IN THE SUPREME COURT OF FLORIDA

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Appellant,

v.

ADOLPH S. JAHREN, a married man,

Appellee.

_____/

Supreme Court Case No.: SC00-1030

Second DCA No.: 2D99-504

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Appellant,

vs.

GARY M. MCCLERNAN, a single person,

Appellee.

_____/

On Discretionary Review from the Florida Second District Court of Appeal

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APPELLANT'S INITIAL BRIEF ON THE MERITS

SAMUEL R. MANDELBAUM, Esq. &
JAMES R. DE FURIO, Esq.,
Becker & Poliakoff, P.A.
SunTrust Financial Center
401 E. Jackson Street, Suite 2400
Tampa, FL 33602
Phone: (813) 222-7500
Florida Bar No. 270806

Attorneys for Petitioner Woodside Village

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INTRODUCTION & CITATIONS TO RECORD

Appellant WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION ("Woodside") herein challenges a decision filed on April 5, 2000 by the Florida Second District Court of Appeal, affirming a summary judgment entered in Appellees' favor by the Circuit Court for the Sixth Judicial Circuit. *Woodside Village v. Jahren*, 754 So.2d 831 (Fla. 2d DCA, 2000). Appellees ADOLPH JAHREN ("Jahren") and GARY MCLERNAN ("McClernan") were investor-owners of multiple units at Woodside Village, having each purchased several units respectively in 1979 and 1996 for leasing purposes (R 157,152).

Woodside thereafter filed a timely notice of intent to seek the discretionary jurisdiction of this Court under Fla. R. App. P 9.030(a)(2)(A)(iv), asserting that the Second District's decision expressly and directly conflicts with decisions of this Court and the Third and Fourth Districts. On October 10, 2000 this Court entered an order accepting jurisdiction in this cause, with oral argument on April 2, 2001.

References in this brief to those pages in the **Record on Appeal** are designated by the letter "**R**," followed by citation to the appropriate page number(s). References to those pages in the **Transcript** of the summary judgement hearing are designated by the letter "**T**," followed by the page number.

STATEMENT OF THE CASE AND FACTS

Woodside was created in 1979 as a condominium association pursuant to F.S. 718.104, consisting of a total of 288 units in Clearwater, Florida (R235;T5). At the time of the proceedings below in the trial court about 55 to 60 of Woodside's 288 units were rented all year and never owner occupied (R235).

The Declaration's Leasing Limitations -

In Woodside's original 1979 Declarations of Condominium ("declaration"), a unit owner was allowed to lease his unit for not more than one year without approval by the Association's Board of Directors (the "board"). Owners were further authorized to successively renew these leases for one-year terms without board approval as well [Section 10.3] (T5; R62-63). Notwithstanding, the original 1979 declarations did place certain restrictions upon the rights of unit owners to lease for more than a year in the following circumstances . . .

(1) where any lessee has violated the rules, regulations, terms and provisions of the association and/or its declaration, or has been the cause of a nuisance or annoyance to other residents, the Association *could disapprove* such lessee and preclude the owner from extending any lease [Section 10.3] ;

(2) that no apartment owner could "lease for a term *in excess of* one year *without approval* of the Board " [Section 11.1] (R62-63).

Amendments to Declarations of Condominium -

The original 1979 declarations also authorized amendments to both the declaration and Articles of Incorporation, following approval by at least 75% of the members of the Association, as well as a majority of the board [Section 14.2] (R69). However, on March 15, 1994, following a meeting of the Association's members, Articles of Amendment were approved which reduced the requisite approval percentage for adoption of proposed amendments to 66-2/3% of the members of the Association, together with a majority of the board (R118-119). The Amendment had been approved at a meeting of members on February 1, 1994, following unanimous adoption of the amendment resolution by a unanimous board and a super-majority of owners.

The following year, in August 1995, the Association approved another amendment to the declaration concerning the leasing provision of Article 10.3 (R120-121). That amendment provided that all leases and renewals "shall be first submitted to the Board of Directors for approval or disapproval," "that no unit owners shall rent or lease more than three of their units at any one time," and "after date of this amendment, no lease of an owner of three rented units shall be approved by the Association" (R121). Also in August 1995, a separate Amendment to Article 11.2(d) was added to the Declaration, prohibiting owners from owning more than three units at Woodside Village (R122-123).

Almost two years later, in January 1997, the Association again approved another leasing-related amendment to the declaration's Section 11.1(b). (R126-129). The Amendment prohibited all apartment owners from entering into any lease without prior board approval (R126-127). Before leasing any unit, an apartment owner is first required under Section 11.1(b) to give the Association notice in writing of the proposed lease, containing the lease and information concerning the intended lessee (R126). This leasing amendment was approved by at least 66-2/3% of the Association's members at its annual meeting (R126).

Two months thereafter, the leasing amendment which is the focal point of this appeal was adopted by the Association at a meeting on March 4, 1997, amending Section 10.3 of the declaration as follows:

> "No unit shall be rented for more than a total of nine (9) months in any twelve (12) month period;"
>
> "No owner shall enter into a lease, rental agreement, or other similar conveyance of a use of a unit during the *first* twelve (12) months of ownership of that unit;"
>
> "Prohibition against corporate ownership: Inasmuch as the Condominium may be used only for residential purposes and a corporation cannot occupy an apartment for such use, no unit may be sold to a corporation, partnership, or other business entity, with a sole exception that the association may take title to a unit pursuant to the governing documents of the Condominium and the Association." (R128-130).

Woodside's president since November 1997, Paul Ceffalio, explained that the nine-month lease limitation amendment was "intended to promote owner occupancy of

units" (R234). At Woodside the ratio between non-owner and owner occupancies was growing for non-owner occupancy, and such condition "would continually have a negative effect on the market value of our units and the quality of our living." (R234, T32). As the Association's president, Ceffalio found that the "value of his unit was enhanced" by the nine-month leasing limitation, because "a greater owner occupancy rate means that more people will care for their unit and the common element' (R234).

