IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,018

LENNAR FLORIDA PARTNERS I, L.P., and LENNAR FLORIDA LAND V Q.A., LTD.,

Petitioners,

v.

REWJB GAS INVESTMENTS, a Florida general partnership; F.S. CONVENIENCE STORES, INC., a Florida corporation, as general partner of REWJB Gas Investments; and TONI GAS AND FOOD STORES, INC., a Florida corporation, as general partner of REWJB Gas Investments,

Respondents.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON JURISDICTION

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I. SUMMARY OF ARGUMENT

In a simple, two-page document amending 22 commercial leases (the "Amendment"), two paragraphs were simultaneously added to the leases, one establishing a long term for the leases, the other establishing a short term. Those paragraphs provided:

> 3. The term of the Leases is amended so that each of the Leases shall have an initial seven (7) year term (beginning on the date of this Amendment), subject to four (4) options exercisable by the Assignees by notice to Lessor to extend said term for up to 5 years each, so that if all said options are fully exercised, the initial and all renewal terms will aggregate to 27 years from the date of this Amendment.
>
> 4. Notwithstanding any conflicting or inconsistent provisions of the Leases or this Agreement, including specifically paragraph 3 hereof, the term of each of the Leases, and all renewal terms shall automatically terminate at the date that is eighteen months after the date of this Amendment.

Opinion of the Third District Court of Appeal ("Opinion") at 2.[1/] The litigation which followed dealt with the obvious question of why the parties would add two completely contradictory and inconsistent provisions to the same document at the same time. The Third District held that the word "notwithstanding" in the second of these paragraphs did not answer that question and that, as a result, the trial court properly allowed the jury to consider parol evidence.

Petitioners seek review of that decision based on an asserted conflict with decisions of the Second and Fourth Districts. Petitioners claim those decisions created a per se rule--that the word "notwithstanding" "operate[s] automatically" to resolve any and all contractual ambiguities. Petitioners' brief at 9. Petitioners contend that the Third District's failure to recognize and apply this per se rule in this case creates conflict.

1/ In their jurisdictional brief, Petitioners fail to quote paragraph 3 and quote only paragraph 4, However, as the Third District recognized, resolution of this case required consideration of both paragraphs 3 and4.

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Petitioners are simply wrong. The decisions on which they rely do not create a per se rule. They do not hold that the word "notwithstanding" resolves all conflicts in all contracts in which it appears. Instead, they merely hold that a particular mortgage clause containing this word controls over a separate note provision in the particular circumstances involved in those cases. But, in this case, the Third District considered a different contract and different facts. Because the Third District reached a different result in light of those different facts, there is no conflict.

To turn the Third District's decision into more than it is--the resolution of a particular factual dispute based on unique facts--Petitioners suggest that the decision casts doubt on hundreds of contracts and statutes that use the word "notwithstanding". However, by asking this Court to adopt a per se rule, Petitioners seek to have this Court rule that all of those contracts and statutes, no matter what the language or factual context, are unambiguous as a matter of law simply because they use the word "notwithstanding". Obviously, this Court cannot so rule without considering the particular language of those contracts and statutes and the nature of the dispute involved. The Third District did consider the particular language and the nature of the dispute and, as importantly, so did both the Second and Fourth Districts in the cases on which Petitioners rely for conflict. As a result, there is no conflict,

II. STATEMENT OF THE CASE

In 1994, Respondents REWJB Gas Investments, F.S. Convenience Stores, Inc. and Toni Gas & Food Stores, Inc. (collectively "Farm Stores") commenced a declaratory judgment action against Petitioners Lennar Florida Partners, I, L.P. and Lennar Florida Land V Q.A., Ltd. (collectively, "Lennar") and defendants Land O'Sun Realty, Ltd., Alan S. Fogg, Jr., Steven M. Fogg, Suzanne Fogg Rentz, C'Store Realty, Ltd., C'Store Management Corporation, Richard D. Rentz and F.S. Disposition, Inc. (collectively the "Foggs"). Farm Stores sought a declaration that the term of 22 Farm Stores leases was 7 years, plus

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four 5-year options, for a total of 27 years, pursuant to paragraph 3 of the Amendment. Lennar and the Foggs countered that the term was only 18 months, pursuant to paragraph 4 of the Amendment.[2/]

Both Lennar and the Foggs moved for summary judgment and contended that paragraphs 3 and 4 were unambiguous, that parol evidence was not required to make sense of them and that the 18 month term provided for in paragraph 4 controlled, Farm Stores contended that these paragraphs were ambiguous and that parol evidence was required to understand the two paragraphs. The trial court found that the two paragraphs were ambiguous and, as a result, denied Lennar's and the Foggs' motions for summary judgment and subsequent motions for directed verdict, The court allowed the jury to consider parol evidence to explain the purpose and intent of the two paragraphs. After consideration of that evidence, the jury returned a verdict in favor of Farm Stores' interpretation of the Amendment.

In their appeal, the Foggs and Lennar argued that the trial court improperly allowed the jury to consider parol evidence. The Third District rejected that argument. It held that Lennar's and the Foggs' construction of the Amendment would render the language in paragraph 3 "completely superfluous, contrary to the rule of construction and of common sense that every provision is deemed to serve some useful purpose, " Opinion at page 3.

The dissenting opinion reasoned that this case was governed by the Third District's prior decision in Quiring v. Plackard, 412 So.2d 415 (Fla. 3d DCA 1982). The dissent also cited the Second District's decision in KRC Enterprises, Inc. v. Soderquist, 553 So.2d 760, 761 (Fla. 2d DCA 1989) and the Fourth

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2/ Petitioners' Appendix to their jurisdictional brief includes the Motions for Rehearing or Certification and Rehearing En Banc which they filed with the Third District. Those documents do not establish conflict jurisdiction since conflict must appear on the face of the Third District's decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). Petitioners' need to rely on those documents shows that there no such conflict exists, If those documents are considered by this Court, this Court should also consider Respondents' opposition to those motions, which is contained in an Appendix to this brief. Pages 4-8 of that opposition set forth a complete description of the facts underlying this litigation.

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District's decision in Grier v. M.H.C. Realty Corp., 274 So.2d 21 (Fla. 4th DCA 1973) as additional authority. Dissent at 8-9 and n. 7.[3/]

Lennar and the Foggs based their Motions for Rehearing, Rehearing En Banc and Certification on the dissent's citation to Quiring, Grier and KRC; they also argued that this case raised a question of great public importance. See Petitioners' Appendix at 11-39. In opposition, Farm Stores amply distinguished this case from Quiring, Grier and KRC. See Respondent's Appendix at 11-15. It also detailed numerous opinions holding that use of the word "notwithstanding" does not conclusively resolve every conflict in any legal instrument or statute in which it appears. See Respondent's Appendix at 15-19.

