29

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ASSOCIATION OF GOLDEN GLADES CONDOMINIUM CLUB, INC., a Florida corporation not for profit,

Petitioner,

SECURITY MANAGEMENT CORP., a Maryland corporation,

Respondent.

DISTRICT COURT OF APPEAL CASE No. 87-539

SUPREME COURT CASE NO. 71,909

RESPONDENT'S BRIEF ON THE MERITS

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P. A.
First Florida Bank Bldg.
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

CYPEN & CYPEN
825 Arthur Godfrey Road
Miami Beach, Florida 33140
(305) 532-3200

and

BUCHBINDER & ELEGANT, P. A.
46 S.W. First Street
Fourth Floor
Miami, Florida 33130
(305) 358-1515

Attorneys of Respondent,
Security Management Corp.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES....................................	ii, iii, iv
STATEMENT OF CASE AND FACTS..............................	1
SUMMARY OF ARGUMENT......................................	5
AIRGUMENT..	7
POINT ONE - THE COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION BECAUSE THE CERTIFIED QUESTION HAS ALREADY BEEN ANSWERED BY IT............................	7
POINT TWO - RESPONDENT/LESSOR NEVER AGREED TO BE BOUND BY THE CONDOMINIUM ACT AS SUBSEQUENTLY AMENDED AND THEREFORE SECTION 718.401(8) CANNOT BE APPLIED TO THIS PRE-EXISTING LEASE....................................	9
POINT THREE - THE MERGER OF THE DECLARER AND THE LESSOR INTO THE PARENT CORPORATION LONG AFTER THE EXECUTION OF THE CONDOMINIUM DOCUMENTS DOES NOT ALTER THE LIABILITIES ESTABLISHED BY THOSE PRE-EXISTING DOCUMENTS.....,......	21
CONCLUSION..	**23**
CERTIFICATE OF SERVICE..................................	**24**

TABLE OF AUTHORITIES

CASES PAGE

Angora Enterprises, Inc. v. Cole,
439 So.2d 832 (Fla. 1983), cert. denied,
104 S. Ct. 1710 (1984).............................. 6, 18, 19

Association of Golden Glades Condominium Club
v. Golden Glades Club Recreation Corp., 385 So.2d
103 (Fla. 3d DCA 1980)................................ 2, 3, 4, 18

Association of Golden Glades Condominium Club, Inc.
v. Golden Glades Club Recreation Corp., 441 So.2d
154 (Fla. 3d DCA 1983)............................. 4, 8, 18

Association of Golden Glades Condominium Club, Inc.
v. Security Management Corp., 518 So.2d 967 (Fla.
3d DCA 1987).. 2

Azalea Park Utilities, Inc. v. Knox-Florida
Development Corp.,
127 So.2d 121 (Fla. 2d DCA 1961). 15

Beach Resort Hotel Corp. v. Wieder,
79 So.2d 659 (Fla. 1955)).......................... 16

Bella Vista, Inc. v. Interior & Exterior
Specialities Co.,
436 So.2d 1107, 1108 (Fla. 4th DCA 1983)............ 16

Buckley Towers Condominium, Inc. v. Buchwald,
354 So.2d 868 (Fla. 1978)............................ 5, 7, 8, 9

Carillon Hotel v. Rodriguez,
124 So.2d 3, 5 (Fla. 1960)........................... 21

Carolina Metal Products Corp v. Larson,
389 F.2d 490, 492 (5th Cir. 1968)...................... 15

Century Village, Inc. v. Wellington,
361 So.2d 128 (Fla. 1978)............................ 6, 19

Condominium Association of Plaza Towers North,
Inc. v. Plaza Recreation Development Corp.,
514 So.2d 381 (Fla. 3d DCA 1987)...................... 2, 5, 11

Cove Club Investors v. Sandalfoot South One,
438 So.2d 354 (Fla. 1983)............................ 2, 5, 9, 10

Dawson v. Mallov,
428 So.2d 297 (Fla. 4th DCA), rev. denied,
436 So.2d 99 (Fla. 1983) 16

Dober v. Worrell,
401 So.2d 1322, 24 (Fla. 1981) 22

Fleeman v. Case, 342 So.2d 815 (Fla. 1976) 2, 3, 4, 15, 7, 8, 9, 10, 23

Greenwald v. Food Fair Stores Corp.,
100 So.2d 200, 202 (Fla. 3d DCA 1958) 15

Halpern v. Retirement Builders,
507 So.2d 622 (Fla. 4th DCA),
rev. denied, 518 So.2d 1277 (Fla. 1987) 6, 11, 20

Herring v. State, 140 Fla. 170, 191 So. 290
(1939) 15

Holmes v. Kilgore, 103 So. 825, 827 (Fla. 1925) 22

Home Development Co. v. Bursani,
178 So.2d 113 (Fla. 1965) 15, 16

Jacobs v. Petrino, 351 So.2d 1036
(Fla. 4th DCA 1976), cert. denied,
349 So.2d 1231 (Fla. 1977) 15

Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977). ..

