

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

CASE NO: 15-80831-BB

MARGARET WEISS and FELIX REYES,

Plaintiffs,

v.

BETHESDA HEALTH, INC. and  
BETHESDA HOSPITAL EAST,

Defendants.

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**PLAINTIFFS OBJECTIONS TO THE PROPOSED FINDINGS AND  
RECOMMENDATIONS**

COMES NOW, Plaintiffs, Margaret Weiss and Felix Reyes, by and through their undersigned counsel, and pursuant to Local Magistrate Judge Rule 4(b) and 28 U.S.C. § 636(b)(1)(B), do hereby file the following objections to Magistrate Judge James M. Hopkins's Report and Recommendation (D.E. 28) filed July 13, 2015, as follows:

**STANDARD OF REVIEW:**

Pursuant to Local Magistrate Judge Rule 4(b) and 28 U.S.C. § 636(b)(1)(C), this Court shall make a de novo review of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. LoConte v. Dugger, 847 F.2d 745, 750 (11<sup>th</sup> Cir. 1988). The District Judge, however, need to conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the Magistrate Judge, making his own determination on the basis of that record. Local Magistrate

Judge Rule 4(b) and 28 U.S.C. § 636(b)(1)(C), The District Judge may also receive further evidence, recall witnesses, or recommit the matter to the Magistrate Judge with instructions. Id.

### **BACKGROUND**

The background and issues present in this preliminary injunction have been extensively briefed by both parties in both this Motion and the Prior Motion for Preliminary Injunction filed by FAD (D.E. 139, D.E. 159, D.E. 166 and D.E. 5, D.E. 19 and D.E. 24). Further oral arguments were heard before the Honorable James M. Hopkins on June 2, 2015 on FAD's Motion and July 7, 2015 on the instant motion. Judge Hopkins recommended that Plaintiffs Weiss and Reyes' Motion for Preliminary Injunction be denied. Plaintiffs hereby file the following objections as they contend the Magistrate Judge erred when making legal conclusions as applied to the facts in this case.

#### **Objection 1: The Magistrate Judge erred when deciding that a VRI can provide effective communication during a childbirth**

Under Title III, a public accommodation such as a hospital has an obligation to:

to take such *steps as may be necessary to ensure* that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

42 U.S.C. § 12182(2)(A)(iii)(emphasis ours), This provision includes the duty to ensure effective communication as detailed in 28 C.F.R. § 36.303. In his order, Judge Hopkins determined that because "Bethesda's policy is reasonable, Bethesda does not discriminate against Plaintiffs by failing to provide them with the auxiliary aid of their choosing". This statement misses the point of the law and this motion. Plaintiffs did not file this motion so they could obtain the auxiliary aid

of their “choosing”, they filed this motion to try to ensure that they would have effective communication during one of the most crucial important moments of medical treatment of their lifetime. Further in finding that Bethesda’s policy is reasonable, Judge Hopkins incorrectly interpreted the technical requirements under 28 C.F.R. 36.303(f) and did not fully consider the “nature, complexity and significance” of childbirth and what in particular plaintiffs will encounter during the birth of their child as required under 28 C.F.R. 36.303(1)(ii).

Objection 1(a): **Technical Requirements**

VRI should only be used if it is appropriate after consultation with the deaf persons involved as to their “self-assessed” communication needs and consideration of the context in which it will be used. 56 Fed. Reg. 35566-67, 28 C.F.R. 36.303(c). Certainly the ADA and the DOJ regulations and resolution agreements interpreting same, do not contemplate that VRI can be used in every situation and for this reason provide guidance as to the limitations of VRI which explicitly include many of the situations which will be encountered by Plaintiffs as discussed below. Further even if deemed appropriate, the VRI system in place must meet **all** of the technical requirements delineated in Section 36.303(f). See D.E.24-1 (Revised Requirements for Effective Communication). Plaintiffs submit the undisputed evidence in this case shows that Bethesda’s VRI system does not meet these requirements.

