Real Property and Business Litigation Report

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Manuel Farach

Life Technologies Corporation v. Promega Corporation, Case No. 14–1538 (U.S. 2017).
The supply of a single component for assembly into a multi-component product overseas does not constitute patent infringement in violation 35 U. S. C. §271(f)(1) of the U. S. Patent Act.

Global Quest, LLC v. Horizon Yachts, Inc., Case No. 15-10713 (11th Cir. 2017).
The Eleventh Circuit adopts *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941), and holds that an "as is" clause does not bar a plaintiff from bringing a fraud claim.

Planned Parenthood of Greater Orlando, Inc. v. MMB Properties, Case No. SC15-1655 (Fla. 2017).
A trial court must apply "equity principles underlying injunctive relief" and abuses its discretion in requiring changed circumstances to modify or dissolve a temporary injunction, even when the injunction is based on violations of recorded real estate covenants and declarations.

Silver Beach Towers Property Owners Association, Inc. v. Silver Beach Investments of Destin, LC, Case No. 1D16-4555 (Fla. 1st DCA 2017).
The First District aligns itself with the Second District and in opposition to the Third District and holds that Florida Rule of Appellate Procedure 9.310(b)(1) (posting of a bond in the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount) is not the only way to receive a stay of execution on a money judgment.

Desylvester v. The Bank of New York Mellon, Case No. 2D15-5053 (Fla. 2d DCA 2017).
The allegation that borrower was in default on a date certain "and all subsequent payments due thereafter" is sufficient to comply with the five-year statute of limitations even if the date certain is outside the five-year window; *Collazo v. HSBC Bank USA, N.A.*, 41 Fla. L. Weekly D2315 (Fla. 3d DCA Oct. 13, 2016), is distinguished.

Quick Cash, LLC v. Tradenet Enterprise Inc., No. 3D16-1640 (Fla. 3d DCA 2017).
The following paragraph in a contract constitutes an exclusive and mandatory jurisdiction and venue clause:

> This purchase order shall be deemed entered into and performed in the State of California and Buyer consents to the jurisdiction of the State of California for purposes of enforcement of the terms hereof. Buyer agrees to the above General Terms including but not limited to terms relating to interest on late payments, conditional terms, attorneys (sic) fees and jurisdiction for enforcement.

Federal National Mortgage v. Gallant, Case No. 4D16-3152 (Fla. 4th DCA 2017).
A party is generally not permitted to intervene in a pending foreclosure action where a lis pendens has been filed, even if the party seeking intervention purchased the property. Furthermore, intervention after final judgment is generally disfavored.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOHN DESYLVESTER,

Appellant,

v.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ALTERNATIVE LOAN TRUST 2005-62, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-62; JOY FREEMAN; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR ESECOND MORTGAGE.COM IN DBA DOLLAR REALTY MORTGAGE; HARBOUR WALK HOMEOWNERS' ASSOCIATION, INC.; THE INLETS AT RIVERDALE, INC.; AND TENANT,

Appellees.

Case No. 2D15-5053

Opinion filed February 22, 2017.

Appeal from the Circuit Court for Manatee County; Thomas M. Gallen, Senior Judge.

David W. Smith, Law Office of David W. Smith, Sarasota, for Appellant.

Sarah T. Weitz, of Weitz & Schwartz, P.A., Fort Lauderdale, for Appellee, The Bank of New York Mellon.

No appearance by remaining Appellees.

WALLACE, Judge.

John Desylvester appeals a final judgment of mortgage foreclosure entered against him and Joy Freeman and in favor of The Bank of New York Mellon (the Bank) following a nonjury trial. Although we affirm the judgment, we write to address the issue of the application of the statute of limitations in a subsequent foreclosure action filed after the dismissal of an initial action for the foreclosure of the same note and mortgage.

I. THE FACTS AND THE PROCEDURAL BACKGROUND

On September 20, 2005, Mr. Desylvester and Ms. Freeman executed an adjustable rate note in the amount of $1,500,000 in favor of "Esecond Mortgage.com in [sic] DBA Dollar Realty Mtg." The terms of the note required the borrowers to make monthly payments of principal and interest, beginning on November 1, 2005, and ending on October 1, 2035.

On the same day, Mr. Desylvester and Ms. Freeman executed a standard residential mortgage securing the note with real property located in Sarasota County. The mortgage named "Esecond Mortgage.com in [sic] DBA Dollar Realty Mtg." as the lender and Mortgage Electronic Registration Systems, Inc. (MERS), as the mortgagee as nominee for the lender and the lender's successors and assigns. Both the note and the mortgage contained optional acceleration clauses authorizing acceleration of the principal and interest due on the note to maturity in the event of a default by the borrowers. In addition, the standard form residential mortgage included a reinstatement

provision in paragraph 19 titled, "Borrower's Right to Reinstate After Acceleration."[1] The Bank filed the original note with the trial court in the underlying litigation. An allonge was attached to the note. The allonge bore two indorsements. The first indorsement was from the original lender to Countrywide Home Loans, Inc., dba America's Wholesale Lender. The second indorsement from Countrywide was in blank.

The Bank filed two foreclosure actions on the note and mortgage. It filed the first foreclosure action against Mr. Desylvester, Ms. Freeman, and other parties on November 15, 2012. The Bank attached a copy of the note, including the allonge bearing both of the indorsements, and a copy of the mortgage to its complaint. The Bank alleged that the mortgage had been assigned to it under an assignment from MERS dated May 10, 2011, and attached a copy of the assignment. With regard to the default, the Bank alleged that the borrowers had defaulted on their regular monthly payment due on October 1, 2008, "and all subsequent payments." The Bank also accelerated the note by declaring the full amount due under the note to be due and payable. The first action was dismissed for reasons that are unexplained in our record.

Subsequently, on December 9, 2014, the Bank filed a second foreclosure action against the borrowers and others on the same note and mortgage. As it did in the first action, the Bank alleged in its complaint that the borrowers had defaulted on the note and mortgage by failing to make the payment due on October 1, 2008, "and all

[1]The reinstatement provision of the standard form residential mortgage is quoted in Justice Lewis's concurrence in Bartram v. U.S. Bank National Ass'n, 41 Fla. L. Weekly S493, S500 n.8 (Fla. Nov. 3, 2016) (Lewis, J., concurring in result only).

subsequent payments due thereafter." Once again, the Bank accelerated the unpaid principal and interest to maturity by declaring the full amount to be due and payable.

Mr. Desylvester filed an answer and affirmative defenses to the complaint in the second action for foreclosure. He generally denied the material allegations of the complaint, including the allegation that he had defaulted on the payment due on October 1, 2008, and "all subsequent payments due thereafter." In his second affirmative defense, Mr. Desylvester alleged that the statute of limitations had run with regard to the alleged default in payment on October 1, 2008, because any such default had occurred more than five years before the filing of the second foreclosure complaint. Mr. Desylvester asserted that "[a]ny suit to foreclose based upon an October 1, 2008 default would have had to been filed prior to October 1, 2013, or otherwise be barred forever." Mr. Desylvester concluded that because the second action was filed on December 9, 2014, it was barred by the statute of limitations. In a third affirmative defense, Mr. Desylvester alleged that the Bank did not have standing to foreclose at the inception of the second foreclosure action.

The trial court held a bench trial for the second foreclosure action in September 2015. Jill Dietrich testified on behalf of the Bank. Ms. Dietrich was an employee of Select Portfolio Servicing, Inc. (SPS), the servicer for the loan. She was qualified to testify about SPS's business records for the loan. Ms. Dietrich identified the original note, the mortgage, and the assignment of mortgage, which the trial court received in evidence. Ms. Dietrich also identified a document reflecting the payment history on the note, which showed that the last payment received had been applied to

the September 1, 2008, installment; no payments had been received on the note thereafter. The trial court also received this document in evidence.

On October 26, 2015, the trial court entered the final judgment of foreclosure. Mr. Desylvester appealed the final judgment. Ms. Freeman has not joined in the appeal or otherwise appeared in this case.

II. MR. DESYLVESTER'S APPELLATE ARGUMENTS

On appeal, Mr. Desylvester raises three points. First, he argues that the Bank failed to present evidence sufficient to establish the alleged default in payment. Second, Mr. Desylvester contends that the Bank failed to establish its standing to foreclose at the inception of the second action. Third, he argues that the Bank's action is barred by the applicable statute of limitations.

Competent substantial evidence in the record demonstrates that the Bank established the alleged default in payment and its standing to foreclose at the inception of the action. Mr. Desylvester's arguments on these points are without merit and do not warrant further discussion. We turn now to a discussion of Mr. Desylvester's argument concerning the statute of limitations.

III. DISCUSSION

We apply a de novo standard of review to the issue of the application of the statute of limitations to the Bank's action for foreclosure. Nationstar Mortg., LLC v. Sunderman, 201 So. 3d 139, 140 (Fla. 3d DCA 2015); see also Hamilton v. Tanner, 962 So. 2d 997, 1000 (Fla. 2d DCA 2007) ("A legal issue surrounding a statute of limitations question is an issue of law subject to de novo review.").

Mr. Desylvester argues that the trial court erred in entering the final judgment of foreclosure in favor of the Bank because the Bank's action was barred by the five-year statute of limitations applicable to actions on a written instrument. See § 95.11(2)(c), Fla. Stat. (2008). In Mr. Desylvester's view, the Bank's action was barred because it was filed more than five years after the date of default, i.e., October 1, 2008. The Bank filed the underlying second foreclosure action on December 9, 2014. Mr. Desylvester claims that in order for the action to be timely, the Bank had to file its complaint before October 1, 2013. Mr. Desylvester concludes that "a complaint is barred by the statute of limitations in a subsequent foreclosure if the alleged date of default is older than five years."

The recent decision of the Florida Supreme Court in Bartram v. U.S. Bank National Ass'n, 41 Fla. L. Weekly S493 (Fla. Nov. 3, 2016), resolves the question of the application of the statute of limitations in the residential mortgage foreclosure context at issue here in favor of the Bank. With regard to the application of the statute of limitations in a subsequent foreclosure action after an initial foreclosure action that sought acceleration was dismissed, the Bartram court said:

> Therefore, with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage.
>
> Consistent with the reasoning of Singleton[v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004)], the statute of limitations on the balance under the note and mortgage would not continue to run after an involuntary dismissal, and thus the mortgagee would not be barred by the statute of limitations from filing a successive foreclosure action premised on a "separate and distinct" default. Rather, after the dismissal, the parties are simply placed back in the same contractual relationship as before, where the

> residential mortgage remained an installment loan, and the acceleration of the residential mortgage declared in the unsuccessful foreclosure action is revoked.

Bartram, 41 Fla. L. Weekly at S497. This result follows regardless of whether the dismissal of the initial foreclosure action was entered with or without prejudice. Id. Accordingly, we conclude that the dismissal of the Bank's earlier foreclosure action did not trigger the statute of limitations to bar the Bank's subsequent foreclosure action based on separate defaults. See id.

We recognize that in the underlying action the Bank alleged that the borrowers defaulted on the note by failing to make the payment due on October 1, 2008, "and all subsequent payments due thereafter." Granted, the October 1, 2008, date was the date alleged as the date of the initial default in the first foreclosure action, and this date was outside the period of the five-year statute of limitations. Nevertheless, the allegations of the complaint in the underlying action that the borrowers were in a continuing state of default at the time of the filing of the complaint was sufficient to satisfy the five-year statute of limitations. See Bollettieri Resort Villas Condo. Ass'n v. Bank of N.Y. Mellon, 198 So. 3d 1140, 1142 (Fla. 2d DCA), review granted, No. SC16-1680 (Fla. Nov. 2, 2016). Thus, the facts of this case are distinguishable from the facts in Collazo v. HSBC Bank USA, N.A., 41 Fla. L. Weekly D2315 (Fla. 3d DCA Oct. 13, 2016). In Collazo, unlike in this case, the plaintiff insisted on trying the case on the basis of a date of default that was outside the five-year statute of limitations period. Id. at D2315. Here, in addition to alleging the initial date of default as October 1, 2008, the Bank alleged that the borrowers were in a continuing state of default up to the time of the filing of the complaint.

IV. CONCLUSION

It follows from the foregoing analysis that the underlying action was not barred by the five-year statute of limitations. For this reason, and because Mr. Desylvester's other points are without merit, we affirm the final judgment of foreclosure.

Affirmed.

SLEET and SALARIO, JJ., Concur.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"),
Petitioner,

v.

STELLA GALLANT, MARY M. SALENEIKS a/k/a **MARY SALENEIKS, CENTURY HARMONY LAKES ESTATES ASSOCIATION, INC.** f/k/a **WEITZER HARMONY LAKES ESTATES ASSOCIATION, INC.,** and **HARMONY LAKES CENTRAL HOMEOWNERS ASSOCIATION, INC.,**
Respondents.

No. 4D16-3152

[February 22, 2017]

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Joel T. Lazarus, Judge; L.T. Case No. CACE11024510.

Nancy M. Wallace, Michael J. Larson and William P. Heller of Akerman LLP, Tallahassee and Fort Lauderdale, for petitioner.

George N. Andrews of Loan Lawyers, LLC, Fort Lauderdale, for respondent Stella Gallant.

PER CURIAM.

Petitioner, Federal National Mortgage Association ("Fannie Mae"), seeks certiorari review of an order granting respondent Stella Gallant's ("Gallant") post-judgment motion to intervene and stay the proceedings. We find that the trial court departed from the essential requirements of the law, resulting in material harm to Fannie Mae that cannot be remedied on appeal.

This case has a long and complicated history. In October 2011, CitiMortgage, Inc. brought a residential foreclosure action against respondent Mary Salenieks, respondent Century Harmony Lakes Estates Association ("the HOA"), and others. A notice of *lis pendens* was recorded immediately. During the pendency of CitiMortgage's foreclosure action, the HOA commenced its own foreclosure action which, in November 2013, resulted in a foreclosure sale. Gallant purchased the property at that sale

for $10,800. She then renovated the property and attempted to sell it for $350,000 but the sale fell through because the prospective buyer could not obtain title insurance.

