IN THE SUPREME COURT OF FLORIDA

OLD PORT COVE HOLDINGS, INC., and OLD PORT COVE EQUITIES, INC.,

Petitioners

v.

OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC.,

Respondent.

CASE NO.: SC07-1032

L.T. NO.: 4D05-3601

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF

DANIEL S. ROSENBAUM
Florida Bar No. 306037
RICHARD VALUNTAS
Florida Bar No. 0151084
JOHN M. SIRACUSA
Florida Bar No. 0159670
BECKER & POLIAKOFF, P.A.
625 North Flagler Drive
7th Floor
West Palm Beach, FL 33401
(561) 655-5444

TABLE OF CONTENTS

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TELEPHONE (561) 655-5444

TABLE OF AUTHORITIES

Cases Cited **Page Number**

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PRELIMINARY STATEMENT

Petitioners, Old Port Cove Holdings, Inc. and Old Port Cove Equities, Inc., were the plaintiffs before the trial court and the appellees in the Fourth District Court of Appeal. Petitioners will be referred to herein as "the Marina." Respondent, Old Port Cove Condominium Association One, Inc., was the defendant before the trial court and the appellant in the Fourth District Court of Appeal. Respondent will be referred to herein as "the Association."

The following symbols will be used throughout this Brief:

IB = Petitioners' Initial Brief on the Merits

ABDA = Petitioners' Answer Brief on Direct Appeal

IBDA = Respondent's Initial Brief on Direct Appeal

JB = Petitioners' Brief on Jurisdiction

R = Record on Appeal

T = Trial Transcripts

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STATEMENT OF THE CASE AND OF THE FACTS

Prior to trial, the parties entered into a Joint Pretrial Stipulation. (R12:2291-2330). The parties stipulated to the following material facts: On February 17, 1977, the Association and Acer Holdings Ltd. (hereafter "Acer Holdings") and E. Llwd Ecclestone, Jr. (hereafter "Ecclestone"), entered into an Agreement granting the Association a right of first refusal for the purchase of certain real property in Palm Beach County, Florida, which was then owned by Acer Holdings and Ecclestone and described as Parcel 16. (R12:2292-93). The February 17, 1977 Agreement ("the Agreement") provides in pertinent part, as follows:

> THIS AGREEMENT entered into this 17 day of February, 1977, by and between OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC., a Florida corporation, hereinafter referred to as the "ASSOCIATION", and ACER HOLDINGS, LTD. and E. LLWYD ECCLESTONE, JR., a JOINT VENTURE, d/b/a OLD PORT COVE INVESTMENT, hereinafter referred to as "OPCI."
>
> WITNESSETH:
>
> WHEREAS, the ASSOCIATION has requested that OPCI grant to it the right of first refusal for the purchase of property hereinafter referred to; and
>
> WHEREAS, OPCI has agreed to grant the right of first refusal hereinafter referred to upon the terms and conditions hereinafter set forth;
>
> NOW, THEREFORE, in consideration of the agreements herein contained and the sum of $10 and

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> other good and valuable consideration, the receipt of which hereby is acknowledged, the parties hereto agree as follows:
>
> In the event that OPCI elects to sell the real property described on EXHIBIT A which is attached hereto and by reference made a part hereof, other than to the persons or corporations which form the OPCI JOINT VENTURE, or to any corporation or other entity owned or controlled by OPCI of by any member of said JOINT VENTURE, or a successor or successors "to the interest of any member in the JOINT VENTURE", the ASSOCIATION shall have the right of first refusal for the purchase of said real property upon the same terms and conditions as are proposed for its sale and purchase by OPCI, said right of first refusal to be exercised by the ASSOCIATION within thirty (30) days following written notice to it of such proposed sale, following which said right of first refusal shall terminate.

(R12:2292-93).

On November 3, 1977, the Agreement was recorded in Official Records Book 2760, at Pages 1665-1669, of the Public Records of Palm Beach County, Florida. (R12:2293).

The intent and purpose of the Agreement was to memorialize the agreement and understanding between the parties to the Agreement, that in the event Parcel 16 was ever offered for sale to any third-party outside of the OPCI Joint Venture, the Association has a right of first refusal for the purchase of the real property upon the same terms and conditions proposed for the purchase by the third-party. (R12:2292-93); (T. 53). Parcel 16 lies within Old Port Cove, is adjacent to the

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Association and is located between the Association and the Intracoastal (Lake Worth Waterway).

The Marina is the successor to the interest of Ecclestone and Acer Holdings in the OPCI Joint Venture. (R12:2293). The Marina is the current record title owner of Parcel 16. (R12:2293).

On October 3, 2002, approximately twenty-five (25) years after the parties entered into the Agreement, the Marina brought an action against the Association, alleging the Agreement violates the common law rule against perpetuities and therefore was void *ab initio*. (R12:2293-94). The Marina's Complaint was based on claims for declaratory judgment (Count I) and quiet title (Count II). (R1:1-200); (R12:2294). On February 21, 2005, the Association served its Amended Answer and Affirmative Defenses to Complaint for Declaratory Relief and to Quiet Title and Amended Counterclaim.[1] (R12:2294). The Association denied that the Agreement violates the common law rule against perpetuities and denied the Agreement was void *ab initio*. The Association raised defenses of failure to state a cause of action, statute of limitations, laches, equitable estoppel, ratification, waiver, statutory reformation and failure to join indispensable parties. (R12:2294).

The Association also brought an Amended Counterclaim against the Marina,

[1] On March 3, 2005, the trial court deemed the Amended Answer and Affirmative Defenses to Complaint for Declaratory Relief and to Quiet Title and Amended Counterclaim timely filed. (R12:2294).

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Ecclestone and Acer Holdings for declaratory judgment that the Agreement is valid and enforceable. (R12:2294). Alternatively, the Association sought, pursuant to Section 689.225 of the Florida Statutes, reformation of the Agreement in the manner that most closely approximates the grantor's plan of distribution and does not violate Florida's common law rule against perpetuities as it may have once existed prior to October 1, 1988. (R12:2294). In particular, the Association sought reformation of the Agreement so that the right of first refusal must vest, if at all, within the lifetime of Ecclestone plus twenty-one (21) years. (T. 239-240).

On March 14, 2003, Ecclestone disclaimed any and all of his interests in the Agreement and agreed to be bound by any adjudication by the trial court and any subsequent appeals that may be taken by any of the parties to this case. (R12:2294). However, Ecclestone specifically reserved his right to participate in the event any party files any motion, action or other pleading in which there arises any claim for monetary damages against him. (R12:2294). On July 15, 2003, the trial court entered a default in favor of the Association on its claims against Acer Holdings. (R12:2295).