The first performance standard states that in order for the VRI system to **ensure** effective communication it must provide “Real-time, full motion video and audio ...that delivers high quality video images that **do not produce** lags, choppy, blurry or grainy images or irregular pauses in communication.” In assessing this standard, Judge Hopkins quoted the owner of the VRI company, Stanley Schoenbach, who stated such problems in general are rare. (Judge Hopkins stated that Schoenbach said that “instances of blurriness, pixilation, or freezing on the VRI

machine are extremely rare” at **Bethesda** however Schoenbach was not referring to Bethesda in particular and just stated this in general. In fact Schoenbach has *never* physically ever gone to the Bethesda himself -- as Bethesda maintains, owns and services its own equipment. D.E. 19-16 p.18. Further Judge Hopkins quoted a nurse Juan Rivera and a nursing supervisor, Dottie Kerr, who stated they “had never experienced problems with the VRI before” or “only had problems with it on one other occasion.” (These are the same nurses who stated that they called for a live interpreter after thirty to forty minutes of struggling with the VRI in December of 2014, when the evidence clearly reveals Bethesda did not call for a live interpreter until Weiss and Reyes had waited for medical treatment for their infant daughter for one hour and forty minutes as the hospital could not get the VRI working. D.E. 24-8). Judge Hopkins then quoted Gary Ritson, the Vice President of Risk Management, who testified he is only aware of one malfunction since 2011. Gary Ritson has *never* seen VRI used by any patient and has *never* seen it turned on by a nurse. [D.E.19-17 T96:18-21 and T98:3-6]

Then, despite the fact that Bethesda’s own employees also confirmed that this VRI machine which only has “rare” problems did, in fact, just happen to have these “rare” problems when Weiss and Reyes were there in December of 2014 and June of 2015, when June McMahon was there in June of 2015, as well as when Plaintiffs’ Expert did an onsite inspection in April of 2015. Notwithstanding these alleged “rare” occasions and the fact that twelve other deaf people filed a complaint against Bethesda for the same problem, Judge Hopkins still found that Bethesda’s VRI system met the first performance standard.

In doing so, Judge Hopkins apparently discredited all of the certifications of Margaret Weiss, Felix Reyes, Irena Weiss, David Weiss, June McMahon and Marvin David Scott that, not only does the machine have problems connecting, that once it does, it is often blurry, freezing,

blacks out or pixilates. [D.E. 5-5, 5-10, 24-21, 24-22, 24-23, 24-24] As counsel for the hospital himself admitted during oral argument when asked why their technical officer, David Neff, did not dispute the claims of Marvin David Scott that the VRI did not work in multiple locations in both hospitals, the “VRI did not work some of the time and did other times”. This was during a prescheduled onsite inspection in a case where twelve other people stated they had problems with this VRI system and yet Bethesda could not even get the VRI to work reliably throughout that inspection. [D.E. 5-10]. It would seem counterintuitive that Bethesda would have their equipment work when they had advance notice in the midst of federal litigation involving such equipment.

Apparently, Judge Hopkins determined that the fact that the VRI does not work sometimes is acceptable under the regulations, despite the fact that the regulations do not state this. The first performance standard states a VRI system can only be used to ensure effective communication if its “video delivers high quality video images that do not produce lags, choppy, blurry, or grainy images or irregular pauses in communication.” Certainly difficulties in connecting repeatedly would violate this standard not to mention problems with freezing, blurriness and pixilation. There is *no* qualification here under the performance standard that states it is okay if the VRI does not work sometimes and then they get it working within some undefined time period. In fact, the opposite is true.

The fourth performance standard says there must be adequate training for the users of technology so they “may quickly and efficiently set up and operate the VRI”. The affidavits of **all** defendant employees who had problems with the VRI reveal they all had to call for technical support as they could not “quickly and efficiently set up and operate the VRI”. The two affidavits of nurses Judge Hopkins quotes to show the staff can quickly and efficiently set up the VRI are

the two nurses who stated falsely that they called for a live interpreter after only thirty minutes of trying to get the VRI to work when in reality it was one hour and forty minutes.

