

**IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
THIRD DISTRICT**

EDUARDO GOMEZ, ET AL.,

Appellants/Defendants,

vs.

DCA CASE NO.: 3D22-1494

L.T. CASE NO.: 19-009661-CA-01

CVPORT SERVICES, LLC,

Appellee/Plaintiff.

**APPELLEE, CVPORT SERVICES, LLC'S
MOTION FOR ATTORNEY'S FEES AND COSTS**

Appellee, CVPORT SERVICES, LLC ("**CVPort**"), by and through the undersigned counsel, and pursuant to Rule 9.400 of the Florida Rules of Appellate Procedure, hereby respectfully moves this Honorable Court for an order determining that CVPort is entitled to an award of attorney's fees and costs against Appellants, EDUARDO GOMEZ ("**Gomez**") and G.D. CONSTRUCTION LLC ("**G.D.**") in connection with this proceeding, and in support states as follows:

STATEMENT OF FACTS

1. In 2016, Feliciano Neto ("**Neto**") – the owner of CVPort, Sergio Sa ("**Sa**") – the owner of Appellee Edex Miami, LLC ("**Edex**"), and Gomez – the owner of G.D., decided to try opening a construction business together

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in Miami, FL, to undertake public works projects. R. 5022, 5027, 5029. To do that, their respective entities – CVPort, Edex, and G.D. – formed and became members of Pegso Construction, LLC (“**Pegso**”), a Florida limited liability company, in April of 2016. R. 1585-86; R. 5021.

2. However, as Pegso had no experience, it could not qualify for a bond or bid on projects. R. 1072, 1368, 5057; App. 188-190. Instead of contributing to Pegso, Edex and CVPort agreed to fund G.D., for G.D. to undertake construction projects in its name alone. R. 1439; 5060-61; App. 044-046, 183.

3. However, G.D. would not have been able to get a bond if CVPort and Edex funded it directly, via a loan or other form of contribution. R. 1368, 5102-103. G.D. could not obtain a bond with third-party money in the bank, rather than a contribution from Gomez. App. 091-092, 178. The parties decided that CVPort and Edex would loan an initial \$200,000.00 to Gomez, which he would deposit into G.D. as a capital contribution. R. 1439; 5099-5104; App. 046-048, 091-092, 212. With the cash asset in hand, G.D. could obtain a bond to undertake public works projects. R. 1439; 5059-61, 5099-5104. Thereafter, G.D. could hire Pegso as a subcontractor or otherwise work with Pegso on construction projects until Pegso got enough experience

to qualify for a bond and to bid on projects on its own. R. 1439; 5059-61, 5099-5104.

4. To effectuate the loan, Gomez, CVPort, and Edex executed a *Promissory Note* (“**Note**”) under which Gomez, as borrower, promised to repay CVPort and Edex, as lenders, the initial sum of \$200,000.00. R. 1282-86, 5114-1; App. 093-094. The Note was signed in **August 2016**, but was **effective** May 31st, 2016 – the parties agreed the Note would be effective retroactively, because the \$200,000.00 loaned to Gomez by CVPort and Edex had been deposited into G.D.’s bank account in June of 2016. R. 1282-86, 1589, 5042, 5113, 5126, 5100, 5129; App. 198.

5. The Note matured on January 1st, 2018, with no repayments whatsoever having been made. R. 1282-86, 1600, 5045-546, 5105.

6. Instead of continuing to be a lender under the Note and collecting the amount due to it, Edex decided to take advantage of a special provision in the Note which allowed it to convert its pro-rata portion of the loan funds to equity in a joint venture or entity – in this case, Pegso. R. 1619-30; App. 49, 67-70, 98, 155, 207.

7. However, CVPort did **not** convert its portion of the loan funds into equity and never terminated the Note, and continued to be a lender on the Note. R. 1619-30, 5164; App. 69, 71, 207, 223-224. Having received no

payments from Gomez, CVPort instituted litigation in the Lower Court, by filing its *Complaint* seeking to recover the money it lent to Gomez. R. 261-63. CVPort later filed an *Amended Complaint*, adding claims for fraudulent and negligent misrepresentation, fraud in the inducement, and tortious interference with an advantageous business relationship and a contract against Gomez and/or G.D. R. 891-920; App. 259-260.

