IN THE COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

BIO LOGIC, INC. a/a/o
Elizabeth Morgan,

Appellant,

v.

ASI PREFERRED INSURANCE CORP.,

Appellee.
_____/

Case No.: 2D16-3798
L.T. Case No.: 2016-CA-458

INITIAL BRIEF

ON APPEAL FROM
THE HON. GILBERT SMITH
TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR MANATEE COUNTY, FLORIDA

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INTRODUCTION AND QUESTIONS PRESENTED

Bio Logic, Inc. ("Bio Logic") appeals the orders granting the motion to dismiss filed by ASI Preferred Insurance Company ("ASI") and denying Bio Logic's motion for rehearing. Bio Logic claims standing as the holder of a post-loss assignment of benefits ("AOB") from ASI's insured, Elizabeth Morgan.

Bio Logic performed cleanup and removal services after a decaying body was found in Ms. Morgan's garage. Her policy included an anti-AOB provision that required the signature of the mortgagee on any AOB. Because the mortgagee had not signed the AOB, the lower court found that Bio Logic lacked standing because the AOB was invalid.

The questions presented in this case are:

1) Does Florida's rule against restrictions on AOBs prohibit an insurer from encumbering the homeowner's benefits with a restriction on alienation that requires third-party consent?
2) If so, does ASI have standing to contest the AOB where it is not a party to the assignment contract?
3) If so, can a motion to dismiss be granted where the unresolved issues of fact in this case are present?
4) Do any other arguments exist that would warrant affirming at this early stage of litigation?

STATEMENT OF THE CASE AND FACTS

On or about July 1, 2015, the residence of Elizabeth Morgan ("insured") was damaged by a decomposing body. (R. 3). The body was found in her garage, in the back seat of a car; carbon monoxide and gas from the body has permeated the house through the open interior door, requiring decontamination of the entire house. (R. 7). The insured contracted with Bio Logic to provide emergency cleanup services, in exchange for an AOB. (R. 3). The AOB provided that:

> I hereby assign any and all insurance rights, benefits, proceeds, and any causes of action under *any* applicable insurance policies to Company, for services rendered or to be rendered by the Company. In this regard, I waive my privacy rights. I make this assignment in consideration of Company's agreement to perform services and supply materials and otherwise perform its obligations under this contract, including not requiring full payment at the time of service. I also hereby direct my insurance carrier(s) to release any and all information requested by Company, its representative, and/or its Attorney for the direct purpose of obtaining actual benefits to be paid by my insurance carrier(s) for services rendered or to be rendered.

(R. 6). Bio Logic submitted an invoice for $50,895. (R. 22). ASI accepted coverage but did not pay ASI the full amount of its invoices. (R. 333). On January 28, 2016, Bio Logic filed a complaint for breach of contract. (R. 4).

ASI filed a motion to dismiss, which it subsequently amended. (R. 190). ASI argued that the AOB violated the anti-assignment clause in the insured's policy (R. 193-96), which provided that "no assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all 'insureds', all additional insureds and all mortgagee(s) named in this policy." (R. 308).[1] ASI contended that the anti-assignment clause was legal because "this Assignment of Claim Benefits provision does not prohibit assignment or require that the insurer consent to any assignment. Instead . . . the provision merely requires that those with an interest in the policy benefits, all 'insureds', additional insureds and named mortgagees give written consent to such an assignment." (R. 395). ASI contended that the clause "seeks to protect all parties with an insurable interest in the subject property, who would necessarily be affected by assignment of rights under the policy to a third party." (R. 395).

In response, Bio Logic explained that the provision was functionally an anti-assignment clause which violated Florida's rule against restrictions

[1] ASI originally argued that the AOB also was invalid because it was not signed by the decedent co-insured, Paul B. Morgan, whose body was recovered from the garage. ASI withdrew that argument.

on AOBs, that it impaired rather than protected the mortgagee's interest, and that the term "additional insureds" was ambiguous. (R. 334-337).

In the reply, ASI accused Bio Logic of "[d]esperately trying to build a bridge from case law addressing 'insurers [sic] consent' assignment clauses to the 'insurable interests consent' provision in this contract." (R. 349). ASI claimed that the "'insurable interests consent' provision here does not 'place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs.'" (R. 350). According to ASI, there existed an important distinction because its anti-assignment clause "simply requires that those with an [sic] vested interest in the insurance benefits agree among themselves to the assignment of their benefits." (R. 350).

ASI also argued that clause was necessary to "assure[] that the insurer is not put in the untenable position of having an assignee with a unilateral assignment seeking benefits to which the other insureds have not consented." (R. 350). It sought protection because "If ASI were to pay Plaintiff the unilaterally assigned claim benefits . . . ASI would be exposed to potential additional actions for the same proceeds by the mortgagee (or any other named insureds) that did not agree to the assignment." (R. 353).

ASI also added a new argument in its reply: that because Bio Logic "ha[d] not asserted that the entire insurance policy ha[d] been assigned" to it, it could not contest the enforceability of the anti-assignment clause. (R. 354). As for Bio Logic's interest in payment, ASI contended that a direction to pay was just as good as an AOB. (R. 355-56). Finally, ASI interpreted the term "all insureds" to apply only to insureds named in the policy, limiting somewhat the number of signatures required. (R. 359).

On May 2, 2016, the lower court held a hearing on the motion to dismiss. (R. 644). ASI characterized its insurance policy as "different than any of the insurance policies that have been evaluated by courts before." (R. 650). Acknowledging the "plethora of case law . . . that says the insurance company cannot have a say on what is assigned," ASI contended that case law did not apply because it relied on "the unambiguous provision that requires the mortgagee to sign off" instead of a clause conditioning assignment on the insurer's consent. (R. 651). According to ASI, the AOB was valid because "you just have to have the signatures of the individuals who are all identified on the declarations page. It's just M&T Bank. That is it." (R. 662).