Judge Hopkins points to the one occasion on which Bethesda finally got a live interpreter in the last year and one half to state that Bethesda will obtain a live interpreter if the VRI does not connect to support the finding that Bethesda's policy is reasonable. Yet Judge Hopkins disregards the fact that on this occasion, Bethesda failed to even call for the live interpreter until one hour and forty minutes later and that the only reason they called for a live interpreter was because they could not connect to the VRI at all, not the situation and not because the machine was blurry or freezing. (Yet the live interpreter got there immediately within twenty five minutes and could have ensured effective communication from almost the beginning of the treatment if called immediately.) In fact, the few times they have called for a live interpreter since 2012, have only been because the machine does not connect at all. Defense counsel acknowledged this during argument when he stated it is undisputed that they have called interpreters when they cannot get the VRI connected. Further when defense counsel was asked during oral argument, if there is a time period they will work on the VRI if it does not work, he responded there is **no set time period**, it is up to the staff. Bethesda's policy may be that they will get a live interpreter if VRI is not effective, but their practice as confirmed by their sign "if you request a live interpreter, you must pay for same" is that they will only provide a live interpreter if they cannot get the VRI connected and even this does not happen except on very rare occasions. [D.E. 5-17]

Lastly, as is shown by Bethesda's employee affidavits, technical staff often must be called to help operate the VRI. The fact that a technician and/or communications officer often have to be present to even get the VRI started or to continue to work is a problem in and of itself under the regulations as the privacy of the deaf person is constantly intruded upon. In point of fact, during

Weiss's last labor and delivery tour, Bethesda had their technical person, David Neff, present during the entire meeting which caused Weiss great discomfort as she felt her privacy was invaded. This is in violation of the regulations that "in order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability" 28 C.F.R. 36.303. There can be no more private and intimate time than when a woman is giving birth. Ms. Weiss already felt uncomfortable when she had to discuss her generic concerns with the Mr. Neff present, the Hospital Technician, during the tour. (D.E. 24-21). If she is forced to have him present along with a machine, when she will be in various stages of undress, pain and extreme physical and emotional stress, this would clearly be an invasion of her privacy. Bethesda would not be protecting her privacy but in fact invading it.

The undisputed record demonstrates that Bethesda's VRI system does not comply with all of the performance standards and the regulations of 28 C.F.R. 36.303 and as such cannot be **relied** upon to **ensure** effective communication in such a monumental occasion as childbirth. That is the sole reason plaintiffs have filed these motions, again only to ensure they will be able to communicate effectively when their baby is born.

**Objection 1(b): Effectiveness for the birth of Plaintiffs' child**

"Whether a particular aid is effective to provide this equal opportunity to benefit from the medical services provided by Bethesda largely depends on context, including principally, the nature, significance, and complexity of treatment, and the ultimate decision as to what measures to take and aids to use rests with the public accommodation, provided that the method chosen results in effective communication. 28 C.F.R. § 36.303(c)(1)(ii). Judge Hopkins erred when he failed to consider many of the circumstances which Margaret Weiss stated would occur during the

birth of her child and which would be expected to occur during any childbirth and how VRI could and would possibly be used.<sup>1</sup> However, the law requires that all such circumstances be addressed as communication must be ensured throughout the birth of plaintiffs' child. Thus the legal conclusions in the Report and Recommendations are in error.

Throughout the hearing and the motions and responses, Plaintiffs detailed issues which will make the use of a VRI *impossible during her childbirth*, such as positioning of her body, multiple speakers, multiple deaf persons in the room, emotional and high stress communications, the pain level, closing of her eyes and many, many other factors. All of these situations are ones which are common and will occur during any childbirth, (with the exception of multiple deaf persons), therefore they should have been considered and addressed by defendants. The only circumstance which was addressed at all that plaintiffs raised, was how a VRI might "fit in places where an in-person interpreter might not be able to fit" and this was addressed by Judge Hopkins who then stated there is "no reason a laptop VRI cannot be similarly positioned to crouch or kneel on the floor". Judge Hopkins failed to address how the laptop will be held or balanced, in what position and how plaintiff in pain could be expected to see a small 2-D screen down low as opposed to a live interpreter who is signing in 3-D and whose signing space is much bigger. Further it is