The Third District denied Lennar's and the Foggs' motions and refused to certify this case for review by this Court, either on the basis of conflict or because it involved a question of great public importance. Significantly, Judge Jorgenson, who authored the dissent, joined in the Third District's determination that there was no conflict or issue of great public importance. See Petitioner's Appendix at A.43. Although Lennar has sought review in this Court, the Foggs--the actual party to the leases with Farm Stores--abandoned any further appeal.

III. ARGUMENT

A. The Third District's Decision Does Not Expressly and Directly Conflict with Decisions of the Second and Fourth Districts

It is well-settled that this Court's "jurisdiction to review decisions of the courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court or another district, or (2) the application of a rule of law to produce a different result in a case which involved substantially the same facts as a prior case."" Mancini v. State, 312 So.2d 732,733 (Fla. 1975). See also Smith v. Jack Eckerd Corp., 577 So.2d 1321, 1322 n. 1 (conflict

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3/ Petitioners' brief relies heavily on the dissent. But the dissent may not be used to establish conflict. Reaves v. State, 485 So.2d 829 (Fla. 1986); Jenkins v. State 385 So.2d 1356 (Fla. 1980). Significantly, Petitioners did not rely on, or even cite, Grier or KRC in their appellate briefs. Petitioners' claim of conflict rings hollow in light of their previous failure to rely on Grier and KRC.

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jurisdiction exists "when a district court applies a rule to produce a decision conflicting with that reached in another decision involving substantially the same controlling facts").

Here, the Third District did not announce any rule which conflicts with a rule announced by the Second and Fourth Districts and it did not reach a result different from that reached by those courts under the same controlling facts. Instead, the Third District, as well as the Second and Fourth Districts, reached its conclusion based on the particular--and different--facts which they faced. As a result, there is no conflict.

KRC Enterprises and Grier addressed the interplay between acceleration provisions in two different documents, a promissory note and a mortgage. KRC Enterprises is the only decision of the two which provides any facts. There, the acceleration clause in the note was automatic. The acceleration clause in the mortgage provided that acceleration was at the mortgagee's option (i.e., it could elect to accelerate or not) and further provided that it applied "notwithstanding" anything in the note to the contrary. The court concluded that the mortgage's acceleration clause applied when the mortgagee sued to foreclose the mortgage. The acceleration clause in the note would apply if suit was brought solely on the note.[4/]

KRC Enterprises and Grier simply did not present the kind of ambiguity which exists here." Loan documents typically include both a note and mortgage. On default, the lender may sue either on the note or to foreclose the mortgage. Therefore, the loan documents in KRC Enterprises and Grier made sense in providing that the acceleration clause in the note would apply if suit was brought on the note, but that the acceleration clause of the mortgage would apply, "notwithstanding" the note provision, if suit was brought to foreclose the mortgage. Under those circumstances, both clauses had meaning and effect. The

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4/ Grier also explicitly recognized this point: "Unquestionably, plaintiff can sue on the note without foreclosing the mortgage, as they are distinct agreements." 274 So.2d at 22.

5/ Indeed, neither KRC Enterprises nor Grier appear to have involved any claim that the documents were ambiguous and neither even mentions parol evidence. These cases only address which document--the note or the mortgage--controls in a particular context, Because these cases fail even to mention ambiguity or rule on admission of parol evidence, they do not conflict with the Third District's decision at bar.

use of the term "notwithstanding" clarified the proper application of each provision under different circumstances.[6/]

By contrast, in this case the parties inserted two provisions in the same document at the same time which on their face are completely repugnant. The use of the word "notwithstanding" does not resolve the ambiguity between paragraphs 3 and 4; the two provisions remain completely inconsistent. Unlike KRC Enterprises and Grier, application of Petitioner's per se rule would not harmonize the two paragraphs and give effect to each under different circumstances, but instead would render paragraph 3 a complete nullity; that is, there would be no circumstances in which this paragraph would have any meaning or effect. As the Third District recognized, this result would violate the principle that all provisions in a contract should be given effect if possible (as they were in KRC Enterprises and Grier).

> Acceptance of appellants' claim that everything after "notwithstanding" negates everything before would unacceptably render the preceding language completely superfluous, contrary to the rule of construction and of common sense that every provision is deemed to serve some useful purpose.

Opinion at 13. Contrary to Petitioner's claim, ambiguity exists here precisely because, unlike the situation in KRC Enterprises and Grier, Petitioners' interpretation of the "notwithstanding" clause of paragraph 4 purports to completely nullify the long-term lease provision of paragraph 3, although the parties had inserted both paragraphs at the same time. As the Third District's opinion properly explains:

> The internal conflict, a paradigmatic "ambiguity," which thus remains, is resolvable--and the obvious question of why people would say two directly contrary things in the same

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6/ Petitioners also seek to rely on the Third District's decision in Quiring v. Plackard, 412 So.2d 415 (Fla. 3d DCA 1982). Of course, Petitioners' reliance on this decision is misplaced because this Court's jurisdiction must be based on interdistrict conflict. Moreover, the Third District found no intradistrict conflict since it denied rehearing en banc.

In any event, Quiring is no different than KRC Enterprises and Grier. It, too, involved an interplay between a discount clause and a clause providing for acceleration on default. Its analysis of the word "notwithstanding" in the acceleration clause gave meaning and effect to both clauses--the discount clause would apply when no default existed, but would not apply after default. Like KRC Enterprises and Grier, it did not announce a per se rule of contract construction, but merely construed the particular contract provisions before it,

> breadth, is answerable--only by evidence beyond the words themselves that the parties intended each of the two terms to operate in particular, but different, circumstances.

Opinion at 4.[7/]

In sum, neither KRC Enterprises nor Grier create any per se rule that the word "notwithstanding" always resolves any contractual ambiguity; instead, they merely held that this word helped explain the circumstances under which either the note or the mortgage would apply. Here, the Third District reviewed fundamentally different facts and concluded that the word "notwithstanding" did not resolve the ambiguity. Because these decisions merely reached different results under different facts, there is no conflict.

B. This Action Does Not Raise Any Issues of Great Public Importance.

Petitioners suggest at pp. 8-10 of their brief that this Court should exercise jurisdiction because this case involves issues of significant importance. According to Petitioners, the Third District's decision "creates a serious dilemma for drafters of legal instruments"; this Court should exercise jurisdiction to eliminate any "doubt on the automatic effectiveness of 'notwithstanding' language".

As an initial matter, Petitioners cannot establish jurisdiction by claiming that this case involves issues of great importance. This Court has held that it "does not have jurisdiction to review cases that a *party* deems to present an issue of great public importance. This Court may only review questions of great public importance that are certified by a district court of appeal. Art V, §3(b)(4), Fla.Const." Allstate Ins. Co. v. Langston, 655 So.2d 91, 93, n.1 (Fla. 1995) (emphasis in original). Here, the Third District (including the dissenter) denied Lennar's request to certify this case. Petitioners cannot support their deficient conflict argument with an argument based on their own view of great public importance.