8. The fraud and misrepresentation counts in the Amended Complaint are based on the fact that Gomez and G.D. affirmatively represented to CVPort that the money it was going to deposit into G.D.'s bank account would be a loan pursuant to a promissory note – the Note. R. 896-98, 900-904. During the litigation, however, Gomez and G.D. changed their story, claiming that the money was never meant to be a loan or repaid, but rather was a contribution to Pegso. As such, if at the end of the day the Note is not really a note, and Gomez is not really indebted to CVPort, then Gomez committed a fraud when he induced CVPort into giving \$307,000.00 to Gomez and G.D. by representing that it was a debt he would repay.

9. On, December 24th, 2020, G.D. and Gomez filed a joint *Answer and Affirmative Defenses to Plaintiff's Amended Complaint*, still raising the defense that the money lent by CVPort to Gomez was not a loan, but a capital contribution to Pegso. R. 1071-1075.

10. On December 23rd, 2021, CVPort filed its *Motion for Partial Summary Judgment* (“**MSJ**”) against Gomez and G.D., seeking entry of summary judgment in its favor on Count I of the Amended Complaint and all of Gomez and G.D.’s affirmative defenses related to that Count (Gomez and G.D. jointly raised affirmative defenses to all counts of the Amended Complaint, even though Count I is against Gomez only). R. 1228-1640.

11. On August 13th, 2022, the Lower Court entered an *Amended Order Granting Partial Motion for Summary Judgment and Summary Judgment as to Count I* (“**Amended Summary Judgment**”), against Gomez and in CVPort’s favor in the amount of \$307,000.00 in principal, plus interest, for a total of \$484,161.53. R. 4877-96.

12. On August 29th, 2022, G.D. and Gomez filed their *Notice of Appeal*, thereby appealing the following orders issued by the Lower Court: *Order Granting Plaintiff’s Partial Motion for Summary Judgment and Summary Judgment as to Count I* dated July 29th, 2022; *Amended Order Granting Plaintiff’s Partial Motion for Summary Judgment and Summary Judgment as to Count I* dated August 13, 2022; *Order on Defendants’ Motion to Dismiss* dated October 19th, 2020; and *Order Denying Gomez’s and G.D.’s Motion to Dismiss* dated November 18th, 2020. R. 4807-52.

13. On May 31st, 2023, CVPort filed its Answer Brief in this appeal.

For the reasons stated therein, CVPort is confident that it will prevail in this appeal. In the event it prevails, it will be entitled to an award of its reasonable attorney's fees incurred in connection with its defense of this appeal, as explained below.

I. STANDARD FOR ENTITLEMENT TO ATTORNEYS' FEES AND COSTS

"It is an elemental principle of law in this State that attorney's fees may be awarded [to] a prevailing party . . . (1) where authorized by contract; [or] (2) where authorized by a constitutional legislative enactment" *Kittel v. Kittel*, 210 So. 2d 1, 3 (Fla. 1967). "The 'prevailing party', for purposes of attorney's fees, is a party which the trial court determines prevailed on significant issues in the litigation." *Boxer Max Corp. v. Cane A. Sucre, Inc.*, 905 So. 2d 916, 918 (Fla. 3d DCA 2005); *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So. 3d 121, 123 (Fla. 2d DCA Sept. 21, 2012) (A prevailing party "is one who prevails on the 'significant issues tried before the court.'").

When a party is clearly the prevailing party, and there is a statute or contract awarding attorneys' fees to the prevailing party, "reasonable attorney fees must be awarded." *Sorrentino v. River Run Condo. Ass'n*, 925 So. 2d 1060, 1066 (Fla. 5th DCA 2006). Moreover, "[the] [] party seeking attorney's fees pursuant to statute or contract must plead entitlement to such

fees.” *Stockman v. Downs*, 573 So.2d 835, 838 (Fla.1991). As to costs, Fla. Stat. § 57.041 provides that “[t]he party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment . . .” Fla. Stat. § 57.041. “This provision requires the trial court to award costs to the prevailing party.” *Connell v. City of Plantation*, 901 So. 2d 317, 320 (Fla. 4th DCA 2005); see also, *Weitzer Oak Park Estate, Ltd. v. Petto*, 573 So.2d 990, 991 (Fla. 3d DCA 1991).

