorized by covenants).

Solky

Solky held that a fee provision in a restrictive covenant was binding on non-signatories who later acquired a burdened property. *Solky*, 129 Nev. 1152, *3. The trial court entered judgment against successors to a servient estate where a recorded deed restriction barred that estate from blocking views of an adjoining property, the dominant estate. 129 Nev. 1152, at *1. The deed restriction contained an attorneys' fees provision. *Id.* The trial court held that the successors violated the deed restriction by erecting trees. *Id.* That court also awarded attorneys' fees against the successors. *Id.* The Nevada Supreme Court held that the successors were liable for attorneys' fees even though they did not sign the restrictive covenant and only had constructive notice of the provisions. *Id.* at *3. The

attorneys' fees provision related to the vindication of a harm to the land.

Paloma

Unlike *Solky*, the primary decisions Crown Castle relies on involved the award of attorneys' fees in cases where the underlying covenants at-issue were not covenants running with the land. In *Paloma Investment Ltd. Partnership v. Jenkins*, 978 P.2d 110 (Ariz. Ct. App. 1998), the court held that the agreement at issue was not a covenant that ran with the land but a conveyance that inured solely to the benefit of the original assignor: "[The restrictions] contained no covenant by the landowner to pump water or to sell water; it merely gave Jenkins the right to receive a share of the proceeds *if* the water were sold." *Id.* at 115. The agreement allowed any owner of the property to sell, lease, or transfer water rights but reserved the right to receive royalty payments solely to Jenkins, who was the original assignor and defendant. *Id.* at 113.

Lundeberg

Lundeberg v. Dastrup, 497 P.2d 648 (Utah 1972), also did not involve underlying covenants that ran with the land. That case involved a contract to sell a motel and café. Both the buyer-side and

seller-side interests were assigned to multiple, subsequent individuals. *Id.* at 649. Not surprisingly, that court held that "a provision in a ***purchase contract***"—not a restrictive covenant—"to pay attorney's fees necessary for enforcement of its terms does not meet the qualification for a covenant which runs with the land." *Id.* at 650 (emphasis added).

Keogh

A third case Crown Castle cites—*Keogh v. Peck*—related to an underlying provision that ***did*** run with the land: a subsequent lessee's option to purchase the leased premises. 259 Ill. App. 503, 505, 517 (Ill. App. Ct. 1931). But *Keogh* is of limited import because the fees provision there was not a *prevailing party* attorneys' fees provision. *Id.* at 506.

In *Keogh*, the plaintiff (the subsequent lessee) successfully sued a transferee of the landlord to enforce the plaintiff's right to purchase the property from that new owner. *Id.* at 505. The plaintiff also sought attorneys' fees through the lease. *Id.* at 505–06.

The relevant part of the fee clause required the lessor to pay all expenses (including attorneys' fees) of the lessee "in any suit or legal proceeding to which he, without his fault, shall be party either

plaintiff or defendant in his capacity as lessee in and under this lease." *Id.*[1] The requirement to pay fees was not associated with vindicating any rights or interests in property. *See id.* In demanding attorneys' fees, the plaintiff argued that the fee provision made "***the option*** more valuable," not ***the land*** or any interest in the land. *See id.* at 517 (emphasis added).

Keogh held that the attorneys' fees provision did not run with the land. *Id.* at 518. The court reasoned that the payment of fees in that case "in no way concerns ***the land***, the improvements on the land, the title to the land, nor the quality or character of either. . . . It does not concern any estate of any nature in the land at all." *Id.* (emphasis added). That court added that "[t]he covenant is purely personal in its nature . . . ." *Id.*

Keogh is distinguishable. The exercise of the fee provision in this action renders the servient estate (RJI's estate) more valuable; this was not the case in *Keogh*. RJI's fees provision protects the servient estate by creating an additional penalty associated with violating the easement or harming the land itself or the easement rights, as

[1] There was no reciprocal provision requiring the lessee to pay the lessor's attorneys' fees. *Id.*

occurred here. RJI's fees provision thus benefits ***the land***, not just the exercise of a provision in the instrument like the option in *Keogh*.