7/ Significantly, Petitioners offer this Court no explanation why the parties would insert paragraphs 3 and 4 in the same document at the same time. Their inability to do so speaks volumes as to the document's ambiguity. See Saco Devel.. Inc. v. Joseph Bucheck Const., Corp., 373 So.2d 419, 421 (Fla. 3d DCA 1979), cited in the Third District's opinion at 3 ("It is not understandable why Saco would insist upon and accept an indemnity and hold harmless agreement . . . and at the same time execute a release . . . which would have the effect of wiping out the indemnity and hold harmless agreement. The ambiguity created by the mutual repugnance of the instruments requires consideration of such evidence, parol or otherwise, as the parties may present on the question of the intent of the parties.").

Moreover, as the analysis above makes plain, no Florida decision has ever announced or established a per se rule that the word "notwithstanding" resolves ambiguity in all contracts and statutes, no matter what the ambiguity, language or context involved. The simple fact is that no such rule exists, Numerous cases recognize and support this conclusion.

For example, in Erdenberger, Inc. v. Partek North America, Inc., 865 P.2d 850 (Col.Ct.App. 1993), the contract contained a clause which stated that royalties were payable "notwithstanding termination . . . of this Agreement." Two years later, the parties entered into a new agreement which stated, among other things, that the first agreement "shall for all purposes terminate and become null and void." The court recognized that it was impossible to reconcile these conflicting provisions from the language itself. The court found an ambiguity existed and resolved it in favor of the first provision only after the use of parol evidence demonstrated the intent of the parties.

In Derosa v. Shiah, 205 Ga.App. 106, 421 S.E. 2d 718 (Ct. App. 1992), the appellate court reversed the entry of summary judgment on the basis that a "notwithstanding" clause almost identical to the one here created an ambiguity with other contractual provisions on the same subject. The contract at issue contained three provisions where the successor employer (Dreyfus) specifically assumed the employment contract which Derosa had with his employer (Stratus). 421 S.E.2d at 720. The very next provision -- like paragraph 4 here -- purported to nullify the assumption of the employment contract. The court held that the "notwithstanding" language did not resolve the ambiguity between these conflicting provisions; an ambiguity still existed.*' Here, as in Derosa, an ambiguity exists because paragraph 4 purports to nullify

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8/ We conclude that an ambiguity exists on the issue of whether Dreyfus assumed liability under appellant's contract with Stratus **based on the language of Sections 6.4, 6.7(a) and 6.7(h) of the lease agreement, on the one hand, and the language of Section 6.8, on the other hand. Even after applying the applicable rules of construction, the ambiguity remains.** The intent of the parties to the lease agreement with respect to the assumption of appellant's employment contract is "'an evidentiary, factual matter for resolution by the jury and not a matter of law for determination by the court"' Because of the ambiguity of the lease agreement, the grant of summary judgment was error. Id. at 721 (citations omitted).

paragraph 3 completely through the use of "notwithstanding" language, even though both paragraphs were added at the same time,

Courts have properly reached the same result in interpreting statutes which contain "notwithstanding" provisions. In Conoco, Inc. v. Skinner, 970 So.2d 1206 (3rd Cir. 1992), the court was faced with an argument that a "notwithstanding" provision in a statute completely nullified another part of the same statute. It refused to reach that conclusion and instead relied on "parol evidence", i.e., the legislative history, purpose and structure of the entire statute:

> . . . Conoco makes much of the fact that the Bowaters Amendment begins with the phrase "Notwithstanding any other provision of law." . . . However, "ordinarily competing sections of a statutory scheme should be construed to give maximum effect to all provisions." [citation omitted]. Consequently, this court has recently interpreted a "notwithstanding" phrase as not taking precedence over other conflicting provisions. See United States v. Gordon 961 F.2d 426,431 (3rd Cir. 1992)(adopting a narrow definition of "notwithstanding" ad noting that "[c]ourts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify the other provision"). , , . Thus, courts must discern the meaning of "notwithstanding" from the legislative history, purpose, and structure of the entire statute.

970 F.2d at 1224 (emphasis added).

As these cases recognize, the issue is not simply whether the contract (or statute) contains a "notwithstanding" clause. Instead, the issue is whether that clause, in the context of the entire contract (or statute), makes sense and resolves any ambiguity. In KRC Enterprises, Grier and Quiring, it did. In Erdenberger, Nevosta, Conoco and this case, it did not. Petitioners choose to ignore the context in which the "notwithstanding" clause is used. They urge this Court to exercise jurisdiction so that it may adopt a per se rule to be vacuously applied without consideration of any other language in a contract. But, as these cases make clear, no such per se rule does or should exist.

Petitioners own argument belies the wisdom of any such per se rule. As Petitioners point out, hundreds of statutes and undoubtedly more contracts use the word "notwithstanding" in various contexts and for various purposes. What do Petitioners ask of this Court? They ask this Court to accept jurisdiction and establish a per se rule (for the first time, since no Court has ever adopted any such rule) that those

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hundreds of statutes and contracts--which this Court has never read or considered--are rendered unambiguous as a matter of law because they include the word "notwithstanding", regardless of the ambiguity involved and the language and facts giving rise to that ambiguity. Obviously, this Court cannot and should not undertake such a task. Courts rule on the facts and documents before them; they do not render advisory opinions on documents they have never seen and facts they have never considered. There is no basis for this Court to accept conflict jurisdiction to undertake that task.

IV. CONCLUSION

Neither the Second District in KRC Enterprises nor the Fourth District in Grier adopted a per se rule establishing that the word "notwithstanding" precludes any ambiguity regardless of the factual context. Instead, those decisions merely construed particular documents and came to the conclusion that those documents were clear. Here, the Third District performed the same analysis and concluded, based on the unique facts involved, that the two contractual provisions did not make sense even though one used the word "notwithstanding". Simply put, the decisions came to different conclusions on completely different facts. There is no conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction was mailed to: Rubin, Baum, et al., Suite 2500, First Union Financial Center, 200 S. Biscayne Boulevard, Miami, Florida 33 13 1 and Elizabeth K. Russo, Esq., Russo & Talisman, P.A., Suite 2001, Terremark Centre, 2601 South Bayshore Dr., Miami, Florida 33 133, this 14 day of April, 1997.

Joseph A. DeMaria

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

CONSOLIDATED CASE NO.: 95-3539

LAND O'SUN REALTY LTD., et al.,

Appellants,

vs.