CVPort has already prevailed in the Lower Court by obtaining an Amended Summary Judgment in its favor, and fully anticipates prevailing in this appeal. Although the Amended Summary Judgment only adjudicates Count I of CVPort's Amended Complaint, the judgment awards CVPort essentially the complete relief (other than attorney's fees and costs) it is seeking in this action – return of the full amount of money lent to Gomez, plus interest, without deduction or setoff. All of the Counts in the Complaint revolve around whether Gomez breached the Note or committed a fraud on CVPort when executing the Note, the damages caused to CVPort via its deposit of \$307,000.00 into G.D.'s bank account, and the total failure by Gomez to repay that money. Prevailing on Count I here is essentially equivalent to prevailing in the entire litigation and certainly demonstrates that CVPort prevailed on the “significant issues tried before the Court.” *Boxer Max*

Corp. v. Cane A. Sucre, Inc., 905 So. 2d 916, 918 (Fla. 3d DCA 2005). The breach of the Note is the “significant” issue in the litigation – all of the rest of the causes of action in the Amended Complaint stem from Gomez’s breach of the Note, and all causes of action seek to recover the funds that CVPort disbursed to G.D. on Gomez’s behalf pursuant to the Note. Accordingly, there can be no question that by prevailing on Count I, CVPort is the prevailing party in this litigation.

Moreover, the Lower Court has already determined that CVPort is the prevailing party in the entire action on account of prevailing on Count I. App. 355-57. On August 16th, 2022, CVPort filed its *Motion for Entitlement to Attorney’s Fees and Costs* in the Lower Court, arguing that it is the prevailing party in the entire litigation on account of prevailing on Count I of the Complaint, and thus entitled to an award of attorney’s fees and costs. App. 307-54. In its September 13th, 2022 *Order Granting Plaintiff CVPort Services, LLC’s Motion for Entitlement to Attorney’s Fees and Costs* (“**Entitlement Order**”), the Lower Court found that CVPort prevailed on the “significant issue” in the litigation and is the prevailing party. App. 355-57. The Lower Court further found that CVPort is entitled to recover its reasonable attorney’s fees and costs incurred in connection with the action. *Id.* As such, this

Honorable Court should also find that CVPort has prevailed in the entire litigation before the Lower Court, if it prevails in this appeal.

II. ENTITLEMENT TO ATTORNEY'S FEES PURSUANT TO THE NOTE

CVPort is entitled to an award of attorneys' fees against Gomez and G.D. pursuant to Section IV of the Note, which specifically provides in relevant part, as follows:

"IV. COLLECTION COSTS

If any payment obligation under this Note is not paid when due, the Borrower promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process." P.App. 96.

CVPort also is entitled to attorneys' fees pursuant to Section X(G) of the Note, which specifically provides in relevant part, as follows:

"G. ATTORNEY'S FEES. If arbitration or litigation is brought concerning this Note, the prevailing party shall be entitled to receive from the non-prevailing party, and the non-prevailing party shall upon final judgment and the expiration of all appeals immediately pay upon demand, all reasonable attorney's fees and expenses of the prevailing party." P.App. 98.

Therefore, if CVPort prevails in this appeal, since it is the prevailing party on the merits of the case in the Lower Court, CVPort will be entitled to recover from Gomez and G.D. the costs and reasonable attorney's fees for its defense herein.