Bio Logic reasoned that ASI did "have a say in" whether benefits were assignable, because "they were the ones" who created the condition on

assignment. (R. 652). Furthermore, the anti-AOB clause violated the "common thread" of Florida case law, "free assignability of post-loss benefits." (R. 653). It was a "restriction upon the insured's absolute common law right to assign post-loss benefits." (R. 666-657). But even if the AOB was defective, Bio Logic had "an equitable assignment of benefits that cannot be derogated." (R. 656). ASI argued in response that any equitable cause of action lay against the insured, not against the insurer. (R. 662).

The court granted the motion, concluding that "the insurance policy does have language in there, but I don't think it restricts the assignment. I think it conditions the assignment." (R. 665). The order provided that "the 'assignment of Claim Benefits' provision is unambiguous. The Court finds that the provision is not an anti-assignment provision but a valid and enforceable condition. Plaintiff's complaint is DISMISSED due to the assignment of benefits not including the written consent of the mortgagee." (R. 440).

Bio Logic filed a motion for rehearing, arguing that the anti-assignment clause was the functional equivalent of a consent requirement invalid under Florida law, and that ASI lacked standing to contest the AOB or assert the mortgagee's rights, which in any event did not extend beyond

coverages A (dwelling) and B (other structures). (R. 443-44). Additionally, Bio Logic had satisfied its pleading burden by averring generally that all conditions precedent had been either satisfied or waived. (R. 445 (citing Fla. R. Civ. P. 1.120(c)). Moreover, because no answer had been filed, ASI had the right to amend the complaint to assert that Ms. Morgan acted as the agent of the mortgagee. (R. 446). Finally, if the AOB failed at law, Bio Logic had an equitable assignment to prevent ASI from unjust enrichment through underpaying benefits. (R. 447). The court denied the motion for rehearing. (R. 690).

Bio Logic filed this timely appeal.

SUMMARY OF ARGUMENT

After a loss, the insured's right to benefits becomes a vested personal property named a *chose in action*. ASI's anti-assignment clause is an illegal restraint on alienability as a matter of general Florida property law. Additionally, black-letter law establishes that the right to insurance benefits is freely assignable after a loss occurs. The more specific rule against restrictions on AOBs is a related but separate doctrine that renders the anti-assignment clause illegal, as the Office of Insurance Regulation has concluded in its capacity as the agency charged with interpreting Florida law. ASI has provided no relevant authority to the contrary.

Additionally, ASI lacks standing to argue that the AOB is invalid because it is not a party to the AOB contract. Even if the anti-assignment clause were valid and enforceable, dismissal would be inappropriate at this stage because Bio Logic has alleged that an equitable assignment existed, and could amend the complaint to allege an agency relationship. Finally, none of the alternative arguments ASI has raised or is likely to raise warrant granting its motion to dismiss.

STANDARD OF REVIEW

This appeal presents an issue of law that is reviewed de novo. Scott v. Busch, 907 So.2d 662, 665 (Fla. 5th DCA 2005); Regis Ins. Co. v. Miami Mgmt., Inc, 902 So. 2d 966 (Fla. 4th DCA 2004) (stating that because a ruling on a motion to dismiss raised issues of law, it is reviewed de novo); McKey v. D.R. Goldenson & Co., 763 So. 2d 409 (Fla. 2d DCA 2000) (holding failure to state a cause of action is question of law reviewed by de novo standard); Palumbo v. Moore, 777 So.2d 1177, 1178 (Fla. 5th DCA 2001) ("Generally, the standard of review of an order dismissing a complaint with prejudice is de novo.").

No deference is granted to the trial court's ruling in this instance. Reyes v. Roush, 99 So. 3d 586, 589 (Fla. 2d DCA 2012).

ARGUMENT

I. ASI's anti-assignment clause violates Florida's rule against restrictions on AOBs.

Florida courts have recognized as black-letter law the rule against restrictions on AOBs. "Even if an insurance policy contained a specific, articulate provision precluding an insured's post-loss assignments of benefits without the insurer's consent, Florida case law yields deep-rooted support for the conclusion that post-loss assignments do *not* require an insurer's consent." Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So. 3d 638, 642-43 (Fla. 2d DCA 2016); see also, e.g., One Call Prop. Servs. v. Sec. First Ins. Co., 165 So. 3d 749, 754 (Fla. 4th DCA 2015) ("an assignable right to benefits accrues on the date of the loss, even though payment is not yet due under the loss payment clause"). Courts have observed that there exists "an unbroken string of Florida cases over the past century" affirming that insurance benefits are freely assignable after a loss. Security First Ins. Co. v. Fla. Dep't of Fin. Servs., 177 So. 3d 627, 628 (Fla. 1st DCA 2015). Nevertheless, because insurers only recently began to challenge "the widely accepted industry practice of allowing post-loss assignments of rights," the case law is relatively undeveloped as to what exceptions the rule permits, if any. Fluor Corp. v. Superior Court, 354 P.3d 302, 333 (Cal. 2015).

It has long been settled that an explicit requirement of advance consent to an AOB violates Florida law. W. Fla. Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209, 210-11 (Fla. 1917) (explaining "it is a well settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest therein, does not apply to an assignment after loss"). To circumvent this doctrine, insurance companies have recently tried to use policy language to create a new type of property that, when assigned, does not transfer the rights necessary to preserve the value of an AOB. We now know that insurance companies cannot use policy language to separate the right to enforce an AOB from the ownership of the proceeds. Restoration 1 CFL v. State Farm Fla. Ins. Co., 189 So. 3d 340, 341 (Fla. 5th DCA 2016) (rejecting argument that AOB "transferred the right to collect benefits but not the right to participate in a suit to determine coverage"); United Water Restoration Grp., Inc. v. State Farm Fla. Ins. Co., 173 So. 3d 1025, 1027 (Fla. 1st DCA 2015) (recognizing "the clearly established principles of law that an assignee of post-loss insurance benefits can sue for breach of such benefits").