A bench trial was held before Circuit Judge Amy Smith on August 15 and 16, 2005. The following facts were conclusively established during the trial and are pertinent to the Association's defenses: Ecclestone developed and built the condominium building for the Association and the adjacent Old Port Cove

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Marina.[2] (T. 95, 98-102). The principals of Acer Holdings were Ecclestone's partners in developing Old Port Cove. (T. 98-99). The principals of Acer Holdings were Gordon Gray and Brian Magee. (T. 111-112). Mr. Gray and Mr. Magee were equal partners in Acer Holdings. (T. 111-112). The Old Port Cove project was the first development that Ecclestone and Gray had worked together. (T. 99-100). Typically, when Ecclestone turned over condominium buildings to their new Associations, there were usually some claims against him for problems with something that he built. (T. 113-114).

There were three (3) signatories to the Agreement, Ecclestone, Acer Holdings, and the Association. Ecclestone admitted he signed the Agreement, but testified that due to the passage of time, he did not recall the facts and circumstances surrounding the Agreement. (T. 97). Ecclestone also did not recall why he signed the Agreement. (T. 97-99). Ecclestone did not recall why he entered into to the Agreement. (T. 101). Ecclestone did not recall whether he intended the Agreement to be valid, but generally when he signs an agreement, he intends for it to be valid. (T. 105-106, 110). In this case Ecclestone said, "obviously I signed it, so whatever it says – this Agreement speaks for itself." (T. 105). Ecclestone was represented by counsel when he signed the Agreement. (T.

[2] Because Ecclestone was in Europe and not available to testify at trial, portions of his deposition were read at trial.

106). That attorney has since passed away. (T. 106).

Ecclestone believed Gray was probably the one that negotiated the Agreement. (T. 105-106, 108). Ecclestone does not believe Magee negotiated the Agreement. (T. 112). Ecclestone did not recall whether he had any discussions with Gray or Magee concerning the Association's right of first refusal. (T. 111-113). Ecclestone no longer has any interest in the Marina or the Association. (T. 102). Ecclestone sold the Marina to his partners, Acer Holdings, Gray and Magee. (T. 102-104).

Mr. Gray was the President of Acer Holdings.[3] (T, Pg. 116-117). Acer Holdings was owned 50/50 by Mr. Gray and Mr. Magee. (T. 117-118). On February 17, 1977, Acer Holdings and Ecclestone owned the Old Port Cove marina. (T. 121). Ecclestone built the marina. (T. 119). Shortly after the marina was built, Gray, Magee and Acer Holdings became involved. (T. 119).

Mr. Gray signed the Agreement for Acer Holdings. (T. 127-128). Mr. Gray did not challenge the Agreement in any way. (T. 128). Mr. Gray did not recall why the right of first refusal was given to the Association. (T. 123, 127). Mr. Gray no longer recalls the Agreement. (T. 123). Mr. Gray believed it was fair to assume that when he signed the Agreement, he knew what it is about, but he did

[3] Mr. Gray was not available to testify at trial, and portions of his deposition transcript were also read to the trial court.

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not recall it now due to the passage of time. (T. 128). Mr. Gray further testified that if anyone knew what the Agreement was about, it would have been Ecclestone, not Gray or Magee. (T. 128-129). Mr. Gray thought the only others besides Ecclestone that might recall the Agreement would be the people from the Association that signed and negotiated it. (T. 129-130). Other than Ecclestone, Gray and Magee, there is no one else from the Marina's side that would know anything about the Agreement, i.e., why it was given and the full consideration. (T. 130). Mr. Gray no longer has any interest in the marina. (T. 130).

It was stipulated by the parties that Brian Magee is suffering from Alzheimer's. (R12:2295). Because of Mr. Magee's memory loss, he was not able to testify in deposition and/or at the trial of this case. (R12:2295). Mr. Magee's memory failed prior to the Marina's filing of this lawsuit. (R12:2295).

The only remaining living Board Member from the Association's 1976 and 1977 Board of Governors is Charles Hereford. (T. 133). Mr. Hereford testified that he was a resident of the Association from 1971 through March of 1977. (T. 132). Hereford was the vice president of the Association in 1976 and did not serve for any other years. (T. 132). He did not have any recollection from being on the Board in 1976, or otherwise, regarding the negotiation of the right of first refusal. (T. 134). Hereford had no recollection of the Association entering into the Agreement. (T. 134). Hereford did not have any recollection at all regarding the

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1977 right of first refusal. (T. 135).

Richard Morgan testified for the Marina. He is president of Old Port Cove Holdings, Inc. and vice president of Old Port Cove Equities, Inc. (T. 31). He manages the assets and day-to-day business of the Marina. (T. 31). Morgan began working for the Marina in October of 1978, roughly a year and a half after the Agreement was signed and recorded. (T. 44). Parcel 16 is part of the operation of the north marina because it provides the upland support area, including parking, for the operation of the north marina. (T. 71-72). Parcel 16 had the same utility and importance to the operation of the north marina in 1977 as it does now. (T. 83-84).

As part of dealing with the day-to-day business of the Marina, Morgan dealt with the Gunster Yoakley law firm from 1978 to present. (T. 52-53). Morgan recalled there being transfers of interest of other parties in the joint venture. (T. 53). The Agreement specifically exempts out from the ability of the Association to exercise the right of first refusal to any transfer within the Old Port Cove joint venture. (T. 53). There were intra-joint venture transfers. (T. 53). Title policies were issued for these intra-joint venture sales. Morgan was involved in the intra-joint venture sales. (T. 53). Morgan was the person from the Marina that dealt with the Gunster Yoakley law firm. (T. 54). Each of the title policies that were issued for the intra-joint venture sales expressly identified, and excluded from coverage, the recorded right of first refusal. (T. 54-65). Gunster Yoakley

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represented the Marina for the intra-joint venture sales and was the title agent for these transfers. Many of the intra-joint venture sales were for more than $1 million. The various intra-joint venture sales occurred between 1987 and 1989. Morgan recalled the intra-joint venture sales, but denied ever seeing any of the exclusions contained within the title policies. (T. 54-65).

Morgan does not have any reason to believe the Agreement is not authentic in any way. (T. 69). Prior to 2000, Morgan is not aware of anyone from the joint venture objecting in any way to the Agreement. Morgan further testified that the Marina waited more than 25 years to challenge the subject right of first refusal in the Agreement because it "simply got missed." (T. 74). The sales that occurred were all intra-joint venture sales, which are permitted under the Agreement. (T. 74). Morgan believed that the Marina has always abided by the Agreement. (T. 74).

Joseph Fagan testified he has been a resident of the Association since 1992. (T. 140). He served as a member of the Association's board from May, 1992 through April, 2004. (T. 140). He always served as either the Board's treasurer or president. (T. 140-141). He first became aware of the Agreement sometime between 1999 and 2002. (T. 143). Fagan believed that due to the passage of time, incident to the filing of this lawsuit, he was the person from the Association in 2005 having the most knowledge of the Agreement. (T. 148).

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On the bottom left hand corner of the Agreement, it says, "Return to William A. Johnson." (T. 145-146). Fagan knows who Johnson is because they live in the same building at the Association. (T. 146). Mr. Fagan believed Johnson was the attorney that may have filed [recorded] the Agreement because it says, "Return to William Johnson, Attorney." (T. 146).