From the Association's point of view, Ceffalio stated, "it is preferable to have seasonal rentals rather than annual rentals since an owner is more likely to keep up with his unit and have concern for the appearance and maintenance of the common elements" (R234-235). With *most* of Woodside's seasonal rentals, however, the unit owner personally resides in his or her unit during the portion of the year that there is not a seasonal tenant there (R234). As both the Association's president and board member, Ceffalio stressed that the Association's goal is for "less absentee owners and more personal attention to the property by owner-occupants" (R235). The effect of the amendment, Ceffalio stated, "is to not encourage short-term tenancies and high turnover," since the 9-month leasing limitation "encourages permanent owner occupancy." (R235). Ceffalio noted that 24 of the Association's units have sold since March 1998, a majority of which have transformed from non-owner occupancy to owner occupancy (R235-236).

Enforcement for Violation of Leasing Covenants & Amendments -

The following year, on March 1998, Woodside's manager sent letters to Appellees Jahren and McClernan, advising each of them that their units had been improperly "rented for more than nine months in this twelve month period" (R7, 27). These letters advised that the Appellees' respective leases were in violation of Section 10.3 of the Declaration, which prohibits leasing by owners of more than three units at any one time, as well as leasing of any unit for over nine months within any twelve-month period (R7, 27). Accordingly, the manager demanded compliance with the declaration by having the respective tenants *immediately vacate* the Appellees' units (R7, 25). Similar notices were sent to the Appellees on other occasions as well (R8, 28, 29). For failure to so comply, these letters advised, the board would be required to enforce compliance with all requirements of Association documents, together with review and approval of all leases (R8, 28). In these notices, the board requested Appellees to have their respective tenants meet with the board's Lease Screening Committee, and bring copies of their lease agreements (R8).

Several months thereafter, in May 1998, Woodside filed two separate Complaints in the Circuit Court for Pinellas County seeking to enjoin Appellees Jahren and McClernan for violation of the declarations and amendments (R1-6, 21-26). The actions sought mandatory injunctions to remove the unauthorized tenants from

Appellees' units, as well as a permanent injunction compelling the Appellees to comply with all terms and conditions of the condominium documents (R5, 25).

Thereafter, on June 16, 1998, the Appellees served identical Answers and Counterclaims (R9-11, 31-33). Appellees generally denied they were in violation of the nine-month leasing limitation, and further denied any failures to comply with Florida law (R9).

In their Counterclaims, each Appellee noted his ownership of several condominium units which they leased to "qualified renters" (R10). They purchased their condominium units as an "investment, with the intent and purpose of leasing them" (R10). At the time of their purchases, their counterclaims alleged, the use restrictions prohibiting leases over nine months did not exist (R10, 31).

Appellees essentially raised identical defenses and counterclaims as follows: (1) that the nine-month leasing limitation is "unreasonable, arbitrary and capricious, having no legitimate purpose other than to effectively ban all, or virtually all, leasing of units; (2) no annual lease is possible under this restriction, and the vast majority of stable tenants desire to lease for a year or more; (3) a lease for a maximum of nine months has the effect of discouraging virtually all tenants, rendering [the Appellees'] condos practically unrentable and valueless as an investment; (4) the Amendment is "confiscatory" and deprives Appellees of those lawful users which were permissible at the time they became owners; (5) the

Amendment destroys the value of their investments, with the only choice to maintain vacant condos or sell them; (6) that the Association seeks to deny Appellees' legitimate, reasonable and lawful uses of their properties, which deprivation, if permitted, would cause Appellees significant economic loss; (7) that Appellees took possession of their condominium units subject to those regulations and use restrictions which were published and recorded in the Public Records; (8) that the Association has not offered to purchase Appellees' condominium units or otherwise compensate them for losses occasioned by "Plaintiff's confiscatory use restriction;" (9) that the Association has failed to "grandfather" those unit owners who bought their condominiums *prior to* the amendment coming into effect in March 1997 (R10).

On June 25, 1998, Woodside filed its Answers to Appellees' Counterclaims, generally denying the substance of Appellees' allegations (R16-17-18, 34-35). As affirmative defenses, Woodside asserted that Appellees were estopped from bringing the action due to the power of the Association's membership to amend the governing documents per the declaration's 1979 reservation to amend (R69), which power to amend was recorded *prior to* the date that Appellees took title to their units (R17, 35).

The Appellees thereafter filed verified motions for injunctions on July 31, 1998, seeking to enjoin enforcement of the Association's new vehicle towing policy

implemented on August 1, 1998 (R37-41). According to Appellees, the new policy provides that any car of a tenant not properly registered would be towed (R38). The Appellees alleged that their tenants have been denied parking permits because their leases with Appellees are annual leases *exceeding* nine months, and considered "in violation" of the March 1997 leasing amendment (R38). For this reason, the Appellees' unregistered tenants are subject to towing if their vehicles are found on Association property (R38). In their injunction motion, Appellees added those challenges to the nine-month leasing restriction as previously asserted in their counterclaims (R37-41).

Summary Judgment Motions -

Soon thereafter Woodside filed its motion for summary judgment on October 5, 1998, maintaining that Appellees' leases are in violation of Section 10.3 of the Declaration's Leasing Amendment (R43-47). Its motion further stated that Appellees have advised that they intended not to conform with the nine-month leasing limitations, believing it to be invalid (R45). Notwithstanding, the Association maintained that the affirmative rights of unit owners to *amend* their declaration,and be bound by those amendments, pre-dates any deeds that Appellees had acquired (R46). Accordingly, Woodside sought mandatory and permanent injunctions, together with attorney's fees and costs (R46). In support of summary

judgment Woodside submitted true copies of its declarations and amendments pertinent to this case (R48-130).

Appellees also filed their counter-motion for summary judgment, essentially seeking to invalidate the nine-month leasing limitation (R133-134). They asserted that the "use restriction," i.e. the March 1997 nine-month leasing limitation, was not properly enacted and was adopted *after* Appellees purchased their condominium units (R134). According to Appellees the amendment amounts to a substantial interference and "taking" of their existing property rights, without just compensation (R134).

Admittedly, Appellees each purchased several units as investments, with rental income as their purpose. The Appellees further noted that at the time they purchased their units, "there was not limitation on the duration of tenancies, and it was the intent of these investing defendants to locate and retain long term tenants who would care for the property as if it was theirs" (R134).