REWJB GAS INVESTMENTS, et al.,

Appellees.
_____/

LOWER TRIBUNAL NO.: 94-446

FARM STORES' OPPOSITION TO APPELLANTS' MOTIONS FOR REHEARING, REHEARING EN BANC AND CERTIFICATION

Appellees REWJB GAS INVESTMENTS, et al. ("REWJB" or "Farm Stores") respectfully submit this response in opposition to: (I) the Motion for Rehearing en banc filed by Appellants Lennar Florida Partners I, L.P. and Lennar Florida Land- V Q.A., Ltd. (collectively, "Lennar"); (ii) the Motion. for Rehearing or Certification filed by Lennar; and (iii) the Motion for Rehearing and Rehearing en banc filed by Appellants Land O'Sun Realty Ltd., Alan S. Fogg, Jr., Suzanne Fogg Rentz, C'Store Realty, Ltd., Richard D. Rentz, Steven M. Fogg and F.S. Disposition, Inc. (collectively, the "Foggs"). In opposition to these Motions, Farm Stores states the following:

I. SUMMARY OF ARGUMENT

Appellants ground their motions on the purported existence of a conflict between the majority panel opinion in this case and Quiring v. Plackard, 412 So.2d 415 (Fla. 3d DCA 1982), concerning the rules of construction to be applied to determine and resolve

APPENDIX

an ambiguity in a contract. Appellants request the panel and the Court en banc to extend the interpretation in Quiring of a mortgage acceleration clause using the term "notwithstanding" into a broad per se rule that any "notwithstanding" clause always precludes the existence of an ambiguity as a matter of law, regardless of the context or meaning of other provisions of the contract. Appellants' request should be denied for several reasons.

First and foremost, Appellants' reliance on Quiring is misplaced. Quiring considered two clauses in mortgage documents, a discount clause and an acceleration clause. The discount clause clearly applied before default; the issue was whether it also applied after default. This Court held that the use of the term "notwithstanding" in the acceleration clause showed a clear intent that the discount clause did not apply after default. As a result, there was no ambiguity. The use of the term "notwithstanding" clearly established when each clause applied. The facts here are fundamentally different. Here, the parties added two paragraphs to a two page Amendment to Leases at the same time--a short term provision and a long term provision. Unlike Quiring, each contradicts the other completely. The use of the term "notwithstanding" raises the obvious question of why the parties would insert at the same time two provisions which are completely contradictory.

The majority opinion applied settled rules of contract construction to support a jury verdict that answered this question

and resolved the contract's ambiguity. That opinion does not conflict with or violate Quiring. Quiring considered the word "notwithstanding" and found that there was no ambiguity in that contract. The majority opinion considered the same word and found that it did not resolve the ambiguity here. The different results merely reflect the fact that determining whether a contractual ambiguity exists involves a case-by-case analysis based on the particular contractual language and the factual and legal context at issue. Simply put, Quiring does not stand for the broad per se rule which Appellants seek to obtain from this Court. There is no conflict on which to rehear or certify this case.

Second, the failure of the Appellants, or the dissent, to provide any coherent explanation for the simultaneous inclusion of both paragraphs 3 and 4 establishes that the word "notwithstanding" does not cure the Amendment's ambiguity. Indeed, the only explanation Appellants offered at any time in these proceedings relied on parol evidence. The majority opinion thus correctly affirmed the trial court's decision to allow the jury to consider parol evidence.

Third, Appellants' failure to rely on Quiring prior to this appeal demonstrates that Quiring does not control this case. At no time did Appellants mention Quiring before or during the trial, let alone contend that this 1982 decision was binding on the trial court. Moreover, Lennar did not rely on Quiring in its initial brief in this appeal and even accused Farm Stores of

misrepresenting the record for suggesting that Lennar had so relied.

II. STATEMENT OF RELEVANT FACTS[1]

In July 1992, Mr. Jose Bared, assisted by his attorney Daniel Lampert, developed a plan of reorganization to acquire Farm Stores, Inc. from bankruptcy. Included in the acquisition were approximately 22 Farm Stores locations (the "Leased Properties") leased from two partnerships owned by the Foggs. Thus, the Foggs were both owner and landlord for these 22 stores, whose leases (the "Leases") extended into the 21st century.

Part of the bankruptcy plan included renegotiation of the Leases.[2] Mr. Lampert and Mr. Alan Fogg, Jr. undertook those negotiations and, consistent with a long-term deal initially proposed by the Foggs, they successfully negotiated a long-term lease agreement to which Lennar agreed. The agreement was set forth in two letters -- the "Fogg Letter Agreement" (between REWJB and the Foggs) and the "Lennar Letter Agreement" (between REWJB

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[1]The recitation of facts herein is a summary of the statement of facts set forth in Farm Stores' Consolidated Brief. For purposes of this response, record citations have been omitted. All emphasis is supplied by counsel unless otherwise indicated.

[2]The Foggs were also trying to renegotiate with Lennar the mortgages which encumbered the 22 stores. The mortgage balances far exceeded the value of the properties and were in default. Lennar, however, was not cooperating. In fact, Lennar required the Foggs to obtain renegotiated lease terms from Mr. Bared before Lennar would even consider renegotiating the terms of the mortgages. As Lennar was a major creditor of Farm Stores, Inc., Mr. Bared needed Lennar's support to purchase the assets of the bankrupt estate.

and Lennar). Exhibit B to each of the Letter Agreements **contained** the long-term lease provisions and stated in pertinent part:

> In **addition to the Amended** Rents, F.S. Purchasing Corp.[3] or assigns will pay all sales tax on the Amended Rents. The Amended Rents will increase by 2% per year (over the base year) during the initial and all renewal **terms. The initial term of all of the leases shall be 7 years, subject to four, five-year options exercisable by the tenant.**

But for the Foggs' mortgage problems with Lennar, the Letter Agreements would not have contained any further language concerning the lease term. On July 16, 1992, however, Mr. Fogg called Mr. Bared to ask him to help the Foggs renegotiate the Lennar mortgages. The Foggs believed that Lennar would not restructure the mortgages after the renegotiated long-term leases took effect and guaranteed Lennar a satisfactory cash flow from these properties. Mr. Fogg asked Mr. Bared to add an additional provision to the Letter Agreements **so that the leases, and the cash** flow paid to Lennar as mortgagee, could end after 12 months, despite the 27 year lease terms. The Foggs could use this provision only to help their negotiations with Lennar. Indeed, Lennar understood that the purpose of this provision was to place "a gun to [its] head." Slip op. at 5 and n. 2. Because Mr. Bared trusted Mr. Fogg,[4] he agreed to provide this accommodation.

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[3]F.S. Purchasing Corp. was the entity created by Mr. Bared to acquire the assets of Farm Stores, Inc. Its rights were subsequently assigned to Appellees.

[4]Mr. Bared believed Mr. Fogg would serve Farm Stores' best interests since he had accepted Mr. Bared's offer to serve as the company's Senior Vice-President and Chief Operating Officer.

Aware of the Foggs' intentions, Lennar negotiated, among other things, an enlargement of the Foggs' proposed provision from 12 months to 18 months (to allow Lennar time to complete foreclosure proceedings against the Foggs if a deal was not reached between them). Pursuant to these negotiations, the Letter Agreements were revised to add:

> However, the Leases will automatically terminate at the date that is eighteen (18) months after the Effective Date of the Purchaser's Plan.

