IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,158

JERSEY PALM-GROSS, INC.,

Petitioner,

v.

HENRY PAPER AND
ANTHONY V. PUGLIESE, III,

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

On Discretionary Review from the District Court of Appeal of Florida, Fourth District

Robert M. Weinberger
COHEN, CHERNAY, NORRIS, MORICI
WEINBERGER & HARRIS
712 U.S. Highway One
Fourth Floor
North Palm Beach, Florida 33408
(407) 844-3600

Attorney for Respondent Pugliese

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,158

JERSEY PALM - GROSS, INC.

Petitioner,

vs.

HENRY PAPER and
ANTHONY V. PUGLIESE, III,

Respondents.
_____/

RESPONDENTS' STATEMENT OF FACTS

This case arises from a loan made by Petitioner, JERSEY PALM-GROSS, INC., a corporation formed for the sole purpose of making the loan (T.24) to a partnership known as Jersey Palm Associates. JERSEY PALM INC.'S president and sole stockholder was Walter Gross (T.9), himself a real estate developer with 40 years experience (T.19). Among the real estate holdings of Walter Gross was a parcel of land adjacent to the land which was owned by the borrower herein, Jersey Palm Associates, which land Walter Gross purchased for $1,300,000.00 from Jersey Palm Associates a few years before making the subject loan. (T.71-72).

When Jersey Palm Associates need for capital arose (as more fully set forth below) HENRY PAPER, Jersey Palm Associates managing partner (hereafter PAPER), in light of Jersey Palm Associates prior transaction with Walter Gross and his familiarity with the subject real estate, approached Mr. Gross with the proposal of investing in the partnership, thereby providing to the partnership sufficient capital for its needs. (T.93-94).

The partnership owned land which it wished to develop. To do so, it had to satisfy a purchase money mortgage which was coming due and other debts of the partnership and had to obtain capital sufficient to fund construction of the improvements. To accomplish this, the partnership had successfully negotiated a loan commitment from Capital Bank in an amount sufficient to pay off the purchase money mortgage and the partnerships other debts and to fund the improvements. However, the proceeds of the loan were insufficient to pay all of the costs attendant to the loan's closing which included brokerage commissions and the costs of the loan itself. These additional costs approximated $200,000.00. It was this $200,000.00 which PAPER asked Walter Gross to invest in the partnership. (T.97-101)

In the course of PAPER's discussions with Walter Gross, the value of the partnership's assets, and the extent of the partnership's debts were fully disclosed to GROSS. (T.97-99) The appraisal which had been currently prepared for Capital Bank was shared with Gross disclosing the present value of the property owned by the partnership as $1,700,000.00 (Defendant's Exhibit 6, R.152-245) and the partnership debts of approximately $1,100,000.00, which debts included the purchase money mortgage, were also disclosed. (T.99)

In the course of these discussions, Walter Gross rejected the proposal of investing in the partnership, but agreed instead to loan the needed $200,000.00 to the partnership at an interest rate of 15% per annum. Mr. Gross' additional requirement was that the

partners of the partnership personally guarantee the loan. (T.23) Respondent PUGLIESE is a party to this cause as a consequence of these guarantees.

PAPER agreed with Walter Gross to the stated terms of the loan, and therefore Walter Gross' attorney prepared and forwarded the loan documents to PAPER, the papers arriving but a few days before the closing on the $200,000.00 loan was to occur. (T.105) It was upon the review of these documents that PAPER and the partnership learned for the first time that in addition to interest at the rate of 15%, JERSEY PALM-GROSS, INC. was demanding as additional consideration for the loan a 15% equity interest in the partnership itself. In spite of the imposition of this new and burdensome condition, PAPER on behalf of the partnership agreed to Gross' demand as there was no time left in which to obtain other funds necessary to close the Capital Bank loan, and he feared that unless the $200,000.00 loan was made, thr Capital Bank loan would be lost and the partnership would risk losing its property to the purchase money mortgage holder (T.101). Further, the partnership would continue to be obligated to pay the costs incurred in negotiating the loan with Capital Bank, such as broker fees and attorney fees, whether the loan closed or not. (T.111) PAPER therefore believed there was no choice but to accept Gross' terms. (T.110-111). Walter Gross himself knew of the partnership's urgent need for the funds which he was lending, testifying that he was aware that the partnership "desperately" needed the money. (T.22).