According to Appellees in their summary judgment motions, "the new use restriction essentially amounts to a ban on all but seasonal or short term rentals; the market for short term renters is extremely narrow, and requires that the owner completely furnish the condo unit; the amendment precludes long-term renters in favor of short-term, transitory renters. In addition, Appellees contend that the use

restriction is discriminatory and intended to target and eliminate minorities, the economically disadvantaged, and to circumvent the fair housing laws" (R135). In support of their summary judgment motions, Appellees submitted affidavits claiming that "the investment value of these condominiums has been destroyed without any provision that the Association grandfather the prior owners, provide them a reasonable period of time to dispose of their units for a fair price, or otherwise compensate them for their loss" (R134-135). Their affidavits asserted that the practical effect of the nine-month leasing limitation "is that only resident owners (or part time, seasonal resident owners) will remain or purchase," and "the 100 or so non-resident [investor] owned units will go vacant as tenants come to the end of their present leases, and many of those units will be placed on the sale market at distressed prices." (R135; 148-161).

Appellees each submitted personal affidavits in support of summary judgment in their favor, together with an Affidavit from William Weatherlow, a former unit owner at Woodside who also works as a realtor (R148-160).

McClernan noted that he had acquired two units at Woodside in 1996, as well as five units in another condominium (R152). He purchased these condominium units for appreciation in value and production of income, specifically intending to rent to people who would treat the property as their own, be respectful of others, and obey the rules and regulations of the Association

(R152). McClernan explained that the nine-month leasing limitation works as a "major hardship" upon him and other non-resident owners (R153).[1] According to McClernan, it precludes any long term rentals, and "requires the unit be empty for three months during any twelve month period." (R153). McClernan mentioned that when he bought his units at Woodside, approximately one-third of all units at Woodside were purchased for investment and leasing purposes (R154). In McClernan's opinion, few investors would now find this Condominium Association attractive because of preclusion of any long term renters (R155).[2] Appellee Jahren, an owner of four Woodside units, had purchased the units for the purpose of investing and providing a source of income (R157). It was Jahren's belief that most seasonal renters, other than those who have dual residencies, are of relatively short duration, usually under six months (R158). According to Jahren, "the units subject to the new lease restriction will be vacant for at least half the year" (R158).

Moreover, Jahren stated in his affidavit for summary judgment that he was "aware" that "from time to time *certain factions* within the Association have

[1] Notwithstanding Appellees' claim in their summary judgment motion that there were "a hundred or so non-resident owners" unable to rent their units, it is significant that no other absentee investor-owners have come forward in this cause to complain of similar constitutional wrongs or discriminatory treatment.

[2] McClernan completely ignores the fact that long prior to his unit purchases in 1996, Woodside's original 1979 declaration expressly provided that no apartment owner could "lease for a term *in excess of* one year without approval of the Board" [Section 11.1(b)], and also authorized the board to disapprove and prohibit leases [Section 11.3(b)] (R62-63,66)

opposed racial minorities and subsidized HUD renters" (R158). According to Jahren, he was personally criticized for renting to "minorities and the economically disadvantaged," although "none were deadbeats or tenants who appeared likely to damage or harm the property or the community" (R158-159).[3] Similarly, Appellee McClernan expressed an "understanding" in his affidavit that the "Association adopted this [9-month leasing limitation] to prevent certain types of tenants," including a "black mother with children" he had leased to for a year who purportedly advised him she was moving out since "she was met with hostility and aversion because of her race" (R154).[4]

Appellees also submitted an affidavit from William Weatherlow, the former Woodside unit owner who worked as a realtor (R148). According to Weatherlow, "the investment market is now dead with the adoption of the new [nine-month] leasing restriction;" "Many owners have bought to invest." "These units are quite rentable on an annual basis. There is only one reason to rent now, and that is to rent seasonally" (R148). Weatherlow stated further that "the inability to rent annually effectively destroys the investment qualities of these condos."

[3] Adamantly refuting Jahren's suggestions of rampant racism at Woodside as "absolutely untrue," president Ceffalio strongly denied that the association's nine-month leasing amendment was "intended" by the board to prevent certain minority groups as tenants (R235).

[4] President Ceffalio responded to McClernan's affidavit reference to the "black mother with children" (R154), noting that the incident stemmed from a HUD complaint filed by Ericka Blake "against Mr. McClernan and the Association" (R235,238). However, the Pinellas Office of Human Rights eventually dismissed Blake's complaint, finding there was "*not reasonable cause* to believe that a discriminatory housing practice has occurred." (R238-239)

Weatherlow criticized the Association's efforts in implementing the nine-month leasing limitation:

> "The Condo Association is trying to make the community 100% owner-occupied. I have never seen this before. If many units are dumped on the sales market at once, as is likely if absentee owners cannot rent annually, it will bring down prices." (R149).

In support of it's motion for summary judgment, Woodside submitted the affidavit of its President, Paul Ceffalio, who explained that the nine-month leasing restriction is intended to promote owner-occupancy units (R233-234). Ceffalio noted that the values would be enhanced by the amendment because a greater owner-occupancy rate means that more people will care for their unit and the common elements; that between 55 and 60 units out of 288 units are rented all year and never owner occupied; that it is "absolutely untrue" that the Board of Directors intended to prevent certain minority groups as tenants; and stressed that the Association wants "less absentee owners and more personal attention to the property by owner occupants," and the amendment "encourages permanent owner occupancy." (R233-236).

Woodside also filed an affidavit in support of its motion for summary judgment from Frank Catlett, a Florida state-certified real estate appraiser (R164-170). Catlett had researched 43 sales of Woodside condominium units over the preceding 18 months to determine whether the nine-month leasing limitation amendment has had any impact on market value (R165). Using a comparative sales approach, he

investigated unit prices with four other condominium projects in the Largo and Clearwater areas of Pinellas County (R165). His research revealed that the Woodside units tend to perform the same in terms of the average price paid-per-foot of living area (R165). From his study, appraiser Catlett stated "there does not appear to be any market evidence over the past 18 months that would lead me to the opinion that the previous cited [nine-month leasing limitation] amendment has had *any* adverse impact on value." (R166). Catlett explained that it is not uncommon for shorter-term leases, especially during the season from December to May, to command higher premiums, which would offset any lease income under an annual lease where rental rates were typically lower (R166). He stressed that there were also positive effects on unit value from the owners that might occupy their units (R166). It was Catlett's conclusion that there is no quantitative information that would indicate that the nine-month leasing limitation amendment would have any adverse impact on a unit's sale price (R166).