Importantly, this Honorable Court has already once before determined that the Note is a proper basis for an award of attorney's fees to CVPort, in

the event it prevails. This appeal is not the first appellate proceeding in this case before this Honorable Court. On May 26th, 2021, Gomez and G.D. filed a *Petition for Certiorari* in Case No. 3D21-1195, petitioning this Honorable Court to review by certiorari a non-final order compelling production of financial records, entered by the Lower Court on April 26th, 2021. App. 261-86. On July 19th, 2021, CVPort filed a Motion for Attorney's Fees in the certiorari proceeding, arguing that in the event it prevailed, it would be entitled to an award of attorney's fees pursuant to the Note. App. 287-304. After considering the Petition for Certiorari and CVPort's response in opposition, this Honorable Court denied the Petition, and **granted** CVPort's Motion for Attorney's fees "pursuant to the terms of the promissory note," contingent upon CVPort prevailing below. App. 305-06. As such, this Honorable Court has already recognized and agreed that CVPort is entitled to an award of reasonable attorney's fees pursuant to the terms of the Note, in the event it prevails (which it has prevailed already before the Lower Court). *Id.*

CVPort is confident that it will prevail in this appeal, as the Note clearly and unambiguously provides that Gomez, the borrower, is indebted to CVPort, the lender, in the initial sum of \$200,000.00, plus any additional sum lent up to \$400,000.00. R. 1282-86. Other agreements or negotiations

among the parties, such as the Pegso Operating Agreement, are parol evidence and cannot alter the plain terms of the Note. *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 52 (Fla. 1st DCA 2005). Although the Note originally had two lenders – CVPort and Edex – there is no dispute that Edex removed itself as a lender by converting its pro rata share of the loan proceeds to equity pursuant to Section VIII of the Note. R. 1282, 1284, 1619-30, 5152, 5120-23, 5140-41; App. 49, 67-70, 97-98, 109-110, 116-17, 119, 142, 154-55, 207. Gomez, Edex, and G.D. all testified that Edex converted its portion of the loan proceeds to equity. When Edex removed itself as a lender, CVPort alone was left as the sole lender. As such, CVPort can enforce the Note alone without Edex's participation.

These undisputed facts overcome G.D. and Gomez's main – and really, only – defense in this case: their argument that CVPort cannot enforce the loan without Edex. Further, their second argument in favor of reversal – that there is an open factual question as to whether the loan proceeds deposited by CVPort into G.D.'s bank account were actually funds lent under the Note or instead contributions to Pegso – is easily dispensed with. There is no dispute that CVPort deposited a total of \$307,000.00 into G.D.'s bank account (at Gomez's request), in three installments. R. 1589-94; 5082, 5103-04, 5123-25, 5137-38, 5150-51. There is also no dispute that the Note was

made retroactive intentionally so that the funds deposited before execution of the Note would be considered loan funds, so G.D. could get a bond. R. 1368, 5102-04; App. 046-048, 091-092, 178.

More importantly, there is no dispute that the parties terminated any obligation to contribute to Pegso by **executing a written Termination Agreement!** R. 1389-90. The Termination Agreement was the last step to guarantee that Edex and CVPort's \$200,000.00 was treated as a loan under the Note and **not** a contribution to Pegso. R. 1389-90; App. 047-048, 097. Unlike Edex, CVPort never executed any document to convert its pro rata share of the loan proceeds to equity. R. 5062-64, 5164. And, tellingly, **Pegso never operated** – all bids were made in G.D.'s name, all construction activities and contracts were undertaken in G.D.'s name, Pegso was never paid, Pegso never entered into a subcontract agreement, Pegso never engaged in any construction activity, never bid on any projects, never had a bond, and never actually conducted any business R. 1287-1353, 5030-36, 5104-5105, 5060-61, 5172; App. 207, 209. It never even had a bank account to receive a contribution, let alone any use for it. *Id.*

For the reasons briefly outlined above and more thoroughly spelled out in CVPort's Answer Brief, it is confident that it will prevail in this appeal. When it does, it should be entitled to an award of its reasonable attorney's

fees and costs pursuant to the clear terms of the Note, more specifically Sections IV and X(G).

III. ATTORNEY'S FEES AND COSTS PURSUANT TO THE PEGSO OPERATING AGREEMENT

In defense of this action, in opposition to CVPort's MSJ, and in their Initial Brief, G.D. and Gomez repeatedly referred to and relied on the *Operating Agreement of Pegso Construction, LLC*, dated and effective May 12th, 2016 ("**Operating Agreement**"). R. 1354-67. Section 19.9 of the Operating Agreement reads, in pertinent part:

If arbitration or litigation is brought concerning this Agreement, the prevailing party shall be entitled to receive from the non-prevailing party, and the non-prevailing party shall upon final judgment and the expiration of all appeals immediately pay upon demand, all reasonable attorneys' fees and expenses of the prevailing party.

