

February 1, 2013

**Via Certified Mail and Facsimile**

Honorable Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

233764  
ENTERED  
Office of Proceedings  
February 1, 2013  
Part of  
Public Record

**Re: MC-F-21047, Frank Sherman, FSCS Corporation, TMS West Coast, Inc., Evergreen Trails, Inc. and Cabana Coaches, LLC –Acquisition and Consolidation of Assets –American Charters, Ltd., American Coach Lines of Jacksonville, Inc., American Coach Lines of Miami, Inc., American Coach Lines of Orlando, Inc., CUSA ASL, LLC, CUSA BCCAE, LLC, CUSA CC, LLC, CUSA FL, LLC, CUSA GCBS, LLC, CUSA GCT, LLC, CUSA K-TCS, LLC, and Midnight Sun Tours, Inc (with regard to the Nevada assets and operations, the predecessor entity “CUSA” and the current applicant “Evergreen”).**

Dear Ms. Brown:

Our firm represents the Livery Operators Association of Las Vegas (“LOA”). The LOA hereby submits this supplemental letter of clarification to bring to the attention of the Surface Transportation Board (the “Board”) certain gross misstatements and omissions in Evergreen’s legal brief, dated the December 18, 2012, which Evergreen styled as Reply to Petition to Reopen (“Evergreen’s Reply”).

The LOA further submits that the Board should also consider the following points and arguments in view of Evergreen’s mischaracterization of the LOA’s Petition.<sup>1</sup> In so doing, this letter will be divided into two parts, in the following order: The first part will summarize the general background facts of this matter; the second part will point out the specific misstatements and omissions in Evergreen’s Reply.

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<sup>1</sup> The LOA understands that the Board’s rules, in general, do not permit a reply to a reply. However, given Evergreen’s mischaracterization of the LOA’s Petition, acceptance of this supplemental letter of clarification in this narrow instance should help to clarify and create a more complete record. To the extent that a motion to file this letter is required, the LOA respectfully urges the Board to accept this letter into the record to create a complete record. This approach is certainly not unprecedented, as opposing counsel himself has previously utilized such a method in a prior matter on behalf of a CUSA affiliate. A true and correct copy of Page One of such supplemental letter of clarification that opposing counsel prepared in the aforementioned unrelated matter is attached hereto as Exhibit “1.”

Lastly, LOA just learned that Evergreen has decided to thumb its nose at the Board and strong-arm the staff at Nevada Transportation Authority ("NTA") by commencing its operations in Nevada, notwithstanding that CUSA only had lapsed Nevada certificates and that the instant Petition was being reviewed by the Board. A true and correct copy of a letter evidencing the same is attached hereto as Exhibit "2."

For all of the reasons noted in the LOA's Petition and in this letter in detail, Evergreen's actions are improper, illegal, and place the travelling public in Nevada into jeopardy, including: First, CUSA's certificate at issue has now lapsed and has not been properly reinstated. As such, Evergreen's instant operations in Nevada is in clear violation of Nevada law. See NRS 706.391(2)(e) (2009) (providing that for permits to be valid, transportation should be provided on a continuous basis); see also NAC 706.389 (requiring approval for cessation of operations). Second, Evergreen's vehicles and drivers have not been tested -whether they meet Nevada safety requirements. Evergreen's operations under these conditions places the travelling public in Nevada into jeopardy. See NAC 706.194. Lastly, Evergreen was previously on notice that the Commission of the NTA already declined to act on Evergreen's application to revive the lapsed certificates, until the Board issued its decision with regard to LOA's instant Petition.

### **General Background Facts**

On September 26, 2012, the LOA filed a Protest Brief before the NTA, in response to Evergreen's request to the NTA for approval to revive CUSA's Nevada Certificates of Public Convenience and Necessity (the "Nevada CPCNs"). The LOA's intervention before the NTA, with regard to the Nevada CPCNs, presents a unique and extraordinary set of circumstances: *Specifically, Evergreen grossly misrepresented its intention with regard to CUSA's Nevada operations to the Board and, as such, has more-recently been claiming powers before the NTA, which were not duly authorized and could not have been authorized by the Board.*

As a result of Evergreen's improper misrepresentations to the Board and the NTA, certain legal infirmities followed. These have been more fully discussed in the LOA's briefs filed before the NTA, copies of which were previously provided to the Board with the LOA's initial letter to the Board, dated October 17, 2012, and, in part, in the LOA's Petition before the Board.

