IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FIRST DISTRICT

CASE NO. 1D12-1513

JERRY COLEMAN, individually,

and

JERRY COLEMAN, P.L.

Appellants,

v.

ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA
L.T. CASE NO. 2008-CA-3218

AMENDED REPLY BRIEF OF APPELLANTS TO ANSWER BRIEF OF COUNTRYWIDE HOME LOANS, INC.

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TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii-iv
INTRODUCTION	1
1. THIS COURT HAS JURISDICTION TO REVIEW THE CIRCUIT COURT'S FINAL DENIAL OF APPELLANTS' MOTION TO REOPEN THE CLOSED 'PROTECTIVE ORDER' CASE	1
2. THIS COURT HAS JURISDICTION TO ADDRESS EVERY MATTER THAT COULD AFFECT THE RESOLUTION OF THE CASE BE IT ONE RAISED BY THE PARTIES OR BY THE COURT ON ITS OWN INITIATIVE AND IT SHOULD DO SO IN THIS CASE	6
3. THIS COURT'S RECENT *RHEA* DECISION, MATTERS OF FIRST IMPRESSION PRESENTED HERE AND THE APPELLATE COURT'S ROLE CALL FOR DE NOVO LEGAL RULINGS AT THIS JUNCTURE	10
4. THIS COURT MAY ANSWER THE FOLLOWING QUESTIONS OF LAW AND WE RESPECTFULLY REQUEST THAT IT DO SO	12
CONCLUSION	13
CERTIFICATE OF SERVICE	14
CERTIFICATE OF COMPLIANCE	15

TABLE OF AUTHORITIES

CASES	**Page(s)**
Alley v. U.S. Dept. of Health & Human Services, 590 F.3d 1195 (11th Cir. 2009)	3, 4, 5, 8, 9, 11
Coventry First, LLC v. State, Office of Ins. Regulation, 2010 WL 478289 (Fla. 1st DCA 2010)	11
Dep't of Health v. Poss, 45 So.3d 510 (Fla. 1st DCA 2010)	12
Eastern Cement Corp. v. Dep't of Envtl. Reg., 512 So.2d 264 (Fla. 1st DCA 1987)	11
Florida Medical Ass'n v. Department of Health Education & Welfare, 479 F.Supp. 1291 (M.D.Fla.1979)	4
Florida Med. Ass'n, Inc. v. Dep't of Health, Educ., & Welfare, 3:78-CV-178-J-34MCR, 2011 WL 4459387 (M.D. Fla. 2011)("*Fla. Med. Ass'n II*")	4, 5
Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954 (Fla. 2005)	6
Herrera v. City of Miami, 600 So.2d at 561 (Fla. 3d DCA 1992), *review denied,* 613 So.2d 2 (Fla.1992)	9
James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. Rodale, Inc., 41 So.3d 386 (Fla.1st DCA 2010)	12
Layne v. Tribune Co., 146 So. 234 (Fla. 1933)	6

TABLE OF AUTHORITIES

Maturo v. City of Coral Gables, 619 So. 2d 455 (Fla. 3d DCA 1993) 9, 10

Mitchell v. S. Florida Baptist Hosp., 805 So. 2d 80 (Fla. 1st DCA 2002 8

Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So.3d 1201 (Fla. 1st DCA 2009) 5, 7, 12

Rhea v. Dist. Bd. of Trustees of Santa Fe Coll., 37 Fla. L. Weekly D1722, *3 (Fla. 1st DCA 2012) 10, 12

Sepro v. DEP, 839 So.2d 781 (Fla. 1st DCA 2003) 11

State, Dept. of Health & Rehabilitative Services v. Lee, 665 So. 2d 304 (Fla. 1st DCA 1995), *approved and remanded sub nom. Lee v. Dep't of Health & Rehabilitative Services*, 698 So. 2d 1194 (Fla.1997) 10