The long-term lease provisions in the Letter Agreements were not deleted.

The Bankruptcy Court ultimately confirmed Mr. Bared's plan. On September 14, 1992, at the closing of the Bared Group's purchase of Farm Stores, Inc.'s assets, the parties entered into an agreement titled "Amendment To Leases" (the "Amendment"). This document formally modified each of the Leases pursuant to the Letter Agreements and provided in part:

> 3. The term of the Leases is amended so that each of the Leases shall have an initial seven (7) year term (beginning on the date of this Amendment), subject to four (4) options exercisable by the Assignee by notice to Lessor to extend said term for up to 5 years each, so that if all said options are fully exercised, the initial and all renewal terms will aggregate to 27 years from the date of this Amendment.
>
> 4. Notwithstanding any conflicting or inconsistent provisions of the Leases or this Agreement, including specifically paragraph 3 hereof, the term of each of the Leases and all renewal terms shall automatically terminate at the date that is eighteen months after the date of this Amendment.

Both Mr. Bared and Mr. Lampert testified at trial that the parties understood that paragraph 3 embodied the long-term lease

deal and that paragraph 4 (the mortgage renegotiation provision requested by the Foggs) would be operative only if both Farm Stores and the Foggs invoked it -- which is why Mr. Bared granted this accommodation to the Foggs in the first place. The possibility that both Farm Stores and the Foggs could seek to end the leases was precisely the reason the Foggs requested paragraph 4, and Lennar had to respect this threat to its long term cash flow. This was the "gun" the Foggs believed they had placed to Lennar's head. However, if either Farm Stores or the Foggs declined to trigger paragraph 4, then Farm Stores would perform the long term leases set forth in paragraph 3 and continue to pay rent, including the **increases** on "October 1 of each year," as required by paragraph 2 of the Amendment.[5] Thus, under Appellees' reading of the Amendment, both paragraphs 3 and 4 (and the long-term lease provisions of paragraph 2) were given meaning and effect.

During 1993, the Foggs were unable to renegotiate the mortgage terms and Lennar commenced foreclosure proceedings. Faced with losing the Leased Properties in Lennar's foreclosure,

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[5]Paragraph 2 of the Amendment also reflected the long-term nature of the Leases. It addressed new base rent and the manner in which it would escalate, providing a "2% per year" escalation "during the initial and all renewal terms of the Leases; each such increase shall be effective as of October 1 of each year commencing with October 1, 1993." Under Appellants' interpretation of the Amendment, the rent escalation clause, which contemplated continuous yearly increases, would be superfluous because only one rent increase would occur during the 18-months following the execution of the Amendment. Farm Stores paid its rent, including the 2% annual increases, in October 1993, 1994, 1995 and 1996.

and in an effort to exert leverage over Lennar by impairing its cash flow, the Foggs threatened to evict Farm Stores, purportedly under paragraph 4 of the Amendment. Lennar initially contested the Foggs' position and supported Farm Stores. However, after Lennar was successful in foreclosing the mortgages and changed its position to join the Foggs in threatening eviction, Farms Stores filed an action seeking a declaratory judgment that the Leases had 27 year terms.

The trial court denied Appellants' motions for summary judgment, finding paragraphs 3 and 4 of the Amendment ambiguous and requiring parol evidence to resolve the ambiguity. In August 1995 the case was tried to a jury for six days during which Farm Stores presented "ample evidence" supporting Appellees' construction of the Amendment. Slip op. at 6. The jury returned a verdict in favor of Farm Stores, finding the parties intended to enter into 27-year lease terms. The trial court denied Appellants' post-trial motions and this appeal ensued.

On October 30, 1996, a majority of the panel affirmed the final judgment. Appellants now seek rehearing, rehearing en banc and certification to the Florida Supreme Court.

III. BECAUSE QUIRING AND THE OTHER CASES UPON WHICH APPELLANTS RELY DO NOT CREATE A PER SE RULE THAT A "NOTWITHSTANDING" CLAUSE ALWAYS RESOLVES ALL AMBIGUITIES AMONG CONFLICTING CONTRACT PROVISIONS, THERE IS NO INTRADISTRICT OR INTERDISTRICT CONFLICT WHICH REQUIRES REHEARING, REHEARING EN BANC OR CERTIFICATION.

A rehearing en banc is appropriate in only two circumstances. To obtain such extraordinary relief, the moving party must

demonstrate that this "case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions." Fla.R.App.P. 9.331(d). Appellants incorrectly maintain that this case satisfies both criteria; in fact, it satisfies neither.

Appellants argue that a rehearing en banc is required because the majority opinion purportedly conflicts with Quiring. They incorrectly claim that Quiring establishes a per se rule, that the use of the word "notwithstanding" in a contract always makes it unambiguous as a matter of law. Based on the same dubious legal principle, Appellants also contend that interpretation of the Amendment is of "exceptional importance". bennar goes further and asks this Court to certify the issue to the Supreme Court to resolve a claimed interdistrict conflict with cases similar to Quiring. But Quiring and the other cases on which Appellants rely established no such absolute rule. They merely held that the word "notwithstanding" clarified an ambiguity in the contracts involved in those cases; they did not hold that the word "notwithstanding" clarifies all ambiguities in all contracts regardless of the context. No published precedent from this or any other Florida court stands for such a broad, all-inclusive rule. Accordingly, this case does not warrant rehearing en banc or certification. While Appellants request rehearing by the panel, they do not make any argument independent of their reliance upon Quiring in support of their request. Thus, the Motion for rehearing by the Panel

should be denied for the same reason that the Motion for rehearing en banc and certification should be denied.

a. **Rehearing En Banc is an Extraordinary Remedy Not Warranted in this Case**

The previous decisions of this Court reflect that the granting of a rehearing en banc in a **case** involving nothing more than contract construction and interpretation is virtually unknown.[6] The reason is simple. Contract construction and interpretation necessarily involve consideration of the particular language of the contract before the Court and the factual and legal background of that contract. Each contract is different; the circumstances surrounding each contract are different as well. As a result, deciding whether a contract is ambiguous in one case will seldom, if ever, effect the outcome of any other case, thus making en banc consideration unsuitable.

[6]A computerized search of this Court's reported decisions in such cases yields only four cases that even considered a rehearing en banc. Hendry Corporation v Metropolitan Dade County, 648 So.2d 140 (Fla. 3d DCA 1994) (public works contract); Humana Medical Plan, Inc. v. Jacobson, 614 So.2d 520 (Fla. 3d DCA 1992) (HMO/provider agreement); Robert A. Shupack, P.A. v. Marcus, 606 So.2d 466 (Fla. 3d DCA 1992) (attorney fee-splitting contract); Brod v. Adler, 570 So.2d 1312 (Fla. 3d DCA 1990) (partnership agreement). In each of these cases, this Court denied the motion for rehearing en banc. By contrast, this Court has granted rehearing en banc in cases involving insurance policies. See e.g., Rabatie v. U.S. Sec. Ins. Co., 581 So.2d 1327 (Fla. 3d 1989). In those limited situations, en banc review occurs because -- unlike this case -- the issue involves great public importance due to the standardized nature of insurance contracts. Id. The contract involved in this case is anything but standardized.