It was further stipulated by the parties that attorney William Johnson, whose name appears at the bottom of the Agreement and is a resident of the Association, is suffering from Dementia and Alzheimer's. (R12:2295). Because of his conditions, Mr. Johnson was not able to testify in deposition and/or at the trial of this case. (R12:2295). Mr. Johnson's Dementia and Alzheimer's developed and were diagnosed prior to the Marina's filing of its claims. (R12:2295). Because of Mr. Johnson's medical condition, Mr. Fagan never discussed the right of first refusal with him. (T. 146).

Mr. Fagan first met Ecclestone over seven (7) years ago. (T. 147-148). Fagan has never discussed the right of first refusal with Ecclestone. (T. 148). Fagan has never met Gray, and first met Morgan when they were at mediation in this case. (T. 148). Fagan did not have any discussions with Morgan prior to this lawsuit. (T. 148). Prior to this lawsuit, Morgan never voiced any objection to the Board that the right of first refusal was not valid. (T. 149). Prior to this lawsuit, Ecclestone never voiced any objection to the Board that the right of first refusal

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was not valid. (T. 149).

Gray never voiced any objection to the Board that the right of first refusal was not valid before the lawsuit was filed. (T. 149). To Fagan's knowledge the only objection the Board ever received was when this lawsuit was filed in 2002. (T. 149). Until this lawsuit, the Association's Board never received any letters or documents of any kind from anyone stating that the right of first refusal in this case was or may not be valid. (T. 149-150). To Fagan's knowledge, prior to this lawsuit, no one from the Marina's side of the case ever took any actions that were not consistent with the terms of the right of first refusal. (T. 150). No one from the Marina's side took any actions, prior to the lawsuit, that led the Association to believe the Marina was not honoring the right of first refusal. (T. 150).

After the Marina filed this lawsuit, the Association conducted a search of its records concerning the right of first refusal. (T. 151-152). The Association spent three (3) weeks searching through all of its records. (T. 152). The Association found notes and a draft agreement.[4] (T. 153). The Association also found a recording receipt for $16.60 for the actual public recording of the right of first refusal. (T. 155). The notes and draft agreement support the fact that the Association, as consideration for the right of first refusal Agreement, likely gave

[4] The notes and agreement referred to by Fagan are actually minutes from a February 15, 1977 board meeting and a draft settlement agreement dated 1976 between the Association and Ecclestone's and Gray's companies. (T. 173-174).

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up claims it had against the developer, Ecclestone. Ecclestone also testified that when he turned over condominium buildings to their new Associations, they typically brought claims against him for construction defects. (T. 113-114).

Other than the few documents mentioned above, the Association could not find any other records in its files regarding the right of first refusal. (T. 178). The Association exhausted its efforts to find other documents in this case regarding the right of first refusal. (T. 179). Other than Gordon Gray, Ecclestone, Richard Morgan and Charles Hereford, the Association did not know of anyone else that can testify with regard to the negotiation of the right of first refusal. (T. 178-79). The Association also exhausted its efforts to find other witnesses to testify with regard to the right of first refusal. (T. 179).

At the conclusion of the case, the trial court requested that the parties submit proposed final judgments. (T. 250-251). The trial court stated proposed orders were helpful and that "[i]t's very rare that I have ever receive [sic] an order that I agree with and that I would use it word for word, and most of the time – I don't know if that would be the case with you as attorneys – but many times I have to take out superfluous language that's more adjectives than perhaps I might use to describe something, and I sometimes use a combination of both." Id. The trial court ultimately entered a final judgment that essentially adopted the proposed final judgment submitted by the Marina. (R12:2348-2367).

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The Association appealed the final judgment to the Fourth District Court of Appeal. The Fourth District reversed the final judgment and held that the common law rule against perpetuities was inapplicable to the Agreement in this case, and that the Agreement did not constitute an unreasonable restraint on alienation. See Old Port Cove Condominium Ass'n One v. Old Port Cove Holdings, 954 So. 2d 742 (Fla. 4th DCA 2007). The Fourth District also held that section 689.225 of the Florida Statutes, which abrogated the common law rule against perpetuities in Florida, was fully retroactive. The Fourth District also certified conflict with the First District's decision in Fallschase Dev. Corp. v. Blakey, 696 So. 2d 833 (Fla. 1st DCA 1997) to this Court.

The Marina invoked the Court's discretionary jurisdiction, and the parties each filed jurisdictional briefs. The Court accepted jurisdiction over this case on October 30, 2007.

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SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal properly held that the Agreement in this case, which was entered into for valuable consideration, was not void under Florida law. The right of first refusal contained in the Agreement cannot violate the common law rule against perpetuities because it does not truly involve any kind of remote vesting. The Agreement creates a contractual right that vested with the Agreement itself, so the common law rule against perpetuities is inapplicable in this case.

The purpose of the common law rule against perpetuities was to make sure that property is reasonably available for development by prohibiting restraints that remove property from a beneficial use for an extended period of time. The Agreement in this case does not violate the public policy behind the common law rule against perpetuities in any way. In fact, as the Fourth District noted in its opinion, the Agreement does not impose any burden hindering or impeding a sale of any land because it merely allows the Association to purchase Parcel 16 when the Marina decides to sell the land to a third-party, at the price the Marina negotiated. Even if the common law rule against perpetuities were applicable in this case, which it is not, the right of first refusal created by the Agreement simply created a conditional fee, and this right was vested and presently reserved in the pre-emptioner.

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The Marina's claim that the Agreement was void *ab initio* was rejected because the Fourth District doubted "that the common law rule against perpetuities ever applied to this kind of right of first refusal." Old Port Cove, 954 So. 2d at 743. Florida adopted the common law of England as it existed on July 4, 1776, and the Marina does not cite any authority holding that the common law rule against perpetuities was ever applied to a right of first refusal similar to the one in this case on or before July 4, 1776. In fact, it appears that the English courts did not address the issue until the late nineteenth century. Because the common law of England, as it existed on July 4, 1776, did not clearly and expressly state that the rule against perpetuities applied to a right of first refusal in a commercial transaction, the Agreement was not void *ab initio* under Florida law.

The Fourth District properly held that section 689.225 of the Florida Statutes applied retroactively because the language therein is unambiguous, and now constitutes "the sole expression of any rule against perpetuities or remoteness in vesting in this state. No common-law rule against perpetuities or remoteness in vesting shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section." § 689.225(7), Fla. Stat. Applying section 689.225 retroactively does not affect substantive property rights, "[u]nless courts are determined to indulge a fiction that parties to such an agreement have a vested interest in secretly intending the agreement to be void when made – thereby

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deceiving the other party – repeal of the common law rule making such agreements void by itself does not impair any vested interests." Old Port Cove, 954 So. 2d at 745. Therefore, the Fourth District's opinion should be approved because it follows the clear legislative mandate set forth in section 689.225 of the Florida Statutes.

