IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SCHICKEDANZ BROS. RIVIERA, LTD., A Florida Limited Partnership, and SCHICKEDANZ BROS. PALM BEACH, LTD., a Florida Limited Partnership, and SCHICKEDANZ ENTERPRISES, INC., the corporate general partner of SCHICKEDANZ BROS. RIVIERA, LTD., and SCHICKEDANZ BROS. PALM BEACH, LTD.,

Petitioners,

Supreme Court Case No. SC00-221
4th DCA Case No. 98-3854

vs.

ROBERT HARRIS and REAL ESTATE MARKETING AND CONSULTING, INC.

Respondents

_____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondents certifies that the following persons and entities have

or may have an interest in the outcome of this case.

1. Thomas F. and Michael J. Ryan (Attorneys for Plaintiffs/Respondents)

2. Robert Harris (Plaintiff/Respondent)

3. Real Estate Marketing and Consulting, Inc. (Plaintiff wholly owned by Robert Harris)

4. Rod Tennyson (Attorney for Defendants/Petitioners)

5. Schickedanz Bros.-Riviera, Ltd. (Defendant-Petitioner)

6. Schickedanz Bros.-Palm Beach, Ltd. (Defendant/Petitioner)

7. Schickedanz Enterprises, Inc. (Defendant-Petitioner)

8. Waldemar Schickedanz (A principal of Defendant-Petitioner)

9. Gerhard Schickedanz (A principal of Defendant-Petitioner)

10. The Honorable Moses Baker (Trial Judge)

11. Fourth District Court of Appeal Panel
    The Honorable Frederick A. Hzouri
    The Honorable Bobby W. Gunther
    The Honorable Robert M. Gross

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CASES:

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SCHICKEDANZ BROS.-RIVIERA
LTD., etc., et al.,

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SUPREME COURT CASE No. SC00-221
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vs.

ROBERT HARRIS and REAL ESTATE
MARKETING AND CONSULTING, INC.

Respondents

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RESPONDENT'S APPENDIX

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STATEMENT OF THE CASE

The Record on Appeal will be referenced as "ROA/page number" and "Supp. ROA page number" since there were two separate indexes filed in this one case, which had two appeals pending simultaneously. Both Indexes are included in the Respondents' Appendix, pages App. 1-App. 10, since transcripts relative to this appeal were filed by the Clerk of the 15th Judicial Circuit in the second Appeal.

Respondents/Appellants, Robert Harris (hereinafter "Harris") and Real Estate Marketing and Consulting, Inc., (hereinafter "REMAC"), Plaintiffs in the trial court, filed a multi-count civil complaint for damages for services rendered and money lent against Petitioners/Appelees, Schickedanz Bros.-Riviera, Ltd, (hereinafter "Schickedanz-Riviera"), Schickedanz Bros.-Palm Beach, Ltd. (hereinafter "Schickedanz-P.B.") and the corporate general partner of both, Schickedanz Enterprises, Inc. (hereinafter "Schickedanz, Inc."), collectively referred to hereinafter as the "Schickedanzes", all Defendants in the trial court, on July 30, 1997. (ROA 01-19)

The Original Complaint was dismissed October 16, 1997 after a hearing in open court. (See transcript, Supp. ROA 9-22). Harris and REMAC were given 15 days to amend. (ROA 50)

The First Amended Complaint was filed October 31, 1997. (ROA 51-78. App. 11-38)

The Schickedanzes again filed a Motion to Dismiss. (ROA 80-83) This was

heard in open court May 14, 1998. (See transcript, Supp ROA 23-40) The Schickedanzes Motion to Dismiss was granted with leave to amend on July 23, 1998. (ROA 103-104, App 39-40)

Harris and REMAC filed a Second Amended Complaint on August 13, 1998. (ROA 105-120, App 41-56) The Schickedanzes filed a Motion to Dismiss Second Amended Complaint with Prejudice. (ROA 122-124, App 57-59) This motion was heard on September 22, 1998 in open court[1]. On September 24, the trial judge, Moses Baker, entered an Order Dismissing Case With Prejudice as to all counts. (ROA 125-126, App 60-61)

[1] Undersigned counsel for Harris/REMAC was in Minnesota and attended by phone and was not able to hear Mr. Tennyson's argument to the court. There was no court reporter to the undersigned's knowledge.

