Thompson v. The Florida Bar Doc. 113

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 07-21256-CIV-JORDAN

JOHN B. THOMPSON,

Plaintiff,

vs.

THE FLORIDA BAR and DAVA J. TUNIS,

Defendants.
_____________________________________/

MOTION TO DISMISS VERIFIED THIRD AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendant, The Honorable Dava J. Tunis, Judge of the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida (hereafter, "Judge Tunis"), through her undersigned attorneys, in both her official and individual capacities, moves to dismiss the Verified Third Amended Complaint For Declaratory Judgment And For Injunctive Relief filed against her, and in support thereof states as follows:

PROCEDURAL AND FACTUAL SUMMARY

Plaintiff, in his Verified Third Amended Complaint For Declaratory Judgment And For Injunctive Relief (hereafter, "3rd Amended Complaint") alleges that Judge Tunis currently serves as the referee in Florida Bar disciplinary proceedings against the Plaintiff. (3rd Amended Complaint, ¶ 3). It is not possible to tell which, if any, counts of the 3rd Amended Complaint are directed to Judge Tunis since the Plaintiff has failed to identify which counts of the 3rd Amended Complaint and which facts are directed to which of the named defendants. However, Plaintiff does contend that

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Judge Tunis has denied, "nearly all discovery" in the pending bar proceedings and has denied subpoenas. (3rd Amended Complaint, ¶ 52). He alleges that the defendants have all collaborated to deny the Plaintiff all discovery on a selective prosecution issue. (3rd Amended Complaint, ¶ 53). This defendant, allegedly, once called the Plaintiff's pleadings "propaganda" and denied him two continuances. After the alleged "propaganda" comment, Plaintiff moved to recuse Judge Tunis, who denied his motion to recuse and allegedly failed to state what the specific defect was in his motion. (3rd Amended Complaint, ¶¶ 54, 78). According to Plaintiff, this demonstrated bad faith. (3rd Amended Complaint, ¶ 78). Also, she purportedly conducted herself "as if she herself were a SLAPP Bar complainant." (3rd Amended Complaint, ¶ 54). Judge Tunis, allegedly, in ruling on issues regarding the Plaintiff's attempts to seek depositions of various Bar personnel, ruled that she was sure Plaintiff's questions would seek privileged and confidential information. (3rd Amended Complaint, ¶ 58). Plaintiff also contends that counsel for Judge Tunis stated that Plaintiff does not have a "history of acquittals" (3rd Amended Complaint, ¶ 89), which he admits is true (See, 3rd Amended Complaint ¶ 33), but contends that he has an acquittal history that goes back years. (3rd Amended Complaint, ¶ 89).

Plaintiff, therefore, requests a declaratory judgment that all Bar Rules being applied against him are unconstitutional on their face (3rd Amended Complaint, Count I, pg. 33); he requests a preliminary injunction so that he may have discovery denied him (3rd Amended Complaint, Count II, pg. 34); a preliminary injunction staying the disciplinary proceedings until Plaintiff can prove their unconstitutional purpose (3rd Amended Complaint, Count II, pg. 35), and a permanent injunction "based on a disciplinary system that has lost its way." (3rd Amended Complaint, Count II, pg. 35). Plaintiff also requests, "Alternative Declaratory Judgment Relief" in the form of a judgment

declaring the Florida Bar to be either a guild and to act like one or to be a part of government required to act like government. (3rd Amended Complaint, Count III, pg. 44).

MOTION TO DISMISS

This action should be dismissed against Judge Tunis based upon the following grounds:

1. Abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

2. Abstention pursuant to Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

3. Abstention pursuant to Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941).

4. There is no claim for an injunction against a judicial officer under 42 U.S.C. § 1983.

5. Qualified Immunity applies in Judge Tunis' individual capacity.

6. The Complaint should be dismissed as an improper "shotgun pleading."

7. The Amended Complaint fails to state a cause of action.

MEMORANDUM IN SUPPORT

1. Younger Abstention Applies.

The Supreme Court, in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), held that the federal courts cannot enjoin pending criminal prosecutions in state courts except in extraordinary circumstances where irreparable injury would otherwise occur.