The Court should not address the Marina's alternative "reformation" argument because it is beyond the scope of the conflict issue. Furthermore, the Marina's argument should be rejected under the principles of judicial estoppel, which prevents litigants from taking entirely inconsistent positions in separate judicial proceedings. Because the Marina took the position before the Fourth District that the Agreement cannot be reformed under section 689.225(6)(c) of the Florida Statutes, its "alternative" argument in this case is completely inconsistent with its previous position before the Fourth District. Therefore, the Marina's "alternative" argument should be barred by the doctrine of judicial estoppel.

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TELEPHONE (561) 655-5444

ARGUMENT

POINT I

THE FOURTH DISTRICT PROPERLY HELD THAT THE COMMERCIAL AGREEMENT IN THIS CASE, WHICH WAS WILLINGLY ENTERED INTO FOR VALUABLE CONSIDERATION, WAS NOT VOID UNDER FLORIDA LAW.

A. Standard of Review

The issues raised in the Marina's Initial Brief require the Court to interpret provisions of Florida law. Therefore, the proper standard of review is *de novo*. Allstate Ins. Co. v. Holy Cross Hosp., 961 So. 2d 328, 331 (Fla. 2007); State v. Glatzmayer, 789 So. 2d 297, 301 fn. 7 (Fla. 2001); Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

B. The Fourth District Correctly Held the Agreement Did Not Violate the Common Law Rule Against Perpetuities

The Marina contends that the Agreement it voluntarily entered into with the Association in 1977, for which valuable consideration was received, should now be deemed void. According to the Marina, the Agreement, which was consummated by sophisticated businessmen involved in a commercial transaction, was void *ab initio* because it purportedly violated the common law rule against perpetuities. The Marina's argument is without merit.

The common law rule against perpetuities, which no longer exists in the

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State of Florida, essentially states that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Iglehart v. Phillips, 383 So. 2d 610, 614 (Fla. 1980)(citation omitted).[5] American courts have long recognized that:

> The rule against perpetuities springs from consideration of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.

Weber v. State, 83 F.2d 807, 808 (5th Cir. 1936). The common law rule against perpetuities, however, is not "merely a technical rule to be mechanically applied. The rule was created by judges to serve important considerations of public policy, and should be applied with those policies in mind." Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537, 540 (Colo. 1985).

The Marina's entire argument in this case is based upon a faulty premise, i.e., that "[t]he Agreement violated the rule against perpetuities as it existed when it was executed." (IB. 10). Contrary to the Marina's contention, the case law from Florida and other jurisdictions demonstrate that the Agreement in this case did not

[5] Contrary to the suggestion in the Marina's Initial Brief (IB. 14), both parties placed the Fourth District on notice of this Court's decision in Iglehart by citing Fallschase Dev. Corp. v. Blakey, 696 So. 2d 833 (Fla. 1st DCA 1997). Since the Fallschase decision expressly referenced Iglehart, both parties were aware of the authority relied upon by the Fourth District's opinion in this case.

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violate the common law rule against perpetuities in any way. For example, in Warren v. City of Leesburg, 203 So. 2d 522 (Fla. 2d DCA 1967), the court considered whether a repurchase option clause in a deed violated the rule against perpetuities. The Second District, in upholding the repurchase option, stated:

> the weight of authority holds that a mere option to purchase land (or repurchase land) does not vest the holder of such option with any interest, legal or equitable, in the land itself. ***Such is strictly a contractual right, not a property right, while the rule against perpetuities is a rule of property rather than a rule of contract.***

Id. at 526 (emphasis added). Thus, Florida law clearly supports the Fourth District's conclusion that the right of first refusal in this case "does not really involve any kind of remote vesting. It is a contractual right that vested with the agreement itself." Old Port Cove, 954 So. 2d at 743. See also Gautier v. Lapof, 91 So. 2d 324, 326 (Fla. 1956)("It seems clear to us that until an optionee exercises the right to purchase in accordance with the terms of his option he has no estate, either legal or equitable, in the lands involved."); Warren, 203 So. 2d at 526 ("The option clause which the City reserved to itself did not restrain alienation by the grantee Warren of what was deeded to him.").

In addition to the Florida case law, persuasive authority from other jurisdictions supports the Fourth District's well-reasoned opinion in this case. For example, the Supreme Judicial Court of Massachusetts in Bortolotti v. Hayden, 866 N.E.2d 882 (Mass. 2007), recently addressed an issue nearly identical to the

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one raised in this case. In Bortolotti, the plaintiff filed a complaint seeking to declare a right of first refusal of unlimited duration void because it purportedly violated the rule against perpetuities. The trial court granted the plaintiff relief, but the Supreme Judicial Court noted that "a substantial number of jurisdictions have declined to apply the rule against perpetuities to a right of first refusal," and ultimately reversed and remanded the case for entry of judgment for the defendant. Id. at 890. In reaching this conclusion, the Massachusetts high court stated:

> Because the holder of a right of first refusal may only choose to purchase property on the same terms as a bona fide offer, if and when the owner decides to sell, there is no power either to compel an owner to sell the property at an unfavorable price, or to encumber an owner's ability to sell the property for a lengthy period of time. ***There is no casting of a cloud of uncertainty on the title to the property, and no potential to forestall a sale. Hence, the rule against perpetuities logically should not apply. In our view, this position is better suited for business transactions, such as the one here, in which the right of first refusal was created.***

Id. at 889 (emphasis added). Thus, the Fourth District's decision in this case is in accord with the recent decision of the Supreme Judicial Court of Massachusetts in Bortolotti.

The Marina's reliance on Fallschase is misplaced because the opinion in that case gave surprisingly little attention to whether the common law rule against perpetuities applies to a right of first refusal. In fact, the First District's analysis of the issue simply stated "[t]here is some authority for the proposition that the rule

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against perpetuities should *not* be applied to a right of first refusal, the stronger view is 'that the agreement for the right of first refusal must not violate the rule against perpetuities.' Watergate Corp. v. Reagan, 321 So. 2d 133, 136 (Fla. 4th DCA 1975)." Fallschase, 696 So. 2d at 835. The Fallschase opinion did not explain why "the stronger view" is to apply the common law rule against perpetuities to a right of first refusal, and the First District failed to cite any authority to support such a cursory statement. Instead, the Fallschase opinion relied upon the Fourth District's decision in Watergate Corp., which merely cited the Restatement of Property and stated "we think the better view to be that the agreement for the right of first refusal must not violate the rule against perpetuities." Watergate Corp., 321 So. 2d at 136. Since the Restatement of Property currently expresses the position that the common law rule against perpetuities does not apply to a right of first refusal to purchase land, the foundation upon which the Fallschase decision was built has now crumbled. See Restatement (Third) of Property (Servitudes) § 3.3, at 425 (2000). Accordingly, the Court should approve the Fourth District's opinion in this case and disapprove the First District's decision in Fallschase.