Harris/REMAC filed a Motion for Rehearing October 5, 1998. (ROA 127-134) Order Denying Motion For Rehearing was entered October 13, 1998. (ROA 135-136) Notice of Appeal was filed November 9, 1998. (ROA 137-141)

While the appeal on the merits was pending, Schickedanzes proceeded with an evidentiary hearing on Attorneys' Fees, which the Trial Court awarded, and a second appeal was filed by Harris/REMAC (hence, the two INDEXES).

On November 17, 1999 the Fourth District Court of Appeals affirmed in part and reversed in part the trial court ruling dismissing the case with prejudice. (App. 62).

The Schickedanzes petitioned to the Florida Supreme Court for Writ of Certiorari based on conflicts with other Appellate and Supreme Court decisions as relates to Chapter 475 Florida Statues dealing with the regulation of Real Estate Brokers and Salespersons.

The Petitioners' Brief on the Merits also addresses the count for Money Lent, which was not addressed in the Petitioner's Brief on Jurisdiction submitted in support of the Petition for Writ of Certiorari.

The facts in this case, for the purpose of this appeal, are as set forth in the First and Second Amended Complaints. (App 11-38, 41-56) Since judgement was rendered on the pleadings, the trial court and the appelant courts must view the facts as alleged in the light most favorable to the complainants,

Harris/REMAC. Hammonds v. Buckeye Cellulose Corp. (1973 Fla.) 285 So. 2d 7.

In summary, Wallace Schickedanz, with proper authority of and on behalf of Schickedanz-Riviera and Schickedanz, Inc., hired Harris as an independent contractor to provide services for Schickedanz-Riviera at a project knows as Woodbine. Schickedanz-Riviera was, at all times material hereto, the developer building product and marketing and selling it to the public for its own account. (Resales were never an issue.) The services Mr. Harris provided went far beyond the usual services of a mere real estate agent[2]. Mr. Harris worked at the project, Woodbine, from July, 1993 until termination on March 1997 and was paid a percentage of gross sales as closings took place whether or not he was the "procuring cause". At the time of termination he still had money due based on transactions that closed at Woodbine.

As further consideration, the "carrot" which had Mr. Harris' attention was the promise that he would receive 50% of all savings on the project's marketing budget which was proscribed by Schickedanz-Riviera to be 5% of gross sales. Mr. Harris was in charge of marketing. It is alleged that the regular financial reports prepared and distributed as a matter of course by Schickedanz-Riviera tracking this element of compensation demonstrated to all the parties that this was likely to be a very

[2]Description of Services is found in the Second Amended complaint. (See ROA 105-120, App. 41-56 at para. 27.)

substantial sum[3]. It is alleged that Schickedanz-Riviera, (a closely held limited partnership) then started charging another family member's salary and other personal expenses to "marketing" intentionally and improperly in order to alleviate the burden of having to pay Harris a marketing bonus.

It is also alleged that Harris entered into a Marketing Consultant Contract with Schickedanz-P.B. as relates to certain properties delineated in said contract and that said contract had no requirement for real estate sales services. That contract was never terminted and Mr. Harris has never seen an accounting. (See Exhibit A, Second Amended Complaint, App. 41-56)

It is also alleged that REMAC regularly advanced money out-of-pocket on behalf of the Schickedanzes and, up until termination, was regularly reimbursed. At termination, reimbursement was promised, but it has never been forthcoming. The trial court dismissed this Money Lent count (Count V, Second Amended Complaint, paragraphs 34-38, App. 41-56) for $33,508.42, which was pleaded for in all the complaints, on the basis of the statue of frauds.