Levenson v. American Laser Corp.,
438 So.2d 179, 183 (Fla. 2d DCA 1983). 16

Lipe v. Miami, 141 So.2d 738, 743 (Fla. 1962) 22

Palm Air Country Club v. Condominium Association
No. 2, Inc. v. F.P.A. Corporation,
357 So.2d 249, 251 (Fla. 4th DCA) 8

Peoples Gas System, Inc. v. City Gas Co.,
147 So.2d 334, 336 (Fla. 3d DCA 1962) 14

Proser v. Berger, 132 So.2d 439, 411
(Fla. 3d DCA 1961) 22

Regency Towers, Inc. v. Arnold, 350 So.2d 18
(Fla. 2d DCA 1977). 8

Seminole-on-the-Green v. Kelly, 445 So.2d 1071, 1072 (Fla. 2d DCA 1984) 8

FLORIDA STATUTES:

Chapter 711 .... 10, 16, 19

Section 711.08 (1965) 10

Section 711.231 .... 1, 2, 4, 7

Section 711.465 (1975) 8

Section 718.401(8) (1981) 4

Section 718.401(8) 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 18 21, 23

OTHER AUTHORITIES:

46 *Am.* Jur. 2d Judgments §472 18

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts is incomplete and the following additions are therefore required.

Respondent, SECURITY MANAGEMENT CORP., is the successor by merger to GOLDEN GLADES CONDOMINIUM RECREATION CORP. **("Lessor").**[1/] It brought an action against Petitioner, ASSOCIATION OF GOLDEN GLADES CONDOMINIUM CLUB, INC. ("Lessee"), for unpaid rent under a condominium recreation lease dated March 14, **1970** ("Lease"), for the months of January 1, **1980** through January **31, 1987,** plus interest at 10% per annum pursuant to the Lease. [R. **34-69].** The rent adjustment clause, Article XXV of the Lease, provided for adjustments to the base rental of $4,400.00 per month, every five years commencing January 1, **1975.**

Section **711.231** of the Florida Statutes (subsequently renumbered Section **718.401(8),** Florida Statutes), which became effective on June 4, **1975,** declared rental escalation clauses based on the cost-of-living index to be void. The Lessee argued that the rent escalation clause in this Lease was invalid under that statute, even though the Lease pre-dated the statute. The Lessee contended that the Declaration of Condominium ("Declaration"), which incorporated the provisions of the

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1/ The Respondent was the Appellee/Plaintiff and the Petitioner/Lessee was the Appellant/Defendant below. The parties will be referred to interchangeably by name, by description or as they stand in this Court, except that "the Lessor" will refer interchangeably to the party actually executing the Lease and to its successor-in-interest under the Lease who was the actual party in this suit. All emphasis is supplied unless otherwise indicated. The following symbols will be utilized: "RA" - Respondent/Lessor's Appendix; "A" - Petitioner/Lessee's Appendix; "R" - Record.

Condominium Act "as it may be amended from time to time," rendered the Lease invalid as a result of this subsequent amendment to the Condominium Act. [R. 207-209, 268-269].

The trial court entered Final Judgment for the Lessor, enforcing the rental escalation clause based upon its findings that: (1) the Declarer and the Lessor were separate entities; (2) the Lessor never agreed to be bound by the Declaration; and (3) the Lease does not incorporate the Declaration or the Condominium Act "as it may be amended from time to time." [R. 2-41. Citing Cove Club Investors v. Sandalfoot South One, 438 So.2d 354 (Fla. 1983), the trial court concluded that, since the Lessor had never agreed to be bound by the Declaration or the Condominium Act, "the Declaration and the language contained in it cannot bind . . . the [Lessor]." [R. 2]. The court then followed the Florida Supreme Court's decision in Fleeman v. Case, 342 So.2d 815 (Fla. 1976), holding that Section 711.231 could not be applied retroactively to a lease signed prior to the enactment of the statute.

The Third District Court of Appeal affirmed in a **per** curiam decision. Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., 518 So.2d 967 (Fla. 3d DCA 1987). [RA. 1]. The court specifically cited its prior decisions in Association of Golden Glades Condominium Club v. Golden Glades Club Recreation Corp., 385 So.2d 103 (Fla. 3d DCA), **rev.** denied, 392 So.2d 1374 (Fla. 1980) ("Golden Glades I") and in Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987) (petition for

review pending), in which it had held that Section 718.401(8) could not be applied retroactively to invalidate the rent escalation clause. [RA. 1].

Golden Glades I was the Third District's decision in an appeal in a related action to enforce the first escalated payment under the Lease, which had been put into effect on January 1, 1975, some six (6) months prior to the effective date of the Florida Statute invalidating escalation clauses. A summary judgment had been granted there for the lessee condominium association as to the lessor's entire claim for unpaid rent which did not set forth any grounds whatsoever for the judgment. [RA. 11-12].