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<sup>1</sup> Judge Hopkins does not explain why he failed to address many of the situations. He did however state in a footnote he found Margaret Weiss to be not credible simply because she stated she planned to have an epidural and natural childbirth. To her, natural childbirth is a vaginal birth in which she will be awake during delivery. "Natural childbirth" is defined as a vaginal delivery in which the mother is more actively involved in the delivery mechanics than in the usual childbirth. In natural childbirth, the mother is awake during delivery, often without general anesthesia, has actively trained in the birthing process and is attended by her partner at the time of delivery." See Segen's Medical Dictionary definition of "Natural Childbirth". © 2012 Farlex, Inc. What is troubling is that Judge Hopkins quoted two nurses, Rivera and Kerr, in DE 19-11 and DE19-9, in two different places in his report, apparently finding them credible, despite the evidence which clearly reveals the time period they put in their affidavits is blatantly false yet somehow finds fault with Weiss for her choice of words.



apparent Judge Hopkins did not consider the implications of putting a laptop with a stationary camera in a low position as it would **be impossible** for the camera which must be level and facing the deaf person to see the deaf person if she is up high.

This also does not take into account that three deaf people would be involved in the birth – Ms. Weiss, Mr. Reyes, and Ms. Weiss’ Mother – all of whom are deaf, and many different speakers in the room. A video or a laptop could not be pointed so the camera can see each of the three deaf persons speaking, cannot interpret for any of the companions while focused on Ms. Weiss, cannot interpret for Ms. Weiss when focused on Mr. Reyes. An interpreter can quickly and easily change focus from one deaf person to another. In addition, a remote interpreter cannot identify to the deaf person who the speaker is, so the interpreter cannot distinguish to Ms. Weiss if the speaker is the doctor, nurse, anesthesiologist, neonatologist, the VRI technician, or a family friend.

Lastly, as is common knowledge for any technology and has been proven again and again here is when the machine is moved, connectivity becomes an issue. (See Declarations of nurses stating the VRI could not be used in the hallways, as well as Declaration of Wynne regarding the fact that the VRI had problems connecting when moved to a different area. The only other factor Judge Hopkins considered was the “complexity” of the communication and again cited Schoenbach, the owner of the VRI company, to say they have an option for picking a certain interpreter based on their skill in a particular area or their gender. Judge Hopkins then stated this was not shown with a live interpreter. Indeed this factor is exactly why using a local interpreter agency is much more likely to ensure effective communication. The local interpreting agency Bethesda uses, Nationwide Interpreting Resource, Inc., being intimately familiar with the local deaf population and in particular Weiss in this situation would provide the interpreter who is in

fact best for her to effectively communicate. There is no dispute that they would be able to get a live interpreter in less than an hour and in most situations less than a half hour in most situations due to the number of interpreters who reside in Palm Beach County as even defense counsel admitted during oral argument.

The fact that there is no per se rule that VRI cannot be used in childbirth is of no moment. The DOJ has not put such prohibitions in place only because in rural areas or in a true emergency, it may be difficult to get a live interpreter. See D.E.24-1. The DOJ has stated again and again that VRI has limitations and may not be appropriate for some situations. These limitations, whether or not they can occur in every birth, must be considered. The DOJ has stated such situations as limited ability to see or move hands, head or arms, pain issues, and multiple people in the room as situations which must be considered when determining if VRI is effective. See Resolution Agreement Between United States and St. Frances Hospital, D.E.5-2 as well as Appendix A to Part 36, Department of Justice Guidelines in 75 FR 56236, 56270 (2010)<sup>2</sup>. In fact significant pain has specifically been listed as a situation in which VRI will not be effective. See Dominion Hospital, Franciscan and Heisley Agreements attached as D.E. 5-12, 13, 14. Notwithstanding the presentation of this evidence, the Defendant **did not admit one scintilla of evidence** relating to

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<sup>2</sup> After consideration of the comments and the Department's own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in § 36.303(f).

how this video equipment, which is comprised of a pole with a monitor and a camera or a laptop, will be placed during a birth, how can it be moved, how can the interpreter determine when several people are speaking or when several deaf people are signing, how it can be used when an epidural is given, or when the pregnant woman is walking through the room, bending over or closing her eyes.