We also know that insurers also cannot separate the right to determine the value of the benefits due from the ownership of the benefits. One Call,165 So. at 755. And, the insurer cannot invoke use policy language to

keep a right to invoke appraisal with the insured instead of the AOB holder. Certified Priority Restoration v. State Farm Fla. Ins. Co., 191 So. 3d 961 (Fla. 4th DCA 2016).

Now, ASI argues that it can condition the right to assign benefits on the approval of a third party, the mortgagor. To address this and future backdoor attempts to circumvent the rule against restrictions on AOBs, Bio Logic returns to first principles of property law before examining the specific case of post-loss assignments of insurance benefits.

A. The rule against restrictions on alienability limits ASI's power to create non-transferable property rights through an insurance policy.

An insured's right to proceeds is a property right, not merely a contractual one, because after a loss the contract right "ripens into a chose in action, a type of personal property, which, pursuant to fundamental principles of debtor-creditor relationships, may not, ordinarily, be restrained from alienability." Wehr Constructors, Inc. v. Assur. Co. of Am., 384 S.W.3d 680, 685 (Ky. 2012). And, "as an incident to ownership the owner of personal property has an inherent right to sell and transfer personal property." Sanders v. Hicks, 317 So. 2d 61, 63-64 (Miss. 1975). Any restraints on the right to transfer personal property are disfavored. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1363 (2013) (discussing long history of the "common law's refusal to permit restraints

on the alienation of chattels"); see also, e.g., Sebastian Int'l, Inc. v. Consumer Contacts (PTY), Ltd., 847 F.2d 1093, 1096 (3d Cir. 1988) (remarking on the "common law aversion to limiting the alienation of personal property"); RTS Landfill, Inc. v. Appalachian Waste Sys., LLC, 598 S.E.2d 798, 802 (Ga. App. 2004) ("restraints on alienation of personal property are disfavored"); In re Winters, 69 B.R. 145, 147 (Bankr. D. Or. 1986) (remarking on state "policy prohibiting restraints on alienation of personal property").

The rules against restricting alienation of real property apply to personal property as well. In re Estate of Walkerly, 108 Cal. 627, 657 (1895) ("The common-law rule against perpetuities does not, as counsel argue, apply only to landed estates. Executory devises, springing and shifting uses, and trusts whether of realty or personalty were all within its terms."). As with real property, "[t]he right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand." Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911); see also Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834, 846 (D.N.J. 1972) ("there is a general public policy against

restraints on the transfer of personal property"); Ritchie v. Rupe, 339 S.W.3d 275, 292 (Tex. App. 2011) ("One of the general reasonable expectations of any property owner . . . is the right of free alienation of that property.").

Thus, the Supreme Court of Florida observed long ago that "[p]ersonal property, as well real property, at common law was subjected to the rule against restraints on alienation." Reimer v. Smith, 105 Fla. 671, 675, (1932).

ASI faces a high burden to justify its attempt to place in the mortgagee the power to block an assignment of the homeowners' interest. Celauro v. 4C Foods Corp., 958 N.Y.S.2d 644, 644 (Sup. Ct.) (citing cases establishing the "general rule that ownership of property cannot exist in one person and the right of alienation in another"). (discussing consent requirement in stock certificate"). Although ASI did not take the power for itself, it still attempted to create a bastardized version of an AOB that gives another the power to "arbitrarily, capriciously, and unreasonably withhold its consent to transfer." Aquarian, 448 So. 3d at 1170; see also Metro. Dade Cnty. v. Sunlink Corp., 642 So. 2d 551, 565 (Fla. 3d DCA 1994) (Cope, J., dissenting) (urging court to find an unlawful restraint on alienation by Dade County where due to conditions for waiver of restrictive covenant Sunlink had to "obtain the neighbors' consent to sell this property", which could be

withheld "at their whim"). Florida courts have held that "where a restraint is absolute and may be exercised for any reason or no reason," it is unenforceable unless the owner's interest is protected. Webster v. Ocean Reef Cmty. Ass'n, 994 So. 2d 367, 370 (Fla. 3d DCA 2008) (explaining why restriction on transfer of condominium was unenforceable unless accompanied by obligation to purchase unit from owner at market price).

Under the policy, the mortgagee can withhold consent to assignment for any reason, or no reason at all. This "arbitrary power to forbid a transfer" is exactly the kind of restraint that "amounts to annihilation of property." Hill v. Warner, Berman & Spitz, P.A., 484 A.2d 344, 351 (N.Y. Super. Ct. App. Div. 1984).

The possibility or even probability that the mortgagee will be willing to sign the AOB does not save the anti-assignment clause. Unless and until the proposed assignment is signed by the mortgagee, its value to a remediation contractor is too speculative to justify accepting it in return for emergency repairs. See Aquarian, 448 So. 2d at 1169 (consent requirement to transfer of condominium unreasonable because "no reasonable likelihood that a potential purchaser, apprised by the condominium documents that the consent of the association is required and that a purchase without consent

vitiates the sale, would be willing to acquire the property without the association's consent").

In fact, even the possibility of anti-assignment clauses like the one at issue here will significantly impair the liquidity associated with an AOB. A post-loss AOB is a definite property right. If insurance policies can create variations of this right, contractors will be forced to determine whether and how any AOB is encumbered. With real property, recording deeds makes it possible, with effort, to determine whether restrictions exist. There is no such mechanism for insurance contracts; indeed, there is no particular reason to believe that an insured facing an emergency will have immediate access to his or her policy to determine the conditions under which assignment is permitted. Thus, allowing ASI's anti-assignment clause to stand will impair all AOBs, to the detriment of homeowners who "simply cannot afford to wait" to repair the damage, and for whom "insurance benefits represent the most ready means of paying for post-loss emergency repairs." Bioscience, 185 So. 3d at 643.