On appeal, apparently believing that the Lease expressly incorporated the Condominium Act "as it may be amended from time to time,"[2/] **id.** at 104, the Third District partially affirmed the judgment on the authority of Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977) (escalation clause was prospectively invalid where it was the express intention of all parties that provisions of the Condominium Act were to become part of the controlling document when they were enacted). Noting, however, that this Court had held in Fleeman that Section 711.12 "was not retroactive," **id.** at 104,

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2/ In actual fact, it was the Declaration of Condominium **--** **not** the Lease **--** which contained that language (A.29) and the Lessor was **not** a party to the Declaration. The Lease contains no language incorporating the Condominium Act in its entirety. **See** Lease provisions at A. 1-27.

the district court also reversed and remanded, holding that the summary judgment dismissing the lessor's claim for all unpaid rent was overbroad. On remand, judgment was entered for the Lessor.

On the appeal from that judgment, the district court receded from that part of its decision in Golden Glades I which had denied rent escalation based upon the court's earlier, erroneous belief that the Lease incorporated the Condominium Act "as amended from time to time."[3/] Association of Golden Glades Condominium Club, Inc. v. Golden Glades Club Recreation Corp., 441 So.2d 154 (Fla. 3d DCA 1983), **rev.** denied, 455 So.2d 1033 (Fla. 1984) (Golden Glades 11). Instead, in this decision, the court squarely upheld the validity and enforcement of the escalation clause in the Lease. In so holding, the district court directly relied upon Fleeman and declared:

> Section 718.401(8), Florida Statutes, 1981 which prohibits rental escalation clauses in leases for condominium recreational facilities does not apply to prohibit enforcement of such clauses in contracts which antedate the statute. Fleeman v. Case, 342 So.2d 815 (Fla. 1976).

Thus, in 1983, the Third District Court of Appeal answered the very question certified here, which is:

> TO WHAT EXTENT DOES SECTION 718.401(8), FLORIDA STATUTES (1985), APPLY TO RENT ESCALATION CLAUSES ENTERED INTO BEFORE THE EFFECTIVE DATE OF THE STATUTE?

[3/] In his dissenting opinion, Judge Ferguson unsuccessfully urged that Section 711.231 was automatically incorporated into the Lease and that this rendered unenforceable all escalated rent payments due after the effective date of the statute.

SUMMARY OF ARGUMENT

The question certified by the Third District has been unequivocally answered by the Supreme Court in Fleeman, supra, and in its subsequent decision in Buckley Towers Condominium, Inc. v. Buchwald, 354 So.2d 868 (Fla. 1978), as well as by appellate courts in Florida adhering to those decisions. These courts have consistently held that Section 718.401(8), Florida Statutes, does **not** apply retroactively to an escalation clause such as this, which predated June 4, 1975. This Court therefore has no need to answer that question once again.

If the Court should nevertheless decide to review the decision below, it should affirm. Although the Declaration adopted the Condominium Act "as amended from time to time," the Lessor never agreed to be bound by either the Declaration or the Condominium Act. As in Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983) and Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987), the Lessor and the developer/declarer were completely different entities and the Lessor was **not** a party to the Declaration. Nor was there any provision in the Lease incorporating either the Declaration or the Condominium Act in their entirety. Quite to the contrary, there were provisions in the Lease which would be meaningless if the parties had intended to incorporate the entire Declaration or Condominium Act into the Lease.

Since the Lessor never agreed to be bound by subsequent amendments to the Condominium Act, the courts cannot re-write the Lease to add such a provision. Accordingly, the Third District correctly held that the Lease's rent escalation clause was not invalidated by the subsequently enacted amendments to the Condominium Act. That decision is in complete accord with the numerous Florida decisions holding that Section 718.401(8) cannot be retroactively applied to void escalation clauses agreed to before enactment of that statute. The Lessor was therefore entitled to collect the rents agreed upon in the Lease.

The cases relied upon by the Petitioner/Lessee are not inconsistent with that decision, given their totally different facts. Unlike this case, in Angora Enterprises v. Cole, 439 So.2d 832 (Fla. 1983) and Century Village, Inc. v. Wellington, 361 So.2d 128 (Fla. 1978), the lessor and declarer were the same entity so that the lessor was bound by the declaration's adoption of the Condominium Act "as amended from time to time." In Halpern v. Retirement Builders, 507 So.2d 622 (Fla. 4th DCA), **rev. denied**, 518 So.2d 1277 (Fla. 1987), the agreement at issue specifically incorporated the declaration, which in turn incorporated the Condominium Act "as amended from time to time'' as part of the entire agreement. That is not the case here.

Finally, Petitioner/Lessee's argument that the merger of the declarer and the Lessor into their parent corporation some 11 years after the execution of the Lease and Declaration operates to now bind the Lessor under the Declaration is totally without

merit. Indeed, that argument was never raised at trial and thus was not even preserved for purposes of appeal. Petitioner's argument further fails because the merger was effective only as of the date of the filing of the articles of merger. Since the Lessor had not agreed to be bound by the Declaration on that date, its parent did not become *so* by the merger.