As noted above, the trial court dismissed all counts as failing to state a cause of action. The Fourth Circuit Court of Appeals reinstated three of the five

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[3]Total sales for Woodbine was on target to be $80,000,000 and ½ of 1% would be $400,000. In May 1996, marketing expense was running at 3.9% of gross sales. (See paragraph 24, Second Amended Complaint, App. 41-56).

substantive counts[4]. In particular the Fourth DCA ruled Count I for unpaid commissions failed based on Chapter 475, Florida Statutes. Harris had argued that since he was in the employ of the developer he did not have to be licensed to sell homes and be paid a commission. Also, Harris had pled Count III based on *Quantum Meruit* under the theory of Hardcastle Pointe Corporation v. Cohel 505 So. 2d 1381, since his duties went far beyond greeting and selling Schickedanzes' product to customers, The Court of Appeals rule cannot have a claim sounding in *quantum meruit* when there is an explicit written contract between the parties.

However, the Fourth DCA disagreed with the Trial Court that the Marketing and Consulting Contract with Schickedanz P.B., which had nothing to do with sales responsibilities (or any of the other contracts between the parties) violated Chapter 475 Florida Statutes. Count IV was reinstated.

The Fourth DCA disagreed that the Trial Court's ruling that the bonus arrangement for managing the marketing budget at Woodbine was a violation of Chapter 475 Florida Statues and Count II was reinstated.

And the Fourth DCA correctly held that Count V for Money Lent did not violate the Statues of Frauds.

There are some misstatements in the Petitioner's Statement of the

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[4] Harris/REMAC had included a Count for an accounting; but indicated to the Fourth DCA that they would not pursue same since the relief could be accomplished through discovery.

Case that need to be identified. These misstatements obfuscate the facts.

As can be seen from the Seconded Amended Complaint, which must be taken as true, the first contract covering Woodbine was terminated by Scheckendenz in 1995. Waldemar Shickedanz told Harris he would have a new contract drawn up.

There followed a second contract (the "Second Contract") drawn up by Schickedanzes' attorney and a third contract, also prepared by the Schickedanzes. Neither contract after the original terminated contract (the "Lost Contract") had a provision for attorney fees. Harris/REMAC have made no claim based on the "Original Contract" that was terminated by Schickedanz as it is only pled and referenced to put the dispute in context and as evidence that there was an oral agreement as to the "bonus" provision (Count II). This is different than a suit based on the termindated contract[6].

The Marketing and Consulting Contract, which was drawn up by the Schickedanzes, was not connected to Woodbine or the other contracts in any way shape or form; and, it has never been terminated.

Count V for money lent has nothing whatsoever to do with the "Original Contract" which was terminated years before Harris caused REMAC to advance

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[6]The other evidence in this regard are the regular internal reports and, at trial, there will be witnesses. For these purposes, that there was an oral agreement must be taken as true, (as well as the fact that Harris performed and the Schickedanzes used fraudulent devices to cheat him of his bonus).

monies for Schickedanzes' benefit. These advances were based on the promise REMAC would be reimbursed. Exhibit C attached to the Complaint was never represented to be a "contract". It is a list of check numbers and payees prepared by Harris from cancelled checks and it does add up to $33,508.42. All REMAC is asking for is just to be paid back the money lent Schickedanzes for the Woodbine project.

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SUMMARY OF ARGUMENT

The Plaintiffs, Harris/REMAC, stated a cause of action. The Complaints, as amended, should not have been dismissed with prejudice. The allegations, which must be taken as true, demonstrate that the Defendants still owe Harris/REMAC monies for services rendered and for money lent. The records demonstrating the exact amount are in the control of the Schickedanzes as relates to the monies owed for services.

Harris worked for the Schickedanzes for over three years and, furthermore, REMAC advanced money on their behalf and was routinely reimbursed up until termination without cause. The defense has been that because Harris is not a licensed real estate person he is not entitled to bring suit to recover what is still owed. Harris claims he is entitled to his compensation for services rendered outside the scope of a real estate salesperson; and Chapter 475 of the Florida Statutes has no bearing on REMAC's claim for money lent, to wit: $33,508.42.