On the other hand, if an AOB remains a standardized property right not subject to restraint, contractors will not have to incur the costs necessary to determine what kind of AOB each particular policy creates. See Thomas Merrill and Henry Smith, *Optimal Standardization in the Law of Property:*

The Numerus Clausus Principle, 110 YALE L. J. 1 (October 2000) (discussing benefits associated with fewer forms of property). In evaluating the reasonableness of restraints on transfer of AOBs, the Court should consider "the measurement costs they impose on strangers to the title" and how they impair market efficiency as a whole. Id. at 26-27.

Below, ASI argued that the clause preserved the mortgagee's rights and protected ASI against competing lawsuits. (R. 351-53). It is unclear how the anti-assignment clause creates additional protection for either ASI or a mortgagee. Indeed, it is not clear that the mortgagee M&T has any interest beyond the structures – that is, Coverage A and Coverage B. Its lien on the dwelling does not extend to Coverage C (personal property), Coverage D (loss of use), or additional coverages for debris removal and reasonable repairs.

Nevertheless, the policy itself requires that any payments in which the mortgagee has an interest be made payable jointly to the insured and the mortgagee. (R. 295 (loss payable under coverage A or B will be made to mortgagee and insured)). After an AOB, the payment would be made to the AOB-holder and the mortgagee if the mortgagee were an interested party. ASI can protect itself through a declaratory action, or joining together all potential claimants after a suit is filed.

The anti-assignment clause here is permanent, it may be enforced for any reason, and does not promote any interest of the insurer or the mortgagee. Other courts have found similar restraints on alienation to be invalid. Hill v. Warner, Berman & Spitz, P.A., 484 A.2d 344, 351 (N.Y. Super. Ct. App. Div. 1984) ("the consent restraint agreement between Blessing and Levitt has no limitation as to time, does not provide that the consent to act by the other shareholder will not be unreasonably withheld and does not promote the interest of the corporation"); Sanders v. Hicks, 317 So. 2d 61, 63-64 (Miss. 1975) (reversing where "restraint on alienation in the deed of trust" had "no relation to any threat to the legitimate interests of the mortgagee"). On the other hand, the value of benefits payable under the policy is reduced or destroyed, not just for those insureds whose policy includes the language at issue here, but for all insureds. Entirely apart from the special rule against restrictions on AOBs discussed in the next section, the clause is an impermissible restraint on the alienation of insurance proceeds.

B. The rule against restrictions on AOBs prohibits conditions with the effect of prohibiting an AOB, or diluting its value.

In the context of post-loss AOBs, black-letter law establishes that no restrictions on alienation are permissible. As this Court has explained, "Even if an insurance policy contained a specific, articulate provision

precluding an insured's post-loss assignments of benefits without the insurer's consent, Florida case law yields deep-rooted support for the conclusion that post-loss assignments do *not* require an insurer's consent." Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So. 3d 638, 642-43 (Fla. 2d DCA 2016).

Post-loss AOBs do not affect any legitimate interest of an insurer. Int'l Sch. Servs., Inc. v. AAUG Ins. Co., Ltd., No. 10-62115-CIV, 2012 WL 5192265, *9 (S.D. Fla. July 25, 2012) (explaining that "allowing an insured to assign its right to the proceeds of an insurance policy after a loss has occurred hurts the insurer not at all."). The only legitimate purpose of an anti-assignment clause is to protect the insurer against "an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer." Lexington Ins. Co. v. Simkins Indus., Inc., 704 So. 2d 1384,1386 (Fla. 1988) (citation omitted). After loss, a debt is created in the amount of covered loss, which does not vary according to the identity of the holder. Williams v. Auto Owners Ins. Co., 779 So. 2d 563 (Fla. 2d DCA 2001) ("rights under a fire insurance policy . . . are fixed both as to amount and standing to recover at the time of the fire loss"). The loss "extinguishes the insurer's interest in the risk profile of the insured," Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 171 (2d Cir. 2006), and thereafter

"[t]he claims are worth what they are worth" regardless of the owner. In re Ambassador Ins. Co., 965 A.2d 486, 490-92 (Vt. 2008). "[T]he need to protect the insurer no longer exists after the insured sustains the loss because the liability of the insurer is essentially fixed." Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 237 (Iowa 2001) (citing cases).

Thus, even if an insurer could require consent to any AOB, "it would be a mere act of caprice or bad faith for it to take advantage of the stipulation that the transfers were subject to its consent, by withholding such consent, in order to defeat the claim of the assignee." Int'l Rediscount Corp. v. Hartford Acci. & Indem. Co., 425 F. Supp. 669, 672-73 (D. Del. 1977). Nevertheless, as a profit-seeking entity, an insurer "would be foolish to consent to the transfer of insurance if, by withholding such consent, it could shed itself of past liability." Travelers Cas. & Sur. Co. v. United States Filter Corp., 870 N.E.2d 529, 545 (Ind. Ct. App. 2007).

AOBs help homeowners by providing liquidity in times of dire need. [2] Liquidity is a public good because "free alienability of property fosters

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[2]Lower courts have explained how AOBs benefit Florida citizens by increasing liquidity and allowing a more rapid response to emergencies. Anderson Restoration & Emergency Servs., LLC a/a/o Myrna Hill v. Universal Ins. Co., No. 13-CC-2940 (Fla. Duval Cty. Ct. Sept. 23, 2013) ("If [the insured] had to wait for claims adjuster from the insurance company to arrive before beginning water extraction after a loss, additional damage from

economic growth and commercial development." Aquarian Found., Inc. v. Sholom House, Inc., 448 So. 2d 1166, 1168 (Fla. 3d DCA 1984) (discussing consent to transfer required under condominium agreement). The rule against restrictions "contribut[es] to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement." Hartford Cas. Ins. Co. v. Fireman's Fund Ins. Co., No. 15-cv-02592-SI, 2015 U.S. Dist. LEXIS 118031, at *9 (N.D. Cal. Sep. 3, 2015); Travelers Cas. & Sur. Co. v. United States Filter Corp., 870 N.E.2d 529, 544 (Ind. Ct. App. 2007) (remarking on "the benefits of promoting the free transferability of assets and compensating those injured as a result of an insured risk").