At the time the loan was closed, Walter Gross was fully aware that as a consequence of the loan which his corporation was making, his corporation,, Petitioner, was to receive a 15% equity interest in the partnership (T.86), and that the only consideration given for this equity interest was the loan itself. (T.68 and Defendants' Exhibits 1, 2 and 3 at R.131 to 146). Documents clearly establishing that the only consideration given by JERSEY PALM-GROSS, INC. for the equity in Jersey Palm Associates was the loan itself, included the Purchase Agreement (Defendants' Exhibit 1, R.131) the Sixth Amendment to Joint Venture Agreement (Defendants' Exhibit 2, R.137) and the Assignment (Defendants' Exhibit 3 R.144). Each of these documents were signed by Walter Gross on behalf of Petitioner, and each document states that the 15% interest in Jersey Palm Associates was being conveyed to JERSEY PALM-GROSS, INC. in exchange for the loan which was being made to the borrower. Typical of such language is the first "Whereas" clause which appears in Defendants' Exhibit 3, the Assignment, which reads as follows:

> Whereas, Assignee has agreed to extend a loan to Jersey Palm Associates, a Florida general partnership ("general partnership"), and in exchange therefore, the general partnership is issuing its Promissory Note and causing certain of the general partners to transfer a portion of their respective percentage interest in the general partnership to JERSEY PALM-GROSS, INC.; (R.144).

After conclusion of all testimony and review of the documentary evidence before it, the trial court rendered its Judgment in which it set forth numerous findings of fact. Included

among the court's factual findings, and relevant to this Appeal, are the following:

***

6. On or about March 27, 1990, and as an intricate part of the loan transaction evidenced by the Promissory Note, Defendants PAPER and PUGLIESE and Plaintiff JERSEY PALM-GROSS, INC. by Walter J. Gross each executed documents entitled "Purchase Agreement" and "Sixth Amendment to Joint Venture Agreement".

7. Also on March 27, 1990, and as an intricate part of the loan transaction evidenced by the $200,000.00 Promissory Note, Defendant PAPER and Plaintiff JERSEY PALM-GROSS, INC. by Walter J. Gross as President executed a document entitled "Assignment".

***

10. The equity value of the partnership as of March 27, 1990 was $600,000.00.

11. As of the date upon which Plaintiff JERSEY PALM-GROSS, INC. loaned funds to Jersey Palm Associates, JERSEY PALM-GROSS, INC. knew the value of the partnership's equity. (emphasis added)

12. JERSEY PALM-GROSS, INC. knew and intended that it was to receive as consideration for its making the $200,000.00 loan to the partnership, 15% interest in the partnership as well as interest at the rate of 15% per annum on the $200,000.00 as provided for in the Promissory Note.

13. As of the date of the loan, March 27, 1990, JERSEY PALM-GROSS, INC. knew that 15% interest in the partnership had an equity value of $90,000.00. (emphasis added)

***

16. Though the Court does not believe that JERSEY PALM-GROSS, INC. harbored ill will or malevolent intent in making the loan to Jersey Palm Associates in consideration of receiving both a 15% interest in the partnership and payments of interest at the rate of 15% per annum on the principal amount of the loan, the Court finds that Plaintiff was aware of the value of the consideration which it was receiving or had a right to receive pursuant to the loan documents, and that the value of this consideration, when spread over the 18 month term of the loan exceeded 25% of the amount of the loan.

***

Based upon the foregoing and other factual findings set forth by the Court, the Trial Court issued Conclusions of Law which included the following:

***

6. As Plaintiff knew the value of the consideration which it received in consideration for making a $200,000.00 loan and further, the Plaintiff knowingly and willingly charged and accepted this consideration, the Court concludes that Plaintiff possessed the requisite intent to render the $200,000.00 transaction usurious. (Citations omitted).

***

8. Exculpatory language inserted into the $200,000.00 Promissory Note does not negate Plaintiff's knowledge that it was charging and intended to charge consideration for making the loan in excess of 25% of the value thereof.

***

(R.246-252).