Toler v. Bank of America Nat. Ass 'n, 78 So.3d 699 (Fla. 4th DCA 2012) 10

Trushin v. State, 425 So.2d 1126 (Fla.1982) 10, 12

University of Florida v. Green, 395 So.2d 258 (Fla. 1st DCA 1981) 8

Utica Mutual Insurance Company v. Clonts, 248 So.2d 511 (Fla. 2d DCA 1971) 9

Westerheide v. State, 831 So. 2d 93 (Fla. 2002) 9

STATUTES

5 U.S.C. § 552 3

Chapter 119, Fla. Stat. 6, 11

TABLE OF AUTHORITIES

RULES

Fla.R.Civ.P. Rule 1.540 ..... 2, 7

INTRODUCTION

Appellants reply to the Answer Brief of Countrywide Home Loans, Inc. (the "(Countrywide Answer Brief)"[1], immediately followed by the specific page number to which we refer), filed by Countrywide Home Loans, Inc. ("Countrywide"—to include the former parent Countrywide Financial Corporation and both companies' successor-in-interest by acquisition, Bank of America).

1. THIS COURT HAS JURISDICTION TO REVIEW THE CIRCUIT COURT'S FINAL DENIAL OF APPELLANTS' MOTION TO REOPEN THE CLOSED 'PROTECTIVE ORDER' CASE

Despite Countrywide's call for summary affirmance of the lower court's denial of Appellant's motion to reopen the case below, or to dismiss our appeal for lack of jurisdiction, (Countrywide Answer Brief p.6), Countrywide knows that Appellants are entitled to direct review of the circuit's court's order. Countrywide concedes the point:

> "The only issue before this Court is whether the trial court erred in denying the motions to reopen the underlying case. Because the court

[1] We use this footnote's reference formats and abbreviations. We use them in our same-dated reply to the Answer Brief of Appellee [the Florida Attorney General (the "Attorney General", "AG" or the "Department"](the "(AG Answer Brief p.__)". In accord with Countrywide's footnote 2 answer brief statement, since July 1, 2008, Bank of America, shows to be the sole ultimate 'real party in interest' arguing for what is now but a nominal 'Countrywide'. We use this format for our Amended Initial Brief of Appellants "(Amended Initial Brief p.__)" and to the various supplemental brief/materials the parties submitted in response to this Court's show cause orders.

> rejected them on jurisdictional grounds that is the only issue Coleman can properly raise on appeal."

(Countrywide Answer Brief p.9) The AG tacitly acknowledged this Court's jurisdiction, instead focusing on its remarkable assertions that the Department is not now nor has it ever been a real party in interest to this appeal or to any of the underlying proceedings related thereto. Of course the AG was in fact a real party interest as matter of law and fact. Countrywide's repeated contention that Appellants' only option to have reviewed the trial court's 2012 orders was lost because they failed to make a Rule 1.540 motion in 2009 (Countrywide Answer Brief pp. 4, 6, 7-8) is easily rejected. First, only a party to a closed case, for very limited reasons, may seek to vacate or modify a judgment, order or decree in that case for a period of one year from the date of entry of the order, judgment or decree. Countrywide was entirely correct in describing the time periods and original party requirements applicable to a motion made under Rule 1.540 of the Fla.R.Civ.P. Because Appellants were not parties to the original proceedings below, we were not even notified of the Clerk's intended closing of the case. (R120-21) Countrywide knows we had standing to directly appeal or make a motion for relief under Rule 1.540. Theirs is a silly argument.

It is well established that courts rarely permit collateral attacks on existing injunctions and protective orders of the nature of that entered in 2008. That order is still in effect as to any person anywhere. It still prohibits the AG's office from

disclosing any of the subject public records. If a person believes he is injured by an injunction or protective order he must return to the issuing court to seek any relief from a still-in-effect injunction or protective order by having it vacated or modified. If the party is denied relief, he or she may seek timely review of the denial of his or her request. This is exactly what Appellants have done here.

The United States Court of Appeals for the 11th Circuit not long ago decided a case dealing with facts sufficiently close in relevant respects to those we respectfully ask this Court to resolve. *Alley v. U.S. Dept. of Health & Human Services*, 590 F.3d 1195 (11th Cir. 2009)(citation omitted). In *Alley* an Alabama resident made a Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") request for documents a Florida federal district court had enjoined a federal agency from releasing pursuant to a FOIA request made 30 years earlier.