Hearing on Summary Judgment -

On November 30, 1998, a hearing was held on Woodside's motion for summary judgment before Pinellas Circuit Judge Brandt C. Downey III, as well as on the Appellees' counter-motion for summary judgment (T1-35). At that hearing, and for the first time in the trial court proceeding below, Appellees' counsel raised a new argument regarding the "Abilities Amendment," claiming Woodside had

"discriminated" against his clients and violated their equal protection rights by creating "two distinct classes of owners at Woodside -- the majority of owners who are subject to the [9-month leasing limitation], and Abilities [handicapped tenants that are exempt from the 9-month leasing restriction] who are treated in a disparate fashion" (T16-18,21,25).[5] At the conclusion of the hearing, Judge Downey took the matter under advisement to review the submitted memoranda and cases (T34).

Final Judgment for Appellees -

A Final Judgment was entered about six weeks later on January 12, 1999, denying Woodside's motion for summary judgment, but granting Appellees' motions (R219-220). According to the trial judge, the 1997 leasing amendments "created more than one class of ownership," which could not be applied retroactively against unit owners who purchased their unit prior to the date of the amendment (R219). The trial judge further held that the subsequent amendment allowing Abilities of Florida to purchase up to six units, exempt from the nine-month leasing limitation, "causes the creation of a separate class of units" (R220). In the final judgment the trial judge allowed Woodside "thirty days to reconsider whether

[5] In 1997, Abilities of Florida ("Abilities"), a non-profit organization that leases apartments to handicapped individuals, sued Woodside in federal court claiming that HUD had refused to finance Abilities' purchase of six units at Woodside Village because of the March 1997 leasing restriction amendment at issue. See *Woodside Village*, 754 So.2d at 835. Abilities' suit asserted Woodside's violation of the U.S. FAIR HOUSING ACT for failing to provide a "reasonable accommodation" to tenants based on their handicap (T29-30). The Association promptly settled Abilities' suit, agreeing to approve an Amendment in November 1997 exempting Abilities and its disabled tenants from the 9-month leasing and 3-unit ownership limitations (T16,30-31).

or not it wishes to enforce this amendment retroactively;" "if [Woodside] does not reconsider, [Woodside] shall purchase the [Appellees'] units for the price at which the [Appellees] purchased each unit, plus one percent for each year that the [Appellees] owned each unit" (R220).

Appeal to the Second DCA -

Thereafter, on February 3, 1999, Woodside filed a timely notice of appeal from the Final Judgment for Appellees to the Second District (R221-224).

The following year, on April 5, 2000, the Second District rendered an opinion of affirming the trial court. See *Woodside Village*, 724 So.2d at 831. The Second District held that the amendments in question were "invalid" as adopted subsequent to the Appellees' purchases, and significantly and unreasonably altered existing rights. In applying a "strict scrutiny" test, the Second District found that the amendment was discriminatory, arbitrary and oppressive in its application to the Appellees, since prior to their purchases at Woodside "there existed no significant restriction against leasing." 745 So.2d at 833.

Regarding the Abilities of Florida amendment approved by the Association in November 1997, the Second District found that the "Abilities Amendment," allowing it to purchase six units exempt from the nine-month leasing and three-unit limitations, "created two classes of condominium unit ownership." 754 So.2d at 836. The Second District further rejected Woodside's objections to consideration

of the subsequent "Abilities Amendment," where Woodside argued that Appellees had failed to properly and timely present the Abilities Amendment issue for summary judgment as creating equal protection and due process violations. 754 So.2d at 835-836.

Discretionary Review to this Court -

Thereafter, on May 3, 2000 Woodside filed a timely notice to invoke the discretionary jurisdiction of this Court, on the basis that the Second District's opinion expressly and directly conflicts with *Flagler Federal v. Crestview*, 595 So.2d 198 (Fla. 3rd DCA 1992), *Seagate Condominium v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976) and *White Egret Condominium v. Franklin*, 379 So.2d 346, 350 (Fla. 1980). This Court accepted jurisdiction over this cause on October 10, 2000.

SUMMARY OF ARGUMENT

1. The Second District and the trial court improperly found Woodside's nine-month leasing limitation and amendments to be invalid, discriminatory, subject to "strict scrutiny" and/or violative of equal protection. Leasing amendments are subject to the reasonableness standard, and "clothed with a very strong presumption of validity." No rights of Appellees were impaired, as they were readily aware of the different leasing restrictions and the possibility of future amendments to the declarations when they initially acquired the properties. Woodside's rationale for approving the leasing limitations was reasonable and related to a legitimate purpose of enhancing the continuity and quality of condominium life at Woodside Village.

2. The 1997 leasing amendments did not violate Appellees' rights to equal protection, and was not an arbitrary creation of "two classes of unit owners." Woodside was constrained to approve the "Abilities Amendment" as a reasonable accommodation and anti-discrimination measure to Abilities' handicapped clients, as required under the Florida and federal Fair Housing Act, the ADA and HUD regulations. These "two classes," Appellees erroneously contend, are disabled individuals favored with practical leasing accommodations, while Appellees are in the "discriminated" class of *non-handicapped* individuals subject to leasing restrictions. The courts erroneously declared the 1997 amendments to be invalid.

ARGUMENTS

POINT I

THE SECOND DISTRICT AND THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT'S 1997 LEASING AMENDMENT WAS "INVALID" AS AN IMPERMISSIBLE AND UNREASONABLE "ALTERATION OF PREVIOUSLY EXISTING RIGHTS," SINCE THE AMENDMENT WAS PROPERLY ADOPTED BY A SUPER-MAJORITY OF ALL UNIT OWNERS, THE APPELLEES WERE AWARE OF THE "POSSIBILITY" OF FUTURE AMENDMENTS WHEN THEY PURCHASED THEIR UNITS, AND THE AMENDMENTS WERE PROPER AND REASONABLE ENACTMENTS TO MAINTAIN CONTINUITY AND CHARACTER OF THE RESIDENCE.