STATEMENT OF THE CASE

After hearing testimony, examining the exhibits and hearing argument, the Trial Court rendered its Judgment which included Findings of Fact and Conclusions of Law. (R.246-252). Petitioner JERSEY PALM-GROSS, INC. timely appealed Trial Court's Judgment to the District Court of Appeals, claiming as error that the Trial Court applied the wrong legal standard in finding that Gross intended to receive usurious interest and that the Trial Court failed to consider the usury savings clause which appeared in the Promissory Note. Petitioner's argument to the Fourth District Court of Appeals with respect the "standard" which should be applied was simply that as Petitioner denied that it knew of the

statutory limitation of 25% constituting criminal usury, and as Respondents produced no evidence that Petitioner in fact knew of the 25% limitation, Petitioner did not have the "corrupt" intent necessary to constitute criminal usury.

What Petitioner did not raise before the Fourth District Court of Appeals, and indeed did not even deny at the trial of this matter, was that Petitioner knew the value of the partnership equity which it received in consideration for making the loan, and that Petitioner knew this equity was in addition to the interest which it was to receive according to the terms of its Promissory Note. As recited by the Fourth District Court of Appeals in JERSEY PALM-GROSS, INC. v. PAPER, 639 So.2d 664 (Fla. 4th DCA 1994) at 667, Petitioner did not challenge the Trial Court's findings with respect to valuation.

The decision of the Fourth District Court of Appeals rejected Appellant's assignments of error and upheld in all respects the decision of the Trial Court.

With respect to Petitioner's assignment of error pertaining to the requisites of establishing intent, the Court of Appeals concluded that a lenders knowledge that it was to receive in excess of 25% per annum interest, and that it willfully intended to receive in excess of 25% interest per annum was sufficient to constitute the intent necessary to render a loan criminally usurious in violation of Section 687.071, Florida Statutes, stating "the lender's claimed ignorance of the specifics of Florida's usury laws does not preclude a finding of intent". 639 So.2d at 668.

With respect to Appellant's assignment of error pertaining to the "savings clause", the Fourth District upheld the Trial Court's refusal to find that the savings clause under the circumstances of this case, was sufficient to overcome other evidence of Appellant's intent to charge usurious interest, and, concurring with decisions rendered by other states which have considered similar savings clauses, concluded that such a clause is but "one factor to which the finder of fact should look in determining whether all of the circumstances surrounding the transaction support a finding of intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned." JERSEY PALM-GROSS, INC., *supra*, at 671.

As the ruling of the Fourth District Court of Appeals with respect to the effect of the savings clause conflicts or at least appears to conflict, with an earlier decision of the Fifth District Court of Appeals, Forest Creek Development Company v. Liberty Savings and Loan Association, 531 So.2d 356 (Fla. 5th DCA 1988), rev. denied, 541 So.2d 1172 (Fla. 1989), the Fourth District Court of Appeals certified the conflict to this Court.

This Court has accepted jurisdiction.

SUMMARY OF RESPONDENTS' ARGUMENT

After trial of all issues, the Trial Court weighed the testimony and documentary evidence before it, including the so called "savings clause" appearing the Promissory Note, and concluded from all such evidence that notwithstanding Petitioner's statement that it did not intend its loan to be usurious, the actual, proven intent of Petitioner at the time the loan was made

was to extract interest from Respondents at a rate which exceeds Florida's criminal usury limitations.

The Fourth District Court of Appeals, upon review of the Trial Court's Judgment, determined that the Trial Court acted properly by weighing the savings clause as one piece of evidence in the determination of Petitioner lender's true intent instead of determining that the savings clause was as absolute bar to usury as a matter of law.

Only three other states have considered the effect of usury savings clauses, and two of them have determined them to be invalid as a matter of law. The other state which has considered this issue, Texas, has consistently ruled that the affect of savings clauses is determined by consideration of the clause in the context of the circumstances entire transaction surrounding the loan.

In adopting a rule similar to that followed by Texas, the Fourth District Court of Appeals was also ruling consistently with decisions previously rendered by other Florida Appellate districts in which savings clauses were considered.

Having applied a proper standard for determining the effectiveness of savings clauses, the Trial Court found from the evidence before it that the true intent of Petitioner was to extract interest well in excess of 25%, and its loan was therefore criminally usurious. The Fourth District Court of Appeal on review determined that the Trial Court 's findings were supported by the substantial weight of the evidence, and accordingly upheld the Trial Court's factual findings.

Petitioner did not deny at trial that it knew, and indeed intended, that it was to receive, in addition to the note rate of 15% interest, an equity interest in the borrowing partnership equal to 15% of the partnership's equity, that the receipt of this interest by Petitioner was solely in exchange for its making the subject loan, nor that it knew at the time the loan was negotiated and made that the value of the equity it was to receive was $90,000.00. Moreover, Petitioner did not assign as error in the Court of Appeals that the Trial Court erred in finding that Petitioner had such knowledge or intent or by including the value of the equity in the partnership as additional interest.