A survey of case law from other jurisdictions reinforces the Fourth District's doubt that "the common law rule against perpetuities ever applied to this kind of right of first refusal." Old Port Cove, 954 So. 2d at 743. For example, the former

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Fifth Circuit Court of Appeals previously held that a right of first refusal under an oil lease, which could extend beyond the limit of the common law rule against perpetuities, did not violate "the purpose of nor the reason for the rule." Weber, 83 F.2d at 808. The Supreme Court of Georgia reached the same conclusion in Hinson v. Roberts, 349 S.E.2d 454 (Ga. 1986), when it held that a right of first refusal clause, based upon matching the offer of a third party, did not violate the rule against perpetuities. A multitude of cases from other states support the Fourth District's holding in Old Port Cove, that the right of first refusal in this case does not violate the common law rule against perpetuities. See Cambridge Co., 700 P.2d at 542; Robroy Land Co. v. Prather, 622 P.2d 367 (Wash. 1980)(right of first refusal did not violate rule against perpetuities); Metropolitan Trans. Auth. v. Bruken Realty Corp., 492 N.E.2d 379, 385 (N.Y. 1986)("the rule against remote vesting does not apply to preemptive rights in commercial and government transactions."); Gartley v. Ricketts, 760 P.2d 143, 145 (N.M. 1988)("A right of first refusal or preemption is not a future interest and we decline to subject it to the rule [against perpetuities]."); Meridian Bowling Lanes v. Meridian Athletic Ass'n, 670 P.2d 1294, 1296 (Idaho 1983)("a preemptive right of first refusal at the owner's own price or a third-parties' bona fide offer which the owner is willing to accept does not suspend the absolute power of alienation of real property."); Hartnett v. Jones, 629 P.2d 1357 (Wyo. 1981)(preemptive right to purchase in a

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joint venture contract was not subject to rule against perpetuities); Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship, 747 So. 2d 260 (Miss. 1999)(rule against perpetuities not violated by operating agreement's preferential right to purchase); Robertson v. Murphy, 510 So. 2d 180 (Ala. 1987)(preemptive right of first refusal in partnership agreement did not violate rule against perpetuities); Keogh v. Peck, 147 N.E. 266, 269 (Ill. 1925)(option creates no interest in land, but "is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a time certain."); Stenke v. Masland Dev. Corp., 394 N.W.2d 418, 422 (Mich. Ct. App. 1986)("It is readily apparent that the rule against perpetuities is not applicable in the present case since the holder of an option to purchase land does not have an interest in the premises, either legal or equitable."). In light of this authority, it is clear that the "stronger view" is that the common law rule against perpetuities does not apply in this case.

Finally, it is notable that Florida adopted the common law of England as it existed on July 4, 1776. § 2.01, Fla. Stat. The Marina's Initial Brief does not cite any authority holding that the common law rule against perpetuities, as it existed on July 4, 1776, was ever applied to a right of first refusal similar to the one in this case. Ex Parte Beville, 50 So. 685, 688 (Fla. 1909)("in order to be binding upon us as evidence of what the common law is, English decisions rendered prior to the

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War of the Revolution must be clear and unequivocal."). In fact, it appears that the first time the English courts addressed the issue was during the nineteenth century in Birmingham Canal Co. v. Cartwright, (L.R.) 11 Ch.Div. (Eng.) 421 and London and S.W. Co. v. Gomm, 20 Ch.Div. (Eng.) 562. Robertson, 510 So. 2d at 182; Baker v. State, 336 So. 2d 364, 367 n.4 (Fla. 1976)(noting that the date of an 1844 English decision was "significant because Florida has adopted the common law of England only 'down to the 4th day of July, 1776.'"). Since it does not appear that the common law of England, as it existed on July 4, 1776, ever expressly stated that the common law rule against perpetuities applied to a right of first refusal in a commercial transaction, the Marina's argument on this point must fail. Old Port Cove, 954 So. 2d at 743 ("We doubt that the common law rule against perpetuities ever applied to this kind of right of first refusal."); Hoffman v. Jones, 280 So. 2d 431, 435 (Fla. 1973)(common law must be clear and free from doubt in order to be part of statutory law under section 2.01 of the Florida Statutes); City of Coconut Creek v. Fowler, 474 So. 2d 820, 822 (Fla. 4th DCA 1985)(Carlisle, A.J., concurring)(English case decided in 1788 "has never been the common law of Florida.").

C. The Fourth District Properly Interpreted Florida Law and Held that the Agreement Did Not Violate the Common Law Rule Against Perpetuities

The Marina contends that the Fourth District's analysis in Old Port Cove

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"confuses the contract right (of first refusal) with the interest proscribed by the rule against perpetuities: remote vesting of an estate in real property." (IB. 13). This argument is misguided because it overlooks the fact that "[t]his kind of right of first refusal does not really involved any kind of remote vesting. It is a contractual right that vested with the agreement itself." Old Port Cove, 954 So. 2d at 743. Since the Agreement involves a contractual right, the common law rule against perpetuities is not implicated at all. Warren, 203 So. 2d at 526; Robroy Land Co., 622 P.2d at 370 ("We reject the view that a preemptive contract of any duration, long or short, creates an interest in land at the time of its inception."); Gartley, 700 P.2d at 145 ("A right of first refusal or preemption is not a future interest and we decline to subject it to the rule."); Stenke, 394 N.W.2d at 570. Even if the common law rule against perpetuities were applicable in this case, which it is not, the right of first refusal created by the Agreement "created a conditional fee and this right is vested and presently reserved in the pre-emptioner." Robertson, 510 So. 2d at 183. Accordingly, the Court should reject the Marina's faulty analysis of this issue.

In this case, the Marina is attempting to apply the common law rule against perpetuities to invalidate the Agreement, which the Marina's predecessor signed twenty-five (25) years earlier for valuable consideration. In Florida, however, the courts must, if possible, construe the Agreement so as not to violate the common law rule against perpetuities. See Lewis v. Green, 389 So. 2d 235, 243 (Fla. 5th

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DCA 1980); Old Port Cove, 954 So. 2d at 745. Applying the common law rule against perpetuities to the Agreement in this case would be inequitable, contrary to Florida law, and would undermine the essential terms of the Agreement. Weber, 83 F.2d at 809; Warren, 203 So. 2d at 526; Old Port Cove, 954 So. 2d at 743. Therefore, the Fourth District properly rejected the Marina's attempt "to have a court strike down an obligation voluntarily undertaken as part of an enforceable written legal agreement." Fallschase, 696 So. 2d at 838 (Wolf, J., dissenting).

The common law rule against perpetuities "was developed to curb excessive dead-hand control of property retained in families through intergenerational transfers." Restatement (Third) of Property (Servitudes) § 3.3, comment b. The objective of the rule was "to ensure that property is reasonably available for development by prohibiting restraints that remove property from a beneficial use for an extended period of time." Iglehart, 383 So. 2d at 813. "The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil." Weber, 83 F.2d at 808.