ARGUMENT

THE APPELLATE COURT WAS CORRECT IN REINSTATING HARRIS' CLAIM FOR PAYMENT OF A MARKETING BONUS (COUNT II) AND THE AUGUST 1993 MARKETING CONSULTING AGREEMENT (COUNT IV).

COUNT II

It is important to remember that for purposes of this appeal the facts as asserted by Harris shall be taken as true. Hammonds, *supra*.

A review of some of those facts is in order.

Harris originally entered into a contract with Schickedanz-Riviera on July 31, 1993. At that time a licensed real estate broker named David Paley was already on site. This contract was identified in the Original Contract and was attached to the First Amended Complaint as Exhibit A. When David Paley left in August of 1995, the "Original Contract" was terminated and it was understood that the Schickedanzes were to prepare a new agreement.

This was eventually prepared and executed around June, 1996, to wit: the "Second Contract". It was not attached to the First Amended Complaint because Harris misplaced his copy; but it was also alleged that a new contract was presented to Harris for his signature on September 16, 1996 and that this "Last Contract" was identical in terms to the "Second Contract" except that the compensation was lowered from 1% of gross sales on each closing to .875% of gross sales on each

closing.

During this time, Harris was:

A) Not a licensed real estate sales person or broker.

B) His real estate sales activity was confined to selling the developer's (Schickedanz-Riviera's) product.

C) He was an independent contractor.

D) He was not required to be the "procuring cause" to be compensated.

A significant distinction between the "Original Contract" and the "Second Contract" and "Last Contract" was that the "Original Contract" addressed a bonus (or carrot) whereby Harris would be entitled to the sum of 50% of all savings in the marketing budget for the entire Woodbine project less than 5% of gross sales; the "Second" and the "Last Contracts" did not. Notwithstanding, it has been alleged that there are writings to support this agreement which, taken together, demonstrate there was an oral understanding that survived the termination of the "Original Contract", to wit: there were regular reports internally generated and circulated to all necessary parties, including Harris, that tracked the budget; Harris continued to be in complete charge and control of marketing for the Woodbine project; and, it was the subject of many discussions and numerous miscellaneous memoranda after the termination of the "Original Contract".

The trial court dismissed Count II as being in violation of 475.42 Fla. Stat.

even though the claim is not for a real estate commission because, it appears, Harris attached the "Original Contract" to the Second Amended Complaint in order to put the claim in context and for the limited purpose of proving up the marketing bonus agreement, which is separate and apart from real estate salespersons services also addressed therein. Since the Fourth District Court of Appeals has now ruled that Schickedanz-Riviera was right as relates to the unenforceability of Mr. Harris' claim for commissions on sales generated at Woodbine, there is no public policy or statute that would weigh against Mr. Harris being paid the compensation he was promised for services outside the scope of commissions for real estate sales services.

For the purposes of this appeal, this Court must take as true that there was an agreement that Harris would be responsible for spending the marketing budget and and that Mr. Harris performed this service for years with the hopes of earning a bonus in knowledge of and at the request of the Schickedanzes; that he was terminated without cause; he has never received a full accounting; and, that Defendant Schickedanz-Riviera and Schickedanz, Inc. knowingly and intentionally doctored the books to deny Harris his just compensation[7].

The fact that one of the writings which supports a conclusion that there was such an agreement happens to also address what has now been ruled to be

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[7] Harris has alleged, and it must be taken as true, that from January 1996 to March 1997 the Schickedanzes began charging items to marketing that were inappropriate in order to wipe out the bonus due Harris. (See Second Amended Complaint, para. 24, App. 41-56)

unenforecable real estate commissions does not defeat this claim which is not for a real estate commission. If the expenditures on marketing were to exceed 5% of gross sales, the fact that the total sellout at Woodbine was $80,000,000 would mean nothing to Harris; he would still get nothing. This bonus for managing the marketing budget was not a real estate commission and the Fourth District Court of Appeals properly so held.