ARGUMENT

POINT ONE

THE COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION BECAUSE THE CERTIFIED QUESTION HAS ALREADY BEEN ANSWERED BY IT.

This Court has expressly held that Section 711.231 [now renumbered 718.401(8), Florida Statutes (1985)] cannot be applied retroactively to rent escalation clauses entered into before June 5, 1975 (the effective date of the statute). In Fleeman v. Case, 342 So.2d 815 (Fla. 1977), the Court held that the statute was intended to apply only to leases which were executed after the effective date of the statute. The Court further held that, if the Legislature had intended the statute to apply retroactively, the statute would then unconstitutionally impair the obligation of contract. The Court subsequently adhered to Fleeman in Buckley Towers Condominium, Inc. v. Buchwald, 354 So.2d 868, 869 (Fla. 1978).

The appellate courts of Florida have consistently followed Fleeman and Buckley Towers. For instance, in Regency Towers, Inc. v. Arnold, 350 So.2d 18 (Fla. 2d DCA 1977), the Second District Court of Appeal expressly recognized the Supreme Court's prior holding on this question:

> The first question concerns the retroactive application of Section 711.465, Florida Statute, 1975. This question has been answered by the Supreme Court in Fleeman v. Case, 342 So.2d 815 (Fla. 1976), and we find no error in the Trial Court's holding that the statute could not be applied retrospectively.

Similarly, in Seminole-on-the-Green v. Kelly, 445 So.2d 1071, 1072 (Fla. 2d DCA 1984), the Second District, relying on Fleeman, declared that the statute has **no** application to preexisting contracts.

In Golden Glades II, a case arising out of these same condominium documents, the Third District Court of Appeal likewise held that the statute does not apply to a contract which antedated the statute. The Fourth District held to exactly the same effect in Palm Air Country Club v. Condominium Association No. 2, Inc. v. F.P.A. Corporation, 357 So.2d 249, 251 (Fla. 4th DCA), **rev.** denied, 365 So.2d 713 (Fla. 1978).

Thus, the rule is plain -- Section 718.401(8) does **not** apply retroactively to an escalation clause entered into before the effective date of the statute. Since the certified question in that regard has been answered over and over again -- in a manner contrary to Petitioner's position here -- there is no need to

answer it once **again.**[4/] If, however, the Court should choose to do so, it should answer the certified question consistently with its decisions in Fleeman and Buckley Towers and hold that, because Section 718.401(8) is prospective in application, it does not apply to a lease, such as this, entered into before the effective date of the statute.

POINT TWO

RESPONDENT/LESSOR NEVER AGREED TO BE BOUND BY THE CONDOMINIUM ACT AS SUBSEQUENTLY AMENDED AND THEREFORE SECTION 718.401(8) CANNOT BE APPLIED TO THIS PRE-EXISTING LEASE.

Section 718.401(8), Florida Statutes, does not apply to escalation clauses adopted prior to enactment of the statute, unless the "automatic amendment" rule applies to the particular agreement. Under that rule, the Lessor must have agreed to be bound by the Condominium Act "as amended from time to time," either by agreeing to that directly in the Lease or by agreeing to that in a Declaration of Condominium which incorporates that Act. Because there was no such agreement by the Lessor here, Florida law plainly establishes the inapplicability of the statute to this Lease.

In Cove Club Investors, Ltd. v. Sandalwood South One, Inc., 438 So.2d 354 (Fla. 1983), as in this case, the lessor did not execute the Declaration of Condominium which incorporated the Condominium Act and its subsequent amendments. Instead, the

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[4/] It is settled that such a certification merely satisfies the Constitutional mandate insofar as this Court's jurisdiction is concerned but does **not** require the Court to decide the question. Novack v. Novack, 195 So.2d 199 (Fla. 1967); Zirin v. Pfizer, 128 So.2d 594 (Fla. 1961).

declarer was the parent of the lessor. And although, as here, the recreation agreement made multiple references to certain, specific parts of the Declaration,?/ it never provided that the lessor would be bound by **all** provisions of the Declaration. Obviously the parties who did sign the Declaration were bound by its terms to all subsequent amendments to the Condominium Act, but the Supreme Court emphasized that "nowhere does the Petitioner agree to be bound by the Declaration nor by the Condominium Act." Id. at 355. Accordingly, the Court held:

> Since it did not agree to be bound by the Act, section 718.401(8), Florida Statutes, will not touch the petitioner. As we pronounced in Fleeman v. Case, 342 So.2d 815 (Fla. 1976), this statute cannot be applied retroactively to leases signed prior to the inception of the statute, because the legislature did not intend retroactive application. Furthermore, we concluded that even had the legislature intended retroactive application, we would have been compelled to hold it invalid as impairing the obligation of contract absent any agreement to be bound by future amendments to the Act.

