

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D08-5

NELSON JULIO HERNANDEZ

Appellant,

vs.

MARIA DE LOS ANGELES GIL,

Appellee(s).

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DO NOT REMOVE FROM FILE

APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY FLORIDA,
CASE NO. 01-4874

INITIAL BRIEF OF APPELLANT
NELSON JULIO HERNANDEZ

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JUN 3 0 2008

MARY CAY BLANKS
Clerk, District Court of
Appeal, Third District

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
STATEMENT OF THE CASE AND FACTS	5
STANDARD OF REVIEW	9
SUMMARY OF ARGUMENT	9
ARGUMENT	10
A. THERE IS A CONFLICT OF LAWS BETWEEN THE COURTS OF PUERTO RICO AND FLORIDA WITH REGARDS TO PROBATE LAWS AND THE SUCCESSION OF REAL PROPERTY LOCATED WITHIN PUERTO RICO, WHICH THE LOWER COURT FAILED TO RECOGNIZE AND WHICH REQUIRES REVERSAL OF THE DECISION TO HOLD "...NELSON HERNANDEZ IN CONTEMPT OF COURT FOR FAILURE TO DISMISS (PUERTO RICAN LAW SUIT) PURSUANT TO THE FEBRUARY 6, 2006 ORDER AND IMPOSING AND PURGEABLE FINE FOR SUCH CONTEMPT AND ORDER TO SHOW CAUSE".	10
B. THE GLOBAL SETTLEMENT AGREEMENT CLEARLY SET FORTH THAT NELSON HERNANDEZ HAS A RIGHT TO BRING "ANCILLARY PROCEEDINGS IN PUERTO RICO" AND THAT THOSE "ANCILLARY PROCEEDINGS WILL BE GOVERNED BY THE LAWS OF THE COMMONWEALTH OF PUERTO RICO"	13
C. LOWER COURT ERRED IN ASSUMING FLORIDA HAD JURISDICTION PRIOR TO PUERTO RICO WITH REGARDS TO THE ESTATES OF JOSE MANUEL HERNANDEZ AND ALICIA ABISLAIMAN HERNANDEZ; ACCORDINGLY PUERTO RICO WAS THE FIRST TO EXERCISE JURISDICTION OVER THE IRREVOCABLE TRUSTS WRITTEN IN PUERTO RICO AND OVER THE REAL PROPERTY RIGHTS OF THE CONDOMINUM IN PUERTO RICO	16
D. LOWER COURT'S ORDERS IMPOSING A \$10,000.00 DAILY FINE, FAIL TO SET FORTH FINDINGS THAT THE APPELLANT HAS THE ABILITY TO PAY SUCH A CONTEMPT FINE	17

CONCLUSION	17
CERTIFICATE OF TYPE SIZE AND STYLE	18

TABLE OF AUTHORITIES

Del Campo Bacardi v. de Lindzon, 845 So. 2d 33, n.5 (Fla. 2002).....	12
Heritage Corp. of South Florida v. Rivas, 289 So.2d 432, 434 (Fla. 3d DCA 1974)	12
Hernandez v. Gil, 958 So.2d 390 (Fla. 3 rd DCA 2007).	13, 14
In re Estate of Luis Joaquin Nicole Santos, 648 So.2d 277 (Fla. 4 th DCA 1995)	12
L'Argent v. Barnett Bank, N.A., 730 So.2d 395 (Fla. 2d DCA 1999)	5
Levin, Middlebrooks et al. v. U.S. Fire Insurance Co. 639 So.2d 606 (Fla 1994)	16
<i>Nelson Hernandez Abislaiman v. Maria de los Angeles Negron and Enrique Lopez Pereira,</i> Case No. KAC 03-7672 (903) (Puerto Rico).....	9, 10
Parisi v. Broward County, 769 So.2d 359 (Fla. 2000)	15
Plantation Company vs. Smith, 23 D.P.R. 394 (1916).....	11
Schwartz vs. Tribunal de Distrito, 73 D.F.R. 856 (1952)	11
<u>Other Sources</u>	
Fla. R. App. P. 9.130 (a)(3)(C)(ii) and (iii)	8
Article 9 of the Puerto Rico Civil Code, , (31 L.P.R.A. Sec. 9)	11
Article 10 of the Puerto Rican Code (31 L.P.R.A. Sec. 10)	11