The 11th Circuit dealt with essentially the same intertwined 'public records', 'disclosure', 'exemptions' and 'protective order/permanent injunction' law infusing the merits and affecting the resolution of Appellants' request to reopen this public records case. *Alley* involved a new FOIA request and a 2007 collateral federal court suit brought in Alabama that would directly affect an:

> "earlier litigation concern[ing] a federal agency's intent to release records of government payments to Medicare providers; [where] on privacy grounds, the providers persuaded a district court to enjoin the release of those records. While its meter might not match our own, that decades-old decision and the injunction issued control the closing couplet of this case."

Alley, supra at 1198. The earlier litigation was *Florida Medical Ass'n v. Department of Health Education & Welfare,* 479 F.Supp. 1291 (M.D.Fla.1979). The *Alley* court acknowledged that the validity of an asserted disclosure exemption could legitimately be called into question, even "a quarter of a century after [an] injunction issued". However, where an injunction (or here, a 'protective order' prohibiting disclosure of Florida public records that is effectively indistinguishable in effect):

> "The rule that a FOIA lawsuit may not be used to collaterally attack an injunction prohibiting disclosure of certain records does not mean there is no remedy for the party seeking those records. It means that the party must first succeed in having the issuing court modify or vacate the injunction barring disclosure. If that court refuses, the party may appeal that refusal. A direct attack, instead of a collateral one, is the proper procedure."

Alley, supra, at 1204. Thus, the *Alley* plaintiffs were required to return to the original court that issued the injunction, which they did. *See, Florida Med. Ass'n, Inc. v. Dep't of Health, Educ., & Welfare*, 3:78-CV-178-J-34MCR, 2011 WL 4459387 (M.D. Fla. 2011).

Moreover, the *Fla. Med. Ass'n II* court acted with the benefit of the appellate court's guidance concerning the merits, not just on the requirement that the plaintiffs first return to seek reopening of the 1979 case. *Alley*, for example, recognized that changed circumstances might render what was FOIA disclosure-exempt at one point no longer so:

> "Moreover, Alley's argument is precisely the type of collateral attack on the *FMA* injunction that we cannot permit, for reasons we have already discussed. *See* Part III, supra. Maybe the rationale behind that injunction has faded enough with time that it should be modified or vacated. Maybe not. Perhaps, as Alley also contends, a 'fundamental shift in Medicare's purpose, as well as dramatic increases in the number of Medicare participants,' have bolstered the public interests favoring disclosure. Perhaps not. If Alley wants to raise those issues, she can do so before the United States District Court for the Middle District of Florida in a proceeding to alter or vacate the injunction; we will not decide those issues here."

Alley, supra at 1209-10. In *Fla. Med. Ass'n II,* the federal district court said:

> "This case presents unusual circumstances. These include the Eleventh Circuit's recent decision in *Alley,* and the important questions raised by the proposed intervenors—whether Medicare records which identify Medicare providers' income, should remain protected by the 1979 *FMA* Injunction and its application of the Privacy Act and the privacy exemption to FOIA, given the alleged change in circumstances underpinning that injunction. These circumstances militate in favor of a determination that the Motions to Intervene are timely. Indeed, there appear to be no circumstances weighing against intervention."

Id. at 9 (footnote and citations omitted)(ordering reopening of the case, granting intervention to all requesting parties and treating various of these parties' requests as a motion to modify or vacate the 1979 injunction).

As we argued, both to this Court and below, it is undisputable that the documents at issue are Florida public records as long as the Attorney General's office has them. *Nat'l Collegiate Athletic Ass'n v. Associated Press,* 18 So.3d 1201 (Fla. 1st DCA 2009). And the office still possesses them.