R. 1366 (emphasis added). "An operating agreement is a contract." *Demir v. Schollmeier*, 199 So. 3d 442, 445 (Fla. 3d DCA 2016). "However, unlike a typical bilateral contract, where both signing parties owe duties to one another, operating agreements establish a more complicated and nuanced set of contractual rights and duties. Operating agreements govern the relations among the members, the managers, and the limited liability company itself, as well as the effect of these relations on third parties." *Id.*

The Operating Agreement reflects that CVPort and G.D. are members of Pegso, and Gomez is the manager. Therefore, CVPort, G.D., and Gomez are all parties to, and bound by, the contract that is the Operating Agreement. CVPort may seek an award of fees under Section 19.9 of the Operating Agreement because G.D. and Gomez injected the Operating Agreement into this case, and requested the Court interpret the agreement and use it to make a finding that the money lent to Gomez by CVPort was not a loan, but a contribution to Pegso. See, e.g. R. 1071-75, 1672-1714; In. Br. 20-25. The Operating Agreement authorizes an award of attorney's fees and costs to the prevailing party in any litigation "concerning" the Operating Agreement. As this action clearly concerns the Operating Agreement, CVPort, as the prevailing party, is entitled to an award of its attorney's fees and costs against Gomez and G.D.

IV. ATTORNEY'S FEES AND COSTS PURSUANT TO THE CONTRIBUTION AGREEMENT

As mentioned above, one of Gomez's and G.D.'s defenses in this case has consistently been that the money CVPort lent to Gomez under the Note was actually a contribution to Pegso. Per Section 11.11 of the Operating Agreement, Edex and CVPort were to make contributions to Pegso pursuant

to a separate Contribution Agreement. R. 1360. The Contribution Agreement contains a prevailing party provision in Paragraph 16:

“If arbitration or **litigation is brought concerning this Agreement**, the prevailing party shall be entitled to receive from the non-prevailing party, and the non-prevailing party shall upon final judgment and the expiration of all appeals immediately pay upon demand, all reasonable attorneys' fees and expenses of the prevailing party.”

R. 1387 (emphasis added).

G.D. and CVPort are both parties to the Contribution Agreement, which is specifically referenced in Paragraph 11.11 of the Operating Agreement. Per the “whereas” clauses of the Contribution Agreement, the Operating Agreement applies to the Contribution Agreement, which means that Gomez should also be bound and his activities as Pegso's manager governed by the Contribution Agreement. R. 1360-85 In light of G.D.'s and Gomez's defenses, as described above, CVPort had to take the time in its MSJ and Answer Brief to explain how the Contribution Agreement and the parties' obligations to contribute to Pegso were intentionally terminated by the Termination Agreement, in order to **ensure** that the money CVPort lent to Gomez was actually treated as a loan. See, e.g., R. 1237-38; Ans. Br. 4, 13, 36-38. As such, this action “concerned” the Contribution Agreement so as to trigger an award of prevailing party attorney's fees to CVPort

**V. ATTORNEY'S FEES AND COSTS PURSUANT TO THE
TERMINATION AGREEMENT**

Related to the Contribution Agreement, and G.D.'s and Gomez's defense in this action that CVPort's loan funds were not a loan but contributions to Pegso, is the *Termination Agreement* effective May 31st, 2016 and signed by G.D., CVPort, and Edex. R. 1389-90. This Termination Agreement terminates the Contribution Agreement and was signed to ensure that the transfers of money by CVPort and Edex to G.D. were treated as a loan rather than as a contribution from third parties so that G.D. could get bonding. R. 5112-13, 18; App. 097. The Note, in combination with the Termination Agreement, converted Edex's and CVPort's combined deposits into G.D.'s bank account to a loan, under the Note. R. 5100; App. 198.