STATEMENT OF THE CASE AND FACTS

This case concerns the only son of Puerto Rican citizens, Jose Manuel Hernandez and Alicia Abislaiman Hernandez (namely, the Appellant, Nelson Hernandez) and his rights to inheritance and succession. In 1999, Jose Manuel Hernandez Vicente and his wife Alicia Hernandez Abislaiman executed their wills in the Commonwealth of Puerto Rico and also executed an Irrevocable Trust setting forth that the Appellee Maria De Los Angeles Gil (a former secretary and office clerk for the family) would serve as the Personal Representative and Trustee of the family trust, and would administer the trust under the laws on the Commonwealth of Puerto Rico for the benefit of Nelson Hernandez, one of its beneficiaries. Throughout the underlying cause and related litigation, the Appellant, Nelson Hernandez, has argued that upon creation of his parents' will(s) and the irrevocable trust in 1999 and upon the death of his father in November of 2001, the trust was funded and irrevocable and cited to *L'Argent v. Barnett Bank*, N.A., 730 So.2d 395 (Fla. 2d DCA 1999) in support of his position. *Id.* (once created, a valid trust cannot be altered, amended, or revoked except by the exercise of a power identified in the trust).

Moreover, Appellant cited to Puerto Rican common law to explain that his mother, Alicia Abislaiman Hernandez could not later unilaterally revoke, alter or amend the irrevocable trust set in motion by the couple's joint act in 1999, in the

Commonwealth of Puerto Rico. When the personal representative and Appellee, Gil sought to introduce a new will and trust in year 2003, Appellant Hernandez introduced affidavits of witnesses willing to testify in the lower court that Doña Alicia Abislaiman Hernandez could not alter the Trust and/or her will from its 1999 version, because she was suffering from dementia and on medications that would bar such an act and that she had no intention of disinheriting her son, Nelson Hernandez.

Finally, the Appellant has argued that any attempt to override a Puerto Rican will and irrevocable trust would have to be performed and/or executed in accordance with Puerto Rican law. Throughout this and related litigation in Puerto Rico, the Appellant has argued and highlighted the fact that the Puerto Rican wills and irrevocable trust were never dismantled in accordance with Puerto Rican law. Accordingly, the Appellant, Nelson Hernandez, claims himself to be the sole heir to the Jose Manuel Hernandez Vicente and Alicia Hernandez Abislaiman trust and their respective estates which the Appellant, himself, helped to finance and build for the benefit of his family's wealth and his future retirement.

Without waiving the attorney-client privilege, on or about November 19, 2002, Nelson Hernandez, under the advice of predecessor counsel, executed a Global Settlement Agreement [“GSA”] that he was told provided his mother with a life-estate, and which he was assured would revert back to him upon his mother's death. In pertinent part, predecessor counsel informed Nelson Hernandez that the words in the Release which stated “except to the extent, if any, that the Releasor is a beneficiary by

law or by description in any such trust instrument,” would guarantee Nelson Hernandez’ standing to assert his rights under his parents’ 1999 Will(s) and the Jose Manuel Hernandez Vicente and Alicia Hernandez Abislaiman Irrevocable Trust, upon the death of his mother.

Moreover, the Section 11 of the GSA specifically provided that “Ancillary Proceedings in Puerto Rico will be governed by the laws of the Commonwealth of Puerto Rico.” Accordingly, the Appellant exercised that right in bringing this action before the Puerto Rican courts on November 6, 2003.

This instant appeal concerns the fact that on May 29, 2007, the appellate court in San Juan, Puerto Rico agreed with the Appellant, Nelson Hernandez, - - - at least to the extent that it concerns his family’s real property within Puerto Rico’s borders. With regard to what Puerto Rico describes as “immovable property,” and based on the authority vested in that Court by the Wills and Trusts executed by the Appellant’s parents in 1999, the Puerto Rican court declared that Apartment A-5 in the Torre de la Reina Condominium complex belongs to Nelson Hernandez, as the rightful heir to Jose Manuel Hernandez Vicente and Alicia Hernandez Abislaiman.

In short, the Puerto Rican Court stated:

The inheritance of [Nelson’s mother] Alicia Abislaiman . . .has not been part of the agreement in the GSA, nor could it have been pursuant to Puerto Rican law applicable to said [real] property, because then it would have constituted an agreement concerning a future inheritance, which is prohibited in [Puerto Rico’s] jurisdiction.”