The claim for the bonus is not barred by the Statute of Frauds since it is fully performed. The facts pled must be taken as true. Based on these facts, HARRIS managed the marketing budget for years and, once adjustments are made for the fraudulent charges that were made to the marketing budget for the specific purpose of defeating the bonus, HARRIS is entitled to a substantial sum which cannot be quantified without complete discovery and/or full accounting.

Peformance given with the full knowledge and acquiescence of the promissory/beneficiary takes a claim out of the Statute of Frauds. See Venditti-Siravo, Inc. v. City of Hollywood, Fla. App., 418 So. 2d 1251 (1982); Gerry v. Antonio, App., 409 So. 2d 1881 (1982); AV-MED, Inc. v. French, App. 3 Dist., 458 So. 2d 67 (1984); Sanders v. Liberty National Life Ins. Co., 443 So. 2d 909 (1983) appeal after remand 501 So. 2d 1201; W.B.D., Inc. v. Howard Johnson Co., App., 382 So. 2d 1323 (1980), review denied 388 So. 2d 1114.

The Bonus has nothing to do with commissions and the reference to Mr. Paley by the SCHICKEDANZES is totally irrelevant.

COUNT IV

Count IV is based on an executed written contract with Schickedanz-P.B. for consulting services. The Marketing Consulting Contract was attached to the Second Amended Complaint as Exhibit "A," (ROA 105-120, App 41-56, Ex. "A") The contract did not require Mr. Harris to perform any real estate sales (or brokerage) services and none were provided. The only services contracted for were marketing consulting services. This contract is not related to any of the other contracts between the parties in any way. It is separate subject matter completely. It was prepared by Schickedanzes. It has never been terminated.

Schickedanz-P.B. takes the position that since Harris' benchmark for compensation for his marketing consulting services was 1% of gross sales, the contract violated Section 475.42 Fla. Stat. and, therefore, the claim was properly dismissed with prejudice. Section 475.42 Fla. Stat. only deals with a suit for a commissioned by an unlicensed person who is not within the ambit of an exception. It is not relevant to this case.

The mere fact that a percent of gross sales is the benchmark for compensation contracted for by two competent parties does not, per se, bring the contract within the scope of §475.42 Fla. Stat. Mr. Tennyson recognized this when he stated in open court on May 14, 1998 in relation to the Marketing Consulting Contract (Exhibit B to the First Amended Complaint):

"Now, Exhibit "B" is a little different Story. Exhibit "B" is a different contract. And Exhibit "B" does sound more in the area of employment opportunities. He hasn't pled it right, but I don't think you can dismiss that one with prejudice. I think there may be, he may be able to allege a cause of action based upon employment theories on Exhibit "B" totally different contract". (App.-66)

The services provided under the Marketing Consulting Contract were not real estate sales services. This must be taken as true. Harris had no obligation to be involved in sales activity and he wasn't. On page 11 of the Appellee's Answer Brief, in the Fourth District Court of Appeals case, in order to support the SCHICKEDANZES' contention that the Trial Court was right to dismiss HARRIS' claim as in Violation of Chapter 475, Florida Statutes, it is alleged that "HARRIS' job was to find prospective purchasers..." This statement is reiterated again on page 9 of Petitioner's Brief On The Merits. But this is not true. Harris had no such obligation.

Marks v. M.S.F. Management Corp. 540 So. 2d 138 (Fla. 5th DCA, 1989) and Fuller v. Alberts, 382 So. 2d 113 (Fla. 2nd DCA, 1980) were both fact situations transactional in nature (the parties suing claimed to be the procuring cause). In the case at bar, HARRIS' claims are not transactional in nature and, indeed, to this day, HARRIS, does not know what has sold and what has not sold. He did not deal with buyers or real estate transactions in any way, shape or form.