2. THIS COURT HAS JURISDICTION TO ADDRESS EVERY MATTER THAT COULD AFFECT THE RESOLUTION OF THE CASE BE IT ONE RAISED BY THE PARTIES OR BY THE COURT ON ITS OWN INITIATIVE AND IT SHOULD DO SO IN THIS CASE

We believe this Court can readily discern which matters it should for various reasons address now, despite Countrywide's repeated but untrue claims of Appellants' "failure to preserve for appellate review" bona fide issues presented to this Court and Countrywide's mischaracterization that what we ask this court to do is render an "Advisory Opinion". *See, e.g., Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 962 (Fla. 2005)(nothing requires a court to "turn a blind eye" to the facts laid before it); *Layne v. Tribune Co.,* 146 So. 234, 237 (Fla. 1933)("What everybody knows the courts are assumed to know, and of such matters may take judicial cognizance"(citation omitted)). What Countrywide urges this Court to do is to turn a blind eye to, as Marvin Gaye's famous lyrics call it, "what's going on" (e.g., at best, the at best unseemly machinations below: the AG suing Countrywide in Broward Circuit court, but Countrywide bringing the action below to seal the relevant AG investigative records up in Leon County, away from glare of press and public alike; a brief hearing prohibiting Chapter 119 AG disclosure of 88,000+ pages of documents without the court ever seeing more than a "sampling' of whatever Countrywide brought to that hearing and just how

many documents could realistically have been reviewed in ten minutes)—'what went on' was about as "secret[] [of a] proceeding[s]" as one can pull off in a Florida court. *See Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1214 (Fla. Dist. Ct. App. 2009). Well, so far. Countrywide mistakenly contends that this Court lacks jurisdiction to weigh in on issues beyond simply whether or not the lower proceeding must be reopened. This Court can and should not hold back regarding the scenario that played out in late 2008.

The many reasons for and the legal authority under which we seek modification or vacating of this continuing protective order were clearly before the court below for three full months before the lower court denied our motion to reopen the case and our motion to reconsider its denial. (R188-89, 184-85) The Court had access to the case file and in early December 2011 we provided the court with an updated petition with copies of all relevant prior materials for its inspection and ruling. (R 122-183) This material was provided to Countrywide's counsel and the AG. (R125) The court denied us any hearing, ruling that we lacked standing to seek still existent public records, noting only that we took no direct appeal and that we sought no Rule 1.540 relief. We could not have done either of the latter, never having been parties to the original proceedings.

Moreover, not only did we provide Countrywide with our 2011 and 2012 lower court submissions (addressing all the myriad issues upon which we ask this Court to provide guidance), on May 25, 2012, Countrywide submitted to this Court a Reply to Appellant's Response to Order to Show Cause (Countrywide Rep. Show Cause Order p.2 *citing* (R4-24)). This Countrywide filing alone evidenced that not only Countrywide had reviewed our submissions to this Court, but it specifically referred this Court to its own 2008 filings in the original proceedings going to the merits of what constitutes a protectable trade secret in this case. (R4-24) Thus the case law and the filings and pleadings were all reviewed and considered, and the law, issues, argument and facts related to the case have all been sufficiently "raised below" to permit this Court's ruling on each of them in this appeal.

This Court has held that "'[i]t is not our function to search the record for any support of an order and to affirm it with a blind eye to the reasons [or lack thereof] for the fact-finder's rulings.'" *Mitchell v. S. Florida Baptist Hosp.*, 805 So. 2d 80, 82 (Fla. 1st DCA 2002), *quoting University of Florida v. Green,* 395 So.2d 258 (Fla. 1st DCA 1981). Countrywide's restricted view of this Court's jurisdiction, once properly invoked, to the single issue of reopening of the case below was not what the appellate court limited itself to in *Alley, supra.* Nor have Florida's appellate courts imposed such untenable limits on themselves.

The *Alley* court gave guidance to a lower court concerning various aspects of the law to be applied, leaving the actual review of the public records to the district court. That is Florida's practice too.

In Westerheide v. State, 831 So. 2d 93 (Fla. 2002), the Florida Supreme Court held:

> "Further, once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. *See id.* at 1130. Thus, to the extent that Westerheide's due process claims raise facial challenges to the Ryce Act, we find them appropriate to consider in our review of this matter.