Both the Appellant, Nelson Hernandez, and the Appellee, Maria de Los Angeles Gil, were duly represented by counsel in the Puerto Rican court system. Moreover, the Appellee, Maria de los Angeles Gil, raised and argued the doctrines of full faith and credit, judicial comity, conflict of laws, res judicata and forum non conveniens before the Puerto Rican courts in seeking to persuade the Puerto Rican court to dismiss the Appellant's cause- - - to no avail.

Upon being advised of the status of affairs before the Puerto Rican appellate courts with regard to Apartment 5 in the Torre de la Reina Condominium complex, in Puerto Rico, the lower court in Florida found the Appellant, Nelson Hernandez, to be in contempt of court and imposed a civil sanction in the amount of fifty thousand dollars (\$50,000.00) and imposed an additional fine of \$10,000.00 per day, for each additional day beyond December 18, 2007, in which the Puerto Rican case of *Nelson Hernandez Abislaiman v. Maria de los Angeles Negron and Enrique Lopez Pereira*, Case No. KAC 03-7672 (903) was not dismissed with prejudice.

This appeal concentrates on the conflict in decisions between the Florida Court and Puerto Rican Appellate Court as to which jurisdiction governs the rights to succession of real property located in Puerto Rico and specifically questions the authority of the lower court in Florida to sanction and condemn a party for merely exercising his rights to pursue ancillary proceedings in another jurisdiction, as afforded by the very GSA which the Appellee is seeking to enforce.

STANDARD OF REVIEW

Pursuant to Fla. R. App. P. 9.130 (a)(3)(C)(ii) and (iii), this appeal stems from the lower court's error in entering an order of civil contempt requiring the Appellant, Nelson Hernandez, to dismiss, with prejudice, the Puerto Rican action. Nelson Hernandez Abislaiman v. Maria de los Angeles Negron and Enrique Lopez Pereira, Case No. KAC 03-7672 (903) (Court of Appeals, Regional District of San Juan and Humacao, Puerto Rico, Section V) and the Florida civil action, that has already been administratively dismissed in the lower court entitled Nelson Hernandez Abislaiman v. Maria de los Angeles Negron, 11th Judicial Circuit Court Case No. 04-13995-CA-10. The lower court also abused its discretion in entering an order imposing an initial \$50,000.00 sanction followed by a civil fine of \$10,000.00 a day after December 18, 2007, should the Appellant fail to dismiss the causes of action with prejudice.

This case also concerns a conflict of laws and the deference that should be afforded to sister states such as the Commonwealth of Puerto Rico, with regards to the laws of succession of real property located in its borders.

SUMMARY OF ARGUMENT

The lower court erred in both (1) ordering the Appellant Nelson Hernandez to dismiss the Puerto Rican action as Puerto Rico has the exclusive jurisdiction to decide upon the succession of real property within its borders and (2) in imposing an initial monetary sanction of \$50,000.00 followed by a daily sanction of \$10,000.00 after

December 18, 2007, for each day that Nelson Hernandez does not dismiss with prejudice the Puerto Rican case entitled *Nelson Hernandez Abislaiman v. Maria de los Angeles Negron and Enrique Lopez Pereira*, Case No. KAC 03-7672 (903). Accordingly, the Appeal is taken of the lower court's December 3, 2007 "Order Holding Nelson Hernandez in Contempt of Court for Failure to Dismiss Actions Pursuant to February 6, 2006 Order and Imposing a Purgeable Fine for Such Contempt and Order to Show Cause" and the December 27, 2007 "Corrected and Amended Order Holding Nelson Hernandez in Contempt of Court for Failure to Dismiss Actions Pursuant to February 6, 2006 Order and Imposing a Purgeable Fine for Such Contempt and Order to Show Cause" (Composite Appendix¹ 1) as well as the "Order Denying Petitioner's Emergency Motion for Stay and Motion for Reconsideration and Motion for Stay of Order Holding Nelson Hernandez in Contempt of Court for Failure to Dismiss (Puerto Rican Law Suit) Pursuant to February 6, 2006 Order and Imposing a Purgeable Fine for Such Contempt, and Order to Show Cause" (App. 2).