The Agreement in this case, as the Fourth District astutely noted, does not "impose any burden hindering or impeding a sale" because it merely allows the

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Association to purchase Parcel 16 when the Marina decides to sell the land to a third-party, at the price the Marina negotiated. Old Port Cove, 954 So. 2d at 743; Weber, 83 F.2d at 808 (purchase option did not restrain alienation at all, it simply required the lessee to be afforded the prior right to buy). The Fourth District's conclusion is bolstered by the fact that this Court previously refused to hold that a repurchase option was void under the common law rule against perpetuities. Iglehart, 383 So. 2d at 614. Instead, the Court analyzed whether the repurchase option constituted an unreasonable restraint on the use of the property. Id. Since the Agreement in this case does not violate the public policy behind the common law rule against perpetuities in any way, the Fourth District properly held that the Agreement was not void *ab initio*.[6]

The Marina also argues that the Fourth District's decision in Old Port Cove improperly held that section 689.225 of the Florida Statutes, which codified the rule against perpetuities in Florida, applied retroactively. (IB. 15-16). However, the Court's decision in Iglehart, which "recognized and gave effect to the 1977 statutory abrogation of the common law" regarding a 1959 conveyance, demonstrates that the Fourth District's retroactive application in this case was proper. Old Port Cove, 954 So. 2d at 744; Iglehart, 383 So. 2d at 614 ("Further, it

[6] The Marina's Initial Brief does not explain how the Agreement in this case creates a restraint that removes the property "from a beneficial use for an extended period of time." Iglehart, 383 So. 2d at 813.

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should be recognized that the rule against perpetuities in the State of Florida is now governed by a statute adopted by the legislature in 1977, subsequent to the enactment of this case."). The Marina's reliance on Fallschase is misplaced because the First District acknowledged that the reformation provision of section 689.225(6)(c) of the Florida Statutes (1989) "was intended to operate retroactively," yet refused to effectuate the Florida Legislature's clearly expressed intent. The Fourth District's decision in Old Port Cove, in contrast, adhered to the clear legislative mandate and held that section 689.225(7) of the Florida Statutes (2005) applied retroactively.

The Marina's reliance on Fallschase is also erroneous because that case applied and interpreted the language of section 689.225 as it existed when the statute was amended in 1988. Nothing in the version of section 689.225 analyzed in Fallschase expressly abolished the common law rule against perpetuities. The opinion in Old Port Cove, however, considered an entirely different version of section 689.225, enacted several years after the Fallschase opinion. The version of section 689.225 addressed in Old Port Cove, unlike the statute analyzed in Fallschase, expressly abolished the common law rule against perpetuities in Florida. Thus, the decision in Fallschase is clearly inapposite.

It is axiomatic that Florida courts are without power to construe an unambiguous statute in a way "which would extend, modify, or *limit*, its express

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terms or its *reasonable and obvious implications*. To do so would be an abrogation of legislative power." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)(citing American Bankers Life Assurance Co. of Fla. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968)). Section 689.225(7) of the Florida Statutes (2005) is unambiguous, and now constitutes "the ***sole expression*** of ***any*** rule against perpetuities or remoteness in vesting in this state. No common-law rule against perpetuities or remoteness in vesting ***shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section.***" (Emphasis added). Under the plain language of this statute, as the Fourth District noted, "[r]etroactive application could hardly have been stated more clearly." Old Port Cove, 954 So. 2d at 744. The common law rule against perpetuities no longer exists in the State of Florida "with respect to ***any interest or power***." § 689.225(7), Fla. Stat. (emphasis added); Sander v. Ball, 781 So. 2d 527, 528 (Fla. 5th DCA 2001)("It now appears from section 689.225(7), Florida Statutes (2000), that such abolition of the common law rule was intended."). Since the interests of the parties set forth in the Agreement clearly constitute "any interest or power" as contemplated by section 689.225(7) of the Florida Statutes (2005), the common law rule against perpetuities cannot be applied to the Agreement in this case. Old Port Cove, 954 So. 2d at 744-745.

The Marina argues that the Fourth District's opinion in this case improperly

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concluded that the majority in Fallschase made no attempt "to identify the rights that are vested and show how they would be impaired by the retroactive application of the statute." Old Port Cove, 954 So. 2d at 745-746. According to the Marina, the Fallschase majority "identified as a vested property right the owner's freedom to convey the property without the impediment of an unlawful first refusal right." (IB. 16). The majority in Fallschase, however, did not cite any authority holding that an owner has a vested right to declare a right of first refusal, which was voluntarily entered into, invalid under the common law rule against perpetuities. In fact, Judge Wolf reached a contrary conclusion and stated he was "unaware of a vested right to have a court strike down an obligation voluntarily undertaken as part of an enforceable written legal agreement." Fallschase, 696 So. 2d at 838 (Wolf, J., dissenting). Accordingly, the Fourth District properly concluded that "[u]nless courts are determined to indulge a fiction that parties to such an agreement have a vested interest in secretly intending the agreement to be void when made – thereby deceiving the other party – repeal of the common law rule making such agreements void by itself does not impair any vested interests." Old Port Cove, 954 So. 2d at 745.

D. The Fourth District Properly Held that Section 689.225 of the Florida Statutes Applied Retroactively; the Trial Court Improperly Rejected the Association's Defenses in this Case

Section 689.225 of the Florida Statutes Applies Retroactively

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The Marina argues that the current version of section 689.225(7) of the Florida Statutes, originally enacted in 2000, is inapplicable in this case because the Agreement was executed in February of 1977. According to the Marina, "because the Agreement violated the common law rule against perpetuities applicable in 1977, it was void *ab initio*." (IB. 18). This argument must fail because, as explained above, the Marina does not cite any authority holding that the common law rule against perpetuities, as it existed on July 4, 1776, was ever applied to a right of first refusal in a commercial transaction. § 2.01, Fla. Stat. (adopting the common law of England as it existed on July 4, 1776).

The common law rule against perpetuities "was developed to curb excessive dead-hand control of property retained in families through intergenerational transfers." Restatement (Third) of Property (Servitudes) § 3.3, comment b. Since the Agreement in this case does not involve any type of "dead-hand control of property," it is doubtful that "the common law rule against perpetuities ever applied to this kind of right of first refusal." Old Port Cove, 954 So. 2d at 743; Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 584-585 (Md. 1988)(Cole, J., dissenting)("I believe that a right of first refusal does not hinder the alienability, marketability, or development of property and therefore conclude that the rule against perpetuities should not apply."). Furthermore, this Court has previously held:

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> ***For a principle of law to be governed by the common law in Florida, that principle must have existed as part of the common and statutory law of England on July 4, 1776***, and must not be inconsistent with the constitution and laws of the United States or the acts of the legislature of this State. *See* § 2.01, Fla. Stat. In addition, ***the common law principle, as it existed on July 4, 1776, must have been 'clear and free from doubt.'***

State ex rel. Clayton v. Board of Regents, 635 So. 2d 937, 938 (Fla. 1994)(emphasis added).