B. The Panel Decision Does Not Conflict With Quiring Or The Other Cases Upon Which Appellants Rely

Appellants argue that an intradistrict conflict between the panel decision and Quiring requires a rehearing en banc.[7] Appellants are wrong because Quiring is distinct from, and does not conflict with, this case.

In Quiring, a mortgage acceleration clause provided that it governed once there was a default "notwithstanding" anything in the promissory note or mortgage to the contrary. Id. at 416-17. The mortgage provided that the borrower received a $28,000 discount if it paid the mortgage in full prior to its maturity date. The borrower defaulted. Two days after the lender filed a foreclosure suit, the borrower tendered the remaining balance due, less the discount. The trial court in a bench trial enforced the mortgage acceleration provision over the discount clause. This Court affirmed that ruling, relying on a similar mortgage loan

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[7] Lennar contends that the majority violated the principle that a three-judge panel of a district court must follow prior decisions from that district. Lennar's Motion for Rehearing or Certification at p. 5. However, as the Florida Supreme Court recognized when it enacted Fla.R.App.P. 9.331, 'in many instances factual circumstances are different and cases may be distinguishable on that basis. In addition, the issues raised and argued in a prior case may not be the same as issues raised and argued in the case under review." In re: Rule 9.331, 416 So.2d 1127, 1128 (1982)(emphasis added). Since it is reasonable to assume that Chief Judge Schwartz and Judge Goderich were aware of the requirement to follow a prior controlling decision of this Court, it is reasonable to conclude, as shown below, that the majority's decision that Quiring does not control the outcome of this case was based upon its view that the facts and issues raised and argued in Quiring were different from the facts and issues raised and argued in this case.

acceleration case from the Fourth District Court of Appeal. Id. at 417.

Quiring simply did not present the kind of ambiguity which exists here. A mortgage note typically contains both n acceleration clause to govern after default and other provisions (in Quiring, a discount clause) that apply absent default. Therefore, the mortgage documents in Quiring made sense in providing that the acceleration clause will govern the parties' rights in the event of default, "notwithstanding" any other provision to the contrary. Under those circumstances, both clauses had meaning and effect--the discount clause would apply when no default existed, but would not apply after the default and acceleration occurred. The use of the term "notwithstanding" clarified the proper application of each provision under different circumstances.

By contrast, in this case, the parties inserted in the Amendment, at the same time, two new provisions which on their face are repugnant. The use of the word "notwithstanding" does not resolve the ambiguity between paragraphs 3 and 4; the two provisions remain completely inconsistent. Moreover, the interpretation of "notwithstanding" urged by Appellants would not give effect to both conflicting provisions, but would render the long-term lease provisions of paragraphs 2 and 3 of the Amendment a complete nullity- that is, there would be no circumstances in which these two paragraphs of the Amendment would have any meaning or effect. This result would violate the principle that all

provisions in a contract should be given effect if possible, as they were in Ouiring. The majority opinion correctly recognized that settled Florida law prohibits such a result in construing contracts:

> Acceptance of the appellants' claim that everything after "notwithstanding" negates everything before would unacceptably render the preceding language completely superfluous, contrary to the rule of construction and of common sense that every provision is deemed to serve some useful purpose. Slip op. at 3 (citations omitted),

The ambiguity here exists precisely because the "notwithstanding" clause of paragraph 4 purports improperly to "wipe out" the long-term lease provision of paragraph 3, although the parties had simultaneously inserted both paragraphs in the Amendment.[8] As the majority opinion explains:

> the internal conflict, a paradigmatic "ambiguity" which thus remains is resolvable--and the ambiguity -- the obvious question of why people would say two directly contrary things in the same breath, is answerable -- only by evidence beyond the words themselves that the parties intended each of the two terms to operate in particular, but different, circumstances.

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[8] See Saco Devel., Inc. v. Joseph Bucheck Const. Corp., 373 So.2d 419, 421 (Fla. 2d DCA 1979), cited by majority, Slip op. at 3, ("It is not understandable why Saco would insist upon and accept an indemnity and hold harmless agreement . . . and at the same time execute a release . . . which would have the effect of wiping out the indemnity and hold harmless agreement. The ambiguity created by the mutual repugnance of the instruments requires consideration of such evidence, parol or otherwise, as the parties may present on the question of the intent of the parties") .

Slip op. at 4.[9]

Appellants also seek to establish interdistrict conflict for certification of the issue. The cases on which Appellants rely for conflict, KRC Enterprises, Inc. v. Soderquist, 553 So.2d 760 (Fla. 2d DCA 1989) and Grier v. M.H.C. Realty Corp., 274 So.2d 21 (Fla. 4th DCA 1973), like Quiring, involve the interplay between an acceleration provision and other provisions in a mortgage document, when the acceleration clause is prefaced with a "notwithstanding" provision. Both cases recognize that use of the term "notwithstanding" in the acceleration clause clarifies the timing issue regarding application of each provision so that all provisions apply in their proper context and none are rendered meaningless. These cases, like Quiring, do nothing more than consider the particular provisions in the contracts before them. Like Quiring, they do not establish a per se rule that the word "notwithstanding" resolves all ambiguities in all contracts as a matter of law regardless of the contractual language or context.

While Quiring, KRC Enterprises and Grier may have resolved a particular ambiguity regarding the application of an acceleration provision in mortgage documents, these rulings cannot be extended and applied blindly across all commercial transactions regardless of the contractual language and factual context at issue. Ambiguities in complex contracts in commercial transactions should

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[9]In Quiring, the mortgage itself set forth the "particular, but different" circumstances in which the discount and acceleration clauses apply. As the majority decision recognizes, this amply distinguishes Quiring from the case at bar.

be resolved only after careful analysis of the particular provision and, if necessary, consideration of parol evidence -- not by the rote application of a per se rule whenever the word "notwithstanding" appears.

C. The Use of "Notwithstanding" Does Not Conclusively Resolve Every Conflict

As the majority recognized, Appellants' argument that Quiring requires the word "notwithstanding" to control, not only in this case, but in every case, ignores that 'the term simply does not have that logical, semantic or legal effect." Slip op. at 3. Whether construing contracts or statutes, no rule of construction mandates that a "notwithstanding" clause always "automatically overrides" everything else. To the contrary, cases make clear that the word "notwithstanding" does not resolve all conflicts, that a case-by-case analysis of the particular contractual ambiguity is required, and that in some cases ambiguity remains even in contracts that use the term "notwithstanding".