ARGUMENT

A. THERE IS A CONFLICT OF LAWS BETWEEN THE COURTS OF PUERTO RICO AND FLORIDA WITH REGARDS TO PROBATE LAWS AND THE SUCCESSION OF REAL PROPERTY LOCATED WITHIN PUERTO RICO, WHICH THE LOWER COURT FAILED TO RECOGNIZE AND WHICH REQUIRES REVERSAL OF THE DECISION TO HOLD ". . NELSON HERNANDEZ IN CONTEMPT OF COURT FOR

¹ Appendix hereinafter "App."

FAILURE TO DISMISS (PUERTO RICAN LAW SUIT) PURSUANT TO THE FEBRUARY 6, 2006 ORDER AND IMPOSING AND PURGEABLE FINE FOR SUCH CONTEMPT AND ORDER TO SHOW CAUSE".

. On May 29, 2007, the appellate court in San Juan, Puerto Rico held that it had exclusive jurisdiction to determine the succession of real property located in the Commonwealth of Puerto Rico and that the Apartment No. 5 in the Torre de la Reina Condominium complex, belonged to Nelson Hernandez as the sole heir to Jose Manuel Hernandez and Doña Alicia Abislaiman Hernandez. (App. 3 and 4).

The Article 9 of the Puerto Rico Civil Code, , (31 L.P.R.A. Sec. 9) clearly establishes that:

“The laws relative to the rights of the family, or to the status, condition and legal capacity of persons, are binding on the citizens of Puerto Rico, even if they reside in foreign countries”.

Article 10 of the Puerto Rican Code (31 L.P.R.A. Sec. 10), states that:

“Movable property is subject to the laws of the nation of the proprietor; immovable property to the laws of the country where it is situated”.

From the beginning of its jurisprudence, the Supreme Court of Puerto Rico, has resolved that regarding immovable property located in Puerto Rico, their sale and disposition must be conducted in accordance with the laws of Puerto Rico. *The Plantation Company vs. Smith*, 23 D.P.R. 394 (1916). The Supreme Court in Puerto Rico also resolved that the assets of a trust are ruled by the law where the assets are located. *Schwartz vs. Tribunal de Distrito*, 73 D.F.R. 856 (1952) (following Puerto

Rican law despite the fact that the trust was created and legalized outside Puerto Rico):

"It must also be said, that issues related to the validity and the administration of an immovable property trust must be resolved on the basis of the laws prevailing in the jurisdiction where the immovable property is located, that is, on the basis of the laws of Puerto Rico, in the case at hand. Restatement of the Law of Conflict of Laws, sections 241 and 243; Land Trust in Conflict of Laws, pages 258, 263, 264; Knox v. Jones, N.Y. 369; Matter of Osborne, 151 Misc. 52, 270 N.Y. Supp. 616 and Swetland v. Swetland. 149 Atl, 907. That implies the need to apply our laws and it makes our courts the most convenient forum"

The fact that Apartment No. 5 in the Torre de la Reina Condominium complex, is located in Puerto Rico. Makes it an exception to rule, in that it is immovable property in which Puerto Rico is claiming exclusive jurisdiction to adjudicate its proper succession to Nelson Hernandez. As such, the Courts in Florida should afford comity to Puerto Rico to adjudicate real property rights in its borders. The decision of the Puerto Rican appellate courts to transfer the real property to Nelson Hernandez is in keeping with Florida common law. *See e.g., Heritage Corp. of South Florida v. Rivas*, 289 So.2d 432, 434 (Fla. 3d DCA 1974) (judgments of courts in Puerto Rico are entitled to full faith and credit in the same manner as judgments from courts of sister States). *See also In re Estate of Luis Joaquin Nicole Santos*, 648 So.2d 277 (Fla. 4th DCA 1995)(it is a general rule that the situs of real property generally governs the property's transfer, alienation and descent as well as the parties' capacities to contract with regard to that property). *See Del Campo Bacardi v. de Lindzon*, 845 So. 2d 33, n.5 (Fla. 2002)(*emphasis added*) (holding that even though separate causes of action can be tried within the State of Florida, both private and public interests

would be best served by litigating the claims regarding each trust in their principal place of administration, in that case, the Cayman Islands).

However, it is unclear whether this Court previously denied the Appellant's request to have Puerto Rican law applied with respect to the alienability of real property rights located in Puerto Rico, when it cited the public policy which favors settlements and stated that the language of the Global Settlement Agreement reached between the parties was "clear and unambiguous." *Hernandez v. Gil*, 958 So.2d 390 (Fla. 3rd DCA 2007).