After a loss, "it is of the first importance" that the insured "immediately realize the amount of their insurance, to replace the property destroyed [and] prevent the utter ruin of the sufferer." Goit v. Nat'l Prot. Ins. Co., 1855 N.Y. App. Div. LEXIS 175, 25 Barb. 189, 194 (App. Term Apr. 2, 1855). Obtaining the necessary signatures imposes a substantial burden on

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the water event could occur. The same would occur if the insured did not have the funds immediately available to pay for water extraction and water extraction companies were not able to rely on assignments of benefits…."); see also Anderson State Farm & Emergency Servs. LLC v. Fla. Peninsula Ins. Co., Case No. CC13-0550 (Fla. St. Johns Cty. Ct. June 3, 2013)

insureds. By definition, emergencies are not limited to business hours, or whatever the availability of the mortgagee happens to be. When fast action is required, the mortgagee may not be available. Indeed, the policy itself may be unavailable, perhaps due to the very incident requiring immediate remediation. It may not be clear what individual is authorized to sign the AOB on the mortagagee's behalf, or even whether the named mortgagee has transferred its interest in the residence.

Moreover, without assignments that enable repairs to commence immediately, "he may be in the power of the company and subjected to such terms as the managers may see fit to impose." Goit, 25 Barb. at 194. Restrictions on assignments – including doctrines that make accepting an AOB a riskier proposition, as HCPCC promotes here – allow insurance companies to:

> say, in effect, to the man who has bargained with them for absolute indemnity, and to whose business prospects delay is utter ruin, or whose family are in pinching want for the relief which this indemnity would afford, "accept of the pittance we offer or we will contest your claim and avail ourselves of such delays as a litigation will afford; and as you cannot realize the amount by sale or pledge, without incurring a forfeiture of the claim, you must await our inclination, or the slow result of a lawsuit, before you can recover the money to which you are entitled and which you so much need."

Id. As Justice Allen remarked long ago, "Public policy forbids that the [insurer] should, without any reason except such as grows out of caprice or some worse motive on his part, have this power over his creditor." Id. A later case found that restrictions on assignment, regardless of the motive behind them, have a "quite obvious" effect: "It puts it in the power of the insurer to prescribe terms of adjustment in disregard of the rights of its weaker adversary." Courtney v. N.Y.C. Ins. Co., 1858 N.Y. App. Div. LEXIS 114, at *4-9, 28 Barb. 116, 117-18 (App. Term Sep. 14, 1858).

Thus, this Court has correctly observed that "Florida stands apart from a minority of jurisdictions that permit an insurer to contractually restrict its insured's post-loss assignment without the insurer's consent." Bioscience W., Inc, 185 So. 3d at 643 n.1. The cases cited above demonstrate that courts throughout Florida have applied this rule to functional equivalents of explicit consent requirements.

The decision below squarely endorses functional restrictions on AOBs by giving insurers grounds to challenge them and decreasing the value of AOBs generally. "After all, the assignment is only as good as payment if the provider can enforce it." N. Jersey Brain & Spine Ctr. v. Aetna, Inc., 801 F.3d 369, 373 (3d Cir. 2015) (citing Conn. State Dental Ass'n v. Anthem Health Plans, Inc., 591 F.3d 1337, 1352 (11th Cir. 2009)). It is the insurer,

not the third-party contractually empowered to block transfer, who is denying consent to the assignment. Thus, the anti-assignment clause at issue here is within the reason for the rule against restrictions on AOBs.

It may be tempting to proceed as though the right to freedom of contract should be weighed against prohibiting anti-assignment clauses. "Along with liberty of contract, free alienation is one of the keystones of the twin policies of promoting individual autonomy and free exchange in competitive markets." Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1191 (May 1985). But it would be a mistake to proceed as though this case was about any issue other than free alienation of property.

The right to contract is not actually at issue here, because homeowners have no meaningful ability to negotiate individual terms – they can only take it or leave it. Wehr Constructors, Inc. v. Assur. Co. of Am., 384 S.W.3d 680, 687 n.8 (Ky. 2012) (observing that an "individual member of the general public [] will normally have considerably less bargain power than the insurance company from whom he purchases his policy, and thus will generally be compelled to accept the company's standardized adhesion contract"). The correct approach is from a consumer protection standpoint, in accordance with similar doctrines limiting the absolute right to freedom of

contract. The clause at issue here is squarely within the reason for the rule against restrictions on AOBs, and should be invalidated.

C. The Office of Insurance Regulation has determined that ASI's anti-assignment clause violates Florida law.

Generally, language in any insurance policy has been approved by the Office of Insurance Regulation ("OIR"), the agency charged with administering Florida's insurance laws. Prior to delivering or issuing insurance policy forms, an insurer is required to file, for approval, with the OIR, all forms it seeks to use in Florida. See § 627.410, Fla. Stat. Section 624.11 prohibits any person from transacting insurance in this state without complying with the applicable provisions of Florida's insurance laws. Section 627.412 (1) requires use of "standard provisions" in insurance contracts, and prohibits substitute provisions that are "less favorable in any particular to the insured or beneficiary than the provisions otherwise required."

ASI's anti-assignment clause was not reviewed or approved by the OIR. In fact, the OIR has disapproved the language when other insurers have submitted it for review.

On December 3, 2012, the OIR's Commissioner issued an order intended to address the high volume of form filings by property and casualty

insurers. (App. A, app. at 1).[3] The order exempted, *inter alia*, homeowners insurance forms from review, as long as the form was submitted at least thirty days before its effective date and accompanied by a statement that the forms were "in compliance with all applicable Florida laws." (App. A, app. at 2). On June 24, 2013, the Commissioner extended the order until December 31, 2013. (App. B, app. at 6).

On December 30, 2013, the ASI filed the form adding the anti-assignment clause. (App. C, "Special Provisions for Florida," app. at 19). General Counsel for ASI, Angel Bostick, certified that the filing complied "with all applicable Florida Laws, including but not limited to statutes, rules, regulations and court decisions," bypassing OIR review and approval. (App. C, app. at 34-36).