The Supreme Court, in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), determined that a three-part test should be applied to determine if Younger abstention is appropriate: (1) if state proceedings are ongoing,

(2) if the state proceedings implicate important state interests, and (3) if the state proceedings afford adequate opportunity to raise federal questions. Once these elements are met, the federal court must abstain, except in the most extraordinary circumstances. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976); Old Republic Union Ins. Co. v. Tillis Trucking Co., 124 F.3d 1258, 1261 (11th Cir. 1997). We know this can be applied to Bar Disciplinary Proceedings where indeed, Middlesex, itself, involved attorney disciplinary proceedings. Rooker-Feldman. All that is required under the Younger abstention doctrine is "the opportunity to present their federal claim in the state proceedings." Juidice v. Vail, 430 U.S. 327, 337 (1977). The Plaintiff is intimately familiar with its applicability to proceedings of The Florida Bar where it was the grounds for dismissal of his action in Thompson v. Rogers, Case No. 06-22477-CIV-HUCK/SIMONTON, 2006 U.S. Dist. LEXIS 95477 (S.D. Fla. 2006):

> It is clear that Florida bar disciplinary procedures are judicial in nature. See In the Matter of Calvo, 88 F.3d 962, 965 (11th Cir. 1996). Likewise, the Supreme Court recognized in Middlesex that Younger abstention applies to pending bar disciplinary proceedings because a state "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." 457 U.S. at 434; see also The Florida Bar v. Went For It, 515 U.S. 618, 625, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) ("we have little trouble crediting the [Florida] Bar's interest [in regulating its lawyers] as substantial"). Having satisfied the first two elements of Middlesex, the remaining question is whether Florida bar disciplinary proceedings provide an adequate opportunity to raise constitutional issues. Thompson contends that it is "a joke" that the Florida Supreme Court would "skewer its own Bar" for unconstitutional acts. Pl.'s Resp. to Mot. To Dismiss at 4. "[U]nless state law clearly bars the interposition of the constitutional claims," the Court must abstain. Middlesex, 457 at 424. The burden is upon the person claiming that abstention is inapplicable to show that state law clearly bars the interposition of constitutional claims. Butler v. Alabama Judicial Inquiry Comm'n, 245 F.3d 1257, 1262 (11th Cir. 2001). Thompson has not met this burden. "Florida Bar rules and state law do not clearly bar the interposition of Mason's constitutional claims. To the contrary, there is abundant opportunity for a lawyer facing disciplinary charges to raise constitutional issues at almost every stage of the Florida proceedings." Mason v. Florida Bar, 2005 U.S. Dist. LEXIS 40029, 2005 WL 3747383 at *5 (M.D. Fla. Dec.

16, 2005) (citing Ch. 3-7, R. Regulating the Fla. Bar) (additional citations omitted).

Id. at 8-9.

Plaintiff's previous inference that Pulliam v. Allen, 466 U.S. 522 (1984) somehow overruled Younger (2d Amended Complaint, ¶¶ 95-97, 99), is unavailing where Younger is only mentioned twice in the decision, both times in footnotes and both times with approval. It was not a case in which Younger abstention was an issue where it was limited to judicial immunity for attorney's fees after successfully obtaining an injunction. No appeal of the injunction was taken and there is no indication that Younger abstention was ever raised as a defense, in Pulliam.

While there is a narrow bad faith exception to Younger abstention, as this Court noted at DE# 88, p. 2, the exception is a narrow one, requiring more than conclusory allegations to support. Kugler v. Helfant, 421 U.S. 117 (1975). Indeed, extraordinary circumstances including great, immediate and irreparable injury must be shown. Id. at 124. Plaintiff, to come within the bad faith exception as to Judge Tunis, would have had to set forth sufficient factual allegations to show that she was permitting the proceedings against him solely for the purpose of suppressing his exercise of free speech rights. See Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996) (in which failure to dismiss under Younger was reversed). Even if every allegation against Judge Tunis were treated as the absolute truth, Plaintiff would not fall within the bad faith exception, with regard to claims against Judge Tunis.