The Termination Agreement was the last step to guarantee that Edex and CVPort's initial combined deposit of \$200,000.00 into G.D.'s bank account was treated as a loan under the Note and **not** a contribution to Pegso. R. 1389-90; App. 047-048, 097. The Termination Agreement specifically states at the top that it is the result of "renegotiations" - the changes in business plan to use the Note to allow G.D. to acquire CVPort's and Edex's money. App. 099. This Termination Agreement expressly terminated the Contribution Agreement as of May 31st, 2021, **prior** to

CVPort's initial deposit of \$133,000.00 into G.D.'s bank account in June of 2021. R. 1389-90.

The Termination Agreement has its own prevailing party provision in Section 4(c):

“Should either party hereto, or any heir, personal representative, successor or assign of either party hereto, resort to litigation to enforce this Termination, the party prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to recover its or their reasonable attorneys' fees and costs in such litigation from the party against whom enforcement is sought.”

Enforcing the Note and finding that the money CVPort disbursed to G.D.'s bank account was a loan under the Note and *not* a contribution to Pegso, is also enforcement of the Termination Agreement. To determine that CVPort contributed to Pegso rather than loaned money to Gomez would be to enforce the Contribution Agreement in clear contradiction of the terms of the Termination Agreement, which expressly terminated any obligation of the parties to contribute to Pegso. As such, CVPort is entitled to an award of attorney's fees and costs in this appeal against G.D. and Gomez pursuant to Section 4(c) of the Termination Agreement.

VI. FEES & COSTS TO PROVE ENTITLEMENT

CVPort is also entitled to recover reasonable attorneys' fees and costs incurred to prove its entitlement to attorneys' fees. *State Farm Fire & Cas.*

Co. v. Palma, 629 So. 2d 830, 833 (Fla. 1993) (finding that attorneys' fees for litigating entitlement to attorneys' fees may be awarded). Accordingly, CVPort is entitled to reasonable attorneys' fees and costs incurred for any time spent litigating the matter of entitlement in this case, including, but not limited to, the time spent in preparation of this Motion, and a Reply, if any.

VII. ENTITLEMENT TO COSTS

CVPort, as the prevailing party, is entitled to recover its taxable costs pursuant to Fla. Stat. § 57.041 and Fla. Rule of Appellate Procedure 9.400(a). Specifically, § 57.041 provides that "[t]he party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment." The party in whose favor judgment is entered, is the party entitled to all taxable costs as a matter of law. *Bessey v. Difilippo*, 951 So.2d 992 (Fla. 1st DCA 2007), *review denied* 965 So.2d 121. Rule 9.400(a) states that "[c]osts shall be taxed in favor of the prevailing party unless the court orders otherwise." Fla. R. App. P. 9.400(a). Therefore, CVPort, as the prevailing party, in whose favor summary judgment was entered, is entitled to all taxable costs pursuant to Fla. Stat. § 57.041 and Rule 9.400(a).

WHEREFORE, CVPort respectfully requests that this Honorable Court enter an Order (i) granting this Motion; (ii) finding that CVPort is entitled to

reasonable attorneys' fees from Gomez and G.D. pursuant to the authorities cited above, (iii) remanding the issue of determining the reasonableness of CVPort's attorney's fees to the Lower Court; and (iv) any other relief this Court deems just and proper, considering the foregoing.

Dated: June 5th, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 5th day of June, 2023, a true and correct copy of the foregoing has been furnished via regular mail upon:

<p>MICHAEL G. NEARING, ESQ. NEARING & EGGER, PLLC 2000 S. Dixie Highway, Suite 112 Miami, Florida 33133 Tel: (305) 573-1550 Fax: (305) 573-1559 mnearing@nearingfirm.com jesely@nearingfirm.com</p>	<p>ANTHONY C. HEVIA HEVIA LAW FIRM Co-counsel for Defendants Gomez and G.D. 2525 Ponce de Leon Blvd., Coral Gables, FL 33134 Tel: 786-441-5120 Facsimile: 786-543-5600 Anthony@HeviaLawFirm.com Susy@HeviaLawFirm.com</p>
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By: /s/ Angela Bousalis
RAUL MORALES
ANGELA BOUSALIS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing has been computer generated
in 14-point Arial and complies with the requirements of Rule 9.045.

By: /s/ Angela Bousalis
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