While Petitioner for the first time raises in this Court that the value of the equity which it received was uncertain, the evidence before the Trial Court was clear and convincing as to what the value was at the time of the loan and that Petitioner knew the value.

While this Court has accepted jurisdiction because of the appearance of conflict between the Fourth District's decision in this case and a decision of the Fifth District Court of Appeals rendered in Forest Creek Development Company v. Liberty Savings and Loan Association, 531 So.2d 356 (Fla. 5th DCA 1988) rev. denied, 541 So.2d 1172 (Fla. 1989), Respondents submit that a close examination of the Forest Creek case discloses that no such conflict exists. However, if Forest Creek is to be interpreted for the proposition that savings clauses, as a matter of law, eliminate a usurious taint from a transaction, then for the reasons

articulated by the Fourth District Court of Appeals, the Fifth District decision should now be overruled.

ARGUMENT

I. THE "SAVINGS CLAUSE" APPEARING IN PETITIONER's PROMISSORY NOTE WAS PROPERLY CONSIDERED BY BOTH THE TRIAL COURT AND THE FOURTH DISTRICT COURT OF APPEALS.

This case is presently before this Court to permit this Court's resolution of what appears to be a conflict between the Fourth and Fifth Circuit Courts of Appeal with respect to the proper application of a so called "savings clause" appearing in a Promissory Note. Such clauses, as does the clause to be considered by this Court, typically state that it is not the intent of the lender to make a usurious loan.

The Fourth District Court of Appeals, after a thoughtful analysis of the purpose of usury statutes, the reasonable application of savings clauses, and how such clauses have been applied by sister states, declined to follow the Fifth District's decision, Forest Creek Development Company v. Liberty Savings and Loan Association, 531 So.2d 356 (Fla. 5th DCA 1988), rev. denied, 541 So.2d 1172 (Fla. 1989), noting that the Fifth District neither discussed the facts nor cited any authority supporting its holding. See JERSEY PALM-GROSS, INC. *supra* at 669.

Reviewing decisions of sister states, the Fourth District Court of Appeals noted that of the 39 states having usury laws, only 3 states (besides Florida) have considered the effect of a usury savings clause on transactions which otherwise would be usurious. JERSEY PALM-GROSS, INC., *supra* at 670. Of the states

which have considered the issue, the Court noted that two of them, North Carolina and Connecticut have determined that such clauses are contrary to public policy and unenforceable.

Between the effect of usury savings clauses as afforded by Florida's Fifth Appellate District - that is that they avoid usury as a matter of law - and the position of North Carolina and Connecticut that they are unenforceable as a matter of law, the Fourth District found that the approach taken by Texas made more sense from both a policy and legal point of view. Reviewing Texas decisions, the Fourth District stated:

> Texas Courts since 1937 have repeatedly acknowledged the validity of the usury savings clauses, but still hold that a usury savings clause will not necessarily relieve the lender from the consequences of the usuary laws when the transaction is clearly usurious at the outset. Nevels v. Harris, 129 Tex. 190, 102 SW 2d 1046 (1937) Woodcrest Assocs., Ltd. v. Commonwealth Mortg. Corp., 775 SW 2d 437 (Tex. Ct. App. 1989). In Nevels, the Texas Supreme Court, in acknowledging the validity of usury savings clauses, gave the following strongly worded caveat:
>
> > Of course we do not mean to hold that a person exact from a borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done. [citation omitted] JERSEY PALM-GROSS, INC. *supra* at 670.

After analyzing Texas decisions, the Fourth District set forth its own formulation at page 671 as follows:

> A usury savings clause is one factor to which the finder of facts should look in determining whether all of the circumstances surrounding the transaction support a finding of intent on the part of the lender to take more than the legal rate of interest for the use of money loaned.

The Fourth District of Appeals went on to note that in circumstances where the rate of interest is determined by difficult or uncertain calculation or becomes usurious upon the happening of a future contingency, a clause disavowing an intent to charge usury may be persuasive in avoiding the penalties of usury. However, the Fourth District noted that there were no such factors present in the loan made by Petitioner.