The fee provision in *Keogh* is dissimilar in another respect. Regardless of whether any interest in land (or the land itself) were affected (or vindicated), the fee provision in *Keogh* required payment. Fees neither had to touch nor concern the land or an interest in the land. Fees and the other expenses subject to that provision were truly collateral to the land in *Keogh*. Here, RJI is only entitled to attorneys' fees if it prevails in litigation against the Easement Agreement's Grantee, the Grantee's successors, or those claiming under it related to rights and obligations of an appurtenant easement. A.034, § 8.[2]

B. *Flying Diamond* Provides an Analytical Framework.

To the extent that this Court seeks guidance from foreign jurisdictions, it should rely on a decision that Crown Castle, RJI, and

[2] The fee provision, obviously, works both ways. If Crown Castle prevails in any attempt to block its access to its property or the use of its easement, the fee provision is an additional remedy or penalty that aids in vindicating its rights and interests in the land. The provision, thus, renders the dominant estate more valuable as well. Crown Castle's assertion that the fee provision may render RJI's property less valuable if RJI does not prevail thus misses the point. Ans.Br. at 31–32. The fees provision helps protect rights in land regardless of who prevails.

dozens of courts have relied on: *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989).

The Court's Analysis in Flying Diamond

The Utah Supreme Court considered whether a covenant in an easement agreement to make royalty payments to the surface owner of land for oil, gas, and other minerals touched and concerned the land. *Id.* at 621–22.

That court held that the covenant to pay royalties touched and concerned the land. *Id.* at 627. The opinion surveyed the substantial jurisprudence on covenants running with the land, including caselaw that Crown Castle relies on here. *E.g.*, *id.* at 624 (discussing *Lundeberg* but not *Keogh*). The court acknowledged the impossibility of arriving at an absolute test for when covenants touch and concern the land. *Id.* at 623 n.7. But the court identified certain formulations to assess the touch-and-concern requirement.

Application of Flying Diamond Analysis to the Instant Case

Two of these formulations are pertinent here. First, the court recognized a key distinction between personal and real covenants: "If the performance of a covenant can be enforced regardless of one's status as owner of an interest in land, the covenant is personal . . . .

A real covenant bestows a benefit or imposes a burden only on the rights of a landholder, as landholder." *Id.* at 624. Second, "a promise to pay money may touch and concern the land if its purpose is to benefit the covenantor's interest in the land. . . . 'The promise to pay money is necessarily dependent on the purpose of the payment and thus should not stand alone.'" *Id.* at 625 (citations omitted).

Those formulations led the court to conclude that the royalty payment touched and concerned the land where it required the mineral right holder to pay royalties to the surface owner, who granted an easement to transport excavated minerals.

The covenant in *Flying Diamond* only provided royalty benefits to the then-fee simple owner of the surface rights—it did not vest payments only with the original assignor as in *Paloma*. *Id.* at 627. The royalty payment was also designed to "obtain and maintain the good will and cooperation of the landowner and to prevent disputes from arising between the surface owner and the mineral estate owner." *Id.* at 626 (explaining that the royalty was commensurate with the additional use of the surface rights to transport increased excavated minerals).

Under the *Flying Diamond* analysis, RJI's fee provision also touches and concerns the land. By its express terms, the fee provision is in favor of the ***then-current*** owner and user of the easement. A.034, § 8. The purpose of the fee provision—at least as to the dispute here—relates to the interests in and use associated with the land. A.079 (holding that Crown Castle violated RJI's easement). And among other things, attorneys' fees are designed to prevent disputes by creating an additional penalty associated with violating easement rights. A.034, § 8.

Crown Castle asserts that the instant fee provision cannot run with the land because it supposedly does not neatly fit into the historic formulations for such covenants. *E.g.*, Ans.Br. at 23–24 (arguing, in part, that a fee provision does not create an interest in land or affect the occupation, use, or enjoyment of land). But the same could have been said of arbitration clauses before *Hayslip v. U.S. Home Corp.*, 336 So. 3d 207 (Fla. 2022). As *Flying Diamond* acknowledged, there is no absolute test for the touch-and-concern inquiry.

Crown Castle urges this Court to instead adopt the Eleventh Circuit's characterizations of *Hayslip* as "one step removed" from the

traditional touch-and-concern analysis and the instant fees provision as being at least another step removed from *Hayslip*. Ans.Br. at 12. But this Court never so characterized *Hayslip*. *See, e.g.*, *Hayslip*, 336 So. 3d at 210. Nor is the instant fees provision a step removed from *Hayslip*. As one example, the fee provision affects the occupation and enjoyment of the land by creating an additional remedy or penalty to dissuade abuses of easement rights. RJI's fees provision touches and concerns the land.[3]

C. Crown Castle's Touch-And-Concern Arguments Are Unpersuasive.

Crown Castle's analysis of whether fee provisions touch and concern the land in circumstances such as these is disjointed and unavailing. Ans.Br. at 27–36.