Id. at 356.

Sandalfoot involved exactly the same facts as this case and is squarely controlling here. As in Sandalfoot, the Lessor was **not** the developer and it did **not** execute the Declaration./ Just

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5/ Examples of these provisions referencing the Sandalfoot Declaration are set out at RA. 24-25.

6/ The developer here submitted specific property to condominium ownership pursuant to Chapter 711, Florida Statutes, "as amended from time to time." Section 711.08, Florida Statutes, (1965) required a statement submitting the condominium property to condominium ownership. The developer's statement to that effect simply constitutes **its** compliance with that requirement. Certainly it does not reflect any intent on behalf of the Lessor which did not even sign the Declaration.

as in Sandalfoot, the Lease was attached to the Declaration as an exhibit but the Lessor only signed the Lease. And, although there were references in the Lease to specific parts of the Declaration, nowhere in the Lease did the Lessor expressly agree to be bound by the Declaration or by the Condominium Act in their entirety. As this Court held in Sandalfoot, absent such an agreement, the mere reference to certain provisions of the Declaration or the Condominium Act is not legally sufficient to bind the lessor to the entire Declaration or Act.

This is made clear, not only by Sandalfoot, but by the Third District's decision in Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987) (petition for review pending), which deals with virtually the same condominium documents as those at issue here. There the lessor brought an action to collect the unpaid escalated rent pursuant to a recreation lease which was entered into prior to the effective date of Section 718.401(8). The developer and the lessor were separate entities, and the lessor did not sign the declaration. The lease contained no language incorporating the Condominium Act as amended. Although there were references in the lease to the declaration, which did incorporate the Condominium Act "as amended from time to time," there was no provision in the lease which adopted the declaration in its entirety. To the contrary, there were specific provisions in the lease which would have been rendered meaningless if the parties had intended to incorporate the declaration in its entirety into the Lease.

Under those circumstances, the Third District refused to imply an agreement by the lessor to be bound by the Declaration of Condominium:

> [T]he recreational lease, which the parties herein did sign, contains no language incorporating the Condominium Act, as amended. In this connection, we reject the argument that this result was indirectly accomplished by the multiple references in the lease to the declaration of condominium which, it is urged, incorporated the declaration of condominium en toto, and therefore incorporated the specific declaration provision which incorporated future amendments to the Condominium Act.

Id. at 382. Noting that there was no provision in the lease expressly adopting the Condominium Act as amended, the court stated:

> We will not turn the general language of the lease on its head *so* as to incorporate by incorporation future amendments to the Condominium Act -- especially where, as here, the result of such an interpretation is to void specific rental provisions in the lease . . . [s]uch a drastic result should only be accomplished by clearly expressed lease terms which expressly adopt the Condominium Act, as amended.

Id. Because Florida law is clear that the statute prohibiting the enforcement of rental escalation clauses may not be retroactively applied to a pre-existing lease, the court enforced the rent escalation clause contained in it.

The condominium documents in the instant case are virtually identical to those in Plaza. As in Plaza, not only is there no explicit incorporation of the entire Declaration in the Lease, the Lease contains various provisions which affirmatively negate any such intent by the parties.

For instance, the Lease contains an integration clause which provided that "this instrument contains the entire agreement of the parties. . . ." and that there are "no collateral agreements . . . which are not expresslv contained in this agreement."[7] [A. 14]. This provision is completely at odds with the Lessee's contention that the parties intended to incorporate the entire Declaration -- as a part of their agreement -- even though that alleged "collateral agreement" was not expressly contained in the Lease. Furthermore, the Lease specifically prohibited any modification of "any provision" of the Lease without the written consent of the Respondent. [A. 14]. Yet, under the Lessee's interpretation of the Lease, subsequent amendments to the Condominium Act would automatically modify the Lease, without the Lessor's written consent, thereby negating the Lease's express prohibition against any such modification.

Even more importantly perhaps, the Lease specifically imposes upon Lessee a firm and irrevocable obligation to pay the full rent for the full term of the Lease. [A. 17]. That unqualified contractual obligation would also be negated if the Court were to imply an agreement to alter that payment obligation upon subsequent amendment of the Condominium Act.

7/ Such integration clauses are clearly valid and enforceable, and they serve to hold the parties to the actual language of their contract. See, e.g., Saunders Leasing Sys., Inc. v. Gulf Cent. Dist. Center, Inc., 513 So.2d 1303 (Fla. 2d DCA 1987); Ortiz v. Orchid Springs Dev. Corp., 504 So.2d 510 (Fla. 2d DCA 1987).