While the Fourth District's decision may appear contradictory to the Fifth District's decision in Forest Creek, *supra*, the Fourth District was not the first Florida appellate court to consider the effect of savings clauses and to conclude that the presence of a savings clause does not, as a matter of law, insulate a loan from the consequences of usury. In Rebman v. Flagship First National Bank, 472 So.2d 1360 (Fla. 2d DCA 1985) the Second District considered a claim of usury against which the lender defended with the fact that a savings clause appeared in the Promissory Note. The Second District agreed with the lender that the subject loan was not a usurious loan. However, in reaching its conclusion, the Second Circuit did not rely solely upon the savings clause (referred to as a disclaimer clause by the Second District), but instead, the Second District considered all of the facts surrounding the transaction, as the test fashioned by the Fourth District suggests should be done. In ruling on the claim of usury, the Second District stated: "The circumstances surrounding the entire transaction, together with the stated interest rate and the disclaimer clause found on the face of each note, conclusively show

the bank did not wilfully or knowingly charge or accept excessive interest." (Rebman, *supra*, at 1364). (emphasis added)

The Second District again considered savings clauses in Plantation Village Ltd. v. Aycock, 617 So.2d 729 (Fla. 2d DCA 1993). In this case the Second District reversed a Summary Judgment entered in favor of a lender as the Court determined that the borrower had raised facts in opposition to the motion which may demonstrate an intent on the part of the borrower to have made a usurious loan. The Court noted that a savings clause was contained within the loan documents, but nonetheless determined that facts pertaining to the actual circumstances surrounding the loan must be considered, and since such facts were in dispute, the summary judgment was improper. Surely had the usury savings clause been sufficient in and of itself to establish a lack of intent as a matter of law, the summary judgment would have been proper.

Accordingly, though the Second District did not provide a method for application of a savings clause, it clearly may be implied from its decisions that the Second District Court of Appeals also believes that such clauses are not in and of themselves controlling evidence of intent, but are rather but one piece of evidence which must be considered.

It might also be noted that Plantation Village Ltd. v. Aycock, *supra*, questioned whether a savings clause can ever apply to avoid criminal usury since the savings provisions which the legislature has set forth in Section 687.04(2), Fla. Statutes, of which provisions a lender may avail itself prior to initiating suit on a

defaulted loan, expressly applies only to civil usury, no mention being made of its application to loans with an interest rate constituting criminal usury.

The Fourth District, having concluded that savings clauses are to be considered in determining a lenders intent, but are not in and of themselves conclusive in the determination of that intent, then proceeded to review the facts before the Trial Court to determine whether in the totality of the circumstances surrounding Petitioner's loan the savings clause appearing in its Promissory Note avoided the otherwise usurious transaction.

II. THE TRIAL COURT's FINDINGS WITH RESPECT TO THE INTENT OF PETITIONER TO MAKE A USURIOUS LOAN ARE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD.

The Fourth District, having ruled that a savings clause does not by itself avoid usury, reviewed the record made before the Trial Court to determine whether the Trial Court's finding that petitioner "possessed the requisite intent to render the $200,000.00 transaction usurious." (Conclusion of law 6 of the Trial Court's Judgment, (R.51).

The Fourth District concluded that "the Trial Court's Order entered after a non-jury trial is supported by substantial competent evidence". JERSEY PALM-GROSS, INC., *supra* at 666. The Court then proceeded to recite the facts which, when considered in conjunction with the savings clause were sufficient to establish Petitioner's knowledge and intent as violative of statute. These facts as summarized and set forth by the Fourth District were as follows:

> Here the amount charged for the loan exceeded the lawful rate of interest by 27%. The usurious amount was exacted at the outset, and did not depend on the occurrence of a future contingency, which might or might not have made the loan usurious. The borrowers were in desperate need of money. The lender had full knowledge of the borrower's financial situation and took full advantage of the situation by overreaching. The usurious charge did not occur by happenstance, but through the lender's purposeful actions. JERSEY PALM-GROSS, INC. *supra* at 671.

It is difficult for a Respondent to argue against much of what Petitioner set forth in its argument pertaining to intent. The cases which Petitioner cites in support of its formulation of intent include Rebman v. Flagship First National Bank, 472 So.2d 1360 (Fla. 2nd DCA 1985); Chandler v. Kendrick, 108 Fla. 450, 146 So. 551 (1933) and Dixon v. Sharp, 276 So.2d 817 (Fla. 1973). Each of these cases teach that if a lender knew the terms of its loan, intended the terms of its loan to be implemented, and if in fact the terms of the loan as known to the lender resulted in a rate of interest which exceeded the limitations imposed by state statute (whether the lender knew of the statutory limitation or not) such knowledge was sufficient to constitute a violation of usury laws.