Crown Castle ignores the commonsense truth that awarding attorneys' fees for violations of appurtenant easement rights benefits the land and its owners. Ans.Br. at 28–36. Crown Castle argues that

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[3] Crown Castle notes that Florida follows the American Rule: parties normally pay for their own attorneys' fees. Ans.Br. at 25–26. That is why the original servient and dominant estate holders here bargained for a different arrangement related to the burdens and benefits associated with their properties. The recorded easement provided their successors with constructive notice of the abrogation of the American Rule related to the easement rights and obligations.

an award of "damages" (say $25,000) for violations of an easement makes the easement holder whole. But this disregards the fact that the holder may have had to spend $100,000 in attorneys' fees to prevail and to stop further violations of its easement. Without fee-shifting, a reasonable estate holder would not spend $100,000 to recover $25,000, with the effect that its property rights would be left unprotected.

The fee provision thus acts as a remedy for prevailing parties and creates a feasible avenue to protect property rights. These are precisely the circumstances this Court has recognized exist to remedy violations of certain contractual interests. *See Blount Bros. Realty Co. v. Eilenberg*, 124 So. 41, 41 (Fla. 1929) (recognizing that "a contract to pay attorney's fees is one . . . to protect and indemnify him against expenditures necessarily made or incurred to protect ***his interest***" (emphasis added)); *see also Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 980 (Fla. 1987) (same). Here, the interest is the easement rights. The fees provision relates to, and facilitates protection of, the easement rights.

It is thus unsurprising that the Easement Agreement's original covenanters included the fee provision under the "Remedies for

Breach" section of the instrument. A.034. Crown Castle advances a myopic argument about the remedies provision, ignoring that fees were among the bundle of rights prevailing parties were entitled to here. Ans.Br. at 30. Further, if the fee provision did not run with the land like all the other remedies, then after signing the Easement Agreement, either party could transfer its estate to an affiliate and nullify the counterparty's attorneys' fee rights. The fees provision must run with the land: a party cannot have all the rights of the easement but avoid the attendant obligations, which includes paying prevailing party attorneys' fees.

The present case illustrates the point. RJI was awarded $1 for breach of the Easement Agreement and, at least initially, obtained an injunction. Without the prospect of recovering prevailing party fees, landowners would have little incentive to enforce easements and other property rights. The risk of substantial attorneys' fees, far exceeding nominal damages, serves as a more effective deterrent to future encroachments of property rights and restrictive covenants.

For those reasons, and the reasons identified in the Initial Brief, this Court should answer the certified question in the affirmative. Only a decision in the affirmative could be reconciled with *Hayslip*. It

cannot be the law that a Florida mandatory arbitration covenant runs with the land but a fees provision that requires the losing party to pay for that arbitration does not.[4]

II. Crown Castle Is a Party to the Easement Agreement.

A. Crown Castle Is An Adjudicated Party Bound by the Fees Provision of the Easement Agreement.

This Court should also reject Crown Castle's position that neither it nor RJI are parties to the Easement Agreement. Ans.Br. at 15, 33.

RJI is a party to the Easement Agreement that affects the use of its Property. Crown Castle argues that the original owner of RJI's Property—Hidden Valley Corp.—is the actual party, not RJI. Crown Castle's assertion that only Hidden Valley can enforce harms to a property it no longer owns is absurd and erroneous. "[A]n appurtenant easement is a permanent easement running with the

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[4] Crown Castle incorrectly asserts that the Eleventh Circuit stated that "there is no contractual intent evinced from" the Easement Agreement that the fee provision would run with the land. Ans.Br. at 34. The Eleventh Circuit made no such statement. If it did, there would be no need for a certified question. That is because even if this Court agreed that the fee provision here touched and concerned the land, the covenant could not run with the land if—as the Eleventh Circuit supposedly concluded—there was no intent that the provision run with the land. *See* Initial.Br. at 15–16.

land and passes as an incident to it." *Morris v. Winbar LLC*, 273 So. 3d 176, 178–79 (Fla. 1st DCA 2019); *Star Island Assocs. v. City of St. Petersburg Beach*, 433 So. 2d 998, 1001, 1004 (Fla. 2d DCA 1983) (holding that a subsequent owner of an easement's servient estate was bound to an easement agreement created by its prior owners).