In February 2014, CitiMortgage assigned the subject mortgage to Fannie Mae and Fannie Mae was substituted as party plaintiff in the case. The record reflects that shortly after assigning the mortgage, CitiMortgage inadvertently recorded a release of mortgage. The release was subsequently rescinded in May 2015. Prior to the release being rescinded, however, a consent final judgment was entered and Fannie Mae voluntarily dismissed the case. Fannie Mae later filed a Florida Rule of Civil Procedure 1.540 motion to set aside the voluntary dismissal. At this point, Gallant moved to intervene in the foreclosure action. On October 1, 2015, the trial court, after denying Gallant's motion to intervene, also granted Fannie Mae's motion and reinstated the final judgment.

Gallant subsequently filed a renewed motion to intervene, arguing that she should be allowed to intervene "in the interest of justice" because she had improved the property in reliance upon CitiMortgage's release of the mortgage and Fannie Mae's voluntary dismissal of the foreclosure action. The court granted the motion on October 29, 2015, and cancelled the upcoming foreclosure sale. Fannie Mae moved for reconsideration and the matter proceeded to a hearing. On the day of the scheduled hearing, Judge Lazarus, the assigned judge, was unavailable and Judge Stone heard argument instead. On February 11, 2016, Judge Stone granted Fannie Mae's motion for reconsideration and vacated Judge Lazarus's order granting Gallant's renewed motion to intervene. Gallant did not appeal that order or move for rehearing.

In June 2016, Gallant filed yet another motion to intervene and a request to stay the proceedings. Therein, she argued that a stay of the foreclosure action was warranted pending the outcome of a quiet title action she had filed against Fannie Mae and CitiMortgage after the denial of her last motion to intervene. After hearing argument, but without reaching the merits of Gallant's motion, Judge Lazarus concluded simply that Judge Stone did not have authority to vacate his previous order granting intervention. Judge Lazarus thereafter granted Gallant's motion to intervene and stay the proceedings, and cancelled the upcoming foreclosure sale. Fannie Mae's timely petition follows.

The trial court's order granting Gallant's motion to intervene and stay the proceedings is subject to certiorari review. *See Doerschuck v. Doerschuck*, 481 So. 2d 1317 (Fla. 4th DCA 1986) (Glickstein, J., concurring specially); *Dep't of Children & Families v. L.D.*, 840 So. 2d 432,

434 (Fla. 5th DCA 2003). Fannie Mae must establish that the court departed from the essential requirements of the law, resulting in material harm that cannot be remedied on appeal. *See Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011).

We find that the trial court departed from the essential requirements of the law in a number of respects. First, Judge Stone did in fact have the authority to vacate Judge Lazarus's previous order granting intervention. *See Tingle v. Dade Cty. Bd. of Cty. Comm'rs*, 245 So. 2d 76, 78 (Fla. 1971) (holding that a successor judge has the authority, up until final judgment is entered, to "vacate or modify the [i]nterlocutory rulings or orders of his predecessor in the case"); *Duke v. Russell*, 557 So. 2d 587, 587 (Fla. 3d DCA 1990) (noting that an order *granting* intervention is a non-final order). The effect of Judge Stone's February 11, 2016 order was to deny Gallant's renewed motion to intervene. An order denying a motion to intervene is a final, appealable order. *See J.R. v. R.M.*, 679 So. 2d 64, 65 n.1 (Fla. 4th DCA 1996); *Superior Fence & Rail of N. Fla. v. Lucas*, 35 So. 3d 104, 105 (Fla. 5th DCA 2010). Gallant did not appeal Judge Stone's order or timely seek rehearing. Therefore, Judge Lazarus lacked authority to reconsider that final order on the same facts, absent the grounds set forth in Rule 1.540. *See Tingle*, 245 So. 2d at 78; *see also Quinones v. Se. Inv. Grp. Corp.*, 138 So. 3d 549, 549-50 (Fla. 3d DCA 2014).

Second, although we do not need to reach the merits of Gallant's repeated requests to intervene in this case, we find that the court departed from the essential requirements of the law by permitting her to do so. "'[W]hen property is purchased during a pending foreclosure action in which a lis pendens has been filed, the purchaser generally is not entitled to intervene in the pending foreclosure action.'" *Bonafide Props. v. Wells Fargo Bank, N.A.*, 198 So. 3d 694, 695 (Fla. 2d DCA 2016) (quoting *Mkt. Tampa Invs., LLC v. Stobaugh*, 177 So. 3d 31, 32 n.1 (Fla. 2d DCA 2015)). *See also De Sousa v. JP Morgan Chase, N.A.*, 170 So. 3d 928, 929-30 (Fla. 4th DCA 2015). Furthermore, intervention after final judgment is generally disfavored. *See De Sousa*, 170 So. 3d at 930; *Sedra Family Ltd. P'ship v. 4750, LLC*, 124 So. 3d 935, 936 (Fla. 4th DCA 2012).

Gallant acknowledges these general rules, but argues that the "interests of justice" support intervention in this case. We disagree. The events that transpired after Gallant purchased the property, namely CitiMortgage's release of the mortgage and Fannie Mae's voluntary dismissal of the foreclosure action, do not change the fact that Gallant purchased the property with full notice of the pending foreclosure action. *See U.S. Bank Nat'l Ass'n v. Bevans*, 138 So. 3d 1185, 1188–89 (Fla. 3d DCA 2014) ("A lis pendens serves as constructive notice of the claims

asserted against the property in the pending litigation." (internal quotation marks and citations omitted)). Gallant accordingly knew, or should have known, that she was taking title subject to the first mortgage. *See id.* Furthermore, Gallant's allegations against Fannie Mae and CitiMortgage can be litigated in the quiet title action irrespective of the outcome of this case.

Third, we further conclude that the trial court departed from the essential requirements of the law by granting Gallant's request to stay the foreclosure proceedings pending the outcome of the quiet title case. The two cases do not involve the same parties or the same subject matter, and Fannie Mae's foreclosure case was filed well before Gallant's quiet title action. *See Harper v. E.I. Du Pont de Nemours & Co.*, 802 So. 2d 505, 509-10 (Fla. 4th DCA 2001); *Sunshine State Serv. Corp. v. Dove Invs. of Hillsborough*, 468 So. 2d 281, 284 (Fla. 5th DCA 1985).

In addition to departing from the essential requirements of the law, the trial court's order causes material harm because Fannie Mae is being prevented from resolving this case, in which a consent final judgment was entered over two years ago. This harm cannot be remedied on appeal because the trial court's order is not appealable and the time for appealing the final judgment has expired. We therefore grant the petition, quash the order, and remand for further proceedings consistent with this opinion.

Petition granted; order quashed; remanded.

DAMOORGIAN, GERBER and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10713

D.C. Docket No. 9:13-cv-80283-KLR

GLOBAL QUEST, LLC,

Plaintiff –
Counter Defendant –
Appellant,

versus

HORIZON YACHTS, INC,
HORIZON GROUP, et al.,

Defendants –
Counter Claimants –
Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(February 24, 2017)

Before MARCUS and FAY, Circuit Judges, and FRIEDMAN,[*] District Judge.

[*] Honorable Paul L. Friedman, United States District Judge for the District of Columbia, sitting by designation.

FRIEDMAN, District Judge:

Plaintiff Global Quest, LLC appeals from the district court's grant of summary judgment to defendants on all but one count of plaintiff's amended complaint and to defendant Horizon Yachts, Inc. on its counterclaim for foreclosure of a promissory note. Plaintiff appeals from the district court's entry of partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[1] We reverse the district court's grant of summary judgment to defendants on Counts I, III, IV, VII, and VIII of plaintiff's amended complaint and the grant of summary judgment to defendant Horizon Yachts, Inc. on its counterclaim.[2]

I. BACKGROUND

Plaintiff purchased a 105 foot luxury super-yacht, specifically a CC-105 Horizon Explorer named "Starlight," from defendant Horizon Yachts, Inc. ("Seller"). The yacht was manufactured by defendant Horizon Yacht Co., Ltd. ("Horizon") and its wholly-owned subsidiary Premier Yacht Co., Ltd. ("Premier")

[1] "When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b); see Lloyd Noland Found., Inc. v. Tenet Health Care Corp., 483 F.3d 773, 778-80 (11th Cir. 2007).

[2] Plaintiff does not challenge the district court's entry of summary judgment on Counts II, V, VI, IX, and X of the amended complaint. Counts VIII, IX, and X incorrectly are labeled in the amended complaint as IX, X, and XI respectively.

in Taiwan. While both Horizon and Premier are Taiwanese companies, Seller is an independent U.S. Corporation based in Florida. It is undisputed, however, that the Seller is Horizon's agent and appears to be owned, at least in part, by Horizon and Premier's founder and CEO, John Lu. HORIZON YACHTS, INC., http://www.horizonyachtusa.com (last visited May 10, 2016) ("Horizon Yacht USA is the U.S. agent for Horizon Yachts").

Plaintiff purchased the Starlight for $6,835,000 after negotiating and executing a Purchase and Sale Agreement with Seller, along with an Addendum executed shortly thereafter. That contract, as modified by the Addendum, contains a seemingly self-contradictory provision. The "as is" clause in the original Agreement, paragraph 10, states that "upon closing, buyer will have accepted the vessel in its 'as is' condition. Seller and the brokers have given no warranty, either express or implied, and make no representation as to the condition of the vessel, its fitness for any particular purpose or merchantability, *all of which are disclaimed*." The Addendum, however, modifies this clause — providing that before the word "Seller," "the following language is inserted: 'Other than the limited express warranty attached here as Exhibit A.'" With this alteration, paragraph 10 thus reads: "Other than the limited express warranty attached here as Exhibit A, Seller and the broker have given no warranty, either express or implied . . . ." Thus, while the original Agreement purported to disclaim all warranties, express or

implied, the Addendum inserted an express limited warranty into the contract. But the Addendum also contains a further provision stating that "[t]he terms of this Acceptance shall govern over any inconsistent terms in the Purchase Agreement which is hereby ratified and declared to be in full force and effect."

As stated in the Addendum, Plaintiff was given a limited express warranty, the terms of which were negotiated by the parties as part of the sale. Issued on Seller's letterhead but purporting to be from "Horizon Group," a trade name for Horizon's companies, the limited warranty covers certain manufacturing and design defects for a period of one year from the contract date. It is limited, however, to "covered defects first discovered and reported to Horizon or the Original Selling Dealer." The limited warranty also disclaims "all other express and implied warranties (except title)," and states that "[n]o employee, representative, authorized dealer or agent of Horizon other than an executive officer of Horizon is authorized to alter or modify any provision of the Limited Warranty or to make any guaranty, warranty or representation, express or implied, orally or in writing which is contrary to the foregoing." The limited warranty also lists Premier and its contact details on the final page, without any explanation as to their relationship to the warranty.

Plaintiff contends that defendants made numerous false representations regarding the yacht's condition during the negotiation of the sale. Specifically,

plaintiff claims that the yacht was represented to be MCA LY2 compliant and built to DNV standards, both in statements made by Seller's sales representative and on Horizon's webpage advertising the Starlight.[3] Plaintiff claims that after it took possession it quickly discovered that the yacht was not MCA LY2 compliant nor was it built to DNV standards. The yacht had numerous problems that sharply limited the range of the vessel to short distances and also had electrical issues that rendered it unsafe. After defendants refused to repair or address the problems under the warranty, plaintiff filed suit against the three defendants, bringing ten claims under the amended complaint against each defendant: (1) fraud in the inducement; (2) revocation of acceptance under the Magnuson-Moss Warranty Act; (3) breach of the implied warranties of merchantability and usage of trade; (4) breach of the implied warranty of fitness for a particular purpose; (5) breach of a pre-purchase express oral warranty; (6) breach of a post-purchase express oral warranty; (7) breach of the implied warranty of workmanlike performance; (8) breach of the express written limited warranty; (9) rescission of the promissory note executed with the purchase; and (10) an injunction barring defendants from foreclosing on the promissory note or taking possession of the yacht for non-payment. Seller counterclaimed to foreclose on the promissory note.

[3] MCA is an acronym for the United Kingdom's Maritime and Coastguard Agency. The agency publishes, among other codes, the Large Commercial Yacht Code, abbreviated "LY2", which is a set of building standards for large yachts. DNV stands for "Det Norske Veritas" and it is the world's largest classification society. The organization sets safety, reliability, and environmental standards for maritime vessels.

The district court entered summary judgment for defendants on all but two claims: the breach of express warranty claims against Horizon and Premier. The district court also entered summary judgment for Seller on its counterclaim to foreclose on the promissory note. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court certified the judgment as a partial final judgment for interlocutory review. Plaintiff appeals, challenging the district court's entry of summary judgment as to Counts I, III, IV, VII, and VIII and the counterclaim.

II. DISCUSSION

We review a district court's grant of summary judgment *de novo*. Stephens v. Mid-Continent Cas. Co., 749 F.3d 1318, 1321 (11th Cir. 2014) (citing Kragor v. Takeda Pharm. Am., Inc., 702 F.3d 1304, 1307 (11th Cir. 2012)). Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and compels judgment as a matter of law. Id.; see also FED R. CIV. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Plaintiff challenges the entry of summary judgment as to: (1) the fraudulent inducement claims against all three defendants (Count I); (2) the breach of implied warranty claims against all three defendants (Counts III, IV, and VII); and (3) the breach of express warranty claim against Seller, Horizon Yachts, Inc. (Count VIII). Each is addressed in turn.

A. Fraudulent Inducement: Count I

The district court granted summary judgment to all three defendants on plaintiff's fraudulent inducement claim, relying on Florida precedent holding that a plaintiff "cannot recover for fraudulent oral representations which are covered in or contradicted by a later written agreement." Sherwin-Williams Co. v. Auto Body Tech. Inc., No. 12-23362, 2014 WL 2177961, at *4 (S.D. Fla. May 26, 2014) (citing Giallo v. New Piper Aircraft, Inc., 855 So. 2d 1273, 1275 (Fla. Dist. Ct. App. 2003)). Relying on the "as is" and "entire agreement" clauses in the contract, the district court held that the claim is based on alleged pre-contractual misrepresentations that were expressly contradicted by the later written agreement, concluding that plaintiff could not have relied on the earlier statements as a matter of law due to the conflicting conditions in the agreement.