Rule 61J2-5.015 Florida Administrator Code, referred to by the SCHICKEDANZES on pages 9-10 of Petitioner's Brief On The Merits is taken completely out of context since the officers and directors of a corporation referred to therein are officers and directors of real estate brokerage firms!

Allgood v. Florida Real Estate Commission, 156 So. 2d 705 (Fla. 2nd DCA, 1963) deals with transactional matters and is, therefore not relevant. In that case, the telephone bank people working for a marketing company were dealing directly with the public and qualifying them as prospects for sales. These people were... "taking part in the procuring of prospective customers." Harris had no such role in this instance.

The ruling of the Fourth Circuit Court of Appeals should be affirmed as to Count IV.

II

THE APPELLATE COURT PROPERLY REINSTATED HARRIS/REMAC'S COUNT V CLAIM FOR MONEY LENT.

Neither the original contract nor the Statute of Frauds have any bearing on this issue.

Schickedanzes reference the Original Contract which calls for a note in the event the owners (Schickedanzes) advance monies to Paley/Harris.

In this case it is Harris/REMAC lending the Schickedanzes money; and it is years after the Original Contract was terminated by Schickedanze.

Also, this Count has nothing to do with the alleged conflict that is the basis for this Court's jurisdiction.

Count V of the Second Amended Complaint states, and it must be taken as true, that REMAC paid $33,508.42 of expenses on behalf of Schickedanz-Riviera with the agreement that reimbursement would be forthcoming in due course. It must be taken as true that these advances were made at the request of, on behalf of and with the knowledge of Schickedanz-Riviera. Count V follows the simple format set out by the Supreme Court of the State of Florida, Fla. Civ. P. Form 1.936, for "Money Lent".

Contrary to the findings of the trial court that the "Second Amended Complaint attempts for the fist time to allege a cause of action for money loaned." (ROA 125-126, para. 2, App. 60), this claim can be found in the Original Complaint (ROA 1-19 at para. 15 (d)) and the First Amended Complaint (ROA 51-78 at paras: 41-45, App.

"A", pg. 19)

Trial court's observation in the Order, prepared by Schickedanzes' Counsel, that the alleged agreement is attached as Exhibit C which constitutes handwritten notes unsigned by either party (ROA 125-126, para. 2, App. E) is a misstatement, a mischaracterization and a misreading. Exhibit C is a list of the checks that were paid on behalf of Schickedanz-Riviera and submitted for reimbursement. It was never alleged to be a written agreement between the parties.

The sections of the Statute of Frauds relied upon by the trial court, §671.206 and 687.0304 deal with the sale of personalty valued at more than $5,000 and credit agreements, respectively, and are not relevant to the case at bar.

It is fundamental in a money lent situation that one party has completely performed (performance is an exception to the Statute of Frauds); and the transaction is outside the Statute of Frauds because it is an original promise, 27 Fla. Jur 2d, STATUTE OF FRAUDS, §5.

The SCHICKEDANZES have obfuscated the issue by making reference to the Original Contract on page 17 of Petitioner's Brief On The Merits and reversing the parties' roles. First, the Original Contract is not material to the claim for money lent. Second, the section cited deals with loans from OWNER (SCHICKEDANZ) to MARKETING BROKERS (HARRIS and Paley), not vise-versa. Third, the "Original Contract" had been long terminated. Fourth, it is only the SCHICKEDANZES that allege the list attached as Exhibit "C" purports to be an agreement.

HARRIS/REMAC never alleged that there was any written agreement. Lastly, the "Consulting Contract" has nothing to do with the money lent; it only dealt with other SCHICKEDANZ projects (not Woodbine).

The fact that the list only adds up to $17,888 is further evidence of obfuscation since the SCHICKEDANZES are aware that the list is two pages of advances made at different dates and at the most the undersigned somehow failed to attach both pages to their copy when filing the Second Amended Complaint, but see Exhibit D, First Amended Complaint where both pages were attached.