The governing legal instruments confirm that the conveyance of the Property also conveyed to RJI the easement rights. A.039–40. In October 1993, Hidden Valley conveyed the Property to RJI's predecessor and affiliate "SUBJECT TO: ***Conditions***, ***covenants***, restrictions, limitations ***and easements which appear of record***." A.039 (emphases added). The Easement Agreement was of record. A.032 (reflecting recording of the Easement Agreement in May 1993). And the Easement Agreement itself is binding on "all subsequent owners of the Easement Property," i.e., RJI. A.033, § 5. RJI may enforce that agreement as a covenant running with the land or against all parties to that agreement.

Crown Castle is a party to the Easement Agreement as well. Crown Castle contends, however, that it is a mere sublessee of a "portion" of the dominant estate leased by BellSouth (the original counter-party to the Easement Agreement). Ans.Br. at 8–9. Crown

Castle accordingly asserts that even if there were horizontal privity between RJI and BellSouth—as Grantor and Grantee of the Easement Agreement—there is no privity of estate between BellSouth and Crown Castle sufficient to subject Crown Castle to the Easement Agreement. Ans.Br. at 48.

Crown Castle is wrong. The federal district court entered a judgment containing dispositive findings that Crown Castle cannot contest here. The district court entered a judgment on both Crown Castle's tort (trespass) ***and*** contract violation (breach of the Easement Agreement). A.096, ¶¶ 2–3. It expressly rejected Crown Castle's assertion that it could not be liable under the Easement Agreement because it was a non-signatory. A.076. It held, as a matter of law, that Crown Castle was a successor-in-interest to BellSouth and that it breached the Easement Agreement. A.076–77, A.080–81.

Crown Castle could have challenged on appeal the determination that it was a successor-in-interest to BellSouth. It could have, for instance, advanced the argument that because it only succeeded to a "portion" of the BellSouth estate, privity of estate was lacking to hold it liable for breaching an easement agreement it did not sign.

But as Crown Castle admits here, Ans.Br. at 10 n.3, it never appealed that district court's ruling. Under applicable federal law, the district court's findings are the law of the case. *See United States v. Stein*, 964 F.3d 1313, 1324 (11th Cir. 2020) ("[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." (citation omitted)).[5]

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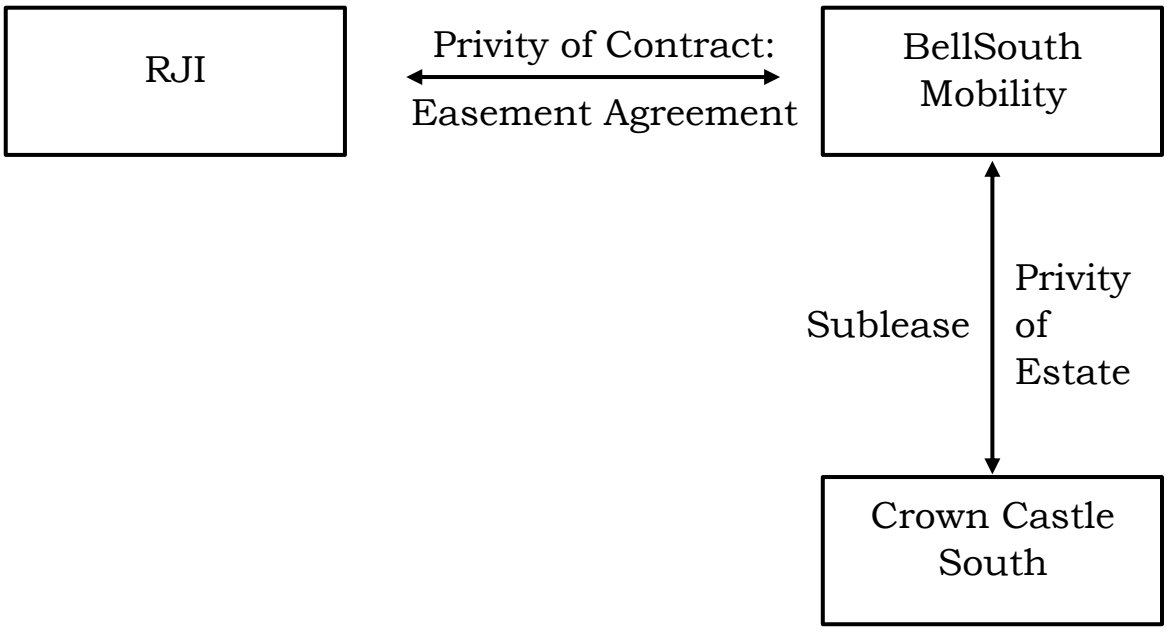
[5] Crown Castle asserts that the district court "expressly rejected the contention that RJI and Crown Castle were parties to the easement agreement." Ans.Br. at 2 (citing A.133 n.2). Not true. Here is what the district court actually wrote: "The Court did not conclude that Defendant [i.e., Crown Castle] was ***an original party*** to the Easement Agreement; rather, the Court explicitly treated Defendant as a successor-in-interest." A.133 n.2 (emphasis added). The district court did not rely on notice or another basis in law to hold Crown Castle liable under the Easement Agreement. A.067–87.