As set forth infra, the language of the Global Settlement Agreement allowing ancillary proceedings to be brought in Puerto Rico, opens the window to allow Nelson Hernandez the relief he obtained by the appellate courts in Puerto Rico.

B. THE GLOBAL SETTLEMENT AGREEMENT CLEARLY SET FORTH THAT NELSON HERNANDEZ HAS A RIGHT TO BRING "ANCILLARY PROCEEDINGS IN PUERTO RICO" AND THAT THOSE "ANCILLARY PROCEEDINGS WILL BE GOVERNED BY THE LAWS OF THE COMMONWEALTH OF PUERTO RICO" . . .

Appellant, Nelson Hernandez, respectfully submits that Article 11 of the Global Settlement Agreement clearly contemplated ancillary proceedings and set forth that the ancillary proceedings will be governed by the laws of the Commonwealth of Puerto Rico. (App. 5)

Furthermore, with regards to the Appellant's rights, and pursuant to the subject release, Nelson Hernandez only released his rights to the property temporarily and

made the specific exception in the release that he was not releasing “to the extent, if any, that the Releasor is a beneficiary by law or by description in any such trust instrument,” (App. 6, emphasis added). The Appellant was and is a beneficiary in accord with Puerto Rican law as clearly set forth by the Puerto Rican Appellate Court decision (App. 3), and is clearly a beneficiary pursuant to the 1999 Will(s) and Irrevocable Trust Documents of Jose Manuel Hernandez and Alicia Abislaiman Hernandez to the Apartment located in Puerto Rico.

Accordingly, the Appellant respectfully believes that the Third District inappropriately struck out that exception to the releases, and Article 11 of the GSA when it rendered its decision and created this conflict of laws between its decision and that of the Appellate Court in and for the Commonwealth of Puerto Rico. *Hernandez v. Gil*, 958 So.2d 390 (Fla. 3rd DCA 2007).

Moreover, Appellant Nelson Hernandez respectfully submits that this Court and the lower court may have failed to question the parties’ legal capacities to enter into such a GSA contract concerning Puerto Rican real property rights, as the Florida decisions are completely void of the distinction clearly contemplated by the Puerto Rican Appellate Court, that the law of the situs of the property governs succession and alienation.

Rather than address the distinction to be made between the real and personal property located in Puerto Rico and Florida with regards to succession, the lower court ordered the Appellant to dismiss any real property rights in Puerto Rico, with prejudice

and imposed upon the Appellant, NELSON HERNANDEZ an initial \$50,000.00 fine and a daily fine of \$10,000.00 per day for each day after December 18, 2007, that the Puerto Rican case remains open.

The Appellant claims the imposition of a contempt fine to be improper as he is not in willful or contumacious violation of the lower court's order, such that would warrant the imposition of what is now a ONE MILLION DOLLAR (\$1,000,000.00) contempt fine or sanction. The Appellant, Nelson Hernandez, is merely pursuing the ancillary proceeding in Puerto Rico as contemplated by Article 11 of the Global Settlement Agreement as it relates to his real property rights in Puerto Rico, and in particular, the rights to Apartment No. 5 in the Torre de la Reina Condominium complex.

By imposing the contempt fine and setting forth such an egregious amount, the lower court proceeded in such a manner as to obviate the right of Nelson Hernandez to pursue the instant appeal and the appellate processes in Puerto Rico. Pursuant to Florida common law, the contempt sanction arguably interferes with power of appellate court to make its jurisdiction effective with respect to order on appeal. (App. 7).

The cases cited by Appellee Gil which prompted the lower court to enter such contempt sanctions and overextend the jurisdiction of this Court, are distinguishable, in that the Courts that can only order contempt if they are possessed of jurisdiction over the subject matter at issue. *See Parisi v. Broward County*, 769 So.2d 359 (Fla.

2000) (courts are granted contempt authority to enforce a judgment because the interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter) (*emphasis added*). In this case, the Appellant is arguing and the Puerto Rican appellate court have already held that Puerto Rico has the exclusive jurisdiction with regard to determining the rights to succession of real property located within its borders . *Id.* (balance must be struck with the necessity of preventing abuse of these contempt powers). *See also Levin, Middlebrooks et al. v. U.S. Fire Insurance Co.* 639 So.2d 606 (Fla 1994) (actually holding that absolute immunity must be afforded any act occurring during course of judicial proceeding, regardless of whether act involves defamatory statement or other tortious behavior, such as tortious interference with business relationship, so long as act has some relationship to proceeding).