After the review exemption expired, the OIR consistently rejected attempts by other insurers to import ASI's anti-assignment clause into their own policies. American Integrity Insurance Company of Florida submitted a filing that added the anti-AOB clause on February 11, 2014. (App. D, "Special Provisions for Florida," app. at 97, 112). On March 26, 2014, an analyst memorialized via e-mail a telephone conversation from the previous

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[3] Citations are to the letter of the appendix and the Bates-stamped pagination.

day. (App. D, app. at 120). The analyst indicated that the submission would not be approved unless the insurer "delete[d] the Assignment of Claim Benefits language." The filing was withdrawn.

On July 1, 2014, Security First Insurance Company submitted an endorsement that included two anti-AOB measures, including the one at issue here:

> 18. Assignment of Benefits.
>
> a. For any assignment of benefits after a loss:
>
> 1. You must disclose the assignment to us prior to the payment of any claim; and
>
> 2. You must comply with all of the Section I – Condition B. Duties after loss. *We have no duty to provide coverage under this policy if you fail to comply with these duties.*
>
> b. No assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all "insureds", all additional "insureds", and all mortgagee(s) named in this policy.

(App. E, app. at 130).[4]

On July 29, 2014, the analyst requested that Security First "delete the phrase 'prior to the payment of any claim'" and "delete item 18.b" in its entirety. (App E, app. at 136).

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[4] This language mirrors language submitted pursuant to the 2012-13 review exemption by Olympus Insurance Company in OIR Filing 12-20317.

On August 15, 2014, the OIR disapproved Security First's proposed requirement of mortgagee consent to AOB, explaining:

> The forms contain language restricting the assignment of a post loss claim under the policy, which is contrary to Florida law. *See Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377 n.7 (Fla. 2008); *Better Const., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 651 So. 2d 141, 142 (Fla. 3d DCA 1995); *Panopoulos v. Lexington Ins. Co.*, 8:13-CV-00-T-33TGW, 2013 WL 2708688, at *2 (M.D. Fla. June 12, 2013); *Erickson's Drying Sys., Inc. v. QBE Ins. Corp.*, 2:11-CV-581-FTM-99, 2012 WL 469746, at *2 (M.D. Fla. Feb. 13, 2012); *Belfor USA Group, Inc. v. Bray & Gillespie, LLC*, 6:05CV1624ORL19UAM, 2008 WL 276022, at *2 (M.D. Fla. Jan. 31, 2008).

(App E, app. at 137). The OIR's interpretation of Florida law is entitled to great deference, and its decision should be upheld "unless it is clearly erroneous." BellSouth Telecomms., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998).

The OIR's decision is not clearly erroneous; in fact, it is correct. Under any standard of review, the Court should find in favor of Bio Logic.

D. The authority cited below does not permit mortgagees to veto an assignment by the named insured.

ASI's legal reasoning for the enforceability of the anti-assignment clause is suspect. As it recognizes, the mortgage clause provides that "If a mortgagee is named in this policy, any loss payable under Coverage A or B

will be paid to the mortgagee and you. . . ." (R. 351). ASI has not established or even alleged that the proceeds in the case were paid pursuant to Coverage A or B.

Nevertheless, ASI quoted at length from a case to support its claim that the anti-AOB clause was "consistent with Florida law which has long recognized and protected a mortgagee's interest in such insurance proceeds." Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n, 691 So. 2d 1104, 1105-08 (Fla. 3d DCA 1997). In National Title Insurance Co., the court ruled that the mortgagee could sue the condominium association for "negligent mismanagement" of insurance proceeds where the funds were dissipated and reconstruction never occurred. This cause of action shows that the mortgagee does not lack remedies against an insured or an assignee who fails to protect its interest in the property.

Appellee cited Vermont Mutual Insurance Company v. Bolding, 381 So. 2d 320 (1980), for the proposition that "The word 'insured' in the insurance policy includes the insured's mortgagees. . . ." (R. 351). In fact, the court interpreted "insured" in the attorney fee statute, Section 627.428, to include a loss-payable mortgagee, consistent with the statutes purpose of "penaliz[ing] a carrier for wrongfully causing its insured to resort to litigation. . . ." Gov't Emps. Ins. Co. v. Battaglia, 503 So. 2d 358, 360 (Fla.

5th DCA 1987); see S.C. Ins. Co. v. Pensacola Home & Sav. Asso, 393 So. 2d 1124, 1126 (Fla. 1st DCA 1980) (applying identical statutory interpretation.). The holding does not appear relevant here.

Russ v. State, 830 So. 2d 268, 270 (Fla. 1st DCA 2002), was a criminal case clarifying that a homeowner could commit larceny by converting insurance benefits to which a mortgagee had a superior interest. Mr. Russ owned his home pursuant to a mortgage deed requiring him to insure the property in the mortgagee's name and giving the mortgagee the right to receive any benefits paid. Id. at 269. A fire occurred, and the insurer gave Mr. Russ a check payable jointly to him and to the mortgagee. Id. Instead of respecting the mortgagee's right to the proceeds, Mr. Russ deposited the check and "used the money to make a down payment on a pickup truck and purchase a four-wheeler vehicle." Id. His conviction was affirmed because he "used the insurance proceeds for his own personal ends, knowing that the mortgagee had a superior possessory interest." Id. at 270. Appellee did not explain this case's relevance, (R. 352), but it would seem that the possibility of criminal prosecution for conversion by an AOB holder (who steps into the shoes of the insured) undercuts the argument that ASI needs an anti-AOB clause to protect itself.

II. ASI lacks standing to challenge the assignment.

"Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it." Martin Props. v. Fla. Indus. Inv. Corp., 833 So. 2d 825, 827 (Fla. 4th DCA 2002). The standing doctrine prevents debtors from challenging the contractual assignment of their debts. Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C., 717 F. Supp. 2d 724, 736-37 (E.D. Mich. 2010) (citing cases treating assignments particularly). "As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so." Blackford v. Westchester Fire Ins. Co., 101 F. 90, 91 (8th Cir. 1900).