On many occasions Florida courts have "pointed out the uniqueness of the problems of condominium living and the resultant necessity for a greater degree of control over and limitation upon the rights of the individual owner than might be tolerated given more traditional forms of property ownership. *Seagate Condominium v. Duffy*, 330 So.2d 484, 486*; Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975). In discussing justifications for allowing a condominium association to place reasonable restrictions on the use and occupancy of its units, this Court in *White Egret Condominium v. Franklin*, 379 So.2d 346, 350 (Fla. 1980), stated:

> "It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."

As endorsement for such limitations, this Court in *White Egret* pointed out that "the legislature of the State has expressly approved the allowance of reasonable restrictions on use and occupancy." See F.S. §718.112(3). In evaluating whether a particular condominium's amendment restricting unit owner leasing is valid, the question posed to the appellate court "is whether the appellant's leasing restriction <u>is</u> <u>reasonable</u> given the context in which it was promulgated, i.e. the condominium's living arrangement." *Seagate,* 330 So.2d at 486. This Court set forth the following standard for evaluating the enforceability of condominium restrictions and limitations:

> "Therefore, it is our view that a condominium restriction or limitation does not inherently violate fundamental right and may be enforced if its serves a legitimate purpose and is reasonably applied."
> --*White Egret*, 379 So.2d at 350.

With regard to the propriety of leasing limitations coming into existence by amendment *subsequent* to a party's obtaining of an interest in property, leasing

restrictions and preclusions in declarations of condominiums "are clothed with a very strong presumption of validity," *Flagler Federal,* 595 So.2d at 200.

In this case, Woodside had approved various leasing restrictions in it's original 1979 declaration. The declaration allowed unit owners to lease three units without board approval for up to a one-year period, including successive renewals (R62-63). However, the 1979 declaration did have two provisions authorizing the Association and/or its board to approve, veto or disapprove the leasing of units. Specifically, the second portion of Section 10.3 regarding leasing states:

> "if the Association finds during the term of any such lease that the Lessee has violated the rules and regulations of the Association or the terms and provisions of the Declaration of Condominium…or that the Lessee has otherwise been the cause of a nuisance or annoyance to the residents of Woodside Village, then the Association may so notify Lessor of its disapproval of such Lessee in writing, and Lessor shall be precluded from extending any Lease to said Lessee without the written approval of the Association."

Moreover, Section 11.1(b) of the 1979 declaration further stated that certain lease transfers were subject to Board approval:

> "(b) Lease. No apartment owner may dispose of an apartment or any interest therein by Lease for a term *in excess of one (1) year* without approval of the Board of Directors of the Association." (R63)

However, in 1995 the association and a super majority of *more than* 66-2/3 of its owners approved an Amendment requiring that all leases be first submitted to the Board of Directors for approval or disapproval, and *prohibited* the unit owners from leasing more than three of their units at any one time (R121). Another

amendment to Section 11.1(b) was enacted in January 1997, where the Association prohibited entering into any leases without Board approval, *regardless* of a length of term (R126-127). Thus, Appellee McClernan, who first purchased his Woodside units in 1996 (R152), was on record notice that he purchased his units subject to provisions authorizing the board to deny approval on lease requests, irrespective of the terms (R120-121).

In *Seagate Condominium,* 330 So.2d at 486, the Fourth District gave broad approval to leasing amendments that completely bar *any* leasing of a unit. The restriction *in Seagate Condominium* specifically provided that "the *leasing of units* to others as a regular practice for business, speculative, and investment or other similar purposes *is not permitted*. 330 So.2d at 485. However, Seagate's amendment did contain an exemption to meet extraordinary situations and avoid undue hardships, where the Board of Directors could grant permission under extraordinary circumstances to leases for a four to twelve month period. 330 So.2d at 485. The Fourth District found that Seagate's leasing amendment was "reasonable and did not constitute a restraint on alienation."

In reversing the trial court's finding that these restrictions were "invalid as an unlawful restraint on alienation, " the Fourth DCA in *Seagate* explained why Seagate's amendment barring practically all leasing was "reasonable" . . .

> "Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South

> Florida in particular, **appellant's avowed objective--to inhibit transiency and to impart a certain degree of continuity of residence and a residential charter to their community—is, we believe, a <u>reasonable</u> one**, achieved in a not unreasonable manner by means of the restrictive provision in question. The attainment of his community goal outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone so desires." 330 So.2d at 486.

Similarly, in *Flagler Federal,* 595 So.2d at 199, Crestview's original declaration specifically provided that unit owners could not lease their units without the express approval of the Association. However, the declaration specifically excluded institutional mortgagees from the leasing restrictions, which exclusion was in effect when Flagler Federal became the mortgagee on two units in 1970. 595 So.2d at 199. Fourteen years *after* Flagler Federal acquired mortgages in two condominium units, Crestview's declaration was amended in 1984 to prohibit leasing *entirely*. When Flagler Federal attempted to lease out the units to tenants, the Crestview obtained an injunction against Flagler Federal notwithstanding its claim that its mortgage interest in the units *preceded* the subsequent lease amendments. 595 So.2d at 199. However, at the time that Flagler Federal originally issued its mortgages in the two units, it was *aware* from the recorded Declaration and its amendment provisions which clearly gave notice that there was the <u>possibility</u> of subsequent amendments. 595 So.2d at 200.

In affirming the injunction against Flagler Federal, the Third District held that Flagler was bound by the provisions of the declaration as amended, which completely barred any leasing of those units:

> "Restrictions found in a Declaration of Condominium 'are clothed with a very strong presumption of validity which arises from the fact that each individual owner purchases his unit knowing of and accepting the restrictions to be imposed."
>
> "[Flagler Federal] had the option of refusing to issue mortgages on units bound by the Declaration…like other unit owners who acquired title *prior to* the Amendment, is bound by the Declaration as amended." 595 So.2d at 200.

See also: Pine Island Ridge Condominium Association v. Waters, 374 So.2d 1033 (Fla. 4th DCA, 1079) (where declaration of condominium specified that unit owner had to obtain approval of association prior to leasing his unit, association's refusal to allow leasing was "reasonable"); *c.f.: Lakeside Manor Condominium Association v. Forehand*, 513 So.2d 1104,1106 (Fla.5th DCA,1987) (condominium declaration provision requiring unit owners to offer association right of first refusal for leasing unit before offering lease to third person, and association's voiding of lease for failure to so offer, was *not* invalid as "arbitrary and discriminatory" merely because the developer and mortgagee are *exempt* from that provision).