By way of background, Nevada is a highly regulated state with respect to commercial motor transportation, as is the transportation market in Clark County, Nevada (Las Vegas). Unlike any other commercial market in the United States, casino gaming is indispensable to the continued viability of the state, with approximately forty (40) million tourists annually requiring safe and proper transportation in Las Vegas alone. As such, any risk to public safety would compromise the viability of the state as a tourist destination. Given this unique paradigm, the state's transportation demand can only be met with a uniquely specialized transportation effort that is sensitive to the safety needs of our visitors.

Accordingly, NTA has been entrusted by the Nevada Legislature to regulate intrastate motor carriers in Nevada. The purpose of these regulations *inter alia* is to ensure public safety, as well as to ensure adequate, economical, and efficient service of the traveling public and to foster sound economic conditions in motor transportation. See NRS 706.151. Most importantly, the NTA has the unique local expertise to appropriately execute its solemn responsibility with regard to such “guiding charter.”

### **Specific Misstatements and Omissions**

1. Evergreen’s Reply states that the “LOA fails to show the existence of *any new evidence or materials error*.” Evergreen’s Reply at Page 3, Paragraph 1 (emphasis added); see also Id. at Page 7, Paragraph 3 (arguing similarly).

**These statements appear to entirely overlook that, in its application before the Board, Evergreen specifically and categorically told the Board that it was not resuming operations in Nevada, and thereby the Board and the public have relied on such false statements, which have now definitively been demonstrated to be a complete misrepresentation by Evergreen.**

2. Evergreen’s Reply states that the “LOA *sat on its right*.” Evergreen’s Reply at Page 3, Paragraph 1 (emphasis added); see also Id. at Page 6, Paragraph 2 (stating that the “LOA had *ample notice and opportunity to express its concerns* . . . [in the context of Evergreen’s instant Application before the Board.]” (emphasis added); Id. at Page 2, Paragraph 4 (stating that the *LOA should have been aware of potential Nevada operations in June 2012*); cf. Id. at Page 2, Paragraph 3 (admitting, albeit indirectly, that “Evergreen has . . . [*only*] now stated its . . . [real] intention . . . in Nevada” (emphasis added)).

**Again, Evergreen’s allegations of proper notice appear to entirely overlook that, in its application before the Board, Evergreen specifically and categorically told the Board that it was not resuming operations in Nevada, and thereby the Board and the public have relied on those statements and therefore, were not properly noticed. As such, the LOA’s failure to act on the initial application was due to Evergreen specifically representing in its application that it was not resuming CUSA’s Nevada operations.<sup>2</sup>**

3. Evergreen’s Reply states that its newly-stated request to also conduct Nevada operations is “the *logical outgrowth* of Evergreen’s [application to the Board].” Evergreen’s Reply at Page 3, Paragraph 2.

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<sup>2</sup> Evergreen appears to claim that the LOA should have filed a Petition to Reopen at the end of October. See Evergreen’s Reply at Page 6, Footnote 2. There is, of course, no time limitation as to when such Petition may be filed. Evergreen’s Reply also fails to note that the LOA filed a Protest before the NTA, the agency and its Commissioners that Evergreen had been attempting to bypass in order initiate intrastate transportation.

**This statement itself appears to be entirely illogical, as the decision to bypass obtaining a Nevada Certificate of Public Convenience (“CPCN”) and perform intrastate commercial transportation services is not a “logical outgrowth” but rather an intentional act to mislead the Board and the public.**

4. Evergreen’s Reply states that “Evergreen *obviously* was still open to the possibility of conducting . . . [Nevada] operations.” Evergreen’s Reply at Page 4, Paragraph 3 (emphasis added); see also Id. at Page 4, Paragraph 1 (stating that purchasing transportation assets in a certain market *obviously* means use of those assets in that market); Id. at Page 8, Paragraph 2 (similarly arguing “*obviousness*”).