Therefore, since Florida Bar disciplinary proceedings against the Plaintiff are ongoing, Younger abstention applies.

2. Abstention pursuant to Burford v. Sun Oil May Also Be Appropriate.

Federal courts should invoke Burford abstention to avoid interfering with a state's efforts to

"establish coherent policy with respect to a matter of substantial public concern." Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 746 (3d Cir. 1982), cert. denied 456 U.S. 990, 73 L. Ed. 2d 1285, 102 S. Ct. 2270 (1982). Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), established the principle that federal courts should exercise their discretionary power to refuse to hear cases that would impair the independence of state governments in carrying out their domestic policy. Id. at 318, 63 S.Ct. at 1099. Thus, Burford abstention is appropriate when exercise of federal review of the question in a case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. See Rindley v. Gallagher, 929 F.2d 1552 (11th Cir. 1991) (quoting Colorado River Water Conservation Dist. v. United States, supra, 424 U.S. at 814. A case requesting that both identified and unidentified bar rules be declared facially unconstitutional (3rd Amended Complaint, pg. 33) and a permanent injunction against a "disciplinary system that has lost its way" (3rd Amended Complaint, pg. 35) would certainly appear to be such a matter. Therefore, Burford abstention may well be applicable, as well.

3. **Pullman Abstention Applies.**

> Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971. That is especially desirable where the questions of state law are enmeshed with federal questions. Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 . . .
>
> In such case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily. Railroad Commission of Texas v. Pullman Co., supra, 323 U.S. 104–105, 65 S.Ct. 154. (other citations omitted).

City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 79 S.Ct. 455, 456-57, 3 L.Ed.2d

562 (1959).

Here, where there are obvious issues of discretion to grant or deny continuances, motions to recuse and state discovery issues (3rd Amended Complaint, ¶¶ 52-53, 58, 78), Pullman abstention applies.

4. There Is No Claim For An Injunction Against A Judicial Officer Pursuant to 42 U.S.C. § 1983.

Further, the statute the Plaintiff is relying on exempts judicial officers from being the subject of injunction unless a declaratory judgment that they are violating is already in place. § 1983 provides for an action against persons who deprive citizens of federal constitutional rights, "...except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." The United States D.C. Circuit, in interpreting this language, held:

> We agree with Superior Court appellants that the District Court erred in holding that appellees might be able to obtain injunctive relief. 42 U.S.C. § 1983, as amended in 1996 by the Federal Courts Improvement Act, explicitly immunizes judicial officers against suits for injunctive relief. The statute states that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (codified as amended at 42 U.S.C. § 1983 (2000)). Neither statutory limitation appears to apply in this case, and appellees' complaint says nothing to the contrary.

Roth v. King, 449 F.3d 1272, 1286 (D.C. Cir. 2006).

This has specifically been applied to state judicial officers. See Smith v. City of Hammond, Indiana, 388 F.3d 304, 307 (7th Cir. 2004) (held to bar injunctive action against judge of state's city court).

There can be no claim for an injunction against Judge Tunis.

5. Qualified Immunity Applies In Judge Tunis' Individual Capacity.

Qualified immunity will apply to give the government agent the benefit of the doubt so long as the conduct was not so obviously illegal in the light of then-existing law that only an incompetent or one who was knowingly violating the law would have committed the acts concerned. See Crosby v. Paulk, 187 F.3d 1339 (11th Cir. 1999), *rehearing and rehearing en banc denied by* 226 F. 3d 650 (2000); GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1366 (11th Cir. 1998). Intent and motivation are insignificant to the wholly objective standard. See Crosby, supra, at 1344.