Clearly, Petitioner/Lessee's position -- which would necessarily render specific provisions of the Lease meaningless -- seeks an impermissible result. It is a settled precept that a contract should not be construed in a manner which would render express contractual provisions void. Peoples Gas System, Inc. v. City Gas Co., 147 So.2d 334, 336 (Fla. 3d DCA 1962) ("No word or part of an agreement is to be treated as a redundancy or surplusage if any meaning reasonable and consistent with other parts can be given to it . . . since it would not have been inserted had it not been intended to serve some purpose in expressing the intention of the parties"). But, as the Plaza court recognized, that would be exactly the result if the entire Declaration were implied to be a part of an agreement which states on its face that it constitutes the parties' sole agreement.

Other principles of contract construction similarly confirm the correctness of the Third District's refusal to imply an incorporation of the entire Declaration into the Lease. The Lease refers, in several different places, to specific portions of the Declaration; for instance, the Lease expressly incorporates those terms of the Declaration which relate to the Lease.[8/] [A. 24]. Obviously, there would have been no need to incorporate those specific portions of the Declaration if, as Petitioner/Lessee contends, the entire Declaration was already incorporated. Indeed, the very fact that the parties only

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8/ In addition, paragraph 26 of the Lease simply confirms that those provisions of the Declaration which are "relative to this Lease" constitute consideration "to the Lessor for this Lease." [A. 20-21].

incorporated certain portions of the Declaration demonstrates that they did **not** intend to incorporate the others. Herring v. State, 140 Fla. 170, 191 So. 290 (1939) (rule of expressio unius est exclusio alterius establishes that the enumeration of particular things excludes that which is not mentioned); 17A C.J.S., Contracts § 312; 17 Am.Jur.2d Contracts § 255.

The critical fact is that the Lease does **not** contain a provision where the Declaration is incorporated in its entirety or where the Lessor agrees to be bound by either the Declaration or the Condominium Act as amended from time to time. The absence of such a provision cannot be supplied by judicial fiat.

This Court made that precise point in Home Development Co. v. Bursani, 178 So.2d 113 (Fla. 1965), declaring that, if the parties intended a certain provision, "it would have been a simpler matter . . . to have said so. The fact that they did not, indicates an intention to exclude such a provision.'' Id. at 117 (citing Azalea Park Utilities, Inc. v. Knox-Florida Development Corp., 127 So.2d 121 (Fla. 2d DCA 1961)); see also Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976), cert. denied, 349 So.2d 1231 (Fla. 1977); Greenwald v. Food Fair Stores Corp., 100 So.2d 200, 202 (Fla. 3d DCA 1958) (if "the particular element of the alleged extrinsic negotiation . . . is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element"); Carolina Metal Products Corp v. Larson, 389 F.2d 490, 492 (5th Cir. 1968) ("If a

particular element of the extrinsic negotiation is dealt with in the writing it is probable that the writing was meant to embody that element of the negotiation").

Petitioner/Lessee's assertion that this Court should find that the Lessor agreed in the Lease to be bound by the Condominium Act and the Declaration in their entirety -- rather than only by those provisions specifically incorporated into the Lease -- would require this Court to remake the Lease for these parties. But it is fundamental that "courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain." Bursani, 178 So.2d at 117 (quoting Beach Resort Hotel Corp. v. Wieder, 79 So.2d 659 (Fla. 1955)); see also Bella Vista, Inc. v. Interior & Exterior Specialities Co., 436 So.2d 1107, 1108 (Fla. 4th DCA 1983); Levenson v. American Laser Corp., 438 So.2d 179, 183 (Fla. 2d DCA 1983); Dawson v. Malloy, 428 So.2d 297 (Fla. 4th DCA), **rev.** denied, 436 So.2d 99 (Fla. 1983). Since there was no explicit incorporation of the Declaration or the Condominium Act in their entirety in the Lease, this Court should not now gratuitously incorporate them into the Lease.

Petitioner/Lessee unsuccessfully urged below that the Condominium Act and the subsequent amendments thereto were necessarily incorporated into the Lease by its incorporation of the definition section of the Declaration which defined the Condominium Act as F.S. 711 et. seq. "as the same may be amended

from time to time." However, as the Third District correctly recognized, that provision does **not** incorporate the entire Condominium Act into the Lease. Rather, it simply incorporates certain definitions which are to be applied -- under certain circumstances -- in the Lease.

Thus, most significantly of all, that provision states **only** that these shall be the definitions unless the context in which the term is used reauires otherwise. [A. 21]. Because of that explicit limitation to this incorporation provision, the context in which a term is used in the Lease must be examined to determine whether the definitions of the Declaration are to be applied. When that is done with respect to the single reference to the Condominium Act contained in the Lease, it is clear that the Condominium Act was **not** incorporated **in its** entirety in the Lease.

The only explicit reference to the Condominium Act in the Lease is to the "duty of the Lessee to assess its unit owners in accordance with the Condominium Act . . . in such amounts as shall be necessary to pay its obligations -- payable in money to the Lessor hereunder . . . ." [A. 18]. As the context of this reference to the Condominium Act makes clear, it is the Lessee -- not the Lessor -- who agreed there to be bound by the Act. Since the term "Condominium Act" is used in the Lease solely with respect to the Lessee's duty to make the agreed upon assessments, that isolated reference to the Act cannot serve to bind the Lessor to the entire Condominium Act as "amended from time to time."