**As noted above, Evergreen’s specific denials -in its application to the Board- of planned operations in Nevada cannot make such expressly denied matter obvious.<sup>3</sup> Furthermore, under Nevada law, there are no property rights in a CPCN. See NRS 706.398(2) (empowering Nevada regulators to revoke certificates that are not in compliance); see generally Rosenthal v. Nevada, 434 U.S. 803 (1977) (holding that there is no property right in a gaming license). As such, without meeting regulatory requirements in Nevada, there was no automatic right to a CPCN.**

5. Evergreen’s Reply states that it can now operate in Nevada “pursuant to the Board’s decision,” because “nothing” in its application foreclosed that possibility. See Evergreen’s Reply at Page 5, Paragraph 2.

**This statement again appears to entirely overlook that, in its application before the Board, Evergreen specifically and categorically told the Board that it was not resuming operations in Nevada, and thereby the Board relied on that representation as also reflected in the Board’s specific Order. Accordingly, the Board has not and could not have granted any such authority.**

6. Evergreen’s Reply appears to indirectly imply that its August letter to the NTA stating that “Evergreen” now wanted to operate in Nevada could not establish any undisclosed plans with respect to “CUSA-Evergreen Application” to the Board. See Evergreen’s Reply at Page 5, Footnote 1.

**First, the specific timeline belies such statement. The CUSA-Evergreen Application was submitted in June, 2012. In that application, CUSA-Evergreen specifically disavowed any Nevada operations. In August 2012, Evergreen appears to have changed its mind and**

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<sup>3</sup> Later in Evergreen’s Reply, Evergreen offers up a string of legal authorities for the general proposition that certain thing that the complainant could have foreseen should not be a basis for reopening. See Evergreen’s Reply at Page 6, Paragraph 2 and Page 7, Paragraph 1. All of the legal authorities set forth by Evergreen in its brief, however, are distinguishable and *offer no legal support whatsoever for the proposition that the specific and categorical denial of something by an applicant in his or her application should make such act foreseeable.*

only informed the NTA of its intent to operate in Nevada based on the Board's imminent anticipated approval of the CUSA-Evergreen Application. Indeed, Evergreen itself admits that "[only] [f]ollowing the filing of the . . . [CUSA-Evergreen] Application, Evergreen identified certain business opportunities in Nevada . . . ." See Evergreen's Reply at Page 5, Paragraph 2.

Second, by attempting to distinguish between what occurred before the Board with respect to its Application and the representations it only made to the NTA as to the Board's approval of the CUSA-Evergreen Application became imminent, Evergreen continues its practice of making misrepresentations.

7. Evergreen's Reply states that the LOA's Petition is "a thinly-disguised effort" for LOA members to "keep the motorcoach business opportunities in the Las Vegas area to themselves." Evergreen's Reply at Page 1, Paragraph 1.

As explained in the LOA's Petition, CUSA ceased its Nevada operations more than six months ago and, when it did, Nevada operators had to fill the vacuum –by hiring additional staff and by committing additional resources to those transportation services that CUSA had completely abandoned. As such, the exit of CUSA from the Nevada market created significant costs to be borne by those left behind and stranded passengers who had pre-paid for transportation services that CUSA was not to perform due to its exit from the market. As such, Evergreen's instant application does not restore the same level of competition in the Las Vegas market, as Evergreen alleges. Accordingly, Evergreen's argument that the LOA is anti-competitive as Evergreen is merely seeking to restore the same level of competition in the Las Vegas market is completely without merit.<sup>4</sup>

8. Evergreen's Reply goes on at length stating the reasons that the Board should not consent to the concurrent jurisdiction of the NTA, pursuant to 49 U.S.C. § 13101(a)(1)(E), and/or cooperate with that agency. See Evergreen's Reply, Pages 10 through 14.