Once qualified immunity is asserted, the plaintiff bears the burden of demonstrating that the federal rights allegedly violated were clearly established. Flores v. Satz, 137 F.3d 1275, 1277 (11th Cir. 1998); Foy v. Holston, 94 F.3d 1528 (11th Cir. 1996). This burden cannot be met by generally stating constitutional rights. Crosby, supra, at 1345; Harbert International, Inc. v. James, 157 F.3d 1271, 1283-85 (11th Cir. 1998). The Plaintiff must establish more than legal truisms, he or she must demonstrate that the law fixed the contours of the right so clearly that a reasonable official would have understood his or her acts were unlawful. Dolihite v. Maughon by and through Videon, 74 F.3d 1027, 1040-41 (11th Cir. 1996), cert. denied, 519 U.S. 870, 117 S.Ct. 185, 136 L.Ed.2d 123 (1996). This Court has described the application of qualified immunity as follows:

> That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. (Footnote omitted) Harlow, 457 U.S. at 818, 102 S.Ct. at 2738 (officials "generally are shielded from liability for civil damages"); Barts v. Joyner, 865 F.2d 1187, 1190 (11th Cir.1989) ("The Harlow decision sets up a bright-line test that is a powerful constraint on causes of action under section 1983."); Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323-24 (11th Cir.1989) (when "no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where [First Amendment case law] would lead to the

> inevitable conclusion that the [act taken against] the employee was unlawful"). Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit. See Malley v. Briggs, 475 U.S. 335, 341-43, 106 S.Ct. 1092, 1096-97, 89 L.Ed.2d 271 (1986). Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity.

Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994).

Here, the Plaintiff has done no more than allege that Judge Tunis has made rulings that he believes violated his constitutional rights. (3rd Amended Complaint). It is impossible to determine from the language of the 3rd Amended Complaint whether Plaintiff's claims are against her in her official or her individual capacity (or, indeed, what claims are being asserted against her, at all). Therefore, to the extent that any of Plaintiff's claims could be interpreted as being against Judge Tunis in her individual capacity, qualified immunity applies to protect her from such allegations.

6. The Complaint Should Be Dismissed As A "Shotgun Pleading".

Rule 8, Fed. R. Civ. P., requires the Complaint to contain, "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 10, Fed. R. Civ. P. states that, "Each claim founded upon a separate transaction or occurrence...shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth." Plaintiff, while he has set forth three counts, has failed to identify which counts apply to which of the four named defendants. This is a new problem since, previously, Plaintiff identified which defendants were required to defend which counts of the Complaint. (See, 2d Amended Complaint).

Additionally, Plaintiff realleges all prior paragraphs in every count of the Complaint directed against all four separate defendants so that, by the last count, he is realleging 100 previous

paragraphs and it is impossible to determine which alleged facts apply to which defendants and which counts of the complaint. (See, 3rd Amended Complaint, ¶¶ 90, 94, 101). This type of pleading practice is often referred to as "shotgun pleading" and is greatly disfavored in this circuit:

> This court has addressed the topic of shotgun pleadings on numerous occasions in the past, often at great length and always with great dismay. See, e.g., Byrne v. Nezhat, 261 F.3d 1075, 1128-34 (11th Cir. 2001) ("Shotgun pleadings . . . impede[] the due administration of justice and, in a very real sense, amount[] to obstruction of justice.") (internal citation omitted); Magluta v. Samples, 256 F.3d 1282, 1284-85 (11th Cir. 2001) (per curium) (refusing to address and decide serious constitutional issues on the basis of a "quintessential 'shotgun' pleading of the kind [this court has] condemned repeatedly, beginning at least as early as 1991" because "it is in no sense the 'short and plain statement of the claim' required by Rule 8"); Anderson v. Dist. Bd. of Trustees of Cent. Fl. Comm. Coll., 77 F.3d 364, 366 (11th Cir. 1996) ("[Plaintiff's] complaint is a perfect example of 'shotgun' pleading in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief.") (internal citation omitted); Pelletier v. Zweifel, 921 F.2d 1465, (11th Cir. 1991) (describing "quintessential shotgun pleadings" complete with "rambling recitations" and "factual allegations that could not possibly be material" that force the "district court [to] sift through the facts presented and decide for [itself] which were material to the particular cause of action asserted").

Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp., 305 F.3d 1293, 1296, n. 9 (11th Cir. 2002).