Plaintiffs on the other hand not only provided the Court with all the situations they believe they will encounter and the difficulties with these with VRI, they also provided the Court with the Declarations of Dr. Judy Kegl and David Scott to explain how VRI and a live interpreter are different and how VRI would not be appropriate for childbirth. David Scott has worked with VRI for twenty years and is the Chief Technology Officer for Absolute Quality Interpreting Services which utilizes both live and VRI interpreters and is uniquely qualified to testify about its limitations in every childbirth. Dr. Kegl as a neuro-linguist who specializes in American Sign Language and as a Certified Interpreter for the Deaf herself is intimately familiar with all that needs to occur and what does occur during childbirth. Yet Judge Hopkins did not refer to these Declarations at all during his Report and Recommendation.

Many of the situations in childbirth are ones in which a VRI machine **cannot** be effective. When a woman closes her eyes from the pain of labor, she **cannot** see the VRI screen, while an onsite interpreter can physically touch her and do tactile signing in her hand. When a woman is in childbirth and is screaming in pain, the VRI unlike an onsite interpreter **cannot** keep moving around the room to hear what a person is saying and still allow the deaf persons in the room to see the screen. A VRI machine **cannot** quickly move to different positions up high or lower or move down the hallway if a woman needs to be moved to an operating room and is in critical stage of

her labor, (the VRI loses connectivity D.E. 19-6) to accommodate the changing needs during a labor and delivery of both the woman in labor and the hospital staff.

For the twenty-five years since it was enacted, the Americans with Disabilities Act obliges public accommodations to take such steps as may be necessary to ensure effective communication during all moments of medical treatment with deaf persons. There truly can be no other medical treatment more significant when one is awake and in need of effective communication than bringing a new life into this world. The nature of childbirth as outlined above as well as the significance of this treatment is of utmost importance in determining whether an auxiliary aid is appropriate. Plaintiffs raised many, many issues which would make VRI difficult and even impossible which were not addressed by Defendants who must ensure effective communication. Assuming *arguendo* Bethesda's policy and even their practice was somehow found to be reasonable, there is absolutely no provision under the law that says Plaintiffs must use an auxiliary aid when it is clear that it cannot ensure effective communication throughout her labor and delivery. In fact, the opposite is true, as the ADA Title III specifically states that Plaintiffs are not required to engage in futile gestures. 42 U.S.C. 12188(a)(1) and the remedy for Title III is injunctive relief.

Yet this is exactly what Judge Hopkins report and recommendation mandates that plaintiffs go through the emotional distress and frustration of having to use a device they know cannot ensure effective communication throughout. Plaintiffs are not requesting that VRI not be used at all and if it works, it can certainly be used until a live interpreter arrives, but what they are requesting is that this Court enjoin Bethesda from failing to call for a live interpreter immediately when they arrive so that effective communication can be ensured throughout the childbirth as is required under the law. A live interpreter is a reasonable accommodation under the law, just as a VRI can

be **but all** factors which comprise the nature of the situation, must be considered to determine which auxiliary aid will **ensure** effective communication in this situation as is required. This analysis is necessary and has been done by many other courts in other situations requiring sign language interpreters. In Tugg v. Towey, 864 F. Supp. 1201 (S.D. Fla. 1994) the Court granted a preliminary injunction requiring defendant to provide mental health counselors who were fluent in American Sign Language where even qualified interpreters did not ensure effective communication during therapy. So even though they were providing sign language interpreters in that case, the Court found this was not as effective as providing mental health counselors who themselves were fluent in American Sign Language so they could provide direct services. Also see Clarkson v. Coughlin, 898 F.Supp. 1019(S.D.N.Y. 1995) Crawford v. University of California, 440 F. Supp. 1047 (M.D.N.C. 1977 Hernandez v. County of Monterey Case No: 5:13-CV-2354-PSG(N.Dist.Ct.Calif 4/14/15) and Zachary Featherstone v. Pacific Northwest Univ., :CV-14-3084SMU(E.D.Wash.2014, DE 24-19).