Petitioner's argument appears to suggest that in order to find criminal usury, the Trial Court was required to find some facts beyond those merely establishing that Petitioner knew the conditions on which it was making the loan, intended those conditions to be implemented, and knew the value of the consideration which it was to receive for the loan. Petitioner refers to what is required in order to establish criminal usury as

"corrupt intent" taking this phrase from this Court's decision in Dickson v. Sharp, 276 So.2d 817 (Fla. 1973). Petitioner, however, fails to state what in addition to a lender's knowledge of what it is to receive its intent to receive it, and the value of what is received exceeding usuary limitations must be shown to establish this "corrupt intent." What Petitioner apparently ignores is that this phrase was used by this Court, and other Courts considering the issue, to describe a state of mind described by Section 687.071 (2), that is acting "wilfully and knowingly." Not only does Section 687.071(2) require a showing only of the wilfulness and knowledge of the lender, but cases construing this section have equated this state of mind to the "corrupt intent" required to constitute criminal usury.

Typical of discussion of the intent necessary to constitute that which renders a loan usurious is found in Ross v. Whitman, 181 So.2d 701 (Fla. App. 3d DCA 1966) in which the Court stated:

> The lender's professed ignorance of the laws of usury did not render lawful his knowing and intentional acceptance of usurious interest. Shorr v. Skafte.

The wilful violation mentioned in the statute, and corrupt intent referred to in the decisions, consists of knowingly and intentionally charging or accepting interest at a higher rate that the law allows. Ross, *supra* at 703. More recently, the First District in Rollins v. Odom, 519 So.2d 652 (Fla. App. 1st DCA 1988) stated:

> Rather it is the fact that the lender consciously intends and does in fact make charges which result in usury that establishes

> the requisite element of corrupt intent. [citation omitted] '[w]hen the lender has intentionally and purposely done that which amounts to or results in a contract for the exaction of usurious interest, an argument by the lender that it was not shown the lender intended to violate the usury statute is without merit.' Rollins, *supra* at 658. (emphasis added)

From the evidence presented at trial and from the Fourth District's review of that evidence, it is clear that Petitioner knew that it was to receive 15% interest on the principal it was lending, knew and intended that it was to receive a 15% equity interest in the partnership to which it was making the loan, which equity was being provided to lender solely in consideration for the loan, that Petitioner knew the equity had a present value at the time of the loan was made of $90,000.00, and that Petitioner therefore knew that it was to receive consideration in excess of 25% of the principal it was lending (on an annualized basis.)

Review of the transcript of proceedings before the Trial Court reveals that Petitioner never denied that it knew the value of the equity which was conveyed to it at the time of the loan nor professed its ignorance of such value. Moreover, Petitioner never assigned as error or argued to the Fourth District Court of Appeals that the Trial Court erred in determining that the value of the equity received by Petitioner was $90,000.00 or that Petitioner knew the value of the equity which it was to receive and intended to receive. Indeed the Court of Appeal even commented that Petitioner did not raise a challange to these findings of the Trial Court. JERSEY PALM-GROSS, INC., *supra*, at 667. Yet Petitioner now

Court. JERSEY PALM-GROSS, INC., *supra*, at 667. Yet Petitioner now argues before this Court, for the first time, that "there was never any showing that GROSS intended to receive $90,000.00 in addition to the $15,000.00 interest on the note. ... the value of the 15% share of JPA was highly speculative and no one was more aware of this than GROSS ..." See Petitioner's Initial Brief at page 11.

It is submitted that even had Petitioner raised this argument before the Court of Appeals it would have been rejected as the evidence before the Trial Court is clear and unrebutted that Petitioner was fully aware of the value of the property owned by the partnership, the debts of the partnership, the resulting equity owned by the partnership, and its share of that equity. There is no evidence before the Trial Court that the equity owned by the partnership was in any way contingent upon any future event occurring. Accordingly, Petitioner's claims of speculation as to the value of the equity should be rejected and the Trial Court's determination that Petitioner knew the value of the equity, that this value was $90,000.00, that Petitioner intended to receive equity of this value, and that this value is properly included as interest should be upheld. See Continental Mortgage Investors v. Sailboat Key, Inc., 354 So.2d 67 at 73 (Fla. 3d DCA 1978), quashed on other grounds 395 So.2d 507. (Fla. 1981)

III. READ CLOSELY, NO CONFLICT EXISTS BETWEEN THE FOURTH DISTRICT's DECISION IN JERSEY PALM-GROSS, INC. AND THE FIFTH DISTRICT's DECISION IN FOREST CREEK.