Judge Tunis respectfully submits that the shotgun pleading filed by the Plaintiff should be dismissed based upon its procedural deficiencies and non-compliance with the Court's rules governing this action. **7. The Amended Complaint Fails To State A Cause of Action.**

Plaintiff has failed to allege any act or omission that Judge Tunis has done with sufficient specificity to determine whether Plaintiff's rights were violated or not. (See, 3rd Amended Complaint, ¶¶ 11-89). While it is true that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (Conley v. Gibson, 355 U.S. 41 (1957)), factual allegations

supporting a claim "must be pleaded with sufficient clarity so as to 'give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.'" Peterson v. Atlanta Housing Authority, 998 F.2d 904, 912 (11th Cir. 1993) (emphasis supplied by Circuit Court) quoting Conley, 355 U.S. at 47. Conclusory allegations and unwarranted deductions of fact need not be accepted as true. Id., citing Assoc. Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974). Moreover, when no construction of the factual allegations will support the cause of action, dismissal of the complaint is appropriate. Marshall County Bd. of Educ. v. Marshall County Gas Distr., 992 F.2d 1171, 1174 (11th Cir. 1993).

Here, Plaintiff has failed to allege that Judge Tunis has done anything except rule against him in matters that he believed resulted in violation of his constitutional rights, primarily by allegedly denying him discovery, denying continuances and denying a motion to recuse. (3rd Amended Complaint, ¶¶ 52-54, 58). It is submitted that such allegations are insufficient to state a cause of action.

Further, regarding the injunction claim (which appears to be the only remedy requested against Judge Tunis, although it is impossible to tell - See 3rd Amended Complaint, ¶¶ 94-100), Plaintiff has failed to state a claim. In order to prevail on a motion for injunctive relief pursuant to Federal Rule of Civil Procedure Rule 65, the Plaintiff must demonstrate the following four factors: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. See McDonald's Corp. v. Robertson, 147 F.3d 1301 (11th Cir. 1998). The Eleventh Circuit has also stated that the granting of an injunction requires demonstration that there

is no adequate remedy at law. See Keener v. Convergys Corp., 342 F.3d 1264, 1269 (11th Cir. 2003) (permanent injunction requires success on the merits, continuing irreparable harm and no adequate remedy at law).

"A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." Id. at 1306. A weakness in proof on one of the four factors may not be remedied by demonstrating strength in another. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983) (movant bears burden of persuasion on each factor in preliminary injunction test).

Courts will not grant injunctive relief if the plaintiff demonstrates only a mere possibility of injury. See Baxter Int'l, Inc. v. Morris, 976 F.2d 1189, 1194 (8th Cir. 1992) ("[i]njunctive relief must be based on a real apprehension that future acts are not just threatened but in all probability will be committed"). Here, the Plaintiff's allegations are insufficient to even allege the possibility that these factors could be fulfilled.

Certainly, the declaratory judgment claim requesting that identified and unidentified Bar Rules be declared facially unconstitutional (3rd Amended Complaint, Count One, pg. 33) could not be directed to Judge Tunis, who is simply the referee in the proceedings concerned. The Rules of Discipline of the Florida Bar are administered exclusively by the Florida Supreme Court. See Rule 3-3.1. Rules Regulating Fla. Bar. Such rules are adopted and amended exclusively by the Florida Supreme Court. See, e.g., In Re: Amendments to the Rules Regulating The Florida Bar, 916 So. 2d 655 (Fla. 2005). Thus, Judge Tunis is clearly without authority or jurisdiction to declare Rules Regulating The Florida Bar as unconstitutional and a declaratory judgment making such a declaration could not appropriately be directed to her. Likewise, Count III, for Alternative

Declaratory Judgment Relief concerns matters directed exclusively to The Florida Bar and could not be properly directed to Judge Tunis. (See, 3rd Amended Complaint, ¶¶ 101-120).

CONCLUSION

Based upon the above arguments and authorities, the 3rd Amended Complaint should be dismissed as to Judge Tunis.

Dated: September 17, 2007
Fort Lauderdale, FL

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Charles M. Fahlbusch
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SERVICE LIST

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United States District Court, Southern District of Florida

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