As mentioned above, from its inception, Woodside's declaration placed significant limits on unit owners to lease their units for more than a one-year period and to disallow any such leases. The Board's authorization to disapprove all leases in its discretion was expanded in August 1995 and January 1997 (R120-121; 126-129). It was in March 1997 that the subject amendment in issue was approved by *at least* 66-2/3% of the Association's members at a meeting on March 4, 1997, which barred leasing for over nine months in any twelve month period, and also precluded any corporate ownership of units (R128-130).

In support of summary judgment, the Association's president, Paul Ceffialio, stated that the nine-month lease amendment was "intended to promote owner occupancy of units, as the ratio of non-owner occupancy was growing

(R234). The Association felt that "unit value was enhanced" by the nine-month leasing limitation, because a greater owner occupancy rate means more people will care for their unit and the common elements (R234). According to the Association's president, "it is preferable to have seasonal rentals rather than annual rentals since *an owner is more likely to keep up with his unit and have concern for the appearance and maintenance of the common elements*." (R234-235). With at least two-thirds of the owners having approved the nine-month lease limitation amendment, it was the association's goal to promote "less absentee owners and more personal attention to the property by owner – occupants" (R235). As a result of the Amendment, the Association's president pointed out, permanent owner-occupancy has increased. (R235). These are reasonable justifications for the amendment, to enhance the quality of life at the Woodside community.

Accordingly, these leasing restrictions do not inherently violate any fundamental rights of Appellees, and are readily enforceable since they serve a legitimate purpose and are reasonably applied. *See White Egret*, 379 So.2d at 350 (condominium limitations are enforceable if they serve a legitimate purpose and are reasonably applied). As emphasized in *Aquarian Foundation v. Sholom House*, 448 So.2d 1166, 1167 (Fla. 3d DCA, 1984) . . .

> "It is well settled that increased controls and limitations upon the rights of unit owners to transfer their property are necessary concomitants of condominium living.

> Accordingly, restrictions on a unit owner's right to transfer his property are recognized as a valid means of insuring the association's ability to control the composition of the condominium as a whole."

Woodside's attainment of its expressed community goals far outweighs Appellees' interests in retaining broad leasing rights in investment properties for unlimited durations. *See Seagate* 330 So.2d at 486.

Of great significance is the fact that when the Appellees acquired their interests in their respective condominium units, they necessarily acquired title with *full knowledge* that the declaration might thereafter be lawfully amended, as in fact from time to time has since occurred. *See Kroop v. Caravelle Condominium*, 323 So2d 307, 309 (Fla. 3d DCA, 19745) (amendment restricting leasing of units was valid and enforceable where condominium owner acquired title with knowledge of declaration and possibility of subsequent amendments); *Flagler Federal*, 595 So2d at 200 (amendment prohibiting leasing entirely was valid and enforceable, as lender had knowledge of provisions for amending declaration when mortgage interests were acquired in two units).

Where a declaration of condominium contains provisions for subsequent amendments, an owner cannot complain that a later amendment is binding. *Providence Square Association v. Biancardi*, 507 So2d 1366, 1372 (Fla. 1987). As absentee investor-owners of multiple Woodside units, Appellees were well aware from the inception of ownership at Woodside of the "possibility" of subsequent

declaration amendments, particularly in the leasing area. This is especially the situation with Appellee McClernan, who acquired title in 1996 after certain amendments had already been approved by over two-thirds of the owners, which placed more restrictions on leasing. The 1997 amendments are reasonable means to accomplish the lawful purposes of providing stable communities, continuity and responsibility with regard to ownership and quality of life at Woodside Village.

Accordingly, the Second District and trial court below erroneously concluded that the 1997 leasing limitations "deprived Appellees of a valuable property right that existed at the time they purchased their units." 754 So2d at 833. The courts also improperly applied a "strict scrutiny" test, instead of the reasonableness standard. Here, the leasing limitations effectuate a legitimate purpose and is quite "reasonable." This Court should reverse these rulings and find that the nine-month leasing limitations were "clothed with a very strong presumption of validity," *Flagler Federal,* 595 So.2d at 200, and are reasonable, enforceable measures that serve the legitimate purposes of the Association.

POINT II

THE SECOND DISTRICT AND TRIAL COURT ERRED IN FINDING THAT THE 1997 LEASING AMENDMENTS CONSTITUTED AN ARBITRARY, IMPERMISSIBLE CREATION OF "TWO SEPARATE CLASSES" OF CONDOMINIUM UNIT OWNERSHIP, IN VIOLATION OF APPELLEES' RIGHTS TO EQUAL PROTECTION.

In its opinion below the Second District held that the nine-month leasing limitation, viewed together with the subsequent "Abilities Amendment," violated Appellees' equal protection rights since these two 1997 amendments constituted "an **arbitrary** creation and treatment of **two classes of unit owners**." *Woodside Village*, 754 So.2d at 836. This Court in *White Egret*, 379 So.2d at 351, held that restrictions cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing.

For example, in analyzing the constitutionality of a restriction based on age, attacked on due process and/or equal protection grounds, this Court in *White Egret* queried, 379 So.2d at 351:

> (1) Whether the restriction under the particular circumstances of the case is reasonable, and
>
> (2) Whether it is discriminatory, arbitrary or oppressive in its application.

"It is a fundamental principle that in order to establish a colorable equal protection claim, Plaintiffs must show that [an enactment] *has created a classification* that violates equal protection principles*."* *Seniors Civil Liberties Association v. Kemp*, 761 F. Supp. 1528, 1556-1557 (M.D. Fla., 1991), *affirmed*, 965 F.2d 1030 (11th Cir. 1992). Where a Plaintiff asserts an equal protection claim that an enactment is discriminating against a particular group of people, the Plaintiff has a "heavy burden of demonstrating that such a classification…is not rationally related to a legitimate state interest." *Seniors,* 761 F. Supp. at 1557. Similarly, the burden is on one complaining of a due process violation to establish that a condominium association in implementing an amendment "has acted in an arbitrary and irrational way." *See Seniors*, 761 Fed. Supp at 1558.