There have been repeated documented problems with the VRI system at Bethesda which continue as recently as a few weeks ago. Further, plaintiffs have shown many situations during childbirth in which VRI cannot be used. Yet Bethesda still refuses to agree that they will call for a live interpreter when plaintiffs arrive for childbirth. They have refused all pre-litigation requests for same by plaintiffs, their advocate and counsel and have vehemently opposed these Motions which seek only to ensure that they will call for a live interpreter for the child birth. These facts alone reveal Bethesda's policy and practice, that plaintiffs must try and go through childbirth using the VRI until it does not work which could be during the middle of a very delicate serious moment of medical care, and then if they decide to, they will call for an onsite interpreter. These

futile gestures in a situation where it will be impossible to use VRI are specifically not required under the law.

It is not mere hyperbole that the Plaintiffs have said that it is **impossible** to use the machine for labor and delivery under these circumstances. The Defendant has not proffered one iota of evidence how this machine can be effectively used during a birth, who would control the machine, or even where it could be placed during a birth. Ms. Weiss does not even know if the laptop would be balanced on her body while giving birth. While the Plaintiffs presented all of the reasons why use of the machine would be impossible, the Defendant's only rebuttal was that the machine may physically operate, but after attempts - and it does not, there is a laptop, and if that does not work, then a live interpreter can be obtained. For labor and delivery, this is unconscionable. The Defendant never responded to the *seminal* question of exactly how this device can be used to ensure that effective communication, both receptively and expressively, to the deaf patient and her companions. Not – does this machine turn on.

Despite all of this, Judge Hopkins determined the fact that their policy is reasonable, is enough. However having a policy that is reasonable is not enough if it does not ensure effective communication. Aikins v. St. Helena Hospital, 843 F. Supp. 1329, 1335 (N.D. Ca. 1994). In any event, Bethesda's policy is not reasonable. Apparently as is clear from their actions in the instant case, Bethesda's policy and practice does not allow them to consider the nature, complexity and significance of the situation that will be encountered, before requiring a deaf person to engage in futile gestures. This is simply not the law as stated repeatedly above. The law requires that they consider all of these factors **before** determining which auxiliary aid to use. When the factors as has been shown here reveal that a particular aid such as VRI **cannot ensure** effective communication,

an alternative aid that **will ensure** effective communication, here an onsite interpreter, must be used.

WHEREFORE, the Plaintiff are hereby requesting that this Court overrule the Report and Recommendation of the Magistrate Judge as the legal conclusions made were based upon errors of fact and law and enjoin the Bethesda Hospital from failing to provide Plaintiffs with in-person interpreter services for the birth of their child.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16<sup>th</sup> day of July, 2015, 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 via CM/ECF on this day to: John D. Heffling, Esquire, Sonneborn Rutter & Cooney, P.A. 1400 Centrepark Boulevard, Suite 400, West Palm Beach, Florida 33401.

Respectfully submitted this 16 day of July, 2015.

Disability Independence Group, Inc.  
2990 Southwest 35<sup>th</sup> Avenue  
Miami, Florida 33133  
Telephone: (305) 669-2822  
Facsimile: (305) 442-4181  
[rgoldstein@justdigit.org](mailto:rgoldstein@justdigit.org)  
[mdietz@justdigit.org](mailto:mdietz@justdigit.org)  
By: s/ Rachel L. Goldstein  
Rachel L. Goldstein, Esquire  
Florida Bar No.: 0095973  
Matthew W. Dietz, Esquire  
Florida Bar No.: 0084905

By: s/ Clara R. Smit  
Clara R. Smit, Esquire  
Turnpike Metroplex  
190 Route 18N, Suite 200  
East Brunswick, New Jersey 08816  
Telephone: (732) 843-6601  
Facsimile: (732) 843-6602  
[crsmitlaw@aol.com](mailto:crsmitlaw@aol.com)