The Supreme Court of Florida addressed a similar case in Lugassy v. Independent Fire Ins. Co., 636 So. 2d 1332, 1335 (Fla. 1994). In Lugassy, an insurance company argued that a lack of consideration prevented the insureds and their attorneys from altering the terms of their original retainer agreement. 636 So. 2d 1332 at 1335. The Florida Supreme Court found that the insurer could not raise lack of consideration to challenge the new retainer agreement because it was not a party or a third-party beneficiary to that retainer agreement. Id. (citing Thompson v. Commercial Union Ins. Co., 250 So. 2d 259, 262 (Fla. 1971) (requiring clear intent to benefit third party

before standing is conveyed)); see also Liu v. T&H Mach., Inc., 191 F.3d 790, 797-98 (7th Cir. 1999) (finding that, under Illinois law, third party lacked standing to challenge adequacy of consideration for AOB); Stanfield v. W.C. McBride, Inc., 88 P.2d 1002 (Kan. 1939). Similarly, in Progressive Express Ins. Co. v. McGrath Community Chiropratic, 913 So. 2d 1281, 1289 (Fla. 2d DCA 2005), the appellate court found that Progressive's challenge to an equitable assignment for lack of consideration was improper because the insurer was a third party to the assignment.

Just as the insurers in Lugassy and Progressive, ASI not a party to the AOBs. It has not demonstrated that any party to the AOBs intended to benefit ASI, and it lacks standing to step into the shoes of either. The mortgagee is not attempting to block the AOB. Indeed, it would appear to be to the mortgagee's benefit to permit the AOB, to allow timely repairs and thereby protect its interest in the residence. If the anti-assignment clause is legal, it is the mortgagee who should attempt to enforce it, not ASI.

III. Dismissal would be inappropriate even if the anti-assignment clause were valid due to unresolved issues of fact.

If the anti-AOB clause is valid and ASI can enforce it, the court should not have granted the motion to dismiss. Bio Logic alleged that an equitable assignment existed, and could have amended the complaint to

allege that the insured granted the AOB as an agent of the mortgagee. Other key issues are also not suitable for resolution at this stage.

A. Equitable assignment.

Assuming *arguendo* there were some technical defect in the assignment, Bio Logic would still hold an equitable assignment in the insurance benefits associated with the work it performed. No particular verbal formula is necessary for an equitable assignment. McClure v. Century Estates, 96 Fla. 568, 583 (Fla. 1928); SourceTrack, LLC v. Ariba, Inc., 958 So. 2d 523, 526 (Fla. 2d DCA 2007). If words or actions demonstrate an intent on one side to assign a right, and intent on the other to receive, an equitable assignment occurs if there is consideration. Giles v. Sun Bank, N.A., 450 So. 2d 258, 261 (Fla. 5th DCA 1984). The contract itself demonstrates the requisite intent, and Bio Logic provided consideration by rendering services in exchange for the assignment. Thus, even if the AOB here was void, Bio Logic has an equitable right to payment for its services.

B. Agency.

Homeowners generally preserve their residences – and the interest of the mortgagee therein – without the involvement of the mortgagee. Accordingly, here the insured may have had been acting as the mortgagee's agent, with permission to authorize an AOB on its behalf. "An agency

relationship can arise by written consent, oral consent, or by implication from the conduct of the parties." Stalley v. Transitional Hosps. Corp. of Tampa, Inc., 44 So. 3d 627, 630 (Fla. 2d DCA 2010) (citing Thompkin Corp. v. Miller, 156 Fla. 388, 24 So. 2d 48, 49 (Fla. 1945)). Additionally, the mortgagee may be held to have ratified the creation of the AOB after the fact. Frankenmuth Mut. Ins. Co. v. Magaha, 769 So. 2d 1012, 1022 (Fla. 2000). Whether an agency relationship between two related parties exists is decided by "the trier of fact." S. Fla. Coastal Elec., Inc. v. Treasures on the Bay II Condo Ass'n, 89 So. 3d 264, 267 (Fla. 3d DCA 2012) (citing Moore v. River Ranch, Inc., 642 So. 2d 642, 643-44 (Fla. 2d DCA 1994). Thus, the lower court should have granted leave to file an amended complaint.

C. Other issues of fact.

A motion to dismiss is not intended to "determine issues of ultimate fact." Roberts v. Children's Med. Servs., 751 So. 2d 672, 673 (Fla. 2d DCA 2000). Several key issues render dismissal premature. The mortgage agreement, which may authorize the insured to act on the mortgagee's behalf, is not in the record. Bio Logic has not had an opportunity to verify that the insurance policy ASI provided is correct, and cannot do so at this stage. It is also unknown pursuant to which coverage payments was issued, a factor in determining whether the mortgagee has an interest in the benefits.

In the complaint, Bio Logic alleged generally that all conditions had been performed. That allegation satisfies Bio Logic's pleading burden. Fla. R. Civ. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred."). Moreover, Bio Logic alleged in the alternative that any conditions precedent had been waived, a question for the trier of fact. Bolin v. State, 793 So. 2d 894, 897 (Fla. 2001). This case cannot be resolved without further factual development.

IV. The Court should not consider any basis for affirming the lower court except the reasoning in the order granting the motion to dismiss.

The trial court committed legal error by holding that ASI's anti-assignment clause applied to the insured's insurance benefits. The Court should not consider any other issues in this appeal. In Van v. Schmidt, 122 So. 3d 243, 261-62 (Fla. 2013), the Florida Supreme Court refused to apply the doctrine when reversing an error of law because "the trial court's order… was premised, at least in part, on an error of law." Id. at 261-262. The Court explained that appellate courts faced with errors of law should "remand[] to trial courts for reconsideration of findings in light of the proper standard." Id. The same course should be followed here. See also One Call Prop. Servs. v. Sec. First Ins. Co., 165 So. 3d 749, 755-56 (Fla. 4th DCA 2015).