The length of this argument reveals the depth of Evergreen's desperation. Indeed, it was before the Commissioners of the NTA that Evergreen's complete misrepresentations as to the Nevada market were first uncovered. Having made such misrepresentations, it is not at all surprising that Evergreen now seeks to avoid having to face that governing body.

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<sup>4</sup> Later in Evergreen's Reply, Evergreen offers up a string of legal authorities for the general proposition that the Board should not assist the LOA in achieving some alleged "anti-competitive" goal. See Evergreen's Reply at Page 9, Paragraph 2. Again, as set forth above, Evergreen's argument that the LOA is anti-competitive, as Evergreen is merely seeking to restore the same level of competition in the Las Vegas market, is completely without merit. Moreover, all of the legal authorities offered up by Evergreen in its brief are distinguishable and *offer no legal support for the proposition that false misrepresentations by an applicant to the Board should be ignored if the applicant making such false misrepresentation to the Board can then invent and attribute some negative motive to the person that clearly proves the falsity of the applicant's statements to the Board.*

More importantly for policy purposes, Nevada is a highly-regulated state with respect to commercial motor transportation, as is the transportation market in Clark County, Nevada (Las Vegas). The NTA has been entrusted by the Nevada Legislature to regulate intrastate motor carriers in Nevada. The purpose of these regulations *inter alia* is to ensure public safety, as well as to ensure adequate, economical, and efficient service of the traveling public and to foster sound economic conditions in motor transportation. See NRS 706.151.

9. In Evergreen's Reply, Evergreen argues that it should be able to receive the currently-lapsed Nevada CPCNs, as it is not its fault that they could not resume operations by October 12, 2012, as specifically required by Nevada statute. See Everson's Reply, at Page 13, Footnote 7. Evergreen further claims that LOA was the cause of such delay. See id.

Again, Evergreen's arguments evidences its lack of understanding of the specific jurisdictional requirements it seeks to operate under as an intrastate carrier in Nevada. Thus, the only reason for the instant delay is Evergreen's misrepresentations to the Board, which were only uncovered as a result of Evergreen's surprising, unprecedented, and improper request made to the NTA. As such, it is improper for Evergreen to try to lay blame elsewhere. Furthermore, at present there is no NTA Order that has extended the October 12, 2012 deadline for the expiry of the Nevada CPCNs.

Indeed, as noted above, in a most cavalier manner, Evergreen now decided to thumb its nose at the Board and strong-arm NTA staff by commencing its operations in Nevada with lapsed CPCNs. Evergreen has done so in spite of that fact that its actions are clearly improper, illegal, and places the travelling public in Nevada into jeopardy, or the fact that it is on notice that there is an ongoing review by the Board which was also duly considered by the Commissioners of the NTA.

For the foregoing reasons, the Board should re-open the application by granting the LOA's Petition and refer Evergreen's application for proposed Nevada operations to the NTA, to fully evaluate such newly-requested intrastate operations.

Respectfully submitted,



Kimberly Maxson-Rushton, Esq.  
Louis V. Csoka, Esq.  
Cooper Levenson, Attorneys at Law  
Attorney for the LOA

Honorable Cynthia T. Brown  
February 1, 2013  
Page 7

cc: As set forth in Certificate of Service, attached as Exhibit "3" hereto.

# EXHIBIT 1

# EXHIBIT 1

STEPTOE & JOHNSON LLP  
ATTORNEYS AT LAW

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Washington, DC 20036-1795  
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May 28, 2010

VIA Electronic Filing

Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
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227170  
227171  
227172

Re: STB Docket Nos. MC-F-20904, MC-F-20908, MC-F-20912 – Petition of Coach USA, Inc. and Megabus Northeast LLC to Reopen Approval of Fourth Amendment

Dear Ms. Brown:

Coach USA, Inc. and Megabus Northeast LLC (jointly, "Coach USA") hereby submit this letter to bring the Board's attention to certain gross misstatements and omissions in the May 17, 2010 Opposition of Greyhound Lines, Inc. and Peter Pan Bus Lines, Inc. ("GLI/PPB") to the above-referenced Coach USA Petition to Reopen. Coach USA submits that the Board should consider the following points in view of the mischaracterization of Coach USA's Petition by GLI/PPB.<sup>1</sup> The Board should also take note of the fact that GLI/PPB do not dispute the fact that circumstances have changed since the Fourth Amendment to their pooling agreements was approved.