In this case, the Marina does not cite any authority holding that a right of first refusal in a commercial transaction, similar to the one in the Agreement, violated the common law of England on July 4, 1776. In fact, it appears that the English courts did not address such an issue until the late nineteenth century. See Robertson, 510 So. 2d at 182. Whether the common law rule against perpetuities applied to a right of first refusal on July 4, 1776 is not "clear and free from doubt," as evidenced by the conflict among the courts addressing the issue. See Old Port Cove, 954 So. 2d at 744-745; Fallschase, 696 So. 2d at 837; Bortolotti, 866 N.E.2d 882; Weber v. State, 83 F.2d at 808; Ferrero Constr. Co., 536 A.2d 1137; Birmingham Canal Co., (L.R.) 11 Ch.Div. (Eng.) 421; London and S.W. Co., 20 Ch.Div. (Eng.) 562. Since the Marina does not cite, and the Association's research has not uncovered, any clear and unambiguous pronouncement that the common law rule against perpetuities applied to rights of first refusal in commercial transactions on July 4, 1776, the Marina's assertion that the Agreement violated

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the common law rule against perpetuities, and was void *ab initio*, must fail. See Duval v. Thomas, 114 So. 2d 791, 794-795 (Fla. 1959)("We are not advised, and our own research has not divulged the clear, unambiguous pronouncement of the common law in effect 4 July 1776, that would leave us no room but to adopt it in this cause under the mandate of Sec. 2.01"); State ex rel. Clayton, 635 So. 2d at 938; Donnelly v. United States, 228 U.S. 243, 278 (1913)(Holmes, J., dissenting)("the English cases since the separation of the two countries do not bind us").

According to the Marina, the Fourth District erroneously applied section 689.225(7) of the Florida Statutes retroactively in this case. (IB. 21-24). The decisions in Old Port Cove, Fallschase, and Sander, however, all acknowledge that the Florida Legislature intended section 689.225 to apply retroactively. Section 689.225(7) is unambiguous, and now constitutes "the sole expression of any rule against perpetuities or remoteness in vesting in this state. No common-law rule against perpetuities or remoteness in vesting shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section." § 689.225(7), Fla. Stat. Despite this clear legislative mandate, the Marina contends that section 689.225(7) cannot be applied retroactively because it purportedly violates the Marina's "substantive property rights."

Contrary to the Marina's contention, section 689.225(7) does not infringe

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upon the Marina's purported "freedom to dispose of Parcel 16 to whomever the Property Owners choose, without the impediment of the right to first refusal." (IB. 23). In fact, Judge Wolf acknowledged that he was "unaware of a vested right to have a court strike down an obligation voluntarily undertaken as part of an enforceable written legal agreement." Fallschase, 696 So. 2d at 838 (Wolf, J., dissenting). Furthermore, as the Fourth District stated, "[u]nless courts are determined to indulge a fiction that parties to such an agreement have a vested interest in secretly intending the agreement to be void when made – thereby deceiving the other party – repeal of the common law rule making such agreements void by itself does not impair any vested interests." Old Port Cove, 954 So. 2d at 745. Since the Marina has not cited any authority holding that a right of first refusal in a commercial transaction violated the common law rule against perpetuities as it existed on July 4, 1776, it is unclear how its "property rights" have been affected by the Fourth District's retroactive application of section 689.225. See Juliano & Sons Enters. v. Chevron, 593 A.2d 814 (N.J. Super. Ct. App. Div. 1991)(statute abolished common law rule against perpetuities, and nondonative commercial transaction was no longer subject to the common law rule).

The Marina's final argument on this point is that section 689.225(7) should not be applied retroactively because statutes in derogation of the common law must

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be strictly construed so they "do not displace the common law any more than is plainly necessary." (IB. 23). This argument must fail because, as discussed above, the common law rule against perpetuities as it existed on July 4, 1776 did not apply to rights of first refusal in commercial transactions. Although the First District's decision in Fallschase did not directly address this matter, the Fourth District expressly stated "[w]e doubt that the common law rule against perpetuities ever applied to this kind of right of first refusal." Old Port Cove, 954 So. 2d at 743. Section 689.225(7) is not a "statute in derogation of the common law" as it exists in Florida, and the Marina's argument on this matter is without merit.

The Trial Court Erroneously Concluded that the Association's Defenses of Laches, Estoppel, and Waiver were Inapplicable

Although the Association's equitable defenses were not addressed in the Old Port Cove opinion, the issue was raised in the Marina's Initial Brief. (IB. 25-26). Therefore, the Association will briefly respond to the issue.

The Marina's argument on this issue is flawed because it assumes that "the common law rule against perpetuities applied in 1977 to void the right of first refusal." (IB. 25). However, as discussed above, the Marina does not cite any authority holding that the common law rule against perpetuities, as it existed on July 4, 1776, was ever applied to a right of first refusal in a commercial transaction. Since the application of the common law rule against perpetuities to

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rights of first refusal in commercial transactions was not "clear and free from doubt" on July 4, 1776, the right of first refusal in the Agreement did not violate Florida law in any way. See State ex rel. Clayton, 635 So. 2d at 938; § 2.01, Fla. Stat.

Contrary to the Marina's assertion, the Association's equitable defenses were applicable in this case. The Second District's decision in Sarasota County v. Taylor Woodrow Homes Ltd., 652 So. 2d 1247 (Fla. 2d DCA 1995), is instructive on this point. In Sarasota County, the trial court determined on the pleadings that Sarasota County's 1974 agreement with Taylor Woodrow Homes was void *ab initio* because the agreement violated the Constitution as an unlawful taking. Id. The Second District held that a 1974 contract could not be declared void (even for a Constitutional violation) in the 1990's based merely on the pleadings. Id. at 1251. The Second District reasoned that although the judiciary will generally not allow a governmental agency to take private property without due process of just compensation, it is equally true, however, that a party to a contract is expected to abide by the terms of the contract, "especially if it executed the agreement without protest twenty years ago and has accepted the benefits of the contract." Id. at 1250.

The opinion in Sarasota County concluded that, under the circumstances, Sarasota County had the right to raise defensive equitable issues in the nature of

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waiver and estoppel. Id. Accordingly, the trial court in this case could not find in 2005 that the Agreement entered into in 1977 was void without at least considering the Association's equitable defenses. See id.; see also McNulty v. Blackburn, 42 So. 2d 445 (Fla. 1949)(fireman was estopped from claiming that a 1941 Fireman's Pension Fund was unconstitutional after accepting its benefits for more than six years); Steen v. Scott, 198 So. 489 (Fla. 1940)(married woman who accepted rent from a lessee for years was estopped from later challenging the validity of the lease on the grounds her notary failed to certify that the wife acknowledged execution of the lease "separate and apart from her husband" as was then required by statute); Lipkin v. Bonita Gardens Apartments, Inc., 122 So. 2d 623 (Fla. 3d DCA 1960).