Nevertheless, in the interest of addressing arguments that might otherwise require Bio Logic to exceed the page limitations on its reply brief, one likely defense – that of "Partial Assignment" – is discussed here.

Insurers often cite Space Coast Credit Union v. Walt Disney World Co., 483 So. 2d 35 (Fla. 5th DCA 1986), for the propositions that AOBs generally are unenforceable partial assignments. Space Coast involved garnishment of an employer under a partial assignment of unearned future wages. Although the court declared the partial assignment was valid, the employer was not liable to respond to a writ of garnishment absent the joinder of all parties entitled to the wages, "unless joinder is not feasible and it is equitable to proceed without joinder." Id. at 36. (quoting Restatement (Second) of Contracts § 326(2)).

It is true that the AOB in this case is "partial" in the sense that it did not necessarily cover all benefits paid in connection with the loss event. But as the recent decisions by the District Courts show, Florida courts have recognized AOBs like this for at least century. It would be more consistent with Florida law to conceive of the AOB as a complete transfer of all rights to benefits associated with Bio Logic's services.

Case law supports this view of wholeness and partialness. For example, the Third District has explained: "A provision in a policy of

insurance which prohibits assignment thereof except with the consent of the insurer does not apply to prevent assignment of the claim or interest in the insurance money then due, after loss." Gisela Inv. N.V. v. Liberty Mut. Ins. Co., 452 So. 2d 1056, 1057 (Fla. 3d DCA 1984 (emphasis added). The statement in Gisela that an insured may assign "the claim or an interest in the insurance money then due" was later quoted with approval by this Court. Prof'l Consulting Servs., Inc. v. Hartford Life & Accident Ins. Co., 849 So. 2d 446, 447-448 (Fla. 2d DCA 2003), in which the court observed that, generally, "rights under a contract are assignable," and "[i]n keeping with this . . . , Florida law generally authorizes assignments of after-loss [insurance] claims." (emphasis added). Using similar language in Continental Casualty, the court described an assignment as "'a transfer . . . of property, or of some right or interest therein.'" Id. at 376 (emphasis added). Accordingly, the 11th Circuit Court's appellate ruling in Graham's Carpet Cleaning & Restoration v. Royal Palm Ins. Co., Case No. 10-6858 CC 05 (Fla. 11th Cir. Ct. June 18, 2013) properly rejected the argument that a similar assignment was an invalid "partial" assignment.

Florida law recognizes that separate coverages give rise to separate causes of action. "A breach of each coverage provision gives rise to a separate cause of action and may be separately asserted." Bryant v. Allstate

Ins. Co., 584 So. 2d 194, 195 (Fla. 5th DCA 1991) (citing Couch on Insurance 2d (Rev. Ed.) § 74:825); see also State Farm Mut. Auto. Ins. Co. v. Yenke, 804 So. 2d 429 (5th DCA 2001) (court rejected insurer's argument for application of rule against splitting causes and followed the Bryant rule). Florida law recognizes that the insurer has a duty to deal fairly in good faith with multiple claimants. Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555 (Fla. 4th DCA 2003). Here, there is no indication that any other potential claimant would have to be joined in the instant suit.

Additionally, if a party contracts to "perform separately" any portion of a contract, it may be separately assigned. Restatement (Second) of Contracts § 326(2)); see Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So. 3d 638, 641 (Fla. 2d DCA 2016) (standard loss payment clause anticipates "the need to pay those 'legally entitled to receive payment' under the policy," not merely named insured). In the insurance context, multiple claimants are customary because the policy has various insurance coverages that are ordinarily payable to different claimants. The record is insufficient to determine whether ASI contracted to separately perform payment to all AOB-holders.

The Court should also remember that below, ASI argued that the assignment was invalid because it did not transfer the entire policy. (R.

354). As advocated by ASI, the partial assignment argument creates an impossibly narrow space between an assignment of the entire policy and a "partial" assignment which conveys less than all rights potentially due for a loss incident and thereby invalidate AOBs *de facto*. This effort should be rejected.

To summarize: AOBs are not partial assignments, because the "whole" is not the entire policy, nor all benefits under the claim number. At law and as a matter of policy, the "whole" is all benefits associated with work performed by the AOB-holder. Any contrary interpretation of the law violates Florida's rule against restrictions on AOBs. Start to Finish Restoration, LLC v. Homeowners Choice Prop., 41 Fla. L. Weekly D1385 n.1 (Fla. 2d DCA June 10, 2016) (explaining that rule on unenforceability of partial assignments without the obligor's consent "would likely be subsumed in this context by Florida's longstanding precedent that insurance policy benefits are freely assignable, even without the insurer's consent").

Even if the AOB in this case were partial, ASI would still have to show that the policy cannot be interpreted to contract to perform separately each AOB; that all parties entitled to benefits could not be joined; and, that proceeding without the other parties would be inequitable. If the Court considers this issue, it should be decided against ASI as a matter of law.

CONCLUSION

As with the other novel anti-AOB arguments recently rejected by the courts, ASI's mortgagee consent requirement should be held illegal. Even without the special protection afforded assignments of post-loss homeowners insurance benefits, ASI's anti-assignment clause is an invalid restraint on the alienation of personal property. The anti-assignment clause is also squarely within the rule against restrictions on AOBs, and has been disallowed by Florida's Office of Insurance Regulation.

Even if the anti-assignment clause were legal and ASI had standing to raise it here, dismissal is inappropriate because Bio Logic alleged a valid equitable assignment, and had a right to amend the complaint to allege an agency relationship. No meritorious grounds for dismissal exist because the AOB is valid and Bio Logic has standing to bring this suit.

Respectfully Submitted,

/s/ Gray Proctor

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, through the e-filing portal, to: Thomas Keller, Esq., 400 N. Ashley Drive, Suite 2300, Tampa, FL 33602 at:

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this 26th day of October, 2016.

/s/Gray R. Proctor
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CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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