For example, in Erdenberger, Inc. v. Partek North America, Inc., 865 P.2d 850 (Col.Ct.App. 1993), the contract contained a clause which stated that royalties were payable "notwithstanding termination . . . of this Agreement." Two years later, the parties entered into a new agreement which stated, among other things, that the first agreement "shall for all purposes terminate and become null and void." The court recognized that it was impossible to reconcile these conflicting provisions from the language itself. The court found an ambiguity existed and

resolved it in favor of the first provision only after the use of parol evidence demonstrated the intent of the parties.

In Derosa v. Shiah, 205 Ga.App. 106, 421 S.E. 2d 718 (Ct. App. 1992), relied upon by the majority, Slip op. at 3, the appellate court reversed the entry of summary judgment on the basis that a "notwithstanding" clause almost identical to the one here created an ambiguity with other contractual provisions on the same subject. The contract at issue contained three provisions (section 6.4, 6.7(a) and 6.7(h)) where the successor employer (Dreyfus) specifically assumed the employment contract between Derosa and his employer (Stratus). 421 S.E.2d at 720. The very next provision (section 6.8) -- like paragraph 4 here -- purported to nullify the previous provision by providing that:

> [n]otwithstandins the foresoing, nothing express or implied in this Lease is intended to confer upon any member or former member of the SPC Employees, the Terminal Employees or the Existing Lessee Employees any rights or remedies (including **any** rights of employment for any specified period of time) . , . .

Id. at 720 (emphasis added). The court held that the "notwithstanding" language did **not resolve the ambiguity between** these conflicting provisions; an **ambiguity** still existed:

> We conclude that an ambiguity exists on the issue of whether Dreyfus assumed liability under appellant's contract with Stratus **based on the language of Sections 6.4, 6.7(a) and 6.7(h) of the lease agreement, on the one hand, and the language of Section 6.8, on the other hand. Even after applying the applicable rules of con-**struction, the **ambiguity remains.** The intent of the parties to the lease agreement with respect to the assumption of appellant's employment contract is "'an evidentiary, factual matter for resolution by the jury and not a matter of law

> for determination by the court."' Because of the ambiguity of the lease agreement, the grant of summary judgment was error.

Id. at 721 (citations omitted). Here, as in Derosa, an ambiguity exists because paragraph 4 purports to nullify paragraph 3 completely through the use of "notwithstanding" language, even though both paragraphs were added at the same time.

Courts have properly reached the same result interpreting statutes which contain "notwithstanding" provisions. In Conoco, Inc. v. Skinner, 970 So.2d 1206 (3rd Cir. 1992), the court was faced with an argument that a "notwithstanding" provision in a statute completely nullified another part of the same statute. It refused to reach that conclusion and instead relied on "parol evidence", i.e., the legislative history and purpose of the entire statute:

> . . . Conoco makes much of the fact that the Bowaters Amendment begins with the phrase "Notwithstanding any other provision of law." . . . However, "ordinarily competing sections of a statutory scheme should be construed to give maximum effect to all provisions." [citation omitted]. Consequently, this court has recently interpreted a "notwithstanding" phrase as not taking precedence over other conflicting provisions. See United States v. Gordon, 961 F.2d 426, 431 (3rd Cir. 1992) (adopting a narrow definition of "notwithstanding" and noting that " [c]ourts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify the other provision). . . . Thus, courts must discern the meaning of "notwithstanding" from the legislative history, purpose, and structure of the entire statute.

970 F.2d at 1224 (emphasis added).[10]

As these cases recognize, the issue is not simply whether the contract (or statute) contains **a** "notwithstanding" clause. Instead, the issue is whether that clause, in the context of the entire contract (or statute), makes sense and resolves the ambiguity. In Quiring, KAC Enterprises and Grier it did. In Erdenberser, Conoco, Derosa and this case, it did not. Appellants choose to ignore the context in which the "notwithstanding" clause is used. They urge this Court to grant a rehearing en banc and to

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[10]The need for a case-by-case analysis, even where the term "notwithstanding" is used, is also made **clear** in the interpretation of the Supremacy Clause of the United States Constitution. In what is perhaps the seminal legal use in the United States of the term "notwithstanding", Article 6, **clause 2** of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, **any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.** (emphasis added)

Under the argument advanced by Appellants, the use of "notwithstanding" in the Supremacy **Clause** would require that federal law always prevails over state law, without regard to Congressional intent, the equivalent of par01 evidence in a contractual setting. However, the obverse is true. "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."' Cipsollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (citation omitted). Thus, the "notwithstanding" clause is not an automatic override, as Appellants suggest. To the contrary, "the purpose of Congress is the ultimate touchstone . . .", even in the context of such a settled doctrine **as** the Supremacy Clause. Id. (quotations omitted).

adopt a per se rule to be applied without consideration of any other language in the contract. But, as the cases make clear, no such per se rule does or should exist.[11]

The per se rule Appellants propose is unworkable for another reason. By eliminating a case-by-case ambiguity analysis merely because of the presence of the word "notwithstanding," Appellants would create circumstances where a court improperly rewrites the contract -- in violation of still another maxim -- regardless of the parties' true intent.[12] Whether a "notwithstanding" clause resolves an ambiguity, as it did in puiring, or exacerbates it, as it does here, can only be determined on a case-by-case basis and not by a per se rule.[13]

"Appellants also rely on the use of the citation signal "contra" in the opinion to suggest that the majority expressly recognized a conflict with Quiring which supports a rehearing en banc. Slip op. at 3. Appellants clearly are confused. To illustrate the point that a case-by-case analysis must determine whether a "notwithstanding" clause resolves a conflict, the majority cites two cases. In the first case, such a clause was found ineffective to reconcile a preceding inconsistent provision. Derosa (slip op. at 3). In the second case, Quiring, the "notwithstanding" clause in the mortgage loan documents was found effective to resolve the apparent ambiguity. The comparison of the contrary results in these cases furnishes the basis for the "contra" signal.

[12]If analyzing the complete language and context reveals (as the jury, trial' court and majority opinion found here) 'that the parties intended the Amendment to provide for a long-term lease, the mechanical per se rule Appellants propose would override that intent.

[13]Appellants' -parade of horribles -- the purported "chaos" created in legal instruments using the term "notwithstanding" and the alleged future litigation therefrom -- does not establish that this case is of "exceptional public importance" to warrant en banc review in order to establish a per se rule. Such "horribles" simply do not exist. Appellants suggest that draftsmen will not be able to use "notwithstanding" clauses to clarify intent and

IV. THE AMBIGUITY IN THE LEASE CONTRACT IS ALSO DEMONSTRATED BY APPELLANTS' INABILITY TO INTERPRET THE AMENDMENT WITHOUT RESORT TO PAROL EVIDENCE

Appellants maintain, and the dissent agreed, that "all paragraphs can be given effect, by reading them together, as written, with the specific wording selected by the parties . . ." Slip op. at 9-10. Both Appellants and the dissent are wrong. The dissent offers no explanation for the simultaneous inclusion of paragraphs 3 and 4. Appellants offer no explanation which does not require consideration of parol evidence. The failure to provide any such explanation establishes that the term "notwithstanding," without more, does not explain the Amendment's ambiguity.