The fact of the matter is, even before the instant claim for rent was brought, the Third District had directly sustained the enforceability of this rental escalation clause in its earlier decision in Golden Glades 11. Despite the "automatic amendment" language **in the** Declaration, the court held there that Section 718.401(8) did **not** apply retroactively to this Lease.[9] Its decision to the same effect in this case was eminently correct under well-established Florida case law.

The decisions relied upon by Petitioner/Lessee all involved condominium documents which were either executed by a lessee and a declarer which were one and the same entity or a lease which incorporated the Condominium Act "as amended from time to time." Accordingly, the Third District's decision -- which was based on the completely different circumstances present in this case -- does not conflict with those decisions.

For instance, in Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied, 104 S. Ct. 1710 (1984), the developer who executed the declaration of condominium was also the lessor who executed the lease agreement. The Declaration specifically incorporated the Condominium Act "as it may be amended from time to time":

9/ Although the court referred in the decision below to its decision in Golden Glades I, its holding was in fact consistent with its later decision in Golden Glades 11. Certainly Petitioner/Lessee's contention that Golden Glades I -- rather than Golden Glades II -- constitutes the law of the case was without merit. First, no "law of the case" defense was ever affirmatively pled by Petitioner/Lessee. Furthermore, as between two conflicting judgments involving the same parties or their privies, the last in point of time controls. **46** Am.Jur.2d Judgments § 472.

> ANGORA ENTERPRISES, INC. -- hereby states and declares that said realty, together with improvements thereon, is submitted to condominium ownership pursuant to the Condominium Act of the State of Florida F.S. Section 711. - et. seq. (hereinafter referred to as the "Condominium Act"), and **the** provisions of said act are hereby incorporated by reference and included herein thereby. . . .

Id. at 834. Here, of course, completely different entities executed the Lease and the Declaration,[10/] and the Lease itself -- which was the only document the Lessor agreed to -- did not expressly incorporate the Condominium Act.

Likewise, because of the material differences in the documents being reviewed, as well as the differences in the issues presented, the decision in Century Village, Inc. v. Wellington, 361 So.2d 128 (Fla. 1978) does not conflict with the decision below. In Century Village, this Court retroactively applied Section 711.63(4) to allow a condominium unit owner to pay rent into the court's registry pending an action on a lease. The Court first held that that statute, unlike the statute sought to be applied here, was intended to be applied retroactively. The Court also found that there was no impairment of contract because the lease, which was executed by the developer/lessor, who were one and the same party incorporated the declaration's definitions of

10/ Significantly, Petitioner/Lessee never claimed at trial that the corporate veil should be pierced and that these separate corporations should be viewed as one single entity. Quite to the contrary, Petitioner/Lessee complained that the Respondent did not even have standing to sue here and that the Lessor was an indispensable party which had to be joined in the case. [RA. 14-15].

the Condominium Act "as amended from time to time". As noted above, the declarer and the Lessor in this case were completely different entities.

Finally, contrary to Petitioner/Lessee's suggestion, there is no confusion in the decisional law created by Halpern v. Retirement Builders, Inc., **507** So.2d 622 (Fla. 4th DCA) **rev.** denied, 518 So.2d 1277 (Fla. 1987). There, the court held that subsequent amendments to the Condominium Act were expressly incorporated into the Management Agreement between the parties. But, in that case, the parties specifically and unequivocally provided in the Management Agreement that the declaration was a part of the Management Agreement. Thus, the integration clause in that agreement expressly incorporated the declaration as a part of the parties' agreement:

> This instrument, together with the Declaration of Condominium to which this agreement is attached, and the exhibits attached to said Declaration of Condominium, including this agreement, constitute the entire agreement between the parties . . . .

Id. at 624. Because the declaration incorporated future amendments to the Condominium Act, the Management Agreement -- which by its very terms incorporated the declaration -- constituted an agreement to be bound by any such statutory amendments.

Unlike Halpern, there is **no** provision incorporating the Declaration of Condominium into the Lease. And, since the Lease contains an explicit integration clause which excludes any agreements other than those expressly contained in the Lease --

and which made **no** reference to incorporating the Declaration as a part of the Lease as was done in Halpern -- no agreement to be bound by the entire Declaration can be implied into the Lease.

It has long been settled that Section 718.401(8) cannot be applied retroactively to void a rent escalation clause in a lease executed before the effective date of that statute. The Third District correctly declined to do that in this case.

POINT THREE

THE MERGER OF THE DECLARER AND THE LESSOR INTO THE PARENT CORPORATION LONG AFTER THE EXECUTION OF THE CONDOMINIUM DOCUMENTS DOES NOT ALTER THE LIABILITIES ESTABLISHED BY THOSE PRE-EXISTING DOCUMENTS.