The district court expressly declined to follow Oceanic Villas, Inc. v. Godson, 4 So. 2d 689 (Fla. 1941), which, contrary to the district court's reasoning, held that an "as is" clause does not bar a plaintiff from bringing a fraud claim. Specifically, the Florida Supreme Court in Oceanic Villas held that where an agreement is procured by fraud or misrepresentation "every part of the [] contract" is vitiated because "[i]t is well settled that a party can not contract against liability for his own fraud." Id. at 690. The district court declined to follow Oceanic Villas because, in its view, (1) it "is distinguishable because it did not involve a warranty

disclaimer or address recent Florida law, stating that a party cannot recover in fraud for misrepresentations covered or expressly contradicted in a later written agreement;" (2) it was decided before the enactment of Florida's Uniform Commercial Code in 1965, which permits "as is" clauses and the exclusion of warranties; and (3) the Florida Supreme Court's holdings are "fact intensive and depend on a review of the conditions of the contract as a whole, not just one clause."

Plaintiff argues that the district court erred by refusing to follow Oceanic Villas and granting summary judgment to defendants on the fraudulent inducement claim. We agree.

"As a federal court sitting in diversity jurisdiction, we apply the substantive law of the forum state, in this case Florida, alongside federal procedural law." Horowitch v. Diamond Aircraft Indus., Inc., 645 F.3d 1254, 1257 (11th Cir. 2011) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 (1938)). The Florida Supreme Court "does not intentionally overrule itself sub silentio." Puryear v. Florida, 810 So. 2d 901, 905 (Fla. 2002). "Where a court encounters an express holding from [the Florida Supreme] Court on a specific issue . . . , the court is to apply [the] express holding in the former decision until such time as [the Supreme] Court recedes from the express holding." Id.; see also Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973). The Florida Supreme Court has not overruled Oceanic Villas,

explicitly or implicitly. In fact, Florida's intermediate courts of appeal have continued to apply Oceanic Villas as recently as 2011. See, e.g., Lower Fees, Inc. v. Bankrate, Inc., 74 So. 3d 517, 519 (Fla. Dist. Ct. App. 2011); D & M Jupiter, Inc. v. Friedopfer, 853 So. 2d 485, 488-89 (Fla. Dist. Ct. App. 2003); Burton v. Linotype Co., 556 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 1990); see also Carolina Acquisition, LLC v. Double Billed, LLC, No. 07-61738-CIV, 2009 WL 3190807, at *2 (S.D. Fla. 2009). Oceanic Villas therefore remains binding precedent on the law of fraudulent inducement in Florida, a fact unchanged by the more recent case law cited by the district court. And neither the district court nor this Court is "at liberty to disregard binding case law that is so closely on point," and has not been directly overruled by the Florida Supreme Court. United States v. Clarke, 780 F.3d 1131, 1133 (11th Cir. 2015) (second alteration in original) (quoting United States v. Chubbuck, 252 F.3d 1300, 1305 n.7 (11th Cir. 2001)).

Oceanic Villas also is not distinguishable from this case. Nor was its holding "fact intensive" such that its reasoning must be limited to the precise contract provisions it considered. Oceanic Villas held that a contract provision, including an "as is" clause, cannot preclude a fraud claim, unless the contract expressly states that it is incontestable on the ground of fraud. 4 So. 2d at 690-91 ("We recognize the rule to be that fraud in the procurement of a contract is ground for rescission and cancellation of any contract unless for consideration or

expediency the parties agree that the contract may not be cancelled or rescinded for such cause."). This rule is directly contrary to the district court's holding that plaintiff's claim is barred by virtue of the provisions of the contract. That the contract at issue in Oceanic Villas did not contain a warranty disclaimer is a distinction without a difference. Nothing in Oceanic Villas suggests that the result would have been different with a warranty disclaimer, or any other contract provision save a specific disclaimer of liability for fraud. Absent such a disclaimer, no matter the context, "a party can not contract against liability for [its] own fraud." 4 So. 2d at 690.

The district court appears to have confused the threshold question of whether a claim is barred as a matter of law with the later question of whether the evidence is sufficient to survive summary judgment. The Sixth Circuit, applying Oceanic Villas in a diversity case, recently explained this distinction as follows:

> Attempting to overcome this conclusion [that its alleged reliance on statements was unreasonable], [Appellant] relies on two Florida cases — Oceanic Villas, Inc. v. Godson, 4 So. 2d 689, 690 (Fla. 1941); Allen v. Stephan Co., 784 So. 2d 456 (Fla. Dist. Ct. App. 2000) — to show that a fraud claim can survive an integrated lease. But simply because [Appellant] is not *prohibited* from bringing a fraud claim does not mean [Appellant] can prove the *elements* of its fraud claim. Neither case suggests otherwise. In Oceanic Villas, the Florida Supreme Court held that an integration clause similar to the ones at issue here did not "estop[]" the lessee from alleging fraud or "make the contract incontestable because of fraud." Oceanic Villas, Inc v. Godson, 4 So.

> 2d at 690-91. But the court went on to call an integration clause "evidence[]" that "neither party has relied upon the representation of the other party made prior to the execution of the contract." Id. at 691; accord Cassara v. Bowman, 186 So. 514, 514 (1939). Here, we have that precise "evidence" *and* [Appellant]s' actual knowledge that Best Buy Mobile would enter the relevant malls or already had done so before any final leases were signed [directly contradicting the alleged fraudulent misrepresentations]. . . . But again, no one here thinks [Appellant]'s claim is barred; the claim just lacks merit."

Beeper Vibes, Inc v. Simon Property Grp., Inc., 600 Fed. App'x 314, 318-19 (6th Cir. Dec. 12, 2014). The "as is" clause and the rest of the Purchase Agreement in this case may constitute evidence against plaintiff's fraud allegations, but plaintiff's claims are not precluded as a matter of law.

The confusion over this distinction appears to have led the district court to conclude that two Florida cases, Faulk v. Weller K-F Cars, Inc., 70 So. 2d 578 (Fla. 1954), and Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So. 2d 306 (Fla. Dist. Ct. App. 1990), are irreconcilable and that Faulk suggests an implicit rejection of Oceanic Villas. In Faulk, the Florida Supreme Court held that a written guarantee with a clear disclaimer of warranties and representations "negatives the idea of fraudulent misrepresentations" and that plaintiff's "allegations and the proof with reference to fraudulent misrepresentations were wholly insufficient." 70 So. 2d at 579. Faulk thus is an illustration of the above distinction — the court did not address whether the claim was barred as a matter of law; the claim just lacked

merit because the allegations and evidence "were wholly insufficient" and the clear contract provisions weighed in the other direction. Similarly, in Lou, the Florida District Court of Appeal did not consider whether a claim was barred as a matter of law by a contract provision, but instead found sufficient evidence to affirm a jury verdict because the plaintiff had "produced evidence as to all the elements of fraud in the inducement" despite the existence of an "as is" provision in the contract. 570 So. 2d at 308. Neither Faulk nor Lou applied the rule from Oceanic Villas, and they are irrelevant for our purposes here.

Lastly, the fact that Oceanic Villas was decided before Florida's enactment of the Uniform Commercial Code also is of no moment because, although the UCC permits "as is" clauses and warranty disclaimers, it is silent as to the impact, if any, that such contract provisions have on fraud claims. See Hill v. Florida, 711 So. 2d 1221, 1224 (Fla. Dist. Ct. App. 1998) ("In the absence of clear constitutional or statutory authority reflecting a change in established law, we do not possess the authority to disregard controlling precedent of the [Florida Supreme Court]."); see also Hoffman v. Jones, 280 So. 2d at 434. There is no indication that the Florida legislature intended to overrule Oceanic Villas by passing the UCC. See also Tinker v. De Maria Porsche Audi, Inc., 459 So. 2d 487, 491 (Fla. Dist. Ct. App. 1984) (Florida's UCC "states that the pre-Code law with regard to fraud supplements the U.C.C. and is not displaced by the Code, unless a particular

provision specifically provides for such displacement.") (citing Fla. Stat. § 671.103).

Defendants suggest two alternatives bases on which we might affirm the district court. First, defendants maintain that they are entitled to summary judgment because there are no genuine issues of material fact. Specifically, defendants argue that plaintiff has failed to present "any record evidence of the required elements of knowledge and intentional deceit." In fraud cases, however, summary judgment "is rarely proper as the issue so frequently turns on the axis of the circumstances surrounding the complete transaction, including circumstantial evidence of intent and knowledge." Coastal Investment Properties, Ltd. v. Weber Holdings, LLC, 930 So. 2d 833, 834 (Fla. Dist. Ct. App. 2006) (quoting Cohen v. Kravit Estate Buyers, Inc., 843 So. 2d 989, 991 (Fla. Dist. Ct. App. 2003)); see also Burton, 556 So. 2d at 1129-30 ("Fraud is ordinarily inappropriate for summary disposition; only after a full explanation of the facts and circumstances can the occurrence of fraud be determined."). To establish a claim of fraud in the inducement under Florida law, a plaintiff must establish that: (1) the representor made a false statement concerning a material fact; (2) the representor knew or should have known that the representation was false; (3) the representor intended to induce another party to act in reliance on the false statement; and (4) the party acted in justifiable reliance on the representation and was injured as a result.

Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010) (citing Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985)). Despite defendants' protestations that there is no direct evidence proving intent and knowledge, suffice it to say that the elements of fraud — particularly including intent and knowledge — may be, and often are, proven by circumstantial evidence. See, e.g., Bacon & Bacon Mfg. Co. Inc. v. Bonsey Partners, 62 So. 3d 1285 (Fla Dist. Ct. App. 2011); Century Properties, Inc. v. Machtinger, 448 So. 2d 570 (Fla. Dist. Ct. App. 1984). Viewed in the light most favorable to plaintiff, there is sufficient evidence on the elements of fraudulent inducement for this case to proceed to trial.

Internal emails of the defendants indicate knowledge of the yacht's very poor condition, and plaintiff's representative, Paul Queyrel, and its brokers testified in depositions that defendants and their representatives made representations to them during the sales pitch about the condition of the yacht and specifically that it met international standards, which allegedly proved false after delivery. In addition, plaintiff alleges that defendants advertised the yacht, both on the internet and in physical handouts, as being MCA LY2 compliant and built to DNV standards. Plaintiff's representative and its brokers also testified that they discussed these two standards at length with defendants and relied on defendants' written and oral representations, and that defendants were aware that these standards were "the selling point" of the sale. Plaintiff claims that these repeated

representations induced it to purchase the yacht. Plaintiff's representative and its brokers further testified that the yacht was represented to be new, not a used "dealer-demo" as defendants claim, and that when certain problems were discovered prior to the sale, defendants "represented that Horizon would 'take care of' and fix th[e] problem."

The CEO of the Seller, Roger Sowerbutts, denied under oath ever making representations that the yacht was MCA LY2 compliant, denied that defendants were aware of manufacturing defects and damage to the yacht, and claimed that defendants believed the yacht to have been built to DNV standards. Mr. Sowerbutts conceded, however, that defendants' website incorrectly described the yacht as MCA LY2 compliant, despite the fact that the yacht "never was inspected by MCA." There therefore are genuine issues of material fact and evidence sufficient to survive summary judgment as to all four elements of the claim of fraudulent inducement.

Second, defendants argue that the economic loss rule bars plaintiff's claim for fraudulent inducement. The "economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." Tiara Condominium Assoc., Inc. v. Marsh & McLennan Companies, 110 So. 3d 399, 401 (Fla. 2013). The rule was designed to prevent the application of tort remedies to traditional contract law damages. Id.

The economic loss rule "has its roots in the products liability arena," id., and the Florida Supreme Court recently clarified in Tiara that under Florida law "the economic loss rule applies only in the products liability context." Id. at 407. The Florida Supreme Court thus "recede[d] from [its] prior rulings to the extent that they [] applied the economic loss rule to cases other than products liability." Id.; see also Alpha Data Corp. v. HX5, L.L.C., 139 So. 3d 907, 910 (Fla. Dist. Ct. App. 2013) (citing Tiara and summarily reversing a district court's decision that the economic loss rule barred a fraudulent inducement claim).

Although a fraudulent inducement claim still must be independent of a breach of contract claim, that minimal requirement is readily met here — the fraud allegations are separate and distinct from defendants' performance under the contract. The fraud allegations concern representations about the yacht's condition and certain international building standards. The contract contains no statements about either the international standards or the yacht's condition. Such claims therefore could not form the basis of a breach of contract claim.[4]

B. Breach of Implied Warranties: Counts III, IV, and VII

The district court granted summary judgment to all three defendants — Horizon Yachts, Inc., Horizon Yacht Co., Ltd., and Premier Yacht Co., Ltd. — on

[4] Because judgment in favor of plaintiff on the fraudulent inducement claim would "vitiate" the contract, we also reverse the grant of summary judgment to the Seller on its counterclaim to foreclose on the promissory note.

plaintiff's breach of implied warranty claims due to the contract's express disclaimer of all implied warranties. Plaintiff argues that Section 2308(a) of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2308(a), prohibits a seller from disclaiming implied warranties if an express warranty, including a limited warranty, is given. The district court rejected this argument because "limited warranties are not governed by MMWA." Not so.

The Magnuson-Moss Warranty Act *does* apply to limited warranties. As relevant, Section 2308(a) provides that:

> (a) No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if . . . such supplier makes any written warranty to the consumer with respect to such Consumer Product . . . ."

15 U.S.C. § 2308(a). As Section 2303 of the Act makes clear, the term "written warranty" encompasses both "full" warranties, written warranties that meet "the Federal minimum standards for warranty set forth in section 2304 of [the Act]," and "limited" warranties, written warranties that do not meet the Federal minimum standards. 15 U.S.C. § 2303(a). By its plain language, Section 2308 prohibits sellers from disclaiming implied warranties when either a full or a limited warranty is provided by the seller. Accord Abraham v. Volkswagen of America, Inc., 795 F.2d 238, 248 (2d Cir. 1986) ("Implied warranties . . . may not be disclaimed if a written warranty, "full" or "limited," is given, 15 U.S.C. § 2308(a)."); Boelens v.