First, and most starkly, GLI/PPB characterize the Coach USA Petition as a means to "eliminat[e] one of the company's main rivals on the Northeast Corridor bus routes – namely, the BoltBus line of enhanced bus service authorized by the Fourth Amendment." (GLI/PPB Opposition at 1). Playing on

<sup>1</sup> Coach USA understands that the Board's rules do not permit a reply to a reply. Here, given the mischaracterization of their Petition acceptance of this letter should help to clarify the record. To the extent that a motion to file this letter is required, Coach USA respectfully urges the Board to accept this letter into the record.

**EXHIBIT 2**

**EXHIBIT 2**

David H. Coburn  
202 429 8063  
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Washington, DC 20036-1795  
202 429 3000 main  
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January 10, 2013

**VIA Email**

Mr. James Day  
The Nevada Transportation Authority  
2290 South Jones Boulevard  
Suite 110  
Las Vegas, NV 89146

**Re: Notification of Evergreen Trails, Inc. dba Horizon Coach Lines of Intent to Resume Service Authorized by Certificates of Public Convenience and Necessity 2016 sub. 2 and 2115**

Dear Mr. Day:

This letter is to inform you that on January 15, 2012, Evergreen Trails, Inc. dba Horizon Coach Lines ("Evergreen") intends to initiate service authorized by certificates of public convenience and necessity ("CPCNs") 2016, Sub 2 and 2115. The service will be initiated in Horizon's name.

As you are aware, CPCNs 2016, Sub 2 and 2115 were formerly held by CUSA K-TCS, LLC ("K-TCS") but have been transferred to Evergreen as the result of a Surface Transportation Board ("STB") decision approving Evergreen's acquisition of the assets of K-TCS. *See Frank Sherman, FSCS Corporation, TMS West Coast, Inc., Evergreen Trails, Inc. and Cabana Coaches, LLC – Acquisition and Consolidation of Assets – American Charters, Ltd., et al.*, STB Docket No. MC-F-21047 (served September 6, 2012). On August 13, 2012, Evergreen sent a letter to the Nevada Transportation Authority ("NTA") to inform the agency that the STB was expected to soon approve the transfer. The STB granted approval on September 6, 2012 and the sale of assets from K-TCS to Evergreen closed on September 12, 2012. On September 12, 2012, Evergreen sent a follow-up letter to the NTA advising that the STB had approved the transfer and requesting that the NTA update its records to reflect the transfer of CPCNs. However, the NTA has yet to update its records to reflect this transfer.

In April 2012, prior to the acquisition of its assets by Evergreen, K-TCS was forced to cease operations due to its financial position. K-TCS had sought authority from the NTA to temporarily discontinue operations until the CPCNs could be sold and transferred to Evergreen via the STB process. K-TCS's request was granted by the NTA in a May 16, 2012 order in Docket No. 12-04018. On November 30, 2012, as a precaution, Evergreen filed a request with

Mr. James Day  
January 10, 2013  
Page 2



the NTA seeking to have the order approving the temporary cessation of service under the CPCNs formerly held by K-TCS extended until service is resumed.

As you have advised in the past, on the strength of the STB's transfer decision, Evergreen is free to initiate intrastate service in Nevada without awaiting an order from the NTA acknowledging the STB's decision. Accordingly, Evergreen intends to begin operations authorized by CPCNs 2016, Sub 2 and 2115 on January 15, 2012. It is our understanding that the NTA typically requires written notice for the resumption of service in cases where an NTA order permitting the temporary cessation of service is in effect. Because it is unclear to Evergreen whether the NTA currently considers an order for the temporary cessation of service under CPCNs 2016, Sub 2 and 2115 to be in effect, Evergreen is providing this written notice of its intent to resume service. Evergreen has also attached a copy of the Form E insurance filing that it filed with the NTA in September 2012. We will also be filing appropriate tariffs.