At 105. Similarly, in *Maturo v. City of Coral Gables*, 619 So. 2d 455 (Fla. 3d DCA 1993), the Court said:

> "Such a review is entirely consistent with the above cited authorities, and with common sense. *See Herrera v. City of Miami,* 600 So.2d at 561 [(Fla. 3d DCA 1992), *review denied,* 613 So.2d 2 (Fla.1992)]. It is our responsibility, as part of the judicial review process, to insure that the Circuit Court has properly applied the law in order to maintain the integrity of the legal system and legal processes. We cannot, and should not, turn a blind eye to an incorrect application of the law. To allow a decision to stand where the correct law was wrongly utilized, simply because that particular law itself was applicable, does not provide a valid or just reason sufficient to support a legal decision. As stated by the Second District Court of Appeal in *Utica Mutual Insurance Company v. Clonts,* 248 So.2d 511, 512 (Fla. 2d DCA1971) (emphasis omitted):
>
> > '[Judicial discretion] is not a naked right to choose between alternatives. There must be a sound and logically valid reason for the choice made. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, and there is no valid reason to support the choice made, then the choice made may just as well have been decided

> by the toss of a coin. In such case there would be no certainty in the *law and no guidance to bench or bar....'*

Maturo at 457; see, also, State, Dept. of Health & Rehabilitative Services v. Lee, 665 So. 2d 304, 305 (Fla. 1st DCA 1995), *approved and remanded sub nom. Lee v. Dep't of Health & Rehabilitative Services*, 698 So. 2d 1194 (Fla.1997)("Although not initially raised by the parties as an issue on appeal, sovereign immunity was an issue below and is properly considered here." *See Trushin v. State,* 425 So.2d 1126, 1129 (Fla.1982)(once appellate court has jurisdiction it may, if it finds necessary to do so, consider any item that may affect the case)). While the 2nd DCA used the term "cop out", we would not dare.

3. THIS COURT'S RECENT *RHEA* DECISION, MATTERS OF FIRST IMPRESSION PRESENTED HERE AND THE APPELLATE COURT'S ROLE CALL FOR DE NOVO LEGAL RULINGS AT THIS JUNCTURE

Countrywide's answer brief incorrectly cites *Toler v. Bank of America Nat. Ass 'n,* 78 So.3d 699 (Fla. 4th DCA 2012), as calling for an "abuse of discretion" standard of review. This Court holds that "[w]here purely legal issues of whether a document is a public record and subject to disclosure are involved, we have de novo review." *Rhea v. Dist. Bd. of Trustees of Santa Fe Coll.*, 37 Fla. L. Weekly D1722, *3 (Fla. 1st DCA 2012).[2]

[2] Though this decision appears to be still subject to revision or withdrawal, we are confident that this Court would not revise this particular holding describing the nature of Appellants' right involved in this case.

Additionally, while appellate courts usually defer to a trial court's interpretations and many factual conclusions regarding the trial court's own injunctions and protective orders, "'[t]o the extent [a trial court judge] interpreted the terms of [an earlier] judgment, which was entered by a different [trial] judge, we accord [the latter judge's] interpretation no deference and review the requirements of that judgment de novo.'" *Alley, supra at* 1202. Here, just as in *Alley*, the judge who refused to reopen the case below was not the judge who first entered the protective order drafted by Countrywide's counsel. That order found almost 90,000 pages of public records to be trade secrets after what appears to have been a 10-minute "inspection of sample records". (R25-27)

For understandable reasons, the great majority of reported Florida appellate decisions involving Chapter 119, Fla. Stat., and its "trade secrets" exemption, have come from the two state appellate courts sitting in Tallahassee. We found 13 such decisions, not counting four Supreme Court decisions of the "In re Amendments..." type. Three were decided by the Florida Supreme Court. Five were decided by this Court, all involving Florida state-level agencies, to wit: *Eastern Cement Corp. v. Dep't of Envtl. Reg.,* 512 So.2d 264 (Fla. 1st DCA 1987); *Sepro v. DEP,* 839 So.2d 781 (Fla. 1st DCA 2003); *Coventry First, LLC v. State, Office of Ins. Regulation*, 2010 WL 478289 (Fla. 1st DCA 2010);