Redman Homes, Inc., 748 F.2d 1058, 1063 (5th Cir. 1984) ("Although 'limited' warranties are not subject to [the standards of Section 2304], the Act does provide that the terms of a limited warranty may limit the duration of implied warranties only to the duration of the written warranty.") (quoting 15 U.S.C. § 2308). If a jury concludes that one or all of the defendants issued or agreed to be bound by the limited written warranty, the disclaimer of implied warranties therefore would be ineffective to bar plaintiff's claim.[5]

Defendants argue in the alternative that Horizon and Premier are entitled to summary judgment because they are not in privity of contract with plaintiff, that only the Seller — Horizon Yachts, Inc. — is. See Kramer v. Piper Aircraft Corp., 520 So. 2d 37, 38 (Fla. 1988) (Florida law requires privity of contract for a breach of implied warranty claim). Because, as we discuss infra at 21-25, there is a genuine issue of material fact regarding who issued the limited express warranty (Horizon, Premier, Horizon Yachts, or some combination thereof), there also is a genuine issue of fact regarding privity of contract. Florida courts have found the

[5] The district court's reliance on Bailey v. Monaco Coach Co., 350 F. Supp. 2d 1036, 1042 (N.D. Ga. 2004), to reach the opposite conclusion was misplaced. In Bailey, the Northern District of Georgia correctly noted that the MMWA distinguishes between full and limited warranties and that "[o]nly full warranties are required to meet the minimum standards set forth in 15 U.S.C. § 2304." 250 F. Supp. 2d at 1042. The court then concluded that "because the law relating to limited warranties is not expressly modified, limited warranties . . . are not governed by Magnuson-Moss but by the Uniform Commercial Code" and went on to discuss relevant state law warranty standards. Id. This overly broad statement is correct as to Section 2304 — the minimum standards of Section 2304, by definition, apply only to full warranties — but incorrect as to Section 2308, which, as discussed above, does apply to limited warranties.

privity requirement to be satisfied when a manufacturer directly provides a warranty to, or otherwise has direct contact with, a buyer who purchases from a third party. See ISK Biotech Corp. v. Douberly, 640 So. 2d 85 (Fla. Dist. Ct. App. 1994) (finding privity where manufacturer's representative told third-party seller that seller could assure plaintiff that product would not destroy plaintiff's crop); Cedars of Lebanon Hosp. Corp. v. European X-Ray Distribs. of America, Inc., 444 So. 2d 1068, 1072 n.4 (Fla. Dist. Ct. App. 1984) (finding privity where manufacturer's representative made express warranty through direct contacts with the purchaser who bought product from third-party distributor).

Here, a jury could find that Horizon and Premier directly issued to plaintiff a unique limited express warranty that was provided and specifically negotiated as part of the purchase of the yacht they manufactured. See Cedars of Lebanon, 444 So. 2d at 1072 ("It seems fundamentally unfair, and anomalous in the extreme, to allow the manufacturer to hide behind the doctrine of privity when the product, which it induced the purchaser to buy, turns out to be worthless."). There also is evidence that the founder and CEO of Horizon and Premier was directly involved in the negotiation of the purchase and limited warranty, it is undisputed that the Seller, Horizon Yachts, is an agent of Horizon. HORIZON YACHTS, INC., http://www.horizonyachtusa.com (last visited May 2, 2016) ("Horizon Yacht USA

is the U.S. agent for Horizon Yachts").[6] Plaintiff therefore might well be able at trial to establish privity through the agency relationship. See Ocana v. Ford Motor Co., 992 So. 2d 319, 324-25 (Fla. Dist. Ct. App. 2008) (an agency relationship can establish the requisite privity).

C. Breach of Express Limited Warranty: Count VIII

The district court granted summary judgment to the Seller, Horizon Yachts, Inc., on plaintiff's breach of express warranty claim, but not to Horizon Yacht Co., Ltd. or to Premier Yacht Co., Ltd. It held that the Seller did not issue or provide an express limited warranty to plaintiff. The district court concluded that the Addendum did not incorporate the limited express warranty into the contract because: (1) "it would be unreasonable to interpret paragraph ten of the agreement, indicating both that the [Seller] makes no warranties and sells the yacht "AS IS," and to thereafter include a limited warranty by the [Seller];" and (2) the Purchase Agreement, Addendum, and limited warranty "indicate[] that [Horizon Yachts] is not part of "Horizon" or "Horizon Group," the party that issued the limited warranty."

We disagree that it would be unreasonable to interpret the Purchase Agreement, as amended by the Addendum, to include both the limited warranty and an "as is" clause. The amended "as is" clause specifically demarcates the

[6] Horizon Yachts, Inc. also uses the name "Horizon Yacht USA."

limited warranty as an exception to the clause. And the Addendum states that "[t]he Terms of this Acceptance shall govern over any inconsistent terms in the Purchase Agreement." Thus, to the extent that the original "as is" clause conflicts with the Addendum or the added limited warranty, the Addendum and limited warranty would govern — assuming, of course, that they are a part of the contract — a question to which we now turn.

A collateral document, such as the limited warranty, is deemed to be incorporated by reference into a contract if the contract "(1) specifically provide[s] that it is subject to the incorporated [collateral] document and (2) the collateral document to be incorporated must be sufficiently described or referred to in the incorporating agreement so that the intent of the parties may be ascertained." BGT Grp., Inc. v. Tradewinds Engine Servs., LLC, 62 So. 3d 1192, 1194 (Fla. Dist. Ct. App. 2011) (quoting Kantner v. Boutin, 624 So. 2d 779, 781 (Fla. Dist. Ct. App. 1993)). The first requirement mandates that "there must be some expression in the incorporating document . . . of an intention to be bound by the collateral document." Kantner, 624 So. 2d at 781. As to the second requirement, "[i]t is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." Id. (quoting OBS Co. v. Pace Constr. Corp., 558 So. 2d 404, 406 (Fla. 1990)).

Viewing the evidence in the light most favorable to the plaintiff, as we must on summary judgment, we conclude — while it is a very close question — that there are genuine issues of material fact as to whether the limited warranty was incorporated into the contract or whether the Seller, Horizon Yachts, otherwise agreed to be bound by the warranty. Admittedly, the Purchase Agreement and the warranty appear to differentiate between "Buyer" and "Seller [Horizon Yachts]" on the one hand, and the "Horizon Group," on the other, an indication that the Seller, Horizon Yachts, is not a part of the Horizon Group, as the district court found. And paragraph 13 of the warranty suggests that it was not the Seller who issued the warranty and that the Seller did not agree to be bound by it. But this evidence, while strong, conflicts with three pieces of evidence that in our view raise genuine issues of material fact for a jury to resolve.

First, the Purchase Agreement, as amended by the Addendum, states that "[o]ther than the limited express warranty attached here as Exhibit A, Seller and the brokers have given no warranty, either express or implied . . . ." This reasonably could be read to mean that the Seller, Horizon Yachts, itself, at least in part, issued the limited express warranty. The Purchase Agreement, together with the Addendum, specifically lists the limited warranty and states that it is attached "as Exhibit A." Moreover, the limited warranty was listed in the Closing Index, along with the Purchase Agreement and the Addendum, as a part of the parties'

agreement. Second, the limited warranty was issued on the Seller's letterhead, and it was negotiated alongside the Purchase Agreement and provided to plaintiff by the Seller prior to the execution of the Purchase Agreement. Finally, a jury also could reasonably conclude that the Seller is part of the "Horizon Group" mentioned in the limited warranty — its website states that it is the U.S. agent of Horizon and the Seller appears to be owned, at least in part, by Horizon's founder and CEO.

The Purchase Agreement as a whole thus contains conflicting provisions as to the Seller's relationship with the warranty, and it is bolstered by extrinsic evidence of the Seller's relationship with the other Horizon entities. While there is certainly strong evidence against finding that the Seller, Horizon Yachts, Inc., agreed to be bound by the limited warranty, we believe that there is also sufficient evidence in the record to create a genuine issue of material fact entitling the jury rather than the court to decide that question.

There is one final point to address with respect to the express limited warranty. As noted, the Purchase Agreement states that it is "attached here as Exhibit A," but it was not actually physically attached as an exhibit. Nevertheless, the limited warranty was negotiated by the parties in conjunction with the Purchase Agreement, provided to plaintiff well before the agreement was executed, and was listed in the Closing Index. See Avatar Properties, Inc. v. Greetham, 27 So. 3d

764, 766 (Fla. Dist. Ct. App. 2010) (where a home warranty was not attached to any agreement, language that "the warranty was available for examination at [the seller's] offices and that upon request the warranty would be attached as an exhibit to the purchase and sale agreement" was sufficient to satisfy the second requirement for incorporation by reference). Reading the documents together, a jury could conclude that the parties intended for the Purchase Agreement, Addendum, and limited warranty all to be part of the same contract. See Phoenix Motor Co. v. Desert Diamond Players Club, Inc., 144 So. 3d 694, 697-98 (Fla. Dist. Ct. App. 2014) (holding that documents "executed as part of the same transaction" are incorporated when "they indicate the parties' intent for the [incorporating document] and the [collateral document] to be part of the same contract"); see also Collins v. Citrus Nat'l Bank, 641 So. 2d 458, 459 (Fla. Dist. Ct. App. 1994) ("Where two or more documents are executed by the same parties, at or near the same time, in the course of the same transaction, and concern the same subject matter, they will be read and construed together.").

III. CONCLUSION

For the foregoing reasons, we vacate the district court's grant of summary judgment, as to Counts I, III, IV, VII, and VIII and remand for trial, but affirm the grant of summary judgment as to the remaining claims. We also reverse the district court's grant of summary judgment on defendants' counterclaim.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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LIFE TECHNOLOGIES CORP. ET AL. *v.* PROMEGA CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 14–1538. Argued December 6, 2016—Decided February 22, 2017

Respondent Promega Corporation sublicensed the Tautz patent, which claims a toolkit for genetic testing, to petitioner Life Technologies Corporation and its subsidiaries (collectively Life Technologies) for the manufacture and sale of the kits for use in certain licensed law enforcement fields worldwide. One of the kit's five components, an enzyme known as the *Taq* polymerase, was manufactured by Life Technologies in the United States and then shipped to the United Kingdom, where the four other components were made, for combination there. When Life Technologies began selling the kits outside the licensed fields of use, Promega sued, claiming that patent infringement liability was triggered under §271(f)(1) of the Patent Act, which prohibits the supply from the United States of "all or a substantial portion of the components of a patented invention" for combination abroad. The jury returned a verdict for Promega, but the District Court granted Life Technologies' motion for judgment as a matter of law, holding that §271(f)(1)'s phrase "all or a substantial portion" did not encompass the supply of a single component of a multicomponent invention. The Federal Circuit reversed. It determined that a single important component could constitute a "substantial portion" of the components of an invention under §271(f)(1) and found the *Taq* polymerase to be such a component.

Held: The supply of a single component of a multicomponent invention for manufacture abroad does not give rise to §271(f)(1) liability. Pp. 4–11.

(a) Section 271(f)(1)'s phrase "substantial portion" refers to a quantitative measurement. Although the Patent Act itself does not define the term "substantial," and the term's ordinary meaning may refer

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either to qualitative importance or to quantitatively large size, the statutory context points to a quantitative meaning. Neighboring words "all" and "portion" convey a quantitative meaning, and nothing in the neighboring text points to a qualitative interpretation. Moreover, a qualitative reading would render the modifying phrase "of the components" unnecessary the first time it is used in §271(f)(1). Only the quantitative approach thus gives meaning to each statutory provision.

Promega's proffered "case-specific approach," which would require a factfinder to decipher whether the components at issue are a "substantial portion" under either a qualitative or a quantitative test, is rejected. Tasking juries with interpreting the statute's meaning on an ad hoc basis would only compound, not resolve, the statute's ambiguity. And Promega's proposal to adopt an analytical framework that accounts for both the components' quantitative and qualitative aspects is likely to complicate rather than aid the factfinder's review. Pp. 4–8.

(b) Under a quantitative approach, a single component cannot constitute a "substantial portion" triggering §271(f)(1) liability. This conclusion is reinforced by §271(f)'s text, context, and structure. Section 271(f)(1) consistently refers to the plural "components," indicating that multiple components make up the substantial portion. Reading §271(f)(1) to cover any single component would also leave little room for §271(f)(2), which refers to "any component," and would undermine §271(f)(2)'s express reference to a single component "especially made or especially adapted for use in the invention." The better reading allows the two provisions to work in tandem and gives each provision its unique application. Pp. 8–10.

(c) The history of §271(f) further bolsters this conclusion. Congress enacted §271(f) in response to *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, to fill a gap in the enforceability of patent rights by reaching components that are manufactured in the United States but assembled overseas. Consistent with Congress's intent, a supplier may be liable under §271(f)(1) for supplying from the United States all or a substantial portion of the components of the invention or under §271(f)(2) for supplying a single component if it is especially made or especially adapted for use in the invention and not a staple article or commodity. But, as here, when a product is made abroad and all components but a single commodity article are supplied from abroad, the activity is outside the statute's scope. Pp. 10–11.

773 F. 3d. 1338, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which THOMAS

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and ALITO, JJ., joined as to all but Part II–C. ALITO, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined. ROBERTS, C. J., took no part in the decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 14–1538

LIFE TECHNOLOGIES CORPORATION, ET AL., PETITIONERS *v.* PROMEGA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 22, 2017]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case concerns the intersection of international supply chains and federal patent law. Section 271(f)(1) of the Patent Act of 1952 prohibits the supply from the United States of "all or a substantial portion" of the components of a patented invention for combination abroad. 35 U. S. C. §271(f)(1). We granted certiorari to determine whether a party that supplies a single component of a multicomponent invention for manufacture abroad can be held liable for infringement under §271(f)(1). 579 U. S. ___ (2016). We hold that a single component does not constitute a substantial portion of the components that can give rise to liability under §271(f)(1). Because only a single component of the patented invention at issue here was supplied from the United States, we reverse and remand.