Petitioner/Lessee contends that the merger of the declarer and the Lessor into the parent corporation (Respondent Security Management Corp.) in 1981 -- eleven years after the execution of the Declaration and the Lease -- requires a finding that the Lessor is now the same entity as the declarer and thus bound by the Declaration's incorporation of the Condominium Act "as amended from time to time." However, Petitioner/Lessee never pled that merger as a defense to the lessor's claim for unpaid rents, nor was this issue raised by Petitioner in its pre-trial stipulation.[11] [RA. 13-23]. Hence, Petitioner/Lessee failed to preserve the issue for appeal. Carillon Hotel v. Rodriguez, 124 So.2d 3, 5 (Fla. 1960) (refusing to review issues not raised

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11/ Neither the trial court nor the Third District addressed this point.

before Florida Industrial Commission); **see,** e.g., Dober v. Worrell, 401 So.2d 1322, 1323-24 (Fla. 1981); Lipe v. Miami, 141 So.2d 738, 743 (Fla. 1962).

Furthermore, Petitioner/Lessee's argument is in any event totally without merit. Regardless of the 1981 merger, when the condominium documents were executed in 1970, Respondent/Lessor corporation was a totally separate, legal entity from the declarer. Therefore, when the Lease and Declaration were executed, neither party had the rights or liabilities of the other. The subsequent merger cannot alter the fact that the lessor and the declarer were separate entities when the agreements before this Court were actually executed.

The only issue is whether, when the Lessor executed the Lease in 1970, the Lessor agreed to be bound by the Declaration which had been signed by the declarer. Obviously, the intent of the parties must be gleaned from the documents themselves as of the date of their execution, **not** on the basis of events occurring long afterwards. Holmes v. Kilgore, 103 So. 825, 827 (Fla. 1925) (contracts must be given reasonable interpretation "according to the intention of the parties at the time of executing them"); Proser v. Berger, 132 So.2d 439, 411 (Fla. 3d DCA 1961). Since the Lessor did not agree at that time to be bound by the Declaration, the subsequent merger did not operate to create such an agreement "after-the-fact."

The fact of the matter is, the merger did not make Respondent/Lessor responsible for the liabilities of the declarer but merely made their parent corporation responsible for the liabilities of each separate entity as they existed on the date of the merser. Before the merger, there is no question that Respondent/Lessor was not responsible for the liabilities of the declarer. After the merger, there is still no question: because Lessor never agreed to be bound by the Declaration and thereby assumed this "liability" when it signed the Lease, its parent, as successor in interest to the Lease, assumed no such liability.

CONCLUSION

It is respectfully submitted that these proceedings should be dismissed because the question certified here has already been answered by this Court and virtually every appellate court in the State of Florida. It need not be answered again. If it is to be again answered, however, it should be answered just as it was in Fleeman: Section 718.401(8), Florida Statutes, does not apply to leases containing rent escalation clauses entered into before the effective date of the statute. Accordingly, the Third District correctly enforced the rent escalation clause in this Lease which pre-dated that statute, and that decision should be affirmed.

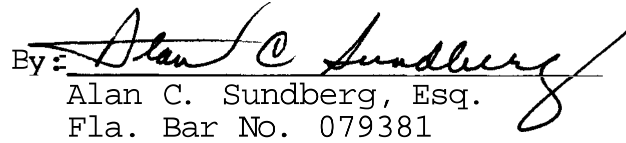
Respectfully submitted,

CYPEN & CYPEN
825 Arthur Godfrey Road
Miami Bch., FL 33140
(305)532-3200

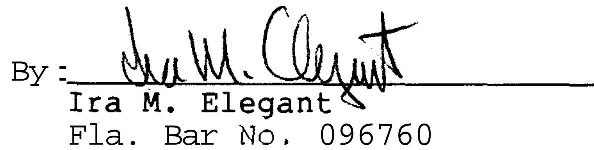
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
First Florida Bank Bldg.
P.O. Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

BUCHBINDER & ELEGANT, P.A.
46 S.W. 1st Street, 4th Floor
Miami, Florida 33130
(305) 358-1515

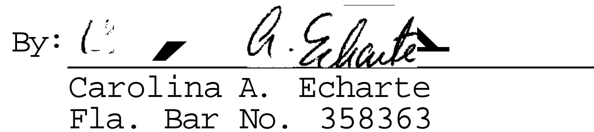
Attorneys for Respondent
Security Management Corp.



By: ______________________
Alan C. Sundberg, Esq.
Fla. Bar No. 079381



By: ______________________
Ira M. Elegant
Fla. Bar No. 096760



By: ______________________
Carolina A. Echarte
Fla. Bar No. 358363

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of April, 1988 to NANCY SCHLEIFER, ESQ., Attorney for Petitioner/Lessee, 800 Brickell Avenue, Suite 1200, Miami, Florida 33131.

Alan C. Sundberg