As reflected in Second District opinion below, Abilities is a non-profit corporation using HUD funds to purchase six units at Woodside for renovation and leasing to disabled persons. Abilities had filed a federal action asserting that the leasing amendments at issue violated the civil rights of the handicapped. *See Woodside Village*, 754 So.2d at 835. HUD had refused to finance Abilities' purchase of six units at Woodside Village, intended to be leased to handicapped persons, because of the leasing restriction amendment at issue. 754 So.2d at 835. Abilities' suit claimed that Woodside had violated the U.S. Fair Housing Act for failing to provide a "reasonable accommodation" to tenants based on their handicap (T29-30).[6] However, while the federal action was pending, the parties settled the matter wherein Woodside agreed to allow Abilities to purchase up to six units and obtain an exemption from the nine-month leasing limitation (T30). After the federal judge entered a temporary injunction against the Association, the Association settled the matter in accordance with its statutory authority to settle litigation pursuant to F.S. §718.111(3).[7]

According to Woodside's counsel at the hearing below, "the reason why we were sued was because we enforced the Declaration with regard to [the nine-month limitation of] leasing" rather than pursue efforts for "selective enforcement" of the nine-month leasing limitation (T31). To effectuate the settlement, on November 12, 1997, Woodside's Association adopted and filed the "Abilities Amendment" exempting Abilities and its handicapped tenants from both the nine-month leasing and three-unit ownership limitations (T16).

[6] Abilities is a private non-profit corporation that obtains federal financing to buy condominium units for leasing and housing to handicapped individuals (T30).

[7] Under F.S. §718.111(3), condominium associations have the power to "institute, maintain, settle or appeal actions on behalf of all unit owners."

At the summary judgment hearing in the trial court below, Appellees' counsel argued that these 1997 leasing amendments create "two distinct classes of owners at Woodside, the majority of the owners who are subject to this rule, and than there's the Abilities, who is treated in a disparate fashion" (T16-17). Appellees' counsel further claimed that these restrictions are "discriminatory" in that the Abilities' amendment "favors Abilities and disfavors the rest of the condominium units (T21). The Second District "agree[d] with Appellees and the trial court that [the leasing amendments] created two classes of condominium unit ownership." *Woodside Village*, 754 So.2d at 836.

In this case, Woodside's unit owners approved the "Abilities Amendment" for the purpose of complying with the U.S. Fair Housing Act, 42 U.S.C. 3601 *et seq*., the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. 12131, as well as Florida's Fair Housing Act, F.S. §760.20 *et seq*.

Florida's Fair Housing Act, F.S. §760.23 prohibits discrimination in the sale or rent of housing, by making it unlawful to "make unavailable or deny a dwelling to any person because of …handicap," as well as "to discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling…because of …handicap." Section 760.23(9), defines "discrimination" as "a refusal to permit, at the expense of the handicap person, reasonable modifications of existing premises, or "a refusal to make reasonable accommodations and *rules, policies*, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." F.S. §760.23(9)(a) and (b). The U.S. Fair Housing Amendments Act, which expanded coverage of the federal act prohibiting discrimination based on disability or familial status, provides that HUD can bring administrative enforcement actions on behalf of victims of housing discrimination based on handicap. 42 U.S.C. 3601 *et seq*. Moreover, the ADA prohibits discrimination against persons with disabilities in all services, programs and activities made available by State and local governments, which include HUD programs, services and regulatory activities relating to state and local public housing, housing assistance and referrals. 42 U.S.C. 12131; 28 C.F.R. Part 35.

HUD insures private mortgage loans to develop, construct, or rehabilitate rental housing for low income persons with disabilities, apparently the type of projects that Abilities is involved in. See §811, National Affordable Housing Act, 24 C.F.R. Part 890 (program administered by the New Products Division of HUD's office of multi-family housing development). To encourage private investment, the Act authorizes HUD to insure private loans used to construct low income housing at reduced interest rates, with lessor/borrower equity requirements. *See United States v. Southland Management Corp*., 95 F. Supp. 2d 629, 631 (S.D. Miss., 2000) . The National Housing Act was enacted to "assist private industry in

providing housing for low and moderate income families and displaced families." *Southland*, 95 F. Supp. 2d at 631.

"However, as consideration for receiving this economic benefit from the federal government, the owner is required to comply with HUD Rules and Regulations." *Pine v. Lish*, 583 N.Y.S. 2d 128 (N.Y., 1992). These HUD rules that owners must comply with, include strict rent controls, limiting owners from engaging in other businesses, mandates that the property be dedicated for medium and low income tenants, limits of profit distribution, and requirements that the owner use trents to maintain the property in good repair and condition. *Southland,* 95 F. Supp. 2d at 631.

With the backdrop of the federal and state Fair Housing Acts, ADA, as well as other state and federal laws precluding discrimination or mandating reasonable accommodations for handicapped persons, Woodside's owners and Board approved the November 1997 Amendment to reasonably accommodate Abilities of Florida and the needs of its handicapped clients (T16, 30-31). Although the Association enacted the November 1997 Abilities Amendment to specifically afford "reasonable accommodations" to the disabled at Woodside Village and avoid any discrimination against handicapped individuals, Appellees' counsel asserted at the hearing that the Abilities Amendment "is discriminatory…it favors Abilities and disfavors the rest of the condominium units." (T31). Thus, Appellees are effectively arguing that Woodside's passage of anti-discriminations measures to favor handicapped individuals has the reverse effect of "discriminating" against Appellees as non-handicapped individuals who are not entitled to the same reasonable accommodations under the Fair Housing Acts and ADA.

The approval of the Abilities Amendment was neither "arbitrary" nor "unreasonable" – Woodside has an obligation under state and federal law to provide these reasonable accommodations concerning its rules and policies to assure that handicapped persons have sufficient access to housing. It's fair to observe that handicapped individuals are more challenged to access the workplace, education and housing, which is why reasonable accommodations are required by law. Nor do disabled persons have the same access to conventional mortgages as many others have, a problem to which HUD and other similar financing and

agencies serve. By no stretch of the imagination was Woodside acting arbitrarily or unconstitutionally by accommodating Abilities' disabled tenants through exemptions from leasing policies—or in failing to provide similar reasonable accommodations to non-handicapped individuals such as Appellees.