If you have any questions, please do not hesitate to contact us.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David H. Coburn".

David H. Coburn  
Christopher G. Falcone  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue NW  
Washington, DC 20036  
(202) 429-8063

Attorneys for Evergreen Trails, Inc.

Form E  
UNIFORM MOTOR CARRIER BODILY INJURY AND PROPERTY  
DAMAGE LIABILITY CERTIFICATION OF INSURANCE

Filed with NEVADA TRANSPORTATION AUTHORITY (herein after called Agency)  
(Name of Agency)

This is to certify that the Occidental Fire & Casualty Co. of North Carolina  
(Name of Company)  
(herein after called Company) of P.O. Box 10800, 702 Oberlin Road, Raleigh, NC, 27605  
(Home Address of Company)

(DBA) HORIZON COACH LINES  
has issued to EVERGREEN TRAILS INC of 4500 WEST MARGINAL WAY SW, SEATTLE, CA  
(Name of Motor Carrier) (Address of Motor Carrier)  
98106

A policy or policies of insurance effective from 04/15/2012 12:01 A.M. standard time at the address of the insured stated in said policy or policies and continuing until cancelled as provided herein, which by attachment of the Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement, has or have been amended to provide automobile bodily injury and property damage liability insurance covering the obligations imposed upon such motor carrier by the provisions of the motor carrier law of the State in which the Agency has jurisdiction or regulations promulgated in accordance therewith.

Whenever requested, the Company agrees to furnish the Agency a duplicate original of said policy or policies and all endorsements thereon. This certificate and the endorsement described herein may not be cancelled without cancellation of the policy to which it is attached. Such cancellation may be effective by the Company or the insured giving thirty (30) days' notice in writing to the State Agency, such thirty (30) days' notice to commence to run from the date notice is actually received in the office of the Agency.

Countersigned at 158 N. Harbor City Blvd. This 11th day of Sep 20 12  
Melbourne (Address) (Day) (Month) (Year)  
FL 32935

Insurance Company File No. CA00037547  
(Policy No)

ROBERT ALKIRE  
(Authorized Company Representative)

Underlying Limit :0.00      Liability Limit :5,000,000.00

# Exhibit 3

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on February 1, 2013, I served a copy of the above and foregoing **CORRESPONDENCE DATED 02/01/13 FROM KIMBERLY MAXSON-RUSHTON TO THE HONORABLE CYNTHIA T. BROWN AT THE SURFACT TRANSPORTATION BOARD** via U.S. Mail, postage prepaid, upon the following:

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Senior Deputy Attorney General  
Office of the Attorney General  
555 East Washington Avenue, Suite 390  
Las Vegas, Nevada 89101

Nevada Transportation Authority  
Applications Manager  
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Michael Yusim  
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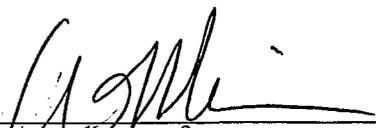
Federal Trade Commission  
Bureau of Competition Premerger  
Notification Office  
600 Pennsylvania Ave., N.W.  
Washington, DC 20580

U.S. Department of Justice  
Antitrust Division  
950 Pennsylvania Avenue, N.S.  
Washington DC 20530

U.S. Department of Transportation Federal  
Motor Carrier Safety Administration  
1200 New Jersey Ave., S.E.  
Washington, DC 20590

U.S. Department of Transportation Office  
of The General Counsel  
1200 Hew Jersey Avenue, S.E.  
Washington, DC 20590

Ventura County Transportation  
Commission  
Mitchel B. Kahn  
300 Esplande Dr. Suite 1170  
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Cooper Levenson, Attorneys at Law