Simply put, the Amendment includes no language on its face under which both paragraphs 3 and 4 can be given meaning and effect. On its face, the Leases are for either 27 years including options (paragraph 3) or 18 months (paragraph 4). As written,

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that the interpretation of contracts already in existence will be put in doubt. This is sheer nonsense. If the contract with the notwithstanding clause is unambiguous, the intent will be plain and will be enforced. But, if the notwithstanding clause merely makes what' is confusing even more so, then, as always, par01 evidence will be admissible to clarify the contract. In either circumstance, the intent of the parties will be carried out.

Appellants' "horribles" regarding form documents are also nonsense. If there is a typed addendum to a form document, it makes sense to begin that addendum with the phrase "notwithstanding anything in the form document to the contrary." Indeed, this is nothing more than implementation of the rule that typed provisions govern over form provisions. But this is not the same as including two typed provisions in the same document at the same time, one purporting completely to override the other.

these two provisions are mutually exclusive and "hopelessly in conflict." Slip op. at 5, n.3.

Farm Stores, however, provided at trial a coherent explanation as to how all the paragraphs of the Amendment were intended to operate together. See Slip op. at 5. As Farm Stores proved to the jury, paragraph 4 was a provision that the Foggs could use only if Farm Stores also agreed to leave the Leased Premises after 18 months. Its purpose was to pressure Lennar to renegotiate the mortgages with the Foggs, based on the possibility that the Foggs and Farm Stores could both decide to cut off Lennar's cash flow. The trial court and the panel correctly recognized that the jury was entitled to consider this evidence in interpreting the Amendment.

Unlike Farm Stores, Appellants cannot provide a coherent or even consistent interpretation of the Amendment. This fatally undermines their arguments for rehearing en banc. Indeed, Appellants differed between themselves at trial regarding how both paragraphs of the Amendment would operate and then changed their position on appeal and relied on parol evidence to support their new position. At trial, Lennar testified that paragraph 3 was intended to apply if the mortgages were renegotiated, but Alan Fogg, Jr. directly contradicted this testimony and testified that paragraph 3 was without "any impact" and that he did not know why it was placed there. After Farm Stores pointed out this conflict on appeal, the Foggs joined in Lennar's interpretation of the Amendment. The problem with these positions, however, is that no

language in the Amendment supports either of these alternative interpretations. Thus, even the Fogg Appellants resort to parol evidence to explain the two contractual provisions. The majority opinion thus correctly affirmed the trial court's decision to allow the jury to consider parol evidence, given the conflicting factual issues concerning the term of the Leases which were not resolved by the use of the word "notwithstanding".

V. THAT QUIRING DOES NOT GOVERN THIS CASE IS FURTHER DEMONSTRATED BY THE FACT THAT APPELLANTS DID NOT RELY ON IT BEFORE THE TRIAL COURT AND LENNAR DID NOT EMBRACE IT ON APPEAL

Appellants' own arguments before and during this appeal belie their insistence that Ouiring dictates the result in this case. Not once prior to this appeal did Lennar or the Foggs rely on Quiring, despite having numerous opportunities to do so. Neither the Foggs nor Lennar ever mentioned Quiring (i) in their motions for summary judgment, (ii) at the hearing on those motions, (iii) during the motions for directed verdict, (iv) as supporting authority for any of their proposed jury instructions, or (v) in the post-trial motions for a judgment notwithstanding the verdict.

Moreover, only the Foggs cited Ouiring in their appellate brief. Lennar accused Farm Stores of mischaracterizing their argument when it interpreted Appellees' Consolidated Brief to suggest that Lennar had relied on Quiring:

> Although Lennar certainly does not object to emphasis on the Quiring case, the language from REWJB's Answer Brief quoted above is a plain misstatement of the content of Lennar's Initial Brief - Lennar's Initial Brief does not cite to Quiring, either at page 10 or elsewhere.

Lennar Reply Brief at p. 13 (footnote omitted). Had Appellants believed that Quiring governed, they would have relied on (or at least cited) the case well before this appeal.

Both Appellants embrace Quiring now because, the dissent having cited this case, it is their last vestige of hope to prevail in this lawsuit. However, the dissent's disagreement with the majority of the panel is, respectfully, **based on the apparent view**, not the rule in this district, that a contract should be interpreted (almost exclusively) by the trial judge and not the jury. See State Farm Fire and Cas. Co. v. De Londono, 511 So.2d 604 (Fla. 3d DCA 1987), review denied, 519 So.2d 988 (Fla. 1987) (Jorgenson, J., dissenting) (majority opinion held **that parol** evidence was necessary to resolve disputed terms in contract and denied rehearing despite dissent's view that **trial court should** analyze and interpret ambiguous terms); see Slip op. at 4. As the majority of the panel recognized in this case, factual conflicts surrounding the interpretation of ambiguous terms in **a contract** are entrusted to the jury. Slip op. at 5-6 (and cases cited therein) .[14]

CONCLUSION

[14]Even if the Cdurt determines that Quiring suggests rehearing, then Farm Stores respectfully requests the Court to clarify that Quiring does not apply outside the mortgage loan acceleration context. Cases such as Derosa, Erdenberser and Conoco demonstrate that the mere use of the word "notwithstanding" cannot dictate the outcome in every case. Thus, if the panel grants a rehearing it should do so merely to clarify the limited scope of Quiring and to indicate that there is no intradistrict conflict to warrant en banc consideration. Compare Michel v. Merrill Stevens Dry Dock Co., 554 So.2d 593 (Fla. 3d DCA 1989)(en banc **review** granted for sole purpose that Court was receding from language in prior opinion).

In Quiring, the term "notwithstanding" resolved the conflict between two contractual provisions; here, it did not. Thus, there is no conflict between the majority opinion and Quiring. Accordingly, Appellants' motions for rehearing, rehearing en banc and certification should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing opposition to appellants motion for rehearing and rehearing en banc was mailed to: Curtis Carlson, Esq., Carlson & Bales, P.A., 2770 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131, Lawrence Stumpf, Esq., Rubin, Baum, et al., Suite 2500, First Union Financial Center, 200 S. Biscayne Boulevard, Miami, Florida 33131, and Kimberly L. Boldt, Esq., Russo & Talisman, P.A., Suite 2001 Terremark Centre, 2601 South Bayshore Drive, Miami, Florida 33133, this 6th day of December, 1996.

Humberto H. Ocariz

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