The Courts have readily recognized that effectuation of anti-discrimination measures and reasonable accommodations, which may effectively treat victims of discrimination differently, does not constitute a denial of equal protection or an "arbitrary creation and treatment of two classes" of grantees. For example, in *Seniors*, 761 F. Supp. at 1556-1557, the U.S. District Judge held that elderly residents of restricted housing were not "deprived of equal protection" by the provisions of the Fair Housing Amendments Act of 1988, which prohibited discrimination in sale or rental dwelling units on basis of familial status.

According to the plaintiffs in *Seniors*, the Fair Housing Act deprived them of vested property and contractual rights, subjecting them "to arbitrary and capricious discrimination without due process of law." 761 F. Supp. at 1556. The basis for the plaintiffs' equal protection claim in *Seniors* was that the Fair Housing Amendments Act "is discriminating against a group of people who want to continue to be able to discriminate [against others] on the basis of familial status." 761 F. Supp. at 1557. According to the plaintiffs, the Housing Act "discriminates against them by interfering with their choice to live in a community which excludes children." Recognizing that the familial status provisions of the Fair Housing Act is to provide a "remedy for the widespread housing discrimination against families with children in both rental and ownership housing," the U.S. District Court rejected the plaintiffs' equal protection challenge, stating:

> "Plaintiffs cannot meet their heavy burden of demonstrating that such a 'classification drawn by the statute' is not rationally related to a legitimate state interest." - - (761 F. Supp. at 1557).

Accordingly, in dismissing the plaintiffs' claim that their equal protection rights were violated, the Court in *Seniors* concluded "that eliminating discrimination on the basis of familial status *is rationally related* to a legitimate state interest and is *therefore not a violation of equal protection*." 761 F. Supp. at 1557, *affirmed*, 965 F.2d at 1030 (11th Cir., 1992).

This same principal of disallowing equal protection challenges as a sword for obtaining special accommodations in condominium uses was applied by the Fifth District in *Lakeside Manor,* 513 So.2d at 1106. There the court rejected a

unit owner's equal protection challenge to a condominium board's denial of leasing rights, notwithstanding the fact that *other classes of owners* were exempt from the same leasing restriction's operation:

> "we do not hold [the leasing restriction] invalid as arbitrary and discriminatory merely because the developer and institutional first mortgage holder's are exempt from its operation, as has been contended by the unit owner." - - 513 So.2d at 1106.

In *Lyons v. King*, 397 So.2d 964, 967 (Fla. 4th DCA, 1981), the Fifth District rejected a prospective condominium unit purchaser's lawsuit claiming that the condominium association "was guilty of an unreasonable and arbitrary restraint on the alienation of property." The proposed unit owner did not intend to live in the condominium unit, but rather intended only to rent the apartment, preferably to a long term tenant "who would be like a resident." The condominium building in *Lyons* was of a residential nature and owner-occupied, with no apartments held for investment and leased to non-owners. 397 So.2d at 967. After the Condominium Association rejected plaintiffs as applicants for purchase of an apartment, the plaintiffs argued that the restrictions regarding purchase approvals were arbitrarily and unreasonably applied by the Association and the approval procedure. However, the Fourth District in *Lyons* rejected the plaintiff's challenge, agreeing that the Condominium Association "*did not act in an arbitrary and unreasonable manner in applying the approval provisions* of the document." 397 So.2d at 968. *See also: Pine Island,* 374 So.2d at 1035 (where declaration required unit owner to obtain Association's approval prior to leasing a unit, it was reasonable to withhold such approval from owner).

See also *Pomerantz v. Woodlands Association*, 479 So.2d 794 (Fla. 4th DCA, 1986) (homeowner association's deed restriction prohibiting permanent residents under age 16 was "reasonable and valid" as against equal production and due process attack).

The Second District and the trial court below have erroneously viewed Woodside's anti-discrimination measures and reasonable accommodations to Abilities' handicapped clients as arbitrary, discriminatory and violative of Appellees' equal protection rights. In essence, the courts in this cause below have held that the association's efforts to institute anti-discrimination measures for Abilities' handicapped clients, leads to "discrimination" against Appellees as non-disabled individuals.

There is no valid basis or sufficient evidence for the courts below to have deemed Woodside's 1997 amendments as "an arbitrary creation and treatment of two classes of unit owners." 754 So.2d at 835-836. This Court should reverse and remand the lower court's rulings. See *Rodriguez v. Tower Apartments*, 416

F.Supp. 304, 307 (D.P.R., 1976) (where certain tenants receiving federal subsidies and reduced rents at HUD housing, other full-paying tenants that aren't receiving such federal subsidies *are <u>not</u> denied equal protection*; "it is clearly a rational exercise of the [HUD] secretary's discretion to treat the two classes of tenants differently in light of the differences of the federal benefits they receive").

CONCLUSION

Based upon the foregoing arguments and authorities, the Appellant Woodside Village Condominium Association respectfully requests this Honorable Court to *reverse* the Second District's opinion and trial court below and enforce the subject amendments to Appellant's Declaration of Condominium as valid leasing limitations. This Court should further remand this cause to the trial court with instructions for entry of judgment in favor of Appellant, therein granting mandatory and permanent injunctions against Appellees (1) enjoining tenancies that exceed nine months, (2) removing unauthorized tenants, and (3) compelling Appellees to comply with the terms and conditions of the amendment to Appellant's Declaration of Condominium.

Respectfully Submitted,

Samuel R. Mandelbaum, Esq.(FBN 270806)
James R. De Furio, Esq. (FBN 364061)
Becker & Poliakoff, P.A.
401 East Jackson Street,
24th Floor
Tampa, Florida 33602
Tel. (813) 222-7500
Fax (813) 222-7519

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been sent by regular U.S. Mail to Robert G. Walker, Esq., 1421 Court Street, Suite F, Clearwater, Florida 33756-6147, on this 27th day of November, 2000.

CERTIFICATION OF TYPE

I HEREBY CERTIFY that size and style of type used herein is 14-point proportionately spaced Times Roman.

_____
Samuel R. Mandelbaum, Esq.

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