James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. Rodale, Inc., 41 So.3d 386 (Fla.1st DCA 2010); and *Dep't of Health v. Poss*, 45 So.3d 510 (Fla. 1st DCA 2010). Along with deciding more Chapter 119/trade secrets cases than any other appellate court, and as many as the other four Florida district courts of appeal combined, this Court decided *Rhea*, *supra*, and *Nat'l Collegiate Athletic Ass'n, supra*, each of which is important in the review here.

For reasons (a) of this Court's frequency of treatment of the subject matter, (b) the need for the court below to apply this Court's own expressed precedent upon reopening and review of the subject records, and (c) in the interests of consistency in statewide guidance, this Court's should apply a de novo standard of review to rule on all the matters raised below or argued by the parties, including those raised in multiple responsive and reply briefs occasioned by this Court's orders for supplemental briefing. Finally, this Court should exercise its clear jurisdiction to determine any matter that could affect the case, even those it sees but have not been raised by the parties. *See Trushin v. State,* supra at 1129.

4. THIS COURT MAY ANSWER THE FOLLOWING QUESTIONS OF LAW AND WE RESPECTFULLY REQUEST THAT IT DO SO

With its failure to cite any case law authority in its March 1, 2012 order denying reopening (R188-190) or its order denying reconsideration (R184-185), the lower court seems to have confirmed the dearth of appellate or rule guidance

for Florida's trial courts in important areas of law which are not its prerogative to give. The following matters of law are before the Court, somewhat in this order for treatment, and could affect the resolution of the case:

> Does this Court have jurisdiction to review the lower court's order denying reopening? Does this Court have jurisdiction to rule on intertwined issues of law raised below or in these proceedings? What standard(s) of review apply? Does the right to request to inspect and copy a public record ever go stale as long as a state agency possesses the record? May a member of the public request that a state agency which withheld disclosure of a public record on the basis of a statutory exemption revisit the determination at a later date to see if changed circumstances no longer support the initially claimed exemption? Is there a time limit after which a request for public records cannot be made? Is the same person who once requested a copy of a public record that was withheld from disclosure on the basis of a claimed exemption precluded from asking at a later date? Did the trial court err in denying Appellant's motion to reopen the case below? Does a court owe an agency, which is presumed to comply with the law, any degree of deference in a *decision to disclose* a particular claimed trade secret document, as compared to an agency's *decision to deny disclosure*? If so, what degree of deference should be afforded the agency's determination *in favor of disclosure* and what are the relevant factors for a court to look at? Does trade secret protection extend to public records that might indicate a private or public party's fraud, deceit, crime or perpetuation of an injustice?

CONCLUSION

For the foregoing reasons and authority set forth here and in our other filings we respectfully request that this Court reverse the trial court order denying our motion to reopen the case. We also request that this Court address and rule on all issues and questions of law potentially affecting the outcome of the case to provide explicit guidance to the court below and other trial courts across the state.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 14, 2012, a true and correct copy of the foregoing was furnished via email to all counsel of record on the attached service list.

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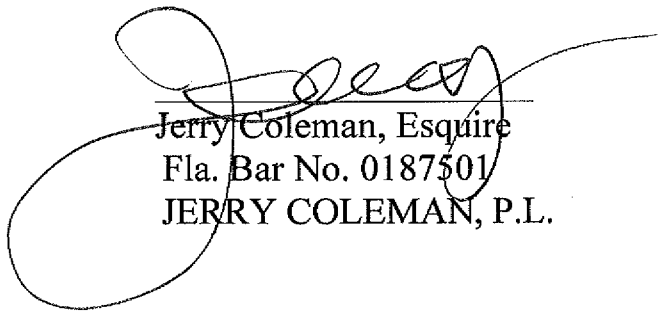
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Rule 9.210. It is typed in Times New Roman 14-point type and it is double spaced.



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CASE NO. 1D08-1137

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