Crown Castle acknowledges that the district court necessarily found that Crown Castle had sufficient privity to be subject to the Easement Agreement's terms. *See, e.g.*, Ans.Br. at 10 ("Despite RJI and Crown Castle having no privity of contract in relation to the Easement Agreement, the District Court . . . eventually found Crown Castle liable for breach of contract . . . ."). That implicit decision by the district court that Crown Castle never appealed is law of the case. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005) ("The [law-of-the-case] doctrine operates to preclude courts from revisiting issues that were decided explicitly ***or by necessary implication*** in a prior appeal." (emphasis added)).

Accordingly, Crown Castle is a successor of BellSouth and is bound by all terms of the Easement Agreement, including the attorneys' fees provision. The illustration below depicts the parties' adjudicated relationship.



Sand Lake Hills Homeowners Association v. Busch, 210 So. 3d 706 (Fla. 5th DCA 2017), cited by Crown Castle, supports RJI's position that Crown Castle is bound by the district court's findings. In *Sand Lake*, a homeowners' association recorded an amended declaration of covenants that included an attorneys' fees provision. *Id.* at 709. Certain association members (the Busches) successfully

sued, and the trial court determined that the amendments were ineffective as to them. *Id.* at 708–09. The Busches moved for and were awarded attorneys' fees. *Id.* at 709.

The Fifth District Court of Appeal held that the Busches were not entitled to attorneys' fees under the amended declaration. *Id.* It held that "[b]ecause the trial court found that no contract existed between [the association] and the Busches, the Busches were not entitled to attorney's fees under the fee provision of the [amended declaration]." *Id.*

By contrast, the federal district court found that not only was there a valid Easement Agreement, but also that Crown Castle was bound to it as a successor who also breached the agreement. A.075–79. Under the law of this case, Crown Castle is bound to the provisions regarding the proper use of RJI's easement and to the easement's fees provision.

B. Crown Castle Is Bound by the Easement Agreement in Another Manner.

Crown Castle also contests that it is an assignee subject to section 5 of the Easement Agreement. Ans.Br. at 37. But section 5 does not merely bind "assigns" or "successors"; it also binds "all

subsequent owners of . . . the Benefitted Property [i.e., Crown Castle's dominant estate] ***and all persons claiming by, through and under them***." A.033, § 5 (emphasis added). Crown Castle took possession of the dominant estate with—at a bare minimum—constructive notice of the terms of the Easement Agreement.

The Easement Agreement thus expressly binds Crown Castle—as a "successor," an "assign," or a "person[] claiming by, through and under successors and assigns"—to its terms, including the fees provision. This Court should hold that Crown Castle is bound by the fees provision.

CONCLUSION

This Court should answer the certified question in the affirmative. This Court should alternatively and independently hold that Crown Castle is a party to the Easement Agreement.

Dated: December 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on December 16, 2024, via electronic mail using the Court's ePortal system upon Eve A. Cann, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, 200 E. Broward Blvd., Suite 2000, Fort Lauderdale, Florida 33301 at ecann@bakerdonelson.com, *Counsel for Respondent*; Joshua Tropper, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Suite 1500, Monarch Plaza, 3414 Peachtree Rd. NE, Atlanta, Georgia 30326 at jtropper@bakerdonelson.com, *Counsel for Respondent*; and Desislava K. Docheva, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, 200 E. Broward Blvd., Suite 2000, Fort Lauderdale, Florida 33301 at ddocheva@bakerdonelson.com, *Counsel for Respondent*.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Bookman Old Style, 14–point font, and contains 4,000 words, in compliance with Rules 9.045(b) and 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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