I

A

We begin with an overview of the patent in dispute. Although the science behind the patent is complex, a basic understanding suffices to resolve the question presented

by this case.

The Tautz patent, U. S. Reissue Patent No. RE 37,984, claims a toolkit for genetic testing.[1] The kit is used to take small samples of genetic material—in the form of nucleotide sequences that make up the molecule deoxyribonucleic acid (commonly referred to as "DNA")—and then synthesize multiple copies of a particular nucleotide sequence. This process of copying, known as amplification, generates DNA profiles that can be used by law enforcement agencies for forensic identification and by clinical and research institutions around the world. For purposes of this litigation, the parties agree that the kit covered by the Tautz patent contains five components: (1) a mixture of primers that mark the part of the DNA strand to be copied; (2) nucleotides for forming replicated strands of DNA; (3) an enzyme known as *Taq* polymerase; (4) a buffer solution for the amplification; and (5) control DNA.[2]

Respondent Promega Corporation was the exclusive licensee of the Tautz patent. Petitioner Life Technologies Corporation manufactured genetic testing kits.[3] During the timeframe relevant here, Promega sublicensed the Tautz patent to Life Technologies for the manufacture and sale of the kits for use in certain licensed law enforcement fields worldwide. Life Technologies manufactured all but one component of the kits in the United Kingdom. It manufactured that component—the *Taq* polymerase—in

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[1] The Tautz patent expired in 2015. The litigation thus concerns past acts of infringement only.

[2] Because the parties here agree that the patented invention is made up of only these five components, we do not consider how to identify the "components" of a patent or whether and how that inquiry relates to the elements of a patent claim.

[3] Applied Biosystems, LLC, and Invitrogen IP Holdings, Inc., are also petitioners in this proceeding and are wholly owned subsidiaries of Life Technologies Corporation. The agreement at issue here was originally between Promega and Applied Biosystems. 773 F. 3d 1338, 1344, n. 3 (CA Fed. 2014).

the United States. Life Technologies shipped the *Taq* polymerase to its United Kingdom facility, where it was combined with the other four components of the kit.

Four years into the agreement, Promega sued Life Technologies on the grounds that Life Technologies had infringed the patent by selling the kits outside the licensed fields of use to clinical and research markets. As relevant here, Promega alleged that Life Technologies' supply of the *Taq* polymerase from the United States to its United Kingdom manufacturing facilities triggered liability under §271(f)(1).

B

At trial, the parties disputed the scope of §271(f)(1)'s prohibition against supplying all or a substantial portion of the components of a patented invention from the United States for combination abroad. Section 271(f)(1)'s full text reads:

> "Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer."

The jury returned a verdict for Promega, finding that Life Technologies had willfully infringed the patent. Life Technologies then moved for judgment as a matter of law, contending that §271(f)(1) did not apply to its conduct because the phrase "all or a substantial portion" does not encompass the supply of a single component of a multi-component invention.

The District Court granted Life Technologies' motion.

The court agreed that there could be no infringement under §271(f)(1) because Promega's evidence at trial "showed at most that *one* component of all of the accused products, [the *Taq*] polymerase, was supplied from the United States." 2012 WL 12862829, *3 (WD Wis., Sept. 13, 2012) (Crabb, J.). Section 271(f)(1)'s reference to "a substantial portion of the components," the District Court ruled, does not embrace the supply of a single component. *Id.,* at *5.

The Court of Appeals for the Federal Circuit reversed and reinstated the jury's verdict finding Life Technologies liable for infringement.[4] 773 F. 3d 1338, 1353 (2014). As relevant here, the court held that "there are circumstances in which a party may be liable under §271(f)(1) for supplying or causing to be supplied a single component for combination outside the United States." *Ibid.* The Federal Circuit concluded that the dictionary definition of "substantial" is "important" or "essential," which it read to suggest that a single important component can be a "'substantial portion of the components'" of a patented invention. *Ibid*. Relying in part on expert trial testimony that the *Taq* polymerase is a "'main'" and "'major'" component of the kits, the court ruled that the single *Taq* polymerase component was a substantial component as the term is used in §271(f)(1). *Id.*, at 1356.

II

The question before us is whether the supply of a single component of a multicomponent invention is an infringing act under 35 U. S. C. §271(f)(1). We hold that it is not.

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[4] Chief Judge Prost dissented from the majority's conclusion with respect to the "active inducement" element of 35 U. S. C. §271(f)(1). 773 F. 3d, at 1358–1360. Neither that question, nor any of the Federal Circuit's conclusions regarding Life Technologies' liability under §271(a) or infringement of four additional Promega patents, see *id*., at 1341, is before us. See 579 U. S. ___ (2016).

A

The threshold determination to be made is whether §271(f)(2)'s requirement of "a substantial portion" of the components of a patented invention refers to a quantitative or qualitative measurement. Life Technologies and the United States argue that the text of §271(f)(1) establishes a quantitative threshold, and that the threshold must be greater than one. Promega defends the Federal Circuit's reading of the statute, arguing that a "substantial portion" of the components includes a single component if that component is sufficiently important to the invention.

We look first to the text of the statute. *Sebelius* v. *Cloer*, 569 U. S. ___, ___ (2013) (slip op., at 6). The Patent Act itself does not define the term "substantial," and so we turn to its ordinary meaning. *Ibid.* Here we find little help. All agree the term is ambiguous and, taken in isolation, might refer to an important portion or to a large portion. Brief for Petitioners 16; Brief for Respondent 18; Brief for United States as *Amicus Curiae* 12. "Substantial," as it is commonly understood, may refer either to qualitative importance or to quantitatively large size. See, *e.g.,* Webster's Third New International Dictionary 2280 (defs. 1c, 2c) (1981) (Webster's Third) ("important, essential," or "considerable in amount, value, or worth"); 17 Oxford English Dictionary 67 (defs. 5a, 9) (2d ed. 1989) (OED) ("That is, constitutes, or involves an essential part, point, or feature; essential, material," or "Of ample or considerable amount, quantity, or dimensions").

The context in which "substantial" appears in the statute, however, points to a quantitative meaning here. Its neighboring terms are the first clue. "[A] word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U. S. 285, 294 (2008). Both "all" and "portion" convey a quantitative meaning. "All" means the entire quantity, without refer-

ence to relative importance. See, *e.g.,* Webster's Third 54 (defs. 1a, 2a, 3) ("that is the whole amount or quantity of," or "every member or individual component of," or "the whole number or sum of"); 1 OED 324 (def. 2) ("The entire number of; the individual components of, without exception"). "Portion" likewise refers to some quantity less than all. Webster's Third 1768 (defs. 1, 3a) ("an individual's part or share of something," or "a part of a whole"); 12 OED 154, 155 (def. 1a, 5a) ("The part (of anything) allotted or belonging to one person," or "A part of any whole"). Conversely, there is nothing in the neighboring text to ground a qualitative interpretation.

Moreover, the phrase "substantial portion" is modified by "of the components of a patented invention." It is the supply of all or a substantial portion "of the components" of a patented invention that triggers liability for infringement. But if "substantial" has a qualitative meaning, then the more natural way to write the opening clause of the provision would be to not reference "the components" at all. Instead, the opening clause of §271(f)(1) could have triggered liability for the supply of "all or a substantial portion of . . . a patented invention, where [its] components are uncombined in whole or in part." A qualitative reading would render the phrase "of the components" unnecessary the first time it is used in §271(f)(1). Whenever possible, however, we should favor an interpretation that gives meaning to each statutory provision. See *Hibbs* v. *Winn*, 542 U. S. 88, 101 (2004). Only the quantitative approach does so here. Thus, "substantial," in the context of §271(f)(1), is most reasonably read to connote a quantitative measure.

Promega argues that a quantitative approach is too narrow, and invites the Court to instead adopt a "case-specific approach" that would require a factfinder to decipher whether the components at issue are a "substantial portion" under *either* a qualitative or quantitative test.

Brief for Respondent 17, 42. We decline to do so. Having determined the phrase "substantial portion" is ambiguous, our task is to resolve that ambiguity, not to compound it by tasking juries across the Nation with interpreting the meaning of the statute on an ad hoc basis. See, *e.g., Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 345–346 (1997).

As a more general matter, moreover, we cannot accept Promega's suggestion that the Court adopt a different analytical framework entirely—one that accounts for both the quantitative *and* qualitative aspects of the components. Promega reads §271(f)(1) to mean that the answer to whether a given portion of the components is "substantial" depends not only on the number of components involved but also on their qualitative importance to the invention overall. At first blush, there is some appeal to the idea that, in close cases, a subjective analysis of the qualitative importance of a component may help determine whether it is a "substantial portion" of the components of a patent. But, for the reasons discussed above, the statute's structure provides little support for a qualitative interpretation of the term.[5]

Nor would considering the qualitative importance of a component necessarily help resolve close cases. To the contrary, it might just as easily complicate the factfinder's review. Surely a great many components of an invention (if not every component) are important. Few inventions, including the one at issue here, would function at all without any one of their components. Indeed, Promega has not identified any component covered by the Tautz

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[5]The examples Promega provides of other statutes' use of the terms "substantial" or "significant" are inapposite. See Brief for Respondent 19–20. The text of these statutes, which arise in different statutory schemes with diverse purposes and structures, differs in material ways from the text of §271(f)(1). The Tax Code, for instance, refers to "a substantial portion of a return," 26 U. S. C. §7701(a)(36)(A), not to "a substantial portion *of the entries* of a return."

patent that would not satisfy Promega's "importance" litmus test.[6] How are courts—or, for that matter, market participants attempting to avoid liability—to determine the relative importance of the components of an invention? Neither Promega nor the Federal Circuit offers an easy way to make this decision. Accordingly, we conclude that a quantitative interpretation hews most closely to the text of the statute and provides an administrable construction.

B

Having determined that the term "substantial portion" refers to a quantitative measurement, we must next decide whether, as a matter of law, a single component can ever constitute a "substantial portion" so as to trigger liability under §271(f)(1). The answer is no.

As before, we begin with the text of the statute. Section 271(f)(1) consistently refers to "components" in the plural. The section is targeted toward the supply of all or a substantial portion "of the *components*," where "such *components*" are uncombined, in a manner that actively induces the combination of "such *components*" outside the United States. Text specifying a substantial portion of "components," plural, indicates that multiple components constitute the substantial portion.

The structure of §271(f) reinforces this reading. Section 271(f)(2), which is §271(f)(1)'s companion provision, reads as follows:

> "Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for

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[6] Life Technologies' expert described the *Taq* polymerase as a "main" component. App. 160. The expert also described two other components the same way. *Ibid.*

> substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer."

Reading §271(f)(1) to refer to more than one component allows the two provisions to work in tandem. Whereas §271(f)(1) refers to "components," plural, §271(f)(2) refers to "any component," singular. And, whereas §271(f)(1) speaks to whether the components supplied by a party constitute a substantial portion of the components, §271(f)(2) speaks to whether a party has supplied "any" noncommodity component "especially made or especially adapted for use in the invention."

We do not disagree with the Federal Circuit's observation that the two provisions concern different scenarios. See 773 F. 3d, at 1354. As this Court has previously observed, §§271(f)(1) and 271(f)(2) "differ, among other things, on the quantity of components that must be 'supplie[d] . . . from the United States' for liability to attach." *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 454, n. 16 (2007). But we do not draw the Federal Circuit's conclusion from these different but related provisions. Reading §271(f)(1) to cover *any* single component would not only leave little room for §271(f)(2), but would also undermine §271(f)(2)'s express reference to a single component "especially made or especially adapted for use in the invention."[7] Our conclusion that §271(f)(1) prohibits the supply of components, plural, gives each subsection its unique

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[7]This Court's opinion in *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 447 (2007), is not to the contrary. The holding in that case turned not on the number of components involved, but rather on whether the software at issue was a component at all.

application.[8] See, *e.g., Cloer*, 569 U. S., at ___ (slip op., at 6).

Taken alone, §271(f)(1)'s reference to "components" might plausibly be read to encompass "component" in the singular. See 1 U. S. C. §1 (instructing that "words importing the plural include the singular," "unless the context indicates otherwise"). But §271(f)'s text, context, and structure leave us to conclude that when Congress said "components," plural, it meant plural, and when it said "component," singular, it meant singular.

We do not today define how close to "all" of the components "a substantial portion" must be. We hold only that one component does not constitute "all or a substantial portion" of a multicomponent invention under §271(f)(1). This is all that is required to resolve the question presented.

C

The history of §271(f) bolsters our conclusion. The Court has previously observed that Congress enacted §271(f) in response to our decision in *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518 (1972). See *Microsoft Corp.*, 550 U. S., at 444. In *Deepsouth*, the Court determined that, under patent law as it existed at the time, it was "not an infringement to make or use a patented product outside of the United States." 406 U. S., at 527. The

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[8] Promega argues that the important distinction between these provisions is that §271(f)(1), unlike §271(f)(2), requires a showing of specific intent for active inducement. Brief for Respondent 34–41. But cf. *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754, 765–766 (2011) (substantially equating the intent requirements for §§271(b) and 271(c), on which Promega asserts §§271(f)(1) and (f)(2) were modeled). But, to repeat, whatever intent subsection (f)(1) may require, it also imposes liability only on a party who supplies a "substantial portion of the components" of the invention. Thus, even assuming that subsection (f)(1)'s "active inducement" requirement is different from subsection (f)(2)'s "knowing" and "intending" element—a question we do not reach today—that difference between the two provisions does not read the "substantial portion" language out of the statute.

new §271(f) "expand[ed] the definition of infringement to include supplying from the United States a patented invention's components," as outlined in subsections (f)(1) and (f)(2). *Microsoft*, 550 U. S., at 444–445.

The effect of this provision was to fill a gap in the enforceability of patent rights by reaching components that are manufactured in the United States but assembled overseas and that were beyond the reach of the statute in its prior formulation. Our ruling today comports with Congress' intent. A supplier may be liable under §271(f)(1) for supplying from the United States all or a substantial portion of the components (plural) of the invention, even when those components are combined abroad. The same is true even for a single component under §271(f)(2) if it is especially made or especially adapted for use in the invention and not a staple article or commodity. We are persuaded, however, that when as in this case a product is made abroad and all components but a single commodity article are supplied from abroad, this activity is outside the scope of the statute.