It is a fundamental equitable principle that once a party accepts the proceeds and benefits of a contract, that party is equitably estopped from challenging the validity of the contract or otherwise repudiating the burdens of the contract. Head v. Lane, 495 So. 2d 821, 824 (Fla. 4th DCA 1986); Fineberg v. Kline, 542 So. 2d 1002, 1003 (Fla. 3d DCA 1988). "[T]he law is too well settled to admit of controversy that one may not accept the fruits of a contract and at the same time renounce, or repudiate, the burdens which that contract places upon him." Warren v. Tampa Mortgage Investors' Co., 112 Fla. 555, 563 (Fla. 1933). The Marina and/or their former partners in the OPCI Joint Venture, Ecclestone and Acer Holdings, accepted the benefits of the Agreement. They cannot accept the benefits

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of the Agreement and then repudiate their obligations after enjoying the benefits of the Agreement for the last twenty-five (25) years. Given the Marina's unreasonable twenty-five (25) year delay in bringing its claims, its (and/or its predecessors') acceptance of the benefits of the Agreement and the resulting prejudice to the Association, the trial court erred in not finding the Marina's claims barred by the equitable doctrines of laches, as well as waiver and equitable estoppel.

The Trial Court Erroneously Concluded that the Association was not Entitled to Reformation of the Agreement under Section 689.225(6)(c)

Even assuming, *arguendo*, that the Agreement violated Florida's rule against perpetuities as it existed prior to October 1, 1988, which it does not, the trial court should have reformed the Agreement pursuant to section 689.225(6)(c) of the Florida Statutes in the manner that most closely approximates the grantor's plan of distribution and does not violate any rule against perpetuities. According to the applicable Florida Statutes:

> If a nonvested property interest or a power of appointment was created before October 1, 1988, and is determined in a judicial proceeding commenced on or after October 1, 1988, to violate this state's rule against perpetuities as that rule existed before October 1, 1988, a court, upon the petition of an interested person, may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against

LAW OFFICES
BECKER & POLIAKOFF, P.A. • 625 N. FLAGLER DRIVE, 7TH FLOOR • WEST PALM BEACH, FL 33401
TELEPHONE (561) 655-5444

> perpetuities when the nonvested property interest or power of appointment was created.

§ 689.225(6)(c), Fla. Stat.

For example, the right of first refusal could be reformed so that it must vest, if at all, within the lifetime of Ecclestone plus twenty-one (21) years. Even if Section 689.225(6)(c) was not retroactive to 1977 and the parties' "mistake" in not complying with the rule against perpetuities was one of law, and not one of fact, reformation of the Agreement would nonetheless as a matter of law be appropriate because the mistake concerned the private rights of the parties involved. Atchison v. Englewood, 193 Colo. 367, 373 (1977)(reforming right of first refusal to comply with Colorado's rule against perpetuities). A mistake as to private rights may be treated as a mistake of fact. Id. Therefore, assuming that the Agreement violated Florida's common law rule against perpetuities, the trial court improperly refused to reform the Agreement pursuant to section 689.225(6)(c) of the Florida Statutes.

POINT II

THE FOURTH DISTRICT'S DECISION IN THIS CASE DID NOT IMPROPERLY FAIL TO INSTRUCT ON REFORMATION.

The only issue raised in the Marina's Brief on Jurisdiction is the alleged conflict between the Fourth District's opinion in this case and the First District's decision in Fallschase. (JB. 3-10). The issue raised in Point III of the Marina's

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BECKER & POLIAKOFF, P.A. • 625 N. FLAGLER DRIVE, 7TH FLOOR • WEST PALM BEACH, FL 33401
TELEPHONE (561) 655-5444

Initial Brief was not raised in its Brief on Jurisdiction and is beyond the scope of the conflict issue. Therefore, the Court should decline to address the issue raised in Point III of the Initial Brief because the Marina never raised the issue before the Fourth District, and it is outside the scope of the conflict certified by the Court. See Williams v. State, 863 So. 2d 1189, 1190 (Fla. 2003); Farrior v. Farrior, 736 So. 2d 1177, 1179 (Fla. 1999); Asbell v. State, 715 So. 2d 258, 258 (Fla. 1998).

The Marina's argument on this point should also be rejected under the principles of judicial estoppel. Judicial estoppel is an equitable doctrine that prevents litigants from taking entirely inconsistent positions in separate judicial proceedings. Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001). This doctrine "prevents parties from 'making a mockery of justice by inconsistent pleadings,' American Nat'l Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983), and 'playing fast and loose with the courts.'" Id. Before the Fourth District, the Marina argued that the Agreement cannot be reformed under section 689.225(6)(c) of the Florida Statutes. (ABDA. 24-28). The Marina now contends, in its alternative argument, that the reformation provision in section 689.225(6)(c) should be applied. (IB. 30-33). Since the Marina's alternative argument before the Court is completely inconsistent with its previous position before the Fourth District, and its argument in Point II of the Initial Brief in this case (IB. 26-30), it should be barred by the doctrine of judicial

LAW OFFICES
BECKER & POLIAKOFF, P.A. • 625 N. FLAGLER DRIVE, 7TH FLOOR • WEST PALM BEACH, FL 33401
TELEPHONE (561) 655-5444

estoppel.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Association respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal and hold that the Agreement is valid and enforceable.

Respectfully submitted,

BECKER & POLIAKOFF, P.A.
Attorneys for Respondent, OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC.
625 N. Flagler Drive, 7th Floor
West Palm Beach, FL 33401
Telephone No. (561) 655-5444
Facsimile No. (561) 832-8987

By: _____
DANIEL S. ROSENBAUM
Florida Bar No. 306037
RICHARD VALUNTAS
Florida Bar No. 0151084
JOHN M. SIRACUSA
Florida Bar No. 0159670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by **U.S. Mail** to: **Jack J. Aiello, Esquire,** and **Nicole K. Atkinson, Esquire**, Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, Florida 33401; **Paul Erickson, Esquire**, 321 Royal Poinciana Plaza, Palm Beach, Florida 33480; **Nanette Gammon, Esquire**, 1555

Palm Beach Lakes Boulevard, Suite 1100, West Palm Beach, Florida 33401; and **Mayra Colon, Esquire**, Douberly & Cicero, 1551 Sawgrass Corporate Parkway, Suite 240, Sunrise, Florida 33323 this 26th day of December, 2007.

BECKER & POLIAKOFF, P.A.
Attorneys for Respondent, OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC.
625 N. Flagler Drive, 7th Floor
West Palm Beach, FL 33401
Telephone No. (561) 655-5444
Facsimile No. (561) 832-8987

By: _____
DANIEL S. ROSENBAUM
Florida Bar No. 306037
RICHARD VALUNTAS
Florida Bar No. 0151084
JOHN M. SIRACUSA
Florida Bar No. 0159670

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY pursuant to Florida Rule of Appellate Procedure 9.210 that this Answer Brief has been prepared in Times New Roman 14pt. font.

BECKER & POLIAKOFF, P.A.
Attorneys for Respondent, OLD PORT COVE CONDOMINIUM ASSOCIATION ONE, INC.
625 N. Flagler Drive, 7th Floor
West Palm Beach, FL 33401
Telephone No. (561) 655-5444
Facsimile No. (561) 832-8987

By: _____

DANIEL S. ROSENBAUM
Florida Bar No. 306037
RICHARD VALUNTAS
Florida Bar No. 0151084
JOHN M. SIRACUSA
Florida Bar No. 0159670

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