The SCHICKEDANZES fail to address the fact that the format of the pleading used by HARRIS/REMAC is that proscribed by the Florida Supreme Court for Money Lent.

The SCHICKEDANZES rely on Section 687.0304, Florida Statutes, sometimes referred to as the "new statute of frauds" by the Courts; but his is not relevant since he SCHICKEDANZES would be the "Debtor" under Section 687.0304 (i)(c). Florida Statutes, and REMAC is trying to collect money lent, and is not suing on a credit agreement. (See Brenowitz v. Central National Bank, 597 So. 2d 340, for a good discussion of the purpose and intent of the "new statute of frauds").

SCHICKEDANZES' reliance on Section 725.01, Florida Statutes, is also misplaced since the basis of the Money Lent count is that REMAC advanced money for SCHIKEDANZ BROS-RIVIERA, LTD., not HARRIS; and SCHICKEDANZ BROS.-RIVIERA, LTD. is the debtor, not HARRIS.

The question of the Statute of Frauds in relation to loans was addressed in Wassil v. Gilmour, 465 So. 2d, 566 (Fla. App. 3 Dist. 1985). The subject of the dispute was a $16,600 loan and oral promises to repay same. The defendant raised the Statute of Frauds as a bar. The Third DCA held that an agreement to repay a loan even more than a year after the money changed hands is not subject to the one year performance portion of the Statute of Frauds. The court noted on page 567, footnote 3:

> "While we technically need not consider the alternative point, we note that it is established that an agreement to repay a loan even more than a year after the money changed hands - **and which has by definition thus been completely performed by the lender** - is not subject to the one year performance section of the Statute of Frauds. *Purity Maid Products Co. v. American Bank & Trust Co* 105 Ind. App. 541, 14 N.E. 2d 755 (1938); *Bowman v. Wade*, 54 Or. 347, 103 P. 7 (1909). *MacDonald v. Crosby*, 192 Ill. 283, 61 N.E. . *505 (1901);* Annot. Performance as taking contract not to be performed within a year out of the Statute of Frauds, 6 A.L.R. 2d 1053, 1111 (1949)." (Emphasis supplied)

As to the provision in the Statute of Frauds relating to the debt of another person, the debt being sued upon is SCHICKEDANZ BROS.-RIVIERA LTD.'S debt. REMAC is not asking this Court to hold SCHICKEDANZ BROS.-RIVIERA LTD. responsible for the debt of another.

CONCLUSION

The Fourth District Court of Appeals decision demonstrates that the facts as alleged, which must be taken as true, demonstrate that these were services rendered separate and apart from real estate sales and that the Counts that were reinstated were not for commissions; and, that the Statute of Frauds is not an issue where one party has performed.

Respectfully Submitted,

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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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_____/

OBJECTION TO PETITIONERS MOTION
FOR ATTORNEY'S FEES AND COSTS

Although the "Original Contract" had a provision for Attorney's Fees and Costs, the Original Contract ws terminated by Schickedanzes in late July or early August 1995 and none of the subsequent contracts prepared by Schickedanzes

subsequent thereto had a provision for Costs or Attorneys' Fees. The dispute at bar is not a suit for default as the "Original Contratct". The "Original Contract is references for the purpose of putting the dispute in historical context; and to be used as evidence to prove up an oral agreement which was performed by Harris relative to his claim for a bonus (Count IV). Therefore, under the American Rule, there is no basis for an award of Attorney's Fees.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was delivered to Rod Tennyson, Esq. at 1801 Australian Ave. S., Ste. 101, West Palm Beach, FL 33409 by U.S. Mail this 25th day of October, 2000

_____

Michael J. Ryan
FL Bar No. 0120754

CERTIFICATION OF FONT SIZE

IT IS HEREBY CERTIFIED that the style and type of font used to prepare this response brief is 14 point proportionately spaced Times New Roman.

_____

Michael J. Ryan, Esquire
Florida Bar #1020754