III

We hold that the phrase "substantial portion" in 35 U. S. C. §271(f)(1) has a quantitative, not a qualitative, meaning. We hold further that §271(f)(1) does not cover the supply of a single component of a multicomponent invention. The judgment of the Court of Appeals for the Federal Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 14–1538

LIFE TECHNOLOGIES CORPORATION, ET AL.,
PETITIONERS *v.* PROMEGA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[February 22, 2017]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I join all but Part II–C of the Court's opinion. It is clear from the text of 35 U. S. C. §271(f) that Congress intended not only to fill the gap created by *Deepsouth Packing Co.* v. *Laitram Corp.,* 406 U. S. 518 (1972)—where all of the components of the invention were manufactured in the United States, *id.,* at 524—but to go at least a little further. How much further is the question in this case, and the genesis of §271(f) sheds no light on that question.

I note, in addition, that while the Court holds that a single component cannot constitute a substantial portion of an invention's components for §271(f)(1) purposes, I do not read the opinion to suggest that *any* number greater than one is sufficient. In other words, today's opinion establishes that more than one component is necessary, but does not address *how much* more.

Supreme Court of Florida

No. SC15-1655

PLANNED PARENTHOOD OF GREATER ORLANDO, INC., etc.,
Petitioner,

vs.

MMB PROPERTIES, etc.,
Respondent.

[February 23, 2017]

PARIENTE, J.

The conflict issue presented in this case involves the standard for modifying or dissolving a temporary injunction. The Fifth District Court of Appeal "acknowledge[d] conflict with the Third and Fourth District[s]" as to whether a party moving to modify or dissolve a temporary injunction must establish "changed circumstances." Planned Parenthood of Greater Orlando v. MMB Properties, 171 So. 3d 125, 128 & n.3 (Fla. 5th DCA 2015).[1] We conclude that requiring a party to meet the burden of proving changed circumstances even when

1. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

a party shows clear misapprehension of the facts or clear legal error is incompatible with the equity principles underlying injunctive relief and hold that a trial court abuses its discretion in not modifying or dissolving a temporary injunction in such an instance, regardless of whether the movant shows changed circumstances.

After resolving the conflict issue, we also review the temporary injunction entered by the trial court in this case and conclude that the order enjoining Planned Parenthood of Greater Orlando ("Planned Parenthood") from performing certain activities was not based on competent, substantial evidence. Accordingly, we quash the Fifth District's decision below to the extent it affirmed the trial court's temporary injunction. See Planned Parenthood of Greater Orlando, 171 So. 3d at 130-31.

FACTS AND BACKGROUND

Oak Commons is a medical complex consisting of approximately eleven acres located near the Osceola Regional Medical Center. In 1986, the developer of Oak Commons executed a Declaration of Restrictions ("the Declaration") that was duly recorded and expressly ran with the land. The Declaration covenanted the following:

> The property described herein shall not be used for the following activities without the prior written permission of [the developer], which shall be granted only in its sole and unfettered discretion, unless ancillary and incidental to a physician's practice of medicine:

1. An Outpatient Surgical Center
2. An emergency medical center.
3. A Diagnostic Imaging Center which includes the following radiographic testing: Fluroscopy [sic], Plane Film Radiography, Computerized Tomography (CT), Ultrasound, Radiation Therapy, Mamography [sic] and Breast Diagnostics, Nuclear Medicine Testing and Magnetic Resonance Imaging (MRI).

Planned Parenthood purchased the property located at 610 Oak Commons Boulevard ("Kissimmee Health Center") in December 2013. Respondent, MMB Properties, is a general partnership that has operated a cardiology practice in Oak Commons since 1996. In June 2014, approximately one month before Planned Parenthood opened the Kissimmee Health Center, MMB Properties filed a single-count complaint alleging that Planned Parenthood's use of the property violated the Declaration. The complaint sought a permanent injunction preventing Planned Parenthood from performing outpatient surgical procedures, which MMB Properties alleged included abortions, and from providing emergency medical services, which allegedly included the provision of the "Morning After Pill." The complaint was supported by an affidavit of Dr. John Massey, a cardiologist and one of the general partners of MMB Properties, as well as a zoning verification letter that Planned Parenthood sent to the City of Kissimmee inquiring whether it could operate an "Out Patient Surgical Center" at the Kissimmee Health Center and an application Planned Parenthood submitted to the Florida Agency for Health Care Administration to operate an abortion clinic.

Soon after MMB Properties filed the complaint, MMB Properties moved to temporarily enjoin Planned Parenthood from "performing abortions, providing outpatient surgical services, or providing emergency medical services, including emergency contraception (including administering the 'Morning After Pill'), until this lawsuit is fully resolved on the merits."[2] Planned Parenthood filed its answer, affirmative defenses, and a memoranda of law in opposition to the complaint and MMB Properties' temporary injunction motion, along with an affidavit of its then-CEO, Jenna Tosh. Two business days after Planned Parenthood opened the Kissimmee Health Center to the public, the trial court held a hearing on MMB Properties' motion for a temporary injunction. At the hearing, Ms. Tosh and Martha Haynie, a board member and the treasurer of Planned Parenthood, testified on Planned Parenthood's behalf. Dr. Massey and Dr. Jose Fernandez, a family physician who actively opposes abortions, testified on behalf of MMB Properties.

Ms. Tosh testified that Planned Parenthood was a nonprofit organization that intended to perform surgical abortions at its then recently opened Kissimmee Health Center. Ms. Tosh further testified that abortions represent less than one

2. The temporary injunction motion was also supported by an affidavit of Dr. Massey, who averred that the performance of abortions at the Kissimmee Health Center was "obnoxious and out of harmony with the rest of the offices in Oak Commons Medical Park." However, the trial court did not grant the temporary injunction on this basis.

percent of the total number of services Planned Parenthood provides and do not constitute a significant portion of the services Planned Parenthood intended to provide at the Kissimmee Health Center. Rather, Ms. Tosh testified that Planned Parenthood provides all FDA-approved methods of contraception, breast and cervical cancer screenings, and a "whole scope of primary preventative care for women." Ms. Tosh further testified that all of its services, including surgical abortions, could be performed in its building without having a surgical suite.

Testimony during the hearing also adduced that Planned Parenthood employed a salaried medical director, Dr. Merri Morris, a board-certified obstetrician and gynecologist ("OBGYN"), as well as four other licensed physicians who were independent contractors. Ms. Tosh testified that Dr. Morris would soon begin working exclusively for the Kissimmee Health Center. Ms. Tosh also testified that while surgical abortions were routinely referred to as surgery, she did "not agree that surgical abortions entails what is usually thought of as surgery." Additionally, Ms. Tosh testified that Planned Parenthood was independent of the national organization, Planned Parenthood Federation of America.

Ms. Haynie testified that, as treasurer of Planned Parenthood, she was familiar with the costs that the organization incurred in establishing the Kissimmee Health Center. Specifically, Ms. Haynie testified that if Planned Parenthood were

required to move its operations from the Kissimmee Health Center to another location, that process would take approximately eighteen months and cost Planned Parenthood slightly over $700,000 in lost revenue.

Dr. Massey testified that abortion is a surgical procedure and that the Declaration's restrictive covenants applied equally to his practice as it did to Planned Parenthood's. For instance, Dr. Massey testified that his practice could not conduct cardiac catheterizations because they are considered a surgical procedure. Dr. Fernandez testified that surgical abortions are surgical procedures because they involve "instrumentation, a woman usually under some form of anesthesia, and the extraction of bodily fluid and tissues." Approximately one week after the hearing, the trial court granted MMB Properties' motion for a temporary injunction, finding that MMB Properties had a substantial likelihood of showing that performing surgical abortions would violate the Declaration and that such procedures are not incidental to a physician's practice of medicine. Additionally, the trial court enjoined Planned Parenthood from providing sonographic or other diagnostic imaging services such as ultrasounds.

Post-Temporary Injunction Motion and Supporting Affidavits

Five days later, Planned Parenthood filed a "Motion to Reconsider, Dissolve, or Modify Order Granting Motion for Temporary Injunction" in the trial court ("motion to modify or dissolve"). The motion alleged that the temporary

injunction was "based on an erroneous reading of the Declaration, and includes several additional errors of law and fact." The motion specifically requested modification of the temporary injunction order "to provide sonograms or other diagnostic imaging services as Plaintiff MMB [Properties] never sought any relief precluding rendition of those services, either in its Complaint or in Plaintiff's Motion for Temporary Injunction." The motion did not acknowledge any change in the underlying facts or law from when the temporary injunction was entered, but argued that the trial court misapprehended the facts as presented to the court during the evidentiary hearing. The motion also sought clarification of what procedures were enjoined by the temporary injunction in addition to prohibiting performing surgical abortions and sonographic or other diagnostic imaging services.

In support of its motion, Planned Parenthood submitted a supplemental affidavit of Ms. Tosh and affidavits of three additional individuals involved with the planning and construction of the Kissimmee Health Center.[3] In response, MMB Properties argued that the motion simply "rehashe[d] testimony already considered" and failed to show a change in facts or circumstances. The trial court

3. The following individuals submitted affidavits: Thomas R. Harbert, the attorney whose firm represented Planned Parenthood in connection with its acquisition of the Kissimmee Health Center; Matthew Harkins, a licensed general contractor who oversaw the planning and renovation of the Kissimmee Health Center; and Dr. Merri Morris, who has been the medical director of Planned Parenthood since September 2012.

summarily denied Planned Parenthood's motion to modify or dissolve the temporary injunction without explanation and without holding a hearing.

The Fifth District Stay Panel Opinion

Planned Parenthood appealed the temporary injunction and the denial of its motion to modify or dissolve the temporary injunction to the Fifth District. Planned Parenthood also filed an emergency motion seeking to stay the temporary injunction pending the Fifth District's opinion on the appeal. The Fifth District stay panel,[4] in considering the evidence before the trial court at the time of the temporary injunction order as well as the supplemental affidavits, concluded that "the trial court erred as a matter of law when it enjoined Planned Parenthood from providing sonographic and other diagnostic imaging services because MMB never requested this relief in its pleadings or in its motion for temporary injunction." Planned Parenthood of Greater Orlando. v. MMB Properties, 148 So. 3d 810, 812 (Fla. 5th DCA 2014). The stay panel also concluded:

> Planned Parenthood is likely to succeed on the merits regarding the portion of the injunction that prevents it from providing surgical procedures. The Declaration of Rights allows surgery to occur in the Oak Commons Medical Center so long as it is "ancillary and incidental to a physician's practice of medicine." The trial court found that Planned Parenthood is not a "physician's practice" because it is a § 501(c)(3) tax-exempt nonprofit organization. Simply because an organization chooses to obtain nonprofit status does not mean that it is not a physician's practice. The trial court's other findings with

4. The stay panel consisted of Judges Evander, Cohen, and Lambert.

> respect to this issue are similarly unsupported by the record. When examining the record as a whole, including the affidavits Planned Parenthood filed in support of its motion for rehearing, there is a likelihood that Planned Parenthood will prevail on appeal, either because it is not an Outpatient Surgical Center or, even if it is, the surgeries it performs are ancillary to a "physician's practice."

Id. Lastly, the stay panel noted that "Planned Parenthood has sufficiently proved that it will suffer harm absent a stay." Id.

The Fifth District Merits Panel Opinion

On appeal, a different panel of the Fifth District reversed the stay panel, holding that the stay panel should not have considered the affidavits filed in connection with the motion to modify or dissolve the temporary injunction.[5] Planned Parenthood, 171 So. 3d at 128. The Fifth District, addressing the trial court's denial of Planned Parenthood's motion to modify or dissolve the temporary injunction, stated that Planned Parenthood "needed to establish changed circumstances which it did not do," and acknowledged conflict with the Third and Fourth District Courts of Appeal. Id. at 128 & n.3 (citation omitted).

Addressing the merits of the temporary injunction order, the Fifth District construed the Declaration de novo and concluded that the restrictive covenant at issue "prohibits the property from being used as an outpatient surgical center, the

5. The merits panel consisted of Judges Lawson, Palmer, and Evander. Judge Evander concurred in part and dissented part.

common and ordinary meaning of which is a facility or place for, or for the purpose of, performing outpatient surgical procedures." Id. at 130. Based on this construction, the Fifth District concluded that the trial court's factual findings were supported by competent, substantial evidence, including its finding that Planned Parenthood's "performance of abortions was not ancillary or incidental" to Planned Parenthood's physician's practice of medicine. Id. Accordingly, the Fifth District affirmed in part the temporary injunction enjoining Planned Parenthood from performing abortions at the Kissimmee Health Center. Judge Evander, who sat on both panels, contested the conclusion, based on the limited evidence before the temporary injunction hearing, "that MMB met its burden of showing a substantial likelihood of success on the merits." Id. at 133 (Evander, J., concurring in part, dissenting in part).

Planned Parenthood sought discretionary jurisdiction in this Court based on the acknowledged conflict regarding the changed circumstances requirement and moved the Fifth District to stay issuance of the mandate. After the Fifth District denied the motion, Planned Parenthood moved this Court to review the denial. We granted jurisdiction and stayed the proceedings below pending disposition of this case.

ANALYSIS

I. The Changed Circumstances Requirement when Moving to Modify or Dissolve a Temporary Injunction

As this Court acknowledged long ago, the purpose of a temporary injunction is to preserve the status quo while final injunctive relief is sought. See Sullivan v. Moreno, 19 Fla. 200, 215 (1882); see also Grant v. Robert Half Intern., Inc., 597 So. 2d 801, 801-02 (Fla. 3d DCA 1992) ("The purpose of a temporary injunction is not to resolve a dispute on the merits, but rather to preserve the status quo until the final hearing when full relief may be granted."). A temporary injunction is provisional by nature. Thus, once a temporary injunction order is entered and pending a trial on the final injunctive relief sought, a party may seek to modify or dissolve the temporary injunction pursuant to Florida Rule of Civil Procedure 1.610(d), which provides:

> A party against whom a temporary injunction has been granted may move to dissolve or modify it at any time. If a party moves to dissolve or modify, the motion shall be heard within 5 days after the movant applies for a hearing on the motion.