While the Fourth District Court of Appeal certified conflict to this Court, and this Court has accepted jurisdiction, it is

submitted that a close reading of Forest Creek reveals that a conflict may not in fact exist.

Forest Creek reviewed the action of a trial court granting a Motion to Dismiss a Complaint alleging a loan as uncollectible because of usury. A savings clause appeared within the loan document which was attached to the Complaint, and was therefore to be considered in determining whether the Complaint with attachments stated a cause of action.

The Forest Creek decision contains no discussion with respect to the allegations set forth in the Compliant. It may, therefore, be reasonably assumed that the Compliant merely alleged that the interest charged was in excess of statutory limits and therefore constituted usury.

As the Fourth District's decision makes clear, the effect of the savings clause is only determinable in the context of all facts relating to the making of the loan. That is, without facts to demonstrate the lender's actual knowledge and intent, and what devices the lender may have used to implement its intent, the savings clause may or may not be effective. If all that was alleged in the Forest Creek Complaint was a simple statement that the amount of interest charged exceeded statutory limits - none of the other surrounding facts being alleged - then the trial court may well have acted property in dismissing the Complaint for in circumstances in which there is no showing other than that the amount of interest exceeds of usurious limits (and Forest Creek does not even tell us by how much the limits were exceeded) under

the rule for applying savings clauses as set forth by the Fourth District, the savings clauses may well have been sufficient to determine that no cause of action was stated.

However, the Fourth District had before it a record replete with evidence as to the lender's knowledge, intent, and willfulness. Had the Appellant in Forest Creek amended its Complaint to allege such facts, and had the Fifth District then dismissed the Compliant, then in that instance there would certainly be conflict between the Fifth and Fourth circuits. However, if Forest Creek is read to mean that if all that is alleged, and therefore assumed to be true is that the rate of interest charged exceeds the statutory limitation, then the Fifth District's decision may yet stand.

CONCLUSION

Petitioner has set forth no argument or compelling reason why savings clauses should be read so as to preclude usury as a matter of law as Forest Creek Development Company v. Liberty Savings and Loan Association, *supra*, seems to hold. Indeed, even Petitioner seems to be suggesting that a savings clause is but one piece of evidence the Court is to consider in determining the true intent of the lender.

The evidence produced before the Trial Court clearly demonstrates that Petitioner knowingly and wilfully contracted to obtain consideration for its loan well in excess of 25% interest per annum.

In light of the Petitioner's true and proven intent, and the savings clause having been afforded its proper consideration has but one piece of evidence demonstrating a lack of intent, but nonetheless insufficient evidence to overcome other evidence of record showing intent, the decision of the Fourth District Court of Appeals should be upheld and if this Court determines that the Fourth District's decision conflicts with Forest Creek, that decision overruled.

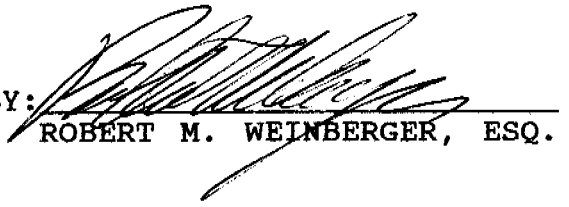
COHEN, CHERNAY, NORRIS, MORICI,
WEINBERGER & HARRIS
712 U.S. Highway One
Fourth Floor
North Palm Beach, Florida 33408
(407) 844-3600

BY: _____
ROBERT M. WEINBERGER
Florida Bar No. 570567

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Answer Brief was mailed this 7th day of December, 1994 to: Daniel S. Pearson, Esq., and Lucinda Hofmann, Esq., HOLLAND & KNIGHT, 701 Brickell Avenue, Suite 3000, Miami, Florida 33101 and HENRY PAPER, 2500 Military Trail, Suite 200, West Palm Beach, Florida 33431.

Respectfully submitted,



BY: ROBERT M. WEINBERGER, ESQ.

C:WPDOCS\PUGLIESE\stmt-case