By imposing such an egregious contempt sanction and/or ordering a party to dismiss a cause of action with prejudice, the lower court was trying to obviate the Appellant's right to an appeal and a determination of the conflict between the districts as to the succession of real property located in the commonwealth of Puerto Rico.

C. LOWER COURT ERRED IN ASSUMING FLORIDA HAD JURISDICTION PRIOR TO PUERTO RICO WITH REGARDS TO THE ESTATES OF JOSE MANUEL HERNANDEZ AND ALICIA ABISLAIMAN HERNANDEZ, ACCORDINGLY, PUERTO RICO WAS THE FIRST TO EXERCISE JURISDICTION OVER THE WILLS AND IRREVOCABLE TRUST WRITTEN IN PUERTO RICO AND OVER THE REAL PROPERTY RIGHTS OF THE CONDOMINUM IN PURTO RICO

As clearly set forth in the Puerto Rican decision, the courts of Puerto Rico had jurisdiction in 1999 upon the execution of Wills and irrevocable trusts by citizens of Puerto Rico, Jose Manuel Hernandez and Alicia Abislaiman Hernandez, and that jurisdiction remained with respect to the real property located within Puerto Rico's borders, namely, Apartment No. 5 in the Torre de la Reina Condominium complex, is located in Puerto Rico. Accordingly, that was the first jurisdiction to have authority over this cause.

D. LOWER COURT'S ORDERS IMPOSING A \$10,000.00 DAILY FINE, FAIL TO SET FORTH FINDINGS THAT THE APPELLANT HAS THE ABILITY TO PAY SUCH A CONTEMPT FINE

Finally, as set forth by Florida's common law, the lower court's order is improper in that it fails to set forth any factual findings that Nelson Hernandez has the financial ability to pay such an egregious fine of \$10,000.00 per day.

CONCLUSION

WHEREFORE, Appellant, Nelson Hernandez respectfully requests that this Court reverse and vacate the lower court's Orders entitled:

- (1) "*Order Holding Nelson Hernandez in Contempt of Court for Failure to Dismiss Actions Pursuant to February 6, 2006 Order and Imposing a Purgeable Fine for Such Contempt and Order to Show Cause*" dated December 3, 2007
- (2) "*Corrected and Amended Order Holding Nelson Hernandez in Contempt of Court for Failure to Dismiss Actions Pursuant to February 6, 2006 Order and*

Imposing a Purgeable Fine for Such Contempt and Order to Show Cause" dated December 27, 2007; and

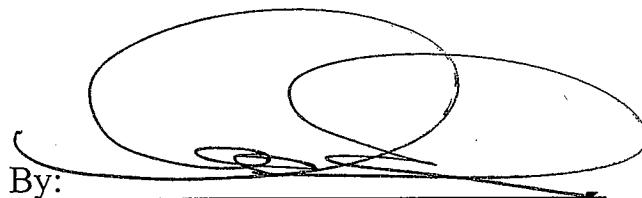
(3) "Order Denying Petitioner's Emergency Motion for Stay and Motion for Reconsideration and Motion for Stay of Order Holding Nelson Hernandez in Contempt of Court for Failure to Dismiss (Puerto Rican Law Suit) Pursuant to February 6, 2006 Order and Imposing a Purgeable Fine for Such Contempt, and Order to Show Cause"
dated December 28, 2007

Appellant Nelson Hernandez further requests that this Court remand this cause with instructions in accord with the reversal of the entry of these orders and issue such further relief as this Court deems just and proper under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief was furnished via U.S. Mail this 30th day of June 2008, to the following:

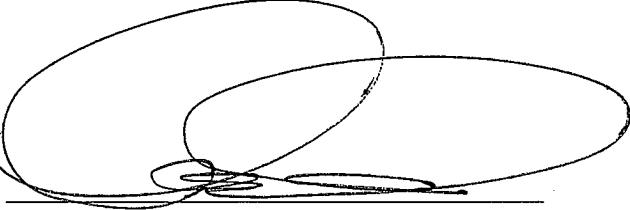
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In accordance with Florida Rule of Appellate Procedure 9.210(a)(2),
undersigned counsel certifies that the foregoing Initial Brief is printed in Times
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