The party moving to dissolve or modify a temporary injunction entered after notice and a hearing bears the burden of proof. See Orlando Orange Groves Co. v. Hale, 144 So. 674, 676 (Fla. 1932). The Florida Rules of Civil Procedure, however, do not specify that the party carrying the burden must demonstrate "changed circumstances" or "changed conditions" when moving to dissolve or

modify a temporary injunction pursuant to rule 1.610(d). Despite the absence of such a requirement in the Florida Rules of Civil Procedure, the First, Second, Third, and Fifth District Courts of Appeal all require such a threshold showing. See Brock v. Brock, 667 So. 2d 310, 311-12 (Fla. 1st DCA 1995); Hunter v. Dennies Contracting Co., 693 So. 2d 615, 616 (Fla. 2d DCA 1997); Fong v. Courvoisier Courts Condo. Ass'n, Inc., 81 So. 3d 562, 563 (Fla. 3d DCA 2012); Highway 46 Holdings, LLC v. Myers, 114 So. 3d 215, 221 (Fla. 5th DCA 2012).

The Fourth District, however, has rejected this rigid application of the changed circumstances rule. See Minty v. Meister Fin. Grp., Inc., 132 So. 3d 373, 376 (Fla. 4th DCA 2014); Precision Tune Auto Care, Inc. v. Radcliff, 731 So. 2d 744, 745 (Fla. 4th DCA 1999). As the Fourth District explained in Precision Tune Auto Care, Inc.:

> We do not agree . . . that a trial court cannot grant a motion to dissolve a temporary injunction where the arguments or evidence in support of the motion to dissolve could have been raised at the hearing on the temporary injunction. Such a bright line rule would, in our opinion, be inconsistent with two well-established principles. First, the "granting and continuing of injunctions rests in the sound discretion of the Court, dependent upon surrounding circumstances." Davis v. Wilson, 190 So. 716, 718 (Fla. 1939) and cases cited. Second, a trial court has the inherent authority to reconsider a non-final order and modify or retract it. Hunter v. Dennies Contracting Co., 693 So. 2d 615 (Fla. 2d DCA 1997). See also N. Shore Hosp., Inc. v. Barber, 143 So. 2d 849 (Fla. 1962).
>
> We conclude that a trial court's decision as to whether to reconsider, on a motion to dissolve, a temporary injunction entered after notice and a hearing, is discretionary, regardless of whether the arguments or evidence could have been brought to the attention of the

> court at the hearing on the injunction. Although the opinion in Hunter observed that it was incumbent on the party moving to dissolve the temporary injunction to demonstrate a change of circumstance, the court also recognized that the trial court's decision not to reconsider was discretionary.

731 So. 2d at 745-46 (footnote omitted). Thus, as the Fourth District recognized, establishing changed circumstances as a threshold requirement before a trial court may modify or dissolve a temporary injunction is at odds with this Court's longstanding maxim that "[w]ide judicial discretion rests in the court in the granting, denying, dissolving, or modifying injunctions." Shaw v. Palmer, 44 So. 953, 954 (Fla. 1907).

A temporary injunction is an equitable remedy. As we have explained, "a court of equity is a court of conscience; it 'should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience.' " Wicker v. Bd. of Pub. Instr. of Dade Cty., 106 So. 2d 550, 558 (Fla. 1958) (quoting Degge v. First State Bank of Eustis, 199 So. 564, 565 (Fla. 1941)). Also "[i]nherent in equity jurisprudence is the doctrine that equity will always move to prevent an injustice engendered by fraud, accident or mistake." Hedges v. Lysek, 84 So. 2d 28, 31 (Fla. 1955). Because "[a] motion to dissolve an injunction involves the sufficiency of the equities of the complaint to justify the injunction in the first instance . . . if it appears that the injunction should not have been granted, it should be dissolved." Coastal Unilube, Inc. v. Smith, 598 So. 2d 200, 201 (Fla.

4th DCA 1992). Thus, requiring a threshold showing of changed circumstances when moving to modify or dissolve a temporary injunction is incompatible with equity principles when a party shows clear misapprehension of the facts or clear legal error on the part of the trial court in entering the temporary injunction.

In this case, the temporary injunction order granted relief that was never sought or tried, was vague in its description of the activity enjoined, Planned Parenthood, 171 So. 3d at 127, and, as Planned Parenthood's motion to modify or dissolve alleged, was based on erroneous factual findings. In short, the temporary injunction in this case frustrated the status quo, rather than preserved it, and denial of the motion to modify or dissolve the temporary injunction necessarily thwarted the preservation of the status quo. Accordingly, we hold, just as a trial court's denial of a motion to modify or dissolve a temporary injunction when changed circumstances is shown is an abuse of discretion, denial of a motion to modify or dissolve is also an abuse of discretion where a party can demonstrate clear legal error or misapprehension of facts on the part of the trial court. Therefore, we reject the bright line changed circumstances rule for modifying or dissolving a temporary injunction as articulated by the First, Second, Third, and Fifth Districts.

II. The Temporary Injunction Order

Planned Parenthood next requests this Court's review of the Fifth District's decision affirming in part the trial court's temporary injunction order in this case.

"Although this issue was not the basis of conflict jurisdiction, once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court." State v. T.G., 800 So. 2d 204, 210 n.4 (Fla. 2001). Mindful that the temporary injunction proceeding in this case has spanned more than two years, and in order to bring judicial resolution of this protracted temporary injunction proceeding, we exercise our discretion to consider whether the Fifth District erred in affirming in part the trial court's order temporarily enjoining Planned Parenthood from performing abortions at its Kissimmee Health Center, an issue that the parties have raised and extensively argued before this Court.

While this Court must accept a trial court's findings of fact if supported by competent, substantial evidence, we may nevertheless review the Fifth District's review of those legal conclusions de novo and review the Fifth District's conclusions regarding the legal sufficiency of the evidence supporting the trial court's factual findings. See Naegle Outdoor Advert. Co. v. City of Jacksonville, 659 So. 2d 1046, 1046-47 (Fla. 1995). Although a trial court has wide discretion in reviewing a temporary injunction, the trial court's factual determinations must be supported by competent, substantial evidence. Concerned Citizens for Judicial Fairness v. Yacucci, 162 So. 3d 68, 72 (Fla. 4th DCA 2014).

Our review of the temporary injunction order, however, does not take into consideration the supplemental affidavits Planned Parenthood submitted to the trial court in support of its motion to dissolve or modify the temporary injunction. Rather, we consider only the evidence before the trial court at the time it entered its temporary injunction order.

Trial Court's Factual Findings Supporting Temporary Injunction

The temporary injunction at issue concerns the enforcement of the Declaration. The Declaration states:

> The property described herein shall not be used for the following activities without the prior written permission of [the developer], which shall be granted only in its sole and unfettered discretion, unless ancillary and incidental to a physician's practice of medicine:
>
> 1. An Outpatient Surgical Center.
> 2. An emergency medical center.
> 3. A Diagnostic Imaging Center which includes the following radiographic testing: Fluroscopy [sic], Plane Film Radiography, Computerized Tomography (CT), Ultrasound, Radiation Therapy, Mamography [sic] and Breast Diagnostics, Nuclear Medicine Testing and Magnetic Resonance Imaging (MRI).

(Emphasis added.) None of the terms in the Declaration are defined. At the outset, we agree with the Fifth District's interpretation of the Declaration as "prohibit[ing] the property from being used as an outpatient surgical center," which "is a facility or place for, or for the purpose of, performing outpatient surgical procedures." Planned Parenthood, 171 So. 3d at 130. Therefore, we are left to determine whether Planned Parenthood may perform surgical abortions under the

Declaration's exception, which provides that outpatient surgical procedures may be performed so long as they are "ancillary and incidental to a physician's practice of medicine."

The trial court concluded that Planned Parenthood "is not a 'physician's practice' as that term is defined in the Declaration[]," and, therefore, the Declaration's exception for uses that are "ancillary and incidental to a physician's practice of medicine," did not apply. This conclusion was based on the trial court's findings that Planned Parenthood is a 501(c)(3) tax-exempt nonprofit organization and "many of [Planned Parenthood's] services fall well beyond the traditional ambit of a 'physician's practice of medicine,' " because Planned Parenthood "is heavily involved with various educational, advocacy, and community outreach activities in furtherance of its mission as a nonprofit corporation."

Planned Parenthood correctly notes, however, that the Declaration does not define "physician's practice." Further, the record does not reveal any testimony or other evidence that could support the trial court's finding that Planned Parenthood "is heavily involved with various educational, advocacy, and community outreach activities in furtherance of its mission as a nonprofit corporation." In fact, Planned Parenthood's CEO, Ms. Tosh, testified that Planned Parenthood was not involved with educational, advocacy, and community outreach activities:

> Planned Parenthood of Greater Orlando is an independent non-profit organization with our own staff and our own—we carry an independent budget. And Planned Parenthood Federation of America is the national arm. There are 68 Planned Parenthood affiliates in the United States that voluntarily affiliate with Planned Parenthood Federation of America. Planned Parenthood Federation is also our accrediting agency and provides guidance and consultation on a wide range of issues for affiliates.

The trial court also concluded that Planned Parenthood could not be a "physician's practice" because Planned Parenthood "just recently hired a physician as a medical director. The medical director currently works one day a week in Jacksonville for another affiliate of Planned Parenthood Federation of America and spends some time each week at [Planned Parenthood's] other two Orlando-area locations." However, Ms. Tosh testified at the initial temporary injunction hearing that Planned Parenthood employed a medical doctor, who Planned Parenthood had "access to . . . at all times."

Accordingly, the trial court's finding that Planned Parenthood is not a "physician's practice" is unsupported by competent, substantial evidence. The trial court concluded, however, that even if Planned Parenthood could be considered a "physician's practice," its "intended violative uses are neither 'ancillary' nor 'incidental' sufficient to bring them within the exception," because Planned Parenthood's witnesses, Ms. Tosh and Ms. Haynie, testified that abortions were a "substantial" and "central" Planned Parenthood service.

The trial court acknowledged that Ms. Tosh asserted in her affidavit that "surgical abortions are expected to comprise less than 1% of [Planned Parenthood's] services," but found "this asserted statistic is offered out of context in light of the totality of the evidence." This finding is also unsupported by competent, substantial evidence. There was no evidence before the trial court prior to its entry of the temporary injunction regarding the number of surgical abortions likely to be performed, except for Ms. Tosh's statement that the number of surgical abortions performed would likely constitute approximately one percent of Planned Parenthood's activities and "would also likely constitute a very small percentage of the total services provided at the Kissimmee Health Center." Indeed, cross-examination of Ms. Tosh during the temporary injunction hearing reveals the same:

> Q. Where—at the very bottom, you—you affirm under oath that abortions represent less than 1 percent of the total number of services that Planned Parenthood provides; is that right?
>
> A. That's correct.
>
> Q. So is it fair to say, given that it is such a nominal percentage of total services, that if the Court were to say, "Maintain the status quo. Don't start doing abortions until the Court has the chance to have a full hearing on this matter," that Planned Parenthood would not be—its practice, its operation would not be harmed or disrupted? That's true, isn't it?
>
> A. No, it's not true.

> Q. So 1 percent constitutes a significant portion of what Planned Parenthood plans to do? No pun intended.
>
> A. We believe in providing reproductive healthcare to our patients. And so any interference in our ability to comprehensively care for our patients would be a substantial burden on our practice.

Further, Ms. Haynie's testimony during the temporary injunction hearing cannot also be construed to support the trial court's factual finding that performing surgical abortions is "central" to Planned Parenthood's physician's practice, but rather central to Planned Parenthood's revenue because revenue from other medical services could be attributable to the performance of surgical abortions:

> Q. Ms. Haynie, breaking out the abortions is a—is a false premise, is that correct, because the abortions are central to the rest of the practice that you perform—or that Planned Parenthood of Greater Orlando performs in its facility?
>
> A. That's correct.
>
> Q. In other words, patients that come in for abortions lots of times come back in for lots of other female gynecological services; is that correct?
>
> A. Yes.
>
> Q. And if you don't perform abortions, then those patients never come in?
>
> A. That's correct.
>
> Q. And likewise with patients that you're providing gynecological services for, if you don't provide abortion services and they have need for abortion services, they're more likely to go someplace else, and that revenue would be lost, correct?

A. That's correct.

Q. So is that the reason that you find it difficult to break out revenues for abortion services specifically?

A. I don't think that would be a relevant number.

Neither Ms. Haynie's nor Ms. Tosh's testimony, then, support the trial court's finding that abortions are not ancillary and incidental to Planned Parenthood's physician's practice of medicine. At best, the testimony relates only to how the performance of surgical abortions affects Planned Parenthood's revenue, not whether the actual performance of surgical abortions was central or an otherwise substantial component of its physician's practice. Accordingly, the trial court's conclusion that abortions would be "substantial" and "central" to Planned Parenthood's physician practice is simply not supported by competent, substantial evidence in the record.

Regardless of the testimonial supplemental affidavits, we conclude that the trial court erred in granting the temporary injunction because the trial court's conclusions supporting its entry of a temporary injunction order were not based on competent, substantial evidence. Indeed, the trial court's temporary injunction order at times completely misstated facts adduced during the temporary injunction hearing and, at other times, based factual and legal conclusions on facts not appearing in the record at all, including: Planned Parenthood engaged in advocacy and outreach activities, when testimony adduced at trial indicated that it was

actually the national organization, Planned Parenthood Federation of America, that engaged in these activities; Planned Parenthood recently hired a medical director when it in fact already employed a medical doctor; and that performing abortions would be substantial and central to Planned Parenthood's physician practice when testimony adduced at trial confirmed that the performance of abortions would represent less than one percent of the total number of services Planned Parenthood provides. In addition, as the Fifth District correctly noted, the trial court granted relief that was not requested by "temporarily enjoining Planned Parenthood from performing sonograms." Planned Parenthood, 171 So. 3d at 127.

Because there is a lack of competent, substantial evidence to support the trial court's factual findings and resulting conclusion that MMB Properties was likely to succeed on the merits in the final injunction proceeding, the Fifth District erred in affirming the trial court's conclusion as to this temporary injunction prong. Because the party seeking a temporary injunction must establish that the party has demonstrated a substantial likelihood of success on the merits, and because this prong was not established, this error alone requires that the temporary injunction order be vacated. See Provident Mgmt. Corp. v. City of Treasure Island, 796 So. 2d 481, 485 n.9 (Fla. 2001) (noting the conjunctive elements of a temporary injunction).

CONCLUSION

Accordingly, we quash in part the Fifth District's decision below that affirmed the trial court's order temporarily enjoining Planned Parenthood from performing abortions at the Kissimmee Health Center and its conclusion that Planned Parenthood "needed to establish changed circumstances" in its motion to modify or dissolve the temporary injunction. Planned Parenthood, 171 So. 3d at 128. Because the stay of the temporary injunction has been in effect since the Fifth District issued the stay at the outset of the litigation, the parties will have substantial additional evidence regarding Planned Parenthood's activities and whether they, in fact, violate the Declaration. We remand this case to the Fifth District with instructions that it be further remanded to the trial court to conduct permanent injunction proceedings.

It is so ordered.

LABARGA, C.J., and LEWIS, and QUINCE, JJ., concur.
CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.
LAWSON, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, J., dissenting.

"[T]he acknowledged conflict," majority op. at 10, on which the majority bases the exercise of express-and-direct-conflict jurisdiction concerns a question—whether the dissolution or modification of a temporary injunction requires a

showing of changed circumstances—that was not presented to the Fifth District for decision and which the district court therefore necessarily did not decide. The district court's opinion makes this unmistakably clear: "In its initial brief, Planned Parenthood does not challenge the denial of its motion to dissolve or modify the injunction, much less argue that it established changed circumstances." Planned Parenthood of Greater Orlando v. MMB Properties, 171 So. 3d 125, 128 (Fla. 5th DCA 2015). The opinion repeats the point: "None of Planned Parenthood's appellate arguments . . . relate to" the order that "denied the motion to dissolve or modify the injunction." Id. at 127 n.1.

The court makes a passing reference to the existing conflict of the Fifth District's case law with other districts concerning whether changed circumstances must be shown to justify modifying or dissolving a temporary injunction. Id. at 128 & n.3. But that passing reference to a conflict on an issue that was neither presented for review nor decided by the district court is not a proper basis for the exercise of conflict jurisdiction. What the district court said on this issue had no bearing on the resolution of the case and thus does not constitute a holding. Such dicta cannot properly serve as the basis for concluding that the decision is in express and direct conflict with another decision.

I therefore dissent. The case should be discharged.

POLSTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Fifth District - Case No. 5D14-2920

(Osceola County)

Donald Edward Christopher and Kyle A. Diamantas of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, Florida,

for Petitioner

Jamie Billotte Moses of Holland & Knight LLP, Orlando, Florida; Derek James Angell and Dennis Richard O'Connor of O'Connor & O'Connor, LLC, Winter Park, Florida; and Maureen Ann Arago and Keith Patrick Arago of Arago Law Firm, Kissimmee, Florida,

for Respondent

Helene T. Krasnoff of Planned Parenthood Federation of America, Washington, District of Columbia, and Maithreyi Ratakonda of Planned Parenthood Federation of America, New York, New York,

for Amicus Planned Parenthood Federation of America

Third District Court of Appeal

State of Florida

Opinion filed February 22, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1640
Lower Tribunal No. 15-29723

Quick Cash, LLC, etc.,
Appellant,

vs.

Tradenet Enterprise Inc., etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Marin, Judge.

Wasson & Associates, Chartered, and Annabel C. Majewski; Jay B. Weiss, P.A., and Jay B. Weiss, for appellant.

The Barthet Firm, and John C. Hanson, II, for appellee.

Before WELLS, ROTHENBERG, and LAGOA, JJ.

ROTHENBERG, J.

Quick Cash, LLC ("Quick Cash") appeals a final order granting Tradenet Enterprise Inc.'s ("Tradenet") motion to dismiss Quick Cash's complaint for lack of jurisdiction and improper venue. The trial court's decision was based on its interpretation of a forum selection clause in the parties contract, which we review de novo. Celistics, LLC v. Gonzalez, 22 So. 3d 824, 825 (Fla. 3d DCA 2009). The clause at issue is as follows:

> **This purchase order shall be deemed entered into and performed in the State of California and Buyer consents to the jurisdiction of the State of California for purposes of enforcement of the terms hereof.** Buyer agrees to the above General Terms including but not limited to terms relating to interest on late payments, conditional terms, attorneys fees and jurisdiction for enforcement.

(Emphasis added). The issue in this case is whether the bolded portion of the above forum selection clause reflects that the parties agreed to mandatory jurisdiction and venue in California.

Parties to a contract may agree in writing to resolve all future disputes arising out of the contract in a specific forum. Weisser v. PNC Bank, N.A., 967 So. 2d 327, 330 (Fla. 3d DCA 2007). Such forum selection clauses are either permissive or mandatory. DVDPlay, Inc. v. DVD 123 LLC, 930 So. 2d 816, 818 (Fla. 3d DCA 2006) (stating that the contract's mandatory clause "requires that a particular forum be the exclusive jurisdiction for litigation concerning the contract"); Regal Kitchens, Inc. v. O'Connor & Taylor Condo. Constr., Inc., 894

So. 2d 288, 291 (Fla. 3d DCA 2005) (stating that permissive clauses "do not exclude jurisdiction or venue in any other forum").

The determination as to whether a term or clause is mandatory or permissive does not depend on the inclusion or exclusion of specific "magic words." Golf Scoring Sys. Unlimited, Inc. v. Remedio, 877 So. 2d 827, 829 (Fla. 4th DCA 2004) (holding that although the forum selection clause did not contain the words "must" or "shall," the clause was nevertheless mandatory because it limited the appropriate forum to only one option, to the exclusion of all others). Instead, the test is whether, when read as a whole, the forum selection clause indicates that the parties intended to try a case in the specified forum and to the exclusion of all others. Celistics, 22 So. 3d at 826 (holding that a forum selection clause which reads that "the parties agree to select the venue and jurisdiction of the Courts and Tribunals of the city of Madrid" was mandatory based on the definitions of the words "agree" and "select"); Weisser, 967 So. 2d at 331-32 (holding that a forum selection clause was mandatory because it contained "words of exclusivity").

The forum selection clause in the instant case contains "words of exclusivity." The inclusion of the phrase "**shall be deemed entered into and performed in the State of California . . . for purposes of enforcement of the terms hereof**" indicates that the parties intended for California to be the sole venue for the enforcement of the terms of the purchase order. The phrase "consents

to the jurisdiction of the State of California," must be read together with the adjoining words of exclusivity. Were this case to proceed in Florida, the words of exclusivity in the clause would be rendered meaningless. World Vacation Travel, S.A., de C.V. v. Brooker, 799 So. 2d 410, 412 (Fla. 3d DCA 2001) (stating that to interpret the forum selection clause in that case as permissive would render certain portions of the clause "utterly meaningless," in violation of Florida's principles of contract interpretation).

We therefore, conclude that the parties clearly intended for any judicial action, which may be necessary to enforce the terms of the purchase order, be had exclusively in California. Because we find that the forum selection clause is mandatory in nature, we affirm the trial court's order dismissing the case for lack of jurisdiction and improper venue.[1]

Affirmed.

[1] We find that Quick Cash's remaining arguments are without merit, and we therefore decline to discuss them further.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D16-4555

SILVER BEACH TOWERS PROPERTY OWNERS ASSOCIATION, INC., SILVER BEACH TOWERS EAST CONDOMINIUM ASSOCIATION, INC., and SILVER BEACH TOWERS WEST CONDOMINIUM ASSOCIATION, INC.,

Appellants/Cross-Appellees,

v.

SILVER BEACH INVESTMENTS OF DESTIN, LC, and THE CLUB AT SILVER SHELLS, INC.,

Appellees/Cross-Appellants.
_____/

Opinion filed February 21, 2017.

An appeal from an order of the Circuit Court for Okaloosa County.
John T. Brown, Judge.

Daniel M. Schwarz, Audrey M. Fisher, and Ron M. Campbell of Cole, Scott & Kissane, P.A., Bonita Springs, for Appellants/Cross-Appellees.

Philip J. Padovano and Joseph T. Eagleton of Brannock & Humphries, Tallahassee; Bruce P. Anderson of Bruce P. Anderson Law, Destin, for Appellees/Cross-Appellants.

PER CURIAM.

In this appeal of a judgment awarding appellees $1,827,372.18 plus pre-judgment interest of $292,497.34, appellees filed a cross-appeal and motion for review pursuant to Florida Rule of Appellate Procedure 9.310(f) seeking review of the lower tribunal's order staying that judgment. They argue that the lower tribunal's order was legally insufficient in that it conditioned the stay pending appeal on appellants' posting of a $175,000 bond but failed to apply the automatic bond procedure outlined in Florida Rule of Appellate Procedure 9.310(b)(1), which appellees contend is the sole method of obtaining a stay of a money judgment. We disagree with this contention, and we affirm the trial court's order.

Rule 9.310(b)(1) provides:

> *(1) Money Judgments.* If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. Multiple parties having common liability may file a single bond satisfying the above criteria.

Fla. R. App. P. 9.310(b)(1). This provision allows a party in an appeal of a money judgment to obtain a stay from the lower tribunal without following the procedure outlined in rule 9.310(a), which requires the filing of a motion to stay with the lower tribunal. The rule does not, however, eliminate the ability of a party to obtain a stay under rule 9.310(a) if it so chooses.

There exists a split among the District Courts of Appeal of this state on the question of whether rule 9.310(b)(1) is the only method of obtaining a stay of a judgment solely for the payment of money. The Third District has answered this question in the affirmative. See Mellon United Nat'l Bank v. Cochran, 776 So. 2d 964, 964 (Fla. 3d DCA 2000). The Second District has reached the opposite conclusion. See Platt v. Russek, 921 So. 2d 5, 7-8 (Fla. 2d DCA 2004); Waller v. DSA Group, Inc., 606 So. 2d 1234, 1235 (Fla. 2d DCA 1992). This court has not yet weighed in on the issue, but we now hold, along with the Second District, that rule 9.310(b)(1) is not the only avenue for obtaining a stay of a money judgment. A trial court has the authority, upon the motion of a party pursuant to rule 9.310(a), to enter a stay upon conditions other than a bond, so long as the conditions are adequate to ensure payment.[*] Platt, 921 So. 2d at 7-8; Waller, 606 So. 2d at 1235.

Appellees cite several cases that they assert stand for the proposition that a trial judge has *no* discretion to determine the bond amount in an appeal from a money judgment. See QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541 (Fla. 2012); Mellon, 776 So. 2d 964; Taplin v. Salamone, 422 So. 2d 92 (Fla. 4th DCA 1982); Proprietors Ins. Co. v. Valsecchi, 385 So. 2d 749 (Fla. 3d DCA 1980). However, we read these cases as standing not for the proposition that the only means

[*] Here, appellees do not argue that the conditions imposed by the court are insufficient. Instead, their argument is limited to whether the court has the authority to enter a stay

of staying a money judgment is to utilize the automatic stay procedure of rule 9.310(b)(1), but rather that *when* a party opts to utilize this automatic stay provision, the trial court has no authority to alter the bond amount required by the rule. In QBE Ins. Corp., the court wrote:

> The Florida counterpart of this federal rule provides that if an order "is a judgment solely for the payment of money, a party may obtain an *automatic* stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond." Fla. R. App. P. 9.310(b)(1) (emphasis added). . . . The purpose of an appellate stay is to maintain the status quo in the lower tribunal while an appeal proceeds. If no bond is posted, the judgment creditor may execute on the judgment during the appeal. Palm Beach Heights Dev. & Sales Corp. v. Decillis, 385 So. 2d 1170, 1171 (Fla. 3d DCA 1980). . . . Under Florida law, the posting of a "good and sufficient bond" as provided in rule 9.310(b) results in an automatic stay pending appeal of an adverse money judgment. Palm Beach Heights, 385 So. 2d at 1171; Proprietors Ins. Co. v. Valsecchi, 385 So. 2d 749, 750 (Fla. 3d DCA 1980). The trial court has no discretion to change this amount or deny a stay when the bond requirements have been met.

94 So. 3d at 555. The question the court was considering in QBE Ins. Corp. was whether "language in an insurance policy mandating payment of benefits upon 'entry of a final judgment' require[s] an insurer to pay its insured upon entry of judgment at the trial level." Id. at 545. In answering this question, the court "conclude[d] that a contractual provision mandating payment of benefits upon 'entry of final judgment' does not waive the insurer's procedural right to post a bond pursuant to rule 9.310(b) to stay execution of a money judgment pending resolution of the appeal." Id. at 555-

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of a money judgment pursuant to rule 9.310(a) upon conditions other than a bond.

56. Thus, despite the court's citation to Palm Beach Heights and Proprietors Ins. Co., we do not read the holding in QBE Corp. so broadly as to suggest that rule 9.310(b)(1) is the only authorized means of staying a money judgment; rather, we interpret the ruling as applying to a party's rights and obligations *when* the automatic stay provision of rule 9.310(b)(1) is utilized.

The phrase "[e]xcept as provided by general law and in subdivision (b) of this rule" at the beginning of rule 9.310(a) does not alter the analysis. This phrase simply carves out the alternative procedure created in rule 9.310(b)(1). For the reasons expressed herein, we certify conflict with the Third District Court of Appeal's decision in Mellon United National Bank v. Cochran, 776 So. 2d 964 (Fla. 3d DCA 2000). Accordingly, appellees' motion for review filed November 14, 2016, is denied, and the trial court's order on the motion to stay is affirmed.

MOTION DENIED; ORDER AFFIRMED.

WOLF, RAY, and MAKAR, JJ., CONCUR.